

M e m o r a n d u m

To : Mehdi Morshed, Executive Director
California High-Speed Rail Authority

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Telephone: (916) 324-7862

FACSIMILE: (916) 327-2247

E-mail: George.Spanos@doj.ca.gov

From : George C. Spanos
Deputy Attorney General
Business and Tax Section
Office of the Attorney General – Sacramento

Subject :
Peer Review Group; Applicability of Open Meeting Act

You have requested informal advice as to whether the peer review group, referenced in Public Utilities Code section 185035 and Streets and Highways Code section 2704.08, is subject to the Open Meeting Act. For the reasons which follow, I have concluded that it is considerably more likely than not that a court would find that the peer review group is not subject to the provisions of the Open Meeting Act.¹

Please note that the advice contained in this memorandum assumes that the peer review group will function as described in the law, and that it will not take on any additional responsibilities. Any enhancement or alteration of the role of the peer review group would render the advice and conclusions contained herein void.

As discussed below in greater detail, Public Utilities Code section 185035 directs the Authority to "establish" an independent peer review group. The peer review group is to review and to analyze various elements of the Authority's plans, prior to the Authority requesting an appropriation of funds for any particular corridor, and to report to the Legislature on its findings and conclusions. The Authority does not play any role in the selection of the members of the peer review group, nor does it have anything to say as to the areas of experience or expertise of members of the group.

¹ Please note that this advice is accompanied by the customary disclaimer: this advice, and the conclusions expressed herein, are provided to you in my capacity as legal counsel to the Authority; they do not constitute a formal opinion of the Attorney General nor do they necessarily reflect the Attorney General's views. If a formal opinion is desired, it can be requested from the Attorney General's Opinion Unit. Moreover, any advice contained herein is intended for the Authority's use only, and is not intended to be relied upon by anyone else.

Section 185038 was added to the High Speed Rail Act as a result of Assembly Bill 3034, approved in 2008.² The same measure included other provisions which made up the Safe, Reliable High-Speed Passenger Train Bond Act (hereafter, the "Bond Act") presented to and approved by the voters at the November 4, 2008, election. The bill also included other provisions which amended the High-Speed Rail Act.

The Bond Act authorized the issuance of \$9 billion of bonds to be used for planning and engineering for the high-speed train system and for capital costs. (Sec. 2704.04, subd. (b)(1).) However, the money does not flow automatically to the Authority. It must be appropriated by the Legislature as part of the annual Budget Act. (Sts & Hwys C. sec. 2704.04, subd. (b).) At least 90 days prior to requesting an appropriation of bond proceeds for use in any particular corridor, the Authority must approve and submit to the Director of Finance, to the peer review group, and to the transportation and fiscal committees of the Legislature a detailed funding plan. (Sts & Hwys C. sec. 2704.08, subd. (c).) The plan is to be evaluated by the peer review group which, within 60 days of receiving the plan, reports on its conclusions to the Legislature. (Pub. Util. C. sec. 185035, subd. (a), (c), and (e).) Thus, a request by the Authority for an appropriation cannot be made until after submittal of the plan and after the peer review group has made its report to the Legislature.

The Authority's plan must include a number of elements. These elements include the cost of construction, the sources of all funds to be invested in the corridor, projected ridership and operating revenue, foreseeable risks associated with construction and operation and management of those risks, and the status of environmental review. (See Sts & Hwys C. sec. 2704.08, subd. (c)(2).)

The Peer Review Group is defined in Public Utilities Code section 185035. It consists of eight members who are to have specified types of experience and expertise and who are designated by specified public officials. The Treasurer designates two persons with experience in the construction or operation of high-speed trains in Europe, Asia, or both. The Controller designates one person with experience in engineering and construction of high-speed trains and another person with experience in project finance. The Director of Finance designates a person from a financial services or financial consulting firm. The Secretary of the Business, Transportation, and Housing Agency designates a person with experience in environmental planning and two other persons who are expert representatives from agencies providing intercity or commuter passenger train services in California.

The Peer Review Group's purpose is to review "the planning, engineering, financing, and other elements of the authority's plans and issuing an analysis of appropriateness and accuracy of the authority's assumptions and an analysis of the viability of the authority's financing plan, including the funding plan for each corridor." (Pub. Util. C. sec. 185035.)

² All references to section 185035 are to the Public Utilities Code. All references to section 2704.08 are to the Streets and Highways Code. All references to section 11121 are to the Government Code.

There is a correspondence between the disciplines and areas of experience which certain members of the peer review group are to have and the elements of the Authority's plans which they are to review and to analyze. In other words, the membership of the peer review group appears to have been tailored by the Legislature taking into account the various elements which the law requires be included in the funding plans prepared by the Authority.

The Open Meeting Act defines the term "state body" in Government Code section 11121. There are four definitions in that section. Two of them, set forth in subdivisions (b) and (d), can be dismissed with little discussion.

Subdivision (b) of section 11121 defines "state body" to include a multimember body "that exercises any authority of a state body delegated to it by that state body." The authority, if any, of the peer review group and its responsibilities are set forth in the legislation. The High-Speed Rail Authority does not delegate any authority to the peer review group. Consequently, subdivision (b) does not apply.

Subdivision (d) of section 11121 defines "state body" as a multimember body "on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body." As the foregoing indicates, two conditions must both be satisfied. While it is possible that the Authority will provide funds to support the peer review group's activities, the other condition – membership of a member of the High-Speed Rail Authority Board on the peer review group as a representative of the board – does not exist. The Legislature has provided in detail for the membership of the peer review group. It does not include a member of the Authority Board, nor does the Board have any role to play in selecting who shall be a member of the peer review group. Consequently, subdivision (d) does not apply.

The remaining two definitions call for more detailed examination. Subdivision (c) of section 11121 defines "state body" as a "multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons." The peer review group, having eight members, satisfies the numerical requirement of subdivision (c). There remain, then, two questions: (1) is the peer review group "created" by the Authority and (2) is it an advisory body within the meaning of section 11121?

Subdivision (c) uses the verb "created." Section 185035, on the other hand, uses the verb "establish": "The authority shall *establish* an independent peer review group." (Emph. added.) The verbs "to create" and "to establish" are not synonyms. "Create" is defined to mean "[t]o cause to come into existence; bring into being; make; originate." By contrast, "establish" is defined to mean "[t]o make stable; make firm; settle."³ Given these differing definitions, and taking into account the fact that the Legislature has prescribed the membership of the peer review group, defined it as being "independent," and provided that the group reports, not to the

³ Webster's New World Dictionary, Second College Edition, 1972.

Authority but to the Legislature, one can reasonably conclude that the Authority's role is to assist the peer review group in organizing itself, but not "to create" it.⁴

Putting aside whether "establish," within the meaning of section 185035, is synonymous with "created" within the meaning of Government Code section 11121, there is an independent basis for concluding that subdivision (c) does not apply. In order to be a "state body" under subdivision (c), the multimember body must be an "advisory" body. Presumably, it must advise the body which created it. However, the peer review group does not advise the Authority. The peer review group reports to the Legislature, not to the Authority. Moreover, its function is not to advise, in the typical sense, but rather to report to the Legislature on its review (or on the review made by its members) of various elements of the Authority's funding plans.

Furthermore, subdivision (c) applies only to advisory bodies created by formal action of a state body. As shown above, the peer review group is not created by formal action of the Authority. The group's existence is a product of action by the Legislature. Even if it were deemed the product of formal action by the Authority, it is not an advisory body of the Authority. Thus, subdivision (c) does not apply.

Subdivision (a) of section 11121 defines "state body" to include every "state board, or commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings and every commission created by executive order." The peer review group is neither a state board nor a commission, it is not required by law to conduct official meetings, and it was not created by executive order. Thus, in order for subdivision (a) to apply the peer review group must be a multimember body of the state which is *similar* to a state board or commission and which is created by statute. Thus, two issues arise in applying subdivision (a) to the peer review group: (1) is it created by statute and (2) is it similar to state boards or commissions?

The peer review group is created either by the Legislature or by the Authority. As discussed above, in connection with subdivision (c) of section 11121, the peer review group does not appear to be a creation of the Authority. However, if it is, then it is not created by statute and therefore subdivision (a) does not apply. If, on the other hand, it is deemed to have been created by statute, then the inquiry must turn to the question of *similarity*.

If the Legislature had intended all multimember bodies created by statute to fall within the definition of subdivision (a), it would not have used the word "similar." It could simply have stated that "state body" includes "any multimember body of the state that is created by statute." However, it did not do so. Instead, by using the words it chose to use, it implicitly

⁴ Note that if the peer review group is "created" by the Authority, then subdivision (a), pertaining to multimember bodies "created" by statute, would not apply. Conversely, if the peer review group is "created" by statute, then subdivision (c) does not apply.

excluded some multimember bodies created by statute from the scope of subdivision (a), to wit: multimember bodies created by statute that are *not similar* to boards and commissions.⁵

The purpose of the Open Meeting Act has been described by the Attorney General as allowing "the public to attend, observe, monitor, and participate as fully as possible in the decision-making process of state bodies." (85 Ops. Cal. Atty. Gen. 145.) However, not all multimember bodies are "decision-making" bodies, nor is it feasible for the public "to attend, observe, monitor, and participate" in the work of any multimember body.

The peer review group is a good example of a body which is not a decision-making body. It is made up of a group of members who represent disparate disciplines. Some are experts in operations or construction of high-speed trains overseas. Others are engineers. Yet others have expertise in environmental or financial matters. As discussed above, the array of disciplines described in section 185035 corresponds to the elements that the law requires be included in the Authority's funding plans for the various corridors of the system.

The intent of the Legislature appears to have been to have each element of the Authority's funding plan reviewed by a person or persons with particular experience applicable to that element. By contrast, a board or commission is made up of voting members each of whom has an equal voice as to any matter that comes before that body for decision or recommendation. While some members of such a board or commission might defer to other members who may be known to have special knowledge about a particular matter, they are not obliged to do so, nor is there any expectation that only the knowledgeable members will participate in the decision on that matter which the board or commission will eventually make as a single entity.

On the other hand, the peer review group is so constituted as to suggest strongly that the reports the group will make to the Legislature will be made up of constituent elements, and that each element will be prepared by and will reflect the analyses and conclusions of those group members with expertise relating to that element. For example, the Legislature probably does not expect that the Director of Finance's designee, from a financial services or financial consulting firm, will be involved in the analysis of those portions of the Authority's plans involving the accuracy of the Authority's certification relative to environmental clearances. (Sec. 2704.08, subd. (c)(2)(K).)

The issue of whether a multimember body was "similar" to a board or commission was addressed in a formal opinion of the Attorney General in 2002. (85 Ops. Cal. Atty. Gen. 145; hereafter, the "AG opinion.") The question pertained to the Clinical Advisory Panel, "established in the department [i.e., Department of Managed Health Care]." (Former Health and Safety Code section 1347.1.)

⁵ Note that the Legislature did not include the word "committee" in subdivision (a), although it did include the word in subdivisions (b), (c), and (d). A committee is often, although not always, a subset of some other body, such as a board, commission, or other legislative body.

The statute specified that the Clinical Advisory Panel would be made up of five appointees of the department director who would be professors of medicine and two of whom would also be practicing physicians. The statute stated that the purpose of the panel was "to provide expert assistance to the director in ensuring that the external independent review system is meeting the quality standards necessary to protect the public's interest." The statute also stated that "[t]he panel shall review the decisions made in external review to ensure that the decisions are consistent with best practices and make recommendations for improvements where necessary. The panel shall meet quarterly and shall have staff provided as necessary."

The AG opinion concluded that the panel met the definition of "state body" set forth in subdivision (a) of section 11121 because it was a multimember body established by legislative command which was required to hold meetings. In reaching its conclusion, the AG opinion rejected the idea that the panel was not "similar" to a "state board or commission." It based its rejection on the fact that there are statutorily created boards and commissions which have only investigatory or advisory roles, such as the Commission on the Status of Women and the Commission on Aging.

The Peer Review Group can be distinguished from the Clinical Advisory Panel discussed in the AG opinion. It is not "similar" to boards and commissions. First, it is not required to hold meetings. This fact is consistent with the diversity of disciplines of its membership and the reasonable inferences one can draw as to how it is expected to function. One must also take into account the fact that the Peer Review Group is directed to render a report to the Legislature and other entities within 60 days of receiving the Authority's funding plan. Meeting that deadline and conducting all of its deliberations within the context of the Open Meeting Act are probably not reconcilable. By contrast, the law requires the Commission on the Status of Women to conduct its meetings publicly, and the Commission on Aging is required to hold meetings at least six times a year. (Gov. C. sec. 8243 and Welfare and Inst. C. sec. 9202, subd. (e).

Second, based on its structure and task, the Peer Review Group is not a body reasonably expected to make collective decisions. The areas of expertise which the members of the group are to have and the correspondence of those areas with the elements of the funding plans which the members of the group will evaluate suggest a process which will not involve the making of decisions through a voting process. By contrast, and almost by definition, "boards," "commissions," and "committees" are generally viewed as bodies which act collectively, based on numerical (i.e., majority or other fractional) voting. (While a "panel" of people is not necessarily a body which acts collectively, in the case of the Clinical Advisory Panel the law required it to meet.) In effect, the Peer Review Group is made up of persons who will function in a sort of staff capacity rather than serving, collectively, in a decision-making role.⁶

⁶ Given the emphasis given to areas of expertise, it is less likely that the Peer Review Group's members will depend on the expertise of others in order to reach their findings and conclusions, but instead will rely on their own areas of expertise, similar to a group of staff members preparing a multi-faceted report.

Third, the nomenclature used by the Legislature underscores the distinction between the Peer Review Group and boards and commissions. The AG opinion used as illustrations of statutorily-created advisory bodies two entities which the Legislature denominated as "commissions." On the other hand, the members of a "group" constitute simply a collection of people. There is nothing associated with the word "group" to suggest collective action as there is in the case of boards, commissions, and, to a lesser extent perhaps, committees. Thus, not only in terms of function but also in terms of nomenclature, it is reasonable to draw the inference that the Legislature did not intend to create a body "similar to a state board or commission" when it created the peer review group.

For the reasons set forth above, the stronger argument regarding the applicability of the Open Meeting Act to the Peer Review Group is that the Act does not apply. However, this conclusion assumes that the Peer Review Group exercises only those powers and duties expressly set forth in the law.