

Action/Information Item

California Student Aid Commission

**Discussion of EDFUND's Closed Session Meetings on the Executive
Change-in-Control Severance Agreement**

The following chronology of events, meetings and correspondence are provided to facilitate the discussion of EDFUND's closed session meetings on the Executive Change-in-Control Severance Agreement.

Date	Description
April 14, 2008	EDFUND notices a teleconference meeting of the EDFUND Board of Directors for April 23, 2008. The meeting notice indicated "The Board of Directors will meet in CLOSED SESSION to discuss and possibly take action on business matters of a proprietary nature pursuant to California Education Code section 69525(g) and to discuss and possibly take action on personnel matters pursuant to Government Code 11126(a)(1). Topics will cover: <ul style="list-style-type: none">o Potential sale and related personnel issues
April 17, 2008	Commission staff requested EDFUND staff to provide information regarding the noticed meeting. EDFUND's General Counsel indicated that he could not discuss the issue at the time; however, Executive Director Fuentes-Michel would receive agenda materials by Tuesday April 22, 2008.
April 22, 2008	Executive Director Fuentes-Michel received the April 23, 2008 EDFUND Board agenda materials at 2:16 p.m. This was the first material Commission staff received regarding EDFUND'S draft severance agreement. The material contained: <ul style="list-style-type: none">• Blacklined version of a draft document titled EDFUND's Executive Change-in-Control Severance Agreement.• Email with preliminary comments to the agreement from EDFUND consultant.• Memo with comments from EDFUND's outside counsel.

Date	Description
April 23, 2008	<p data-bbox="440 296 1421 426">Executive Director Fuentes-Michel and General Counsel Keri Tippins discuss concerns relating to the Bagley-Keene Open Meeting Act, the Political Reform Act and other potential conflict-of-interest issues raised by the EDFUND Board agenda and materials.</p> <p data-bbox="440 464 1421 558">EDFUND Board met in closed session and discussed the potential sale and related personnel issues. At the EDFUND Board meeting, Executive Director Fuentes-Michel expressed concern regarding:</p> <ul data-bbox="488 569 1421 699" style="list-style-type: none"> <li data-bbox="488 569 1323 596">• EDFUND Executive management presenting the agenda item. <li data-bbox="488 604 873 632">• Meeting in closed session. <li data-bbox="488 640 1421 699">• The lack of timeliness materials were provided prior to the meeting to allow adequate review and analysis by Commission staff. <p data-bbox="440 737 1421 800">The EDFUND Board refers discussion of the matter to the EDFUND Personnel and Nominations Committee.</p>
April 24, 2008	<p data-bbox="440 842 1421 905">EDFUND notices an EDFUND Personnel & Nominations Committee meeting for May 5, 2008.</p>
May 2, 2008	<p data-bbox="440 968 1421 1041">Commission Chair Galligani sent a memo (Tab 2.a) to EDFUND Board Chair Furay indicating:</p> <ul data-bbox="488 1045 1421 1377" style="list-style-type: none"> <li data-bbox="488 1045 1421 1140">• “Discussion and action related to a severance agreement for EDFUND executives is not an appropriate basis for a closed session meeting under California law.” <li data-bbox="488 1148 1421 1308">• “...the Board of Directors may wish to seek legal advice on whether adopting the severance agreement may trigger a violation of the Political Reform Act or other conflict-of-interest laws for any of the EDFUND executive management who may have “participated in the making of” the severance agreement proposal.” <li data-bbox="488 1316 1421 1377">• A severance agreement will require approval by an officer of the Commission and the Director of Finance. <p data-bbox="440 1451 1421 1514">EDFUND notices a meeting for EDFUND’s Executive Committee for May 14, 2008 to discuss in open and closed Session:</p> <ul data-bbox="488 1518 1089 1545" style="list-style-type: none"> <li data-bbox="488 1518 1089 1545">• Potential sale and related personnel issues
May 5, 2008	<p data-bbox="440 1619 1421 1682">EDFUND canceled the EDFUND’s Personnel & Nominations Committee meeting scheduled for May 5, 2008.</p> <p data-bbox="440 1755 1421 1843">EDFUND notices a meeting for the EDFUND Board of Directors for May 15, 2008 to discuss in Open and Closed Session the “potential sale and related personnel issues.”</p>

Date	Description
May 6, 2008	<p>EDFUND Board Chair Furay sent a memo (Tab 2.b) to Commission Chair Galligani indicating EDFUND Board has obtained, and agrees with, the legal opinion from outside legal counsel that indicates:</p> <ul style="list-style-type: none"> • EDFUND may discuss the Change-in-Control issues in both open and closed sessions, as appropriate, in accord with the dual principles of communication in the public interest and protection of the proprietary interests of CSAC/EDFUND in its work in the student loan industry for California and nationally.
May 9, 2008	<p>Commission's General Counsel confers with the Office of Attorney General regarding EDFUND Board meeting in closed session regarding the draft Change-in-Control Severance Agreement.</p> <p>Commission Chair Galligani sent a memo (Tab 2.c) to EDFUND Board Chair Furay:</p> <ul style="list-style-type: none"> • Indicating the Commission's General Counsel disagrees with the legal opinion provided by EDFUND's outside counsel. • Requesting that the EDFUND Executive Committee meeting scheduled for May 14, 2008 be re-noticed and discussions related to the severance agreement be held in open session.
May 14, 2008	<p>EDFUND's Executive Committee met in open session and discussed the Governor's May Revise as it relates to the potential sale of EDFUND.</p> <p>The Committee met and discussed in closed session the potential sale and related personnel issues.</p> <p>The Executive Committee recommended the following resolution to the EDFUND Board:</p> <p>RESOLVED: that the Executive Committee of this Board be authorized and directed to consider and recommend to the Board whether, in light of the pending sale of the corporation, action should be taken with respect to the retention of key employees;</p> <p>RESOLVED FURTHER: that the Executive Committee, acting on behalf of the corporation, confer with the California Student Aid Commission and the Department of Finance regarding the Board's right to deliberate in closed session matters relating to the sale of the corporation, including the retention of key employees.</p>

Date	Description
May 15, 2008	<p data-bbox="435 289 1252 323">EDFUND Board of Directors met and approved in open session:</p> <p data-bbox="435 359 1419 491">RESOLVED: that the Executive Committee of this Board be authorized and directed to consider and recommend to the Board whether, in light of the pending sale of the corporation, action should be taken with respect to the retention of key employees;</p> <p data-bbox="435 527 1430 695">RESOLVED FURTHER: that the Executive Committee, acting on behalf of the corporation, confer with the California Student Aid Commission and the Department of Finance regarding the Board's right to deliberate in closed session matters relating to the sale of the corporation, including the retention of key employees. (Tab 2.d)</p>
May 19, 2008	<p data-bbox="435 730 1414 800">Commission Chair Galligani sent a memo (Tab 2.e) to EDFUND Board Chair Furay:</p> <ul data-bbox="483 800 1409 1102" style="list-style-type: none"> <li data-bbox="483 800 1377 869">• Acknowledging the resolution of the EDFUND Board at its May 15, 2008 meeting. <li data-bbox="483 869 1409 938">• Notifying the EDFUND Board that the Commission would be meeting in open session regarding the issue. <li data-bbox="483 938 1349 1037">• Requesting that any meeting between representatives from the Commission, EDFUND and Department of Finance include a representative from the Office of the Attorney General. <li data-bbox="483 1037 1393 1102">• Strongly urging the EDFUND Board to hold meetings on the topic in open session.

CALIFORNIA STUDENT AID COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR



May 2, 2008

Sister Sally Furay, Chair
EDFUND Board of Directors
1653 Borana Street
San Diego, CA 92111-6939

Dear Chair Furay:

On April 23, 2008, a closed session meeting of the EDFUND Board of Directors was held to discuss, according to the meeting notice, "Potential sale and related personnel issues." The claimed authority for the closed session meeting was Government Code section 11126(a)(1) and Education Code section 69525(g).

Upon receipt and review of the meeting materials, it was discovered that the purpose of this closed session meeting was to discuss an "Executive Change-in-Control Severance Agreement ("hereinafter "severance agreement") for EDFUND executives in the event that EDFUND is sold as authorized by Senate Bill 89. Discussion and action related to a severance agreement for EDFUND executives is not an appropriate basis for a closed session meeting under California law.

Education Code section 69525(g)(1) provides that EDFUND's "board of directors ... shall conduct its business in public meetings in accordance with the Bagley-Keene Open Meeting Act" The Bagley-Keene Open Meeting Act has very specific restrictions on items that may be considered in closed session. The "personnel exception" cited by the Board of Directors provides: "Nothing in this article shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing." There is nothing within this provision which would exempt a discussion of a severance agreement for EDFUND executives from being held in open session. In fact, this would seem to be the type of governmental action that the Bagley-Keene Open Meeting Act was designed to prohibit.

In addition to the exceptions found within the Bagley-Keene Open Meeting Act, EDFUND is permitted to "hold a closed session to consider a matter of proprietary nature the discussion of which would disclose a trade secret or proprietary business information that could potentially cause economic harm to the auxiliary organization" (See Educ. Code § 69525(g)(2), emphasis added.) However, there does not appear to be any basis to claim that a severance agreement would be considered a "trade secret"¹ or

¹ California Civil Code section 3246.1(d) defines "Trade secret" to mean "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

"proprietary business information"² that could cause economic harm to EDFUND for purposes of a permissible closed session meeting under this section.

As a result of the foregoing, it does not appear that there was a legally permissible basis for the severance package discussion to be held in closed session by the Board of Directors. The Commission has consulted with the Office of the Attorney General which concurs that this was an impermissible closed session under Bagley-Keene. The Office of the Attorney General also expressed skepticism over the assertion that a severance agreement for executives was the type of business activity being protected when EDFUND was granted the authority to hold closed session meetings for business items with the potential to cause "economic harm" to EDFUND.

Accordingly, as the Chairperson of the California Student Aid Commission, I am requesting that the May 5, 2008 closed session meeting of the Personnel & Nominations Committee be re-noticed and that all discussion related to the severance agreement be held in an open session meeting. It should be noted that Government Code section 11130.7 makes it a misdemeanor for "each member of a state body who attends a meeting of that body in violation of any provision of [Bagley-Keene] where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled to ...".

In addition, the Board of Directors may wish to seek legal advice on whether adopting the severance agreement may trigger a violation of the Political Reform Act or other conflict-of-interest laws for any of the EDFUND executive management who may have "participated in the making of" the severance agreement proposal.

Lastly, it is my understanding that any action taken by the Board of Directors with respect to a severance agreement will require approval by an officer of California Student Aid Commission and must be in accordance with Commission policy pursuant to Education Code section 69526(a). The severance agreement will also require the approval of the Director of Finance pursuant to Education Code section 69526(b).

Sincerely,



Dennis J. Galligani
Chair

CC: Members of the California Student Aid Commission
Members of the EDFUND Board of Directors
Mr. Fred Klass, Chief Operating Officer
Ms. Jeanine Oropeza, Program Budget Manager

² Black's Law Dictionary defines proprietary information as "In trade secret law, information in which the owner has a protectable interest." BLACK'S LAW DICTIONARY (6th ed. 1990).

Sister Sally Furay
Chair, EdFund Board of Directors
Tel: 858/268-3340 Fax: 858/874-3424
E-mail: sfuray@earthlink.net

May 6, 2008

Dennis Galligani, Chair
California Student Aid Commission
24992 Danamaple
Dana Point, CA 92629

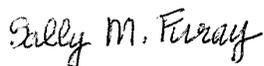
Dear Chair Galligani,

Your letter of May 2, 2008 concerning a closed session of the EdFund Board of Directors arrived while I was in Chicago for meetings, so I received it upon my return on Sunday, May 4, 2008. Your letter crossed in the mail with the legal opinion from independent legal counsel which the EdFund Board had requested early last week.

I am attaching a copy of the legal opinion from outside counsel, with which we agree. The legal opinion demonstrates that, within the law, EdFund may discuss the Change in Control (CIC) issues in both open and closed sessions, as appropriate, in accord with the dual principles of communication in the public interest and protection of the proprietary interests of CSAC/EdFund in its work in the student loan industry for California and nationally.

I am requesting that you pass this legal opinion to CSAC legal counsel for further consideration and response by CSAC legal counsel as soon as possible.

Sincerely,



Sally M. Furay
Chair, EdFund Board

Cc: EdFund Board Members
Executive Director Diana Fuentes Michel
Mr. Fred Klass, Chief Operating Officer, Department of Finance
Ms. Jeannie Oropeza, Program Budget Manager, Department of Finance



CONFIDENTIAL – ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

VIA-EMAIL

To: Sally Furay, Chair of the Board of EdFund
cc: Michael Cooney, EdFund Board Member
From: Russell J. Austin
Date: May 1, 2008
Subject: EdFund: Review of Bagley-Keene Issues

Pursuant to my communications with Michael Cooney, we have been asked to analyze whether meetings of the EdFund Board of Directors, as they pertain to consideration of the proposed “Change in Control Severance Agreement” (the “CIC Agreement”) must be held in open meetings pursuant to state law.

Pursuant to Education Code Section 69525(g)(1,)EdFund meetings are subject to the requirements of the Bagley-Keene Open Meeting Act. Section 69525(g)(2) contains a provision allowing closed sessions for matters "of a proprietary nature the discussion of which would disclose a trade secret or proprietary business information that could potentially cause economic harm to the auxiliary organization or cause it to violate an agreement with a third party to maintain the information in confidence if that agreement was made in good faith and for reasonable business purposes." For the reasons outlined below, we conclude that the CIC Agreement fits within the ambit of Section 69525(g)(2). Therefore, Board discussions of the proposed CIC Agreement may be held in closed session.

In the Senate Floor analysis accompanying EdFund’s enabling statute, it is stated that the purpose of establishing EdFund in 1996 was to “improve CSAC’s ability to compete,” while the Assembly Floor analysis states as an argument in favor of passing the bill that it will give CSAC the “flexibility to compete effectively in the loan marketplace.” While Section 69525(g)(2) was not added until 2004, that addition was part of a large omnibus education bill that did not alter the underlying purpose or intent of EdFund’s enabling statute. Consequently, since the recruitment and retention of qualified management personnel is crucial to effective competition in the marketplace, it seems logical that the legislative intent behind 69525(g)(2) would include discussions of the CIC Agreement. Requiring that such discussions be conducted in open meetings would result in disclosure of proprietary information about EdFund's executive compensation that could result in significant economic harm to EdFund and inhibit its ability to compete effectively by making it more difficult to hire and retain key management personnel.

CONFIDENTIAL – ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Sally Furay
May 1, 2008
Page 2

While Section 69525(g)(2) applies only to EdFund, the Bagley-Keene Act also contains a number of other permissible subjects for closed-session meetings. Such subjects include the consideration of "the appointment, employment, evaluation of performance, or dismissal of a public employee" (Government Code Section 11126(a)(1)).

The Bagley-Keene Act refers to public employees, and thus this exemption may not be directly applicable to EdFund since its employees are not "public employees." However, the inclusion of EdFund within the scope of the Bagley-Keene Act evinces a legislative intent to treat EdFund as a public agency for the purposes of Bagley-Keene. Therefore, EdFund's employees, while not being technically "public employees," should logically fall under the "personnel" exception of Government Code Section 11126(a)(1). In this regard, the enabling legislation applicable to EdFund supports the conclusion that the Legislature did not intend to impose upon EdFund more stringent requirements of openness by precluding EdFund from taking advantage of the personnel exception. This inference is strengthened by the fact that the floor analyses for the Senate and the Assembly pertaining to the enabling legislation for EdFund indicate that the Legislature's intention in authorizing the establishment of EdFund was to enable EdFund to better compete in the private sector by loosening some of the restrictions that bind state agencies. Given this intention, EdFund should also be able to rely upon one of the principal exceptions contained within the Bagley-Keene Act. Finally, while there is some uncertainty under case law as to whether discussions of salary and benefits fit within this "personnel" exception to the Bagley-Keene Act, we conclude that it is more likely than not this exception extends to salary and benefits, which would in turn include consideration of the CIC Agreement.

CALIFORNIA STUDENT AID COMMISSION

OFFICE OF THE EXECUTIVE DIRECTOR

May 9, 2008

Sister Sally Furay, Chair
EDFUND Board of Directors
1653 Borana Street
San Diego, CA 92111-6939

Dear Chair Furay:

Thank you for sharing with me the legal opinion from EDFUND outside counsel, Murphy Austin Adams Schoenfeld LLP, on whether the Change in Control Severance Agreement can be held in closed session in accordance with Government Code section 11126(a)(1) and Education Code section 69525(g). I have shared the legal opinion with the Commission's General Counsel and requested that she provide to me her analysis of the opinion; a copy of that opinion is attached for your consideration.

In summary, the General Counsel is not persuaded by the arguments offered by outside counsel. With respect to the "proprietary" exception found in the Education Code, our General Counsel disagrees that a discussion of severance benefits was contemplated by the Legislature when EDFUND was given the authority to meet in closed session on items of a proprietary nature which would "disclose a trade secret or proprietary business information that could potentially cause economic harm ..." to EDFUND. As you know, executive compensation is already publicly disclosed through the Annual Reports issued by EDFUND and is therefore not proprietary. Accordingly, it seems unlikely that EDFUND could satisfy either the "proprietary" or "economic harm" elements of this provision.

Similarly, case law analyzing the "appointment, employment, evaluation of performance, or dismissal" language has determined that it does not apply to salary and benefits. While admittedly the case mentioned above is referring to the Brown Act governing local agencies, the language is identical to the language found in the Bagley-Keene Open Meeting Act which governs state agencies, boards, commissions and EDFUND.

In enacting the Bagley-Keene Open Meeting Act, California has demonstrated a strong commitment to ensuring that the public has ready access to the workings of public agencies, including the setting of salary and benefits of public employees and the expenditure of state funds. By making EDFUND subject to the provisions of the Bagley-Keene Open Meeting Act, the Legislature has made it clear that EDFUND should conduct itself within the same parameters of other state entities and conduct all meetings in open session unless explicitly granted the authority to do otherwise. The opinion of outside counsel relies heavily on legislative intent and an "uncertainty" on whether salary and benefits falls within either of these exceptions. As a state body, EDFUND should exercise extreme caution when operating in a manner contrary to the statutory constraints explicitly placed on EDFUND when it was created and made subject to the provisions of the Bagley-Keene Open Meeting Act.



Accordingly, as the Chair of the California Student Aid Commission, I am requesting that the May 14, 2008 closed session meeting of the Executive Committee be re-noticed and that all discussion related to the severance agreement be held in an open session meeting. In addition, I am requesting that any discussion of the Change in Control Severance Agreement contemplated for the May 15, 2008 closed session meeting of the Board of Directors be re-noticed and discussed in open session. "Each member of a state body who attends a meeting of that body in violation of any provision of [Bagley-Keene] where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled to ..." is guilty of a misdemeanor. (See Government Code section 11130.7.)

Once again I would like to reiterate that any action taken by the Board of Directors with respect to a severance agreement will require approval by an officer of the California Student Aid Commission and must be in accordance with Commission policy pursuant to Education Code section 69526(a). The severance agreement will also require the approval of the Director of Finance pursuant to Education Code section 69526(b).

Please let me know if you have any questions.

Sincerely,



Dennis J. Galligani
Chair

CC: Members of the California Student Aid Commission
Members of the EDFUND Board of Directors
Mr. Fred Klass, Chief Operating Officer
Ms. Jeannie Oropeza, Program Budget Manager



M E M O

DATE: May 8, 2008

TO: Dennis Galligani, Chair

FROM: Keri Faseler Tippins
General Counsel

SUBJECT: EDFUND Change in Control Severance Agreement
Bagley-Keene Open Meeting Act Violations

Pursuant to your request, I have reviewed the May 1, 2008 Memorandum prepared by Russell Austin of Murphy Austin Adams Schoenfeld LLP (“Austin Memo”) discussing whether meetings by the EDFUND Board of Directors on the proposed Change in Control Severance Agreement (“severance agreement”) must be held in open session under state law. Mr. Austin concludes that state law permits the EDFUND Board of Directors to meet in closed session to discuss the severance agreement. I strongly disagree with this conclusion and I recommend that the Commission convey to the EDFUND Board of Directors its expectation that the Board of Directors will conduct its discussion of the severance agreement in an open session in conformity with state law.

A. Concerns Relating to the Analysis of the “Proprietary” Exception Found in Education Code Section 69525(g)(2)

The Austin Memo found that the EDFUND Board of Directors had authority under Education Code section 69525(g)(2), the “proprietary exception” to meet in closed session to discuss the severance agreement. The Austin Memo discussed the legislatively expressed need for EDFUND to be competitive in the loan marketplace and concluded:

Consequently, since the recruitment and retention of qualified management personnel is crucial to effective competition in the marketplace, it seems logical that the legislative intent behind 69525(g)(2) would include discussions of the [severance] Agreement. Requiring that such discussions be conducted in open meetings would result in the disclosure of proprietary information about EDFUND’s executive compensation that could result in significant economic harm to EDFUND and inhibit its ability to compete effectively by making it more difficult to hire and retain key management personnel.

CONFIDENTIAL ATTORNEY – CLIENT COMMUNICATION

This conclusion ignores key facts regarding the public nature of the compensation paid to EDFUND executives, the context in which the proprietary exception was added to the Education Code, and the general framework in which state agencies are given the ability to meet in closed session on items necessary to protect the state agency's ability to operate in a competitive marketplace.

The Austin Memo asserts that the severance agreement is proprietary because the ability to recruit and retain "qualified management personnel is crucial to effective competition in the marketplace" and that "disclosure of proprietary information about EDFUND's executive compensation ... could result in significant harm to EDFUND." Information about the compensation paid to EDFUND executives is already available to the public through the Annual Report and, as such, there is nothing "proprietary" about this information. The Austin Memo also fails to explain the "significant harm" that EDFUND will experience, especially considering that EDFUND's executive compensation information is already available to the public.

Furthermore, there is no part of this severance package which is intended as a recruitment tool. This severance package is being offered to executives who are already employees of EDFUND and who already agreed to the terms and conditions of their employment. To indicate otherwise is misleading. Lastly, at the same time that the "proprietary" exception was added to Education Code section 69525, Senate Bill 1108 ("SB 1108") also amended Education Code section 69529.5. That amendment provided: "The commission shall report the following information to the Legislature on April 1 of each year ..., with respect to the operation of the auxiliary organization: ... (4) the level of compensation of managers and executives of the auxiliary organization."

The context in which the proprietary exception was added to the Education Code is also at odds with the "logical" inference reached by the Austin Memo that the legislative intent behind 69525(g)(2) would permit discussion of a severance agreement. SB 1108 was the legislation that authorized EDFUND to diversify its Federal Family Loan Program activities. SB 1108 provided the following:

This bill would authorize the auxiliary organization to participate in activities approved by the commission and determined by the commission to be related to student financial aid, consistent with the general mission of the commission, and consistent with the purposes of prescribed provisions of federal law that are related to student financial aid. The bill would authorize the board of directors of the auxiliary organization established by the commission to meet in closed session to consider matters of a proprietary nature under certain circumstances.

There is nothing in this language which indicates an intention to abrogate the general rule that public employee salary and benefits are of public interest and should be considered in open session by public bodies. Other state agencies doing business in competitive markets, such as the California Public Employees' Retirement System and the California State Teachers' Retirement System, have business related closed session exceptions for items related to the purchase, lease and sale of real property and other investment decisions. (See Govt. Code section 11126(c)(7)(A) and 11126(c)(16).) However, I am not aware of any state agency which has claimed that an exclusion of this type extends so far as to encompass the salary and benefits of its executives. Indeed, both CalPERS and CalSTRS have specific statutory authority to hold closed session meetings pertaining to "recruitment, appointment, employment or removal" of the chief executive officer or chief investment officer of these particular agencies but the discussion of salaries, bonuses and benefits is conducted in open session by both agencies. The clearest indicator by the Legislature of how it expected EDFUND to conduct its meetings is

CONFIDENTIAL ATTORNEY – CLIENT COMMUNICATION

the fact that EDFUND was, from the outset, statutorily mandated to comply with the Bagley-Keene Open Meeting Act. As will be discussed below, the personnel exception of the Bagley-Keene Open Meeting Act similarly does not apply and, as a result, discussions relating to the severance agreement must be held in open session by the EDFUND Board of Directors.

B. Concerns Relating to the Analysis of the "Personnel" Exception Found in Government Code Section 111266(a)(1)

The Austin Memo also found that the EDFUND Board of Directors could meet in closed session to discuss the severance agreement under the Bagley-Keene Open Meeting Act. The Austin Memo specifically noted "while there is some uncertainty under case law as to whether discussions of salary and benefits fit within the 'personnel' exception to the Bagley-Keene Act (sic), we conclude it is more likely than not this exception extends to salary and benefits, which would in turn include consideration of the [severance] agreement."

I disagree that there is much uncertainty about whether discussion of salary and benefits is an appropriate use of the "personnel" exception. In *San Diego Union v. City Council of the City San Diego*, 146 Cal. App. 3d 947, the court discusses that, under the Brown Act, salaries for public officials must be discussed in open session. The pertinent language in the Brown Act which is discussed in this case mirrors the language found in the Bagley-Keene Open Meeting Act. The court found:

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." The Brown Act provides for a "personnel exception" in allowing closed sessions when the governmental entity is "meeting to consider the appointment, employment, evaluation of performance or dismissal of a public employee or to hear complaints or charges brought against such employee by another person or employee unless such employee requests a public hearing." The parties agree the underlying purposes of the "personnel exception" are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body.

Mindful we must construe the "personnel exception" narrowly and the "sunshine law" liberally in favor of openness, we reject the City Council's arguments the term "employment" be broadly interpreted so as to encompass the terms and conditions of continued employment of which salary level determination is an integral part or that the amendment providing for "evaluation of performance" be similarly interpreted. Our determination is consistent with the purpose and mandate of the Brown Act and the specific language of section 54957. Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. Public visibility breeds public awareness which in turn fosters public activism politically and subtly encouraging the governmental entity to permit public participation in the discussion process. It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds. With ever-increasing demands on public funds which have dwindled so drastically since the passage of Proposition 13, secrecy cannot be condoned in budgetary determinations, including the establishment of salaries. Granted, evaluating a

CONFIDENTIAL ATTORNEY – CLIENT COMMUNICATION

specific employee's performance is a matter within the ambit of the "personnel exception" in light of the 1982 amendment to section 54957 however, upon the determination a particular public employee is deserving of a salary increase, various other factors must be considered such as available funds, other city funding priorities, relative compensation of similar positions within the city and in other jurisdictions, before determining the salary increase. Each of these considerations is of acute public interest.

Further, there is no basis for the apparent underlying assumption of the City Council's argument that it cannot evaluate the performance of the cited public employees without also establishing their salaries in executive session. Consistent with both the "personnel exception" as to the evaluation of performance of a particular employee and the general mandate of the Brown Act, we envision the two-step process of an executive session evaluating the performance of the public employee and a properly noticed, open session for setting that particular employee's salary as a facile matter, not negatively affecting the review process. Common sense compels the conclusion that oblique references to discussions of salaries for specific individuals within executive sessions evaluating the performance of that public employee would not violate the Brown Act so long as the specific discussions as to the amount of salary increase are reserved for a properly noticed, public meeting.

As noted by the court, the purpose behind the "personnel" exception is "to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body." This is not the situation here. If the Legislature has intended salary and benefits to fall within the personnel exception it would have so provided. Instead, it limited the exception to "appointment, employment, evaluation of performance, or dismissal of a public employee." Since none of these categories apply, the "personnel" exception does not apply and meetings on this severance agreement held in closed session violate state law.

CONCLUSION

By statute, the Commission is charged with the oversight of the activities of its auxiliary organization, EDFUND. This responsibility includes ensuring that EDFUND operates in conformity with state law. The Commission's own governance policy provides that the "Commission will understand, acknowledge, and hold the EDFUND Board accountable for its fiduciary responsibilities...". The governance policy also provides that:

EDFUND Board members are appointed by the Commission and are accountable to the Commission. ... As such, both the Board as a whole and individual Board members have certain fiduciary responsibilities and obligations with regard to the EDFUND organization. The Commission will hold the EDFUND Board, which it appoints, accountable to fulfill these fiduciary responsibilities and obligations. The Commission also has statutory responsibility to oversee its auxiliary, EDFUND. Thus, the Education Code establishes a two-tiered governance structure over EDFUND – the first tier being the EDFUND Board, the second being the Commission. To fulfill its governance role, the Commission will conduct oversight of EDFUND as required by law and deemed necessary and prudent by the Commission.

As the body ultimately responsible for the oversight of EDFUND, I urge the Commission to communicate to the EDFUND Board of Directors its expectation that the Board of

CONFIDENTIAL ATTORNEY – CLIENT COMMUNICATION

To: Commission Chair Dennis Galligani

- 5 -

May 9, 2008

Directors will follow state law and conduct its discussion of the severance agreement in an open session meeting in compliance with the Bagley-Keene Open Meeting Act.

CONFIDENTIAL ATTORNEY – CLIENT COMMUNICATION



RESOLUTION

of EDFUND Board of Directors

RESOLVED: that the Executive Committee of this Board be authorized and directed to consider and recommend to the Board whether, in light of the pending sale of the corporation, action should be taken with respect to the retention of key employees;

RESOLVED FURTHER: that the Executive Committee, acting on behalf of the corporation, confer with the California Student Aid Commission and the Department of Finance regarding the Board's right to deliberate in closed session matters relating to the sale of the corporation, including the retention of key employees.

Approved: May 15, 2008

Sally M. Furay

Sally Furay

Chair, EDFUND Board of Directors