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## 6.e

### Action/Information Item

#### *Governance and Monitoring Committee*

##### Review/Adoption of Proposed Changes to the Meeting Policy

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The recent disagreement between the Commission and EDFUND on the propriety of holding closed session meetings regarding the Executive Change-In-Control Severance Agreement highlighted certain areas of the current Meeting Policy that were insufficient to ensure compliance with the Bagley-Keene Open Meeting Act.

The following enclosures are being provided for your consideration:

- Attachment 6.e.1: Current joint CSAC/ EDFUND Family Education Loan Program Meeting Policy
- Attachment 6.e.2: Redline draft of the current joint CSAC/ EDFUND Family Education Loan Program Meeting Policy reflecting proposed changes  
Note: This draft reflects language edits only; formatting changes were not incorporated
- Attachment 6.e.3: Clean draft of the proposed CSAC Meeting Policy with proposed changes incorporated

**Recommended Action:** Adopt the proposed changes as the CSAC Meeting Policy indicates in the provided enclosures.

**Responsible Person:** Keri Tippins  
General Counsel



## GENERAL POLICY

SUBJECT:

**Meetings**

POLICY NUMBER:

**01**

EFFECTIVE DATE:

APPROVED BY COMMISSION SECRETARY

### Introduction

The California Student Aid Commission (“the Commission”) as a state body is subject to the Bagley Keene Open Meetings Act (“the Act” or “the Bagley–Keene Act”) set forth in Government Code sections 11120-11132. The EDFUND Board of Directors (“EDFUND”) is also subject to the Bagley-Keene Act under Education Code section 69525, subdivision (g)(1). Generally, the Act requires the respective organizations<sup>1</sup> to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized to meet in closed session by the Act or Education Code section 69525, subdivision (g)(2) and (3).

Below is a list of some of the items that may properly be considered in closed session by either the Commission, EDFUND or their respective standing and ad hoc committees. While this list may be a helpful guide, it is no substitute for consulting the actual language of the Act, section 69525, and any court cases and administrative opinions that may interpret these statutes.

### Potential Matters for Closed Session

#### Proprietary

As a general rule, all items placed on an agenda must be addressed in open session. However, the Legislature has allowed closed session in very limited circumstances. Education Code section 69525, subdivision (g)(2) and (3), respectively, allow EDFUND and the Commission to separately hold a closed session to consider a matter of a proprietary nature the discussion of which would disclose a trade secret or proprietary business information that could potentially cause economic harm to EDFUND or cause EDFUND 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.

<sup>1</sup> The term “organization” as used in this policy refers to either the Commission or the EDFUND Board of Directors.

The following is a list of subjects commonly addressed by either the Commission or EDFUND in their respective closed session meetings under Education Code section 69525, subdivision (g)(2) or (3). This list is not intended to limit or mandate the subjects that may be discussed in closed session under this subdivision. Whether a subject falls within this subdivision, is a factual matter to be determined on a case-by-case basis by the respective organization's legal counsel.

- Discussions of trade secrets or confidential or proprietary information may include, but is not limited, to the following:
  - Internal financial statements
  - Any non-public financial reports
  - Cash flow statements
  - Annual Loan Program Business Plan and Budget
  - Federal Family Education Loan (FFEL) Program statistical reports
  - Voluntary Flexible Agreement (VFA) negotiations
  - Development of business diversification opportunities and plans
  - Review of a Commission draft report on EDFUND's Annual Performance Review. The content of this report should be examined closely to ensure that it relates to confidential proprietary information under Education Code section 69525, subdivision (g)(2).

Civil Code section 3426.1, subdivision (d)(1)(2), defines a trade secret "as 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."

(Education Code section 69525, subdivision (g); Civil Code section 3426.1, subdivision (d)(1)(2).)

### **Audits**

- The Commission and EDFUND may each meet in closed session to discuss their respective responses to any confidential final draft audit report received from the Bureau of State Audits. However, once the Bureau of State Audits publicly releases an audit report, each organization must meet in open session to discuss the audit report unless exempted from that requirement by some other provision of law.

(Government Code section 11126.2.)

### **Employees**

- The Commission may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of the Commission Executive Director or any other public employee of the Commission. However, any discussion of the amount of compensation must be discussed in open session.

- EDFUND may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of the EDFUND President or EDFUND employees. However, any discussion of the amount of compensation must be conducted in open session.<sup>2</sup>

(Government Code section 11126, subdivision (a).)

### **Advice of Counsel**

- Either the Commission or EDFUND may meet in closed session to receive advice of their respective counsel on pending litigation. For purpose of the Act, litigation is “pending” in three basic situations. First, where either organization is a party to existing litigation. Second, where under existing facts and circumstances, either organization has substantial exposure to litigation. Third, where either organization is meeting for the purpose of determining whether to initiate litigation.

(Government Code section 11126, subdivision (e).)

### **Real Estate**

- Either the Commission or EDFUND may meet in closed session to advise its negotiator in situations involving real estate transactions and in negotiations regarding price and terms of payment. However, before meeting in closed session, the respective organization must identify the specific parcel in question and the party with whom it is negotiating.

(Government Code section 11126, subdivision (c)(7).)

### **Security**

- Either the Commission or EDFUND may, upon a two-thirds vote of those present, conduct a closed session to consider matters posing a potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the body, where disclosure of these considerations could adversely affect their safety or security.

(Government Code section 11126, subdivision (c)(18).)

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<sup>2</sup> Notwithstanding the Act, the EDFUND President and EDFUND employees are not public employees and, if not for the Act, issues of compensation brought to the EDFUND Board, if any, would be confidential and not subject to public disclosure. Nothing within the Act subjects the EDFUND Board to evaluate or discuss issues of compensation at a Board or committee meeting.

## Meeting Notices

Meeting notices shall be given and made available on the Internet at least 10 days in advance of the meeting. Prior to holding any closed session, a meeting notice must indicate that a closed session will be held and must include a description of any item to be transacted or discussed in closed session. Meeting notices, for either open or closed sessions shall include a brief general description of an item (usually 20 words or less). In general, the items on the meeting notice should be written to provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item. The description of an item to be transacted or discussed in closed session shall at a minimum include a citation of the specific statutory authority under which a closed session is being held.

A meeting occurs when a quorum of each respective organization convenes to address issues under the respective organization's jurisdiction.

(Government Code section 11125, 11122.5.)

## Agendas

All agendas should follow the respective organization's standard meeting agenda format and should include a reference to any closed session. All agendas should be reviewed by the respective organization's legal counsel before each agenda is finalized and published.

A separate agenda shall be prepared for closed sessions clearly distinguishing items to be considered in closed session. The closed session agenda should cite the statutory authority or provision that authorized the particular closed session. Closed session agenda and any supporting materials shall be clearly marked CONFIDENTIAL and handled and secured in a manner that respects the nature of the material.

The Commission and EDFUND should each have their respective agendas and background materials for both open and closed sessions mailed or electronically transmitted to their members at least 10 days in advance of the meeting, unless the Chair of their respective body approves an alteration to such schedule.

## Conducting Closed Session

A closed session shall be held only during a regular or special meeting of either the Commission or EDFUND. The respective organization's legal counsel should be present during all closed sessions, if possible. Prior to convening into closed session, the Chair of either the Commission or EDFUND must publicly announce that its organization is going into closed session and should state those issues that will be considered in closed session. In the closed session, each organization may consider only those matters covered in the meeting notice. After any closed session, each organization shall reconvene into open session prior to adjournment and shall disclose

any reportable actions taken in closed session. Upon determination by either the Commission or EDFUND, the respective organization may record its closed session.

(Government Code section 11126.3.)

### **Minutes/Records**

All matters discussed or disclosed during a lawfully held closed session and all notes, minutes, records or recordings made of such a closed session are confidential and shall remain confidential unless and until required to be disclosed by action of the respective organization or by law.

The Commission and EDFUND shall each designate an individual (such as legal counsel, a commissioner or board member and/or employee) to attend a closed session meeting and to document in a minute book a record of closed session topics discussed and any decisions made at the meeting. This minute book may, but need not, consist of a recording of the closed session.

The minute book is not a public record subject to inspection pursuant to the California Public Record Act (Government Code section 6250, Chapter 3.5 of Division 7 of Title 1), and therefore shall be kept confidential. The minute book shall be available to the respective members of each organization, including ex officio members, and the respective organization's legal counsel.

If a violation is alleged to have occurred at a closed session, a court of general jurisdiction may have access to the minute book. Minutes of a closed session shall be reviewed by legal counsel and reviewed and signed by the Chair of the respective organization that entered into the closed session.

(Government Code section 11126.1)

### **Best Practices**

Nothing contained within this policy shall prevent either the Commission or EDFUND from adopting additional requirements that are not addressed in this policy, so long as these additional requirements are not inconsistent with this policy, the Act or any other relevant law or administrative decisions.



# GENERAL POLICY

SUBJECT:  
**Meetings**

POLICY NUMBER:  
**01**

EFFECTIVE DATE:

APPROVED BY COMMISSION SECRETARY

## Introduction

The California Student Aid Commission (“the Commission”) ~~as is~~ a state body ~~is~~ subject to the Bagley Keene Open Meetings Act (“the Act” ~~or “the Bagley-Keene Act”~~), ~~set forth in~~ Government Code sections 11120-11132. ~~The~~ EDFUND, ~~its~~ Board of Directors ~~and committees~~ (“EDFUND”) ~~is~~ ~~are~~ also subject to the Bagley-Keene Open Meeting Act ~~under pursuant to~~ Education Code section 69525, subdivision (g)(1). ~~Generally, the Act requires the respective organizations<sup>1</sup> to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized to meet in closed session by the Act or Education Code section 69525, subdivision (g)(2) and (3).~~

It is the intent of the Commission that any gathering of a quorum of the Commission, the EDFUND Board of Directors, and the committees of these bodies, for the purpose of discussing matters within its jurisdiction shall comply with all provisions of the Bagley-Keene Open Meeting Act. For purposes of this policy, a quorum of a committee of either the Commission or the EDFUND Board of Directors shall consist of a majority of that committee’s membership without consideration of any vacant position on the committee. A quorum, for purposes of a meeting of the Commission or the EDFUND Board of Directors, is a majority of the body including all vacant positions.

The Commission recognizes and supports the public policy underlying the enactment of the Bagley-Keene Open Meeting Act and declares its intent to narrowly apply any exceptions to the Act so as to ensure the public’s right to open access to the activities of the Commission and its auxiliary organization, EDFUND.

~~Below is a list of some of the items that may properly be considered in closed session by either the Commission, EDFUND or their respective standing and ad hoc committees. While this list may be a helpful guide, it is no substitute for consulting the actual language of the Act, section 69525, and any court cases and administrative opinions that may interpret these statutes.~~

<sup>1</sup> The term “organization” as used in this policy refers to either the Commission or the EDFUND Board of Directors.

### **Potential Matters for ~~CLOSED SESSION~~**

The Commission, the EDFUND Board of Directors, and any committee of these bodies, shall limit the business it conducts in closed session to those matters specifically authorized in Government Code Section 11126 and Education Code Section 69525. In determining whether or not an item is properly held in closed session, the Commission's legal counsel shall review all closed session agendas and materials.

A closed session shall be held only during a regular or special meeting of ~~either the Commission, the or EDFUND, Board of Directors, or any committee of these bodies.~~ The respective organization's legal counsel should be present during all closed sessions, if possible. In addition, the Commission's legal counsel may be present in any closed session meeting convened by the EDFUND Board of Directors or any committee thereof. The presence of the Commission's legal counsel does not constitute a waiver of any legal privilege that may be asserted as to the information being conveyed, or any materials being presented, on the agenda items being held in closed session.

Prior to convening into closed session, the Chair of either the Commission, ~~or the~~ EDFUND Board of Directors or the committee must publicly announce that ~~its~~ organizationthe body is going into closed session and should state those issues that will be considered in closed session. In the closed session, ~~each organizationthe body~~ may consider only those matters covered in the meeting notice. After any closed session, ~~each organizationthe body~~ shall reconvene into open session prior to adjournment and shall disclose any reportable actions taken in closed session. Upon determination by either the Commission or EDFUND Board of Directors, the respective organization may record its closed session.

(Government Code section 11126.3.)

### **Proprietary Business Matters**

As a general rule, all items placed on an agenda must be addressed in open session. However, the Legislature has allowed closed session in very limited circumstances. Education Code section 69525, subdivision (g)(2) and (3), respectively, allow EDFUND and the Commission to separately hold a closed session to consider a matter of a proprietary nature the discussion of which would disclose a trade secret or proprietary business information that could potentially cause economic harm to EDFUND or cause EDFUND 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.

The following is a list of subjects commonly addressed by either the Commission or EDFUND in their respective closed session meetings under Education Code section 69525, subdivision (g)(2) or (3). This list is not intended to limit or mandate the subjects that may be discussed in closed session under this subdivision. Whether a subject falls within this subdivision, is a factual matter to be determined on a case-by-case basis by the respective organization's legal counsel.

- Discussions of trade secrets or confidential or proprietary information may include, but is not limited, to the following:
  - Internal financial statements
  - Any non-public financial reports
  - Cash flow statements
  - Annual Loan Program Business Plan and Budget
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  - Voluntary Flexible Agreement (VFA) negotiations
  - Development of business diversification opportunities and plans
  - Review of a Commission draft report on EDFUND's Annual Performance Review. The content of this report should be examined closely to ensure that it relates to confidential proprietary information under Education Code section 69525, subdivision (g)(2).

Civil Code section 3426.1, subdivision (d)(1)(2), defines a trade secret "as 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."

The "proprietary exception" found in Education Code section 69525(g) shall not be utilized to discuss items related to the employment, salary, retention, severance, or any benefits or other compensation provided to executives, managers, or employees of EDFUND.

(Education Code section 69525, subdivision (g); Civil Code section 3426.1, subdivision (d)(1)(2).)

### **Audits**

- The Commission and EDFUND may each meet in closed session to discuss their respective responses to any confidential final draft audit report received from the Bureau of State Audits. However, once the Bureau of State Audits publicly releases an audit report, each organization must meet in open session to discuss the audit report unless exempted from that requirement by some other provision of law.

(Government Code section 11126.2.)

### **Employees**

- The Commission may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of the Commission Executive Director or any other public employee of the Commission. However, any discussion of the amount of compensation must be discussed in open session.

- EDFUND may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of the EDFUND President or EDFUND employees. However, any discussion of the amount of compensation or benefits, including the terms of any employment contracts or retention or severance agreements, must be conducted in open session.<sup>2</sup>

(Government Code section 11126, subdivision (a).)

### **Advice of Counsel**

- Either the Commission or EDFUND may meet in closed session to receive advice of their respective counsel on pending litigation. For purpose of the Act, litigation is “pending” in three basic situations. First, where either organization is a party to existing litigation. Second, where under existing facts and circumstances, either organization has substantial exposure to litigation. Third, where either organization is meeting for the purpose of determining whether to initiate litigation.

(Government Code section 11126, subdivision (e).)

### **Real Estate**

- Either the Commission or EDFUND may meet in closed session to advise its negotiator in situations involving real estate transactions and in negotiations regarding price and terms of payment. However, before meeting in closed session, the respective organization must identify the specific parcel in question and the party with whom it is negotiating.

(Government Code section 11126, subdivision (c)(7).)

### **Security**

- Either the Commission or EDFUND may, upon a two-thirds vote of those present, conduct a closed session to consider matters posing a potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the body, where disclosure of these considerations could adversely affect their safety or security.

(Government Code section 11126, subdivision (c)(18).)

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<sup>2</sup> ~~Notwithstanding the Act, the EDFUND President and EDFUND employees are not public employees and, if not for the Act, issues of compensation brought to the EDFUND Board, if any, would be confidential and not subject to public disclosure. Nothing within the Act subjects the EDFUND Board to evaluate or discuss issues of compensation at a Board or committee meeting.~~

## Meeting Notices

Regular meetings of the Commission, the EDFUND Board of Directors and their respective committees shall be noticed a minimum of 10 days in advance. Any meeting scheduled with less than 10 days notice will comply with the Special Meeting or Emergency Meeting provisions of the Bagley-Keene Open Meeting Act.

Meeting notices shall be ~~given~~ sent to interested parties and made available on the Internet at least 10 days in advance of the meeting. The meeting notice will contain the website address of the posted notice, as well as, information on how an individual may request a disability-related modification or accommodation.

~~Prior to holding any closed session, a~~ Meeting notices for meetings with a closed session must indicate that a closed session will be held and must include a description, satisfying the requirements stated below under "Agenda Items," of any item to be transacted or discussed in closed session. The meeting notice must also include description of an item to be transacted or discussed in closed session shall at a minimum include a citation of the specific statutory authority under which a closed session is being held.

~~Meeting notices, for either open or closed sessions shall include a brief general description of an item (usually 20 words or less). In general, the items on the meeting notice should be written to provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item.~~

~~A meeting occurs when a quorum of each respective organization convenes to address issues under the respective organization's jurisdiction.~~

~~(Government Code section 11125, 11122.5.)~~

## Agendas

Agenda Items: Each agenda item shall include a brief general sufficient description of an the item to be discussed so as (usually 20 words or less). In general, the items on the meeting notice should be written to provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item. All items on the agenda shall be identified as either action items or informational items. Items designated as informational are appropriate for action if the Commission, the Board of Directors, or committee wishes to take action.

Agendas may include a consent item that consolidates several items for approval by the Commission, Board of Directors, or committee. No discussion or presentation shall be held on an item on the consent agenda. Any member of the Commission, Board of Directors, or committee may ask that an item be removed from the consent calendar and taken separately. Thereafter, the items on the consent agenda may be adopted together upon motion and approval by the Commission, Board of Directors, or committee.

~~Designation of, and Authority for, Closed Session: A separate agenda shall be prepared for closed sessions clearly distinguishing items to be considered in closed session.~~ The closed session agenda should cite the statutory authority or provision authorizing the particular closed session. Closed session agenda and any supporting materials shall be clearly marked CONFIDENTIAL and handled and secured in a manner that respects the nature of the material.

~~Review by Legal Counsel: All agendas should follow the respective organization's standard meeting agenda format and should include a reference to any closed session.~~ All agendas should be reviewed by the respective organization's legal counsel before ~~each agenda is being~~ finalized and published. ~~All closed session notices and agendas, whether for the Commission, the EDFUND Board of Directors, or any committee of these bodies, shall be reviewed by the Commission's legal counsel prior to issuance of the notice. If, in the opinion of the Commission's legal counsel, an agenda item is not appropriate for closed session under the Bagley-Keene Open Meeting Act or Education Code Section 69525(g), a closed session meeting on that agenda item shall not be held until the Executive Director of the Commission determines whether or not the item qualifies for discussion in closed session. If the agenda item is for a meeting of the EDFUND Board of Directors or Board committee, the Executive Director shall confer with EDFUND staff before making the determination. If EDFUND disagrees with the Executive Director's decision, the Commission shall have the final authority to determine, at a properly noticed meeting, whether the EdFund Board of Directors or EDFUND committee may consider the item in closed session. The Commission shall direct the Board of Directors or EDFUND Committee to meet in open session on the agenda item if the Commission determines the item may not be discussed in closed session.~~

Notice, Agenda and Materials availability:

~~A separate agenda shall be prepared for closed sessions clearly distinguishing items to be considered in closed session. The closed session agenda should cite the statutory authority or provision that authorized the particular closed session. Closed session agenda and any supporting materials shall be clearly marked CONFIDENTIAL and handled and secured in a manner that respects the nature of the material.~~

The Commission and EDFUND should each have their respective agendas and background materials for both open and closed sessions mailed or electronically transmitted to their members at least 407 days in advance of the meeting, unless the chair of their respective body approves an alteration to such schedule.

## ~~Conducting Closed Session~~

### Minutes/Records

All matters discussed or disclosed during a lawfully held closed session and all notes, minutes, records or recordings made of such a closed session are confidential and shall remain confidential unless and until required to be disclosed by action of the respective organization or by law.

The Commission and EDFUND shall each designate an individual (such as legal counsel, a commissioner or board member and/or employee) to attend a closed session meeting and to document in a minute book a record of closed session topics discussed and any decisions made at the meeting. This minute book may, but need not, consist of a recording of the closed session.

The minute book is not a public record subject to inspection pursuant to the California Public Record Act (Government Code section 6250, Chapter 3.5 of Division 7 of Title 1), and therefore shall be kept confidential. The minute book shall be available to the respective members of each organization, including ex officio members, and the respective organization's legal counsel.

If a violation is alleged to have occurred at a closed session, a court of general jurisdiction may have access to the minute book. Minutes of a closed session shall be reviewed by legal counsel and reviewed and signed by the Chair of the respective organization that entered into the closed session.

(Government Code section 11126.1)

#### Best Practices

Nothing contained within this policy shall prevent either the Commission or EDFUND from adopting additional requirements that are not addressed in this policy, so long as these additional requirements are not inconsistent with this policy, the Act or any other relevant law or administrative decisions.

#### **COMMITTEE MEETING ATTENDANCE**

**Members of the Commission and/or the EDFUND Board of Directors are entitled to attend any committee meeting, whether standing or ad hoc, of their respective organization irrespective of membership on a particular committee. However, only members of the committee are able to participate or vote on matters before the committee.**



# GENERAL POLICY

SUBJECT:  
**Meetings**

POLICY NUMBER:  
**01**

EFFECTIVE DATE:

APPROVED BY COMMISSION SECRETARY

## INTRODUCTION

The California Student Aid Commission (“the Commission”) is a state body subject to the Bagley-Keene Open Meeting Act (“the Act”), Government Code sections 11120-11132. EDFUND, its Board of Directors and committees are also subject to the Bagley-Keene Open Meeting Act pursuant to Education Code section 69525, subdivision (g)(1).

It is the intent of the Commission that any gathering of a quorum of the Commission, the Board of Directors, and the respective Committees of these bodies, for the purpose of discussing matters within its jurisdiction shall comply with all provisions of the Bagley-Keene Open Meeting Act. For purposes of this policy, a quorum of a Committee of either the Commission or the EDFUND Board of Directors shall consist of a majority of that committee’s membership without consideration of any vacant position on the committee. A quorum, for purposes of a meeting of the Commission or the EDFUND Board of Directors, is a majority of the body including all vacant positions.

The Commission recognizes and supports the public policy underlying the enactment of the Bagley-Keene Open Meeting Act and declares its intent to narrowly apply any exceptions to the Act so as to ensure the public’s right to open access to the activities of the Commission and its auxiliary organization, EDFUND.

## MEETING NOTICES

Regular meetings of the Commission, the EDFUND Board of Directors and their respective committees shall be noticed a minimum of 10 days in advance. Any meeting scheduled with less than 10 days notice will comply with the Special Meeting or Emergency Meeting provisions of the Bagley-Keene Open Meeting Act.

Meeting notices shall be sent to interested parties and made available on the Internet at least 10 days in advance of the meeting. The meeting notice will contain the website address of the posted notice, as well as, information on how an individual may request a disability-related modification or accommodation.

Meeting notices for meetings with a closed session must indicate that a closed session will be held and must include a description, satisfying the requirements stated below under “Agenda Items,” of any item to be transacted or discussed in closed session. The meeting notice must also include a citation to the specific statutory authority under which the closed session is being held.

## **AGENDAS**

Agenda Items: Each agenda item shall include a sufficient description of the item of business to be discussed so as to provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item. All items on the agenda shall be identified as either action items or informational items. Items designated for information are appropriate for action if the Commission, Board or committee wishes to take action.

Agendas may include a consent item that consolidates several items for approval by the Commission, Board of Directors, or committee. No discussion or presentation shall be held on an item on the consent agenda. Any member of the Commission, Board or committee may ask that an item be removed from the consent calendar and considered separately. Thereafter, the items on the consent agenda may be adopted together upon motion and approval by the Commission, Board of Directors, or committee.

Designation of, and Authority for, Closed Session: The closed session agenda shall cite the statutory authority or provision authorizing the particular closed session. Closed session agendas and any supporting materials shall be clearly marked CONFIDENTIAL and handled and secured in a manner that respects the nature of the material.

Review by Legal Counsel: All agendas should be reviewed by the respective organization’s legal counsel before being finalized and published. All closed session notices and agendas, whether for the Commission, the EDFUND Board of Directors, or any committee of these bodies, shall be reviewed by the Commission’s legal counsel prior to issuance of the notice. If, in the opinion of the Commission’s legal counsel, an agenda item is not appropriate for closed session under the Bagley-Keene Open Meeting Act or Education Code Section 69525(g), a closed session meeting on that agenda item shall not be held until the Executive Director of the Commission determines whether or not the item qualifies for discussion in closed session. If the agenda item is for a meeting of the EDFUND Board of Directors or Board committee, the Executive Director shall confer with EDFUND staff before making the determination. If EDFUND disagrees with the Executive Director’s decision, the Commission shall have the final authority to determine, at a properly noticed meeting, whether the EdFund Board of Directors or EDFUND committee may consider the item in closed session. The Commission shall direct the Board of Directors or EDFUND Committee to meet in open session on the agenda item if the Commission determines the item may not be discussed in closed session.

Notice, Agenda and Materials Availability: The Commission and EDFUND should each have their respective agendas and background materials for both open and closed sessions mailed or electronically transmitted to their members at least 7 days in advance of the meeting, unless the Chair of their respective body approves an alteration to such schedule.

## **CLOSED SESSION**

The Commission, the EDFUND Board of Directors, or any committee of these bodies shall limit the business it conducts in closed session to those matters specifically authorized in Government Code Section 11126 and Education Code Section 69525. In determining whether or not an item is properly held in closed session, the Commission's legal counsel shall review all closed session agendas and materials.

A closed session shall be held only during a regular or special meeting of the Commission, EDFUND Board of Directors, or any committee of these bodies. The respective organization's legal counsel should be present during all closed sessions, if possible. In addition, the Commission's legal counsel may be present in any closed session meeting convened by the EDFUND Board of Directors or any committee thereof. The presence of the Commission's legal counsel does not constitute a waiver of any legal privilege that may be asserted as to the information being conveyed, or any materials being presented, on the agenda items being held in closed session.

Prior to convening into closed session, the Chair of either the Commission, the EDFUND Board of Directors, or the committee must publicly announce that the body is going into closed session and should state those issues that will be considered in closed session. In the closed session, the body may consider only those matters covered in the meeting notice. After any closed session, the body shall reconvene into open session prior to adjournment and shall disclose any reportable actions taken in closed session. Upon determination by either the Commission or the EDFUND Board of Directors, the respective organization may record its closed session.

(Government Code section 11126.3.)

### **Proprietary Business Matters**

As a general rule, all items placed on an agenda must be addressed in open session. However, the Legislature has allowed closed session in very limited circumstances. Education Code section 69525, subdivision (g)(2) and (3), respectively, allow EDFUND and the Commission to separately hold a closed session to consider a matter of a proprietary nature the discussion of which would disclose a trade secret or proprietary business information that could potentially cause economic harm to EDFUND or cause EDFUND 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.

The following is a list of subjects commonly addressed by either the Commission or EDFUND in their respective closed session meetings under Education Code section 69525, subdivision (g)(2) or (3). This list is not intended to limit or mandate the subjects that may be discussed in closed session under this subdivision. Whether a subject falls within this subdivision, is a factual matter to be determined on a case-by-case basis by the respective organization's legal counsel. In the event there is a difference of opinion between the Commission and EdFund on whether a matter falls within the "proprietary exception", the Commission shall have the final authority to determine whether an item may be held in closed session and shall direct the Board of Directors, or any of its Committees, to meet in open session on the agenda item.

- Discussions of trade secrets or confidential or proprietary information may include, but is not limited, to the following:
  - Internal financial statements
  - Any non-public financial reports
  - Cash flow statements
  - Annual Loan Program Business Plan and Budget
  - Federal Family Education Loan (FFEL) Program statistical reports
  - Voluntary Flexible Agreement (VFA) negotiations
  - Development of business diversification opportunities and plans
  - Review of a Commission draft report on EDFUND's Annual Performance Review. The content of this report should be examined closely to ensure that it relates to confidential proprietary information under Education Code section 69525, subdivision (g)(2).

Civil Code section 3426.1, subdivision (d)(1)(2), defines a trade secret “as 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.”

The “proprietary exception” found in Education Code section 69525(g) shall not be utilized to discuss items related to the employment, salary, retention, severance, or any benefits or other compensation provided to executives, managers or employees of EDFUND.

(Education Code section 69525, subdivision (g); Civil Code section 3426.1, subdivision (d)(1)(2).)

**Audits**

- The Commission and EDFUND may each meet in closed session to discuss their respective responses to any confidential final draft audit report received from the Bureau of State Audits. However, once the Bureau of State Audits publicly releases an audit report, each organization must meet in open session to discuss the audit report unless exempted from that requirement by some other provision of law.

(Government Code section 11126.2.)

**Employees**

- The Commission may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of the Commission Executive Director or any other public employee of the Commission. However, any discussion of the amount of compensation must be discussed in open session.

- EDFUND may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of the EDFUND President or EDFUND employees. However, any discussion of the amount of compensation or benefits, including the terms of any employment contracts or retention or severance agreements, must be conducted in open session.

(Government Code section 11126, subdivision (a).)

### **Advice of Counsel**

- The Commission or EDFUND may meet in closed session to receive advice of their respective counsel on pending litigation. For purpose of the Act, litigation is “pending” in three basic situations. First, where either organization is a party to existing litigation. Second, where under existing facts and circumstances, either organization has substantial exposure to litigation. Third, where either organization is meeting for the purpose of determining whether to initiate litigation.

(Government Code section 11126, subdivision (e).)

### **Real Estate**

- The Commission or EDFUND may meet in closed session to advise its negotiator in situations involving real estate transactions and in negotiations regarding price and terms of payment. However, before meeting in closed session, the respective organization must identify the specific parcel in question and the party with whom it is negotiating.

(Government Code section 11126, subdivision (c)(7).)

### **Security**

- The Commission or EDFUND may, upon a two-thirds vote of those present, conduct a closed session to consider matters posing a potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the body, where disclosure of these considerations could adversely affect their safety or security.

(Government Code section 11126, subdivision (c)(18).)

### **Minutes/Records**

All matters discussed or disclosed during a lawfully held closed session and all notes, minutes, records or recordings made of such a closed session are confidential and shall remain confidential unless and until required to be disclosed by action of the respective organization or by law.

The Commission and EDFUND shall each designate an individual (such as legal counsel, a commissioner or board member and/or employee) to attend a closed session meeting and to document in a minute book a record of closed session topics discussed and any decisions made at the meeting. This minute book may, but need not, consist of a recording of the closed session.

The minute book is not a public record subject to inspection pursuant to the California Public Record Act (Government Code section 6250, Chapter 3.5 of Division 7 of Title 1), and therefore shall be kept confidential. The minute book shall be available to the respective members of each organization, including ex officio members, and the respective organization's legal counsel.

If a violation is alleged to have occurred at a closed session, a court of general jurisdiction may have access to the minute book. Minutes of a closed session shall be reviewed by legal counsel and reviewed and signed by the Chair of the respective organization that entered into the closed session.

(Government Code section 11126.1)

### **COMMITTEE MEETING ATTENDANCE**

Members of the Commission and/or the EDFUND Board of Directors are entitled to attend any committee meeting, whether standing or ad hoc, of their respective organization irrespective of membership on a particular committee. However, only members of the committee are able to participate or vote on matters before the committee.