



April 5, 2022

Via email

Stephen Brandt, Chair
Delta Independent Science Board
715 P Street, 15-300
Sacramento, CA 95814

Re: Statutory and Constitutional Transparency Requirements

Dear Chair Brandt:

The Delta Independent Science Board (DISB) is a standing board of the State of California. As such, it must follow statutory and constitutional transparency requirements.

The purpose of this letter is two-fold. We request that the DISB comply with the Bagley-Keene Open Meeting Act. (Gov. Code § 11120 et. seq.) We also request that all non-exempt writings that have been distributed to all, or a majority of all, of the members of the DISB related to a matter subject to discussion or consideration at DISB meetings, be listed on the DISB website, as explained below.

The DISB was created by the Delta Reform Act as a board “in state government.” (Wat.Code § 85280(a.)) As such, it is a state body and therefore subject to the Bagley-Keene Open Meeting Act, originally passed in 1967. (Gov. Code § 11120 et. seq.) State law mandates that “notwithstanding being appointed and administered by the Delta Stewardship Council,” the Board members “shall exercise their scientific judgment and perform the functions set forth in this section independently from the council.” (Wat. Code § 85280(a)(4).) Administration of the DISB by the Delta Stewardship Council is irrelevant to the mandate established by Sec. 85280(a)(4).

All members of the Board should have been provided with a copy of the Bagley-Keene Open Meeting Act upon assuming office. (Gov. Code § 11121.9.) Please ensure that all members have received a copy.^{1,2}

¹ This may be helpful: State Water Resources Control Board. 2021. [Bagley-Keene Open Meeting Act and related code sections \(As amended, including statutes 2020\)](#). Compiled by the Office of the Chief Counsel.

https://www.waterboards.ca.gov/laws_regulations/docs/bagleykeene.pdf

² This may also be helpful: California AAPI Commission, [Bagley-Keene Open Meeting Act Training Summary](#) <http://caapicommission.org/wp-content/uploads/2020/05/May11-supplemental.pdf>

The preamble to the Bagley-Keene Open Meeting Act states:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly. (Gov. Code § 11120.)

In California, the Sunshine Act was passed in 2014, amending the state constitution. Article I, section 3(b) of the California Constitution states the following:

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access...

Transparency, i.e. the peoples' right of "access to information" and to "the meetings" and "the writings" is crucial, in view of the extent and intricacy of collaboration and communication between the DISB, the Delta Science Program, the Delta Stewardship Council, and state and federal agencies. The people are entitled to be certain the DISB is complying with the law and that Board members do, in fact, "exercise their scientific judgment and perform the functions set forth in this section independently from the council." (Wat. Code § 85280(a)(4), supra.) Transparency is the process given to the people to ensure compliance.

The DISB has not, to our knowledge, received any training on the Bagley-Keene Open Meeting Act. Board members may not be aware of the definition or prohibition of "serial" meetings. They may not know they are violating the law, i.e., the requirements of the Bagley-Keene Open Meeting Act, when the Delta Lead Scientist or a Delta Stewardship Council member or staff person engages in communications with all, or a majority of all, of the members of the DISB outside of a properly noticed meeting. The Attorney-General's guidance on serial meetings states, in part³:

... problems arise if there are systematic communications through which a quorum of the body acquires information or engages in debate, discussion, lobbying, or any other aspect of the deliberative process, either among themselves or between board members and the staff...

Conversations that advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate

³ California Attorney General's Office. 2018. [A Handy Guide to The Bagley-Keene Open Meeting Act 2004: 2018 Update](https://www.sco.ca.gov/Files-ARD/BudLeg/Bagley-Keene%20Open%20Meeting%20Act%20Requirements.pdf). <https://www.sco.ca.gov/Files-ARD/BudLeg/Bagley-Keene%20Open%20Meeting%20Act%20Requirements.pdf>.

resolution of an issue, are all examples of communications that contribute to the development of a concurrence as to action to be taken by the body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members of state bodies should avoid serial communications of a substantive nature that involve a quorum of the body. In conclusion, serial meeting issues will arise most commonly in connection with rotating staff briefings, telephone calls or e-mail communications among a quorum of board members. In these situations, part of the deliberative process by which information is received and processed, mulled over and discussed, is occurring without participation of the public.

Just remember, serial-meeting provisions basically mean that what the body cannot do as a group it cannot do through serial communications by a quorum of its members.

(p. 5, emphasis added.)

The Bagley-Keene Open Meeting Act also has specific mandates for transparency with respect to writings distributed to all, or a majority, of all members of a state body:

11125.1. (a) Notwithstanding Section 7922.000 or any other provisions of law, agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a state body by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1), and shall be made available upon request without delay. However, this section shall not include any writing exempt from public disclosure under Section 7924.100, 7924.105, 7924.110, 7924.510, or 7924.700 of this code, any provision listed in Section 7920.505 of this code, or Section 489.1 or 583 of the Public Utilities Code.⁴

(b) Writings that are public records under subdivision (a) and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, upon request by a person with a disability.

⁴ Exemptions to the disclosure requirements include documents which are drafts, attorney-client privileged communications, and some personnel matters. We note that attorney-client communications with the DISB do not include communications from the Delta Stewardship's attorney when acting for the Council.

We therefore request that all non-exempt writings that have been distributed to all, or a majority of all, of the members of the DISB in the past month related to a matter subject to discussion or consideration at the April DISB meeting, including communications from the Delta Lead Scientist, or a Delta Stewardship Council member or staff person, be listed on the DISB website. Furthermore, we request that in the future, whenever a non-exempt writing, as discussed below, is distributed to all, or a majority of all, of the members of the DISB in connection with a matter subject to discussion or consideration at a meeting, that said writing(s) be listed on the DISB website.

Thank you for your attention to this essential administrative issue,



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Delta Independent Science Board members

Delta Lead Scientist Laurel Larsen

Mike Chotkowski, Science Coordinator, US Geological Survey

Delta Stewardship Council members

Delta Stewardship Council Executive Director Jessica Pearson

Delta Stewardship Council Executive Director for Science Louise Conrad

Delta Stewardship Council Program Manager Lauren Hastings

Delta Stewardship Council Senior Environmental Scientist Edmund Yu