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March 31, 2016

Linda Evans
California Public Employees' Retirement System
External Affairs Branch
PO Box 942701
Sacramento, CA 94229

Edward Gregory
633 West Fifth Street
Suite 700
Los Angeles, CA 90071

Dear Mr. Gregory and Ms. Evans:

I am writing in response to Linda Evans' March 16 letter addressed to Peter Scheer of the First Amendment Coalition and Edward Gregory's March 21 letter addressed to me regarding Public Records Act requests 2330 and 2471.

First, with regard to Ms. Evans' letter, the letter says "all responsive documents subject to disclosure under the Public Records Act will be mailed to you by April 19, 2016." This response is unsatisfactory and by not citing a reason for delay, does not comply with the provisions for response times set forth in Government Code section 6253. Moreover, in light of CalPERS' overbroad assertions of privilege, it is not at all clear to us what records will be produced and why it would take a period of six weeks (from the March 7 request to April 18) to produce them.

Second, Ms. Evans' letter asserts that documents will be withheld pursuant to Government Code section 6254(a) and Government Code section 6255. As you are no doubt aware, the burden is on CalPERS under both Article I, Section 3(b)(2) of the California Constitution and Government Code section 6255 to justify non-disclosure. *See, e.g., International Federation of Professional and Technical Engineers Local 21* v. *Superior Court* (2007) 42 Cal. 4th 319, 327-29; *California State University Fresno Assn.* v. *Superior Court* (2001) 90 Cal. App. 4th 810, 831 [burden of proof is on proponent of non-disclosure, who must demonstrate a "clear overbalance" on the side of confidentiality]. This burden is not met by CalPERS' nebulous assertion of "deliberative process." "'Not every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence.'" *Marylander* v. *Superior Court* (2000) 81 Cal. App. 4th 1119, 1128. CalPERS' invocation of the section 6255 "catchall" exemption is simply "unsupported statements [which] constitute nothing more than speculative, self-serving opinions designed to preclude the dissemination of information to which the public is entitled." (*Cal. State Fresno*, *supra*, 90 Cal. App. 4th at 835.)

Third, even if the attorney-client privilege applies to some communications related to Robert Klausner – a point we do not concede – there is no justification for the overbroad redactions made in records which CalPERS has produced. For example, CalPERS has redacted the number of hours and the amounts in invoices from Mr. Klausner's firm, and all of the descriptions of his time. The number of hours worked and the amounts are not privileged, and neither are most descriptions of time spent. A time entry reflecting that someone took or defended a deposition, or prepared for or attended a trial, is not privileged; only a description of a specific topic discussed with a client, or perhaps a specific item researched, might arguably qualify for the attorney-client privilege. And as another example of overbroad redactions, a May 6, 2015 communication from Gina Ratto to Tricia McBeath on the subject of "Speaker Confirmation" is heavily redacted. Why is the identity of who is speaking at a conference confidential? It seems likely to us that CalPERS' assertions of confidentiality as to communications with Mr. Klausner are more designed to dissemble its involvement with an individual associated with scandals in Detroit and Jacksonville than to protect any legitimate privilege. And in this regard, we find it ironic that the Steptoe firm -- which was brought in to investigate the criminal conduct of Federico Buenrostro in the infamous "pay to play" scandal which engulfed CalPERS -- has now been hired to keep the public in the dark as to a potential new scandal surrounding its hiring of another questionable "fiduciary."

For example, records produced by CalPERS show that Mr. Klausner had a dinner with Anne Stausboll and Matthew Jacobs on January 21, 2015. His time records reflect 28 hours spent that month, most of it on January 20-22. CalPERS has redacted the description of what Mr. Klausner did on January 20, 21 and 22 (the description for those days appears to consist of only one line, presumably "travel across the country" or something like that). Was CalPERS billed 28 hours of Mr. Klausner's time for a dinner, and for flying across the country and back to attend that dinner? If so, this would be a troubling billing practice and one that would raise serious fiduciary questions for CalPERS as an expenditure of resources that it is charged with safeguarding. There is no reason for redacting the entirety of invoices that would shed light on this question.

CalPERS has also redacted the list of outside counsel which CalPERS has retained. There is no justification whatsoever for redacting the names of law firms or lawyers which CalPERS has retained, and we demand that those redactions of documents produced by CalPERS be removed.

Fourth, even if some communications between Mr. Klausner and CalPERS might arguably qualify for attorney-client privilege – again, a point we do not concede – Mr. Klausner's past role in counseling scandal-plagued pension systems in Jacksonville, Florida and Detroit calls for caution. Evidence Code section 956 states that there is no privilege if the services of the lawyer are sought or obtained to enable or aid anyone to commit a crime or a fraud. While we do not currently claim that Mr. Klausner was consulted for that reason, the history of pay-to-play scandals at CalPERS involving Fred Buenrostro, the former CEO, and Mr.

Klausner's role in other pension systems facing similar accusations, is certainly grounds for concern and for raising section 956.

It is particularly troubling that Mr. Klausner has been regularly depicted as engaging in misconduct similar to CalPERS's recent scandals. Starting in 2004, the press, including the New York Times[1] and Forbes[2], described him as involved in serious improprieties, including regularly getting kickbacks from class action law firms and using his law practice as the foundation for running a much larger and more lucrative pay-to-play operation.

Kickbacks to a fiduciary are prohibited under ERISA[3] and most public pension funds choose to conform to ERISA even when not obligated to do so. Moreover, as a member of the Florida Bar, in the case of referrals of litigation to other firms, Mr. Klausner is required to inform his client of any and all compensation arrangements with that firm. We would separately expect CalPERS as a matter of good order to seek full disclosure of any conflict, and compensation arrangements of the sort Mr. Klausner has entered into with his other pension fund clients would represent such a conflict. Communications seeking or providing this information would not be privileged nor would the contents of any such compensation scheme. We would expect any such records to be included in your document production.

In at least one instance, Klausner failed to encourage his client to stop using a conflicted consultant, Merrill Lynch Consulting Services, that had made payments to Klausner to participate in his pay-to-play fiduciary training courses for his clients despite warnings by an independent expert of self-dealing.

We also note extensive misconduct at the Jacksonville Police and Fire Pension Fund, including the existence of a secret and allegedly illegal special pension fund set up by Mr. Klausner, which provides payments in excess of the maximum allowed by the IRS, and was superfunded when its regular pension fund is one of the most severely underfunded in the state.

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[1] "How Consultants Can Retire on Your Pension," New York Times, December 12, 2004 (http://www.nytimes.com/2004/12/12/business/yourmoney/how-consultants-can-retire-on-your-pension.html).

[2] "The Class Action Industrial Compex," Forbes, September 20, 2004 (http://www.forbes.com/forbes/2004/0920/150.html)

[3] From an ERISA overview by Wagner Law Group (http://www.wagnerlawgroup.com/documents/BasicsERISADoc101711_000.pdf):

ERISA section 406(b) also prohibits transactions that involve any type of self-dealing by the plan fiduciary.... Further, fiduciaries cannot receive "kickbacks" or any other payments for their personal benefit from third parties in connection with performing their fiduciary duties on behalf of the plan.

The Florida Times Union uncovered this abuse through the state's Sunshine Law. Mr. Klausner has engaged a criminal defense attorney, Hank Coxe, to represent him.

Fifth, Evidence Code section 958 provides that there is no privilege as to communications relevant to an issue of breach, by the lawyer or the client, of duties arising out of the lawyer-client relationship. Given that Mr. Klausner was hired as "fiduciary counsel" advising on such matters as potential breach of fiduciary duties by staff or board members, the assertion of privilege is on shaky ground for that reason as well, particularly since Klausner may be opining favorably on actions of his own. This would be similar to actions he has taken with other pension funds where he has served as fiduciary or general counsel, where other experts appear to be universally of the view that self-dealing such as receiving compensation for class action litigation referrals represent clear breaches.

Finally, on CalPERS's assertions of attorney-client privilege, we believe the reading of *Claypool v. Wilson* (1992) in the letter of March 21, 2016 is overstated. Trust law is interpreted on a state-by-state basis to the degree that the selection of which state's law is to govern trusts for asset backed securitizations is recognized as a significant choice in the structuring of private label mortgage-backed securities. Accordingly, only two states' trust law, New York and Deleware, was used in a market that was over $2 trillion at its peak.

We must also point out that another California government entity, the City of San Diego, came to the opposite view as to whether Mr. Klausner, an attorney who was not licensed in California, could opine on California pension matters. The city attorney wrote the pension fund board, objecting to its use of Mr. Klausner's services: "…"an attorney must be licensed in California to render advice on California law to a California client."[4] That view prevailed and Klausner's engagement by the pension fund ended within months.

If CalPERS continues to maintain that Klausner has provided legal advice and not business advice on each and every matter on which he has billed, he may be in violation of California bar rules, a position he appears keen to avoid. Of course, Mr. Klausner might contend he isn't bound by California Bar rules, since he isn't a California lawyer, which would only highlight the sorry state of affairs when California's largest public pension fund hires someone who isn't one of the several hundred thousand licensed California lawyers to advise it on fiduciary duties. This isn't a case of the fox guarding the henhouse: this may be a case of CalPERS going across the country to hire a fox who specializes in building henhouses with no gates.

For the above reasons we demand that CalPERS comply with the Public Records Act requests we have made, remove redactions from documents produced, and reconsider the

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[4] "He Told Them What They Wanted to Hear," San Diego Reader, April 7. 2005 (http://www.sandiegoreader.com/news/2005/apr/07/he-told-them-what-they-wanted-hear/).

exemptions it has asserted, especially those under Government Code sections 6254(a) and 6255. We hope it is not necessary to litigate this matter but, as CalPERS should know from prior Public Records Act cases it has lost, the prevailing plaintiff in PRA litigation is entitled to recover attorney's fees and costs under Government Code section 6259.

Sincerely,

Karl Olson

Cc: Peter Scheer