

April 19, 2017

Honorable Rob Bonta
California State Assembly
State Capitol Room 2148
Sacramento, California 95814

RE: AB 1479 (SUPPORT)

Dear Assemblyman Bonta:

This letter is to support your AB 1479. By way of background, I am the publisher of the finance and economics website, Naked Capitalism (www.nakedcapitalism.com). Naked Capitalism gets between 1.5 million and 2.0 million page views a month. It is regularly included in lists of best economic and financial websites.

More important for your purposes, Naked Capitalism is widely described as influential by virtue of being read by financial regulators, Congressional staffers, and business reporters, along with California officials as a result of our regular coverage of the California Public Employees Retirement System ("CalPERS"). Staffers to State Treasurer John Chiang stated that our articles were an impetus to his sponsorship and the eventual passage of the private equity transparency bill, AB 2833.

Naked Capitalism has made regular use of the Public Records Act ("PRA") over the last four years in our reporting on CalPERS and other California public pension funds. We have found that with every agency at which we have made Public Records Act requests, we have encountered efforts to thwart the production of records. That has included delays, over-reaching interpretations of permitted reasons for withholding documents, impermissible redactions, repeated failure to act on requests, and flat-out lies, in the form of assertions that the agency had no responsive records when we knew through independent sources or actual possession that the agency did indeed have them.

This sad history, for a site as small as ours, highlights the fact that agencies know that the only recourse a publisher or interested citizen has to an improper denial of a Public Records Act request is to litigate. The Public Records Act does allow for the recovery of fees and costs if the plaintiff succeeds. But even when an attorney is willing to work on spec, the diversion of resources to work with counsel and the requirement that the plaintiff still fund legal expenses poses a significant obstacle in an era of thinly-staffed and budget-strained media organizations.

For instance, in a Public Records Act suit we filed against CalPERS, we paid over \$5000 in legal expenses even with pro-bono representation simply to get to a first hearing. For a tiny site like ours, costs like that come at the expense of original reporting.

Mere delay also thwarts the public interest. Many stories have a news hook, so dragging out a response by weeks or longer often serves to kill an article.

To show how skewed the balance of power is, below are a few of many examples of abuses of the Public Records Act we have encountered:

Four failures to produce accurate responsive records over a total of three requests at the Los Angeles Employees Retirement Association (“LACERA”). Please keep in mind these are the only requests we have ever made to LACERA. The first was when we asked LACERA to provide the same 2016 Public Records Act response to us that they had given to Pulitzer Prize winning New York Times reporter Gretchen Morgenson. They denied she had made any such request even though their own PRA logs showed otherwise. The only reason the agency reversed itself was that we contacted Morgenson, who promptly found LACERA’s response and said via e-mail, “They are lying.”

The enclosed e-mail to Staff Attorney John Harrington of LACERA describes the three other failures to produce responsive records in LACERA’s possession.

Stonewalling, delays, and an eventual incomplete response from the California State Teachers’ Retirement System (“CalSTRS”). We have made very few requests to CalSTRS. CalSTRS does not even make a pretense of complying with the form of the PRA. We have never had CalSTRS respond to a first request, nor does CalSTRS acknowledge the statutory requirements for timely responses in its replies, much less attempt to meet them. For instance, I had to send two PRA requests in 2015 each a total of four times, including to the General Counsel (who did not reply or forward them to the appropriate staffer) in order to get CalSTRS to act. Parts of these requests were clearly subject to the PRA, such as records describing policies and procedures for activities that a senior CalSTRS officer said CalSTRS made on an ongoing basis, were simply ignored.

Frequent, deliberately incomplete responses from CalPERS. We have made many PRA requests to CalPERS. We have been advised that it is CalPERS’ policy to stymie many types of requests by delivering incomplete responses. The policy is to disgorge some additional records if the requester persists, but again to drag the process out in the hope that the petitioner does not recognize that he has not gotten a full response or loses interest. For requests that come in regularly, such as for details of board member expenses, the approach for dragging out the request has been systematized.

One 2016 request was for the billing records of an outside attorney and other communications with him. This attorney, who is not licensed in California, had repeatedly maintained in CalPERS' open board sessions, which are recorded on tape, that he was giving only business, not legal advice. A lawyer acting as a business advisor is not subject to attorney-client privilege.

Despite submitting a request that pre-rebutted an assertion of attorney-client privilege, CalPERS nevertheless maintained that substantive communications were privileged and provided documents with the all but transmittal information redacted. That also included redacting the entirety of his invoices save dollar amounts. The only exception was e-mails related to scheduling calls and meetings.

We engaged counsel. After two stern letters, CalPERS provided responsive records with many of the earlier redactions reversed. Even though our counsel's view was that most of the remaining redactions were impermissible, we did not feel it was worth a further investment of cost to get proper disclosure.

We thus regard your bill as an important and badly-needed effort to strengthen the Public Records Act and hope that it becomes law.

Sincerely,

Susan Webber

Enclosure

From: Susan Webber <webber@auroraadvisors.com>
Subject: Multiple failures to provide records in response to earlier Public Records Act requests
Date: April 13, 2017 at 8:54:53 PM EDT
To: John Harrington <jharrington@lacera.com>

Dear Mr. Harrington,

Please note that my last Public Records Act request dated March 3, 2017, began:

"Please provide me with all records with respect to the FTI Consulting "Proposal to Serve Los Angeles County Employees Retirement Association" dated October 9, 2015 from October 9, 2015 to present.

"This would include but not be limited to..."

Your response was limited to the three subpoints I raised, not to the actual scope of the request. Moreover, it was deficient even with respect the request as you attempted to reframe it.

Documents I had in my possession prior to making that request, as well as ones I have recently received since, show that your response raises concerns regarding deliberate false responses, document destruction, and other willful efforts to evade the requirements of the Public Records Act.

This was the key section of your response on March 16, 2017:

"After a diligent search we have found no records responsive to your request. The Investments Division did not correspondence from any of the proposing firms, or any documents from other Agencies. Our Systems Division found no records on LACERA's server."

I have now received CalPERS' response to my PRA #3048. This is the first sentence of that request:

"Please provide me with all records with respect to the provision of the FTI Consulting document, 'Report to California Public Employees Retirement System Regarding Private Equity Compliance Review' dated June 10, 2015 ('FTI Report') to LACERA. "

Please be advised CalPERS provided a very extensive response. It included e-mails from Stuart D. Frankel of FTI Consulting and other FTI personnel stating that they communicated with LACERA several times. On June 14, 2016, an e-mail by Frankel

stated that you had agreed to exchange a properly redacted version of the FTI Consulting report to CalPERS in place of the faultily-redacted one FTI Consulting had provided earlier and you in turn gave to Gretchen Morgenson of the New York Times.

Moreover, the documents from CalPERS indicate that there was at least one conference call with LACERA that you left early. CalPERS provided all records regarding the internal scheduling of such calls. There would almost certainly be similar records on your end, such as agreeing on the participants and circulating the conference call number.

This means the replacement report that FTI Consulting sent you, the e-mail or letter that conveyed it, and all previous and follow-on correspondence should have been supplied in response to my earlier PRA, yet were not. A considerable number of records appear to have been withheld deliberately.

This is a second instance in which you have exempted your own communications from a PRA request, which is a clear violation of the statute. Further, any internal correspondence resulting from FTI Consulting's request for the document swap was in the scope of my previous request and also subject to disclosure under the PRA.

Please provide all correspondence with any employees of FTI Consulting during the stipulated time frame in my initial request, as well as any internal e-mails, messages to file, or other records related to FTI Consulting's request and other correspondence. These records were clearly within the scope of my earlier request yet were omitted.

In addition, the response to CalPERS PRA #3046 also shows CalPERS' staff repeatedly stating that you had assured them that Gretchen Morgenson was the only time you had supplied the FTI Consulting report referenced above to an outside party. That was also false.

I already had documents of the full e-mail correspondence between Chris Thompson and you from February 8, 2016 through (thompson.chris1000@gmail.com), starting with a request on February 8, 2016 through March 18, 2016. The critical exchange the purpose of my previous PRAs was his request for responses to this RFP: https://www.lacera.com/Opportunities/RFP/private_equity_inv_svcs/index.htm, which he made on February 8. You fulfilled the request on March 3, sending him, among other response. That included, "FTI Proposal_5_10_9_2015_Redacted.pdf," the same document I mentioned in my PRA request. It separately clearly included "FTI" and therefore should have been unearthed in your "diligent search".

I also noted when I received your response to my request for your 2015 and 2016 PRA logs that Mr. Thompson's February request for the RFP responses was missing, while his March request for a limited partnership agreement was included. This at best

is a troubling oversight and at worse worse may be the result of doctoring the record.

Please send me your full March 3, 2016 PRA response to Chris Thompson,
since that is an item missing from my earlier PRA.

I trust you will correct your log for February 2016. ***Please provide me with the accurate version when you have.***

I would also urge you to check your records once again regarding my March 3, 2017 request, since I am continuing to pursue this topic. In my limited number of PRA requests to you, I now have four documented instances of you failing to produce records that you handled personally. This looks like a deliberate effort to evade the PRA and is therefore potentially newsworthy and may also be actionable.

Thank you for your attention in this mater.

Susan