CalPERS Sends Data With Errors in Response to Our Lawsuit, Pointing to Problems in Record-Keeping
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Mentions CalPERS

CalPERS continues to make a science of not walking its talk. If you are new to our arm-wrestling match with the giant California public pension system, we have asked CalPERS to give us data about their private equity fund performance that they provided to two scholars at Oxford University, Tim Jenkinson and Ruediger Stucke. Their paper, written with an additional co-author, Miguel Sousa, was published in 2013. It stressed that they had the entire performance of all of CalPERSï¿½ 761 private equity investments, from CalPERSï¿½ first participation in that strategy in 1990 through the first quarter of 2012. The article also stated repeatedly that substantial portions of their data has never been made public.

CalPERS is subject to a California version of FOIA called the Public Records Act. A well-settled principle of the PRA is that once an agency has given out a record to one member of the public, it has forever waived the right to claim any exemption from disclosing the records to others.

As weï¿½ll discuss, weï¿½ve been trying to get this information since we filed a PRA request at the end of September. Not only has CalPERS engaged in what look like stonewalling tactics, but far more seriously, their latest, still incomplete response to our request contained serious errors which suggest there are basic record-keeping problems at CalPERS. Given that CalPERS is a fiduciary, this would be an extremely serious lapse.

Letï¿½s catalogue how many times CalPERS has baited and switched us to date:

1. We submitted our PRA request on September 29. In mid-October, I contacted CalPERS as to why my PRA did not appear in their September log, which had just been released. A CalPERS employee wrote me to say they had no record of my request. Now that already is troubling, in that my PRA request was submitted via a portal at CalPERSï¿½ website. If a request disappeared, either the system is not reliable or a human disappeared it. Neither possibility reflects well on CalPERS.

2. CalPERS sent a letter on December 18 saying they expected that we would receive the information we requested by December 27. We did not get any information. When we pressed CalPERS in January as to what had happened, they sent us a letter dated January 27 which stated CalPERS staff had not given the data to the academics so they had nothing to give us.

As we wrote, this response looked like artful misdirection, since the Oxford authors clearly got their data from CalPERS or an agent of CalPERS; it didnï¿½t fall off a truck or was handed to the scholars in a dark alley by an aggrieved former employee. But limiting their answer to what CalPERSï¿½ staff had done meant they could finesse the question of whether the CalPERS had directed its data custodian (then LP Capital) to give the records to the academics.

3. My lawyer Timothy Y. Fong wrote a nastygram and CalPERS began to pretend to be cooperative. But then they sent us a pathetically small amount of information that was AFTER the time frame in our request! This was a stick in the eye. They had cherry picked one part of our letter

(a sort of ï¿½gee can you throw this in too?ï¿½ with the understanding that we could submit a PRA request for that too and better to get this all done and get us out of their hair) and took the position that our request had been filled.

4. We filed suit at the end of February. CalPERS ï¿½fesses up they did deal with the academics directly.

5. CalPERS also said the academics got a 226 page pdf and looked as if they planned to send that to us. We tell them sternly that giving us a paper record which would be a nightmare to input and could probably not be converted reliably via an optical character reader, was not acceptable. The PRA says the records must be given in the manner in which they are kept. A pdf is a report prepared from underlying electronic records, not the record proper.

6. CalPERS said sweetly that they are cooperating and gathering the data. They then send us three e-mails with five attachments total. This is from the cover note by Christopher Phillips, a litigator at CalPERS:

I told you during that initial phone conversation last Wednesday and in subsequent communications, that CalPERS was committed to adhering to the PRA and cooperating with Ms. Webber. I have now gathered the information requested above and have verified with our PE staff that the attached files are responsive.

As weï¿½ll show, this is another flagrant misrepresentation. But even worse, the errors in what they sent raises troubling questions about the caliber of the recordkeeping at CalPERS.

It took Team NC longer to deal with the CalPERS data than it should have because your humble blogger was really sick and our terrific volunteers for this project had some conflicting commitments. But it didnï¿½t take long to extract what CalPERS sent to look for the most basic level of completeness, namely, did they send us what looks like the data from all the funds, meaning is the total number of investments similar to what the Oxford academics said they got?. Their transmission was a blindingly obvious fail.

From the very get-go, we have referred to and given links to the SSRN home of the article in question. Weï¿½ve cited text from it. The staff at CalPERS is as capable of reading it as we are. So itï¿½s pretty remarkable for them to think that sending us data on only at best 60% of the funds at issue would pass muster.

The paper states, and weï¿½ve repeatedly told CalPERS, that the paper analyzes 761 funds, which they present as the full history of CalPERSï¿½s investment in private equity from 1990 to the end of the first quarter 2012. No matter how you cut and slice it, CalPERSï¿½ response to us is way short of the total we should have received. Weï¿½ll walk you through the analysis, but the bottom lines is the absolute minimum number of funds on which we should have received data is 689 (the 761 total less 72 funds which CalPERS invested after 2008; the researchers got data on the later funds from public sources). We were sent information on 432 funds, or less than 2/3 of the total. And that number would assume the data had been scrubbed in the same manner the authorsï¿½ did.

In fact, the researchers got information about more funds from CalPERS and excluded many from their sample. And some of the funds on which we got information included types that were indeed of the type excluded by the researchers. In other words, that 432 total includes funds that were clearly excluded by the researchers (such as fund of funds), making the percentage of the responsive data even lower (as in our 432 funds includes X funds that were excluded by the Oxford authors; so the relevant percentage would be 432/(761+ X + Y additional funds included in the Oxford list but not provided to us that they also excluded).

But the picture is even worse than this tally suggests. Even on this cursory pass, we identified some funds which are not private equity funds no matter how you define it. This means CalPERSï¿½ records are tainted. You can reach one of two conclusions: either CalPERS rummaged around in 2009 records and slapped together something, and grabbed some crappy records off someoneï¿½s computer. But that is not how a PRA request is supposed to be handled; we are supposed to be given the records in the form in which they are kept, meaning the definitive accounts.

So the first possibility is that CalPERS is continuing to deal with us in bad faith. Thatï¿½s also consistent with them mentioning a 226 page pdf as if they had the actual document. If they did, there would be no justification for sending us files that so obviously fell short of what the researchers got. So it is entirely plausible that Calpers was told either by the researchers or by the former employee that the information was sent in the form of a 226 page pdf. They either could not locate or could not be bothered to locate the actual record, and just threw together a bunch of data in the right time period that looked roughly big enough to try to get rid of us.

But even allowing for the first possibility, the records are entire files (for instance we got three zipped files that contained a number of folders within them). We found meaningful errors within these files. This strongly suggests that the PE records at CalPERS are inaccurate. Even if these were folders prepared by managers from more definitive records (the database then maintained by LP Capital), the inclusion of non-private equity funds in compilations of supposedly private-equity related data raises the possibility that the definitive database is erroneous (as in the local files were almost certainly created from queries to the definitive database, and thus the errors are there as well).

Weï¿½ll parse out both of the problems with the data.

CalPERS Sent Information on Way Too Few Funds

Because weï¿½ve both contacted the authors (Tim Jenkinson, a professor and the lead author, has been very helpful), CalPERS and we both know that Jenkinson et. al. got their data from CalPERS in 2009, and it included all of 2008.

It is also important to understand how private equity is defined, as in precisely what the boundaries are, since investorsï¿½s results are compared against various benchmarks (the Standard & Poors 500 index, various private equity return indices). Thus, to evaluate the performance of any particular manager, it is critical that the deals that they describe as their private equity transactions include all of germane ones (no cherry picking!) and no strays from other strategies (no contamination of the sample).

For generalist readers, here is how authors Jenkinson, Stucke, and Rudiger describe PE:

Institutionalized private equity refers to an asset class that invests in companies whose equity claims are not registered on an organized stock exchange. Early funds focused on venture or growth capital for early-stage and mid-stage companies in the 1970s, but the 1980s saw the emergence of buyout and restructuring capital for mature companies, often involving high levels of financial leverage. In the 1990s, further sub-classes beside corporate private equity gained traction, such as mezzanine funds which include both debt and equity claims, distressed debt which may result in a debt-to-equity swap, as well as investments in real estate.

I have a quibble, which is the inclusion of real estate. Real estate funds are considered to be a separate asset class (in fact, early academic work on asset classes typically looked at very broad categories, often stock, bonds, cash, and real estate). At CalPERS, real estate investments are handled by a completely separate team from private equity.

It is also clear that Jenkinson and his colleagues got more than private equity data; their paper clearly discusses that they had to exclude funds And even though the data that Jenkinson, Sousa, and Stucke included real estate transactions, they removed them from their sample, along with ï¿½general and customized fund of fundsï¿½ and funds acquired in secondary transactions (as in from other investors part way through the fundï¿½s life, versus investing in the fund from one of its initial closing dates). But we donï¿½t know precisely how many funds they stripped from the data CalPERS gave them.

Here is why we are confident CalPERS has grossly shortchanged us. From the paper (click to enlarge):

Focus on the rightmost column, the totals. You can see the grand total, at the bottom right, is 761. They show that the total number of funds, after they scrubbed their data, was 20 in 2011, 25 in 2010 and 27 in 2009. They were given data directly by CalPERS through the end of 2008. 761 ï¿½ (20 + 25 + 27) = 689, the bare minimum we should have gotten, versus the 432 we were sent.

Moreover, if you compare the Jenkinson et al. results to the widely-used Prequin database, you get similar totals. Prequin shows the number of CalPERS private equity fund investments from 1990 to present at 784. Of that total, 81 closed after 2008. So Prequin (due to slightly more permissive definitions of the relevant universe), puts the total PE investments at 703, giving a bit better picture of how much information CalPERS is holding back.

Oh, and thatï¿½s before we get to the fact that CalPERS also failed to send us the data fields we requested, a huge omission we will not belabor at this point. The Oxford researchers stated they got cash flow data, meaning the actual dates and amounts of CalPERS contributions to funds and the fundsï¿½ distributions to CalPERS (their previous public disclosures are of quarterly changes, not actual dates). Theyï¿½ve never contested giving us this information in any communications; in fact, the CalPERS litigator Phillips said in writing he believed this was all disclosable. But even more important, CalPERS conceded this issue in the itty bit of data they gave us in February, by sending us 2012 and 2013 data with cash flow details.

Errors in Calpers Data

CalPERS included in files of private equity funds certain funds that clearly didnï¿½t belong. We are hardly experts, yet we caught these errors:

Relational Investors L.P., a 1996 closing. Relational Investors is a well-known activist fund. They do not invest in private equity. They take significant minority stakes in public companies they believe are mismanaged and press for governance and other changes (often corporate restructurings). This fund has no business being in a private equity fund listing.

Carlyle Realty Qualified Partners L.P., a 2001 closing and Carlyle Realty Partners Europe. L.P, a 2002 closing. Note that these are the only real estate funds that were included in the information sent us. Since, as we indicated, real estate investing is an entirely separate group at CalPERS, those records are maintained separately from those of the private equity team. We gave CalPERS the option of excluding real estate data. CalPERS has a large portfolio of real estate investments; weï¿½d expect to see a large number if they sent those along or none if they excluded those files. In these same years, CalPERS also invested in Carlyle private equity funds: a venture fund in 2001 and a high yield fund in 2002. This looks troublingly as if the Carlyleï¿½s relationship with CalPERS in those days was with private equity professionals, and the real estate team was hopefully brought in to vet those deals, but they wound up being included in the PE rather than the real estate database. And Prequin agrees with our reading; neither of these funds are included in its list of CalPERS private equity investments.

CalPERS appears to be operating under the misapprehension that their interests are best served by running interference for the private equity industry, which requires investors like CalPERS to sign onerous confidentiality agreements. But CalPERS is a fiduciary, and far and away its most important duty is to its pensioners. And the longer CalPERS engages in a pitched battle over an entirely reasonable records request, the more it looks like it is CalPERS, and not just the private equity funds, that has something to hide.