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1 Michael T. Risher (SBN 191627)
2 Law Office of Michael T. Risher
2081 Center St. #154
3 Berkeley CA 94702
Email: michael@risherlaw.com
4 T: (510) 689-1657
F: (510) 225-0941

5 Abenicio Cisneros (SBN 302765)
6 Law Office of Abenicio Cisneros
2443 Fillmore St. #380-7379
7 San Francisco, CA 94115
707-653-0438
8 acisneros@capublicrecordslaw.com

9
10 Attorneys for Plaintiff
11
12

13 **SUPERIOR COURT OF CALIFORNIA**
14 **COUNTY OF ALAMEDA**

14 **Joseph John Jelincic, Jr,**

15
16 Plaintiff,

17 v.

18 **California Public Employees' Retirement**
19 **System Board of Administration,**

20 Defendant.

Case No. _____

**Petition for Writ of Mandate and
Complaint for Equitable Relief
(Public Records Act; Bagley-Keene Act;
Code. Civ. Pro. § 526a)**

Judge:
Department:

FILED BY FAX

ALAMEDA COUNTY

March 08, 2021

CLERK OF
THE SUPERIOR COURT
By Xian-xii Bowie, Deputy

CASE NUMBER:

RG21090970

1. The California Public Employee Retirement System (CalPERS) manages hundreds of billions of dollars of public money for California retirees and their families. California law requires that it comply with a number of transparency laws, including laws that apply only to CalPERS. And, given the immense amounts of public money at stake, compliance with these laws is critical.
2. CalPERS has nevertheless failed to comply with these laws.
3. After its Chief Investment Officer resigned in 2020 following accusations that he had violated conflict-of-interest laws, the CalPERS Board of Administration held an improperly closed meeting about the situation, in violation of the Bagley-Keene Act's open-meeting requirements. It has since refused to release records relating to that meeting, in violation of the California Public Records Act (CPRA).
4. CalPERS has additionally refused to release records relating to its investments that have a market value lower than their reported value, in violation of the CPRA.
5. Plaintiff brings this suit to enforce his CPRA requests, to obtain a declaration that CalPERS has violated the Bagley-Keene Act, and to require CalPERS to comply with this law in the future.

1. Parties

6. Plaintiff Joseph John (JJ) Jelincic, Jr., is a former member of the CalPERS Board of Administration and past president of the California State Employees Association (CSEA), a labor group representing 140,000 active and retired state employees. He was a CalPERS investment officer from 1986 - 2019. As a retired State employee, he is a member of CalPERS and receives a pension from CalPERS.
7. Jelincic continues to monitor the activities of CalPERS by attending Board meetings. He relies upon the Board's agendas to determine what meetings to attend.
8. Jelincic is a resident of Alameda County who is assessed and pays taxes that fund CalPERS, including income, sales, and property taxes. In addition to his direct interest in this matter, he has taxpayer standing as well as public-interest-mandamus standing.
9. CalPERS is a California State agency that manages pension benefits for more than 2 million California public employees, retirees, and their families. Defendant CalPERS Board of

Administration (“Board”) is the governing body of CalPERS. It is subject to the open-meeting requirements of the Bagley-Keene Open Meeting Act as well as the requirements of the California Public Records Act.

10. CalPERS is funded in part by California tax dollars. As the Legislative Analyst’s Officer recently explained, “CalPERS state pensions are funded by three sources: investment gains, employer contributions from the state, and employee contributions.... State employee salaries are paid by the General Fund or other funds, depending on the employees’ work. Employee benefits—like pensions—are paid by the same fund as the employees’ salaries.”¹
11. In the fiscal year 2019-2020, State employer contributions to CalPERS totaled more than \$9.8 billion.² All in all, California taxpayer-funded employers – including State and local agencies, school districts, and charter schools – contributed \$22 billion to CalPERS over that fiscal year.
12. Over that same time period, member contributions totaled \$4,901,000.
13. In addition, the State makes direct payments to CalPERS from its General Fund and other funds. For example, 2019’s SB 90 appropriated approximately \$2.8 billion of General Fund moneys to CalPERS between 2019 and 2023.³
14. CalPERS has billions of dollars in unfunded liabilities – approximately \$59.7 billion as of June 30, 2018.⁴ “These pension unfunded liabilities largely are due to (1) historical contributions being below recommended amounts, (2) past actual investment returns being lower than actuaries assumed, and (3) changes to actuarial assumptions.”⁵
15. The State will probably have to continue to make direct payments to CalPERS to address these liabilities.

¹ California Legislative Analyst’s Office, *The 2019-20 Budget: The Governor’s Proposed Supplemental Pension Payment to CalPERS*, available at <https://lao.ca.gov/Publications/Report/3957>

² CalPERS, *Investment & Pension Funding Facts at a Glance for Fiscal Year 2019-2020*, available at <https://www.calpers.ca.gov/docs/forms-publications/facts-investment-pension-funding.pdf>

³ California Legislative Analyst’s Office, *The 2019-20 Budget: California Spending Plan Debt and Liabilities*, available at <https://lao.ca.gov/Publications/Report/4106>

⁴ *Id.*

⁵ *Id.*

1 16. The defined-benefit pensions administered by CalPERS are ultimately backed by the public
2 treasury if investment returns, employer contributions, and employee contributions are
3 inadequate to fully fund them.

4 17. CalPERS pays some of its employees enormous amounts of money. Most relevant to this case, in
5 2019 it paid Chief Investment Officer Ben Meng more than \$1.5 million, plus another
6 \$215,000 in additional benefits.⁶ Meng's 2019 pay and benefits totaled \$1,760,489.96. He was
7 by far the highest-paid California State employee that year.

8 18. CalPERS prepared, owns, and possesses the records at issue in this proceeding.

9 **2. Jurisdiction and venue**

10 19. This Court has jurisdiction under Government Code §§ 6258, 6259, Code of Civil Procedure
11 §§ 1060 and 1085, and Article VI section 10 of the California Constitution.

12 20. Venue is proper in this Court. Because the California Attorney General has an office located in
13 Alameda County, any suit against a State agency that may be brought in Sacramento may also
14 be commenced and tried in this Court. Code Civ. Pro. § 401(1). Defendant resides in, and the
15 acts and omissions complained of herein occurred in, Sacramento County. *See* Code Civ. Proc.
16 §§ 393(b), 394, 395(a). The records in question, or some portion of them, are situated in
17 Sacramento County, meaning that suit may be brought in that County. Gov. Code § 6259(a);
18 Code Civ. Pro. § 401(1).

19 **3. Governing law**

20 21. The California Constitution requires that “the meetings of public bodies and the writings of
22 public officials and agencies shall be open to public scrutiny.” Cal. Const. Art. I § 3(b)(1).
23 More specifically, the Bagley-Keene Open Meeting Act requires State agencies such as the
24 Board to conduct their business in public unless a specific legal provision allows it to hold a
25 closed session to discuss certain topics. *See* Gov. Code § 11120, 11132. All recordings of open
26 meetings are open to public inspection. *Id.* § 11124.1(b).

27
28 ⁶ *See* <https://transparentcalifornia.com/salaries/2019/state-of-california/yu-meng/>

- 1 22. Government Code § 11126(a)(1) allows public bodies to hold closed sessions to discuss a range
2 of topics relating to personnel matters. However, this provision does not apply to discussions
3 relating to the CalPERS CIO, which are expressly governed by a more-specific subdivision,
4 § 11126(g)(1). This subdivision applies only to the CEOs and CIOs of CalPERS and of the
5 Teacher’s Retirement Board. As relevant here, this statute allows the Board to meeting in
6 closed session only “when considering matters pertaining to the recruitment or removal of the
7 Chief Investment Officer of ... the Public Employees’ Retirement System.” *Id.* § 11126(g)(1).
- 8 23. When a body such as the Board plans to hold a closed session it must first disclose the nature of
9 the items it will discuss. § 11126.3(a). This must include “the specific statutory authority under
10 which a closed session is being held.” *Id.* § 11125(b). “In the closed session, the state body
11 may consider only those matters covered in its disclosure.” *Id.* § 11126.3(b).
- 12 24. The Bagley-Keene Open Meeting Act allows any interested person to “commence an action by
13 mandamus, injunction, or declaratory relief for the purpose of stopping or preventing
14 violations or threatened violations of [the Act] or to determine the applicability of [it] to past
15 actions or threatened future action by members of the state body or to determine whether any
16 rule or action by the state body to penalize or otherwise discourage the expression of one or
17 more of its members is valid or invalid under the laws of this state or of the United States, or to
18 compel the state body to audio record its closed sessions.” *Id.* § 11130(a).
- 19 25. Under the California Public Records Act, Government Code §§ 6250 *et seq.*, all records
20 “containing information relating to the conduct of the public’s business prepared, owned, used,
21 or retained by any state or local agency” must be made publicly available for inspection and
22 copying upon request, unless they are exempt from disclosure. *Id.* §§ 6253(a) and (b), 6252(e).
23 If documents contain both exempt and non-exempt material, the government must disclose all
24 reasonably segregable non-exempt material. *Id.* § 6253(a).
- 25 26. The CPRA allows “[a]ny person [to] institute proceedings for injunctive or declarative relief or
26 writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or
27 to receive a copy of any public record or class of public records....” *Id.* § 6258.
28

1 27. “Whenever it is made to appear by verified petition to the superior court of the county where the
2 records or some part thereof are situated that certain public records are being improperly
3 withheld from a member of the public, the court shall order the officer or person charged with
4 withholding the records to disclose the public record or show cause why the officer or person
5 should not do so. The court shall decide the case after examining the record in camera, if
6 permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties
7 and any oral argument and additional evidence as the court may allow.” *Id.* § 6259(a).

8 28. “The times for responsive pleadings and for hearings in these proceedings shall be set by the
9 judge of the court with the object of securing a decision as to these matters at the earliest
10 possible time.” *Id.* § 6258.

11 **4. The Board’s improperly closed August 17, 2020 meeting and the requests for**
12 **records about that meeting**

13 29. On August 5, 2020, CalPERS Chief Investment Officer Ben Meng resigned from that position
14 following allegations that he had failed to make required financial disclosures. As the New
15 York Times described it, “Mr. Meng resigned after compliance staff noticed that he had
16 personal stakes in some of the investment firms that he was committing CalPERS’s money to,
17 most notably Blackstone. California state officials in that situation are supposed to recuse
18 themselves, but Mr. Meng did not.”⁷

19 30. Five days later, California State Controller and Board member Betty Yee wrote to Board
20 President Henry Jones, raising concerns that Mr. Meng had violated conflict-of-interest laws.
21 This letter noted her deep disappointment “in the actions of former Chief Investment Officer
22 (CIO) Ben Meng and what appears to be a blatant disregard of conflict-of-interest laws and
23 policies.” Controller Yee requested an immediate special meeting to hear about and discuss
24 “potential violation of laws, adequacy of existing policies, safeguards that could prevent a
25

26 ⁷ *Marching Orders for the Next Investment Chief of CalPERS: More Private Equity*, The New York
27 Times (Oct. 19, 2020) available at [https://www.nytimes.com/2020/10/19/business/calpers-pension-](https://www.nytimes.com/2020/10/19/business/calpers-pension-private-equity.html)
28 [private-equity.html](https://www.nytimes.com/2020/10/19/business/calpers-pension-private-equity.html)

recurrence of the situation, and the Chief Executive Officer's oversight and implementation of policies and safeguards.” A copy of this letter is attached to this Petition as Exhibit A.

31. The agenda for the Board’s August 17 meeting listed as its sole substantive item the “Chief Executive Officer's Briefing on Performance, Employment, and Personnel Items,” which was to be closed to the public under Government Code §§ 11126(a)(1), (e), and (g)(1). Subdivision (a) (1) allows the Board to discuss certain topics relating to employee performance in closed session. Subdivision (e) allows it to discuss certain matters relating to litigation in closed session, and also requires that a litigation memorandum be prepared if this occurs. The reference to subdivision (g)(1) indicates that the Board was to consider matters relating to the CIO or CEO.
32. The official transcript of the brief open session of that August 17 meeting reveals that the President stated that the “purpose the [the closed] meeting is to hear briefing on performance, employment, and personnel items.” President Jones rejected a member’s request that the Board take public comment before moving into closed session. Controller Yee expressed her desire that the Board have a hearing on the issues she had raised in her letter. The Board then went into closed session.⁸
33. In that closed session, the Board discussed a number of matters relating to Mr. Meng as well as matters relating to the policy questions raised in Controller Yee’s August 10 letter. In addition, the Board voted to allow its members to review a report relating to the matter. As one news outlet reported, “CalPERS Chief Executive Officer Marcie Frost was questioned by the CalPERS board for four hours in a closed session on what she knew about Meng’s financial disclosures” at this meeting.⁹
34. A substantial portion of the meeting was spent discussing matters that were neither properly discussed in a closed meeting nor properly disclosed by the Board in the agenda.

⁸ See https://www.calpers.ca.gov/docs/board-agendas/202008/full/transcript-boa_a.pdf

⁹ Chief Investment Officer, *California Opens Investigation into Former CalPERS CIO Meng* (Aug. 18, 2020), available at <https://www.ai-cio.com/news/california-opens-investigation-former-calpers-cio-meng/>

- 1 35. The Board did not discuss any pending litigation as defined in Government Code § 11126(e) at
2 the August 17 closed session.
- 3 36. CalPERS legal counsel did not prepare a memorandum under Government Code
4 § 11126(e)(2)(ii) stating reasons and legal authority for closing the August 17 session.
- 5 37. The Board did not discuss any personnel matters relating to any person other than Mr. Meng at
6 the closed session.
- 7 38. The Board did not discuss any personnel matters relating to any person other than those listed in
8 Government Code § 11126(g) in that closed session.
- 9 39. A Board member's record of the meeting lists 55 numbered topics discussed at this meeting; the
10 majority of those topics had nothing to do with personnel matters or other matters properly
11 discussed in closed session.
- 12 40. These topics included general policy matters relating to compliance, employee education, CIO
13 onboarding, the need for additional staffing, when the Board should be informed of "serious
14 issues," transparency, and the need to establish policy to govern investigations.
- 15 41. Approximately seven of these topics involved policy discussions relating to California Fair
16 Political Practices Commission Form 700, Statement of Economic Interests, which some
17 CalPERS employees — including the CIO and CEO and members of the Board — must file
18 annually and which are posted on the CalPERS website.
- 19 42. One of these topics indicates that the Board discussed "gotcha articles."
- 20 43. This topic refers to media coverage of CalPERS.
- 21 44. The Board discussed these topics at the closed session.
- 22 45. The Board held a formal vote at this closed session to authorize its members to read records
23 relating to an investigation of Mr. Meng.
- 24 46. A redacted copy of this document listing the topics discussed is attached to this Petition as
25 Exhibit B. The topics themselves are redacted, other than the words "formal vote" at the end of
26 the last topic. The exhibit is otherwise a true copy of this document.
- 27 47. Plaintiff, Board members, and any other person may lawfully disseminate the unredacted copy of
28 this documents — including the topics discussed — to the public, at least in large part.

1 48. The Board did not reconvene into open session after this closed meeting. It never publicly
2 reported that it had taken any action to dismiss Mr. Meng, as would have been required under
3 Government Code § 11125.2 had the Board taken any such action.

4 49. Defendant has records relating to this meeting in its possession, including a full transcript in
5 audio and/or written form, as well as minutes that include the identities of persons present, the
6 matters taken up by the Board, the general issues discussed, significant procedural motions,
7 and actions taken.

8 50. In September 2020, Plaintiff Jelincic used Defendant's online form to request records relating to
9 this matter under the CPRA. This request noted that "[t]here is much on the public record,
10 including but not limited to the remarks of Marcie Frost and Henry Jones" indicating "that the
11 closed session discussed matters which are not exempted" from the open-meeting
12 requirements. He requested "a copy of the closed session transcript of the August 17, 2020
13 meeting of the Board of Administration," as well as any notices given to any employee under
14 Government Code § 11126(a)(2).

15 51. CalPERS responded by stating that, following a search of its records, it had determined that it
16 either did not have responsive records or that, where it did have records, they were exempt
17 from disclosure. CalPERS therefore refused to provide any records. A copy of this September
18 25, 2020 response letter is attached to this Petition as Exhibit C.

19 52. On December 16, 2020, counsel emailed a 5-page letter to CalPERS on behalf of Mr. Jelincic,
20 explaining why the Board's closure of its August 17 meeting was improper and requesting "all
21 records" relating to that meeting, including any recording or transcript and any records
22 showing whether or not a litigation memorandum was prepared for that meeting. Counsel
23 pointed out that Government Code § 11126(a) does not authorize the Board to discuss matters
24 relating to the CEO or CIO in closed session, and asked that the Board stop relying on this
25 provision when it announces that it will engage in such discussions. A copy of this letter is
26 attached to this Petition as Exhibit D. It was sent to all of the indicated recipients.

27 53. The following week, CalPERS responded to this request. The agency no longer claimed that the
28 August 17 meeting was closed to discuss litigation, but it did maintain that it was properly

1 closed to discuss personnel matters under § 11126(a), (g). It refused to provide any of the
2 requested records. A copy of this December 24, 2020 response letter is attached to this Petition
3 as Exhibit E.

4 54. CalPERS continues to take the position that § 11126(a) authorizes closed-session discussions
5 relating to employment of its CIO .

6 55. For example, the December 1 and 2, 2020, Board agendas listed the following sole item for the
7 closed-session: “1. First Round Interviews for the CalPERS Chief Investment Officer
8 Position.” As authority for closing the session to the public, the agenda listed “Government
9 Code sections 11126(a)(1) and (g)(1)).” As the agenda indicates, the only personnel matters to
10 be discussed at these meetings related to the CIO position.

11 56. The agendas for the December 14 and 16 closed sessions — the “Second Round Interviews for
12 the CalPERS Chief Investment Officer Position”—also listed both 11126(a)(1) and (g)(1)).
13 Again, the only personnel matters discussed at that meeting related to the CIO position.

14 57. The meeting agenda for the Board’s March 2, 2021 Joint Meeting of CIO Subcommittees
15 similarly cites § 11126(a) — along with § 11126(g) — as authorizing the closed meeting. The
16 only personnel matters to be discussed at that meeting relate to the CIO position.

17 58. Copies of these agendas, downloaded from the CalPERS website, are attached to this Petition as
18 Exhibit F.

19 **5. Plaintiff’s request for records relating to inaccurately valued assets**

20 59. As CalPERS explains on its website, it “invests some its money in real assets, meaning real
21 estate, infrastructure, and forestland. These investments are acquired and managed through
22 separate accounts, joint ventures, and commingled funds between CalPERS and investment
23 management firms.”¹⁰ In fiscal year 2019-2020, these real assets comprised some 11.3% of
24 CalPERS \$392.5 billion investment portfolio, meaning they totaled just under \$45 billion.¹¹
25

26
27 ¹⁰ CalPERS *Investment Organization*, available at
<https://www.calpers.ca.gov/page/investments/about-investment-office/investment-organization>

28 ¹¹ CalPERS *Facts at a Glance - Investment & Pension Funding, 2019-20* available at
<https://www.calpers.ca.gov/docs/forms-publications/facts-investment-pension-funding.pdf>

1 60. CalPERS's real-asset "investments are illiquid and resold at varying rates."¹² To assign a market
2 value to these investments, CalPERS thus relies upon "unobservable inputs," meaning that it
3 assigns values to these assets based on its own views and assumptions about what they should
4 be worth, rather than on publicly available information about actual transactions. These inputs
5 include the views of investment managers, appraisals, and benchmark analysis.

6 61. As CalPERS puts it, its estimate of the value of these investments "require management's most
7 difficult, subjective, or complex judgments, often as a result of the need to make estimates
8 about the effects of matters that are inherently uncertain."¹³

9 62. In addition, CalPERS may use months-old data to estimate these values.

10 63. These factors can result in considerable difference between the value that CalPERS reports for an
11 asset and the actual value of that asset.

12 64. For example, in June 2020, the CalPERS external auditor reported "an out of period adjustment
13 of \$582,940 thousand to unrealized gain on investments for real assets in the fiduciary funds
14 recorded in the current year statement of revenues, expenses and changes in net position that
15 was related to the uncorrected fair value of real assets investments misstatement from the prior
16 year's audit."¹⁴

17 65. In plainer language, this means that CalPERS's 2018-2019 audit overstated the value of some of
18 its real assets by nearly \$583 million dollars.

19 66. CalPERS contracts with a private firm to manage the appraisal and valuation process of its real-
20 asset investments. The agreement with this contractor requires the firm to provide CalPERS
21 with specified information and documents, including records relating to its internal controls
22 and operating effectiveness at least once a year.

23 67. A CalPERS Office of Audit Services review of the valuation process for real assets in 2018 and
24 2019 found that this contractor had failed to comply with these reporting requirements. The

25 ¹² CalPERS 2019-20 Comprehensive Annual Financial Report Fiscal Year Ended June 30, 2020 at
26 57 available at <https://www.calpers.ca.gov/docs/forms-publications/cafr-2020.pdf>

27 ¹³ CalPERS Audit Wrap Up, Year Ended June 30, 2020, available at
28 https://www.calpers.ca.gov/docs/board-agendas/202011/risk/item6a-02_a.pdf at 6 . This draft was
subsequently adopted as the final document.

¹⁴ *Id.* at 7.

1 review concluded that this failure meant that CalPERS may not be able to know whether the
2 contractor had adequate internal controls.¹⁵

3 68. In an attempt to investigate issues relating to the accuracy of CalPERS valuation of assets and its
4 disclosure of misevaluation, Mr. Jelincic requested records from CalPERS in January 2020
5 about the overvaluation of assets. Specifically, he requested “[a]ny records, including but not
6 limited to, documents, analysis, appraisals, notes, minutes and/or recordings, which document,
7 support, suggest, hint or warn [of] a market value lower than reported value for any private
8 asset.”

9 69. CalPERS had and still has records responsive to this request. For example, it has records relating
10 to its 2018-2019 \$583-million-dollar overstatement, including records about its discovery of
11 this error.

12 70. CalPERS refused to provide any of these records. Instead, it claimed that “[a]ny records
13 responsive to” the request would be exempt, citing Government Code §§ 6254.26, 6255, and
14 the trade-secret privilege. A copy of CalPERS January 23, 2020 response letter denying this
15 request is attached to this Petition as Exhibit G.

16 71. Mr. Jelincic wrote back to CalPERS the following day, explaining that the first of these
17 exemptions would not cover CalPERS’s \$38 billion in real assets because “§ 6254.26 deals
18 only with private equity funds, venture funds, hedge funds, or absolute return funds. These are
19 not the only forms of private assets held by the System. Just as an example, the System owned
20 over \$38 billion in real assets as of June 30, 2019.” Mr. Jelincic also wrote that the public
21 interest in disclosure of this information means that § 6255 could not authorize withholding,
22 and that this information could not be considered a trade secret. A copy of Mr. Jelincic’s
23 January 24, 2020 letter is attached to this Petition as Exhibit H.

24 72. On February 11, CalPERS responded, again refusing to release any records, asserting that
25 sections 6254.26 and 6255 exempted these documents and also that “many, if not most, of the
26

27
28 ¹⁵ See CalPERS Office of Audit Services Memorandum on Review of Valuation Process for Real
Assets, Job. No. IA18-027 (March 5, 2020).

documents” are protected as trade secrets. A copy of CalPERS’s February 11, 2020 response is attached as Exhibit I.

73. Mr. Jelincic replied two weeks later, noting that the CPRA expressly requires agencies to disclose the “dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets.” He also explained why some of CalPERS’s asserted reasons for refusing to provide the records are invalid. He closed by reiterating his request for the records. A true copy of this February 23, 2020 letter is attached to this Petition as Exhibit J.

74. Mr. Jelincic did not receive any response to this letter. CalPERS has not provided him with any of the requested records.

6. Counts/Causes of Action

Count One

(Violation of the CPRA, the Bagley Keene Open Meeting Act, and Cal. Const. Art. I § 3)

75. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

76. Defendant possesses records relating to the August 17, 2020 closed session that Plaintiff requested, including a full written or audio transcript, or both.

77. Part or all of that meeting should have been conducted in open session because it involved a discussion of matters that cannot lawfully be discussed in closed session.

78. The CPRA, Penal Code § 832.7(b), and the California Constitution require the disclosure of the records relating to the parts of that meeting that should have been discussed in open session.

79. Respondents’ failure to provide these records violates the CPRA and Article I, § 3 of the California Constitution.

Count Two

(Violation of the Bagley-Keene Open Meeting Act)

80. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

81. Defendant violated this Act at its August 17, 2020 meeting by improperly discussing matters in closed session that should have been addressed in public. *See* Gov. Code §§ 11123, 11132.

1 82. Defendant takes the position that Government Code § 11126(a) allows it to hold a closed session
2 to discuss matters relating to the appointment, employment, or evaluation of performance
3 relating to its CIO, or to hear complaints or charges brought against that CIO by another
4 person or employee unless the employee requests a public hearing.

5 83. Plaintiff takes the position that § 11126(a) does not apply to discussions of matters relating to the
6 CalPERS CIO. He believes that such discussions are instead governed by § 11126(g)(1).

7 84. Government Code § 11126(g)(1) allows a closed session to discuss “matters pertaining to the
8 recruitment or removal of the Chief Investment Officer of the State Teachers’ Retirement
9 System or the Public Employees’ Retirement System,” but not does allow closed sessions to
10 discuss other matters relating to the CIO’s employment.

11 85. CalPERS takes the position that all of the August 17 closed session was properly closed.

12 86. Plaintiff takes the position that much of that session should have been conducted in public.

13 87. Defendant takes the position that it was not required to reconvene into open session following its
14 August 17 closed session.

15 88. Defendant takes the position that it is generally not required to reconvene after closed sessions
16 under Gov. Code § 11126.3(f) unless it must make some sort of report regarding that closed
17 session, at least not unless the closed session related to matters covered by § 11126(c)(18). Its
18 practices conform with this position.

19 89. Plaintiff takes the position that Defendant violated this Act at its August 17 meeting by failing to
20 reconvene in open session prior to adjournment and that Defendant must reconvene after every
21 closed session prior to adjournment. *See* Gov. Code § 11126.3(f).

22 **Count Three**
23 **(Violation of the First Amendment, Article I § (3)(b) of the California Constitution, and the**
24 **Bagley-Keene Open Meeting Act)**

25 90. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

26 91. CalPERS Board Governance Policy X(P) prohibits Board members from revealing confidential
27 matters.
28

- 1 92. CalPERS interprets this policy to prohibit Board members from revealing to the public
2 information they learned at a closed session of the Board.
- 3 93. CalPERS takes the position that all of the August 17 closed session was properly closed.
- 4 94. Plaintiff takes the position that at least part of the August 17, 2020 session at issue was
5 improperly closed, because it involved discussions of matters that must be discussed in public
6 under the Bagley-Keene Act and that were not properly noticed on the agenda.
- 7 95. The California Attorney General has opined that, under California open-meeting laws, people
8 may not disclose information they receive in a *properly* closed session, but that the laws’
9 “confidentiality requirements only apply to what is properly discussed in closed session,” not
10 to matters that go beyond what is properly discussed in closed session. 80 Cal. Op. Att’y Gen.
11 231 (1997) fn. 2 and accompanying text.
- 12 96. At least one member of the Board would disclose additional information about what was
13 discussed at the August 17 closed session if this Court were to declare that they could lawfully
14 do so.
- 15 97. Plaintiff and the general public have interests in receiving this information under the First
16 Amendment and Article I §(3)(b) of the California Constitution.
- 17 98. Defendant takes the position that the information redacted from Exhibit H to this Petition — a
18 list of topics discussed at the August 17 closed session — is confidential, and that Board
19 members are prohibited from making it public.
- 20 99. Plaintiff takes the position that this record — including most if not all of the listed topics — is
21 not exempt from disclosure under the CPRA because it involves matters that were not properly
22 discussed in closed session, and that Board members and any other people with access to this
23 record have a right to make this it public, with only limited redactions.

24 **Count Four**
25 **(Unlawful expenditure of public funds in violation of the Bagley-Keene Act)**

- 26 100. Plaintiff incorporates herein by reference the above allegations and Counts, as if set forth in
27 full.
28

- 1 101. Plaintiff has been assessed and has paid taxes that fund CalPERS within one year before the
2 commencement of this action.
- 3 102. Unless enjoined, Defendant is and will be expending public funds by refusing to allow persons
4 present at the August 17 closed session to disclose the details of the information presented at
5 that meeting, including information relating to matters that were not properly discussed in the
6 closed session, or by taking action against them for doing so.
- 7 103. Unless enjoined, Defendant is and will be expending public funds by improperly holding
8 closes sessions to discuss matters that must be discussed in open session.
- 9 104. Unless enjoined, Defendant is and will be expending public funds by improperly listing
10 Government Code § 11126(a) on its agendas as authority to discuss matters relating to the
11 employment of its CIO.
- 12 105. For the reasons described in the previous Counts, these expenditures of public funds are
13 unlawful and should therefore be enjoined and declared unlawful under Government Code
14 § 11130(a), Code of Civil Procedure § 526a and the common law.

15 **Count Five**
16 **(Violation of the CPRA and Cal. Const. Art. I § 3)**

- 17 106. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.
- 18 107. Defendant possesses records that document, support, suggest, hint or warn of a market value
19 lower than reported value for any of its private assets, as Plaintiff requested in January 2020.
- 20 108. Defendants' failure to provide these records violates the CPRA and Article I, § 3 of the
21 California Constitution.

22 **7. Relief requested**

23 Plaintiff requests the following relief:

- 24 1. That the Court declare the following under Code of Civil Procedure § 1060 and Government
25 Code § 11130(a):
- 26 a. Defendant's August 17, 2020 closed session violated the Bagley-Keene Act because the
27 Board discussed matters that were not covered in its disclosure and that cannot lawfully
28

- 1 be discussed in closed session, in violation of Government Code §§ 11126.3(b), 11120,
2 11132.
- 3 b. After reviewing the transcript and/or minute book of that meeting, that particular parts of
4 that transcript relate to matters that were not properly discussed in closed session.
- 5 c. That those specified parts of the transcript that relate to matters that were not properly
6 discussed in closed session are not confidential under Government Code § 11126.1.
- 7 d. That any person present at that August 17 closed session has a right to disclose to the
8 public any information or discussion at that meeting that related to matters that were not
9 properly discussed in closed session, as determined by the Court.
- 10 e. That Government Code § 11126(a) does not authorize the Board to hold a closed session
11 to discuss matters relating to its CIO, and that closed session to discuss such matters are
12 instead governed by § 11126(g).
- 13 f. That after every closed session the Board must reconvene into open session prior to
14 adjournment. *See* Gov. Code § 11125.3(f).
- 15
- 16 2. That the Court issue a writ of mandate and an injunction ordering Defendant to provide
17 Plaintiffs with all the records he requested, as described above, except those records or parts
18 thereof that the Court determines may lawfully be withheld under the CPRA.
- 19
- 20 3. That the Court issue a writ of mandate and an injunction prohibiting Defendant from taking
21 any action against any Board member or any other person for revealing matters discussed in
22 the August 17, 2020 closed session that were not covered in the Board's disclosure or that
23 could not lawfully be discussed in closed session. *See* Gov. Code § 11130(a).
- 24
- 25 4. That the Court order the Board to audio-record its closes sessions and preserve those
26 recordings for at least 5 years under Government Code § 11130(b).
- 27
- 28

- 1 5. That the Court order the Board not to cite Government Code § 11126(a) on its agendas as
2 authority to close a session when the only personnel matters to be discussed in that closed
3 session relate to the CIO.
4
5 6. That Plaintiff be awarded attorneys' fees and costs under Code of Civil Procedure § 1021.5,
6 Government Code §§ 6259, 11130.5, and any other applicable law.
7
8 7. That the Court issue other and further relief as the Court deems proper and just.

9 Dated: 3/8/2021

10 By: 

11 Michael T. Risher
12 Attorney for Plaintiff
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8. Verification

I, Joseph John Jelincic, Jr, the Plaintiff in this matter, have read this Verified Petition for Writ of Mandate and Complaint for Equitable relief in *Jelincic v. CalPERS*. I have personal knowledge that the facts stated in paragraphs 4, 6-8, 15-16, 32, 50-51, 55-57, 62, 64, 68, 70-73, and 74. of the Petition/Complaint are true. I am informed, and do believe, that the matters stated in the remainder of the Petition/Complaint are true. On these grounds I allege that the matters stated herein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: 3/5/21 in the City of Hayward, County of Alameda, California.


Joseph John Jelincic, Jr

Index of Exhibits

Index of Exhibits

- A. August 10, 2020 letter from Controller Yee
- B. List of topics from August 17, 2020 CalPERS Board meeting (redacted)
- C. September 25, 2020 letter from CalPERS to Jelincic
- D. December 16, 2020 letter from Risher to CalPERS
- E. December 24, 2020 letter from CalPERS to Risher
- F. December 1, 3, 14, and 16 2020 and March 2, 2021 Board agendas
- G. January 23, 2020 letter from CalPERS to Jelincic
- H. January 24, 2020 letter from Jelincic to CalPERS
- I. February 11, 2020 letter from CalPERS to Jelincic
- J. February 23, 2020 letter from Jelincic to CalPERS

Exhibit A



BETTY T. YEE
California State Controller

August 10, 2020

Mr. Henry Jones, President
Board of Administration
California Public Employees' Retirement System
400 Q Street
Sacramento, CA 95811

SUBJECT: Request for Immediate Board Action

Dear President Jones:

As a member of the Board of Administration, I take my fiduciary duty to safeguard CalPERS investments very seriously. To that point, I am deeply disappointed in the actions of former Chief Investment Officer (CIO) Ben Meng and what appears to be a blatant disregard of conflict-of-interest laws and policies. I also find it objectionable that this matter is not agendized for Board discussion until August 17.

I believe the Board has an obligation to CalPERS members to determine whether Mr. Meng's carelessness violated any laws or caused financial and reputational damage to the pension system. While the CIO's resignation was appropriate, the Board's obligation to CalPERS members does not end there. Rather, it calls for a swift and thorough inquiry into this matter and potential actions needed.

Under the Bagley-Keene Open Meeting Act, a special meeting can be called at any time by the presiding officer or a majority of the members of the Board if the 10-day notice requirements "would impose a substantial hardship on the state body or where immediate action is required to protect the public interest" pursuant to California Government Code section 11125.4(a). A special meeting also may be called to consider the issuance of a legal opinion.

As such, I hereby request you immediately call a special CalPERS Board meeting within 48 hours of receipt of this letter for purposes of hearing from the Board's counsel and fiduciary counsel regarding potential violation of laws, adequacy of existing policies, safeguards that could prevent a recurrence of the situation, and the Chief Executive Officer's oversight and implementation of policies and safeguards.

Sincerely,

BETTY T. YEE

cc: Matthew G. Jacobs, General Counsel, California Public Employees' Retirement System
Richard J. Chivaro, Chief Counsel, State Controller's Office

Exhibit B



Board of Administration Meeting Agenda

Videoconference – see <https://www.calpers.ca.gov/page/about/board/board-meetings>

CalPERS Auditorium

Lincoln Plaza North
400 P Street
Sacramento, CA

August 17, 2020

9:00 a.m.

Board Members

Henry Jones, President
Theresa Taylor, Vice President
Margaret Brown
Rob Feckner
Fiona Ma

Lisa Middleton
David Miller
Stacie Olivares
Eraina Ortega

Jason Perez
Ramon Rubalcava
Shawnda Westly
Betty Yee

Open Session

9:00 a.m.

1. Call to Order and Roll Call

Closed Session

Upon adjournment or recess of Open Session (Government Code sections 11126(a)(1), (e), and (g)(1))

1. Chief Executive Officer's Briefing on Performance, Employment, and Personnel Items

Notes

- 1) Items designated for Information are appropriate for Committee Action if the Committee wishes to take action. Any Agenda Item from a properly noticed Committee meeting, held prior to this Board meeting, may be considered by the Board.
- 2) The hour designated as the earliest starting time for this meeting is not intended to communicate the expected duration (or ending time) of the preceding meeting.
- 3) Public comment may be taken on any agenda item. There is a three-minute limitation on each public comment, unless otherwise directed by the Presiding Officer. (Cal. Code Regs. tit. 2, § 552.1.) Members of the public may provide public comment via telephone by calling (800) 259-4105.
- 4) In accordance with Executive Orders N-29-20, N-33-20, and the stay-at-home orders and social distancing measures put in place throughout California, Board members will participate via videoconference.

Topics Discussed

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formal vote

Exhibit C



California Public Employees' Retirement System
Office of Stakeholder Relations
400 Q Street, Sacramento, CA 95811 | Phone: (916) 795-3991 | Fax: (916) 795-3507
888 CalPERS (or 888-225-7377) | TTY: (877) 249-7442 | www.calpers.ca.gov

JJ Jelincic
366 Jane Ct
Hayward, CA 94544
jjjelincic@yahoo.com

September 25, 2020

Subject: PUBLIC RECORDS REQUEST – BOARD MEETING TRANSCRIPT, TRACKING #5440

Dear Mr. Jelincic,

This letter is in response to your Public Records Act (PRA) request received by the Office of Stakeholder Relations on September 21, 2020. In your correspondence, you requested:

With respect to the August 17, 2020 closed session of the CalPERS Board of Administration meeting: Copy of any notice(s) give to any employee(s) as required by Government Code 11126 (a) (2)

The boiler plate language in the meeting notice reproduced below was both inaccurate and inadequate for the public to know the nature of the discussion in the closed session: Upon adjournment or recess of Open Session (Government Code sections 11126(a)(1), (e), and (g)(1))1. Item 1. Chief Executive Officer's Briefing on Performance, Employment, and Personnel Items

The law requires that the public's business be conducted in public unless there is a specific exemption permitting the use of closed session. There is much on the public record, including but not limited to the remarks of Marcie Frost and Henry Jones, to disclose that the closed session discussed matters which are not exempted.

Therefore, I am requesting a copy of the closed session transcript of the August 17, 2020 meeting of the Board of Administration. Please feel free to redact any section of the transcript that deals specifically with the recruitment of a new Chief Investment Officer.

After a diligent search of our records staff determined that we either do not have records responsive to your request, or where we do, the records are exempt from disclosure under the PRA. Applicable exemptions include, but are not limited to, Government Code section 11126.1. Section 11126.1 provides that the minutes or recording of a closed session meeting are exempt

from disclosure under the PRA and must be kept confidential. We therefore have nothing to produce in response to your request.

By providing you this information we consider your PRA request fulfilled and closed. If you have any further questions regarding this request, please contact the Office of Stakeholder Relations at the above address or telephone number (916) 795-3055.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Teykaerts', followed by a long horizontal line.

DAVID TEYKAERTS, Manager
Stakeholder Strategy
Office of Stakeholder Relations

Exhibit D

December 16, 2020

Henry Jones
President of the Board of Administration
Matthew Jacobs
General Counsel
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, CA 94229-2701
And by email to
matthew.jacobs@calpers.ca.gov
henry.jones@calpers.ca.gov

Re: Request for records relating to CalPERS Board of Administration's August 17, 2020 meeting

Dear Mr. Jones and Mr. Jacobs:

I am writing on behalf of JJ Jelincic to follow-up on his previous requests for records relating to the CalPERS Board of Administration's August 17, 2020 meeting. That meeting included a brief open session followed by a much-longer session that was closed, ostensibly to discuss personnel matters related to former Chief Investment Officer Ben Meng.

As I understand it, the Board's discussion at that closed session went beyond what may properly be closed to the public and included general a discussion of policy matters as well as a formal vote to allow the Board to inspect a report relating to Mr. Meng. Because this session was not properly closed, the records relating to that hearing – including any minutes or recording of the meeting – must be disclosed to the public under the Public Records Act and Article I § (3) of the California Constitution, in whole or in part. I ask that you do so.

Background

As I understand it, Mr. Meng resigned from his position as CalPERS Chief Investment Officer on August 5 of this year, following allegations that he had failed to make required financial disclosures. On August 10, California State Controller and Board member Betty Yee wrote to Board President Henry Jones, raising concerns that Mr. Meng had violated conflict-of-interest laws. Controller Yee requested an immediate special meeting to hear about and discuss "potential violation of laws, adequacy of existing policies, safeguards that could prevent a recurrence of the situation, and the Chief Executive Officer's oversight and implementation of policies and safeguards." Controller Yee found "it objectionable that this matter [was] not agendized for Board discussion until August 17."

Although the Board did not immediately hold a special meeting, the agenda for its August 17 meeting listed as its sole substantive item the “Chief Executive Officer’s Briefing on Performance, Employment, and Personnel Items,” which was to be closed to the public under Government Code §§ 11126(a)(1), (e), and (g)(1)).¹ The reference to subdivision (g)(1) indicates that the Board was to consider matters relating to the CIO or CEO.

The official transcript of the brief open session of that meeting reveals that the President stated that the “purpose the [the closed] meeting is to hear briefing on performance, employment, and personnel items.” President Jones rejected a member’s request that the Board take public comment before moving into closed session. Controller Yee expressed her desire that the Board have a hearing on the issues she had raised in her letter. The Board then went into closed session.

In that closed session, I understand that the Board discussed a number of matters relating to Mr. Meng as well as matters relating to the of policy questions raised in Controller Yee’s August 10 letter. I also understand that the Board voted to allow its members to review a report relating to the matter. One outlet reported that during this meeting “CalPERS Chief Executive Officer Marcie Frost was questioned by the CalPERS board for four hours in a closed session on what she knew about Meng’s financial disclosures.”²

The Board did not reconvene into open session after this closed meeting. *Cf.* § 11126.3(f) (“After any closed session, the state body shall reconvene into open session prior to adjournment....”).

Discussion

The California Constitution requires that “the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” Cal. Const. Art. I § 3(b)(1). More specifically, the Bagley-Keene Open Meeting Act requires State agencies such as the Board to conduct their business in public unless a specific legal provision provides otherwise. *See* §§ 11120, 11132. Like all California laws, this statute must be “broadly construed if it furthers the people’s right of access [to government information], and narrowly construed if it limits the right of access.” Cal. Const. Art. I § (3)(b)(2). This “constitutional canon requires [courts] to interpret [laws] in a way that maximizes the public’s access to information unless the Legislature has *expressly* provided to the contrary.” *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 175 (2013); *see Travis v. Bd. of Trustees of California State Univ.*, 161 Cal. App. 4th 335, 342–43 (2008) (Exception to Bagley-Keene open-meeting requirements “should be strictly and narrowly construed and will not be extended beyond the import of its terms.”).

¹ All statutory references are to the Government Code unless otherwise indicated.

² Chief Investment Officer, *California Opens Investigation into Former CalPERS CIO Meng*, available at <https://www.ai-cio.com/news/california-opens-investigation-former-calpers-cio-meng/>

When a body such as the Board plans to hold a closed session it must first disclose the nature of the items it will discuss. § 11126.3(a). This must include “the specific statutory authority under which a closed session is being held.” § 11125(b). “In the closed session, the state body may consider only those matters covered in its disclosure.” § 11126.3(b).

Here, the Board President announced in open session that the “the purpose of [the] meeting is to hear briefing on performance, employment, and personnel items.” He also referenced the meeting agenda, which cited §§ 11126(a)(1), (e), and (g)(1)) as grounds to hold a closed session. It does not appear that any of these rationales supported closing the meeting.

Government Code § 11126(a)(1) allows public bodies to hold closed sessions to discuss a range of topics relating to personnel matters. However, closed discussions relating to the CalPERS CIO are expressly governed by a different provision, § 11126(g)(1).³ This statute allows the Board to meeting in closed session only “when considering matters pertaining to the recruitment or removal of the Chief Investment Officer of ... the Public Employees’ Retirement System.” § 11126(g)(1). Under long-established rules of statutory construction, this more-specific statute – which expressly governs retirement systems’ CIOs and CEOs -- trumps the general provisions of subdivision (a). *See Fowler v. City of Lafayette*, 46 Cal. App. 5th 360, 367–68 (2020) (In interpreting Brown Act’s closed-meetings provision, applying the “well-established rule of statutory construction that a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.”). In addition, if subdivision (a) applied to discussions relating to the CIO then subdivision (g)(1) would become useless surplusage, in violation of another cardinal rule of statutory construction. *See People v. Arias*, 45 Cal. 4th 169, 180 (2008) (In construing a statute, this court must avoid “a construction that renders a word surplusage.”). By enacting subdivision (g), the Legislature has determined that the public has a right to know more about the official conduct of the CalPERS CIO – who makes well over \$1 million per year – than it does about most state employees. Section 11126(a)(1) therefore cannot justify discussing anything relating to Mr. Meng’s tenure with CalPERS in closed session. To the extent there is any dispute, the constitutional requirement that any ambiguities be read in favor of disclosure would eliminate it.

For these reasons, to the extent closed session was appropriate to discuss matters relating to Mr. Meng’s employment, only matters relating to his “removal” could be appropriately discussed. § 11126(g)(1). As the Board made clear in its August 5 press release, Mr. Meng was

³ Section 11126(g)(1) states that the Bagley Keene Act “does not prevent ... the Board of Administration of the Public Employees’ Retirement System from holding closed sessions when considering matters pertaining to the recruitment, appointment, employment, or removal of the chief executive officer or when considering matters pertaining to the recruitment or removal of the Chief Investment Officer of the State Teachers’ Retirement System or the Public Employees’ Retirement System.”

not removed; he resigned, and he did so 12 days before the August 17 meeting.⁴ Resignation is not removal. *See, e.g.*, §§ 3002, 19996. Section 11126(g)(1) therefore cannot justify discussing any aspect of Mr. Meng's employment in closed session.

Nor can the provisions for discussing potential litigation justify this closed session. "In the closed session, the state body may consider only those matters covered in its disclosure." § 11126.3(b). Before going into closed session the President stated that the "purpose the [the] meeting is to hear briefing on performance, employment, and personnel items," without any mention of potential litigation. Although the President also made a reference to the agenda, that agenda similarly states that the session was to be closed to hear the "Chief Executive Officer's Briefing on Performance, Employment, and Personnel Items," not to discuss litigation with counsel. Moreover, although the agenda references § 11126(e), that reference is inadequate because it fails to specify which of that provisions disparate subparts merited a closed session. *See* § 11125(b). And, in any event, it does not appear that the closed session involved any qualifying discussion of litigation involving CalPERS, much less that the entirety of this session was devoted to any such discussion. Nor does it appear that a litigation memo was ever prepared, as would be required if the session had been closed under § 11126(e). *See* § 11126(e)(2)(c)(ii). Although it may be that the Fair Political Practices Commission is contemplating litigation with respect to Mr. Meng, the FPPC is not CalPERS, and § 11126(e) permits a body to hold a closed session only to discuss litigation involving that state body, not litigation involving another agency. *See Shapiro v. Bd. of Directors*, 134 Cal. App. 4th 170, 185 (2005) (Holding under corresponding provision of Brown Act that an agency "may not meet in closed session with the Agency's counsel to discuss pending litigation to which [it] is not a party.").

It therefore appears that much if not all of the Board's August 17 meeting should have been conducted in public, rather than in closed session.

The California Public Records Act requires state agencies to make all of their records promptly available to the public unless some provision of law exempts those records from disclosure. *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 616 (2017). "[I]f only part of a record is exempt, the agency is required to produce the remainder, if segregable." *Cty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1321 (2009)); *see* Gov. Code § 6253(a);. Although a recording or minutes of a *properly* closed meeting are exempt from disclosure under § 11126.1, this exemption does not apply if the closure is not proper. *See Register Div. of Freedom Newspapers, Inc. v. Cty. of Orange*, 158 Cal. App. 3d 893, 906-907 & n.6 (1984) (decided under identical provision of Brown Act). Any other result would frustrate the purposes of the Bagley-Keene Act as well as Article I § 3(b) of the California Constitution.

⁴ CalPERS, *CalPERS Chief Investment Officer Yu (Ben) Meng Resigns* (Aug. 5, 2020), available at <https://www.calpers.ca.gov/page/newsroom/calpers-news/2020/chief-investment-officer-yu-ben-meng-resigns>; *see also Statement from Board President Henry Jones on CIO Resignation* (Aug. 6, 2020), available at <https://www.calpers.ca.gov/page/newsroom/calpers-news/2020/calpers-board-president-henry-jones-statement-on-cio-resignation>.

For these reasons, I ask that you release all records relating to the August 17 meeting, including any recording or transcript of that meeting, any record of any vote taken at that meeting, and any records showing whether or not a litigation memorandum was prepared under § 11126(e). Please let me know within 10 days whether you will provide records. *See* § 6253(c). If you will not, please indicate whether these records exist and, if so, the specific grounds for withholding them. *See* § 6253(c).

Because of the ongoing Covid pandemic, please send any correspondence and records to me electronically at michael@riserlaw.com.

In addition, I ask that for future meetings you agree not to rely upon § 11126(a) to discuss matters relating to the Board's CEO or CIO in closed session, to refrain from discussing any matters not properly closed in closed session, and to specify which of § 11126(e)'s subparts justifies a closed session.

Thank you for your time and attention to this matter.

Sincerely,



Michael T. Risher

cc: JJ Jelincic

Marcie Frost, CEO

Members of the Board of Administration

CalPERS Office of Stakeholder Relations - PRA Unit

Exhibit E



California Public Employees' Retirement System

Legal Office

400 Q Street, Sacramento, CA 95811 | Phone: (916) 795-3675 | Fax: (916) 795-3659
888 CalPERS (or 888-225-7377) | TTY: (877) 249-7442 | www.calpers.ca.gov

Michael T. Risher
2081 Center St. #154
Berkeley, CA 94704
michael@risherlaw.com
via email

December 24, 2020

Re: Request for Records Relating to CalPERS Board of Administration's August 17, 2020 Meeting

Dear Mr. Risher:

Thank you for your December 16, 2020 letter regarding the CalPERS Board of Administration meeting held on August 17, 2020.

Your letter alleges that the Board improperly adjourned into closed session at that meeting and requests that CalPERS disclose all records relating to that closed session. Your understanding of the August 17, 2020 closed session is not accurate. Because the closed session was conducted in accordance with the Bagley-Keene Open Meeting Act, the records you have requested are exempt from disclosure under the Public Records Act (PRA). The applicable exemptions include, but are not limited to, Government Code section 6254, subdivision (k). Subdivision (k) incorporates confidentiality privileges found in state and federal law. Applicable privileges include, but are not limited to, Evidence Code section 1040, subdivision (b)(1).

Subdivision (b)(1) of Evidence Code section 1040 permits an agency to withhold official information contained in records when disclosure is forbidden by a California statute. The relevant statutes forbidding disclosure of the requested closed session records are found in the Bagley-Keene Open Meeting Act (Cal. Gov. Code § 11120 et seq.), specifically Government Code sections 11126.1 and 11126, subdivisions (a)(1) and (g)(1). Section 11126.1 provides that the minutes or recording of a closed session meeting are exempt from disclosure under the PRA and must be kept confidential. Both subdivisions (a)(1) and (g)(1) of section 11126 authorize the Board to meet in closed session to consider personnel matters. The protection of these confidentiality privileges extends to any recording or transcript of the closed session, the record of the votes taken during the closed session, and any other records pertaining to the closed session and the discussion therein.

Thank you again for bringing your concerns to our attention.

Sincerely,

Robert Carlin

Robert Carlin
Senior Attorney

Exhibit F



First CIO Interview Subcommittee

The CalPERS Board of Administration considers recommendations from individual Board committees and hears other matters related to the administration of retirement benefits and investment management.

(Agenda items are provided in a PDF format, which require Adobe Reader 8 or higher to view.)

First CIO Interview Subcommittee

Meeting Agenda for December 1, 2020

[View Open Session Meeting Transcript \(PDF\)](#)

Open Session

1:00 p.m.

Item

1. Call to Order and Roll Call

Closed Session

1:00 p.m.

Or upon adjournment of the Open Session – Whichever is Later (Government Code sections 11126(a)(1) and (g)(1))

Item

1. First Round Interviews for the CalPERS Chief Investment Officer Position

Meeting Agenda for December 2, 2020

[View Open Session Meeting Transcript \(PDF\)](#)

Open Session

10:00 a.m.

Item

1. Call to Order and Roll Call

Closed Session

10:00 a.m.

Or upon adjournment of the Open Session – Whichever is Later (Government Code sections 11126(a)(1) and (g)(1))

Item

1. First Round Interviews for the CalPERS Chief Investment Officer Position

Meeting Agenda for December 3, 2020

[View Open Session Meeting Transcript \(PDF\)](#)

Open Session

11:00 a.m.

Item

1. Call to Order and Roll Call

Closed Session

11:00 a.m.

Or upon adjournment of the Open Session – Whichever is Later (Government Code sections 11126(a)(1) and (g)(1))

Item

1. First Round Interviews for the CalPERS Chief Investment Officer Position

Notes

1. The hour designated as the earliest starting time for this meeting is not intended to communicate the expected duration (or ending time) of the preceding meeting.
2. In accordance with Executive Orders N-29-20, N-33-20, and the stay-at-home orders and social distancing measures put in place throughout California, Subcommittee members will participate

via videoconference.



Second CIO Interview Subcommittee

The CalPERS Board of Administration considers recommendations from individual Board committees and hears other matters related to the administration of retirement benefits and investment management.

(Agenda items are provided in a PDF format, which require Adobe Reader 8 or higher to view.)

Second CIO Interview Subcommittee

Meeting Agenda for December 14, 2020

[View Open Session Meeting Transcript \(PDF\)](#)

Open Session

1:30 p.m.

Item

1. Call to Order and Roll Call

Closed Session

1:30 p.m.

Or upon adjournment of the Open Session – Whichever is Later (Government Code sections 11126(a)(1) and (g)(1))

Item

1. Second Round Interviews for the CalPERS Chief Investment Officer Position

Meeting Agenda for December 16, 2020

[View Open Session Meeting Transcript \(PDF\)](#)

Open Session

1:00 p.m.

Item

1. Call to Order and Roll Call

Closed Session

1:00 p.m.

Or upon adjournment of the Open Session – Whichever is Later (Government Code sections 11126(a)(1) and (g)(1))

Item

1. Second Round Interviews for the CalPERS Chief Investment Officer Position

Notes

1. The hour designated as the earliest starting time for this meeting is not intended to communicate the expected duration (or ending time) of the preceding meeting.
2. In accordance with Executive Orders N-29-20, N-33-20, and the stay-at-home orders and social distancing measures put in place throughout California, Subcommittee members will participate via videoconference.



Joint Meeting of CIO Interview Subcommittees

Meeting Agenda

Videoconference – see <https://www.calpers.ca.gov/page/about/board/board-meetings>

March 2, 2021

2:00 p.m.

Subcommittee Members

Marcie Frost, Chief Executive Officer
Michael Cohen, Chief Financial Officer
Sterling Gunn, Managing Investment Director
Scott Terando, Chief Actuary
Michael Kennedy, Korn Ferry

Henry Jones, Board of Administration
Lisa Middleton, Board of Administration
David Miller, Board of Administration
Stacie Olivares, Board of Administration
Eraina Ortega, Board of Administration
Betty Yee, Board of Administration

Open Session

2:00 p.m.

Item

1. Call to Order and Roll Call

Closed Session

2:00 p.m.

Or upon adjournment of the Open Session – Whichever is later (Government Code sections 11126(a)(1) and (g)(1))

Items

2. Call to Order and Roll Call
3. CIO Recruitment: Update

Notes

1. The hour designated as the earliest starting time for this meeting is not intended to communicate the expected duration (or ending time) of the preceding meeting.
2. In accordance with Executive Orders N-29-20, N-33-20, and the stay-at-home orders and social distancing measures put in place throughout California, Subcommittee members will participate via videoconference.

Exhibit G



California Public Employees' Retirement System
Communications & Stakeholder Relations
Office of Stakeholder Relations
P.O. Box 942701
Sacramento, CA 94229-2701
TTY: (916) 795-3240
(916) 795-3991 phone • (916) 795-3507 fax
www.calpers.ca.gov

January 23, 2020

JJ Jelincic
366 Jane Court
Hayward, CA 94544
jj@jjforcalpers.org

Dear Mr. Jelincic:

Subject: PUBLIC RECORDS REQUEST – VALUATION OF ASSETS,
TRACKING #4915

This letter is in response to your Public Records Act (PRA) request received by the Office of Stakeholder Relations on January 13, 2020. In your correspondence, you requested:

Any records, including but not limited to, documents, analysis, appraisals, notes, minutes and/or recordings, which document, support, suggest, hint or warn a market value lower than reported value for any private asset.

The preferred form of any records would be electronic.

Any records responsive to your request are exempt from disclosure under the PRA. Applicable exemptions include but are not necessarily limited to Government Code sections 6254.26 and 6255 and the trade secret privilege. After applying these exemptions, we have nothing to produce in response to your request.

By providing you this information we consider your PRA request fulfilled and closed. If you have any further questions regarding this request, please contact the Office of Stakeholder Relations at the above address or telephone number (916) 795-3055.

Sincerely,

A handwritten signature in black ink, appearing to read "David Teykaerts", with a long horizontal stroke extending to the right.

DAVID TEYKAERTS, Manager
Strategic Stakeholder Outreach
Office of Stakeholder Relations

Exhibit H

JJ Jelincic
366 Jane Court
Hayward, California 94544

January 24, 2020

Henry Jones
President, CalPERS Board of Administration
P.O. Box 942701
Sacramento Ca 94229-2701

Dear Mr. Jones:

I received Mr. David Teykaerts' letter of January 23, 2020 purporting to respond to my recent public records request. (See enclosed.) It is consistent with the CalPERS' practices in responding to record requests but is wholly inadequate.

I am writing you because, as you are very aware, the California Attorney General has opined that an action by staff is legally an action by the Board of Administration. Assuming that Mr. Teykaerts is not a rogue employee but is acting in accordance with his instructions I thought I should write to the principal.

It is worth noting that you do not deny the existence of the requested documents.

The Summary of the California Public Records Act 2004 published by the California Attorney General's Office points out the legal requirements that:

- If a record contains exempt information, the agency generally must segregate or redact the exempt information and disclose the remainder of the record; and
- When an agency withholds a record because it is exempt from disclosure, the agency must notify the requester of the reasons for withholding the record.

You and your agent have chosen to do neither.

You assert but do not offer any justification that the records are exempt from disclosure under Government Code section 6254.26. As I assume you are aware §6254.26 deals only with private equity funds, venture funds, hedge funds, or absolute return funds. These are not the only forms of private assets held by the System. Just as an example, the System owned over \$38 billion in real assets as of June 30, 2019.

You assert, but do not justify, that the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the records. The guidance from the Attorney General points out that:

In order to withhold a record under section 6255, an agency must demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. A particular agency's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the agency's that is weighed. (Emphasis in the original.)

I have a great deal of difficulty understanding how the public interest is better served by disclosing inaccurate financial information than it is served by disclosing the truth. I would point out that the value of non-disclosure must CLEARLY outweigh the value of disclosure. Saving the System from embarrassment may be in the System's interests but that is NOT the test.

You also claim that the information is exempted as a trade secret. In section 3426.1 the Evidence Code as incorporated into the Public Records Act defines a trade secret as:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

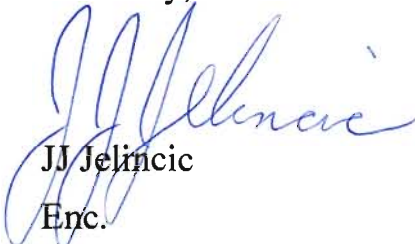
- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

It is unclear how inaccurate asset values would fall within this definition unless the false information would cause the holder of the trade secret to gain higher fees and/or lower refunds. I would further point out that Evidence Code §1060 states:

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, **if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.** (Emphasis added.)

I request that you or your agent provide a proper response to my public record request. Please respond to the above address or by email to jj@jjforcalpers.org.

Sincerely,



JJ Jelincic
Enc.

cc Members CalPERS Board of Administration

Exhibit I



California Public Employees' Retirement System

Legal Office

P. O. Box 942707, Sacramento, CA 94229-2707 | Phone: (916) 795-3675 | Fax: (916) 795-3659
888 CalPERS (or 888-225-7377) | TTY: (877) 249-7442 | www.calpers.ca.gov

February 11, 2020

Mr. JJ Jelincic
366 Jane Court
Hayward, CA 94544
jj@jjforcalpers.org

Subject: PUBLIC RECORDS REQUEST – VALUATION OF ASSETS,
TRACKING #4915

Dear Mr. Jelincic:

This is a follow-up to your January 24, 2020 correspondence to CalPERS Board President Henry Jones. You question CalPERS' January 23, 2020 response to your January 13, 2020 Public Records Act (PRA) request. By way of background, you requested:

Any records, including but not limited to, documents, analysis, appraisals, notes, minutes and/or recordings, which document, support, suggest, hint or warn [of] a market value lower than reported value for any private asset.

Our response concluded that any records in CalPERS' possession were exempt from disclosure pursuant to the PRA.

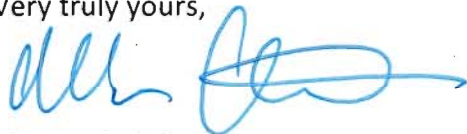
CalPERS' investments in private assets involve complex legal agreements negotiated with outside funds/investment managers that are proprietary to the funds, managers, and CalPERS. Documentation, analysis, appraisals, notes and similar materials pertaining to CalPERS' private asset investments either reflect internal (and exempt) deliberative processes or proprietary information related to the private assets. CalPERS' ability to meet its substantial obligations to fund current and future beneficiary payment obligations depends on its continued ability to invest with and utilize private asset outside managers and the products they provide. Funds and investment managers go to great lengths to require that CalPERS maintain the confidentiality of these documents and information. If CalPERS cannot do so, its ability to invest in private assets will be substantially compromised. Maintaining the confidentiality of information regarding CalPERS' private assets is also essential to ensure that CalPERS and its managers are able to maximize returns when private assets are later sold to others.

As previously noted, the documents you request are exempt from disclosure pursuant to Government Code sections 6254.26, 6255, and others. Section 6254.26 exempts from disclosure various records relating to alternative investments in which a public pension fund invests, including records pertaining to the private assets within an alternative investment vehicle. Section 6255 additionally exempts records from disclosure when the public interest served by not disclosing the records clearly outweighs the public's interest in disclosure. As discussed above, CalPERS believes the strong public interest in ensuring that it can and will meet its investment return and corresponding pension obligations clearly outweighs the public's interest in disclosure. We also note that many, if not most, of the documents you request are exempt from disclosure as a trade secret pursuant to *Evidence Code section 1060* and Civil Code section 3426.1 as they derive independent economic value from not being known to the public and are the subject of reasonable efforts by CalPERS and others to maintain their secrecy. CalPERS' own internal communications regarding its private asset investments are furthermore protected pursuant to the deliberative process privilege. With respect to closed session materials involving CalPERS' private assets, you understand as a former member of the Board that those materials are not subject to disclosure under the PRA.

CalPERS disagrees that its refusal to provide documents otherwise exempt from disclosure under the PRA are to conceal fraud or otherwise work injustice as you suggest.

Thank you for your inquiry. We trust this addresses your concerns in full.

Very truly yours,



Warren Astleford
Assistant Chief Counsel
Legal Office

cc: CalPERS Board of Administration
David Teykaerts

Exhibit J

JJ Jelincic

366 Jane Court
Hayward, California 94544

February 23, 2020

Henry Jones
President, CalPERS Board of Administration
P.O. Box 942701
Sacramento Ca 94229-2701

Dear Mr. Jones:

I received your February 11, 2020 written by Warren Astleford in response to my January 24, 2020 letter. It actually raises more concerns than it answers.

I will again point out that, despite your desire to ignore the issue, Government Code § 6254.26 covers ONLY "... investment in a private equity fund, venture fund, hedge fund, or absolute return fund...". I do acknowledge that the Board is sponsoring legislation to expand the same level of secrecy to externally managed private loans.

Even so G.C. § 6254.26 states "The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets..." and "...shall be subject to disclosure pursuant to this chapter and shall not be considered a trade secret exempt from disclosure..." I acknowledge the statute does require accurate disclosure but that is certainly implied.

You referenced closed session material. This is significant because it acknowledges that the requested documents exist. It also indicates that you have discussed them in closed session. This is an acknowledgement of the common practice under your leadership of violating the Bagley-Keene Open Meeting Act. There is no way the exemptions in the Act can be stretched to include discussions of mis-valued assets especially when those erroneous value are included and incorporated into the Board approved financial statements. (And ultimately roll up into the State's financial statements.

You continue to assert "that many, if not most, of the documents" I seek are exempted as trade secrets because "they derive independent economic value from

not being known to the public.” Have you thought about what you are saying? Can you explain the “independent economic value” from failing to disclose questions about valuation? The only value I can see is that managers are being paid incremental fees on the mis-valued assets. Isn’t that the definition of fraud or other injustice?

You state “CalPERS’ ability to meets its substantial obligations to fund current and future beneficiary payment obligation depends on its continued ability to invest with and utilize private asset outside managers and the products they provide.” For this to be relevant the documents related to mis-valuation must be the documents provided by the outside mangers. This loops back to the discussion of trade secrets. Are you saying that the outside managers have told you that their valuations are questionable? Are you saying there are no internal documents?

It is not clear that hiding erroneous asset valuations is a necessary condition of participation in private assets. If acceptance of fraud is a required condition of investing in private assets, I would suggest that the returns are not real and this is not an asset class or group of classes the system should invest in.

I know you don’t want to give them up but I am again asking for release of the documents. “I don’t wanna” and avoiding embarrassment are not ground to exempt disclosure under the California Public Records Act.

Sincerely,

A handwritten signature in blue ink, appearing to read "JJ Jelencic". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

cc: CalPERS Board of Administration
Warren Astleford
Steve Franklin