

March 18, 2021

Ragesh K. Tangri
Durie Tangri
217 Leidersdorff S.
San Francisco
CA 94111
by email

Re: *Jelincic v. CalPERS*, No. RG21090970

Dear Mr. Tangri:

I am writing in response to your March 17 letter suggesting that Mr. Jelincic has somehow acted improperly by filing the complaint in this matter and threatening to “take appropriate action” against him for doing so.

As an initial matter, the complaint was filed by fax, and the only version on file with the court is the one on its website. There is no reason to think that any redacted matter is visible. I was not aware that any of this material was available to the public, and, as a courtesy, I have taken steps to ensure that it is not. If you have reason to believe that this material is currently posted online please let me know and I will try to have it removed, even though, as discussed below, the law does not require it.

We will not, however, agree to your requests that we withdraw the complaint and ask third parties to destroy copies of any records, for several reasons:

First, although you rely on an Attorney General opinion for the proposition that Board members may not disclose information learned in closed session, the Attorney General has made it clear that these “confidentiality requirements only apply to what is properly discussed in closed session,” not to matters that go beyond what is properly discussed in out of public view. 80 Cal. Op. Att’y Gen. 231 (1997) fn. 2 and accompanying text. The 2004 enactment of Article I § 3(b) — guaranteeing public access to governmental information and requiring that statutes be read in favor of this access — further strengthens this conclusion. You have not explained how any of the matters mentioned in the complaint — most of which have nothing to do with what the public notice said would be discussed at the meeting and some of which was already in the public record¹ — were properly discussed in the closed session. And understandably so — the

¹ For example, an August 2020 article had already reported that that the closed session included a discussion of Mr. Meng, his financial disclosures, and Controller Yee’s request for an open meeting to discuss matters relating to Mr. Meng. *See* Chief Investment Officer, *California* 2081 Center St. #154 Berkeley CA 94704 | 510.689.1657 | 510.225.0941 (fax) | michael@risherlaw.com

Bagley Keene Act flatly prohibits discussion of, for example, “general policy matters relating to compliance, employee education, CIO onboarding, ... transparency, ... the need to establish policy ... media coverage,” and the other topics listed in the complaint. The allegations about the topics improperly discussed is not confidential; they are evidence of a potentially criminal violation² of the Bagley Keene Act. You are thus correct that this is “a very serious matter”; but it is serious because your clients violated the law and their oaths of office, not because this lawsuit may have revealed these violations to the public.

Second, you have failed to explain how the vague descriptions of the topics discussed on August 17 contained in the complaint could possibly implicate Article XVI § 17(c) of the California Constitution or a Board member’s fiduciary duty to CalPERS’s beneficiaries. How could the disclosure of this general information possibly hurt CalPERS’s legitimate interests? Putting aside “gotcha articles” and media coverage, these are all topics that the Board *should* have addressed — albeit in open session — in light of the circumstances of Mr. Meng’s departure. In response to Controller Yee’s letters and open-session comments, President Jones and CEO Frost made clear that the Board *would* address many of these at some point.³ Making public the fact that CalPERS was considering these important issues would help, not hurt, the agency and its beneficiaries. It may well be embarrassing to Board members and staff that the public will learn that it was violating the law by discussing these topics in closed session, but Board members’ have fiduciary duties to protect the beneficiaries, not CalPERS personnel, and their constitutional obligation to act with “care, skill, prudence, and diligence” does not mean that they should cover-up CalPERS’s violations of the law.

Third, since there is no harm to CalPERS’s legitimate interests, there can be no actionable breach of fiduciary duty or interference with contract. *See Caliber Paving Co., Inc. v. Rexford Indus. Realty & Mgmt., Inc.*, 54 Cal. App. 5th 175, 180 (2020); *Brown v. California Pension Administrators & Consultants, Inc.*, 45 Cal. App. 4th 333, 347–48 (1996). Even if there were grounds for either cause of action, the litigation and fair-reporting privileges would bar liability. *See* Civ. Code § 47(b), (d); *J-M Manufacturing Co. v. Phillips & Cohen LLP*, 247 Cal.App.4th 87, 99 (2016); *Pettitt v. Levy*, 28 Cal.App.3d 484, 488-92 (1972). These privileges apply broadly to all torts other than malicious prosecution. *See Hagberg v. California Fed. Bank*, 32 Cal. 4th 350, 360 (2004). They would therefore preclude claims for breach of fiduciary duty or interference with contract, both of which are torts. *See Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990); *Thomson v. Canyon*, 198 Cal. App. 4th 594, 605 (2011). *See also* Gov. Code 8547 (Whistleblower Protection Act). Your claims that Mr. Jelincic “faces

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

² *See* Gov. Code § 11130.7.

³ *See, e.g.*, Complaint Ex. A; Mary Walsh, *After CalPERS Investment Chief’s Abrupt Departure, Trustees Talk Next Steps* The New York Times, (Aug. 17, 2020).

liability for, at a minimum, aiding and abetting the Board member's" supposed breach is at best incorrect and has the odor of an attempt to intimidate him because he filed this lawsuit.

Third, unless the Board Policy relating to confidentiality has been adopted as a regulation, it is not enforceable. *See Malaga Cty. Water Dist. v. Cent. Valley Reg'l Water Quality Control Bd.*, 58 Cal. App. 5th 418, 434 (2020).

Finally, it has been clear since the publication of the Pentagon papers that members of the public have a First Amendment right to disseminate this type of information. *See New York Times Co. v. United States*, 403 U.S. 713 (1971); *see also, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 527–35 (2001); *Jean v. Massachusetts State Police*, 492 F.3d 24, 33 (1st Cir. 2007). The operations of CalPERS are clearly a matter of public interest; allegations that it is violating California's open-meeting laws are particularly newsworthy. Even if there were some viable argument for aiding-and-abetting liability, it could not be used to sanction people who are exercising these important First Amendment rights. Moreover, any claims here are even weaker than those rejected by the Supreme Court, because you do not even claim that Mr. Jelincic disseminated purloined papers, much less records containing state secrets. Instead, you assert that he must withdraw his complaint because it discusses, as you put it, "what Mr. Jelincic believes happened during closed session." CalPERS does not get to tell people what they can or cannot believe, or that they cannot express their good-faith beliefs about the agency's conduct.

For these reasons, even if it were possible to somehow withdraw a complaint and remove it from the court's public files, we would not do so. If you believe that any portion of the complaint should be sealed, you are of course free to ask the Court to seal it. *See Rules of Court 2.550, 2.551.*

That said, Mr. Jelincic brought this lawsuit to get a judicial ruling as to the legality of CalPERS's actions and to ensure that the public has access to information that should be public. We redacted the list of topics discussed not because there is any legal requirement that we do so, but to reduce the possibility of this sort of disagreement. And Mr. Jelincic has no interest in taking actions that will actually hurt CalPERS beneficiaries (after all, he is one). If you can provide us with any substantial reason to think that the information in the complaint is truly so sensitive that it should not be public, we will of course consider what, if anything, we should do to address those concerns. But we will not drop this lawsuit in response to your baseless threats to "take appropriate action" against, and impose liability on, Mr. Jelincic for his bringing this lawsuit to expose CalPERS's wrongdoing and to require the agency to comply with the law.

We would be happy to discuss this, or any other aspects of this case, with you. Also, I assume that you have received notice from the Court that it has set a CMC for May 14 at 9:00 in Department 17; if not, I will send you a copy. In either event, we should set a time to discuss the case at least 30 days before that date.

Finally, please let us know whether your client will agree to waive personal service, as we previously requested, or will instead insist upon personal service.

Sincerely,



Michael T. Risher

cc: Abenico Cisneros