

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

Date: 12/20/2021

Hon. MICHAEL MARKMAN, Judge

Dept. No. 16

**FILED**

Superior Court of California  
County of Alameda

12/20/2021

Clad Fluke, Executive Officer / Clerk of the Court

By:  Deputy

R. Tumon

JOSEPH JOHN JELINCIC, JR.,

Plaintiff,

v.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM BOARD OF  
ADMINISTRATION,

Defendant.

Case No. RG21090970

**ORDER GRANTING JUDGMENT AND  
ISSUING WRIT OF MANDATE**

**I. OVERVIEW**

This case involves the intersection of principles of open government with the practicalities of modern-day investment. Joseph John Jelincic, Jr. ("Plaintiff") alleges that Defendant California Public Employees' Retirement System Board of Administration ("CalPERS") failed to comply with the California Public Records Act ("CPRA") and violated the Bagley-Keene Open Meeting Act.

*First*, Plaintiff seeks a number of documents from CalPERS relating to asset valuation. Plaintiff seeks to learn whether CalPERS inaccurately valued assets among its holdings. In response to Plaintiff's CPRA request, CalPERS withheld a number of documents on the basis that they concern "alternative investments" held by "alternative investment vehicles." Documents relating to such things fall under a new exception to the CPRA, set out in Government Code Section 6254.26. CalPERS also withheld documents that it says are protected by the attorney-client privilege and/or the trade secret exception to the PRA.

The parties seek a ruling on whether CalPERS properly invoked Section 6254.26. Plaintiff contends that the documents CalPERS has withheld relate to investment in real assets and so do not relate to "alternative investments" held by "alternative investment vehicles." Plaintiff also contends that CalPERS has been too aggressive in its invocation of the attorney-client privilege. Plaintiff asks the Court to conduct an *in camera* review of the documents CalPERS has withheld.

*Second*, Plaintiff contends that the CalPERS Board of Administration (“Board”) improperly held a closed session on August 17, 2020. The closed session came in the aftermath of the resignation of CalPERS Chief Investment Officer Ben Meng. CalPERS contends that the closed session fell under an exception to Bagley-Keene because it involved “matters pertaining to the recruitment, appointment, employment, or removal of the chief executive officer or ... matters pertaining to the recruitment or removal of the Chief Investment officer....” (Cal. Gov’t Code §11126(g).) Plaintiff disagrees.

## II. ORDERS AND WRIT

The Petition for Writ of Mandate is GRANTED IN PART and DENIED IN PART, for the reasons explained below.

1. CalPERS shall produce a copy of the Privilege Log Category No. 1 spreadsheet with the “AREIS ID” unredacted to Plaintiff by January 21, 2022.
2. CalPERS shall provide the documents identified as PRIV034, PRIV043-046, PRIV047-050, PRIV072, and in Category No. 6 in its Privilege Log to the Court by January 21, 2022 and the Court shall thereafter conduct an *in camera* review.
3. The Court FINDS that the CalPERS Board of Administration Meeting held on August 17, 2020 was improperly closed. After a review of the transcript, Section 11126(g) of the Government Code is applicable only to the closed-session discussion found at pages 71:3-72:25, 73:1-74:18 and the executive closed session discussion found at pages 104:23-105:9 and 114:1-12. The meeting should otherwise have been public.
4. CalPERS shall provide Plaintiff and make publicly available the transcript of the CalPERS Board of Administration Meeting held on August 17, 2020 in its entirety by January 12, 2022, making only redactions for attorney-client privilege found in the transcript that had been provided to the Court for *in camera* review and redactions with the page/line designations identified above.
5. Taking care to follow the procedures in the Rules of Court, by January 21, 2022, CalPERS shall provide the Court under seal an unredacted copy of the memorandum, prepared pursuant to Government Code section 11126(e)(2)(C), relating to the “potential legal action” referenced in the portions of the transcript that CalPERS redacted from the copy of the transcript lodged with the Court. (See Opp. Br., filed 8/18/21, at 13 [citing Aug. 17, 2020 CalPERS Board Closed Hearing Tr. at 40:2-40:6, 40:16-42:16].)
6. If no such memorandum exists as of the date of this order (December 20, 2021), CalPERS is ordered to show cause as to why it did not follow Government Code section 11126(e)(2)(C). CalPERS may file a written response to the order to show cause on or before January 21, 2022; Plaintiff may file a response by February 4, 2022, and CalPERS

may file a reply on or before February 11, 2022. The Court would set a hearing shortly thereafter. In the alternative, on or before January 21, 2022 CalPERS may release a full and unredacted copy of the transcript of the August 17, 2020 CalPERS Board of Administration Meeting Closed Session to Plaintiff and the Court.

7. The Court GRANTS Plaintiff's Request for Judicial Notice, filed 9/1/21, as to Exhibit A, a copy of the "2005 Assembly Committee on Banking and Finance Report on SB 439, an act to add Section 6245.26 to the Government Code."
8. The Court DENIES Plaintiff's Request for Judicial Notice as to Exhibit B, an order in *First Amendment Coalition v. CalPERS*, S.F. Super. Ct. No. CPF-10-510552, dated 9/14/2021. The authority is not judicially noticeable, but is appropriately submitted to the Court as an attachment to an attorney declaration to make the Court aware of non-binding trial court orders on a topic relevant to the pending litigation.
9. The Court SUSTAINS CalPERS' objections to evidence relating to the "member roundtable. The Court OVERRULES AS MOOT CalPERS' objection to Mr. Perez's statement. The Court OVERRULES CalPERS' objection relating to Plaintiff's education, time as a CalPERS investment officer, and service on the CalPERS Board.
10. The Court SUSTAINS Plaintiff's objection to 2:22-25 of the Corr Declaration. The Court otherwise OVERRULES Plaintiff's objections to the Corr Declaration.
11. The injunctive relief sought by Plaintiff is moot.

### III. THE WRIT PETITION

Mr. Jelincic's Writ Petition alleges five sets of claims for violation of the CPRA, Bagley-Keene Open Meeting Act, and Article I, Section 3 of the California Constitution. He alleges CalPERS:

- Failed to provide documents relating to the closed session of the CalPERS Board on August 17, 2020 (Count 1);
- Violated the Bagley-Keene Open Meeting Act based on improperly discussing matters in closed session on August 17, 2020 (Count 2);
- Violated both the First Amendment of the California Constitution (Art. I, sec. 3(b)) and the Bagley-Keene Open Meeting Act by "prohibiting Board members from revealing what was discussed at the improperly closed meeting on August 17, 2020" (Count 3); and
- Unlawfully expended public funds "by refusing to allow persons present at the August 17 closed session to disclose the details of the information presented at that meeting,

including information relating to matters that were not properly discussed in the closed session, or by taking action against them for doing so” (Count 4).

- Plaintiff also alleges CalPERS failed to produce “records that document, support, suggest, hint or warn of a market value lower than reported value for any of its private assets,” as Plaintiff requested in January 2020, in violation of the CPRA and Article I, section 3 of the California Constitution (Count 5).

#### **IV. THE CALIFORNIA PUBLIC RECORDS ACT CLAIMS**

##### **A. Applicable Law**

###### **1. The CPRA Generally**

In keeping with government transparency, the CPRA requires that a public agency produce documents sought by members of the public unless there is a statutory exception to the disclosure. (Gov’t Code § 6253; *ACLU v. Super. Ct.* (2011) 202 Cal. App. 4<sup>th</sup> 55, 67, 83-86.) The Government Code provides, “The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Gov’t Code § 6255(a).)

Under the CPRA, “a governmental agency is only obliged to disclose public records that can be located with reasonable effort and cannot be subjected to a ‘limitless’ disclosure obligation.” (*Bertoli v. City of Sebastopol* (2015) 233 Cal. App. 4<sup>th</sup> 353, 371-72.) The Court may reject as overly-broad and unduly-burdensome a request that would require “an agency to search an enormous volume of data for a needle in the haystack or ... compel[] the production of a huge volume of material.” (*Id.*)

###### **2. Exceptions to the CPRA**

The statutory exceptions to the presumption of disclosure are “narrowly construed.” (*Bertoli*, 233 Cal. App. 4<sup>th</sup> at 67 & n.2.) CalPERS “bears the burden of proving that an exemption applies” (*ACLU*, 202 Cal. App. 4<sup>th</sup> at 67), and it is to provide a “detailed justification” for withholding a document. (*Id.* at 85.)

CalPERS relies on three exceptions here. *First*, CalPERS relies on an exception to the CPRA for documents relating to “alternative investments” held by “alternative investment vehicles,” set out in section 6254.26 of the Government Code. *Second*, CalPERS contends it withheld a number of documents under section 6255 of the Government Code and the related balancing test in section 1040 of the Evidence Code as trade secrets (as defined in section 3426.1(d) of the Civil Code), also sometimes referenced in California law under the (confusingly

named) "official information privilege." *Third*, CalPERS withholds a number of documents based on the attorney-client privilege.

CalPERS also asserts that it redacted information from a responsive spreadsheet, Log Category No. 1, that is "non-responsive" under section 6255 of the Government Code. The Court will discuss this argument in the "Summary" section of its analysis below.

**1. "Alternative Investments" in "Alternative Investment Vehicles"  
(Gov't Code § 6254.26)**

The Legislature recently created an exception to the CPRA, which is particularly applicable to CalPERS and the sort of information sought by Plaintiff here, relating to a narrow category of investment. CalPERS relies on an exception relating to "alternative investments" and "alternative investment vehicles" found in Section 6254.26 of the Government Code to decline to disclose a set of documents in response to Plaintiff's CPRA request.

Effective January 1, 2017, the Legislature's new exception to the CPRA provides:

(a) Notwithstanding any provision of this chapter or other law, the following records regarding **alternative investments** in which public investment funds invest shall not be subject to disclosure pursuant to this chapter, unless the information has already been publicly released by the keeper of the information:

- (1) Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle.
- (2) Quarterly and annual financial statements of alternative investment vehicles.
- (3) Meeting materials of alternative investment vehicles.
- (4) Records containing information regarding the portfolio positions in which alternative investment funds invest.
- (5) Capital call and distribution notices.
- (6) Alternative investment agreements and all related documents.

(b) Notwithstanding subdivision (a), the following information contained in records described in subdivision (a) regarding alternative investments in which public investment funds invest shall be subject to disclosure pursuant to this chapter and shall not be considered a trade secret exempt from disclosure:

- (1) The name, address, and vintage year of each alternative investment vehicle.

- (2) The dollar amount of the commitment made to each alternative investment vehicle by the public investment fund since inception.
- (3) The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.
- (4) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund from each alternative investment vehicle.
- (5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.
- (6) The net internal rate of return of each alternative investment vehicle since inception.
- (7) The investment multiple of each alternative investment vehicle since inception.
- (8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, by the public investment fund to each alternative investment vehicle.
- (9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year-end basis.

(c) For purposes of this section, the following definitions shall apply:

- (1) **"Alternative investment"** means an investment in a private equity fund, venture fund, hedge fund, or absolute return fund.
- (2) **"Alternative investment vehicle"** means the limited partnership, limited liability company, or similar legal structure through which the public investment fund invests in portfolio companies.
- (3) **"Portfolio positions"** means individual portfolio investments made by the alternative investment vehicles.
- (4) **"Public investment fund"** means any public pension or retirement system, and any public endowment or foundation.

(Cal. Gov't Code § 6254.26 [emphasis added].)

This case appears to be the first in which a Court has been asked to interpret section 6254.26 and the meaning of an “alternative investment” held by an “alternative investment vehicle.” The new statute imposes an obligation on CalPERS to disclose specific pieces of information concerning its “alternative investments.” Those are set out in subdivision (b), and include information about the amount invested, rates of return, management fees paid, and profits received. Beyond those mandatory disclosures, however, CalPERS may keep other information concerning its “alternative investments” confidential.

## **2. Trade Secrets As “Official Information” (Civil Code § 3426.1 and Evidence Code § 1040)**

CalPERS contends that a subset of the documents it has withheld are protected from disclosure as trade secrets. (Cal. Civ. Code § 3426.1.) Supported by the declaration of Sarah Corr, CalPERS’s Managing Investment Director for Real Assets, CalPERS represents that these documents include “CalPERS’s investment strategies, including discussions of opportunities it has declined, which are trade secrets.” (Opp. Br., filed 8/18/21, at 6; Corr Decl., filed 8/18/21, at ¶¶ 39, 41-42, 46.)

The CPRA itself does not create a “trade secret” exception to disclosure. Rather, a public agency may assert that the public interest is best served by not disclosing a trade secret. (Gov’t Code § 6255(a).) The argument dovetails with the “official information” privilege. The Evidence Code provides:

(a) As used in this section, “official information” means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state.

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(Evid. Code § 1040.) In other words, a government agency may argue that there is a need to preserve the confidentiality of trade secret information that outweighs the

need “for disclosure in the interest of justice.” (*Id.*)

California defines a trade secret as:

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.

(Civil Code § 3426.1(d).)

### **3. Attorney-Client Privilege**

CalPERS contends that a number of responsive emails are protected by the attorney-client privilege. A privilege log is required in civil litigation to allow opposing parties, and the Court, if necessary, to evaluate claims of privilege. (Code Civ. Proc. § 2031.240(b).) They can be useful tools in connection with CPRA requests. Given an attorney’s ethical obligations to the Court and the public, nothing in section 2031.240(b) requires that a privilege log be verified.

The Court is empowered to conduct an *in camera* review of documents to assess whether a privilege against disclosure is properly asserted where, after an “initial assessment of the facts,” it is still unclear from the privilege log that the “dominant purpose of the relationship is ‘one of attorney-client.’” (*League of California Cities v. Super. Ct.* (2015) 241 Cal. App. 4<sup>th</sup> 976, 989.)

With regard to emails, the Court will assess the attorney-client privilege based on the email sent to counsel seeking legal advice or the email from counsel providing advice, and any attachments included with those emails. An “assertion that each separate e-mail stands as an independent communication is inaccurate. What is communicated with each e-mail is the text of the e-mail and all the e-mails forwarded along with it.” (*United States v. ChevronTexaco Corp.* (N.D. Cal. 2002) 241 F. Supp. 2d 1065, 1074 n.6.)

That said, an otherwise non-privileged document does not itself become privileged because it is attached to a communication seeking or providing legal advice. Assuming a document is otherwise responsive to a request, if it came earlier in time, the non-privileged email or document ought to be produced on its own.



## B. Analysis

Plaintiff's CPRA request is directed at obtaining information relating to CalPERS's reported value of an asset and the actual value of that asset. He asked for "[a]ny 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." (Petition at 11.)

CalPERS expressed concerns about the breadth of Plaintiff's CPRA request as framed. Its Managing Director for Real Assets explains that Plaintiff's:

request for all records from January 2019 to January 13, 2020 that show any change in valuation of CalPERS Real Assets would require CalPERS to search an enormous volume of documents. Specifically, it would involve searching for and reviewing financial statements that are confidential to CalPERS's [general partners]; draft and final appraisals; and emails, memoranda, or other communication[s] containing any information reflecting past or anticipated performance of Real Assets investments, many of which relate to CalPERS's internal discussions on investment-related and/or policy decisions.

(Corr Decl., filed 8/18/21, at ¶ 26.)

Counsel for CalPERS met and conferred with counsel for Plaintiff in order to focus the CPRA request. (See Gov't Code § 6253.1(a)(1), (3).) Among other things, CalPERS notes the CPRA request was limited to over-valued assets, with a "market value ... lower than reported," rather than assets that went up instead of down. (Opp. Br., filed 8/18/21, at 2.) The parties all note that real asset valuation can be notoriously difficult, and that values may materially fluctuate up and down (e.g., in response to the pandemic), but reach different conclusions about whether that means CalPERS is reporting inflated values, overly-conservative undervaluing assets, or something in between. (*Id.*)

Counsel for Plaintiff worked to narrow the scope of the request to certain "legacy" real estate assets. (Motion for Judgment, filed 7/28/21, at 7.) During the hearing on the merits, the Court participated in that process, proposing that CalPERS provide further information concerning the general partner(s) at issue.

After the October 5 hearing, CalPERS provided an amended privilege log to Petitioner and to the Court. In his sur-reply, Petitioner argues that the Court should not consider the log because the log is not verified.

The Court disagrees with Petitioner. Section 2031.240(b) of the Code of Civil Procedure does not require that a privilege log be verified. It stands to reason; California law does not require that a client sign his or her attorney's briefs either. Interrogatory responses or responses to document requests require verification of the underlying facts described in the

responses by the party under penalty of perjury; they are also signed by counsel. A privilege log, like a memorandum of points and authorities or other brief, typically concerns legal contentions. Given standards of professional conduct, the Court usually takes it as a given that counsel is accurately describing the underlying documents in the log as to which counsel is representing a privilege applies to shield the documents from discovery.

The point of a privilege log is to allow Petitioner and the Court to assess whether or not a document is appropriately withheld from production under the CPRA or whether instead the Court should order its release. Refusing to consider an amended privilege log in the present context based on the lack of a verification would not be in the public's interests.

After much back and forth between the parties as they hashed out the scope of Plaintiff's CPRA request, the core dispute between the parties now appears to be whether CalPERS is allowed to withhold documents relating to investment in real estate under Section 6254.26. Plaintiff argues that Section 6254.26 does not apply to real estate investments. (Plaintiff's Post-Hrg. Statement, filed 11/10/21, at 2; see also Plaintiff's Mot. for Judgment, filed 7/28/21, at 9.) The parties also dispute whether CalPERS may withhold any documents as trade secrets and whether it has made an adequate showing to withhold various emails based on the attorney-client privilege.

**1. "Alternative Investments" in "Alternative Investment Vehicles"  
(Gov't Code § 6254.26)**

During the October 5 hearing on the writ, the Court asked CalPERS to provide an update of its privilege log. The Court proposed that CalPERS provide additional information to better allow Plaintiff and the Court to assess whether a document related to an "alternative investment" held by an "alternative investment vehicle" under section 6254.26. CalPERS revised its privilege log. It seeks to apply section 6254.26 to shield from disclosure due diligence documents concerning investments in real assets under management by an entity called the CIM Group. (Log Category Nos. 2, 4.) It also applies that section to shield from disclosure "confidential information from quarterly and annual financial statements of alternative investment vehicles" (Log Category No. 1 in the redacted "Nav@Market" entries)(see Corr Decl. at ¶34), and emails that "discuss due diligence materials with respect to CalPERS's real asset investments, and CalPERS's investment strategies." (Log Category No. 3.)

Effective in 2017, the California Legislature created a new exception to the CPRA that directly impacts CalPERS's obligation to disclose information about a category of its investments. As noted above, Section 6254.26 requires CalPERS to disclose key information concerning its "alternative investments." Beyond those disclosures, however, CalPERS need not disclose other information about those "alternative investments."

One might reasonably argue that CalPERS ought not to be investing in vehicles that are not entirely transparent to the public. Such a rule would probably reduce CalPERS' rate of return. But, if the economic crisis that led to the 2008 melt-down have taught us anything, it is

that full transparency of investments with low returns may well be better than marginal transparency of a profoundly risky investment with high ones. One might also wonder whether investment managers would make exceptions for public funds rather than lose access to all that money. That said, given the failure of the federal government to accomplish meaningful securities regulation, even in the aftermath of 2008, one might understand a Legislator's desire to participate in the returns (if not value) generated by the more exotic investment vehicles still permitted under the law.

Speculation about the wisdom of its policy decisions aside, the Legislature attempted to strike a balance in its new statute. Section 6254.26 attempts to balance the public interest in transparency with the desire for CalPERS to remain competitive as an investor in connection with evolving modes of investment. The Legislative History of section 6254.26 describes, "investment opportunities are in great jeopardy because the alternative investment funds have begun to reject investments from public institutional investors due to the risk of disclosure of information they consider confidential and proprietary but that they provide to the public institutional investors in the course of doing business." (Plaintiff's RJN Ex. A at 4.) Section 6254.26 "is intended to quell the concerns of the alternative investment community about the disclosure of information about them and their business, where that disclosure could cause them to lose their competitive advantage." (*Id.* at 5.)

In its revised privilege log, CalPERS disclosed that investments discussed in a number of the documents withheld under the PRA related to investments managed by the CIM Group, which is a general partner/external investment manager. Generally, they relate to three funds: CIM Infrastructure Fund L.P., CIM Urban REIT LLC, and CIM Fund III L.P. CalPERS repeats its argument that CIM Group is managing an alternative investment vehicle, and notes that CalPERS made the disclosures about those investment vehicles in its 2018-2019 Annual Investment Report with values of "approximately \$315.7 million, \$247.6 million, and \$336 million, respectively."

Plaintiff appears to agree that CalPERS made an annual disclosure regarding the investment managed by CIM Group (Plaintiff's Post-Hrg. Statement at 2), but argues that more is required under the PRA. According to Plaintiff, CIM Group primarily manages real assets. Plaintiff contends that "real assets" are not "alternative investments" under the Government Code, and so documents relating to the assets under management by CIM Group ought to be produced.

The existence of exotic investment vehicles that appear to qualify as "alternative investment vehicles" is a matter of public record. For example, Special-Purpose Acquisition Companies, or "SPACs," are increasingly used to acquire private companies and many other types of investment, including real estate. The SPACs themselves can then become public companies (or not) depending on the purpose of the SPAC and its controlling shareholders. According to CalPERS, "These are exactly the types of complex alternative investment funds that CIM manages." (CalPERS Response, filed 11/17/21, at 2.)

More specifically, CalPERS's Managing Investment Director for Real Assets offers:

Beyond traditional investments in publicly traded stocks and bonds, public pension funds also invest in a variety of alternative investments. Broadly understood, an alternative investment in any other asset beyond stocks and bonds, including investments in private companies, distressed and mezzanine debt, real estate, and infrastructure. In order to pay promised benefits to members and beneficiaries, public pension funds such as CalPERS must be able to have access to and invest in alternative assets.

(Corr Decl., filed 8/18/21, at ¶ 5.)

Focusing on information about the "legacy" assets that Plaintiff seeks in his narrowed CPRA request, CalPERS explains:

"Legacy" asset is a term that is often used within CalPERS to refer to assets that do not conform to CalPERS's current investment strategies. Whether an asset is "legacy" or not is independent of that asset's risk category. For example, an asset may be low risk (core) but not conform to CalPERS's current investment strategies ("legacy"). Another asset might be high risk (opportunistic) but conform to CalPERS's current investment strategies (non-"legacy"). Thus, it is not true that "non-core" assets are equivalent to "legacy" assets."

(Corr Decl., filed 8/18/21, at ¶ 17.)

The Court finds that the Legislature has not drawn a bright line that real estate investments are never exempt from disclosure under Section 6254.26 of the Government Code. Depending on how they are held, real estate investment can qualify as alternative investments held by alternative investment vehicles. Nothing about the plain language of the statute or the legislative history suggests otherwise.

The Court finds that the documents withheld under Log Category Nos. 2 and 4 fall within the scope of the protections provided by Section 6254.26. These are due diligence materials relating to funds managed by CIM Group and that qualify as "alternative investments" in "alternative investment vehicles" under the Government Code. (Gov't Code § 6254.26(a)(1).) Similarly, Log Category No. 5 is a powerpoint presentation that reflects information obtained from due diligence reports (Gov't Code § 6254.26(a)(1)), and annual and quarterly statements, of alternative investment vehicles. (*Id.*, § 6254.26(a)(2).)

**2. Trade Secrets As "Official Information"  
(Civil Code § 3426.1 and Evidence Code § 1040)**

CalPERS contends that Items 2, 3, and 5 on its Privilege Log should not be disclosed because they include confidential trade secrets. Those secrets are a blend of confidential information of third-party managers of alternative investment vehicles and CalPERS confidential information concerning its investment strategies. (Corr Decl. at ¶ 38-39, 41-42.)

Plaintiff contends that CalPERS is improperly invoking the Uniform Trade Secrets Act ("UTSA") to shield documents from discovery. As noted above, CalPERS does point to the definition of "trade secret" found in section 3426.1 of the Civil Code. Plaintiff argues that "release under the CPRA 'shall be made pursuant to the law in effect' when the [CPRA] was passed in 1984." (Plaintiff's Reply, filed 9/1/21, at 6.)

Plaintiff's argument is based on an improper application of section 3426.7(c) of the Civil Code. That section of the UTSA provides:

This title does not affect the disclosure of a record by a state or local agency under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Any determination as to whether the disclosure of a record under the California Public Records Act constitutes a misappropriation of a trade secret and the rights and remedies with respect thereto shall be made pursuant to the law in effect before the operative date of this title.

(Civ. Code § 3426.7(c).)

Section 3426.7(c) protects California agencies from lawsuits against them for trade secret misappropriation based on their disclosure of records. It does not place boundaries on the use of the definition of a "trade secret" in connection with deciding whether the public interest is served by retaining the documents at issue under Government Code section 6255(a) and the related balancing provisions of the (somewhat confusingly-named) "official information" privilege set out in Evidence Code section 1040(b)(2). In other words, section 3426.7(c) simply means that an entity like CIM Group could not sue CalPERS for trade secret misappropriation under the UTSA based on CalPERS's compliance with Plaintiff's CPRA request.

The Court finds that the public interest and the interests of justice favor "preserving the confidentiality of the information" as compared to "the necessity for disclosure." (See Evid. Code §1040.) The risks of disclosure of confidential information disclosed to CalPERS by the general partners/managers of alternative investment vehicles include that those vehicles would cease working with CalPERS or stop providing detailed disclosures to it. (Corr Decl. at ¶ 38.) The risks of disclosure of confidential information concerning CalPERS's investment strategies would allow parasitic third party market participants to use those strategies to their benefit and to CalPERS's detriment (*e.g.*, using CalPERS's strategies against it to maximize the parasitic third

party investor). (Corr Decl. at ¶ 39, 46.) Using more-graphic and colloquial Wall Street language, disclosing that an investor has a particular investment strategy could also allow a third party to effectively rip that investor's face off (to borrow a phrase made famous by Michael Lewis in *Liar's Poker*).

### 3. Attorney-Client Privilege in CalPERS Emails

Plaintiff takes issue with whether CalPERS has done enough in its privilege log to describe emails withheld from disclosure on the basis of the attorney-client privilege. In a number of instances, Plaintiff contends that emails sometimes include non-privileged documents as part of a longer thread that may also include privileged communications. From Plaintiff's perspective, CalPERS should produce the non-privileged email or document buried in the thread. Plaintiff asks the Court to conduct an *in camera* review to assure itself that CalPERS's invocation of the privilege is appropriate.

For the most part, the Court finds that CalPERS has done enough to establish that the "dominant purpose" of a communication is to seek or provide legal advice and so is protected by the privilege. An *in camera* review is not appropriate with respect to those documents. (See *League of California Cities*, 241 Cal. App. 4<sup>th</sup> at 989.) As to a limited number of documents, however, the Court agrees it needs to see the document to understand the basis for the privilege. The Court identifies those documents by Privilege Log entry in its Order above, so that CalPERS can lodge those documents for further *in camera* review.

Petitioner raises concerns that at least two documents on CalPERS' log, entries 104 and 105, include "Robert Depree," who Petitioner believes is an employee of CIM (based on an online bio on the CIM Group "leadership" website. (Plaintiff's Post-Hearing Reply, filed 11/18/21, at ¶ 3 [citing <https://www.cimgroup.com/about/leadership/robert-dupree>].)

The Court agrees that including a third party would eliminate the attorney-client privilege. But, CalPERS properly invokes section 6254.26 to withhold email discussing "due diligence materials" relating to alternative investment vehicles. (Log Category No. 3.) This explains why Depree would be included on log entries 104 and 105.

The Court's item-by-item analysis is found in the "Summary" below.

### 4. Summary

Consistent with the discussion above, the Court finds that Category Nos. 2, 4, and 5 are properly withheld under Government Code Section 6254.26 and under the balancing test set out in Evidence Code Section 1040 and Government Code Section 6255. The redacted information in the "Nav@Market" portion of the spreadsheet in Category No. 1 is properly redacted under Section 6254.26.

The Court finds that CalPERS properly redacted the “Portfolio” and “CUSIP” categories of the spreadsheet in Category No. 1 under the balancing test set out in Evidence Code Section 1040 and Government Code Section 6255. The “Portfolio” column “refers to the particular bank account associated with the investment and is unrelated to CalPERS’s core/value-add/opportunistic risk classification.” (Corr Decl. at ¶ 35.) CalPERS explains that the “CUSIP”:

is a nine character identifier for a particular security. The first six characters identify the issuer of the security, the seventh and eighth characters identify the type of security, and the ninth character is a check digit to ensure the first eight digits are accurate.... [A]t least some CUSIP numbers for *public* securities are available online. But private assets (like those in this spreadsheet) do not have a standardized CUSIP number. The CUSIP column here refers to an artificial CUSIP – an identifier required and created by CalPERS’s custodial banks’ systems to track assets. The artificial CUSIP is not part of the standardized CUSIP system for public securities.

(Corr Decl. at ¶ 35.) Given these descriptions, the “Portfolio” and “CUSIP” would be of no real value to the public. Further, there are concerns that disclosing the number could present some form of security risk to the extent that the number relates to CalPERS’s custodial banks’ systems.

The Court reaches a different conclusion for the “AREIS ID” column of the Category No. 1 spreadsheet. CalPERS explains that “an asset’s “AREIS ID” ... is a private identifier assigned by a CalPERS internal database, the Automated Real Estate Investment System (referred to as ‘AREIS’).” (*Id.*) There is no reason to believe the AREIS ID, while a “private identifier,” is at all sensitive. Disclosure of the identifier could permit Plaintiff to formulate more-specific CPRA requests to the extent he is attempting to understand non-confidential information concerning CalPERS’s real assets and how those assets have been valued.

Category No. 6 has not been the subject of significant discussion, but the documents in that category remain at issue. (See Plaintiff’s Reply at 12.) They apparently relate to a 2019 closed session of the CalPERS Board. CalPERS indicates that the documents relate to Category No. 2 in the privilege log. (Opp. Br. at 9.) If so, then the documents may be protected under Section 6254.26. But, there is insufficient information in the record for the Court to make that determination. At this point, the lack of information makes it necessary for the Court to review the Category No. 6 documents *in camera*.

The Court makes the following findings with regard to the emails and documents identified in Category No. 3 of the Privilege Log:

PRIV001-008, PRIV009-015, and PRIV016-033 – These emails seek legal advice “from counsel relating to CalPERS’s options with respect to certain CalPERS’s investments,” and include a “summary of legal advice already received.” The description is sufficient to identify the basis for the assertion of privilege. The fact that counsel weighs in to respond in the middle of the

thread simply reflects the nature of email communications and does not mean that the earlier emails are not privileged.

PRIV034-042 – The first document in this thread is described as an “email relating to CalPERS’s options in light of its legal rights and obligations with respect to certain CalPERS’s investments.” While this appears to trigger a privileged conversation, it is not clear whether the initial email is itself privileged. The Court will inspect it.

PRIV043-046 and PRIV047-050 – These email threads begin with the ambiguously-described PRIV034. Since CalPERS explains that “[i]t does not make sense to consider this email in isolation,” the Court will review the threads *in camera*.

PRIV051-071, 073-76, 079-096 – These emails are duplicates.

PRIV072 – This email is “following up” on a thread tracing back to the ambiguous PRIV034 and so the Court will review it.

PRIV077-078 – These emails are between counsel and relate to providing opinions based on investment options given CalPERS’s legal obligations.

PRIV097-099 – These documents appear to be privileged.

PRIV100-103 – These documents appear to reflect legal advice in connection with developing a “plan of action,” and so appear to be privileged.

PRIV104-105 – These documents appear to be communications with a general partner in an alternative investment vehicle. CalPERS argues elsewhere in its briefing that such communications are protected from disclosure under section 6254.26, though the log itself and CalPERS’s Response to Plaintiff’s Post-Hearing Statement, filed November 17, 2021 (at 6), do not repeat this argument. The Court will not find a waiver of the section 6254.26 argument and so will not compel disclosure of these documents.

PRIV106-108 – The email thread with the alternative investment vehicle manager is forwarded to legal counsel in order to obtain legal advice. The privilege appears to apply to this thread.

PRIV109-114 – These emails are duplicative of PRIV104-108. The additional email is between legal counsel and identifies information “relevant to CalPERS’s options with respect to certain investments.” The privilege appears to apply to this thread.

PRIV115-119, 122-127, and 130-138 are duplicates.

The remaining emails not discussed above appear to be privileged based on the descriptions in the revised CalPERS privilege log and the Court need not review them *in camera*.



## V. THE AUGUST 17, 2020 CLOSED SESSION CLAIMS

### A. Applicable Law

The public meeting requirement was a game-changing achievement of the government reform movement of the Progressive Era after the turn of the last century. We presume that meetings of California state bodies will be open and public. Article I, Section 3 of the California Constitution requires public meetings to protect “the right of access to information concerning the conduct of the people’s business,” and so provides 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).)

The Bagley-Keene Act implements the constitutional directive. “[A]ny interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations” of Bagley-Keene. (Gov’t Code § 11130(a).) Of course, CalPERS is a California public body. (Gov’t Code §§ 11121(a); 20090.) Closed sessions of California state bodies are appropriate in a number of instances, which are delineated by statute. (Gov’t Code §§ 11123(a); 11132.) A few of those narrow exceptions to the public meeting requirement (see *Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4<sup>th</sup> 904, 917), are relevant here.

First, CalPERS may hold closed sessions when discussing employment and performance evaluation topics. Specifically:

Nothing in this article shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing.

(Gov’t Code 11126(a)(1).) The personnel exception is intended “to permit free and candid discussions of personnel matters by a ... government body.” (*Travis v. Board of Trustees* (2008) 161 Cal. App. 4<sup>th</sup> 335, 342.)

Second, closed sessions are used to discuss pending litigation. The Government Code provides:

Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation.

(Gov't Code § 11126(e)(1).) The attorney-client privilege takes on special meaning in connection with this exception from the public meeting requirement. The Government Code explains:

For purposes of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated. This subdivision is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article. For purposes of this subdivision, litigation shall be considered pending when any of the following circumstances exist:

(A) An adjudicatory proceeding before a court, an administrative body exercising its adjudicatory authority, a hearing officer, or an arbitrator, to which the state body is a party, has been initiated formally.

(B)(i) A point has been reached where, in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body.

(ii) Based on existing facts and circumstances, the state body is meeting only to decide whether a closed session is authorized pursuant to clause (i).

(C)(i) Based on existing facts and circumstances, the state body has decided to initiate or is deciding whether to initiate litigation.

(ii) The legal counsel of the state body shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to paragraph (1), the memorandum shall include the title of the litigation. If the closed session is pursuant to subparagraph (A) or (B), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the state body prior to the closed session, if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.25.

(iii) For purposes of this subdivision, "litigation" includes any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.

(iv) Disclosure of a memorandum required under this subdivision shall not be deemed as a waiver of the lawyer-client privilege, as provided for under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

(Gov't Code § 11126(e)(2).)

Third, the CalPERS Board may hold closed sessions when discussing a limited set of issues relating to key personnel, including its Chief Investment Officer. Section 11126(g) provides in relevant part:

This article does not prevent either of the following:

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 Public Employees' Retirement System.

(Gov't Code § 11126(g).)

CalPERS must record the topics discussed during the closed session, and decisions made during the session, in a minute book. (Gov't Code § 11126.1.) Where there is a question about whether or not a public entity is permitted to discuss a matter in closed session, that question is reviewed by a Court, including via an *in camera* review of documents maintained under Bagley-Keene to address just such a possibility. (Gov't Code § 11130(c)(3) & (4).)

## **B. Analysis**

After some debate relating to whether information provided to Plaintiff by an alleged whistle-blower about the topics discussed at the August 17, 2020 could provide a legal basis for a finding of good cause to believe a violation of Bagley-Keene has occurred for purposes of section 11130(c)(3) of the Government Code, the parties agreed that the Court should review the August 17, 2020 closed hearing transcript *in camera*. The transcript was mis-filed and briefly became available to the public until the Court re-sealed it. During that time, a member of the public obtained a copy of the transcript. Through that source, the transcript remains available to the public.

After reviewing the transcript, and without regard to the fact that someone has made the transcript publicly available as a result of the mis-filing, the Court concludes that the closed session should not have been closed.

### **1. Appointment, Employment, Performance, and Removal (Section 11126(a)(1))**

Plaintiff argues that the Court should not consider whether the August 17, 2020 meeting could be closed under Section 11126(a)(1) because employment issues relating to the Chief Investment Officer fall under the more-specific Section 11126(g). The Court disagrees and will consider both exceptions. Both Sections materially overlap. That said, Section 11126(a)(1) does not appear to carve out any particular subset of employees. Nor does Section 11126(g)

indicate that the protections under Section 11126(a)(1) are not also applicable to Board discussions about the CIO.

The agenda for the August 17, 2020 closed session indicated that the Board would hear the “Chief Executive Officer’s Briefing on Performance, Employment, and Personnel Items.” (Jelincic Decl., filed 7/28/21, at ¶ 50 & Ex. F.) While this opaque description suggests that someone thought section 11126(a)(1) might be a basis for closing the meeting, further thought needed to be given before closing it.

On August 5, 2020, Mr. Meng resigned as the CalPERS Chief Investment Officer. Conflict of interest issues appeared to motivate his resignation. (See Jelincic Decl. at ¶ 52 & Ex. G.) No one at the August 17 closed session had a copy of a performance evaluation for the CIO. It does not objectively appear that the Board intended to discuss his performance. He was not being appointed or hired/employed, and he was not being dismissed. Again, Mr. Meng had just resigned. Objectively, Section 11126(a)(1) could not be the basis for closing the meeting.

CalPERS argues that the August 17, 2020 meeting was properly closed under Section 11126(a)(1) to discuss “the Chief Executive Officer’s oversight and implementation of policies and safeguards.” (CalPERS Opp., filed 8/18/21, at 10 [quoting Complaint Ex. A.]) While perhaps someone thought the Board might have such a discussion, it did not happen. The transcript reflects a general policy discussion about conflicts of interest, procedures, and processes. The CEO is responsible for implementation of some of those policies and procedures, but the discussion during the closed meeting was more general. The CEO was not singled out for a performance evaluation, and the discussion was about policy not performance. Simply put, the August 17, 2020 meeting was not about whether and how the CEO and/or CIO had done (or not done) a good job.

## **2. Pending Litigation (Section 11126(e))**

Nor was pending litigation a reason to hold a closed session. The Board was clearly concerned about the possibility of future litigation; at one point, a Board member indicates that they expect “everyone” to be sued in the aftermath of Mr. Meng’s departure. But, a general sense of dread of the possibility of litigation is not a basis to close a meeting of a state agency.

No one had filed any lawsuit and no adjudicative matter was yet pending (it is unclear whether one has ever been filed other than this case). There is no indication that the Board or its counsel had formed an actual legal opinion that a “point has been reached where, in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body.” (Gov’t Code § 11126(e)(2)(B)(i).) Further, the Code requires a legal opinion from counsel, and the opinion “shall include the existing facts and circumstances on which it is based.” (Gov’t Code § 11126(e)(2)(C)(ii).) If counsel ever wrote such a memorandum, as CalPERS indicates (Supp. Opp. Br., filed 9/17/21, at 6 n.2), no one ever gave it to the Court.

### 3. Special Exceptions Relating to the CalPERS CIO (Section 11126(g))

As explained above, Bagley-Keene includes a number of exceptions specific to CalPERS's relationship to key executives, including its Chief Investment Officer. (Gov't Code § 11126(g).) After reviewing the transcript, the August 17, 2020 closed discussion does not fall under these exceptions. As noted above, the Board was not discussing Mr. Meng's "recruitment, appointment, employment, or removal." (*Id.*) Again, Mr. Meng had recently resigned as the CIO.

Based on this Court's review of the transcript, the primary purpose of the closed session appears to have been to have a wide-ranging discussion of existing CalPERS conflict of interest rules, procedures, and processes. Those included requirements relating to Form 700 conflict disclosures, which are required of all public employees (including the undersigned). The Board discussed gaps in existing conflict-clearing procedures, and the importance of training and procedures relating to avoiding conflicts of interest.

In short, the Board discussed important matters of policy and procedure that should have been public. Only in a small number of instances did the Board's discussion extend to matters covered by Section 11126(g). Those are found in the closed-session discussion at pages 71:3-72:25, 73:1-74:18 and the executive closed session discussion at pages 104:23-105:9 and 114:1-12.

### 4. Order to Show Cause Re Sealed Materials Re Potential Litigation

The transcript submitted to the Court for in camera review included a number of redactions based on the attorney-client privilege. The Court will not require CalPERS to publicly release copy of the transcript that un-redacts the privileged material. (Gov't Code § 11130(c)(5).) Rather, the Court is ordering CalPERS to file with the Court under seal a copy of the memorandum prepared concerning the potential litigation referenced on page 13 of CalPERS' Opposition Brief. Such a memorandum would have been prepared pursuant to Section 11126(e)(2)(C)(ii) of the Government Code.

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If a memorandum was not prepared under Section 11126(e)(2)(C)(ii) prior to the date of this decision, the Court must order CalPERS to show cause why counsel did not prepare one. Alternatively, CalPERS may produce an unredacted copy of the August 17, 2020 closed session transcript. The procedures relating to the order to show cause, if necessary, are set out in the Orders above.

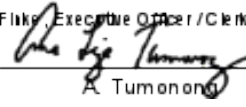
IT IS SO ORDERED.

December 20, 2021



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Michael M. Markman  
Judge, Superior Court of California  
Alameda County

<b>SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA</b>	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	<b>FILED</b> Superior Court of California County of Alameda 12/20/2021
PLAINTIFF/PETITIONER: Joseph John Jelincic, Jr	Chad Finke, Executive Officer / Clerk of the Court By:  Deputy
DEFENDANT/RESPONDENT: California Public Employees' Retirement System Board of Administration	
<b>CERTIFICATE OF MAILING</b>	CASE NUMBER: RG21090970

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

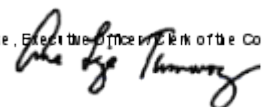
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Dated: 12/20/2021

By:

Chad Finke, Executive Officer / Clerk of the Court  


A. Tumonong, Deputy Clerk

**CERTIFICATE OF MAILING**