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

16 **Joseph John Jelincic, Jr,**

17 Plaintiff,

18 v.

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

21 Defendant.

Case No. RG21090970

**Plaintiff's response to CalPERS's Jan. 21,
2022 submissions**

Judge: Hon. Michael Markman
Department: 14
Hearing Date: 2/22/2022
reservation number R-2295474
case filed 3/8/2021
no trial date set

1 On January 21, CalPERS submitted under seal what it says is the litigation memorandum related
2 to the August 17, 2020 Board meeting. *See* Jan. 21, 2022 Dec. of Joyce Li at 2 ¶ 10. Although
3 Plaintiff Jelincic doesn't have access to this document, all of the evidence he does have indicates that
4 it fails to comply with the Bagley-Keene Act because it was never provided to the Board, much less
5 submitted withing the one-week statutory deadline. *See* Gov. Code § 11126(e)(2)(C).¹ Indeed, it
6 appears that this document was not created until at least 4 months after the meeting, after Jelincic's
7 Counsel sent a demand letter challenging the legality of the closure. This document does not qualify
8 as a litigation memo under Bagley-Keene and has no legal effect.

9 In addition, CalPERS's argument that § 11126.1 protects emails from disclosure is wrong,
10 because that statute by its plain terms applies only to the official "minute book" of the meeting,
11 made by the clerk or other designated officer or employee.

12 **1. The purported litigation memo is a legal nullity.**

13 The Bagley-Keene Act allows State bodies to invoke the attorney client privilege only to shield
14 discussions of "pending litigation when discussion in open session concerning those matters would
15 prejudice the position of the state body in the litigation." § 11126(e)(1). This may include
16 circumstances where a "point has been reached where, in the opinion of the state body on the advice
17 of its legal counsel, based on existing facts and circumstances, there is a significant exposure to
18 litigation against the state body," or when the body itself is considering initiating litigation.
19 § 11126(e)(2)(B)(i), (C). The Board itself must determine that this exposure exists. *See* Plaintiff's
20 Sept. 24, 2021 Supp. Brief at 9. This provision "abrogate[s]" "all other expressions of the attorney
21 client privilege." § 11126(e)(1); *Shapiro v. Board of Directors of Centre City Dev. Corp.*, 134
22 Cal.App.4th 170, 180, (2005) (under Brown Act's parallel provision, "the general rules of attorney-
23 client privilege are *irrelevant* in deciding whether meetings by the [board] may be held in closed
24 session."); *see id.* at 182, 185 (applying rule).²

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26
27 ¹ All section references are to the Government Code unless otherwise indicated.

28 ² Both Acts were amended in 1987 to makes their pending-litigation exceptions consistent. *See* stats
1987 ch. 1320, 1987 Cal. Legis. Serv. 1320 (Senate Bill 200). The provisions now included in
subdivision (e) were originally part of subdivision (q). *See id.*

1 To close a session to discuss pending litigation, “legal counsel of the state body shall prepare and
2 submit to it a memorandum stating the specific reasons and legal authority for the closed session.”
3 § 11126(e)(2)(C)(ii). Unless there is an actual pending case, this “memorandum shall include the
4 existing facts and circumstances on which it is based.” *Id.* “The legal counsel shall submit the
5 memorandum to the state body prior to the closed session, if feasible, and in any case *no later than*
6 *one week after the closed session.*” *Id.* (emphasis added). The use of “shall” means that this duty is
7 mandatory. *See* § 14.

8 CalPERS’s so-called litigation memo fails to comply with these statutory requirements because it
9 was apparently drafted months after the closed session and was never submitted to the Board.

10 Jelincic submitted an interrogatory to CalPERS asking for “all records that were in CalPERS’s
11 possession at any point between September 1, 2020 and December 15, 2020 relating to the August
12 17, 2020 closed meeting,” including but not limited to ... any record showing whether or not a
13 litigation memo was prepared ... under ... § 11126(e).” July 27, 2021 Risher Dec. ISO Mot. for
14 Judgment at 10-11 (Ex. A. at 5) (filed 7/28). In its May 25, 2021 response, CalPERS identified
15 several records but did not list anything relating to a litigation memo. *See id.* at 11. When Plaintiff
16 pointed this out, CalPERS asserted that the memo was created outside of that time period. *See*
17 CalPERS’s Sept. 17, 2021 Supp. Opp. at 6 fn. 2. This means that any existing litigation memo must
18 have been created after December 15, 2021, more than 4 months after the August meeting and after
19 Jelincic’s counsel’s detailed December 16 letter to CalPERS complaining about the closed session.
20 *See* March 8, 2021 Pet. at 8 ¶ 52 & Ex. D. This far exceeds the one-week deadline set by
21 § 11126(e)(2)(C)(ii) and suggests that this memorandum was simply created in response to
22 counsel’s letter (or perhaps the filing of this lawsuit), not based on the facts and circumstances in
23 existence at the time of the meeting itself.

24 Moreover, this belated memo was never presented to the Board. Margaret Brown was a member
25 of the Board from January 2018 until January 15, 2022. *See* Jan. 27, 2022 Dec. of Margaret E.
26 Brown at 2 ¶ 1. (filed herewith). During her time on the Board, Ms. Brown routinely received
27 litigation memos when the Board discussed pending litigation in closed session. *Id.* ¶ 2. These
28 memos were emailed to her along with the rest of the Board. *See id.* Ms. Brown participated in the

1 Board’s August 17, 2020 closed session. *Id.* ¶ 3. But she never received a litigation memo related to
2 this closed session. *Id.* ¶ 4. As far as she knows, no other Board member did, either. *Id.* Moreover,
3 the Board never made any determination at the August 17, 2020 closed session that there was a
4 significant exposure to litigation against it. *Id.* ¶ 5. In Ms. Brown’s opinion, none of the parts of that
5 closed session that CalPERS is now withholding related to pending litigation as that term is used in
6 the Bagley-Keene Act. *Id.* ¶ 6.

7 Apparently recognizing these legal deficiencies, CalPERS suggests that it can “cure any delay”
8 under § 11130.3(a) by drafting a memo months after the meeting. CalPERS’s Sept. 17, 2021 Supp.
9 Opp. at 6 fn. 2. This is wrong, because that provision applies only in cases brought to nullify
10 legislative actions on the grounds that the state body violated § 11123 or § 11125. *See* § 11130.3(a).
11 This case does not seek to nullify any action that the Board took; it simply seeks a declaration that
12 the Board violated the law and access to the discussions that should have been public in the first
13 place. Moreover, nothing in § 11130.3 even suggests that it supersedes other requirements such as
14 the one-week deadline set forth in § 11126(e), the requirement that the Board determine whether a
15 closed session is appropriate before it have the discussion, or the requirement that the memorandum
16 be sent to the Board. To the contrary, the provision that CalPERS cites simply states that “[n]othing
17 in this section” prevents a state body from curing a past violation. § 11130.3(a). It is not a separate
18 grant of authority to cure violations, much less to do so in ways that are contrary to the rest of the
19 Act. This cure provision cannot retroactively cloak the 2020 meeting in privilege.

20 As the Court of Appeal has explained in discussing the Brown Act’s parallel provision, “the
21 purpose of [the pending-litigation exception] is to permit the body to receive legal advice and make
22 litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy
23 decisions.” *Page v. MiraCosta Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 503 (2009). Because
24 CalPERS’s memorandum was not created until months after the meeting and was never distributed
25 to the Board, it fails to comply with the statute and had no legitimate purpose. It is simply a post-hoc
26 part of Defendant’s campaign to hide official discussions at the August closed session. The Court
27 should take this into consideration when deciding whether the Board truly and properly invoked the
28 litigation privilege during the August 2020 closed session and whether the now-redacted parts of the

1 transcript are covered by that exception to the open-meeting requirement. Any parts of the transcript
2 that do not so qualify are not privileged. *See Shapiro*, 134 Cal.App.4th 180. They must therefore be
3 released to the public.

4 **2. The purported litigation memo is not privileged under § 11126(e)(2) or**
5 **§ 6254.25.**

6 CalPERS has moved to seal the memorandum it has submitted based on privilege. But its failure
7 to comply with § 11126(e) means that this memorandum is not privileged under that section or the
8 one it references, § 6254.25.

9 Section 11126(e) states that a litigation memorandum prepared under that statute “shall be
10 exempt from disclosure pursuant to Section 6254.25.” Section 6254.25 in turn makes confidential “a
11 memorandum *submitted to a state body ... by its legal counsel*” under subdivision (e) (former
12 subdivision (q) (emphasis added)).³ § 6254.25 (emphasis added). This protection ends when the
13 litigation does. *See* § 6254.25 (“The memorandum shall be protected by the attorney work-product
14 privilege until the pending litigation has been finally adjudicated or otherwise settled.”).

15 CalPERS’s memorandum was not submitted to the state body, much less submitted within
16 § 11126(e)’s one-week deadline. *See Brown*. Dec. at 2 ¶ 4. It therefore cannot qualify for protection
17 under these provisions. To the extent there is any doubt, Article I § 3(b) of the California
18 Constitution requires that the statute be read in favor of openness.

19 **3. Section 11126.1 does not apply to CalPERS’s emails.**

20 CalPERS argues that the records it has submitted as part of Category 6 are protected by
21 § 11126.1 because they “reflect the substance of topics discussed during closed session.” *See*
22 CalPERS Jan. 21, 2022 response at 2. But that provision does not protect materials that “reflect”
23 closed-session discussions; instead, it protects only the official “minute book” of the meeting, made
24 by the clerk or other designated officer or employee. § 11126.1. The minute book of the August
25 2020 closed session is the recording and transcript of that meeting. *See id.* (“Such minute book may,
26 but need not, consist of a recording of the closed session.”).

27
28 ³ As noted above, the provisions now included in § 11126(e) were originally part of subdivision (q).

1 Item 6 apparently comprises 4 pages of emails. *See* Aug. 18, 2021 Dec. of A. Bennett ISO
2 CalPERS's Opp. at 15 (Ex. 3 p.4). Because these are not the minute book, § 11126.1 does not apply
3 to them. If there were any ambiguity, Article I § 3 would require that it be resolved in favor of
4 transparency. These emails must therefore be made public unless the Court's in camera review
5 shows that they qualify for protection under § 6255. Even if they do, any non-exempt parts must be
6 released. *See* § 6253(a).

7
8 January 27, 2022



Michael T. Risher
Attorney for Plaintiffs

1 **Proof of Service**

2 I am employed in the County of Alameda, State of California and a member of the bar of this court. I
3 am over the age of eighteen years, and not a party to this action. My business address is 2081 Center
4 St. #154 Berkeley CA 94704.

5
6 **1. Plaintiff’s response to CalPERS’s Jan. 21, 2022 submissions**

7 I caused the above document to be served on each of the persons listed below:


| | |
|--|---|
| <p>9 Allyson Bennett Durie Tangri LLP abennett@durietangri.com</p> | <p>Ragesh Tangri Durie Tangri LLP rtangri@durietangri.com</p> |
| <p>12 Joyce Li Durie Tangri LLP jli@durietangri.com</p> | <p>13 Service Durie Tangri LLP service-jelincic@durietangri.com</p> |

14
15
16 by the method marked with a check below:

17 A true and correct copy of the above documents was emailed on January 27, 2022 to
18 the persons listed above at the email addresses listed.

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

21 Executed on January 27, 2022 at Berkeley, California

22 
23 Michael T. Risher