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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT
12 SYSTEM BOARD OF ADMINISTRATION (*aka* CalPERS)

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 OAKLAND DIVISION

16 JOSEPH JOHN JELINCIC, JR.,

17 Plaintiff,

18 v.

19 CALIFORNIA PUBLIC EMPLOYEES'
20 RETIREMENT SYSTEM BOARD OF
ADMINISTRATION,

21 Defendant.

Case No. RG21090970

**DEFENDANT CALPERS'S RESPONSE TO
PLAINTIFF'S JANUARY 27, 2022 FILING**

RESERVATION NO. R-2295474

Date: February 22, 2022

Time: 10:00 a.m.

Dept: 14

Judge: Honorable Michael M. Markman

1 Defendant California Public Employees' Retirement System Board of Administration
2 ("CalPERS") herein provides this brief response to Plaintiff's January 27, 2022 filing regarding
3 CalPERS's January 21, 2022 submissions.

4 On January 21, 2022, CalPERS submitted certain documents for the Court's *in camera* review,
5 pursuant to the December 20, 2021 Order Granting Judgment and Issuing Writ of Mandate ("Writ
6 Order"), which granted in part and denied in part Plaintiff's Petition for Writ of Mandate.

7 On January 27, 2022, Plaintiff filed a response to CalPERS's *in camera* submissions, which
8 included argument on two issues: (1) CalPERS's litigation memorandum related to the August 17, 2020
9 closed session Board meeting; and (2) CalPERS's exemption claims under the Public Records Act
10 ("PRA") for the records identified in Category 6 of CalPERS's Third Amended Log of Exempt
11 Documents. CalPERS addresses both issues briefly below.

12 **A. Litigation Memorandum**

13 First, Plaintiff argues that the litigation memorandum was never submitted to the Board, based on
14 a declaration from former Board member Margaret Brown. Pl.'s Resp. to CalPERS's Jan. 21, 2022
15 Submissions at 3-4. Ms. Brown swears that, as a Board member, she would routinely receive litigation
16 memoranda related to closed session discussions via email and "did not receive any litigation memo
17 related to [the] August 17, 2020 closed session." Brown Decl. ISO Pl.'s Resp. to CalPERS's 1/21/2022
18 Submission ¶¶ 2, 4. Ms. Brown's averment is incorrect. The August 17, 2020 memorandum was in fact
19 submitted to the Board, including Ms. Brown. On April 1, 2021, the litigation memorandum was
20 uploaded to CalPERS's "Diligent Boardbooks" system ("Diligent"). Declaration of Pam Hopper
21 submitted herewith ("Hopper Decl.") ¶ 2. Diligent is a software product that facilitates the distribution of
22 materials, among other functions, and by which CalPERS regularly distributes materials to Board
23 members. *Id.* ¶ 1. That same day, an email was sent to all Board members, including Ms. Brown,
24 notifying them that the memorandum could be accessed on Diligent. *Id.* ¶ 2 & Ex. A; *see also*
25 Declaration of Eric Asai submitted herewith ("Asai Decl.") ¶ 2 & Ex. 1.

26 Second, Plaintiff asserts that the litigation memorandum itself is not privileged because it was
27 untimely submitted to the Board. Pl.'s Resp. to CalPERS's Jan. 21, 2022 Submissions at 5. This theory
28 was addressed in the parties' prior briefing and considered by the Court:

1 Plaintiff also argues that CalPERS failed to prepare a litigation
2 memorandum, pursuant to section 11126(e)(2)(C)(ii). (Reply at 16.)
3 Plaintiff is wrong: CalPERS did prepare a litigation memorandum, *but just*
4 *not within the time period responsive to Plaintiff's interrogatory*
5 *response*. (Li Decl. ¶ 10 [Plaintiff's interrogatory sought "*records that*
6 *were in CalPERS's possession* at any point *between* September 1, 2020
7 and *December 16, 2020*".]) In any event, *CalPERS cured any delay here*.
8 (See Cal. Gov't Code § 11130.3(a) ["Nothing in this section [regarding
9 judicial determination that an action by a state body is null and void] shall
10 be construed to prevent a state body from curing or correcting an action
11 challenged pursuant to this section.].) *Regardless, it does not follow, and*
12 *Plaintiff does not argue, that failure to meet this procedural requirement*
13 *means CalPERS's privilege claims are improper or waived.*

14 Def. CalPERS's Suppl. Br. in Opp. to Pl.'s Mot. for Judgment and Writ at 6 n.2 (emphases added). If
15 Ms. Brown's declaration is intended to convey that she did not receive the memo before (or shortly after)
16 the August 17 meeting, that fact is undisputed—but also irrelevant.

17 Third, Plaintiff re-argues the merits of CalPERS's privilege claims as to portions of the August 17
18 closed session transcript. Pl.'s Resp. to CalPERS's Jan. 21, 2022 Submissions at 4-5. The Court already
19 addressed those claims and determined that "[t]he Court will not require CalPERS to publicly release[]
20 [a] copy of the transcript that un-redacts the privileged material." Writ Order at 21.

21 **B. Category 6 Documents**

22 Plaintiff argues that the Category 6 documents are not exempt from disclosure under the PRA,
23 despite reflecting the substance of topics discussed during an uncontested closed session, because they
24 are themselves not the "minute book" referenced in Cal. Gov't Code § 11126.1. Pl.'s Resp. to
25 CalPERS's Jan. 21, 2022 Submissions at 5-6. This too was already briefed by the parties and considered
26 by the Court. *See* Def. CalPERS's Reply ISO App. to File Document Under Seal at 1-2 ("Although the
27 Board Member Record is not CalPERS's minute book, it is also a 'record of topics discussed' at the
28 closed session (albeit a biased record, *see* Def. Supp. Opp. at 12-13) and should be kept confidential
pursuant to § 11126.1. Otherwise, any closed session discussion could be made public simply by
disseminating information through an informal record of the closed session, as opposed to the minute
book, rendering § 11126.1 meaningless.").

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On February 3, 2022, I served the following documents in the manner described below:

6 **DEFENDANT CALPERS'S RESPONSE TO PLAINTIFF'S JANUARY 27, 2022**
7 **FILING**

8 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through
9 Durie Tangri's electronic mail system from mrubalcaba@durietangri.com to the email
10 addresses set forth below.

11 On the following part(ies) in this action:

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26 I declare under penalty of perjury under the laws of the State of California that the foregoing is
27 true and correct. Executed on February 3, 2022, at San Francisco, California.

28 
Mary Ann Rubalcaba