

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Karl Olson (SBN 104760)
kolson@ramolson.com
RAM & OLSON LLP
555 Montgomery Street, Suite 820
San Francisco, CA 94111
Tel: 415-433-4949
Fax: 415-433-7311

Attorneys for Petitioner

ENDORSED
FILED
Superior Court of California
County of San Francisco

JUL 16 2010

CLERK OF THE COURT
BY: WESLEY RAMIREZ
Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

FIRST AMENDMENT COALITION,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent.

No. **DPF-10-510552**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF MANDATE
UNDER THE CALIFORNIA PUBLIC
RECORDS ACT (Government Code
sections 6258 and 6259)**

Date: **AUGUST 31, 2010**
Time: **9:30 a.m.**
Place: **Dept. 302**

TABLE OF CONTENTS

1

2 I. INTRODUCTION..... 1

3 II. FACTS AND PROCEDURAL HISTORY 2

4 III. THE BURDEN IS ON CALPERS TO JUSTIFY NON-DISCLOSURE.
 5 EXEMPTIONS FROM DISCLOSURE ARE CONSTRUED NARROWLY.
 6 NONE OF THE EXEMPTIONS RELIED UPON BY CALPERS JUSTIFY
 7 NON-DISCLOSURE. 4

8 A. Burden on Public Agencies to Justify Non-Disclosure. 4

9 B. None of the Exemptions From Disclosure Cited by CalPERS Apply. 5

10 1. Alleged Promises That CalPERS Wouldn't Disclose Details of the
 11 Disastrous Investment Do Not Defeat Disclosure..... 5

12 2. Government Code Section 6254.26, Dealing With Venture Capital
 13 Funds, Does Not Defeat Disclosure of Real Estate Investment
 14 Documents..... 6

15 3. CalPERS' Claim of "Trade Secrets" Is Bogus. Losing \$100
 16 Million Is Not a "Trade Secret." 8

17 4. CalPERS' Reliance Upon Government Code Section 6255, the
 18 "Catch-All" Exemption, Fails. There Is an Overwhelming Public
 19 Interest in Knowing How and Why CalPERS Lost Hundreds of
 20 Millions of Dollars, Particularly in Light of Recent Revelations
 21 About Conflicts of Interest and Self-Dealing at the Top Levels of
 22 CalPERS..... 10

23 a. Overwhelming Interest in Disclosure of How Public Money
 24 Spent..... 10

25 b. No Public Interest in Non-Disclosure 11

26 5. CalPERS' Reliance Upon the "Official Information Privilege" Is
 27 Misplaced. Evidence Code Section 1040 Requires a Balancing
 28 Test Like Government Code Section 6255, and the Balance Tips
 Sharply in Favor of Disclosure..... 13

IV. RESPONDENT SHOULD BE ORDERED TO PREPARE A LIST OF
 WITHHELD DOCUMENTS. 14

V. THE COURT SHOULD CONDUCT AN *IN CAMERA* REVIEW 15

VI. CONCLUSION 15

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases

California State University, Fresno Assn. v. Superior Court
(2001) 90 Cal. App. 4th 810..... 10, 14

CBS, Inc. v. Block
(1986) 42 Cal. 3d 646..... 13

International Federation of Professional and Technical Engineers v. Superior Court
(2007) 42 Cal. 4th 319.....passim

Register Division of Freedom Newspapers v. County of Orange
(1984) 158 Cal. App. 3d 893..... 5

San Diego Union v. City Council
(1983) 146 Cal. App. 3d 947..... 11

San Gabriel Tribune v. Superior Court
(1983) 143 Cal. App. 3d 762.....passim

State Board of Equalization v. Superior Court
(1992) 10 Cal. App. 4th 1177..... 14

Uribe v. Howie
(1971) 19 Cal. App. 3d 194..... 9

Statutes

Cal. Const. art. I, section 3(b)(2)..... 4

Cal. Const., art. I, section 3(b)(1)..... 4

Evidence Code Section 1040..... 13, 14, i

Government Code section 6250 4, 10

Government Code section 6252(e)..... 4

Government Code section 6253.3 5

Government Code Section 6254.26..... 6, 7, 8, i

Government Code Section 6255..... 10, 13, 14, i

Government Code section 6259 15

1 **I. INTRODUCTION**

2 This Petition seeks to shed light on how the scandal-ridden California Public Employees'
3 Retirement System lost all of its \$100 million investment in an East Palo Alto apartment
4 complex.

5 The Attorney General of California has recently sued two former CalPERS officials who,
6 as consultants to hedge funds, private equity funds and real estate developers, received more than
7 \$50 million in fees for steering CalPERS' investment of pension assets to their clients' deals,
8 many of which have performed poorly. CalPERS' ill-fated East Palo Alto investment, involving
9 rent-regulated apartments, has also been much criticized because of the developer's strategy of
10 ousting low-rent tenants in order to obtain the higher rents permitted on vacant units, which were
11 apparently needed to finance the development's huge debt.

12 The documents at issue here may shed considerable light on the factors that came to bear
13 on CalPERS' decision to make the East Palo Alto investment. Was this an instance of "crony
14 capitalism" in which CalPERS' fiduciary duty to retirees was blinded by the desire to please
15 former CalPERS officials? And what did CalPERS know, at the time of its investment, about the
16 real estate partnership's controversial business strategy? The public won't know the answers to
17 these questions unless the documents at issue here are made public.

18 The California Supreme Court recently declared, "Openness in government is essential to
19 the functioning of a democracy." *International Federation of Professional and Technical*
20 *Engineers v. Superior Court* (2007) 42 Cal. 4th 319, 328. The Supreme Court in *IFPTE*
21 emphasized the "strong public interest in knowing how the government spends its money." (*Id.*
22 at 333.) Public access makes it possible for members of the public "to expose corruption,
23 incompetence, inefficiency, prejudice and favoritism." (*Ibid.*, internal quotations omitted.) Here,
24 CalPERS' disastrous \$100 million investment was at best an example of incompetence, and at
25 worst outright corruption and favoritism to former CalPERS officials who shared their bounty
26 with current CalPERS officials. The public has an overwhelming interest in knowing what went
27 wrong. This Petition should be granted.

1 **II. FACTS AND PROCEDURAL HISTORY**

2 Petitioner First Amendment Coalition (hereafter "FAC") is a section 501(c)(3) non-profit
3 organization headquartered in San Rafael, California dedicated to safeguarding access to
4 information for the public and to free speech and free press rights. On January 13, 2010, FAC's
5 executive director, Peter Scheer, wrote a Public Records Act request to CalPERS' general
6 counsel, Peter Mixon, requesting the Private Placement Memorandum and Partnership
7 Agreement in connection with CalPERS' investment in an East Palo Alto apartment complex,
8 Page Mill Properties II. A copy of Mr. Scheer's request is attached as Exhibit A to the
9 accompanying Petition for Writ of Mandate.

10 On January 27, 2010, CalPERS denied the request in a letter from its staff counsel, Javier
11 Plasencia, who took the position that the documents requested were exempt on various grounds.
12 A copy of Mr. Plasencia's response is attached as Exhibit B to the Petition for Writ of Mandate.

13 On February 24, 2010, petitioner's counsel, Karl Olson, wrote a letter to Mr. Plasencia
14 which (a) requested that CalPERS reconsider its position on FAC's first request, and (b)
15 supplemented First Amendment Coalition's request by requesting additional public records from
16 CalPERS related to the Page Mill Properties investment. A copy of Mr. Olson's February 24,
17 2010 letter is attached as Exhibit C to the Petition for Writ of Mandate.

18 On March 4, 2010, Mr. Plasencia wrote to Mr. Olson, stating that, "The appropriate real
19 estate program staff is currently reviewing your request to determine which documents we have
20 and are subject to disclosure under the Public Records Act. We estimate that this review will be
21 completed in approximately two weeks" (i.e., by March 18). A copy of Mr. Plasencia's March 4
22 letter is attached as Exhibit D to the Petition for Writ of Mandate.

23 Thereafter, petitioner's counsel called Mr. Plasencia in late March, to check on the status
24 of the Public Records Act request. Mr. Plasencia assured Mr. Olson that records would shortly
25 be produced. When Mr. Plasencia did not comply with this deadline, Mr. Olson called Mr.
26 Plasencia again on April 5, 2010. Petitioner's counsel wrote again on May 12, 2010 in a last-
27 ditch effort to obtain records without litigation (Exhibit E to Petition for Writ of Mandate).

28 On May 20, 2010, CalPERS finally produced some documents, and it confirmed that it

1 had received no distributions from its \$100 million investment in Page Mill Properties. But it
2 refused to disclose the names of investors, other than CalPERS, in Page Mill Properties II, and it
3 refused to disclose the private placement memorandum, the partnership agreement signed by
4 CalPERS, business records provided to CalPERS by the general partner, real estate valuations of
5 the properties, and documents related to CalPERS' decision to invest. (See Exhibit H to Petition
6 for Writ of Mandate responses 3 and 13.) The public is thus left in the dark as to why the
7 nation's largest public pension fund invested \$100 million in a fund which has returned nothing
8 at all.

9 CalPERS' investment in Page Mill Properties II has been the subject of great public
10 interest and controversy. On February 23, 2010, the *Wall Street Journal* reported, "Calpers took
11 a hit last year when its investment in Manhattan's Peter Cooper Village and Stuyvesant Town
12 apartment complex collapsed. But Stuyvesant Town wasn't the huge pension fund's only foray
13 into real-estate investments that involved ousting low-rent tenants." The *Journal* reported that
14 CalPERS invested \$100 million in the Page Mill Properties II project in East Palo Alto in 2006,
15 and that CalPERS had partnered with firms that have bought and converted rent-regulated
16 properties not just in East Palo Alto but also in New York City neighborhoods, including Harlem
17 and Manhattan's Upper East Side. A copy of the *Wall Street Journal's* article is attached as
18 Exhibit F to the Petition for Writ of Mandate.

19 Page Mill Properties isn't CalPERS' only ill-fated foray into real estate in recent years.
20 Starting in 2001, CalPERS both expanded its real estate portfolio and, in order to boost
21 investment returns, adopted aggressive investment strategies that subjected the pension fund to
22 ever greater degrees of risk. To make matters worse, CalPERS accelerated its over-leveraged
23 real estate investments at the peak of the market in 2005-07, producing mammoth losses. Peter
24 Scheer Decl., ¶ 5.

25 This Petition, then, seeks to shed light on CalPERS' disastrous real estate investments and
26 to what extent the misguided, and possibly conflict-ridden strategies underlying them,
27 contributed to losses which the taxpayers will end up bearing.

1 **III. THE BURDEN IS ON CALPERS TO JUSTIFY NON-DISCLOSURE.**
2 **EXEMPTIONS FROM DISCLOSURE ARE CONSTRUED NARROWLY. NONE**
3 **OF THE EXEMPTIONS RELIED UPON BY CALPERS JUSTIFY NON-**
4 **DISCLOSURE.**

5 The Public Records Act embodies the principle that, "Openness in government is
6 essential to the functioning of a democracy." *IFPTE, supra*, 42 Cal. 4th at 328. As the Supreme
7 Court held in *IFPTE*, "Implicit in the democratic process is the notion that government should
8 be accountable for its actions. In order to verify accountability, individuals must have access to
9 government files. Such access permits checks against the arbitrary exercise of official power and
10 secrecy in the political process." *Id.* at 328-29.

11 Government Code section 6250, the preamble to the Public Records Act, declares,
12 "access to information concerning the conduct of the people's business is a fundamental and
13 necessary right of every person in this state." That principle is now enshrined in the California
14 Constitution, as a result of the voters' 83 percent approval of Proposition 59 in 2004: "The people
15 have the right of access to information concerning the conduct of the people's business, and
16 therefore, . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal.
17 Const., art. I, section 3(b)(1), cited in *IFPTE*, 42 Cal. 4th at 329).

18 **A. Burden on Public Agencies to Justify Non-Disclosure.**

19 The records sought here are indisputably "information relating to the conduct of the
20 people's business under Government Code section 6252(e), involving as they do the spending of
21 \$100 million in public money. Accordingly, "The burden is on the agency maintaining the
22 records to demonstrate that the record in question is exempt." *IFPTE, supra*, 42 Cal. 4th at 329,
23 337. CalPERS cannot meet that burden.

24 The California Constitution, in accordance with the case law, requires that any alleged
25 exemptions from mandated disclosure under the Public Records Act must be narrowly construed.
26 Article I, section 3(b)(2) of the Constitution provides, "A statute, court rule, or other authority,
27 including those in effect on the effective date of this subdivision, shall be broadly construed if it
28 furthers the people's right of access, and narrowly construed if it limits the right of access."
Here, none of the alleged exemptions from disclosure cited by CalPERS apply, and CalPERS

1 cannot meet its burden of justifying non-disclosure.

2 Here, the interest in disclosure is at its apex, because the spending of government money
3 is involved: “It is difficult to imagine a more critical time for public scrutiny of its governmental
4 decision-making process than when the latter is determining how it shall spend public funds.”
5 *IFPTE, supra*, 42 Cal. 4th at 334. Here, petitioner seeks to find out how the nation’s largest
6 pension fund decided to spend \$100 million on a risky real estate project at a time when
7 unfunded pension liabilities are a major public concern.

8 **B. None of the Exemptions From Disclosure Cited by CalPERS Apply.**

9 CalPERS has cited a number of alleged exemptions from disclosure. None of them apply.

10 **1. Alleged Promises That CalPERS Wouldn’t Disclose Details of the**
11 **Disastrous Investment Do Not Defeat Disclosure.**

12 First, CalPERS argued that its Private Placement Memorandum with Page Mill Properties
13 -- one of the documents at issue -- cannot be produced because it agreed with Page Mill to keep
14 the document confidential. But Government Code section 6253.3, in accordance with prior case
15 law, makes clear that a government agency’s assurance of confidentiality cannot create an
16 exemption from disclosure.¹ “[Assurances] of confidentiality are insufficient in themselves to
17 justify withholding pertinent public information from the public.” *San Gabriel Tribune v.*
18 *Superior Court* (1983) 143 Cal. App. 3d 762, 776. “We conclude that assurances of
19 confidentiality by the County regarding the settlement agreement are inadequate to transform
20 what was a public record into a private one.” *Register Division of Freedom Newspapers v.*
21 *County of Orange* (1984) 158 Cal. App. 3d 893, 909.

22 Accordingly, any assurances by CalPERS to Page Mill Properties, its partner in the
23 disastrous investment of \$100 million in public funds that went down the drain, that it could
24 hide the Private Placement Memorandum or other documents from the public do not turn these
25 public records into private records.

26 _____
27 ¹ Government Code section 6253.3 provides, “A state or local agency may not allow
28 another party to control the disclosure of information that is otherwise subject to disclosure
pursuant to this chapter.”

1 2. **Government Code Section 6254.26, Dealing With Venture Capital**
2 **Funds, Does Not Defeat Disclosure of Real Estate Investment**
3 **Documents.**

3 CalPERS has also invoked Government Code section 6254.26 as grounds for non-
4 disclosure of some documents. Once again, CalPERS is mistaken.

5 Government Code section 6254.26 was enacted following lawsuits in this Court and
6 others against CalPERS and the University of California pension fund. These suits, brought
7 under the Public Records Act, resulted in increased disclosure by CalPERS and UC concerning
8 the investment performance of venture capital funds and hedge funds in which public pension
9 assets were invested, as well as the fees paid by CalPERS to those venture capital and hedge
10 funds. The purpose of section 6254.26 was to codify these new disclosure obligations (sections
11 6254.26(b)(1)-(9)) while simultaneously exempting from disclosure certain narrow categories of
12 competitively sensitive information (sections 6254.26(a)(1)-(6)). The Legislature certainly did
13 not intend to give public pension funds *carte blanche* to lose hundreds of millions of dollars
14 while keeping the public in the dark about those losses as CalPERS now seeks to do.

15 Section 6254.26's limited exemption from disclosure applies only to "alternative
16 investments." Section 6254.26(a). The term "alternative investment" is defined as: "an
17 investment in a *private equity fund, venture fund, hedge fund, or absolute return fund.*" Section
18 6254.26(c)(1)(emphasis added). Conspicuously absent from this list are investments in real
19 estate.

20 If the Legislature had meant to include real estate — an investment category accounting
21 for a bigger share of CalPERS' assets than all the other named categories combined — it would
22 have said so. Section 6254.26, both in its requirements for disclosure and its exemption from
23 disclosure, is addressed to non-traditional investments of a kind that are relatively new to the
24 investment portfolios of public pensions. Real estate investments, however, are hardly novel and
25 have been part of public pension funds' investment strategies for decades.

26 Section 6254.26(a) tracks CalPERS' own internal organization. Venture capital, hedge
27 fund, absolute return (which is a subset of hedge funds), and private equity portfolios are
28 managed and reported together as CalPERS' "Alternative Investment Management Program"

1 (AIM). Real estate holdings are a separate investment program.

2 Section 6254.26 specified which records regarding “alternative investments” in which
3 public investment funds invest should and should not be disclosed. Section 6254.26(c)(1) defines
4 “alternative investment” to mean “an investment in a private equity fund, venture fund, hedge
5 fund, or absolute return fund.” Notably absent from the definition of “alternative investment” is
6 any reference to a real estate investment. The omission of real estate funds from the definition of
7 “alternative investments,” when venture funds and hedge funds are included, is significant,
8 because ““if the Legislature intends a general word to be used in its unrestricted sense, it does not
9 also offer as examples peculiar things or classes of things since those descriptions then would be
10 surplusage.”” (*IFPTE, supra*, 42 Cal. 4th at 342.)

11 Similarly, section 6254.26(c)(2) defines “alternative investment vehicle” to mean a
12 limited partnership, limited liability company, “or similar legal structure through which the
13 public investment fund invests in portfolio companies.” Again, there is no reference to
14 investments in real estate, and the term “portfolio companies” is a term of art describing the
15 investments made by venture capital funds: for example, a venture capital fund will invest in a
16 start-up company in “stealth mode,” whose existence and prospects may not be publicly known.
17 Again, the definition of “alternative investment vehicle” and the reference to “portfolio
18 companies” simply does not fit a real estate investment.

19 Likewise, section 6254.26(c)(3) defines “portfolio positions” as “individual portfolio
20 investments made by the alternative investment vehicles.” That definition simply does not fit a
21 real estate investment.

22 Nothing in section 6254.26 calls for withholding all the details of a disastrous investment
23 like the one at issue here. While section 1(d) of Statutes 2005 chapter 258 stated that “funds risk
24 being excluded from participation in certain alternative investments,” nothing in either the
25 language or the spirit of section 6254.26 states that CalPERS should be encouraged to squander
26 public money on bad investments, or that it should be allowed to withhold details of investments
27 gone bad.

28 Indeed, the Legislative findings accompanying section 6254.26(e) make clear the

1 legislative mandate that the public must be able to monitor the spending of public money.
2 Section 1(e) of Statutes 2005 chapter 258 states, "It is also the intent of this legislation to allow
3 the public to monitor the performance of public investments; for public bodies to avoid payment
4 of excessive fees to private individuals or companies; and for the public to be able to know the
5 principals involved in management of alternative investment funds in which public investment
6 funds have invested so that conflicts of interest on the part of public officials can be avoided.
7 This legislation is not intended to reverse the general presumption of access and openness of the
8 California Public Records Act and subdivision (b) of Article I of the California Constitution."

9 Nothing in either the letter or the spirit of section 6254.26 allows CalPERS to withhold
10 the documents sought in petitioner's Public Records Act requests. Real estate is not an
11 "alternative investment" and in any event none of the categories of records specified in section
12 6254.26(a) as being exempt from disclosure are at issue here. This Petition should be granted.²

13 **3. CalPERS' Claim of "Trade Secrets" Is Bogus. Losing \$100 Million Is**
14 **Not a "Trade Secret."**

15 CalPERS claimed in its denial of petitioner's initial Public Records Act request that it

16
17 ² Section 6254.26(a) provides an exemption for certain categories of materials: (1) due
18 diligence materials that are proprietary to the public investment fund or the "alternative
19 investment vehicle"; (2) quarterly and annual financial statements of the "alternative investment
20 vehicles"; (3) meeting materials of the alternative investment vehicles; (4) records containing
21 information regarding the "portfolio positions" in which alternative investment funds invest; (5)
22 capital call and distribution notices; and (6) alternative investment agreements and related
23 documents. Section 6254.26(b), on the other hand, mandates disclosure of the following
24 categories of information regarding "alternative investment vehicles": (1) name, address and
25 vintage year; (2) dollar amount of commitment by the public pension fund; (3) cash contributions
26 made by pension fund; (4) dollar amount of cash distributions received by pension fund; (5)
27 dollar amount of cash distributions received by pension fund plus remaining value of investment;
28 (6) net internal rate of return; (7) investment multiple; (8) management fees and costs paid; (9)
dollar amount of cash profit received by pension fund. It is apparent from the terminology used -
- such as "alternative investment vehicles," "portfolio positions," "net internal rate of return" and
the like -- that section 6254.26 does not apply to real estate investments. But even if it did, the
vast majority of the records sought here would not be exempt from disclosure under section
6254.26(a). Moreover, a public agency such as CalPERS has an obligation to produce
disclosable public records to the extent possible and to assist members of the public in locating
public records. (Government Code section 6253 [reasonably segregable portions of records must
be produced even if a portion of a document is exempt from disclosure] and 6253.1 [public
agency must assist member of the public to identify records and information responsive to Public
Records Act requests, must describe information technology and physical location of records, and
must provide suggestions for overcoming any practical basis for denying access to the records or
information sought].)

1 could withhold records because some of the information sought was a “trade secret” which
2 “derives economic value, both actual and potential, from such information not being generally
3 known to the public or to other persons who can obtain economic value from its disclosure or
4 use.” (CalPERS January 27, 2010 letter at 3.) CalPERS’ “trade secret” claim -- in a Public
5 Records Act case seeking records of how CalPERS lost \$100 million -- borders on the frivolous.

6 The Courts have consistently taken a dim view of public agencies’ assertions of “trade
7 secrets,” and indeed there is no specific exemption in the Public Records Act for trade secrets.
8 We are aware of no reported cases which have upheld a public agency’s “trade secret” claim.
9 The Court of Appeal in *Uribe v. Howie* (1971) 19 Cal. App. 3d 194 concluded that courts must
10 engage in a “balancing of interests” when a “trade secret” is asserted: “An absolute privilege for
11 all trade secrets could amount to a legally sanctioned license for unfair competition or fraud and
12 enable the continued use of dangerous materials by a party asserting the privilege.” (*Id.* at 206.)
13 The Court found that the Public Records Act “allow[s] nondisclosure of public records
14 containing trade secrets only when to do so would not tend to conceal fraud or otherwise work
15 injustice.” Applying that test, the court concluded that the records at issue in *Uribe* -- pest
16 control spray reports -- did not constitute trade secrets. *Id.* at 208. Similarly, in *San Gabriel*
17 *Tribune, supra*, 143 Cal. App. 3d at 777, the court rejected a city’s argument that a private
18 company’s financial data could be withheld, finding that it “misstates what the public’s interest is
19 as serving the privacy interests of a private contractor, rather than in serving the public’s interest
20 in participating in local government.”

21 CalPERS cannot meet its burden of showing “trade secrets” here. The Public Records
22 Act requests here at issue seek disclosure of records, including CalPERS e-mails, showing how
23 and why CalPERS decided to invest \$100 million in a controversial real estate project in East
24 Palo Alto, and CalPERS’ own internal discussions of the project. There are no “trade secrets”
25 involved in such records, and even if there were, the “balancing of interests” required here tips
26 sharply in favor of disclosure. CalPERS cannot argue that there are any valuable “secrets”
27 involved in its decision to invest \$100 million in a project which tanked and yielded nothing.
28

1 4. **CalPERS' Reliance Upon Government Code Section 6255, the "Catch-**
2 **All" Exemption, Fails. There Is an Overwhelming Public Interest in**
3 **Knowing How and Why CalPERS Lost Hundreds of Millions of**
 Dollars, Particularly in Light of Recent Revelations About Conflicts
 of Interest and Self-Dealing at the Top Levels of CalPERS.

4 CalPERS has also invoked the "catch-all" exemption, Government Code section 6255, as
5 an alleged ground for refusing to produce records about its disastrous investment of \$100 million
6 in the Page Mill development. In its January 27, 2010 letter refusing to disclose records (Exhibit
7 B to Petition), CalPERS argued, "CalPERS cannot justify the release of information that could
8 negatively affect the return on CalPERS' investments."

9 CalPERS' argument in this regard takes a fair amount of chutzpah. CalPERS seems to be
10 arguing that information about how it lost \$100 million is "valuable proprietary information" and
11 that it has "competitors" who are "competing" with CalPERS to lose \$100 million. Such an
12 assertion would seem to defy basic laws of economics, not to mention the pro-disclosure laws
13 governing public records set forth in Government Code section 6250 and article I, section 3(b) of
14 the California Constitution.

15 As mentioned above, "The burden is on the agency maintaining the records to
16 demonstrate that the record in question is exempt." *IFPTE, supra*, 42 Cal. 4th at 337. An agency
17 relying upon section 6255's "catch-all exemption" must show that "on the facts of the particular
18 case the public interest served by not disclosing the record clearly outweighs the public interest
19 served by disclosure." (Govt. Code section 6255(a).) Courts have consistently rejected agencies'
20 reliance upon section 6255, particularly when, as here, agencies have posited "speculative"
21 assertions of harm to their interests. *See California State University, Fresno Assn. v. Superior*
22 *Court* (2001) 90 Cal. App. 4th 810, 835 [rejecting "unsupported statements [which] constitute
23 nothing more than speculative, self-serving opinions designed to preclude the dissemination of
24 information to which the public is entitled"].

25 a. **Overwhelming Interest in Disclosure of How Public Money**
26 **Spent.**

27 The public has an overwhelming interest in knowing how public money is spent. "Public
28 visibility breeds public awareness which in turn fosters public activism, politically and subtly

1 encouraging the governmental entity to permit public participation in the discussion process. It is
2 difficult to imagine a more critical time for public scrutiny of its governmental decision-making
3 process than when the latter is determining how it shall spend public funds.” *IFPTE, supra*, 42
4 Cal. 4th at 334, quoting *San Diego Union v. City Council* (1983) 146 Cal. App. 3d 947, 955.

5 The general public interest in monitoring the spending of public money is enhanced here
6 for several reasons. First, the magnitude of the investment -- \$100 million -- and its disastrous
7 outcome (a total loss) calls for public attention and comment. Second, Page Mill Properties is
8 not CalPERS’ only ill-fated real estate investment. CalPERS also made a mammoth \$1.12 billion
9 investment in the brand-new bedroom community of Mountain House in San Joaquin County
10 near Tracy -- an investment whose value has shrunk to \$200 million in five years, a huge \$920
11 million loss. (See “CalPERS sticks by real estate investment,” *San Francisco Chronicle* May 6,
12 2010, page C-5, attached as Exhibit G to Petition for Writ of Mandate.)

13 Third, CalPERS’ investment in a private real-estate company raises serious questions
14 about conflicts of interest and outside influence. The *San Francisco Chronicle* recently reported,
15 “Attorney General Jerry Brown has sued two former officials of CalPERS for fraud, alleging a
16 system of kickbacks in exchange for outside firms winning a piece of the fund’s lucrative
17 investment portfolio.” “State sues 2 ex-CalPERS officials for fraud,” *San Francisco Chronicle*
18 May 7, 2010, Ex. A to Olson Decl. The pungent aroma of scandal swirling around CalPERS
19 only heightens the need for full public access to CalPERS’ records. As the *Chronicle*
20 commented, “The alleged kickback scheme raises questions about whether CalPERS board
21 members and investment officers acted in the best interests of the state’s pensioners when they
22 made investment decisions for the fund.” (*Ibid.*)

23 There is, accordingly, an overwhelming public interest in full access to records detailing
24 how CalPERS squandered \$100 million on the Page Mill Properties investment.

25 **b. No Public Interest in Non-Disclosure**

26 CalPERS has placed nothing weighty on the other side of the scale. Its January 27, 2010
27 letter denying petitioner’s original Public Records Act request stated, “CalPERS would be
28 jeopardizing its investment and its relationships with its business partners if it gave competitors

1 valuable proprietary information.” (Exhibit B to Petition at 4.) But this assertion makes no
2 sense on these facts: CalPERS invested \$1 00 million in Page Mill Properties and the investment
3 is worth nothing now, so the release of historical information on a valueless investment cannot
4 “jeopardize its investment.” Likewise, CalPERS’ expressed concern about its “relationships with
5 its business partners” places the interests of private contractors over the interests of the public in
6 monitoring the spending of public money.

7 Courts have consistently held that the public’s interest in monitoring the spending of
8 public money outweighs concerns about the effect of disclosure on a private contractor. In *San*
9 *Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d (1983) 143 Cal. App. 3d 762, 777, a
10 seminal Public Records Act case, a city argued that it didn’t have to turn over a disposal
11 company’s financial information which was sought by a newspaper to evaluate the propriety of a
12 rate increase. The Court of Appeal rejected the city’s argument:

13 “Respondent City argues that disclosure will both invade a private company’s
14 privacy interests, as well as having a chilling effect on obtaining information in
15 similar future transactions. It is said that such a threat to future dealings
16 constitutes a sufficient reason to withhold disclosure in the name of the public’s
17 interest. This argument, however, misstates what the public’s interest is as
18 serving the privacy interests of a private contractor, rather than in serving the
19 public’s interest in participating in local government. For these reasons, the
20 withholding of information cannot be justified.”

21 (*Id.* at 777.)

22 Here too, CalPERS’ concerns about its “relationships with its business partners” exalts
23 the interests of private contractors – whose interest is to benefit themselves and their
24 shareholders, not taxpayers -- over the interests of the public. Our concerns are not fanciful. The
25 Attorney General recently sued former CalPERS Chief Executive Officer Federico Buenrostro
26 Jr., claiming he accepted tens of thousands of dollars in gifts and promises of future employment
27 from Alfred Villalobos, a former CalPERS board member turned “placement agent.” The two
28 also traveled together. The Attorney General’s office obtained a court order freezing the assets of
Villalobos and his company, Arvco Capital, to recover more than \$40 million in commissions.
The Attorney General said the court will take control of Villalobos’ 20 bank accounts and all of
his assets, including two Bentleys, two BMWs, a Hummer, art worth more than \$2.7 million and

1 14 properties in California, Nevada and Hawaii. The Attorney General alleged, "Villalobos
2 cultivated, through gifts and gratuities and promises of future employment, close and long-term
3 relationships with Buenrostro . . . [former CalPERS board member Charles] Valdes and current
4 Senior Investment Officer Shahinian with intent to influence them to make investment decisions
5 in favor of the private equity funds Arvco represented." (See Exhibits A and B to Olson Decl.;
6 see Ex. C to Olson Decl., ¶ 61.)

7 The public has every right to know whether CalPERS' "relationships with its business
8 partners" are based upon a desire to generate returns with which to pay retirees' pensions, or
9 whether they are based on a desire to enrich CalPERS insiders or former insiders. The "privacy
10 interests of a private contractor" cannot and do not outweigh the public interest in seeing how and
11 why CalPERS decided to invest \$100 million in an East Palo Alto apartment complex. The
12 withholding of information cannot be justified. As the Court concluded in *San Gabriel Tribune*,
13 *supra*, 143 Cal. App. 3d at 780, "the interests on the part of the [government agency] in not
14 chilling future information-gathering abilities in business transactions, and on the part of the
15 [Company] in jeopardizing competitive advantages, does not outweigh the public's need to be
16 informed of the provision of governmental services contracted on behalf of the residents."
17 CalPERS cannot show that the interest in non-disclosure "clearly outweighs" the interest in
18 disclosure under Government Code section 6255. The Petition for Writ of Mandate should be
19 granted and CalPERS should be ordered to produce the records requested.

20 **5. CalPERS' Reliance Upon the "Official Information Privilege" Is**
21 **Misplaced. Evidence Code Section 1040 Requires a Balancing Test**
22 **Like Government Code Section 6255, and the Balance Tips Sharply in**
23 **Favor of Disclosure.**

23 CalPERS has also claimed that the records requested here are exempt under Evidence
24 Code section 1040, the "official information privilege." (Exhibit B to Petition at 4.) That
25 privilege, however, "must be 'applied conditionally on a clear showing that disclosure is against
26 the public's interest.'" *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 656.

27 The Courts have repeatedly rejected government agencies' assertion of that "privilege"
28 after rejecting the assertion of the "catch-all" exemption of Government Code section 6255. "The

1 weighing process mandated by Evidence Code section 1040 requires review of the same elements
2 that must be considered under section 6255. [Citation omitted.] Therefore, it is consistent with
3 the PRA. Under this privilege, the burden of demonstrating a need for non-disclosure is on the
4 agency claiming the right to withhold the information. [Citation omitted.] Thus, this court's
5 rejection of the claim of exemption under section 6255 on the ground that the public interest
6 weighs in favor of disclosure similarly requires rejection of the claims of exemption under
7 section 6254, subdivision (k) and Evidence Code section 1040." *CBS, supra*, 42 Cal. 3d at 656;
8 see also *California State University Fresno Association, supra*, 90 Cal. App. 4th at 832-34
9 [individuals who purchased luxury suites "entered into the public sphere" and "voluntarily
10 diminished their own privacy interests"]; *San Gabriel Tribune, supra*, 143 Cal. App. 3d at 776
11 [rejecting claim of exemption under Evidence Code section 1040 because "assurances of
12 confidentiality are insufficient in themselves to justify withholding pertinent public information
13 from the public"].

14 CalPERS' claim of exemption under Evidence Code section 1040 fares no better than its
15 assertion of the "catch-all" exemption of Government Code section 6255. As shown above, the
16 public has an overwhelming interest in knowing why CalPERS invested \$100 million in an East
17 Palo Alto apartment complex, and became what some have called a "slumlord" in the process.
18 There is no cognizable public interest in withholding records of this disastrous investment. The
19 Petition should be granted.

20 **IV. RESPONDENT SHOULD BE ORDERED TO PREPARE A LIST OF WITHHELD**
21 **DOCUMENTS.**

22 Respondent has withheld many documents requested by petitioner, offering vague
23 recitations of claimed exemptions. Under these circumstances, if the Court does anything other
24 than order immediate disclosure of all documents requested by petitioner, it should, at the very
25 least, order CalPERS to prepare a list of all withheld documents.

26 In *State Board of Equalization v. Superior Court* (1992) 10 Cal. App. 4th 1177, 1193, the
27 Court of Appeal held that it was proper for a court to order preparation of such a list. In that
28 case, the court held that preparation of an index of 2,100 documents "is a one-time affair and

1 does not involve an unreasonable amount of effort.” (*Id.* at 1192.) The Court held: “Although
2 the Public Records Act does not, like the FOIA, require the maintenance of an index of records
3 available for public inspection and copying, it does not prohibit a court from ordering the
4 preparation of a list of the documents which are sought. Providing such a list is consistent with
5 the language and spirit of the Public Records Act. For these reasons the trial court did not abuse
6 its discretion in ordering the Board to prepare a list of the requested documents.” (*Id.* at 1193.)

7 Here -- where respondent has in entirely conclusory fashion invoked a laundry list of
8 supposed exemptions and refused to produce virtually all requested records -- CalPERS should
9 be required to furnish a list of withheld documents and the supposed exemptions applicable to
10 each. *Id.* at 1193.

11 **V. THE COURT SHOULD CONDUCT AN *IN CAMERA* REVIEW**

12 Government Code section 6259(a) gives the court the power to conduct an *in camera*
13 review of withheld documents by providing, “The court shall decide the case after examining the
14 record in camera. . .” Accordingly, the court should conduct an *in camera* review as to any
15 documents which are not the subject of an immediate disclosure order.

16 **VI. CONCLUSION**

17 CalPERS' investment of \$100 million in a project which has yielded nothing raises
18 significant questions. Those questions are magnified when CalPERS lost \$900 million in another
19 real estate investment, and when the Attorney General has filed serious charges alleging that
20 former CalPERS officials showered kickbacks on insiders to steer investments. There is an
21 overwhelming public interest in access to records showing what went wrong, and only
22 “speculative, self-serving opinions designed to preclude the dissemination of information to
23 which the public is entitled” on the other side of the scale. This Petition should be granted so that
24 the public can see how CalPERS manages the staggering \$210 billion in assets with which it has
25 been entrusted by government retirees, their dependents, California taxpayers and the public
26 generally.

27 Dated: July 16, 2010

By: 

Karl Olson
RAM & OLSON LLP
Attorneys for Petitioner