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ENDORSED
FILED
San Francisco County Superior Court
SEP 14 2010
CLERK OF THE COURT
BY: MARTA VALLEJO
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 FIRST AMENDMENT COALITION,
12
13 Petitioner,
14
15 v.
16 CALIFORNIA PUBLIC EMPLOYEES'
17 RETIREMENT SYSTEM,
18
19 Respondent.

No. CPF-10-510552

~~PROPOSED~~ ORDER GRANTING
PETITION FOR WRIT OF MANDATE
UNDER THE CALIFORNIA PUBLIC
RECORDS ACT

Date: September 14, 2010
Time: 9:30 a.m.
Place: Dept. 302

20 On September 14, 2010, petitioner First Amendment Coalition's Petition for Writ of
21 Mandate under the California Public Records Act ("PRA") came on for hearing in this Court, the
22 Honorable Charlotte W. Woolard. Having read and considered the moving, opposition and reply
23 papers, and the amicus filing by Page Mill Properties, the Court HEREBY ORDERS:

24 The Petition for Writ of Mandate is GRANTED. For the reasons set forth below,
25 respondent California Public Employees' Retirement System ("CalPERS") shall produce all of
26 the records requested in petitioner's Public Records Act requests, Exhibits A and C to the Petition
27 for Writ of Mandate, except those as to which a credible claim of attorney-client privilege can be
28 made and a limited number of documents as to which deliberative process is asserted as set forth
below. As to these documents, CalPERS shall produce a "privilege log" by September 24, 2010,
shall provide the documents identified on that "privilege log" to the Court by September 24,
2010, and the Court shall thereafter conduct an *in camera* review. All other documents shall be
produced by September 24, 2010 and CalPERS' other asserted exemptions are rejected.

1 **I. APPLICABLE LAW**

2 “Openness in government is essential to the functioning of a democracy.” *International*
3 *Federation of Professional and Technical Engineers Local 21 v. Superior Court* (2007) 42 Cal.
4 4th 319, 328 [“*IFPTE*”]. There is a “strong public interest in knowing how the government
5 spends its money.” *Id.* at 333.

6 The burden is on the public agency, CalPERS, maintaining the records to demonstrate
7 that the record in question is exempt. *IFPTE, supra*, 42 Cal. 4th at 329, 337. Statutes shall be
8 broadly construed if they further the people’s right of access, and narrowly construed if they limit
9 the right of access. (Cal. Constitution, article I, section 3(b)(2).)

10 **II. PAGE MILL NOT INDISPENSABLE PARTY**

11 The Court initially rejects CalPERS’ argument that the so-called “Page Mill entities” are
12 indispensable parties for several reasons. First, since the Page Mill entities are not public
13 agencies under Government Code section 6252, they could not have been joined in this Public
14 Records Act proceeding. Second, under Government Code section 6253.3 and prior case law, “A
15 state or local agency may not allow another party to control the disclosure of information that is
16 otherwise subject to disclosure pursuant to this chapter.” It is for the Court to decide whether the
17 records requested are subject to disclosure, not for CalPERS or Page Mill to decide.

18 Third, the Court observes that CalPERS could have submitted a declaration from Page
19 Mill in opposition to disclosure, but it did not. Similarly, Page Mill could have attempted to
20 intervene (although the Court expresses no opinion on whether intervention would be proper), but
21 it did not; rather it simply submitted a short “amicus filing” although it could have submitted a
22 10-page submission in support of its position. Finally, Page Mill’s status is uncertain: the
23 investment project “is now largely defunct,” in CalPERS’ words, and 19 of the 20 limited
24 partners have sued the general partner for fraud. For all of these reasons, the Court concludes
25 that Page Mill is not an indispensable party to these proceedings and that the action should not be
26 delayed or dismissed because it was not joined.

27
28

1 **III. RULINGS ON EXEMPTIONS.**

2 The Court rules as follows on CalPERS' claimed exemptions:

3 **A. Attorney-Client Privilege**

4 The attorney-client privilege does apply in Public Records Act proceedings, but CalPERS
5 has not identified which documents may be subject to that privilege. Not all of the eight inches
6 worth of documents withheld by CalPERS are attorney-client privileged communications.
7 Indeed, on July 9, 2010 – about six months after the initial Public Records Act request –
8 CalPERS' in-house counsel told petitioner's counsel, "I still owe you additional documents, per
9 your request." (Exhibit I to Petition.) He said, "There were many more documents...which I still
10 need to review." (*Ibid.*) It thus appears that the bulk of the withheld documents are not subject
11 to the attorney-client privilege.

12 CalPERS shall, as set forth above, produce a "privilege log" by September 24, 2010,
13 identifying (by date, author and addressee, and subject matter) those documents it claims fall
14 within the attorney-client privilege, and shall produce said documents for *in camera* review by
15 September 24, 2010. CalPERS shall *not* claim privilege as to communications with the attorneys
16 for the partnership (Opp. at 6:15-21), as those documents do not appear to fall within the
17 privilege and CalPERS has said that it "is willing to produce that latter set of documents."

18 **B. No Trade Secrets Established.**

19 The Court rejects CalPERS' claim that it can withhold "documents that were agreed to be
20 confidential." (Opp. at 6.) Assurances of confidentiality cannot convert public records into
21 private records. *San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 775.
22 CalPERS cannot allow Page Mill or another party to control the disclosure of information.
23 Government Code section 6253.3. The Court presumes that the documents in question contain an
24 exception to confidentiality for disclosures required by law; if they do not, they violate the Public
25 Records Act.

26 The burden is on CalPERS to show the existence of a trade secret, and CalPERS has not
27 done so. There is no declaration from anyone at Page Mill, or anyone at CalPERS who was
28 originally involved with this project. The Declaration of Laurie Weir is conclusory and is not

1 addressed to any of the particular documents being withheld.

2 Even if there were any trade secrets involved, a balancing of interests is required. *Uribe*
3 *v. Howie* (1971) 19 Cal. App. 3d 194, 206; Evidence Code section 1060. On the facts of this
4 case, where the entirety of a \$100 million investment was lost, the court finds that the interest in
5 disclosure far outweighs any asserted interest in non-disclosure.

6 **C. “Deliberative Process” and “Official Information” Privileges Tentatively Do**
7 **Not Apply.**

8 CalPERS has invoked the “deliberative process” and “official information” privileges. In
9 each case, the court must conduct a “balancing test” in which CalPERS must show that the
10 interest in non-disclosure “clearly outweighs” the interest in disclosure. In each case, CalPERS
11 appears to fall short but the Court will conduct an *in camera* review on a limited number of
12 documents.

13 “Not every disclosure which hampers the deliberative process implicates the deliberative
14 process privilege. Only if the public interest in nondisclosure clearly outweighs the public
15 interest in disclosure does the deliberative process privilege spring into existence.” *Marylander*
16 *v. Superior Court* (2000) 81 Cal. App. 4th 1119, 1126. In this case, the public interest in
17 disclosure is very high, because, “It is difficult to imagine a more critical time for public scrutiny
18 of its governmental decision-making process than when the latter is determining how it shall
19 spend public funds.” *IFPTE, supra*, 42 Cal. 4th at 333. Moreover, CalPERS’ own consultants
20 have questioned CalPERS’ real estate investments because of high risk and a “less formal
21 investment authorization process.” (Exhibit B to Peter Scheer Declaration filed July 16, 2010.)

22 CalPERS does not appear to meet its burden of showing that any interest in non-
23 disclosure “clearly outweighs” this high public interest in disclosure. Its declarations are
24 conclusory and not addressed to the documents it has withheld. This is not a good case for
25 asserting the interest in non-disclosure, because the investment in question “is now largely
26 defunct, with CalPERS losing the amount it invested.” (CalPERS Opp. at 2:15-16.) The Court
27 also finds that CalPERS’ declarations are, in the words of the First District Court of Appeal,
28 “conclusionary and lacking in helpful specifics.” *In re Providian Credit Card Cases* (2002) 96

1 Cal. App. 4th 292, 305.

2 CalPERS' claim of "official information" is also subject to a "balancing test" and, for
3 reasons set forth above, the Court finds that CalPERS has failed to make "a clear showing that
4 disclosure is against the public's interest." CalPERS' arguments appears to "misstates what the
5 public's interest is as serving the privacy interests of a private contractor, rather than in serving
6 the public's interest in participating in local government." *San Gabriel Tribune, supra*, 143 Cal.
7 App. 3d at 777.

8 The parties have agreed that the Court may conduct an *in camera* review on a maximum
9 of approximately 71 communications (approximately 20-25 documents) pursuant to the timeline
10 set forth in the conclusion.

11 **IV. GOVERNMENT CODE SECTION 6254.26 DOES NOT APPLY**

12 Finally, the Court finds that Government Code section 6254.26 does not apply. The
13 statute refers to investments in a "private equity fund, venture fund, hedge fund, or absolute
14 return fund." (6254.26(a).) Real estate investments are not included within the definition of
15 "alternative investments" even though CalPERS has long invested in real estate. "[I]f the
16 Legislature intends a general word to be used in its unrestricted sense, it does not also offer as
17 examples peculiar things or classes of things since those descriptions then would be surplusage."
18 *IFPTE, supra*, 42 Cal. 4th at 342. Since the court must, under article I, section 3(b)(2) of the
19 California Constitution, construe potential exemptions from disclosure narrowly, the Court finds
20 that section 6254.26 does not exempt records from disclosure here.

21 **V. CONCLUSION**

22 For the foregoing reasons, the Petition for Writ of Mandate is GRANTED. CalPERS is
23 ordered to produce to petitioner the records requested in Exhibits A and C to the Petition for Writ
24 of Mandate by September 24, 2010, with the exception of those documents as to which a credible
25 claim of attorney-client privilege can be made. As to documents which CalPERS claims are
26 subject to the attorney-client privilege, and as to a maximum of approximately 71
27 communications (approximately 20-25 documents), CalPERS shall produce a "privilege log" by
28 September 24, 2010, and CalPERS shall provide the documents identified therein to the Court at

1 the same time, and the Court shall conduct an *in camera* review. CalPERS shall not claim
2 privilege, and shall produce to petitioner on September 24, 2010, as to communications with the
3 attorneys for the Page Mill partnership (Opp. at 6:15-21), or as to any documents as to which no
4 credible claim of attorney-client privilege can be made.

6 IT IS SO ORDERED.

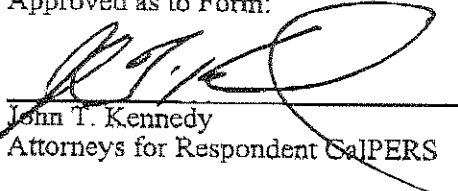
CHARLOTTE WALTER WOOLARD

7 Dated:

8 SEP 14 2010

The Honorable Charlotte W. Woolard
Judge, San Francisco Superior Court

10 Approved as to Form:

11 
12 John T. Kennedy
13 Attorneys for Respondent CalPERS

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