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1 Michael T. Risher (SBN 191627)
 2 Law Office of Michael T. Risher
 2081 Center St. #154
 Berkeley CA 94702
 3 Email: michael@risherlaw.com
 T: (510) 689-1657
 4 F: (510) 225-0941

5 Abenicio Cisneros (SBN 302765)
 6 Law Office of Abenicio Cisneros
 2443 Fillmore St. #380-7379
 7 San Francisco, CA 94115
 707-653-0438
 8 acisneros@capublicrecordslaw.com

9 Attorneys for Plaintiff

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**SUPERIOR COURT OF CALIFORNIA
 COUNTY OF ALAMEDA**

14 **Joseph John Jelincic, Jr,**

15 Plaintiff,

17 v.

18 **California Public Employees' Retirement
 System Board of Administration,**

19 Defendant.

Case No. _____

**Petition for Writ of Mandate and
 Complaint for Equitable Relief
 (Public Records Act; Bagley-Keene Act;
 Code. Civ. Pro. § 526a)**

Judge:
 Department:

- 1 1. The California Public Employee Retirement System (CalPERS) manages hundreds of billions of
2 dollars of public money for California retirees and their families. California law requires that it
3 comply with a number of transparency laws, including laws that apply only to CalPERS. And,
4 given the immense amounts of public money at stake, compliance with these laws is critical.
- 5 2. CalPERS has nevertheless failed to comply with these laws.
- 6 3. After its Chief Investment Officer resigned in 2020 following accusations that he had violated
7 conflict-of-interest laws, the CalPERS Board of Administration held an improperly closed
8 meeting about the situation, in violation of the Bagley-Keene Act's open-meeting
9 requirements. It has since refused to release records relating to that meeting, in violation of the
10 California Public Records Act (CPRA).
- 11 4. CalPERS has additionally refused to release records relating to its investments that have a market
12 value lower than their reported value, in violation of the CPRA.
- 13 5. Plaintiff brings this suit to enforce his CPRA requests, to obtain a declaration that CalPERS has
14 violated the Bagley-Keene Act, and to require CalPERS to comply with this law in the future.

15 **1. Parties**

- 16 6. Plaintiff Joseph John (JJ) Jelincic, Jr., is a former member of the CalPERS Board of
17 Administration and past president of the California State Employees Association (CSEA), a
18 labor group representing 140,000 active and retired state employees. He was a CalPERS
19 investment officer from 1986 - 2019. As a retired State employee, he is a member of CalPERS
20 and receives a pension from CalPERS.
- 21 7. Jelincic continues to monitor the activities of CalPERS by attending Board meetings. He relies
22 upon the Board's agendas to determine what meetings to attend.
- 23 8. Jelincic is a resident of Alameda County who is assessed and pays taxes that fund CalPERS,
24 including income, sales, and property taxes. In addition to his direct interest in this matter, he
25 has taxpayer standing as well as public-interest-mandamus standing.
- 26 9. CalPERS is a California State agency that manages pension benefits for more than 2 million
27 California public employees, retirees, and their families. Defendant CalPERS Board of
28

1 Administration (“Board”) is the governing body of CalPERS. It is subject to the open-meeting
2 requirements of the Bagley-Keene Open Meeting Act as well as the requirements of the
3 California Public Records Act.

4 10. CalPERS is funded in part by California tax dollars. As the Legislative Analyst’s Officer
5 recently explained, “CalPERS state pensions are funded by three sources: investment gains,
6 employer contributions from the state, and employee contributions.... State employee salaries
7 are paid by the General Fund or other funds, depending on the employees’ work. Employee
8 benefits—like pensions—are paid by the same fund as the employees’ salaries.”¹

9 11. In the fiscal year 2019-2020, State employer contributions to CalPERS totaled more than \$9.8
10 billion.² All in all, California taxpayer-funded employers – including State and local agencies,
11 school districts, and charter schools – contributed \$22 billion to CalPERS over that fiscal year.

12 12. Over that same time period, member contributions totaled \$4,901,000.

13 13. In addition, the State makes direct payments to CalPERS from its General Fund and other funds.
14 For example, 2019’s SB 90 appropriated approximately \$2.8 billion of General Fund moneys
15 to CalPERS between 2019 and 2023.³

16 14. CalPERS has billions of dollars in unfunded liabilities – approximately \$59.7 billion as of June
17 30, 2018.⁴ “These pension unfunded liabilities largely are due to (1) historical contributions
18 being below recommended amounts, (2) past actual investment returns being lower than
19 actuaries assumed, and (3) changes to actuarial assumptions.”⁵

20 15. The State will probably have to continue to make direct payments to CalPERS to address these
21 liabilities.

24 ¹ California Legislative Analyst’s Office, *The 2019-20 Budget: The Governor’s Proposed*
25 *Supplemental Pension Payment to CalPERS*, available at <https://lao.ca.gov/Publications/Report/3957>

26 ² CalPERS, *Investment & Pension Funding Facts at a Glance for Fiscal Year 2019-2020*, available
27 at <https://www.calpers.ca.gov/docs/forms-publications/facts-investment-pension-funding.pdf>

28 ³ California Legislative Analyst’s Office, *The 2019-20 Budget: California Spending Plan Debt and*
Liabilities, available at <https://lao.ca.gov/Publications/Report/4106>

⁴ *Id.*

⁵ *Id.*

1 16. The defined-benefit pensions administered by CalPERS are ultimately backed by the public
2 treasury if investment returns, employer contributions, and employee contributions are
3 inadequate to fully fund them.

4 17. CalPERS pays some of its employees enormous amounts of money. Most relevant to this case, in
5 2019 it paid Chief Investment Officer Ben Meng more than \$1.5 million, plus another
6 \$215,000 in additional benefits.⁶ Meng’s 2019 pay and benefits totaled \$1,760,489.96. He was
7 by far the highest-paid California State employee that year.

8 18. CalPERS prepared, owns, and possesses the records at issue in this proceeding.

9
10 **2. Jurisdiction and venue**

11 19. This Court has jurisdiction under Government Code §§ 6258, 6259, Code of Civil Procedure
12 §§ 1060 and 1085, and Article VI section 10 of the California Constitution.

13 20. Venue is proper in this Court. Because the California Attorney General has an office located in
14 Alameda County, any suit against a State agency that may be brought in Sacramento may also
15 be commenced and tried in this Court. Code Civ. Pro. § 401(1). Defendant resides in, and the
16 acts and omissions complained of herein occurred in, Sacramento County. *See* Code Civ. Proc.
17 §§ 393(b), 394, 395(a). The records in question, or some portion of them, are situated in
18 Sacramento County, meaning that suit may be brought in that County. Gov. Code § 6259(a);
19 Code Civ. Pro. § 401(1).

20 **3. Governing law**

21 21. The California Constitution requires that “the meetings of public bodies and the writings of
22 public officials and agencies shall be open to public scrutiny.” Cal. Const. Art. I § 3(b)(1).
23 More specifically, the Bagley-Keene Open Meeting Act requires State agencies such as the
24 Board to conduct their business in public unless a specific legal provision allows it to hold a
25 closed session to discuss certain topics. *See* Gov. Code § 11120, 11132. All recordings of open
26 meetings are open to public inspection. *Id.* § 11124.1(b).

27
28 ⁶ *See* <https://transparentcalifornia.com/salaries/2019/state-of-california/yu-meng/>

- 1 22. Government Code § 11126(a)(1) allows public bodies to hold closed sessions to discuss a range
2 of topics relating to personnel matters. However, this provision does not apply to discussions
3 relating to the CalPERS CIO, which are expressly governed by a more-specific subdivision,
4 § 11126(g)(1). This subdivision applies only to the CEOs and CIOs of CalPERS and of the
5 Teacher’s Retirement Board. As relevant here, this statute allows the Board to meeting in
6 closed session only “when considering matters pertaining to the recruitment or removal of the
7 Chief Investment Officer of ... the Public Employees’ Retirement System.” *Id.* § 11126(g)(1).
- 8 23. When a body such as the Board plans to hold a closed session it must first disclose the nature of
9 the items it will discuss. § 11126.3(a). This must include “the specific statutory authority under
10 which a closed session is being held.” *Id.* § 11125(b). “In the closed session, the state body
11 may consider only those matters covered in its disclosure.” *Id.* § 11126.3(b).
- 12 24. The Bagley-Keene Open Meeting Act allows any interested person to “commence an action by
13 mandamus, injunction, or declaratory relief for the purpose of stopping or preventing
14 violations or threatened violations of [the Act] or to determine the applicability of [it] to past
15 actions or threatened future action by members of the state body or to determine whether any
16 rule or action by the state body to penalize or otherwise discourage the expression of one or
17 more of its members is valid or invalid under the laws of this state or of the United States, or to
18 compel the state body to audio record its closed sessions.” *Id.* § 11130(a).
- 19 25. Under the California Public Records Act, Government Code §§ 6250 *et seq.*, all records
20 “containing information relating to the conduct of the public’s business prepared, owned, used,
21 or retained by any state or local agency” must be made publicly available for inspection and
22 copying upon request, unless they are exempt from disclosure. *Id.* §§ 6253(a) and (b), 6252(e).
23 If documents contain both exempt and non-exempt material, the government must disclose all
24 reasonably segregable non-exempt material. *Id.* § 6253(a).
- 25 26. The CPRA allows “[a]ny person [to] institute proceedings for injunctive or declarative relief or
26 writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or
27 to receive a copy of any public record or class of public records....” *Id.* § 6258.
- 28

1 27. “Whenever it is made to appear by verified petition to the superior court of the county where the
2 records or some part thereof are situated that certain public records are being improperly
3 withheld from a member of the public, the court shall order the officer or person charged with
4 withholding the records to disclose the public record or show cause why the officer or person
5 should not do so. The court shall decide the case after examining the record in camera, if
6 permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties
7 and any oral argument and additional evidence as the court may allow.” *Id.* § 6259(a).

8 28. “The times for responsive pleadings and for hearings in these proceedings shall be set by the
9 judge of the court with the object of securing a decision as to these matters at the earliest
10 possible time.” *Id.* § 6258.

11 **4. The Board’s improperly closed August 17, 2020 meeting and the requests for**
12 **records about that meeting**

13 29. On August 5, 2020, CalPERS Chief Investment Officer Ben Meng resigned from that position
14 following allegations that he had failed to make required financial disclosures. As the New
15 York Times described it, “Mr. Meng resigned after compliance staff noticed that he had
16 personal stakes in some of the investment firms that he was committing CalPERS’s money to,
17 most notably Blackstone. California state officials in that situation are supposed to recuse
18 themselves, but Mr. Meng did not.”⁷

19 30. Five days later, California State Controller and Board member Betty Yee wrote to Board
20 President Henry Jones, raising concerns that Mr. Meng had violated conflict-of-interest laws.
21 This letter noted her deep disappointment “in the actions of former Chief Investment Officer
22 (CIO) Ben Meng and what appears to be a blatant disregard of conflict-of-interest laws and
23 policies.” Controller Yee requested an immediate special meeting to hear about and discuss
24 “potential violation of laws, adequacy of existing policies, safeguards that could prevent a
25

26 ⁷ *Marching Orders for the Next Investment Chief of CalPERS: More Private Equity*, The New York
27 Times (Oct. 19, 2020) available at <https://www.nytimes.com/2020/10/19/business/calpers-pension-private-equity.html>
28

1 recurrence of the situation, and the Chief Executive Officer's oversight and implementation of
2 policies and safeguards.” A copy of this letter is attached to this Petition as Exhibit A.

3 31. The agenda for the Board’s August 17 meeting listed as its sole substantive item the “Chief
4 Executive Officer's Briefing on Performance, Employment, and Personnel Items,” which was
5 to be closed to the public under Government Code §§ 11126(a)(1), (e), and (g)(1).

6 Subdivision (a) (1) allows the Board to discuss certain topics relating to employee
7 performance in closed session. Subdivision (e) allows it to discuss certain matters relating to
8 litigation in closed session, and also requires that a litigation memorandum be prepared if this
9 occurs. The reference to subdivision (g)(1) indicates that the Board was to consider matters
10 relating to the CIO or CEO.

11 32. The official transcript of the brief open session of that August 17 meeting reveals that the
12 President stated that the “purpose the [the closed] meeting is to hear briefing on performance,
13 employment, and personnel items.” President Jones rejected a member’s request that the Board
14 take public comment before moving into closed session. Controller Yee expressed her desire
15 that the Board have a hearing on the issues she had raised in her letter. The Board then went
16 into closed session.⁸

17 33. In that closed session, the Board discussed a number of matters relating to Mr. Meng as well as
18 matters relating to the policy questions raised in Controller Yee’s August 10 letter. In addition,
19 the Board voted to allow its members to review a report relating to the matter. As one news
20 outlet reported, “CalPERS Chief Executive Officer Marcie Frost was questioned by the
21 CalPERS board for four hours in a closed session on what she knew about Meng’s financial
22 disclosures” at this meeting.⁹

23 34. A substantial portion of the meeting was spent discussing matters that were neither properly
24 discussed in a closed meeting nor properly disclosed by the Board in the agenda.
25

26 _____
27 ⁸ See https://www.calpers.ca.gov/docs/board-agendas/202008/full/transcript-boa_a.pdf

28 ⁹ Chief Investment Officer, *California Opens Investigation into Former CalPERS CIO Meng* (Aug. 18, 2020), available at <https://www.ai-cio.com/news/california-opens-investigation-former-calpers-cio-meng/>

- 1 35. The Board did not discuss any pending litigation as defined in Government Code § 11126(e) at
2 the August 17 closed session.
- 3 36. CalPERS legal counsel did not prepare a memorandum under Government Code
4 § 11126(e)(2)(ii) stating reasons and legal authority for closing the August 17 session.
- 5 37. The Board did not discuss any personnel matters relating to any person other than Mr. Meng at
6 the closed session.
- 7 38. The Board did not discuss any personnel matters relating to any person other than those listed in
8 Government Code § 11126(g) in that closed session.
- 9 39. A Board member’s record of the meeting lists 55 numbered topics discussed at this meeting; the
10 majority of those topics had nothing to do with personnel matters or other matters properly
11 discussed in closed session.
- 12 40. These topics included general policy matters relating to compliance, employee education, CIO
13 onboarding, the need for additional staffing, when the Board should be informed of “serious
14 issues,” transparency, and the need to establish policy to govern investigations.
- 15 41. Approximately seven of these topics involved policy discussions relating to California Fair
16 Political Practices Commission Form 700, Statement of Economic Interests, which some
17 CalPERS employees — including the CIO and CEO and members of the Board — must file
18 annually and which are posted on the CalPERS website.
- 19 42. One of these topics indicates that the Board discussed “gotcha articles.”
- 20 43. This topic refers to media coverage of CalPERS.
- 21 44. The Board discussed these topics at the closed session.
- 22 45. The Board held a formal vote at this closed session to authorize its members to read records
23 relating to an investigation of Mr. Meng.
- 24 46. A redacted copy of this document listing the topics discussed is attached to this Petition as
25 Exhibit B. The topics themselves are redacted, other than the words “formal vote” at the end of
26 the last topic. The exhibit is otherwise a true copy of this document.
- 27 47. Plaintiff, Board members, and any other person may lawfully disseminate the unredacted copy of
28 this documents — including the topics discussed — to the public, at least in large part.

1 48. The Board did not reconvene into open session after this closed meeting. It never publicly
2 reported that it had taken any action to dismiss Mr. Meng, as would have been required under
3 Government Code § 11125.2 had the Board taken any such action.

4 49. Defendant has records relating to this meeting in its possession, including a full transcript in
5 audio and/or written form, as well as minutes that include the identities of persons present, the
6 matters taken up by the Board, the general issues discussed, significant procedural motions,
7 and actions taken.

8 50. In September 2020, Plaintiff Jelincic used Defendant's online form to request records relating to
9 this matter under the CPRA. This request noted that "[t]here is much on the public record,
10 including but not limited to the remarks of Marcie Frost and Henry Jones" indicating "that the
11 closed session discussed matters which are not exempted" from the open-meeting
12 requirements. He requested "a copy of the closed session transcript of the August 17, 2020
13 meeting of the Board of Administration," as well as any notices given to any employee under
14 Government Code § 11126(a)(2).

15 51. CalPERS responded by stating that, following a search of its records, it had determined that it
16 either did not have responsive records or that, where it did have records, they were exempt
17 from disclosure. CalPERS therefore refused to provide any records. A copy of this September
18 25, 2020 response letter is attached to this Petition as Exhibit C.

19 52. On December 16, 2020, counsel emailed a 5-page letter to CalPERS on behalf of Mr. Jelincic,
20 explaining why the Board's closure of its August 17 meeting was improper and requesting "all
21 records" relating to that meeting, including any recording or transcript and any records
22 showing whether or not a litigation memorandum was prepared for that meeting. Counsel
23 pointed out that Government Code § 11126(a) does not authorize the Board to discuss matters
24 relating to the CEO or CIO in closed session, and asked that the Board stop relying on this
25 provision when it announces that it will engage in such discussions. A copy of this letter is
26 attached to this Petition as Exhibit D. It was sent to all of the indicated recipients.

27 53. The following week, CalPERS responded to this request. The agency no longer claimed that the
28 August 17 meeting was closed to discuss litigation, but it did maintain that it was properly

1 closed to discuss personnel matters under § 11126(a), (g). It refused to provide any of the
2 requested records. A copy of this December 24, 2020 response letter is attached to this Petition
3 as Exhibit E.

4 54. CalPERS continues to take the position that § 11126(a) authorizes closed-session discussions
5 relating to employment of its CIO .

6 55. For example, the December 1 and 2, 2020, Board agendas listed the following sole item for the
7 closed-session: “1. First Round Interviews for the CalPERS Chief Investment Officer
8 Position.” As authority for closing the session to the public, the agenda listed “Government
9 Code sections 11126(a)(1) and (g)(1)).” As the agenda indicates, the only personnel matters to
10 be discussed at these meetings related to the CIO position.

11 56. The agendas for the December 14 and 16 closed sessions — the “Second Round Interviews for
12 the CalPERS Chief Investment Officer Position”—also listed both 11126(a)(1) and (g)(1)).
13 Again, the only personnel matters discussed at that meeting related to the CIO position.

14 57. The meeting agenda for the Board’s March 2, 2021 Joint Meeting of CIO Subcommittees
15 similarly cites § 11126(a) — along with § 11126(g) — as authorizing the closed meeting. The
16 only personnel matters to be discussed at that meeting relate to the CIO position.

17 58. Copies of these agendas, downloaded from the CalPERS website, are attached to this Petition as
18 Exhibit F.

19 **5. Plaintiff’s request for records relating to inaccurately valued assets**

20 59. As CalPERS explains on its website, it “invests some its money in real assets, meaning real
21 estate, infrastructure, and forestland. These investments are acquired and managed through
22 separate accounts, joint ventures, and commingled funds between CalPERS and investment
23 management firms.”¹⁰ In fiscal year 2019-2020, these real assets comprised some 11.3% of
24 CalPERS \$392.5 billion investment portfolio, meaning they totaled just under \$45 billion.¹¹
25

26
27 ¹⁰ CalPERS *Investment Organization*, available at
<https://www.calpers.ca.gov/page/investments/about-investment-office/investment-organization>

28 ¹¹ CalPERS *Facts at a Glance - Investment & Pension Funding, 2019-20* available at
<https://www.calpers.ca.gov/docs/forms-publications/facts-investment-pension-funding.pdf>

1 60. CalPERS’s real-asset “investments are illiquid and resold at varying rates.”¹² To assign a market
2 value to these investments, CalPERS thus relies upon “unobservable inputs,” meaning that it
3 assigns values to these assets based on its own views and assumptions about what they should
4 be worth, rather than on publicly available information about actual transactions. These inputs
5 include the views of investment managers, appraisals, and benchmark analysis.

6 61. As CalPERS puts it, its estimate of the value of these investments “require management’s most
7 difficult, subjective, or complex judgments, often as a result of the need to make estimates
8 about the effects of matters that are inherently uncertain.”¹³

9 62. In addition, CalPERS may use months-old data to estimate these values.

10 63. These factors can result in considerable difference between the value that CalPERS reports for an
11 asset and the actual value of that asset.

12 64. For example, in June 2020, the CalPERS external auditor reported “an out of period adjustment
13 of \$582,940 thousand to unrealized gain on investments for real assets in the fiduciary funds
14 recorded in the current year statement of revenues, expenses and changes in net position that
15 was related to the uncorrected fair value of real assets investments misstatement from the prior
16 year’s audit.”¹⁴

17 65. In plainer language, this means that CalPERS’s 2018-2019 audit overstated the value of some of
18 its real assets by nearly \$583 million dollars.

19 66. CalPERS contracts with a private firm to manage the appraisal and valuation process of its real-
20 asset investments. The agreement with this contractor requires the firm to provide CalPERS
21 with specified information and documents, including records relating to its internal controls
22 and operating effectiveness at least once a year.

23 67. A CalPERS Office of Audit Services review of the valuation process for real assets in 2018 and
24 2019 found that this contractor had failed to comply with these reporting requirements. The

25 ¹² CalPERS *2019-20 Comprehensive Annual Financial Report Fiscal Year Ended June 30, 2020* at
26 57 available at <https://www.calpers.ca.gov/docs/forms-publications/cafr-2020.pdf>

27 ¹³ CalPERS *Audit Wrap Up, Year Ended June 30, 2020*, available at
28 https://www.calpers.ca.gov/docs/board-agendas/202011/risk/item6a-02_a.pdf at 6 . This draft was
subsequently adopted as the final document.

¹⁴ *Id.* at 7.

1 review concluded that this failure meant that CalPERS may not be able to know whether the
2 contractor had adequate internal controls.¹⁵

3 68. In an attempt to investigate issues relating to the accuracy of CalPERS valuation of assets and its
4 disclosure of misevaluation, Mr. Jelincic requested records from CalPERS in January 2020
5 about the overvaluation of assets. Specifically, he requested “[a]ny records, including but not
6 limited to, documents, analysis, appraisals, notes, minutes and/or recordings, which document,
7 support, suggest, hint or warn [of] a market value lower than reported value for any private
8 asset.”

9 69. CalPERS had and still has records responsive to this request. For example, it has records relating
10 to its 2018-2019 \$583-million-dollar overstatement, including records about its discovery of
11 this error.

12 70. CalPERS refused to provide any of these records. Instead, it claimed that “[a]ny records
13 responsive to” the request would be exempt, citing Government Code §§ 6254.26, 6255, and
14 the trade-secret privilege. A copy of CalPERS January 23, 2020 response letter denying this
15 request is attached to this Petition as Exhibit G.

16 71. Mr. Jelincic wrote back to CalPERS the following day, explaining that the first of these
17 exemptions would not cover CalPERS’s \$38 billion in real assets because “§ 6254.26 deals
18 only with private equity funds, venture funds, hedge funds, or absolute return funds. These are
19 not the only forms of private assets held by the System. Just as an example, the System owned
20 over \$38 billion in real assets as of June 30, 2019.” Mr. Jelincic also wrote that the public
21 interest in disclosure of this information means that § 6255 could not authorize withholding,
22 and that this information could not be considered a trade secret. A copy of Mr. Jelincic’s
23 January 24, 2020 letter is attached to this Petition as Exhibit H.

24 72. On February 11, CalPERS responded, again refusing to release any records, asserting that
25 sections 6254.26 and 6255 exempted these documents and also that “many, if not most, of the
26

27
28 ¹⁵ See CalPERS Office of Audit Services Memorandum on Review of Valuation Process for Real
Assets, Job. No. IA18-027 (March 5, 2020).

1 documents” are protected as trade secrets. A copy of CalPERS’s February 11, 2020 response is
2 attached as Exhibit I.

3 73. Mr. Jelincic replied two weeks later, noting that the CPRA expressly requires agencies to
4 disclose the “dollar amount, on a fiscal yearend basis, of cash distributions received by the
5 public investment fund plus remaining value of partnership assets.” He also explained why
6 some of CalPERS’s asserted reasons for refusing to provide the records are invalid. He closed
7 by reiterating his request for the records. A true copy of this February 23, 2020 letter is
8 attached to this Petition as Exhibit J.

9 74. Mr. Jelincic did not receive any response to this letter. CalPERS has not provided him with any
10 of the requested records.

11 **6. Counts/Causes of Action**

12 **Count One**

13 **(Violation of the CPRA, the Bagley Keene Open Meeting Act, and Cal. Const. Art. I § 3)**

14 75. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

15 76. Defendant possesses records relating to the August 17, 2020 closed session that Plaintiff
16 requested, including a full written or audio transcript, or both.

17 77. Part or all of that meeting should have been conducted in open session because it involved a
18 discussion of matters that cannot lawfully be discussed in closed session.

19 78. The CPRA, Penal Code § 832.7(b), and the California Constitution require the disclosure of the
20 records relating to the parts of that meeting that should have been discussed in open session.

21 79. Respondents’ failure to provide these records violates the CPRA and Article I, § 3 of the
22 California Constitution.

23 **Count Two**

24 **(Violation of the Bagley-Keene Open Meeting Act)**

25 80. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

26 81. Defendant violated this Act at its August 17, 2020 meeting by improperly discussing matters in
27 closed session that should have been addressed in public. *See* Gov. Code §§ 11123, 11132.
28

1 82. Defendant takes the position that Government Code § 11126(a) allows it to hold a closed session
2 to discuss matters relating to the appointment, employment, or evaluation of performance
3 relating to its CIO, or to hear complaints or charges brought against that CIO by another
4 person or employee unless the employee requests a public hearing.

5 83. Plaintiff takes the position that § 11126(a) does not apply to discussions of matters relating to the
6 CalPERS CIO. He believes that such discussions are instead governed by § 11126(g)(1).

7 84. Government Code § 11126(g)(1) allows a closed session to discuss “matters pertaining to the
8 recruitment or removal of the Chief Investment Officer of the State Teachers’ Retirement
9 System or the Public Employees’ Retirement System,” but not does allow closed sessions to
10 discuss other matters relating to the CIO’s employment.

11 85. CalPERS takes the position that all of the August 17 closed session was properly closed.

12 86. Plaintiff takes the position that much of that session should have been conducted in public.

13 87. Defendant takes the position that it was not required to reconvene into open session following its
14 August 17 closed session.

15 88. Defendant takes the position that it is generally not required to reconvene after closed sessions
16 under Gov. Code § 11126.3(f) unless it must make some sort of report regarding that closed
17 session, at least not unless the closed session related to matters covered by § 11126(c)(18). Its
18 practices conform with this position.

19 89. Plaintiff takes the position that Defendant violated this Act at its August 17 meeting by failing to
20 reconvene in open session prior to adjournment and that Defendant must reconvene after every
21 closed session prior to adjournment. *See* Gov. Code § 11126.3(f).

22 **Count Three**
23 **(Violation of the First Amendment, Article I § (3)(b) of the California Constitution, and the**
24 **Bagley-Keene Open Meeting Act)**

25 90. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

26 91. CalPERS Board Governance Policy X(P) prohibits Board members from revealing confidential
27 matters.
28

- 1 92. CalPERS interprets this policy to prohibit Board members from revealing to the public
2 information they learned at a closed session of the Board.
- 3 93. CalPERS takes the position that all of the August 17 closed session was properly closed.
- 4 94. Plaintiff takes the position that at least part of the August 17, 2020 session at issue was
5 improperly closed, because it involved discussions of matters that must be discussed in public
6 under the Bagley-Keene Act and that were not properly noticed on the agenda.
- 7 95. The California Attorney General has opined that, under California open-meeting laws, people
8 may not disclose information they receive in a *properly* closed session, but that the laws’
9 “confidentiality requirements only apply to what is properly discussed in closed session,” not
10 to matters that go beyond what is properly discussed in closed session. 80 Cal. Op. Att’y Gen.
11 231 (1997) fn. 2 and accompanying text.
- 12 96. At least one member of the Board would disclose additional information about what was
13 discussed at the August 17 closed session if this Court were to declare that they could lawfully
14 do so.
- 15 97. Plaintiff and the general public have interests in receiving this information under the First
16 Amendment and Article I §(3)(b) of the California Constitution.
- 17 98. Defendant takes the position that the information redacted from Exhibit H to this Petition — a
18 list of topics discussed at the August 17 closed session — is confidential, and that Board
19 members are prohibited from making it public.
- 20 99. Plaintiff takes the position that this record — including most if not all of the listed topics — is
21 not exempt from disclosure under the CPRA because it involves matters that were not properly
22 discussed in closed session, and that Board members and any other people with access to this
23 record have a right to make this it public, with only limited redactions.

24 **Count Four**
25 **(Unlawful expenditure of public funds in violation of the Bagley-Keene Act)**

- 26 100. Plaintiff incorporates herein by reference the above allegations and Counts, as if set forth in
27 full.
28

1 101. Plaintiff has been assessed and has paid taxes that fund CalPERS within one year before the
2 commencement of this action.

3 102. Unless enjoined, Defendant is and will be expending public funds by refusing to allow persons
4 present at the August 17 closed session to disclose the details of the information presented at
5 that meeting, including information relating to matters that were not properly discussed in the
6 closed session, or by taking action against them for doing so.

7 103. Unless enjoined, Defendant is and will be expending public funds by improperly holding
8 closes sessions to discuss matters that must be discussed in open session.

9 104. Unless enjoined, Defendant is and will be expending public funds by improperly listing
10 Government Code § 11126(a) on its agendas as authority to discuss matters relating to the
11 employment of its CIO.

12 105. For the reasons described in the previous Counts, these expenditures of public funds are
13 unlawful and should therefore be enjoined and declared unlawful under Government Code
14 § 11130(a), Code of Civil Procedure § 526a and the common law.

15 **Count Five**
16 **(Violation of the CPRA and Cal. Const. Art. I § 3)**

17 106. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

18 107. Defendant possesses records that document, support, suggest, hint or warn of a market value
19 lower than reported value for any of its private assets, as Plaintiff requested in January 2020.

20 108. Defendants' failure to provide these records violates the CPRA and Article I, § 3 of the
21 California Constitution.

22 **7. Relief requested**

23 Plaintiff requests the following relief:

24 1. That the Court declare the following under Code of Civil Procedure § 1060 and Government
25 Code § 11130(a):

26 a. Defendant's August 17, 2020 closed session violated the Bagley-Keene Act because the
27 Board discussed matters that were not covered in its disclosure and that cannot lawfully
28

1 be discussed in closed session, in violation of Government Code §§ 11126.3(b), 11120,
2 11132.

3 b. After reviewing the transcript and/or minute book of that meeting, that particular parts of
4 that transcript relate to matters that were not properly discussed in closed session.

5 c. That those specified parts of the transcript that relate to matters that were not properly
6 discussed in closed session are not confidential under Government Code § 11126.1.

7 d. That any person present at that August 17 closed session has a right to disclose to the
8 public any information or discussion at that meeting that related to matters that were not
9 properly discussed in closed session, as determined by the Court.

10 e. That Government Code § 11126(a) does not authorize the Board to hold a closed session
11 to discuss matters relating to its CIO, and that closed session to discuss such matters are
12 instead governed by § 11126(g).

13 f. That after every closed session the Board must reconvene into open session prior to
14 adjournment. *See* Gov. Code § 11125.3(f).

15
16 2. That the Court issue a writ of mandate and an injunction ordering Defendant to provide
17 Plaintiffs with all the records he requested, as described above, except those records or parts
18 thereof that the Court determines may lawfully be withheld under the CPRA.


19
20 3. That the Court issue a writ of mandate and an injunction prohibiting Defendant from taking
21 any action against any Board member or any other person for revealing matters discussed in
22 the August 17, 2020 closed session that were not covered in the Board's disclosure or that
23 could not lawfully be discussed in closed session. *See* Gov. Code § 11130(a).

24 4. That the Court order the Board to audio-record its closes sessions and preserve those
25 recordings for at least 5 years under Government Code § 11130(b).

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- 5. That the Court order the Board not to cite Government Code § 11126(a) on its agendas as authority to close a session when the only personnel matters to be discussed in that closed session relate to the CIO.
- 6. That Plaintiff be awarded attorneys' fees and costs under Code of Civil Procedure § 1021.5, Government Code §§ 6259, 11130.5, and any other applicable law.
- 7. That the Court issue other and further relief as the Court deems proper and just.

Dated: 3/8/2021

By: 
Michael T. Risher
Attorney for Plaintiff