

No. A104796
(Alameda County Superior Court No. RG 03089302)
(The Honorable James A. Richman)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 2

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT IN AND FOR THE COUNTY OF
ALAMEDA,

Respondent.

COALITION OF UNIVERSITY EMPLOYEES, CHARLES
SCHWARTZ, SAN JOSE MERCURY NEWS,

Real Parties in Interest.

**OPPOSITION TO PETITION FOR WRIT OF
MANDATE**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The sixth time is not the charm. The Regents—having made three trips to the trial court in an effort to prevent disclosure of public documents in this case (the original hearing, a motion for reconsideration, and an argument after in camera review of documents), a prior petition to this Court, and a petition to the Supreme Court—now spend 40 pages in a new Petition comprised mostly of a throw-away argument which merited only 12 lines in the trial court (the personnel exemption) and partly of a rehash of arguments this Court has already rejected in this case. But unlike fine wine, the Regents’ lengthy arguments that the public shouldn’t know how the Regents decide what to do with billions of dollars in public money haven’t improved with age. The Regents’ argument that the “personnel exemption” protects from public disclosure discussions which mention no persons by name—and the companion, crocodile-tear appeal to protect the privacy of an unnamed investment staff to which the Regents handed pink slips—lacks support in the law, the facts and in the public policy behind the public records and open meetings laws. The Regents’ sixth attempt to reargue the issues of this case should be rejected. The trial court did not abuse its discretion. The Petition should be summarily denied.

Although the Regents purport to be seeking review of the trial court’s November 14, 2003 order regarding permissible redaction (to protect employee privacy) of documents the trial court previously ordered the Regents to disclose (Pet. 10, ¶¶ 18-20), the Regents in fact argue solely that the trial court erred in ordering the documents

disclosed at all—an order by the trial court that was made on July 24, 2003 and which was the subject of the Regents’ prior petition for writ of mandate (Case No. A103797). That petition was summarily denied by this Court on September 23, 2003 following the filing of both opposition and reply briefs. Because the Regents attempt to renew in this Court arguments previously raised and rejected, this petition should be denied.

This case concerns a California Public Records Act (“CPRA”) petition filed by Real Parties to obtain copies of documents including, among others, minutes and tape transcripts of meetings improperly held in closed session at which the Regents adopted an Asset Allocation Policy in 2000 and adopted a “Multiple Manager Equity Investment Strategy” in 2002 (collectively, the “Meeting Documents”). In opposing the petition the Regents argued that the meeting minutes were exempt from disclosure because the meetings in question were properly held in closed session under Education Code section 92032(b)(4), which allows closed sessions to discuss “[m]atters involving the purchase and sale of investments for endowment and pension funds” (“section 92032(b)(4)”). In passing the Regents also argued that the 2002 meetings were properly held in closed session under Education Code section 92032(b)(7), which permits closed sessions to discuss “[m]atters concerning . . . performance . . . or dismissal . . . of university employees” (“section 92032(b)(7)”).

On July 24, 2003 the trial court issued an order (“July 24 Order”) rejecting the Regents’ claim that the Meeting Documents were exempt from disclosure under either section 92032(b)(4) or section 92032(b)(7) and ordering the Regents to produce the

Meeting Documents. The trial court, however, expressed concern that some parts of the 2002 Meeting Documents might invade the privacy of university employees and ordered the Regents to produce the 2002 Meeting Documents with proposed redactions to the court for in camera review. Thus the only issue that remained unresolved in the trial court following the July 24 Order (and subsequent denial of the Regents' motion for reconsideration) was what, if any, redactions would be permitted to the 2002 Meeting Documents. The Regents filed a Petition for Writ of Mandate in this Court seeking review of the July 24 Order (Case No. A103797). That petition was summarily denied by this Court following the filing of both an opposition brief and a reply brief. The Regents sought review in the Supreme Court on September 26; the Supreme Court summarily denied review on September 30.

On November 14 the trial court issued its final order regarding what redactions would be permitted to the 2002 Meeting Documents which it had previously ordered disclosed. The trial court properly refused to consider new arguments made by the Regents that the 2002 Meeting Documents should not be disclosed at all (see 2d Pet. Ex., Tab 8, page 37, fn. 2). Now the Regents, claiming to seek review of this narrow order regarding redaction, reargue the merits of issues long-ago resolved by the July 24 Order and previously reviewed by this Court. Moreover, by relying on the November 14 Order as the basis for their petition, they make section 92032(b)(7) the cornerstone of their forty-page petition and memorandum, despite the fact that they devoted less than one-half page to their section 92032(b)(7) argument in all the memoranda filed in opposition to

Real Parties' original petition in the trial court (see 1st Pet. Ex., Tab 7, page 187, lines 1-12). The Regents, financed by the billions of dollars in pension and endowment funds they control, apparently will stop at nothing in their efforts to prevent public scrutiny of their investment policy and strategy decisions. This waste of judicial and public resources should be swiftly and summarily rejected.¹

Moreover, as this Court recognized in its previous review of these issues, the Regents' substantive position regarding disclosure of the Meeting Documents is without merit. The trial court in this case sorted through a voluminous record, weighed the evidence, and issued a 20-page decision² consistent with that evidence and compelled by the CPRA.

The trial court properly rejected the Regents' overly broad interpretations of exemptions to the open meetings laws, which are to be construed narrowly in favor of openness. (Duval v. Board of Trustees (2001) 93 Cal. App 4th 902, 908 [personnel exception to the Ralph M. Brown Act must be construed narrowly]; Bollinger v. San Diego Civil Service Com. (2001) 71 Cal. App. 4th 568, 573 [courts must narrowly construe personnel exception to open meeting law and construe sunshine law liberally in favor of openness]). The trial court properly found that the exemptions cited by the

¹ The Regents assert that Real Parties are judicially estopped from contending that the Regents should not be permitted to reargue issues previously considered by this Court. (Pet. at 4.) This assertion is both misleading and a misstatement of the law. Real Parties included three short sentences in their opposition to the Regents' prior petition to this Court suggesting that review might be premature, but then went on to fully argue the merits of the trial court's order requiring disclosure of the 2000 and 2002 Meeting Documents. Moreover, the requirements for application of judicial estoppel have not been met here, as there is no indication that this Court's summary denial of the Regents' prior petition was based on Real Parties' prematurity argument. (See Jackson v. County of Los Angeles, (1997) 60 Cal.App.4th 171, 183.)

² Although the Regents purport to be seeking review of the trial court's four-page order dated November 14, 2003, as noted above, the Regents actually challenge the trial court's 20-page July 24 Order.

Regents did not justify non-disclosure of the Meeting Documents. It issued a decision that reflects the policy of this state to keep people informed about the workings of their government:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

California Govt. Code section 11120. That policy reflects the historical heritage of this country's founding fathers: "[knowledge] will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." (San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 772 [internal quotations omitted], quoting James Madison.)

The trial court correctly followed both the letter and spirit of the law, and did not abuse its discretion. This Court need not and should not invest its valuable time on a discretionary writ petition challenging a well-considered, well-reasoned

order—especially given that this Court has already considered and rejected a petition raising many of the same issues. The petition should be summarily denied.

II. STANDARD OF REVIEW: ABUSE OF DISCRETION, SUMMARY DENIAL PERMISSIBLE

A. PRA Procedures Encourage Summary Denial and Mandate Decision at “Earliest Possible Time.”

The Regents’ brief does not contain a separate section about the standard of review. We provide one here. Government Code section 6259(c)—the exclusive means of review for decisions ordering disclosure under the Public Records Act—was enacted to “expedite the process” of appellate review. (Powers v. City of Richmond (1995) 10 Cal.4th 85, 112.) It was enacted at the urging of the California Newspaper Publishers Association to combat the practice of government agencies of appealing and thereby delaying the disclosure of documents. (Id. at 111.) “The perceived evil at which the bill was aimed . . . was delays of the appeal process, [by means of which] public officials are frustrating the intent of the laws for disclosure . . . Accordingly, the amendment’s goal was to prohibit public agencies from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Public Records Act.” (Ibid., internal quotations omitted.)

As now-Chief Justice George observed in his two-justice concurring opinion in Powers (which provided the needed votes for disposition in view of a three-justice plurality opinion), “it is clear that 6259(c) was enacted not to diminish the rights of

individuals, such as plaintiffs in this case, who seek disclosure of governmental information under the Public Records Act but, on the contrary, for the general purpose of enhancing such persons' rights by ensuring that appellate review of trial court decisions under the act is conducted in a manner that promotes, rather than frustrates, the purpose of the act.” (*Id.* at 118 [George, J., concurring].)

Government Code section 6258 provides that Public Records Act proceedings should be decided “at the earliest possible time.” The speedy writ provision of section 6259(c) demonstrates the Legislature’s understanding that an appellate court may deny an extraordinary writ petition summarily—that is, without issuing an alternative writ or order to show cause, without holding oral argument, and without issuing a written opinion—and that this power of summary denial distinguishes writ review from direct appeal. (*Powers v. City of Richmond*, *supra*, 10 Cal.4th at 114 and fn. 199 [plurality opinion by Kennard, J.].) The wisdom of this policy is made manifest in this case where a powerful public agency with unlimited money to spend and with an aversion to conducting business openly seeks appellate review not once, but twice, in a desperate attempt to keep the public from finding out how its money is being spent and how the Regents are making investment decisions.

B. Standard of Review: Abuse of Discretion

The standard of review for factual determinations under the Public Records Act is abuse of discretion, as the Regents tacitly concede. (Pet. at 10, paragraph 20, contending that the trial court abused its discretion.) “Whether a disclosure of

records is warranted or unwarranted was a question of fact for the trial court to determine by looking at the attendant circumstances.” (Braun v. City of Taft (1984) 154 Cal.App.3d 332, 342.) As this Court found in In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292—involving the comparable issue of review of a trial court’s order unsealing documents—“The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (Id. at 299, citations omitted.) Here, the trial judge—an experienced jurist with a wealth of experience in assessing the kinds of issues presented here—clearly did not abuse his discretion, and his decision clearly did not “exceed the bounds of reason.”

C. Exceptions to the CPRA and Open Meeting Laws are Narrowly Construed; Burden Is on the Government

This Court should give deference to the trial court’s ruling for an additional reason. Exemptions to the CPRA’s disclosure requirements are to be narrowly construed. (CBS v. Block (1986) 42 Cal.3d 646, 651-52.) Thus, “the burden of demonstrating a need for nondisclosure is on the agency claiming the right to withhold the information.” (Id. at 656.) Similarly, exemptions to the open meeting laws are to be narrowly construed. (See, e.g., Duval v. Board of Trustees, *supra*, 93 Cal. App 4th at 908 [personnel exception to the Ralph M. Brown Act must be construed narrowly]; Bollinger v. San Diego Civil Service Com., *supra*, 71 Cal. App. 4th at 573 [courts must narrowly construe personnel exception to open meeting law and construe sunshine law liberally in favor of openness].)

D. Factual Conflicts and Inferences Must be Resolved Against Regents

One final point should be made on the standard of review. An appellate court deciding whether the trial court's decision is supported by substantial evidence must resolve all conflicts in the relevant evidence against the appellant and in support of the order. (Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal.App.3d 106, 111; Vibration Isolation Prod., Inc. v. American Nat. Rubber Co. (1972) 23 Cal.App.3d 480, 482.) Thus, the Regents' presentation of the facts—which resolves all conflicts in the evidence in favor of the losing Regents and against respondent court's order—may be disregarded.

Accordingly, we now turn to the facts, set forth in a manner which—faithful to the standard of review—resolves conflicts in the evidence in the light most favorable to the trial court's order. (In re Providian Credit Card Cases, *supra*, 96 Cal. App. 4th 292, 301 & 303 [conclusion of trial judge when different inferences may be drawn “must be accepted by the appellate court”; looking at whether findings “we may infer in support of the order” have the support of substantial evidence].)³

³ It is especially appropriate for this Court to defer to the trial court after *in camera* review of documents, because the Regents have a knowledge of the documents reviewed which Real Parties, having never seen the documents, do not have, and the Regents are therefore “the only participant that would be able to discuss the arguments with any particularity.” See In re Providian Credit Card Cases, *supra*, 96 Cal.App.4th at 301 fn. 7 [discussing declarations submitted by a party claiming trade secrets].

III. FACTS

The Regents (“Regents”) of the University of California (“UC”) control approximately \$50 billion dollars in pension and endowment funds held for the benefit of UC employees and the UC academic community. (1st Pet. Ex. 24 at 305.) Until 2000, UC’s internally-managed investment program conducted by the Office of the UC Treasurer, at the direction and under the control of the Regents, had achieved solid returns. Starting in 1999, however, the Regents brought in an outside investment consulting firm, Wilshire Associates, on whose advice the Office of the UC Treasurer has been transformed.

The Regents’ decision to cast their lot with Wilshire Associates, and their eventual decision to oust their internal staff which is at issue here, merits especially close public scrutiny in light of recent developments. “Mutual fund companies repeatedly allowed Wilshire Associates, the investment consulting firm, to engage in a rapid-fire trading strategy that netted the firm huge returns—and came at a cost to the mutual funds’ long-term investors,” according to a report in the October 2003 issue of Money Magazine.

(http://money.cnn.com/2003/09/22/funds/moneymag_news/ [visited December 6, 2003].) Wilshire began using this trading strategy roughly a decade ago. The SEC is now investigating Wilshire Associates, and the New York Stock Exchange recently censured Wilshire. (<http://www.nyse.com/pdfs/03-170> [visited Dec. 17, 2003].) The relevance of all this is that Wilshire may be motivated to recommend to the Regents

the same investment companies whose mutual funds Wilshire was allowed to pillage, and the Regents may have ousted their internal staff in favor of well-paid insider traders who are now being investigated and censured. Of course, the Regents may consider that none of the public's business, but we beg to differ.

In 2000, the former Treasurer of the Regents was pushed out. In March 2000, following two improperly held closed sessions, the Regents adopted an Asset Allocation Policy ("AAP") (1st Pet. Ex. 24 at 305) and decided to transfer a substantial amount of internally-managed assets to an external index fund management company. Investment decisions, which are required to and formerly had been made by the Regents themselves, were shifted to the new Treasurer and his staff. In November of 2002 following two more improperly held closed sessions, the Regents adopted a Multiple Manager Equity Investment Strategy ("MMEIS"), as a result of which the eleven existing equity investment staff members were replaced by six new staff members and \$15.2 billion of internally-managed investment funds were transferred into the Russell 3000 Tobacco Free Index. (Id. at 306-307 ¶¶6, 328 ¶36.)

The adoption of the MMEIS also will result, over time, in the management of UC's pension and endowment funds by a number of external managers—managers who may be selected or recommended by the very same people at Wilshire Associates who "engage[d] in a rapid-fire trading strategy that netted the firm huge

returns—and came at a cost to the mutual funds’ long-term investors.” (September 22, 2003 CNN/Money report, cited supra. At page 9.)⁴

In December 2002 Real Parties, through counsel, sought under the CPRA public records regarding UC’s investment and investment policy and strategy activities, including minutes and tape transcripts of the two meetings in 2000 that resulted in adoption of the AAP (“2000 Meeting Documents”) and the two meetings in 2002 that resulted in adoption of the MMEIS (“2002 Meeting Documents”). Following exchange of additional correspondence from January through March 2003, UC refused to produce these records.⁵

Finally, on April 1, 2003, Real Parties filed a CPRA petition seeking a court order requiring disclosure of, among other documents, the 2000 Meeting Documents and the 2002 Meeting Documents. In opposing the Real Parties’ petition, the Regents argued primarily that the meetings in 2000 and 2002 at issue were properly held in closed session under the Bagley Keene Act exemption in Education Code section 92032(b)(4), which allows closed sessions to discuss “[m]atters involving the purchase and sale of investments for endowment and pension funds.” In passing, the

⁴ The Regents will no doubt complain that this is an *ad hominem* attack and that they would never do business with people who run afoul of the law. But these are the very same Regents who lost \$498 million on their investments in Enron and Worldcom. While the managers of Enron and Worldcom are innocent until proven guilty, they don’t appear to be the poster boys for fiduciary responsibility. Same thing for Wilshire Associates—there should be higher qualifications for investment advisors than “I haven’t been indicted yet.”

⁵ The Regents also refused to produce internal rate of return information about their private equity investments—information routinely produced by other public institutions managing public money. The trial court ordered disclosure, the Regents sought a writ of mandate in this Court challenging that order, which was denied, and sought a writ of review in the California Supreme Court, which also was denied. UC is now disclosing this information without apparent negative effect.

Regents also argued that the 2002 meetings were also properly closed under Education Code section 92032(b)(7), which permits closed sessions to discuss “[m]atters concerning . . . performance . . . or dismissal . . . of university employees.” On that basis the Regents argued that the minutes of the 2000 and 2002 meetings were exempt from disclosure under Government Code section 11126.1, providing that minutes of a closed session are not public records.

The trial court heard a lengthy argument on June 24, 2003 (Pet. Ex. 89, at 2215-2247), and exactly one month later, issued a 20-page Order Granting Petition for Writ of Mandate. (Pet. Ex. 61, at 1952-71.) In addition to addressing issues not raised by the current petition, the trial court ordered disclosure of the 2000 Meeting Documents and 2002 Meeting Documents. The court determined that the “investment matters” exemption, on which the Regents primarily relied, was intended to “prevent speculative price movements that could result if word of future specific investment plans became known to the public.” (1st Pet. Ex. 61 at 1968.) The court impliedly concluded that discussion and adoption of the AAP and the MMEIS in open session would not have led to such speculative price movements. The court also observed that the Regents had publicly disclosed the central documents under discussion at the 2000 and 2002 closed meetings, and on that basis concluded that there was “simply no basis” for keeping the deliberations that occurred at the closed session meetings secret from the public even if portions of the meetings were properly held in closed session. (Id. at 1969.)

Finally, recognizing that exemptions to the open meeting laws must be construed narrowly, the court found “nothing in the authorities cited by [the Regents], or in any other authority, to suggest that the exception in [Education Code section 92032(b)] subsection (4) should be construed so broadly as to permit the closing of any meeting in which any discussion whatsoever about investments takes place,” the position espoused by the Regents. (Id. at 1967-68.)

The trial court also rejected the Regents “personnel matters” exemption argument, concluding that “Education Code §92032(b)(7) did not justify closing the meetings at issue, at least in their entirety.” (Id. at 1969.) The court went on to order the Regents to review the 2002 Meeting Documents to “determine if there are any references to individual employees or any other matters that [the Regents believe] would violate the privacy rights of its employees,” and to produce for in camera review proposed redactions to the 2002 Meeting Documents that satisfied that criteria. (Id. at 1969-70.) The court granted the petition for disclosure of the 2000 and 2002 Meeting Documents, subject to that redaction qualification. (Id. at 1970.)

The Regents moved for reconsideration of the July 24 Order on grounds unrelated to this petition and that motion was denied. Pursuant to the July 24 Order, on September 2 and September 16, 2003, later than the trial court had directed, the Regents submitted the 2002 Meeting Documents with proposed redactions for in camera review. (1st Pet. Ex. 87, At 2208-10; 2d Pet. Ex. 1, at 1-5.)⁶

⁶ If the Regents had produced the documents for in camera inspection within the time frame ordered by the court, the piecemeal and sequential appellate review the Regents have sought might have been avoided.

The Regents filed a petition for writ of mandate in this Court on September 5, 2003 challenging the July 24 Order (Case No. A103797). That petition was summarily denied on September 23, 2003 following the filing of opposition and reply briefs. On September 26, 2003 the Regents filed a Petition for Review with the Supreme Court of California. That petition was denied on September 30, 2003, following the filing of opposition and reply briefs.

On October 7, 2003 the trial court issued a “Further Order on Petition for Writ of Mandate Pursuant to Court’s *In Camera* Review” (“October 7 Order”). (2d Pet. Ex. 5 at 24-27.) The trial court rejected most of the proposed redactions to the 2002 Meeting Documents, with a few exceptions in the transcript of the October 2002 meeting, finding that the proposed redacted materials did not “mention any individual employee(s) by name or in any way violate the privacy rights of any such individual(s).” (*Id.* at 26.) The court ordered the minutes of the October and November 2002 meetings produced in full and the transcript of the October 2002 meeting produced with minor redactions allowed. (*Id.*) The court also provided for a hearing on October 23, 2003 if any party objected to the order. (*Id.*) The Regents objected and a hearing was held on October 23, 2003. (See 2d Pet. Ex. 9.) Following that hearing, at which the Regents orally presented their position and suggested certain redactions, the trial court again reviewed the redactions proposed by the Regents. (2d Pet. Ex. 7 at 32.)

On November 14, 2003 the trial court issued an “Order after Hearing on Petition for Writ of Mandate Pursuant to Court’s *In Camera* Review” (“November 14 Order”). (*Id.* at 30-33.) The court confirmed in its entirety its October 7 Order, and granted a stay through January 11, 2004 to allow the Regents to seek appellate review of the November 14 Order. (*Id.*) This writ petition followed.

ARGUMENT

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DISCLOSURE OF THE MINUTES AND TAPE TRANSCRIPTS OF IMPROPERLY CLOSED SESSIONS AT WHICH A CHANGE IN INVESTMENT POLICY AND STRATEGY WAS DISCUSSED

A. The Trial Court Correctly Found That 2002 Meetings Were Not Properly Closed In Their Entirety Under Section 92032(b)(7).

Having virtually ignored the personnel exemption until this petition, the Regents now engage in a last ditch effort to clothe an investment policy and strategy discussion in “personnel matters” attire. The Regents maintain that their closed session meetings in October and November 2002 to discuss and adopt the MMEIS were exempt from their open meeting obligations because they included discussion of “[m]atters concerning the ... performance ... or dismissal of university ... employees,” included in the Education Code 92032(b)(7) exemption (the “personnel exemption”). The Regents assert that because the meetings included comparison of the performance of UC’s internally managed equity portfolio to the performance of a market based index, and because adoption of the MMEIS would result in dismissal of the internal equity managers, the meetings involved discussion of “personnel

matters” exempt from the open meeting laws. The Regents’ arguments don’t hold water.

First, at the time of the October 29, 2002 meeting, the Regents clearly didn’t think personnel matters were involved, as the notice for the 10/29/02 closed session meeting does not list personnel matters as one of the exemptions relied upon for holding the closed session—only investment matters and litigation are listed. (1st Pet. Ex. 52 at 1783.) The Regents argue that this omission is not critical and should not preclude the Regents from invoking the personnel exemption now to justify the closed session. (Pet. at 23, fn. 7.) However, the Bagley-Keene Act explicitly precludes discussion in closed session of any matter not covered in the required pre-meeting disclosures. Government Code section 11126.3(a) specifies what disclosures must be made before holding a closed session (“the general nature of the item or items to be discussed in the closed session”), and section 11126.3(b) states: “In the closed session, the state body may consider only those matters covered in its disclosure.” Thus, the Regents were well aware that if they intended to discuss personnel matters during the October 29 closed session, they were required to include on the agenda the personnel exemption as one of the bases for holding the closed session. Their failure to do so is clear indication that they did not at the time view the consideration of the MMEIS to be a “personnel matter.”

Second, the Regents’ claim that comparison of the performance of UC’s internally managed equity portfolio to the performance of a market based index

converts the discussion into one exempt under the personnel exemption is belied by the fact that there was an open discussion of the alleged poor performance of the internal equity managers and the internally- managed equity portfolio at the Committee on Investments meeting just one month before the 10/29/02 closed session. (1st Pet. Ex. 52 at 1785-1790; 1st Pet. Ex. 40 at 998-1000.)⁷ In that discussion, Regent Blum bluntly questioned the ability of the equity managers in the Treasurer's Office to compete with outside professionals. (1st Pet. Ex. 40 at 999.) Given that open discussion, the Regents' assertion that one month later they were concerned with protecting the privacy and future employment prospects of their internal equity staff lacks merit.

Finally, the Regents' effort to stretch the bounds of the personnel exemption to be so broad as to include any discussion which might result in the elimination of university positions fails because it is clearly contrary to California public policy and the mandate to construe exemptions to the open government laws narrowly. Notwithstanding the Regents' assertion to the contrary (Pet. at 16), the trial court correctly found that protecting the privacy of public employees is the *sine qua non* of the personnel exemption. (63 Ops. Cal. Atty. Gen. 215, 1980 Cal.AG LEXIS 111 at *2 [“the primary purpose of the ‘personnel exception’ [is] ‘to protect the employee from public embarrassment,’ with an ancillary purpose being ‘to permit free discussion of personnel matters.’) As a result, the trial court also correctly focused

⁷ The Regents' claim that such a discussion did not take place (Pet. at 20, fn. 4) is belied by the evidence.

on the evaluation of individual employees as the primary justification for reliance on the personnel exemption in holding a closed session.

As the court in Duval v. Board of Trustees, *supra*, 93 Cal.App.4th at 909 noted:

“We conclude the phrase ‘evaluation of performance’ encompasses a review of *an employee’s* job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance. . . . Further, we conclude ‘evaluation’ may properly include consideration of the criteria for such evaluation, consideration of the process for conducting the evaluation, and other preliminary matters, *to the extent those matters constitute an exercise of defendant’s discretion in evaluating a particular employee.*” (Emphasis supplied.)⁸

(See also 63 Ops. Cal. Atty. Gen. 215, 1980 Cal.AG LEXIS 111 at *5 [The purpose of executive session is to “avoid undue publicity and embarrassment to the affected employee”]. (Emphasis supplied.) Finally, and again contrary to the position espoused by the Regents (Pet. at 17), the trial court correctly considered the acute public interest in the management of \$50 billion of public money as a factor in determining applicability of the personnel exemption. (See San Diego Union v. City Council of the City of San Diego (1983) 146 Cal.App.3d 947, 955 [concluding that discussion of salaries and other terms of compensation of public employees involve considerations of acute public interest and thus may not be held in closed session].) Having properly interpreted the personnel exemption, the trial court then reviewed

⁸ Duval involved the evaluation of the interim superintendent of schools. 93 Cal.App.4th at 904. Bollinger likewise involved an individual employee. The Regents have cited no case that holds that the “personnel exemption” applies to mass terminations.

the minutes and transcripts of the 2002 meetings and concluded that they were not properly held in closed session under that exemption.⁹

Under the Regents' breathtakingly broad construction of the "personnel exemption," the Regents could decide to dismiss their entire security force in a closed session and replace it with skilled mediators on the grounds that unarmed mediators had a better "skill set" than an armed security force. Following this logic the Regents could decide to eliminate half of the UC professors and replace them with hypnotists, because the Regents have been advised by outside consultants that students learn better under hypnosis. That, too, could be done in secret, because "multiple terminations" would be at issue and "the stakes, and the consequent need for candor, are even greater." And, of course, "the privacy and reputational interests of the terminated employees"—half the UC faculty—would not be decreased "merely because they were terminated as a group." (Pet. at 17.)

Indeed, under the Regents' view of the world, the bigger the decision, the greater the need for confidentiality, and the Regents can't let the public which pays

⁹ The Declaration of David Russ, UC Treasurer, filed in the trial court, further undermines the Regents' assertion now that the 2002 meetings involved significant evaluation of employees. (See 1st Pet. Ex. 24 at 306 [discussing consideration of the MMEIS, Russ states: "For that reason [lower historical returns], the concentrated nature of the investment strategy, and the need to further diversify the systematic or idiosyncratic risks associated with a concentrated large capitalization strategy, I recommended that The Regents end internal management of the University's public equity portfolio in favor of investment in broad index-based funds and a multiple manager/multiple strategy active portfolio. . . . The Regents voted to approve this action at their November 2002 meeting."]; *id.* at 307 ["The Regents have made appropriate investment decisions with regard to investment strategy and manager retention within the context of a formal investment policy and the appropriate level of investment risk."]; *id.* at 309-310 [Russ defends the former internal equity managers' investments in Enron and Worldcom: "This is not a criticism of those managers: they made what appeared to be sound investment decisions based on the information that was publicly available on those companies at the time. *The problem was not the managers* but the prior strategy of attempting to "beat the market" through concentrated, internally-managed equity positions."] (Emphasis supplied.)) Thus, the matters discussed in October and November 2002 were never considered "personnel" matters.

them know what they're really thinking and why they're making decisions. The Regents have figured out a wonderful way to govern—eliminate the public from all important decisions, because the higher the stakes, the greater the need for “candor,” and important people like the Regents can't be bothered with those pesky members of the public, those prickly taxpayers, those irritable watchdogs, who are good only for asking hard questions and who don't appreciate how smart the Regents are. In short, the Regents have discovered something which seems to have eluded the trial court (and eluded this Court and the Supreme Court on the Regents' prior petitions)—democracy is a bad thing, and government can only function effectively behind closed doors. Someone should tell the Legislature, which declared in the preamble to the Public Records Act, “access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.” (Govt. Code §6250.)

The trial court rightly refused to buy the Regents' view of the world and the law. The trial court figured out that when you adopt a new policy and as a result dismantle an entire staff but don't mention anyone's name, you should do that in public. In sum, the trial court thoughtfully evaluated the evidence, in two reviews of the minutes and transcript in question, and correctly decided that the minutes and tape transcripts of the 2002 closed sessions should be disclosed to the public, since the Regents could not show that disclosure would invade the privacy of any

particular University employees. The trial court's decision is supported by substantial evidence and should not be disturbed by this Court.

B. The Trial Court Properly Determined That the Broad Policy Issues Discussed in the 2002 Closed Sessions Did Not Fall Under the Open Meeting Exception For Matters Involving the Purchase and Sale of Investments.

1. The Trial Court's Order Rejecting Applicability of the Education Code Section 92032(b)(4) Exemption to the 2002 Meetings Already Has Been Reviewed By This Court.

As a preliminary matter, this petition, which ostensibly seeks review of the trial court's November 14 Order regarding permissible redaction from the 2002 Meeting Documents under Section 92032(b)(7), has absolutely nothing to do with the "investment matters" exemption set forth in Section 92032(b)(4). The applicability of Section 92032(b)(4) to the 2000 meetings and the 2002 meetings was fully and finally resolved in the July 24 Order of the trial court. The Regents challenged that order by filing a petition in this Court on September 5, 2003 (Case No. A103797). That petition was denied following the filing of opposition and reply briefs, which addressed the section 92032(b)(4) issue at length. In fact, the Regents have already conceded that their Section 92032(b)(4) argument is a dead letter by producing to Real Parties the minutes of the meetings held in January and March 2000 to adopt the Asset Allocation Policy—meetings for which the only exemption from the open meeting laws claimed was Section 92032(b)(4). (2d Pet. Ex. 9 at 54, lines 22-24.) Thus, the Regents' arguments that the 2002 meetings were properly closed under Section 92032(b)(4) should be disregarded.

2. Even If The Merits Are Reconsidered, The Trial Court Did Not Abuse Its Discretion In Finding That Section 92032(b)(4) Does Not Justify Withholding The 2002 Meeting Documents.

In the trial court the Regents primarily relied on Section 92032(b)(4) as justification for holding the 2002 meetings in closed session. Section 92032(b)(4) allows the Regents to meet in closed session to discuss “[m]atters involving the purchase or sale of investments for endowment and pension funds.” In the Petition the Regents assert that the trial court erred by ordering disclosure of minutes and tapes of the Closed Sessions based on acceptance of Real Parties’ argument that Section 92032(b)(4) allows a meeting to be closed only if it addressed the purchase or sale of particular specific investments, rather than investment strategy in general. (Pet. at 24.) However, while the trial court did agree with Real Parties’ narrow construction of Section 92032(b)(4), it based its disclosure order on its conclusion that “nothing in the authorities cited by [the Regents], or in any other authority, [suggests] that the exception in subsection (4) should be construed so broadly as to permit the closing of any meeting in which any discussion whatsoever about investments takes place”—the position espoused by the Regents. (1st Pet. Ex. 61 at 1968.) To accept the Regents’ argument that the 2002 closed sessions were proper under Section 92032(b)(4) would have required the trial court to construe the section “so broadly as to permit the closing of any meeting in which any discussion whatsoever about investments takes place.” This the trial court correctly refused to do. The trial court based its decision on the general rule that meetings of the Regents

are to be open to the public, the policy in favor of openness set forth in the preamble to the Bagley Keene Act, and the cases requiring exceptions to the open meeting laws to be construed narrowly to favor openness and disclosure. (Id. at 1967-1969.)

The trial court also based its decision on its evaluation of the evidence in the record. The court noted that Section 92032(b)(4) was “designed, at least in part, to prevent speculative price movements that could result if word of future specific investment plans became known to the public.” (Id. at 1968.) The Regents impliedly concur, given their argument that open discussion of the Multiple Manager Equity Investment Strategy (“MMEIS”) would have led to “front-running.” (1st Pet. Ex. 7 at 185:11-18, 186:21-24.) By ordering disclosure the trial court implicitly concluded that open discussion of the MMEIS would not have led to the harm Section 92032(b)(4) was intended to prevent. This conclusion is supported by substantial evidence in the record. Moreover, “all intendments and presumptions are indulged to support [a trial court’s] order on matters as to which the record is silent.” (Gutierrez v. Autowest, Inc. 2003 Cal.App. LEXIS 1817 at *16, citing Denham v. Superior Court (1970) 2 Cal.3d 557, 564; see also In re Providian Credit Card Cases, supra, 96 Cal.App.4th at 302-03 [examining whether “appropriate findings we may infer in support of the order...have the support of substantial evidence”].)

There is no evidence that open discussion of the MMEIS would have caused the harms claimed by UC. The adoption of the MMEIS and details regarding its future implementation, including the fact that UC *would be* transferring all of its U.S.

equity investments into the Russell 3000 Tobacco-free Index Fund, were publicly revealed in a ucnewswire dated 11/26/03 (1st Pet. Ex. 40 at 967-968), before the asset transfers were complete in early December (Id. at 970), and the sky did not fall.

The Regents assert that implementation of the MMEIS resulted in the sale of \$15.1 billion in assets (Pet. at 25), implying that this large dollar volume of trades, and the \$618 million gain, was in potential jeopardy from market manipulation. Such a claim makes it clear why the trial court was skeptical of the Regents' claims, since only a very small part of the execution of the MMEIS (4.5%) was done through open market trading. (1st Pet. Ex. 40 at 988; see also In re Providian Credit Card Cases, supra, 96 Cal.App.4th 292, 309 [“In light of defendants’ history of defining confidential material as broadly as possible, it would not be improper for the trial court to view their latest effort with considerable skepticism.”].)¹⁰

Finally, the Regents’ assertion that the trial court’s construction of Section 92032(b)(4) would effectively render the exemption a nullity (Pet. at 25) is disingenuous at best. They base this argument on their claim that the Regents never make individual investment decisions—a claim that is simply not true, or at least should not be true. The Bylaws of the Regents of the University of California explicitly make authorization of the purchase, sale, transfer, or exchange of bonds, stocks, and other securities a responsibility of the Committee on Investments. (See:

¹⁰ The position espoused by the Regents regarding the 2000 closed sessions provides further grounds for skepticism. The Regents urged that open discussion of the adoption of the AAP would have resulted in market manipulation, but in fact the Regents disclosed the AAP in its entirety before any steps were taken to implement the policy. (1st Pet. Ex. 40 at 935-936; 939-940; 946-947.)

<http://www.universityofcalifornia.edu/regents/bylaws/bl12.html#bl12.5> (Bylaw 12.5) and <http://www.universityofcalifornia.edu/regents/bylaws/bl21.html#bl21.4> (Bylaw 21.4(f)).

See also 1st Pet. Ex. 40 at 922-923 [consultant and Treasurer recommendation regarding specific investments to be submitted to Regents for approval]; 1st Pet. Ex. 52 at 1772-1773 [Treasurer indicates that COI must approve eight recommended investments.] Moreover, even if the Regents have delegated individual investment decisions to the Treasurer and his staff, such delegation occurred recently and is irrelevant to the interpretation of Section 92032(b)(4), which was enacted in 1982 and has not been amended since 1993.

The Regents also argue that the trial court erred in requiring disclosure of the minutes and tapes of the 2002 closed sessions on the basis that action had already been taken. Once again the Regents distort the trial court's ruling. The trial court relied heavily on the fact that the Regents have publicly disclosed the documents regarding MMEIS discussed at the 2002 closed sessions.

Shortly after adoption of the MMEIS, the Regents publicly disclosed adoption of the MMEIS and details regarding its future implementation, including the fact that UC *would be* transferring all of its U.S. equity investments into the Russell 3000 Tobacco-free Index Fund, before the asset transfer were completed. (1st Pet. Ex. 40 at 967-968, 970.) From these facts the trial court reasonably concluded that disclosure of the minutes and tapes from the closed sessions was warranted even if some portions of the closed sessions were properly held. (1st Pet. Ex. 61 at 1969.)

The trial court apparently determined that the Regents had waived the right to assert the protection of Government Code section 11126.1, a more than reasonable determination in light of the record. (Accord In re Providian Credit Card Cases, *supra*, 96 Cal.App.4th 292, 308 [“The failure of defendants to give the Kahr memoranda—or any of the documents at issue on appeal—this heightened treatment reasonably could be deemed by the trial court as circumstantial evidence that defendants had not previously treated them as trade secrets.”]). Even if this was not the reasoning of the trial court, the trial court’s order “is presumed to be correct, and all intendments and presumptions are indulged to support [a trial court’s] order on matters as to which the record is silent.” (Gutierrez v. Autowest, Inc., *supra*, 2003 Cal.App. LEXIS 1817 at *16.)

V. GOVERNMENT CODE SECTION 11126.1 DOES NOT EXEMPT THE 2002 MEETING DOCUMENTS FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT.

The Regents have the audacity to argue that even if the closed meetings were improper, the minutes and tape transcripts of those meetings should not be disclosed.¹¹ It is their position, apparently, that they are free to violate the law and the public has no recourse to find out what happened behind the closed doors. This is not the law.

While Government Code section 11126.1 provides that minutes and tapes of closed session meetings are not public records subject to disclosure under the California Public Records Act, Government Code section 11124.1, subsection (b) provides that “[a]ny tape or film record of an open and public meeting made for whatever purpose by

¹¹ The Regents also argue that as long as a substantial part of a meeting was properly closed, the minutes of that meeting must remain confidential. (Pet. 31-33.) This argument is irrelevant because the trial court found that the meetings were not properly closed.

or at the direction of the state body shall be subject to inspection pursuant to the California Public Records Act.” Minutes of such meetings are also public records subject to disclosure, because they clearly fall within the definition of a public record and no exception applies. Thus, when the trial court determined that the closed sessions were held in violation of the Bagley Keene Act, the provisions of Government Code section 11126.1 ceased to apply, and the minutes and tape transcripts became subject to disclosure as if the closed meetings had been held in open session as they should have been.

The Regents also argue that Government Code sections 11130(a) and 11130.3 provide the exclusive remedies for a violation of the Bagley Keene Act, and thus Real Parties are not entitled to disclosure of the minutes and tapes of closed sessions even if improperly closed. (Pet. at 33-37.) Because the Regents make this argument for the first time on appeal, it must be deemed waived. (Gutierrez v. Autowest, Inc., *supra*, 2003 Cal.App. LEXIS 1817 at *23 fn. 13 [an argument not raised in the trial court is deemed waived].) Moreover, the argument is irrelevant. Petitioners did not file a petition for writ of mandate under the Bagley Keene Act, but rather sought disclosure of documents under the California Public Records Act. Because the closed sessions held by the Regents in 2000 and 2002 should have been held in open session accessible to the public, the minutes and tapes of those meetings are subject to disclosure under the Public Records Act.¹²

¹² The Regents’ reliance on Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, to support their argument is misplaced. The court in Kleitman addressed the propriety of a discovery order in litigation under the Brown Act requiring city council members to disclose personal recollections of what took place during a closed meeting at

The Regents will clearly go to any length, and spend any amount of the public's money, to keep their deliberations secret from the public and pensioners they are supposed to serve. Nothing demonstrates the Regents' aversion to disclosure of the public business better than the Regents' pronouncement, "Participants in a closed session are entitled to rely on their counsel's advice that the meeting has been properly closed, and express themselves with candor that might be inappropriate in an open forum." (2d Pet. Ex. 1 at 4.) This passage indicates that the Regents are unable to be truthful or candid when the public is watching, and that they feel more comfortable doing the public's business in private, when they can perhaps decide how to manage billions of dollars in public money in the privacy of a cloakroom, without pesky public watchdogs around (but perhaps with the advisors from Wilshire around). Such an approach to conduct of the public's business should not be tolerated.

VI. THE REGENTS' REQUEST FOR STAY SHOULD BE DENIED.

Government Code section 6259(c) provides that a stay should be issued only if the petitioning party can demonstrate that "it will otherwise sustain irreparable damage and probable success on the merits." For reasons stated above, the Regents clearly have not demonstrated "probable success on the merits."

The Regents' attempt to show "irreparable harm" is disingenuous. The Regents—who gave 11 employees pink slips and didn't have the guts to do it in public—now feign concern for those people, arguing that "disclosing candid statements

which no minutes were taken and which was not recorded. It has no bearing on this case, where the trial judge determined that meetings were closed in violation of the Bagley-Keene Act, and as a result ordered disclosure of minutes and tape transcripts of those meetings under the CPRA.

concerning the qualifications of those employees made during a properly closed session would literally add insult to injury. Those employees should be free to go about their lives, without suffering the added and irreparable injury caused by the Superior Court's November 14 Order." (Petition at 37.)

The crocodile tears shed by the Regents are misplaced. First of all, the trial court's November 14 Order didn't cause "irreparable injury" to the 11 employees; rather it was the Regents' decision to fire them that injured them. Second, the trial court at all times displayed great solicitude for the privacy of those individuals--that's why it ordered in camera review in the first place—and it made its order only after conducting an in camera review on two separate occasions to satisfy itself that no one was mentioned by name and no one would be harmed from disclosure of the documents.¹³ Third, and most fundamentally, the petitioning party on this writ must show "irreparable harm." The Petitioning party is the Regents, not any of the employees involved, and the only "irreparable damage" which might result from the disclosure of the documents in question is to the Regents' own credibility. Damage to the credibility of a high government official is not cognizable at law. See New York Times v. Sullivan (1964) 376 U.S. 254, 273 ["If judges are to be treated as 'men [and women] of fortitude, able to thrive in a hardy climate,'...surely the same must be true of other government officials"], cited in Recorder v. Commission on Judicial Performance (1999) 72 Cal.App.4th 258, 280.

¹³ Real party Coalition of University Employees, of course, is also not insensitive to the privacy interests of UC employees.

Given the trial court's careful review and re-review of the proposed redactions to the 2002 Meeting Documents, it is clear that the court did not abuse its discretion in ordering these documents produced with minimal redactions. The request for stay should be denied.

VII. CONCLUSION

Two centuries ago, James Madison proclaimed that the public business should be done openly, because “knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives.” San Gabriel, *supra*, 143 Cal.App.3d at 772. More recently, this Court (Division Three) echoed those words by saying, “we fail to see the merit of a system in which public officials, sitting in judgment of other public officials...are allowed to hide behind a veil of secrecy when making the ‘tough calls’ necessary to any adjudicatory regime.” Recorder v. Commission on Judicial Performance, *supra*, 72 Cal.App.4th 258, 280. The Regents here sat in judgment of their internal investment staff. They were not entitled to “hide behind a veil of secrecy” when doing so.

The Regents have demonstrated a fundamental disagreement with open government principles throughout this litigation, whether the issue be disclosure of venture capital performance information, asset allocation, or transferring investment decisions from inside analysts to outside managers such as those hand-picked by the insider-trading Wilshire Associates. The Regents and their Treasurer insist that they are the best and the brightest, and that only when afforded the “candor” of closed sessions can their true

wisdom and investment genius flourish. (Pet. at 17.) The trial court has three times patiently listened to the Regents' pleas for secrecy, and each time found them wanting. It did not abuse its discretion. This Court rejected the secrecy argument once (as did the Supreme Court), and it should do so again. The Petition should be summarily denied.

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