

No. A103797
(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**

Karl Olson (SBN 104760)
Erica L. Craven (SBN 199918)
LEVY, RAM & OLSON LLP
639 Front Street, 4th Floor
San Francisco, CA 94111-1913
Tel: 415-433-4949

Attorneys for Real Parties in Interest
COALITION OF UNIVERSITY
EMPLOYEES and CHARLES
SCHWARTZ

Judy Alexander (SBN 116515)
WINN & ALEXANDER
820 Bay Avenue, Suite 109
Capitola, CA 95010
Telephone: 831-479-3490

Attorneys for Real Party in Interest
SAN JOSE MERCURY NEWS

TABLE OF CONTENTS

	Page #
I. INTRODUCTION	1
II. STANDARD OF REVIEW: ABUSE OF DISCRETION, SUMMARY DENIAL PERMISSIBLE	2
A. PRA Procedures Encourage Summary Denial and Mandate Decision at “Earliest Possible Time.”	2
B. Standard of Review: Abuse of Discretion.	3
C. Burden Rests on Those Asserting Trade Secrets	5
D. The Regents’ Cases Reject Trade Secret Claims	6
E. Exceptions to PRA are Narrowly Construed; Burden Is on the Government	7
F. Abuse of Discretion Standard Also Applies to Minutes and Tapes	8
G. Factual Conflicts and Inferences Must be Resolved Against Regents	8
III. FACTS	9
A. Texas Discloses Internal Rate of Return Information	9
B. California Follows Suit After San Francisco Judge’s Ruling.	10
C. IRRs Are a “Valuable and Widely-Accepted Tool” For Evaluating Performance. They Aren’t Trade Secrets and Anyone With a Calculator Can Figure Them. UC Disclosed IRR When Venture Capital Funds Were Making Money, Before They Started Losing Money in the Last Three Years.	10
D. UC Is Now the Lone Holdout Against Disclosure of IRR and Also Refuses to Disclose Minutes of Improperly Closed Sessions	13
E. The Beneficiaries of the UC Pension Fund Who Depend on It	

	for Their Retirement Income Are Forced to Sue.	14
F.	UC Belatedly Produces Documents, After Being Sued.	14
G.	The Regents Argue the 6255(a) Exemption, Paying Little Attention to “Trade Secrets”	15
H.	The Trial Court Orders Disclosure of IRRs	16
I.	The Regents’ Request for Reconsideration Is Denied.	19
J.	Sequoia, at the 12 th Hour, Complains About Public Disclosure Laws	20
	ARGUMENT	21
IV.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE REGENTS’ TRADE SECRET AND OTHER CLAIMS OF EXEMPTION FROM THE PRA.	21
A.	The Regents Did Not and Cannot Meet Their Burden of Establishing a Trade Secret.	21
B.	Under Any Test Which the Trial Court Applied or Could Have Applied, It Did Not Abuse Its Discretion in Ordering Disclosure.	26
1.	No Factual Basis to Apply Trade Secret Test.	26
2.	The Regents Themselves Emphasized the Section 6255(a) Balancing Test Over the Trade Secret Test.	26
3.	The Trial Court Applied the Trade Secret Test Anyway, and the Regents Lost Under That Test Too.	27
4.	The Regents Cite No Case in 35 Years of PRA Law Which Has Held That Trade Secrets Trumped the PRA. This Case – in Which No Trade Secrets Exist and the Regents Are the Lone Holdout Against Disclosure – Should Not Be the First.	31
5.	People Who Take Public Money Invite Public Scrutiny	33

6.	The Balancing of Interests Supports Disclosure, as the Trial Court Held. The Trial Court Did Not “Exceed the Bounds of Reason” In Holding UC to the Same Standard as Other Pension Funds	35
V.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DISCLOSURE OF THE MINUTES AND TAPES OF CLOSED MEETINGS AT WHICH INVESTMENT POLICIES WERE DISCUSSED AND ADOPTED.	41
A.	To the Extent the Petition Seeks Review of the Trial Court’s Order Requiring Disclosure of the Minutes and Tapes of the Closed Sessions, the Petition Should Be Summarily Denied as Premature.	41
B.	The Trial Court Properly Determined That the Broad Policy Issues Discussed in the Closed Sessions Did Not Fall Under the Open Meeting Exception For Matters Involving the Purchase and Sale of Investments.	42
C.	Trial Court Correctly Concluded That Even If Portions of The Meetings at Issue Were Properly Closed, Disclosure of the Minutes and Tapes Is Appropriate Where the Regents Have Released the Documents Discussed at the Closed Sessions.	46
VI.	THE COURT SHOULD NOT ISSUE A STAY	47
	CONCLUSION	48

TABLE OF AUTHORITIES

	Page #
<u>Agricultural Labor Relations Board v. Richard A. Glass Co.</u> (1985) 175 Cal.App.3d 703	6, 7, 27, 29
<u>Braun v. City of Taft</u> (1984) 154 Cal.App.3d 332	4, 8, 26, 35
<u>Bridgestone/Firestone, Inc. v. Superior Court</u> (1992) 7 Cal.App.4th 1384	29
<u>Cal. State University, Fresno v. Superior Court</u> (2001) 90 Cal.App.4th 810	7, 27, 30, 33, 34, 37, 40
<u>CBS, Inc. v. Block</u> (1986) 42 Cal.3d 646	7, 30, 35-37
<u>City of Hemet v. Superior Court</u> (1995) 37 Cal.App.4th 1411	30
<u>City of Richmond v. Superior Court</u> (1995) 32 Cal.App.4th 1430	30
<u>Connell v. Superior Court</u> (1997) 56 Cal.App.4th 601	17, 36, 39
<u>County of Los Angeles v. Superior Court</u> (2000) 82 Cal.App.4th 819	30
<u>Felix v. Bomoro Kommanditgesellschaft</u> (1987) 196 Cal.App.3d 106	8, 9
<u>In re Providian Credit Card Cases</u> (2002) 96 Cal.App.4th 292 ...	1, 2, 4, 5, 7, 9, 15, 17, 21, 25, 26, 30, 31, 35, 45, 46
<u>Morningstar v. Superior Court</u> (1993) 23 Cal.App.4th 676	12
<u>National Parks and Conservation Assn. v. Kleppe</u>	

(D.C. Cir. 1976) 547 F.2d 673	32
<u>New York Times Co. v. Superior Court</u> (1990) 218 Cal.App.3d 1579	35
<u>Pittsburg Unified School District v. California School Employees Association</u> (1985) 166 Cal.App.3d 875	34
<u>Powers v. City of Richmond</u> (1995) 10 Cal.4th 85	2, 3, 48
<u>Press-Enterprise Co. v. Superior Court</u> (1986) 478 U.S. 1	49
<u>Register Division of Freedom Newspapers, Inc. v. Orange County</u> (1984) 158 Cal.App.3d 893	26
<u>Roberts v. City of Palmdale</u> (1993) 5 Cal.4th 363	30
<u>San Gabriel Tribune v. Superior Court</u> (1983) 143 Cal.App.3d 762	2, 16, 25, 32, 33, 36, 39
<u>Stadish v. Superior Court</u> (1999) 71 Cal.App.4th 1130	21, 22, 29
<u>The Recorder v. Commission on Judicial Performance</u> (1999) 72 Cal.App.4th 258	33
<u>Uribe v. Howie</u> (1971) 19 Cal.App.3d 194	6, 7, 28, 31, 32
<u>Vibration Isolation Prod., Inc. v. American Nat. Rubber Co.</u> (1972) 23 Cal.App.3d 480	8

Statutes

Education Code section 92032(b)(4) 42, 43, 45

Evidence Code sections

1040 32

1060 21, 27, 28, 30-32

1061 15, 21

1061(b) 15, 22

Government Code sections

11126.1 46

6250. 1, 21, 35

6254(k) 8, 29, 31-33

6255(a) 6, 15, 16, 26, 27, 32

6257.5 36

6258 3, 21, 26

6259(c) 2, 3, 48

I. INTRODUCTION

The trial court in this case sorted through a voluminous record, weighed the evidence, and issued a 20-page decision which was consistent with that evidence and compelled by both the California Public Records Act (“PRA”), Government Code section 6250 et seq., and by this Court’s recent decision, In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292.

The University of California Regents (hereafter “Regents”) now ask this Court to find that basic performance information, return on investment, which is now freely disseminated by every major public pension fund in this country and this state – and which was disseminated by the Regents themselves just three years ago in an “up” market – is a “trade secret” on the order of rocket propulsion, when the Regents themselves eagerly shared the same information with the public before the principle of gravity brought the venture capital funds in which they invest in a free-fall back to earth (section III C infra).

Most shrewd investors don’t buy from people who won’t tell them how their “secret” investments are performing, and the trial court wisely didn’t buy what the Regents tried to sell it. This court – which can choose whether to invest its valuable time on this discretionary writ – shouldn’t either.

At bottom, the Regents’ attitude toward disclosure – both of basic financial performance information and of their own improperly closed meetings – is summarized in a telling footnote: “the public’s interest in disclosure is nil.” (Petition at 33 fn. 9.) But James Madison, two centuries ago before the current venture capital industry started and even before California’s first venture capitalists discovered gold at Sutter’s Mill in 1848, had a very different attitude. He declared – in ringing words which animate the Public Records Act – “[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].)

The trial court correctly followed both the letter and spirit of the law as set forth by Madison and the First Amendment, the Public Records Act and Providian. It clearly did not abuse its discretion in weighing the evidence in this heavily fact-based case. This Court need not and should not invest its valuable time on a discretionary writ petition challenging a well-considered, well-reasoned 20-page order. 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 section 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) effectuates that policy by allowing appellate courts to dispose of challenges to PRA orders summarily: “The legislative history 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 affording the parties an opportunity for 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. 119 [plurality opinion by Kennard, J.].)

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. (Petition at page 16 paragraph 39, and page 35, twice 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.) 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.

This Court (Division Four, Justice Kay) recently applied these standards in the closely-analogous context of whether a party’s assertion of trade secrets was sufficient to justify sealing of court records under California Rule of Court 243.1. In In re Providian Credit Card Cases, *supra*, 96 Cal.App.4th 292, the trial court (then-Judge Pollak) had ordered a large number of “confidential” documents unsealed. This court evaluated whether, as the party asserting trade secret protection asserted, the decision should be reviewed de novo, or whether, as a news media intervenor contended, the standard was abuse of discretion. This Court had no difficulty deciding: “[C]ourts throughout the country have treated the scope of public access as committed to a trial court’s discretion.” (*Id.* at 299, citations omitted.) “If a decision involves the exercise of discretion by a trial court, a reviewing court will reverse that decision only if it concludes that the discretion was abused. ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.’” (*Id.* at 299, citations omitted.)

This Court then evaluated the standard of review for determining whether a party has met its burden of establishing the existence of a trade secret. “The courts of this state have traditionally treated the issue of whether information constitutes a trade secret as a question of fact. There may be a number of related factual determinations, such as whether the trade secret is in fact secret, whether the information ‘derive[s] “independent economic value”’, whether a party made reasonable efforts to maintain secrecy, and whether disclosure will cause damage. A trial court’s express or implied resolution of purely factual issues will be upheld on appeal if supported by substantial evidence.” (*Id.* at 300-01, citations omitted.)

C. Burden Rests on Those Asserting Trade Secrets

Significantly, this Court rejected Providian’s argument that de novo review should be applied, and also rejected Providian’s argument that the declarations of those asserting trade secret protections “settle the facts.” (Id. at 301.) “The trial court was entitled to consider the entire record before it. It was not obliged to accept the Greiner and Klein declarations as dispositive. This is important because it was defendants’ burden to prove the existence of trade secrets, and to overcome the presumption in favor of public access. If the trial court found the declarations conclusory or otherwise unpersuasive, it could conclude, as it did, that defendants had failed to demonstrate any ‘overriding interest that overcomes the right of public access. . .’ ‘Where different inferences may reasonably be drawn from undisputed evidence, the conclusion of the jury or trial judge must be accepted by the appellate court.’” (Id. at 301, citations omitted.)

While the court in Providian had not made express findings on the trade secret issue, this Court found that this was not necessary. “[T]he papers submitted to the trial court may also identify subjects for implied findings. Finally, there may be other sources in a given case, which furnish insight to implied findings Lacking any express written findings by the trial court, the scope of our review of the order begins by determining whether appropriate findings we may infer in support of the order that 21 exhibits be unsealed have the support of substantial evidence.” (Id. at 302-03.)

Providian defeats the Regents’ Petition. The trial court impliedly found that the Regents had not met their burden of establishing the existence of a trade secret, and as demonstrated below it did not abuse its discretion in doing so.¹ The Regents impliedly concede that they cannot establish an abuse of discretion unless their novel interpretation

¹ Pet. Ex. 62 at 1981 [court finds trade secret contention “wanting”]; id. at 1984 [“If all this is evidence of a valuable ‘trade secret,’ it comes in a novel guise”].

of the law when trade secrets have been established is adopted here. (See Petition at 26 [conceding that Government Code section 6255(a) “puts an extra weight on the disclosure side of the scale”].) Because the trial court did not abuse its discretion in concluding that the Regents hadn’t met their burden of showing a trade secret, this Court need not and should not entertain the Regents’ novel assertion that the existence of trade secrets automatically eviscerates the Public Records Act, a position which lacks legal support in any event.

D. The Regents’ Cases Reject Trade Secret Claims

The Regents cite two cases for the proposition that whether information is a trade secret is a question of law (Petition at 20), but neither supports the Regents’ position and both reversed a trial court decision which had found a trade secret. In Agricultural Labor Relations Board v. Richard A. Glass Co. (1985) 175 Cal.App.3d 703, 713, the court stated in dicta that what constitutes a trade secret is a question of law (id. at 713); it went on to find that the trade secret claimant “failed to meet its burden proving either the existence of trade secrets or how disclosure would injure its business” (id. at 715); the court concluded that even if there was a trade secret, “allowance of the privilege would tend to conceal fraud and work an injustice on the agricultural workers.” (Ibid.) Thus, the portion of the ALRB v. Glass decision cited by the Regents is dicta and the decision as a whole soundly rejects every argument made by the Regents in this case.

Uribe v. Howie (1971) 19 Cal.App.3d 194, also cited by the Regents (Petition at 20), was cited in ALRB and contains many factual similarities. Like ALRB v. Glass, Uribe contains dicta about trade secret determination being a question of law (id. at 207); like ALRB v. Glass, it impliedly reverses a trial court finding that there were trade secrets (id. at 209); and like ALRB v. Glass, Uribe holds, “even if the information in the spray reports does contain trade secrets, we believe that the public interest is far better served

by disclosure than the converse.” In short, the appellate courts in both ALRB v. Glass and Uribe did what the trial court did in this case: they essentially rejected a trade secret claim, but went on to find that even if a trade secret existed, the public interest in disclosure predominated and allowance of a trade secret privilege would “conceal fraud and work an injustice.” (ALRB v. Glass, *supra*, 175 Cal.App.3d at 715.)

Indeed, the Regents’ counsel characterized the holding of Uribe thusly at oral argument: “Uribe’s holding that the information sought in that case was not a trade secret, that’s the holding.” (Pet. Ex. 90 at 2267:22-24.)

This Court should follow its recent Providian decision (and the many cases cited therein) and give deference to the trial court’s finding that there was no trade secret; in any event, this court can follow the ultimate conclusion of all three courts that no trade secret existed and that even if there was one, the interest in disclosure outweighed any interest in non-disclosure.

E. Exceptions to PRA 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 PRA’s disclosure requirements are narrowly construed. (California State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal.App.4th 810, 831.) Our Supreme Court has declared, “Maximum disclosure of the conduct of governmental operations was to be promoted by the act.” (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 [rejecting the same §6254(k) exemption asserted by the Regents].)

F. Abuse of Discretion Standard Also Applies to Minutes and Tapes

The abuse of discretion standard of review is also applicable to review of the trial court’s order requiring disclosure of the minutes and tapes of the closed sessions held in

2000 and 2002 to adopt changes to the Regents investment policies. Although the Regents attempt to paint this as purely a question of law, the trial court's decision relied heavily on factual determinations. Moreover, although the decision involved construction of an exception to the Bagley Keene Act's open meeting requirements, it was nonetheless a Public Records Act decision subject to abuse of discretion review. (Braun v. City of Taft (1984) 154 Cal.App.3d 332, 342.)²

G. 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 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. (Providian, supra, 96 Cal.App.4th at 301, 303 [conclusion of trial judge when different inferences may be drawn “must be accepted by the appellate court”];

² To the extent the Court purely construed the statute to apply only to matters involving “the purchase or sale of particular specific investments,” that may have been a legal determination. Pet. Ex. 61 at 1967. But that was a correct determination; otherwise any meeting involving any general discussion of any investment policy at all would ipso facto be closed. Even the Regents have not consistently adhered to such an expansive reading of the statute, and there is no basis for this Court to adopt such a reading.

looking at whether findings “we may infer in support of the order” have the support of substantial evidence³].)

III. FACTS

A. Texas Discloses Internal Rate of Return Information

This case, in some ways, originated deep in the heart of Texas. Under pressure from the Houston Chronicle and that state’s Attorney General, the University of Texas Investment Management Company (“UTIMCO”) in September, 2002 decided to publish the financial performance results for the venture capital funds in which it invested. As award-winning journalist Matt Marshall⁴ wrote for real party San Jose Mercury News (hereafter “Mercury News”), “It’s no secret that most venture funds are doing terribly,” and UTIMCO’s decision did not make the venture funds happy. (Petition Exhibit 2 (hereafter “Pet. Ex.”) at 42.)

B. California Follows Suit After San Francisco Judge’s Ruling.

UTIMCO’s decision had immediate consequences in our Golden State. Real party Mercury News pressured the nation’s largest public pension fund, the California Public Employees’ Retirement System (CalPERS), to release its performance information. CalPERS resisted strenuously, making every argument now advanced by the Regents about the harm which would come from disclosure of performance results and the alleged

³ Providian and the Felix and Vibration Isolation cases are especially significant here because all arise in the context of a trial court which had to weigh declarations, as the trial court did here. Providian weighed declarations in the closely-analogous context of whether “trade secret” assertions overcame the public’s right of access to court records. The latter two cases weighed evidence in the context of declarations submitted on a motion to quash service of summons for lack of personal jurisdiction. All affirmed the trial courts.

⁴ Marshall won this year’s James Madison Freedom of Information Award from the Northern California chapter of the Society of Professional Journalists for shedding light on the venture capital industry.

“trade secret” nature of internal rate of return (“IRR”). The Mercury News sued, and San Francisco Superior Court Judge A. James Robertson II issued a tentative ruling (after full briefing and a lengthy hearing) that internal rates of return (“IRR”) are not trade secrets exempt from disclosure under the PRA. (Pet. Ex. 2 at 35:25-26.)

In the face of Judge Robertson’s ruling, the California State Teachers Retirement System (CalSTRS) immediately decided to publish the IRR of its venture capital funds. One month later, CalPERS – by far the nation’s largest public pension fund – decided to do the same. CalPERS and the Mercury News entered into a Stipulated Judgment on December 20, 2002 whereby CalPERS agreed to publish, on a quarterly basis, the internal rates of return (“IRR”) for its private equity partners in a detailed format which states vintage year, capital committed, cash in, cash out, cash out plus remaining value, investment multiple and internal rate of return. (Pet. Ex. 2 at 36.)

C. IRRs Are a “Valuable and Widely-Accepted Tool” For Evaluating Performance. They Aren’t Trade Secrets and Anyone With a Calculator Can Figure Them. UC Disclosed IRR When Venture Capital Funds Were Making Money, Before They Started Losing Money in the Last Three Years.

The Regents’ brief never tells this Court what the internal rate of return (“IRR”) is, even though that’s what this case is about (Pet. Ex. 62 at 1978-79, Court’s Order limited to IRRs), so we will. IRR is defined by CalSTRS as, “The discount rate at which the present value of future cash flows of an investment equals the cost of the investment.” Dr. Robert Hendershott, an independent expert who teaches at Santa Clara University and spent three years consulting for an institutional private equity investor, explains, “The IRR is a standard measure of financial performance. It is generally the theoretically correct measure because, unlike many other performance measures, IRRs account for both the size and timing of cash flows. Consequently, the IRR of an investment captures the actual economic impact of the investment, and provides a consistent framework upon

which multiple investments can be compared.” (Pet. Ex. 49 at 1533.) Dr. Hendershott remarks that IRRs “allow a knowledgeable observer to accurately discern a fund’s interim performance.” (Ibid.) He observes that they are “widely and regularly cited by both individual funds and national data providers,” and thus are a “valuable and widely-accepted tool for evaluating private equity funds’ performance over time.” (Id., paragraph 7, at 1534.)

Dr. Hendershott explains that “IRRs are the theoretically correct measure of financial performance, and all serious investors require knowing the interim IRRs from a private equity group’s more recent funds as part of their due diligence as they consider making an investment.” (Pet. Ex. 49 at 1534.) This comment is borne out by the fact that UC itself, when it considered investing in new venture funds in 1999, publicly disclosed the IRR of those funds. (Pet. Ex. 52 at 1772-78, especially pages 1775-77.)

Only one difference between then and now accounts for the Regents’ current refusal to disclose IRR of the individual funds: their private equity funds were making money in 1999, and they are losing money now. (Pet. Ex. 52 at 1769-70, showing 29 percent drop for UC private equity portfolio in year ending June 30, 2001, lagging the benchmark, and 15 percent drop in year ending June 30, 2002.) Indeed, the Regents’ own web site shows that the annualized total return of the UCRP private equity portfolio over the last three years is a negative 34 percent.

(<http://www.universityofcalifornia.edu/regents/regmeet/sept03/601b.pdf> [UCRP Private Equity Performance, as of June 2003].)⁵

⁵ Not surprisingly, the Regents do not mention the precipitous losses of the past three years in their brief. The tendency to accentuate the positive and omit the negative is not unusual in the fund industry (or the government). (See Morningstar v. Superior Court (1994) 23 Cal.App.4th 676, 681 [mutual fund sues unsuccessfully over critique headlined “Lies, Damn Lies and Fund Advertisements”].) The Regents would like the public and this Court to believe that their venture investments inhabit Garrison Keillor’s fictional

Dr. Hendershott's testimony shows that IRRs are not a "trade secret." He notes that they are "widely and regularly cited by both individual funds and national data providers." (Pet. Ex. 49 at 1534.) He likewise gives short shrift to the Regents' contention that the IRR is a "trade secret" of Cambridge Associates, which compiles UC's IRRs: "I find this an odd claim: calculating an IRR is straightforward and covered in virtually all introductory finance courses (as well as being explained in most finance textbooks). A function for IRR calculations is built into virtually all financial calculators (as well as Excel). I would certainly be very skeptical of the claim that the calculation of an IRR is a trade secret of Cambridge Associates." (*Id.* at 1534.) The Regents claim that IRR may be based on confidential valuations, but the valuations themselves have been disclosed by the Regents. (Pet. Ex. 24 at 565-71.) The trial court shared Dr. Hendershott's skepticism about the Regents' "trade secret" claims, and with good reason. (Pet. Ex. 62 at 1982-84.)

D. UC Is Now the Lone Holdout Against Disclosure of IRR and Also Refuses to Disclose Minutes of Improperly Closed Sessions

The IRR of venture capital funds is now published by every significant public pension fund in the country, with the lone exception of the University of California. Indeed, at least 41 of the funds invested in by UC (or 56 percent) have had their IRRs released by other public pension funds. (Pet. Ex. 9, at 1800:6-13 and 1808-1861.) Only nine of the 72 UC funds with IRR data which object to the release of IRR can say that their IRR has not previously been disclosed. (Pet. Ex. 48 at 1525.) IRR, therefore, is not a "trade secret."

Lake Woebegone, where "all the children [or venture funds] are above average," but the Regents' headquarters are actually closer to Lake Merritt. Lake Merritt is nice, but it isn't Lake Woebegone. Indeed, the Regents' attempt to put the best "spin" on losses extends to Treasurer David Russ' declaration (Pet. Ex. 24 at 310 ¶ 20), where he congratulates himself for not investing in new venture funds from 2000 to 2002.

The Regents have cited no evidence of any public pension fund – other than their own – which invests in venture capital funds and which continues to resist disclosure of the basic IRR information released by all those funds.

The Regents’ refusal to disclose information everyone else discloses represents an attitude that also manifests itself in their overly secretive deliberations about matters of investment policy. In January and March of 2000 the Regents’ Committee on Investments (“COI”) met in closed session to discuss and adopt an Asset Allocation Policy (“AAP”) based on the recommendations of Wilshire Associates Inc. (Pet. Ex. 24 at 329 ¶39.) At these meetings the COI also discussed and adopted a plan to place a portion of the University’s public equity investments, which until that time had been managed solely by the Treasurer’s office, into externally managed index funds. (Id.) In October and November of 2002 the COI met in closed session to discuss and adopt a Multiple Manager Equity Investment Strategy (“MMEIS”). (Pet. Ex. 24 at 306-307 ¶6, 328 ¶36.) The closed session meetings of the COI in January and March of 2000 are referred to as the “2000 Closed Sessions,” the closed session meetings of the COI in October and November 2002 are referred to as the “2002 Closed Sessions,” and these closed session meetings are referred to collectively as the “Closed Sessions.”

E. The Beneficiaries of the UC Pension Fund Who Depend on It for Their Retirement Income Are Forced to Sue.

The decisions by CalPERS, CalSTRS, and the San Francisco retirement fund to release IRR information prompted the Coalition of University Employees (“CUE”), which represents 18,000 clerical employees in the UC system, to ask UC to do the same. CUE made a Public Records Act request for, among other things, IRR information on December 24, 2002. CUE cited CalPERS’ decision to release IRR information after Judge Robertson’s tentative ruling. (Pet. Ex. 2 at 13-16.) CUE also requested all records, including minutes and tapes, of the Closed Sessions. (Pet. Ex. 2 at 13.) While the

Regents produced some documents, they refused to produce IRR information and the records of the Closed Sessions.

CUE did not decide to sue swiftly or lightly. It waited for more than three months before it became apparent that UC would not follow the lead of other major public pension funds. Finally, on April 1, 2003, CUE and retired UC Professor Charles Schwartz, joined by the Mercury News, brought this action.⁶ (Pet. Ex. 2 at 3-44.)

F. UC Belatedly Produces Documents, After Being Sued.

More than two months after this action was brought, UC belatedly produced additional documents. This disclosure occurred on the eve of the due date for real parties' Reply Brief and nearly six months after real parties' PRA request. (Pet. Ex. 47 at 1347:6-1348:2.)

One of the belatedly-produced documents contained a post-it on the cover reading, "Too complicated David does not want to disclose," referring to UC Treasurer David Russ. (Id. at 1347:19-25; see Pet. Ex. 45 at 1289-90.)

The Regents attempt to minimize the significance of Mr. Russ' attitude, asserting that it is "irrelevant" and demonstrates "only that the University discloses records, despite the concerns of its officials, if the Public Records Act requires it to do so." (Petition at 8 fn. 2.) But in light of the fact that the document was produced two and a half months after the Regents were sued, one could say, as this Court remarked in Providian, "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." (96 Cal.App.4th at 309.)

⁶ While not a party to this action, the United Professional and Technical Employees Union ("UPTE") has since decided to support the action. UPTE also represents UC employees.

G. The Regents Argue the 6255(a) Exemption, Paying Little Attention to “Trade Secrets”

The Regents’ Opposition to real parties’ Petition made little attempt to show that IRRs are a “trade secret.” The Regents’ primary argument was that the “catch-all” exemption of Government Code 6255(a) justifies non-disclosure of IRR, because the interest in non-disclosure “clearly outweighed” the interest in disclosure. (Pet. Ex. 7 at 174-180.) Only as an afterthought did the Regents argue that IRRs were a “trade secret.” (*Id.* at 180-82.) Moreover, while citing Evidence Code section 1061's definition of a trade secret (Pet. Ex. 7 at 180), the Regents made no effort to comply with the specific procedures set forth in Evidence Code section 1061(b), which require the owner of a trade secret to file a motion for protective order and to file a specific affidavit setting forth the owner’s knowledge and the basis for the claim of trade secret. Rather, the Regents’ cursory argument on the “trade secret” point relied only upon conclusory declarations which, for the most part, avoided any discussion of IRRs and concentrated only upon “release of information regarding the performance of individual portfolio companies in which the partnerships have invested,” a point not at issue on this writ. (Pet. Ex. 7 at 182:6-8.)

H. The Trial Court Orders Disclosure of IRRs

The trial court heard a very 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.) The Court, after noting the broad scope of the PRA and the narrow construction of exemptions (*id.* at 1954-55), observed that the Regents’ brief was primarily devoted to a claim that the section 6255(a) exemption applied, while the Regents at argument “focused primarily on the contention that the IRRs are exempt as trade secrets. The Court thus begins its analysis with discussion of this [trade secret] contention – and finds it wanting.” (*Id.* at 1956, emphasis added.)

The Court first examined the contention that the IRRs were “trade secrets” either of Cambridge Associates or the venture capital funds. The Court correctly observed that assurances of confidentiality between UC and either Cambridge or the funds cannot carry the day: “Assurances of confidentiality . . . that the data would remain private was not sufficient to convert what was a public record into a private record.” (Pet. Ex. 61 at 1958, quoting San Gabriel, *supra*, 143 Cal.App.3d at 775.)

The Court then waded through the voluminous evidence in this case showing prior disclosure of IRR by other public pension funds and comparing those disclosures to the venture capital funds in which UC invests. Looking at the Regents’ own evidence, submitted by the Regents’ counsel’s legal assistant, the Court found that 37 percent of the funds which have generated IRRs – 33 out of 88 – have had their IRRs revealed. The Regents’ counsel also had found that for 24 out of the 33 funds whose IRRs had been disclosed, the IRR figures are “materially different” from those calculated by Cambridge Associates for UC. “If all this is evidence of a valuable ‘trade secret,’ it comes in a novel guise,” the trial court concluded. (Pet. Ex. 61 at 1959.)

The trial court, with that observation, impliedly found that the Regents failed to show the existence of a trade secret. The Court left little doubt of that conclusion with the following sentence, too: “In sum, there is no question that numerous funds have already had their IRR data made public, a fact that makes apt the recent observation of Justice Kay: ‘[p]ublic disclosure...is fatal to the existence of a trade secret.’ (*Id.* at 1959, citing In re Providian Credit Card Cases, *supra*, 96 Cal.App.4th at 304.)

After leaving little or no doubt that the Regents had failed to meet their burden of establishing a trade secret, the Court went on to assume, arguendo, that the Regents had shown trade secrets, and balanced the interests. (Pet. Ex. 61 at 1959.) The Court held that under any test, whether with trade secrets or without, “the public interest in disclosure of the IRRs clearly outweighs the claimed need to keep them secret.” (*Id.* at

1960.) The Court balanced the clear public interest in “disclosure of government financial information” (*id.*, citing Connell v. Superior Court (1997) 56 Cal.App.4th 601, 617) against the interest in non-disclosure, which the Court characterized as follows: “At best, it is conclusory – at worst, speculative.” (Pet. Ex. 61 at 1962.)

The Court referred to UC’s venture fund declarations as “conclusory,” and observed that “of the approximately 94 funds in which Respondent invests, less than one quarter have submitted declarations in support of Respondent’s opposition,” and “of those funds which do provide declarations, many object only to release of ‘Portfolio Company Information,’ not of IRRs.” (*Id.* at 1962-63.) “Moreover, some fund managers who do object to release of the IRR admit that the same information has recently been disclosed by CalPERS and others, and that they did nothing.” (*Id.* at 1963.) Finally, the Court concluded, “the record as a whole demonstrates that other public pension plans have produced IRR information without the dire consequences predicted by [the Regents] – indeed, that perhaps the dire predictions are false.” (*Id.* at 1963.) The Court then went on to cite the widespread disclosure by other public pension funds of IRRs and the absence of any dire consequences. “None of Respondent’s ‘the sky will fall’ concern has manifested. Which is perhaps not surprising, at least in the current economic climate.” (*Id.* at 1964.)

The trial court also ordered disclosure of the minutes and tapes of the Closed Sessions. 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.” (Pet. Ex. 61 at 1968.) The court impliedly concluded that discussion and adoption of the Asset Allocation Plan and the Multiple Manager Equity Investment Strategy 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

Closed Sessions, and on that basis concluded that there was “simply no basis” for keeping the deliberations that occurred at the Closed Sessions secret from the public even if portions of the meeting were properly held in closed session. (Id. at 1969.)

The Regents also claimed that the 2002 Closed Sessions were properly held because they included discussion of personnel matters—i.e., discussion of the performance and dismissal of the University’s private equity staff. The court illustrated its skepticism of the Regents’ declarations by rejecting their personnel exception argument “unless [the Regents’] could demonstrate that the [2002 Closed Sessions] contained discussions regarding the performance and/or dismissal of university employees.” (Id.) The court then ordered the Regents to produce for in camera review the minutes and tapes of the 2002 Closed Sessions, indicating what portions of those minutes and tapes should be redacted because they referred to individual employees or otherwise would violate the privacy rights of the University’s employees. (Id. at 1969-70.) The Regents belatedly did, but because they were late in doing so the in camera review has not been completed.

I. The Regents’ Request for Reconsideration Is Denied.

The Regents promptly moved for reconsideration of the Court’s decision with respect to IRRs, basing their motion upon a decision by Sequoia Partners to exclude the University of Michigan from future funds. Interestingly, the Regents learned of this “new evidence” not from Sequoia itself – which had already submitted a declaration in support of the Regents’ position – but from a news article in real party San Jose Mercury News.

Real parties opposed the Regents’ Motion for Reconsideration with, inter alia, a declaration from the Mercury News’ Matt Marshall. (Pet. Ex. 77 at 2084-90.) Marshall had canvassed CalPERS and CalSTRS to see whether either had experienced “negative repercussions” as a result of disclosing IRR. CalPERS reported, “[S]o far we have not had trouble accessing funds because of the disclosure issue.” (Id. at 2087.) Grove Street

Advisors – which manages a “fund of funds” for CalPERS and which had earlier intervened in the CalPERS case to oppose IRR disclosure – reported, “The vast majority of our funds have voiced little concern about the CalPERS disclosure rules and the overall portfolio remains ‘best in class’ in our opinion.” (Pet. Ex. 77 at 2089.) Finally, a CalSTRS spokeswoman commented, “this is the new environment, and there’s been no repercussions about our disclosures.” (Pet. Ex. 77 at 2085.) Finally, Marshall reported that Sequoia itself – which had elected to discontinue its relationship with Michigan – had “never asserted that its ‘internal rate of return’ was a trade secret, and it had also indicated to me that if disclosure was limited to internal rate of return, it would not have a problem.” (Pet. Ex. 77 at 2085, ¶ 5.)

J. Sequoia, at the 12th Hour, Complains About Public Disclosure Laws

The Motion to Reconsider was heard on August 28, 2003 at 9:00 a.m. On August 27, 2003 at 3:27 p.m., Sequoia Capital notified UC for the first time that it was being disinvented from a new fund. Sequoia defiantly asserted, “We will never agree to the release of information about our investments” (Pet. Ex. 85 at 2200), but it said so only after bragging about the purportedly outsized return on investments enjoyed by UC’s investment in Sequoia. UC Treasurer Russ – after maintaining for months that he could not disclose the rate of return for any particular venture capital fund – submitted a declaration boasting about the return on UC’s investment in Sequoia. (Pet. Ex. 85 at 2197.)⁷

The declaration was submitted to the Court on the morning of the hearing on the Motion for Reconsideration. The Regents’ counsel emphasized Sequoia’s decision. The trial court was unpersuaded: “best I can tell, 92 or 93 . . . funds they invested or 94, one of

⁷ The Treasurer claimed a 4.6-fold return (Pet. Ex. 85 at 2197), but that was over a 22-year period. (Pet. Ex. 85 at 2198.)

them pulled the plug and that leaves 93 more. And the rules are that it's public." (Pet. Ex. 90 at 2256:13-20.) The Regents' counsel touted Sequoia, to which the trial court responded: "Let's take the worst performing of the 93 Why shouldn't that be out there in the public?" (Pet. Ex. at 2257:21-2258:1.) The trial court went on to deny the Motion for Reconsideration. Its order stated that it had considered "the declarations filed at the hearing," including the Regents' 12th-hour Sequoia disclosure.

This Writ petition followed. Real parties have stipulated that the trial court's order may be stayed until September 30, 2003, to allow the trial court to complete an in camera review of open meeting documents, and in order to give this Court time to entertain this petition. (Pet. Ex. 88 at 2212-13.) Real parties oppose any further delay in the disposition of this petition in view of the clear mandate of Government Code section 6258 that PRA matters be heard "at the earliest possible time," and in view of the fact that on September 30, this case will have been pending for six months.

ARGUMENT

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE REGENTS' TRADE SECRET AND OTHER CLAIMS OF EXEMPTION FROM THE PRA.

A. The Regents Did Not and Cannot Meet Their Burden of Establishing a Trade Secret.

At the outset, the Regents' trade secret claim founders on procedural shoals. The Regents failed to follow the requirements set forth in Evidence Code section 1061 for someone who wants to demonstrate a trade secret. In Stadish v. Superior Court (1999) 71 Cal.App.4th 1130, 1145, the Court observed, "We conclude that the procedures called for in section 1061 have a utility in a civil action in protecting the trade secret privilege called for in section 1060 and should be followed. However, we note that the affidavits

submitted by the Gas Company in this case are conclusory in nature and not in compliance with section 1061, subdivision (b)(1).”⁸

Division Four of this Court likewise rejected a claim of “trade secrets” when the declarations in support of the trade secret claim were “conclusionary and lacking in helpful specifics.” (Providian, *supra*, 96 Cal.App.4th at 305.) Those adjectives aptly characterize the declarations submitted by the Regents, most of which appeared to have been “cloned” from a template generated in the CalPERS case.

Section 1061(b) requires the owner of the trade secret to file a motion for a protective order, including an affidavit based upon personal knowledge listing the affiant’s qualifications to give an opinion regarding the trade secret, identifying the trade secret at issue, and presenting evidence that the “secret” qualifies as a trade secret. The Regents didn’t even try to comply with that procedure. While they did submit a number of declarations, the trial court – using the same word used by the Court in Stadish – correctly found those declarations “conclusory.” (Pet. Ex. 61 at 1962; *compare* Stadish, *supra*, 71 Cal.App.4th at 1145.) “More importantly, the Court notes that of the approximately 94 funds in which Respondent [the Regents] invests, less than one quarter have submitted declarations in support of Respondent’s opposition.” (Pet. Ex. 61 at 1963, citing Pet. Ex. 48, at 1524-31.) The trial court went on to find, “[O]f those funds which do provide declarations, many object only to release of ‘Portfolio Company Information,’ not of IRRs. Moreover, some fund managers who do object to release of the IRR admit that the same information has recently been disclosed by CalPERS and others, and that

⁸ Stadish was not a Public Records Act case. Given the “fundamental and necessary” policies of access to records set forth in the PRA’s preamble, Govt. Code section 6250, even greater specificity should be required in a PRA case when a party resisting disclosure asserts trade secret protection.

they did nothing.” (Pet. Ex. 61, at 1963, citing Pet. Ex. 16 at paragraph 12 and Pet. Ex. 18 at paragraph 12.)

Accordingly, the Regents failed to meet their burden of establishing a trade secret. The trial court did not abuse its discretion in finding the Regents’ trade secret contention “wanting.” (Pet. Ex. 61 at 1956.)

The Regents’ counsel conceded at the hearing on the Petition, “The University claims with respect to this data no confidentiality interest of its own.” (Pet. Ex. 89 at 2220:15-16.) Not only did the Regents not claim a trade secret, but none of the alleged trade secret owners cared enough about their “trade secrets” to intervene in this case, as might have been expected of one who had a valuable “trade secret” to protect.⁹

Conceding that UC had no trade secrets of its own, the Regents argued below that Cambridge Associates – which merely compiles IRR information – had a valuable trade secret of some sort. The Regents, however, conceded, “Obviously, how to calculate an

⁹ In the CalPERS case, Grove Street Advisors, a “fund of funds” for CalPERS, moved to intervene in the case before eventually agreeing to a Stipulated Judgment which agreed to release of IRRs of non-Grove Street funds. (Pet. Ex. 2 at 36:8-11.) Grove Street Advisors vigorously opposed disclosure of IRRs and argued that CalPERS’ investment would be jeopardized by disclosure. But after the CalPERS Stipulated Judgment, Grove Street’s counsel stated with reference to venture funds, “In some of these cases, it’s pretty clear something more than just a market downturn has caused huge losses At the height of the market there was so much money chasing so few deals, the amount of care and thinking that went into throwing millions of dollars into fly-by-night companies was slim to none.” (Pet. Ex. 5 at 152, paragraph 5; see Pet. Ex. 5 at 155.) Grove Street itself announced, after CalPERS decided to release the IRRs of Grove Street funds, too, “CalPERS has made the decision to expand public disclosure of its private equity investments consistent with their overall leadership in the arena of public transparency and corporate governance. While we sought to protect the confidentiality of the funds in our portfolio, we will work within our client’s policies to continue to build an outstanding private equity portfolio for CalPERS.” (Pet. Ex. 53 at 1806.) Finally, Grove Street very recently announced, “The vast majority of our funds have voiced little concern about the CalPERS disclosure rules and the overall portfolio remains ‘best in class’ in our opinion.” (Pet. Ex. 77 at 2089.)

IRR is not, I agree, not rocket science.” (Pet. Ex. 89 at 2226:11-13.) The Regents argued that Cambridge had contracted with UC to compile IRR, but also conceded, “I do not say that you can contract with somebody to make something that is not a trade secret a trade secret.” (Pet. Ex. 89 at 2228:19-21.) The trial court expressed great skepticism both at argument and in its ruling that Cambridge had a “trade secret” in its compilation of IRR information. (Pet. Ex. 89 at 2234:20- 2235:4; Pet. Ex. 61 at 1957 and fn. 5, and 1959.) Eventually, the trial court concluded, pointing to the fact that different consultants come up with different IRR figures, “If all this is evidence of a valuable ‘trade secret,’ it comes in a novel guise.” (*Id.* at 1959.)¹⁰ The trial court’s ruling is supported by an expert, Dr. Hendershott, who was “very skeptical” of Cambridge’s “trade secret” claim. (Pet. Ex. 49 at 1534.)

The Regents now renew their argument that Cambridge has a trade secret (Petition at 21), but the Regents’ counsel at the hearing on the Motion for Reconsideration faulted the Court for focusing on Cambridge Associates (when the Regents had asked the court at the first hearing to do so), saying, “The Court’s order focused on Cambridge Associates, but I believe the focus should have been on, although they have a trade secret interest in it, it’s relatively limited The real trade secrets here are the trade secrets of the underlying private equity partnerships and their portfolio companies.” (Pet. Ex. 90 at 2252:24-2253:3.)

The Regents’ assertion of “trade secret” in the private equity partnerships’ IRRs is disproved not just by the consistent disclosure of IRRs by other public pension funds, but by the Regents’ own disclosure as well. In June, 1999, the Regents’ then-Treasurer, Patricia Small, recommended investing in eight new venture funds. Ms. Small’s

¹⁰ The fact that UC uses a private consultant to compile IRRs certainly does not create a trade secret. CalPERS, too, uses a private consultant, State Street Corp., to compile IRR, and that IRR is publicly disclosed. (Pet. Ex. 53 at 1816.)

recommendation focuses on the historical performance – using net IRR – of UC’s venture capital portfolio, and on the net IRR of the eight funds being considered. (Pet. Ex. 52 at 1772-78.) These documents were made public to real party Prof. Schwartz in the year 2000. From this, Professor Schwartz concluded, “[I]t appears that the ‘urgent’ need for secrecy on IRRs is a rather recent thing, which occurred only when the rate of return declined.” (Pet. Ex. 52 at 1742 ¶ 23.) The trial court made the same observation: “I take it . . . were it the case that the newspaper wanted this stuff four years ago, Mr. Russ, if he was a treasurer then, they would have been delighted to give them all this IRR because they were doing so well. Far and away best performing. Is that right?” (Pet. Ex. 89 at 2231:20-25.) The trial court recognized the Regents’ position for what it is: good news is not a “trade secret,” but bad news is.¹¹

In short, the trial court did not abuse its discretion in finding that the Regents failed to meet their burden – either procedurally or substantively – of showing a “trade secret.” The trial court – as this Court recently held in Providian – was well within its discretion to conclude that the Regents’ declarations were “conclusory or otherwise unpersuasive.” (Providian, supra, 96 Cal.App.4th at 301; see Pet. Ex. 61 at 1962-63 [branding the Regents’ declarations “conclusory” and finding them unpersuasive].)

Most of the Regents’ “trade secret” argument is grounded on the alleged fact that the University contracted with Cambridge and the venture capital funds for confidentiality. (Petition at 22.) But the Regents conceded at argument – as they must –

¹¹ The Regents argue (Petition at 21, fn. 4) that if a fund’s portfolio contains few investments, IRR can be “reverse engineered” to discover portfolio company valuations. The record belies this contention. UC’s venture capital partners freely disclose the identity of their “portfolio companies” on the web. (Pet. Ex. 51 at 1537-1734.) Those that do generally have dozens, if not hundreds, of portfolio companies. (Id. at 1599-1628, Kleiner Perkins website.) And many of those companies are public. (See, e.g., Pet. Ex. 51 at 1599, listing Amazon and AOL as portfolio companies.)

that contracts for confidentiality can't carry the day. (Pet. Ex. 89 at 2228:19-21 ["I do not say that you can contract with somebody to make something that is not a trade secret a trade secret"].) As the Court in San Gabriel Tribune, *supra*, 143 Cal.App.3d at 775, concluded, "Assurances of confidentiality by the City to the Disposal Company that the data would remain private was not sufficient to convert what was a public record into a private record." (Accord, Register Division of Freedom Newspapers, Inc. v. Orange County (1984) 158 Cal.App.3d 893, 909-10.)

The trial court correctly rejected all of the Regents' trade secret contentions. Both its express findings and its implied findings are supported by substantial evidence, and the court did not abuse its discretion. (Providian, *supra*, 96 Cal.App.4th at 301; Braun, *supra*, 154 Cal.App.3d at 342.)

B. Under Any Test Which the Trial Court Applied or Could Have Applied, It Did Not Abuse Its Discretion in Ordering Disclosure.

1. No Factual Basis to Apply Trade Secret Test.

The Regents devote the bulk of their argument to a contention that the trial court applied the wrong legal standard. (Petition at 24-33.) But they are wrong for several reasons, both factually and legally.

First and foremost, the Regents are wrong factually: as demonstrated above, the Regents did not and cannot meet their burden of showing a trade secret, the trial court did not abuse its discretion in rejecting trade secret claims, and that is the end of the inquiry. The trial court's express and implied rejection of the Regents' trade secret claims makes it unnecessary for this Court to decide what standard applies if there are trade secrets. A summary denial of this petition is both permissible and preferable in light of the clear command of Government Code section 6258 that PRA matters be resolved at the "earliest possible time."

2. The Regents Themselves Emphasized the Section 6255(a) Balancing Test Over the Trade Secret Test.

Second, the Regents clearly invited the error they now contend the trial court committed. The Regents spent a full six pages in their Opposition to the petition – before contending that any “trade secret” existed – arguing that they fell within the “catch-all” exemption of Government Code section 6255(a). (Pet. Ex. 7 at 174-80.) They now contend that was the wrong standard. The Regents themselves implicitly concede they can’t meet the 6255(a) standard: “When an agency invokes the Section 6255(a) ‘catch-all’ exception, it has the burden of proof. Unsurprisingly, because the ‘catch-all’ exemption is invoked to prevent disclosure of unprivileged, non-exempt information, that burden is not trivial: the agency has the ‘burden of demonstrating a ‘clear overbalance’ on the side of confidentiality.” (Petition at 24, quoting California State University, Fresno v. Superior Court (2001) 90 Cal.App.4th 810, 835.) As discussed infra, the interest in disclosure far surpasses the interest in non-disclosure.

3. The Trial Court Applied the Trade Secret Test Anyway, and the Regents Lost Under That Test Too.

Third, the trial Court applied – for the sake of argument – the standard the Regents say it should have applied. The trial court, after expressly and impliedly rejecting the claim of trade secrets (Pet. Ex. 62 at 1981, 1984), went on to “assume” that there were trade secrets, and to examine what the Regents say it should examine: whether, under Evidence Code section 1060, “allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” (Pet. Ex. 62 at 1985.) The Court then concluded that “the public interest in disclosure of the IRRs clearly outweighs the claimed need to keep them secret.” (Id. at 1985.) It concluded alternatively – using the trade secret standard of Evidence Code section 1060 – that “failure to produce the IRRs would work an injustice. The IRRs are not exempt from disclosure under the trade secret exemption.” (Pet. Ex. 62

at 1990.) A case cited by the Regents which didn't even involve the weighty public policies in favor of disclosure of the Public Records Act similarly found that allowance of the trade secret privilege would "tend to conceal fraud and work an injustice." (ALRB v. Glass, *supra*, 175 Cal.App.3d at 715.)

The Regents devote a lengthy argument to the proposition that the "very precise" standard of Evidence Code section 1060 and Government Code section 6254(k) is "perfectly clear" and establishes a "very different standard than the one prescribed under Section 6255(a) when an agency seeks to withhold disclosure of unprivileged, non-exempt information." (Petition at 24-30, especially page 25.) As previously noted, this Court need not resolve this academic argument because the Regents have failed to establish its factual predicate: there are no trade secrets to protect. But even assuming, as the trial court did for the sake of argument, that there are trade secrets, the Regents are wrong on the law, too.

Not one case under the Public Records Act has ever established the law the Regents would like this Court to make, and none has even come close. The Regents labor mightily to distinguish Uribe v. Howie (1971) 19 Cal.App.3d 194, asserting that the trial court was "just plain wrong" in its reading of Uribe because Uribe "never interpreted the 'work injustice' standard at all." (Petition at 26.) Once again, however, it is the Regents – not the trial court – who are "just plain wrong."

Uribe devoted a lengthy discussion to Evidence Code section 1060's "work injustice" standard, noting that under that standard "the trade secret might be protected only if the interests of justice are thus best served." (Id. at 207.) After devoting lengthy discussion to whether there was a trade secret in that case – and indicating, as the trial court did in this case, that there really wasn't (id. at 207-09) – Uribe went on to hold, "even if the information in the spray reports does contain trade secrets, we believe that the public interest is far better served by disclosure than by the converse." (Id. at 210.)

Several other cases also undertake the “ad hoc” balancing test the Regents condemn. In San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, the Court brushed aside claims of exemption under Evidence Code sections 1040 and 1060 in a Public Records Act case. (Id. at 775-77.) Like the trial court here, San Gabriel rejected a trade secret claim and found that a claim of exemption asserting trade secrets is analogous to the balancing test under Government Code section 6255(a): “the privilege that section 6254(k) incorporates should be applied conditionally on a clear showing that disclosure is against the public’s interest.” The Court found that section 6254(k) should not be applied, and “adhere[d] to the federal court’s policy of narrowly construing the disclosure exemptions.” (Id. at 777-78.)

Even in cases which do not arise under the Public Records Act – which, of course, “encourages openness by government” (id. at 773) – the Courts have consistently undertaken the balancing test the Regents condemn. In Stadish v. Superior Court, supra, 71 Cal.App.4th at 1145, the Court held that the public interest must be weighed in deciding whether there is good cause for a protective order in a “trade secret” case. The Court condemned “conclusory” affidavits submitted by a party asserting trade secrets, just as the trial court did in this case. (Id. at 1145.) In Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal.App.4th 1384, cited by the Regents, the Court held, “we believe that a court is required to order disclosure of a trade secret unless, after balancing the interests of both sides, it concludes that under the particular circumstances of the case, no fraud or injustice would result from denying disclosure.” (Id. at 1393.) And in ALRB v. Glass, supra, the Court of Appeal found that the burden is on the holder of an alleged trade secret to demonstrate not just the existence of the “trade secret, but also how disclosure would injure its business.” (175 Cal.App.3d at 714-15.) In short, there is no question that the trial court was required to balance the interests under section 6254(k) and Evidence

Code section 1060 if a trade secret existed (which, as shown above, is an academic inquiry since no trade secret existed).¹²

The Regents cite several cases in support of their proposition that no balancing should be undertaken, but all are inapposite. The Regents cite a passage from City of Hemet v. Superior Court (1995) 37 Cal.App.4th 1411 (Petition at 27), but Hemet did not involve the trade secret privilege of Evidence Code section 1060, but rather an exemption for peace officer records contained in the Penal Code. Roberts v. City of Palmdale (1993) 5 Cal.4th 363 involved the attorney-client privilege, which doesn't have the elastic "work injustice" language of section 1060. County of Los Angeles v. Superior Court (2000) 82 Cal.App.4th 819 involved the attorney work-product privilege. Hemet and City of Richmond v. Superior Court (1995) 32 Cal.App.4th 1430, 1440-41 both involved peace officer personnel records. None of these cases help the Regents in the slightest.

Finally – aware that precedent is not on their side – the Regents make a policy argument for heightened trade-secret protection. (Petition at 29.) But the policy arguments favor real parties, too. Under the Regents' view of what the law should be, parties asserting trade secret protection could almost invariably block Public Records Act requests with conclusory declarations. This Court in Providian voiced grave concern over such possibilities in the context of a motion to seal court documents: "We must note a profoundly unsettling consequence to the logic of defendants' uncontradicted evidence argument. According to defendants, the only relevant evidence are the two declarations it

¹² The Regents are also wrong when they attempt to shift the burden to real parties if a trade secret exists. "The CPRA embodies a strong policy in favor of disclosure of public records, and any refusal to disclose public information must be based on a specific exception to that policy. Statutory exemptions from compelled disclosure are narrowly construed." (Cal. State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal.App.4th 810, 831.) The burden of demonstrating a need for nondisclosure is on the agency resisting disclosure. (CBS, supra, 42 Cal.3d at 656.)

asserted against Hearst’s motion to unseal. These declarations were based on a knowledge of the documents that nonparty Hearst, having never seen the heretofore sealed documents, could never have. If defendants’ argument were to prevail, it would mean that the scope of relevant evidence would be defined by the party resisting disclosure and the only participant that would be able to discuss the arguments with any particularity. If defendants’ view of the process at the trial and reviewing court levels were accepted, the practical reality would appear to be that the party resisting disclosure would enjoy an advantage that virtually guarantees success.” (Providian, 96 Cal.App.4th at 301 fn. 7.) The trial court here avoided such “profoundly unsettling consequences.” This court should too.

4. The Regents Cite No Case in 35 Years of PRA Law Which Has Held That Trade Secrets Trumped the PRA. This Case – in Which No Trade Secrets Exist and the Regents Are the Lone Holdout Against Disclosure – Should Not Be the First.

Fourth, the Regents have not cited one case in 35 years of Public Records Act law¹³ which has upheld a trade secret claim of exemption under the Public Records Act. The Regents’ attempt to distinguish Uribe v. Howie (1971) 19 Cal.App.3d 194 fails. Uribe specifically holds that under Evidence Code section 1060 – the only basis for importation of a “trade secret” privilege into the Public Records Act through Government Code section 6254(k) – “a balancing of interests is necessary to determine whether the exemption will be allowed under Evidence Code, section 1060.” (19 Cal.App.3d at 206.)

Uribe went on to find that there were no trade secrets, and that in any event the interests in disclosure outweighed the interests in non-disclosure. When it got to section 6255, the Court simply remarked, “We have already discussed the public interests served by disclosure and nondisclosure at considerable length and have concluded that disclosure

¹³ The PRA was enacted by Statutes 1968 chapter 1473.

best serves the public interest. There is no need to repeat that discussion here. Suffice to say that we have concluded that the pesticide applicator spray reports are not exempt from public disclosure under the provisions of Government Code, section 6255.” (Id. at 213.)

Uribe’s virtual equation of section 6255(a) and the “trade secret” balancing test of section 1060 was echoed in San Gabriel, supra, 143 Cal.App.3d 762. There, the City of West Covina asserted – as the Regents do here – claims of exemption from the PRA under section 6254(k) and Evidence Code sections 1040 and 1060, the so-called “official information” and trade secret privileges. (Id. at 775.) There, as here, a private agency and the public agency too claimed it had “trade secrets” in financial information. (Id. at 776.) There, as here, the court held, “assurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public.” (143 Cal.App.3d at 776.)

The San Gabriel court concluded: “The privilege that section 6254(k) incorporates should be applied conditionally on a clear showing that disclosure is against the public’s interest. No such showing is evident under the facts of this case.” (Id. at 777.) The court rejected an analogy to cases under the federal Freedom of Information Act similar to that advanced by the Regents here (Petition at 38): the court cited a federal case involving a third party’s financial interests in which “the court referred to its general policy of narrowly construing the exemptions to give effect to FOIA’s intent to insure comprehensive public access to government records.” (Id. at 778, citing National Parks and Conservation Assn. v. Kleppe (D.C. Cir. 1976) 547 F.2d 673.) The San Gabriel court concluded, “We adhere to the federal court’s policy of narrowly construing the disclosure exemptions. . . .” (Id. at 778.)

Everything said by the San Gabriel court can be said here. The Regents – like the City of West Covina – “Argue that disclosure will both invade a private company’s privacy interests, as well as having a chilling effect on obtaining information in future

transactions.” The Regents – like the City there – cite “a threat to future dealings” as a “sufficient reason to withhold disclosure in the name of the public’s interest.” (San Gabriel, *supra*, 143 Cal.App.3d at 777.) But at bottom, the Regents’ argument “misstates what the public’s interest is as serving the privacy interests of a private contractor, rather than in serving the public’s interest in participating in local government. For these reasons, the withholding of information cannot be justified under section 6254(k).” (Id. at 777.)

5. People Who Take Public Money Invite Public Scrutiny

At bottom, the Regents’ position in this case is an effort to protect the venture capital funds in which they invest from embarrassment at disclosure of recent poor returns, or perhaps an effort to protect the venture funds from any scrutiny at all. But that surely is an insufficient reason to deny disclosure. By taking public pension money, the venture funds “entered into the public sphere. By doing so, they voluntarily diminished their own privacy interests.” (Cal. State University, Fresno Assn., Inc. v. Superior Court, *supra*, 90 Cal.App.4th at 834 [ordering disclosure of names of luxury suite owners in Public Records Act lawsuit].)

This case has a certain similarity to this Court’s (Division Three’s) recent decision in The Recorder v. Commission on Judicial Performance (1999) 72 Cal.App.4th 258. In that case, the California Commission on Judicial Performance (“CJP”) resisted disclosure of the votes of members of the CJP, reasoning that disclosing an “8-2” vote was all the public needed to know and that the public didn’t need to know who the eight votes were and who the two votes were. The CJP also claimed that people would not serve on the Commission if their votes were disclosed (as the Regents now claim people won’t take their money if their performance is disclosed). The CJP’s reasoning echoes the reasoning employed by the Regents here: “we tell you how the overall private equity performs, so

you don't need to know how individual venture funds are doing.” (Petition at 6, 32.) Justice Phelan for this Court (Division Three) rejected that claim: “The commission has also claimed it will be difficult to find citizens willing to serve if prospective commissioners know their votes will be publicly disclosed. This is, however, a bald claim without support in the record. In any event, we fail to see the merit of a system in which public officials, sitting in judgment of other public officials regarding charges of official misconduct, are allowed to hide behind a veil of secrecy when making the ‘tough calls’ necessary to any adjudicatory regime. A certain amount of courage and a ‘thick skin’ are essential attributes for anyone who purports to perform ‘judicial’ functions. We should expect, and accept, no less from members of the commission.” (*Id.*, 72 Cal.App.4th at 280.)

The same goes for venture capitalists who collectively decide to take hundreds of millions of dollars of public money. As this division of this Court observed in Pittsburg Unified School District v. California School Employees Association (1985) 166 Cal.App.3d 875, 904, “Just as judges must be prepared to accept and should not be swayed by public criticism, respondents, as public officials, are ‘supposed to be men [and women] of fortitude, able to thrive in a hardy climate.’” The venture funds who have accepted the hundreds of millions of dollars given them by the Regents have accepted a “valuable commercial benefit” – millions of dollars – and have thus “entered into the public sphere. By doing so, they voluntarily diminished their own privacy interests.” (Cal. State Fresno v. Superior Court, *supra*, 90 Cal.App.4th at 834.) Having chosen to enter the kitchen, they should expect to take a little heat when their investments don't perform well, and with the 12th-hour exception of Sequoia, there is no evidence that any venture funds are unwilling to trade public scrutiny for millions of public dollars.

6. The Balancing of Interests Supports Disclosure, as the Trial Court Held. The Trial Court Did Not “Exceed the Bounds of Reason” In Holding UC to the Same Standard as Other Pension Funds

We now turn to the crucial balancing of interests performed by the trial court to see whether the trial court abused its discretion. (Braun, supra, 154 Cal.App.3d at 342.) As this Court observed just last year in Providian, ““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (Providian, supra, 96 Cal.App.4th at 299.) Applied to the facts of this case, the test is whether the trial court “exceeded the bounds of reason” in concluding that the Regents should do what every other large public pension fund in this country is now doing: disclose the IRR of the funds in which it invests. The trial court did not “exceed the bounds of reason” in holding the Regents to the same standard as any other government agency.

The trial court began where any Public Records Act case must begin, with the policy of the Act. Government Code section 6250 provides that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state Maximum disclosure of the conduct of governmental operations was to be promoted by the Act.” (Pet. Ex. 62, citing CBS, Inc. v. Block (1986) 42 Cal.3d 646, 651-52.)

The PRA defines “public records” very broadly, in section 6252(e), and as the trial court concluded, there is no dispute that the records sought here are indeed public records. (Pet. Ex. 62 at 1980.)

Significantly, exemptions from disclosure “are construed narrowly to ensure maximum disclosure of the conduct of governmental operations.” (Pet. Ex. 62 at 1980, citing New York Times Co. v. Superior Court (1990) 218 Cal.App.3d 1579, 1584, and San Gabriel, supra, 143 Cal.App.3d at 772-73.) The burden is on UC. (CBS, 42 Cal.3d at 656.)

The trial court correctly found that the public has a strong interest in disclosure of government financial information. (Pet. Ex. 62 at 1985, citing Connell v. Superior Court (1997) 56 Cal.App.4th 601, 617.) The trial court quoted the following eloquent passage from Connell: “While the Controller may assert the public has no interest in these records because she is performing her task properly and is herself seeking out unpaid vendors to ensure they receive compensation for goods and services, this is akin to asking that we allow her ‘to exercise absolute discretion, shielded from public accountability’ in the operations of her office However, the public interest demands the ability to verify. Only in this way can the public be certain, for example, that there is not a conspiracy of silence Since there is a strong public interest in disclosure, the balance must tip in favor of access” (Pet. Ex. 62 at 1985-86, citing Connell, supra, 56 Cal.App.4th at 617.)

The interest in monitoring investments is particularly strong here given the millions of dollars involved and the risks taken by the Regents with public money.

The Regents advance several arguments against disclosure here. The trial court aptly characterized the Regents’ claimed public interest in non-disclosure as follows: “At best, it is conclusory – at worst, speculative.” (Pet. Ex. 62 at 1986.)

The Regents attempt to shift the burden here by arguing that “Real Parties have made no showing of any genuine need” for IRR information. (Petition at 31.) The Regents miss the boat here for at least three reasons. First, Government Code section 6257.5 doesn’t require anyone to show a “need” for information: “This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.” (Id.) “[T]he burden of demonstrating a need for nondisclosure is on the agency claiming the right to withhold the information.” (CBS v. Block, supra, 42 Cal.3d at 656 [emphasis added].) Second, the 18,000 members of real party CUE have an obvious “need” to monitor their

retirement portfolio, particularly when it comes to such a risky sector as venture capital. The average clerical employee doesn't have the financial cushion of the average venture capitalist.¹⁴

Third, the Regents' arguments are inconsistent. When arguing that one venture capital firm might decide not to do business with them, the Regents argue that such a decision might cost them "hundreds of millions of dollars." (Petition at 1.) But when looking at the public interest in disclosure, the Regents essentially say "so what" by arguing, "The private equity partnerships (and related private investments) represent approximately 2.7 percent of the University's total investment portfolio." (Petition at 31.) When it comes to one fund, the Regents again say "big deal": each fund, the Regents argue, represents "only about .03% of the University's overall portfolio." (Petition at 32.)

The Regents thus find themselves hoist on their own petard: their own "evidence," consisting solely of "evidence" submitted on the day of the hearing on a Motion for Reconsideration, shows that just one fund, which hasn't even gone to market yet and therefore doesn't even represent the "average" .03% of the University's overall portfolio, has decided in a fit of pique not to do business with them because it doesn't like being "hounded, badgered and stalked" with Freedom of Information requests. (Pet. Ex. 85 at 2199.) How any future Sequoia fund will perform is in any event "speculative" and thus insufficient to defeat disclosure. (Fresno, supra, 90 Cal.App.4th at 835.)

The Regents next argue that the public has no interest in knowing the relative performance of venture funds, condemning real parties for mentioning Enron and Worldcom. (Petition at 32.) Indeed, the Regents denigrate real parties for being "just

¹⁴ The American Association of Retired Persons submitted an amicus brief below observing that the Regents owe a fiduciary duty to disclose information to CUE's members, the beneficiaries of the plan. (Pet. Ex. 42 at 1048-59.)

plain silly” to mention Enron and Worldcom, which the Regents characterize as a “heavy-handed effort to tar this case with mud from unrelated corporate scandals.” (Id. at 32.)

There are 498 million reasons why the Regents are wrong to dismiss the relevance of Enron and Worldcom. The Regents lost \$145 million on Enron, and then argued in a suit against Enron “the public has a hunger for and right to the information contained in the documents of this highly publicized case.” (See Pet. Ex. 4 at 71, 76, 82.) UC became the lead plaintiff in that case. The Regents lost another \$353 million on their Worldcom investment and sued Worldcom. (Pet. Ex. 4 at 71, 89 [Regents sold off all of their nearly worthless Worldcom stock for a loss of \$353 million].)

The Regents’ attempt to distinguish Enron and Worldcom from their venture capital investments gets it all wrong. The Regents argue, “Enron, WorldCom and Tyco were all publicly traded stocks. Extensive data on publicly traded companies is readily available.” (Petition at 32.) This proves our point. If the Regents can be fleeced of \$498 million on “safe,” “old-economy,” publicly-traded stocks on whom “extensive data . . . is readily available,” the risks of investing in unproven venture capital funds – a riskier sector with less information available – are staggering, and the public interest in monitoring performance is at its highest. Real parties simply want to ensure that the Regents invest prudently and that the criminal conduct in a “transparent” public equity stock such as Enron is not replicated in the private equity sector.

Indeed, the Regents’ own documents show that prior to 1998, the UC Treasurer’s Office had one full-time investment professional dedicated to “evaluating, selecting, and monitoring private equity partnerships.” (Pet. Ex. 52 at 1778.) In other words, the Regents had one person watching a venture capital portfolio supposedly worth \$314 million. (Id. at 1775.) That is a very small “watchdog” guarding a very large property. The public – and the 18,000 CUE members who brought this suit – have an extremely

strong interest in helping that “watchdog” do her job to ensure that the Enron experience is not repeated in the private equity sector.

At bottom, the Regents’ entire argument against disclosure boils down to just two things: (1) trust us, we’re smart, and (2) trust our venture capital investment, it’s made a lot of money. But the first is a paternalistic argument which the Founding Fathers themselves eschewed with Madison’s immortal words that “[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, supra, 143 Cal.App.3d at 772.) Or, as the Court of Appeal more recently put it, and as the trial court remarked in this case, “this is akin to asking that we allow [the Regents] ‘to exercise absolute discretion, shielded from public accountability in the operations of [their] office However, the public interest demands the ability to verify.’” (Connell, supra, 56 Cal.App.4th at 617, cited in trial court’s Order, Pet. Ex. 61 at 1960-61.)

The Regents’ second argument – “we’ve made a lot of money on our venture capital investments so you don’t need information about them” – suggests that democracy should be traded like pork belly futures, that the right of access to government information should rise or fall with the Nasdaq, and that when dot-com stocks are up the Public Records Act is up, and vice versa. No case has ever so held, and this should not be the first. Not only is the concept dangerous, but the factual premise is weak. True enough, the Regents’ venture capital investments went up handsomely for a while. But the higher they go, the harder they fall. In the past two years, the Regents’ venture capital portfolio has shrunk to one-third of its former \$1.5 billion value. (Pet. Ex. 2 at 4:14-18; see also section III C, supra [negative 34% annualized return in last three years]; Pet. Ex. 52 at 1738 [one UC Regent worries, “I’m afraid that twelve, eighteen months from now

we are going to see this whole world crumbling on us. And we are going to wake up to some really bad news. So when I look at these returns on non-liquefied assets, I don't buy it"].) Indeed, UC Treasurer Russ – while speculating in this Petition that being shut out of venture capital funds may “potentially” cost the Regents hundreds of millions of dollars – congratulated himself in his declaration for “prudently not adding many new private equity partnerships into the portfolio” from 2000 to 2002 when the portfolio lost \$851 million in market value. (Pet. Ex. 24 at 317-18, ¶ 20.) Accordingly, UC's interest in non-disclosure is entirely “speculative” and cannot defeat disclosure. Fresno, supra, 90 Cal.App.4th at 835.

The Regents argue that they already supply a “huge” amount of information about their venture capital investments. (Petition at 5-6.) This contention is both irrelevant and wrong. The information supplied by the Regents contained the most subjective information about the venture capital partnerships – their so-called “market value” (Pet. Ex. 24 at 565-71) – but not the most meaningful, the “internal rate of return,” which is universally regarded as the “theoretically correct measure” of private equity performance and the “standard measure of financial performance” according to an independent expert. (Pet. Ex. 49 at 1533.) In short, under any balancing test, the trial court correctly concluded that the interest in disclosure of IRRs “clearly outweighs the claimed need to keep them secret.” (Pet. Ex. 62 at 1985.) Even if there were “trade secrets” at stake – and the trial court correctly felt that there were not – “failure to produce the IRRs would work an injustice.” (Pet. Ex. 62 at 1990.) The trial court did not abuse its discretion or “exceed the bounds of reason” in holding that the Regents must do what every other large public pension fund in this state and country now does.

The Regents also argue that they “have no role, individually or collectively, in the selection of individual investments.” (Petition at 33.) The record belies this contention. In 1999, the then-UC Treasurer wrote to one Regent, himself a venture capitalist, to

propose that UC invest in “eight potentially attractive” venture funds. (Pet. Ex. 52 at 1772-78.) The Treasurer also reported on the IRR of other funds. (Ibid.) The Regents’ assertion that they have “no role” lacks credibility, especially since the Treasurer reports to them.

Finally, the Regents’ assertion that they disclose a great deal of information is disingenuous. Although they previously disclosed the identity of their private equity partners (Pet. Ex. 24 at 565-71), after the trial court’s ruling the Regents responded by removing even that information from their web site. (See www.ucop.edu/treasurer/portfolioret/ucrpeqret.html, compare 6/30/03 with 12/31/02, <visited August 28, 2003>.) Thus, after being told by the Court to disclose more information, the Regents responded by disclosing less.

The trial court balanced things properly and did not abuse its discretion. The Petition should be summarily denied.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DISCLOSURE OF THE MINUTES AND TAPES OF CLOSED MEETINGS AT WHICH INVESTMENT POLICIES WERE DISCUSSED AND ADOPTED.

A. To the Extent the Petition Seeks Review of the Trial Court’s Order Requiring Disclosure of the Minutes and Tapes of the Closed Sessions, the Petition Should Be Summarily Denied as Premature.

As a preliminary matter, review of the trial court’s disclosure order regarding the minutes and tapes of the Closed Sessions is premature. The Regents did not submit the minutes and tapes of the Closed Sessions for in camera review by the trial court until September 2, 2003, forty days after the court ordered them to do so and only three days before this Petition had to be filed with this Court. Because the trial court has not issued a final order with respect to the minutes and tapes of the Closed Session, review of the trial court’s order, if any, should not occur until the trial court has issued a further order.

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

In the trial court the Regents primarily relied on Education Code section 92032(b)(4) (“Section 92032(b)(4)”) as justification for holding the Closed Sessions. 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. (Petition at 43.)

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. (Pet. Ex. 61 at 1968.) To accept the Regents’ argument that the 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. (Pet. Ex. 61 at 1968.)

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 the 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 concern that open discussion of the Asset Allocation Policy (“AAP”) and Multiple Manager Equity Investment Strategy (“MMEIS”) would have led to “front-running.” (Pet. Ex. 7 at 185:11-18, 186:21-24.) By ordering disclosure the trial court implicitly concluded that open discussion of the AAP and 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. (Pet. Ex. 40 at 875-882, especially 878-79.)

A brief scan of the AAP (Pet. Ex. 40 at 904-933) reveals that it provides no information about the specific trades that UC would be making to implement the plan. It merely reallocates the percentage of funds that would be invested in broad market segments. Open discussion about such reallocations would not have given speculators enough information to short stocks or otherwise cause negative consequences for UC.¹⁵

¹⁵ Both CalPERS and CalSTRS discuss and adopt their Asset Allocation Policies in open meetings without apparent harm. See <http://www.CalSTRS.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0201pdf/ic0206.pdf>; <http://www.CalSTRS.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0401pdf/ic0410.pdf>; <http://www.CalSTRS.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0501pdf/ic0509.pdf>; <http://www.calstrs.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0601pdf/ic0608.pdf>; <http://www.calstrs.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0701pdf/ic0705.pdf>; <http://www.calstrs.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0701pdf/ic0707%20.pdf>; <http://www.calstrs.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod0901pdf/ic0906.pdf>; <http://www.calstrs.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod>

This is made evident by the fact that UC disclosed the AAP in full, and discussed openly the implementation plan for the AAP shortly after it was adopted, and before the implementation was started. In an April 20, 2000 letter to the UC Community, UC announced the AAP and included all the details of the plan. (Id. at 935-936.) The Treasurer's implementation plan for the AAP was not even due to the Regents until April 28, 2000 (id. at 939-40), and was not delivered until that date (id. at 946). Moreover, the COI openly discussed the AAP at its May 18, 2000 meeting, including the fifteen-month plan for its implementation, the time period in which a portion of the portfolio would be transferred to the equity index fund, and the new allocation percentages. (Id. at 947.)

The actual transfer of 30% of the equity portfolio to the Russell 3000 Index and MSCI EAFE index funds occurred on November 1, 2000 (id. at 960), months after the AAP plan was disclosed in its entirety and at the intended time pursuant to the implementation plan. (Id. at 947.) Obviously, discussing and adopting the AAP in open session would not, as UC claims, have resulted in negative market manipulation, since the AAP was fully disclosed before any action was taken to implement it.

Although implementation of the MMEIS occurred much more quickly than implementation of the AAP, there is still no indication that open discussion 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 30000 Tobacco-free Index Fund, were publicly revealed in a ucnwswire dated 11/26/03 (id. 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

1001pdf/ic1007.pdf;
<http://www.calstrs.com/About%20CalSTRS/Teachers%20Retirement%20Board/agendas/bod1101pdf/ic1105.pdf>;
<http://www.calpers.ca.gov/whatshap/calendar/board/invest/200210/Item04a.doc.>)

implementation of the MMEIS resulted in the sale of \$15.1 billion in assets (Petition at 42), implying that this large dollar volume of trades, and the \$618 million gain, was in potential jeopardy from market manipulation.

Such a contention 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. (Pet. Ex. 40 at 988; see also In re Providian Credit Card Cases (2002) 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”].)

Finally, the Regents assert that the trial court’s construction of Section 92032(b)(4) would effectively render the exemption a nullity. (Petition at 43). They base this argument on their claim that the Regents never make individual investment decisions. This is simply not 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 COI. (See <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 Pet. Ex. 40 at 922-923 [consultant and Treasurer recommendation regarding specific investments to be submitted to Regents for approval]; Pet. Ex. 52 at 1772-1773 [Treasurer indicates that COI must approve eight recommended investments].)

C. Trial Court Correctly Concluded That Even If Portions of The Meetings at Issue Were Properly Closed, Disclosure of the Minutes and Tapes Is Appropriate Where the Regents Have Released the Documents Discussed at the Closed Sessions.

The Regents argue that the trial court erred in requiring disclosure of the minutes and tapes of the Closed Sessions on the basis that action had already been taken. Once again the Regents misstate the trial court’s ruling. The trial court relied heavily on the fact

that the Regents have publicly disclosed the documents regarding the AAP and MMEIS discussed at the Closed Sessions.

Shortly after adoption of the AAP, the Regents publicly disclosed the AAP and openly discussed the plans for its implementation. (Pet. Ex. 40 at 935-936, 947.) This disclosure occurred long before the plan was implemented. (*Id.* at 960.) Similarly, 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 transfers were completed. (*Id.* 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. (Pet. Ex. 61 at 1969.) In essence, 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* (2002) 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.”].)

In sum, the trial court thoughtfully evaluated the evidence, made credibility determinations when necessary, and correctly decided that the minutes and tapes of the Closed Sessions should be disclosed to the public, except to the extent that the Regents could show that disclosure would invade the privacy of University employees. The trial court’s decision is supported by substantial evidence and should not be disturbed by this Court.¹⁶

¹⁶ The trial court denied injunctive relief with respect to future meetings (Pet. Ex. 62 at 1970), so this Petition presents no occasion for this court to make statutory

VI. THE COURT SHOULD NOT ISSUE A STAY

Government Code section 6259(c) – requiring a government petitioner to demonstrate “irreparable damage and probable success on the merits” – makes a stay of trial court orders under the Public Records Act the exception and not the rule. As the Supreme Court explained in Powers, supra, 10 Cal.4th at 112, the “legislative objective was to expedite the process” of appellate review, not to delay it.

For all of the reasons set forth above, the Regents cannot demonstrate that they will be “irreparably damage[d]” if the trial court’s order is not stayed. In the last three years, their investment in private equity has yielded an annualized return of negative 34 percent. Indeed, the Regents’ Treasurer, David Russ, actually boasted in his declaration that he had stayed out of the private equity sector recently while the value of the UCRP private equity portfolio shrank by \$851 million. (Pet. Ex. 24 at 317-18 ¶ 20.) Moreover, with the 12th-hour exception of Sequoia, no venture funds have indicated any displeasure with the trial court’s order and other public pension funds have experienced no “negative repercussions” as a result of disclosing IRR. (Pet. Ex. 77 at 2085-90.) Accordingly, the Regents will not be “irreparably damaged” if and when they do what the trial court told them to do.

Likewise, for all the reasons set forth above, the Regents cannot show “probable success on the merits.” The trial court’s 20-page order (Pet. Ex. 61 at 1952-71), issued a month after a lengthy argument and after consideration of a voluminous record, was not an abuse of discretion. It faithfully followed the Public Records Act. This Court can and

determinations or policy determinations with respect to future meetings. Indeed, the trial court’s refusal to do so seriously undercuts the Regents’ sweeping charge that “the Superior Court ignored the plain language of the governing statutes, substituting its view of desirable public policy for that of the Legislature.” (Petition at 2.) This was in all respects a fact-based determination, and the Regents are mistaken on both the facts and the law.

should summarily deny the petition (Powers, supra, 10 Cal.4th at 114 and fn. 19), but even if it doesn't there is no need to issue a stay.

CONCLUSION

The Regents have not yet learned the lesson of Government Code section 11120: “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.” (Id.) They display a certain paternalism which evidences that they feel that they alone – better than the trial court, better than every other large pension fund, and better than the Californians they serve – know what the law is and what's right.

They don't. They run a public pension fund, with public money, and they and the venture capitalists who take millions in public money cannot expect to avoid the most basic principles of public accountability, and the basic principles upon which our nation was founded. As Chief Justice Burger has held for the U.S. Supreme Court, ““People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”” (Press-Enterprise Co. v. Superior Court (1986) 478 U.S. 1, 13.) The trial court correctly applied that first principle. The Petition should be summarily denied.

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LEVY, RAM & OLSON

By: _____
Karl Olson
Attorneys for Real Parties in Interest
COALITION OF UNIVERSITY
EMPLOYEES and CHARLES
SCHWARTZ

WINN & ALEXANDER

By: _____
Judy Alexander
Attorneys for Real Party in Interest SAN
JOSE MERCURY NEWS

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