

No.  
(Alameda County Super. Ct. No. RG 03089302)  
(The Honorable James A. Richman)

**IN THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO**

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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 and SAN JOSE MERCURY NEWS,  
*Real Parties in Interest.*

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**PETITION FOR WRIT OF MANDATE AND  
SUPPORTING MEMORANDUM OF POINTS  
AND AUTHORITIES  
(STAY REQUESTED)  
(TRIAL COURT STAY EXPIRES JANUARY 11, 2004)**

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## **INTRODUCTION AND SUMMARY OF ARGUMENT**

In the fall of 2002, most of the University of California's U.S. equity portfolio was invested in a relatively small number of companies (156), selected by the staff of the University Treasurer's Office. Moreover, this portfolio focused on a single segment of the equity market: large-capitalization companies. A new University Treasurer had reviewed this unorthodox investment strategy—which had been rejected by most comparable public investment funds—and concluded that it had generated substandard returns. The Treasurer therefore proposed that these 156 stocks—which were worth more than \$15 billion—be sold over a short period, and replaced by investments in broad-based index funds, pending selection by the University of outside managers to manage investments in several different segments of the equity market.

As often happens, this change in policy was accompanied by a change of personnel. In developing his proposal, the Treasurer evaluated each of the eleven internal equity managers in his office to determine whether that individual had the skills the Treasurer needed to implement the new investment strategy. After this review, the Treasurer recommended that all eleven internal equity managers be terminated and replaced by six individuals with a different skill—the ability to select and supervise fund managers from outside the University.

The Treasurer's recommendation was discussed at a meeting of the Regents' Committee on Investments on October 29, 2002, and a meeting of the full Board of Regents two weeks later. Both of these meetings (the "Meetings") were held in closed session. During the Meetings, participants made numerous comments regarding the performance of the University's internal equity managers; how the Treasurer's recommendation could be reconciled with the positive reports the Regents had received from the previous Treasurer; which positions in the Treasurer's Office would be terminated; and how the dismissal of these individuals would be implemented. The participants in the Meetings also discussed the mechanics of how the

University's internal equity portfolio would be sold—*i.e.*, the timing and how the actual sales would be accomplished.

This Petition seeks appellate review of a Superior Court order, entered pursuant to the Public Records Act (PRA), Government Code Sections 6250-6260, compelling the Regents to disclose the minutes of the two closed Meetings and a transcript of one of them. This order is legally flawed in numerous respects. To begin with, the Meetings were properly closed pursuant to Education Code Section 92032(b)(7), which authorizes the Regents to meet in closed session to consider “[m]atters concerning the appointment, employment, performance, compensation, or dismissal of university officers or employees.” Despite this clear language, the trial court's order requires disclosure of candid statements made in closed session concerning the performance of the eleven equity managers and why these employees were not retained to implement the Treasurer's new investment policy.

The trial court did not explain its rationale for holding the Meetings were not properly closed under this statute. But it appears to have believed that Section 92032(b)(7) applies only to the names of individual employees or disclosures that would impair an identifiable individual's privacy. No case supports this crabbed interpretation of the statute. Instead, like the almost identically worded provision of the Brown Act (GOV'T CODE §54957), Section 92032(b)(7) permits “the majority of personnel matters to be discussed freely and candidly in closed session”—with open sessions permissible only when an employee requests a public hearing to contest “specific complaints or charges.” *Duval v. Bd. of Trustees*, 93 Cal. App. 4th 902, 908 (2001) (quoting *Bell v. Vista Unified Sch. Dist.*, 82 Cal. App. 4th 672, 682 (2000) (internal quotation marks omitted)). Similarly, the trial court's apparent belief that Section 92032(b)(7) applies only where individual employees are mentioned by name puts the statute in a linguistic strait-jacket: it ignores the obvious fact that the personnel involved in a particular matter can be identified in dozens of ways, and not merely by name.

The Meetings were also properly closed, in whole or in part, under Education Code Section 92032(b)(4), which authorizes the Regents to “conduct closed sessions when they meet to consider or discuss: . . . [m]atters involving the purchase or sale of investments for endowment and pension funds.” The Superior Court held that this statute did not apply to the Meetings because they were not focused on “particular specific investments.” But no such requirement appears in Section 92032(b)(4), which applies to the sale of any investment in the University’s portfolio. Even if it did, the trial court did not explain why a decision to sell 156 specific stocks that were worth more than \$15 billion should be treated differently than a proposal to sell a single stock.

Similarly, the trial court held that even if the Meetings had been properly closed when they occurred, the minutes were no longer exempt from disclosure once the transactions under discussion had been consummated. But Government Code Section 11126.1 provides that minutes of closed meetings “shall be kept confidential,” without imposing an expiration date. Hence, the statute applies if the meeting was properly closed *when it occurred*, regardless of what occurs later. The trial court’s ruling that the confidentiality of closed meetings ends once the decisions made in those meetings have been carried out blows a gaping hole in the numerous state statutes that permit closed sessions on a variety of topics—particularly since these statutes typically require that *decisions* made in closed session (but not the details of the closed discussions) be publicly announced once the closed session is over.

The trial court’s ruling leaves the University in a quandary. If statements made during a closed session must be publicly disclosed once the decisions made during that session have been carried out, no Regent can be sure that statements made during a closed session will stay confidential for more than a very short time after the meeting is held, *even if the meeting was properly closed in the first instance*. Thus, the trial court’s ruling eviscerates the purpose of having closed meetings at all, which is to ensure that important but

sensitive issues can be discussed with the candor that confidentiality promotes. The Court should grant the Petition to eliminate this uncertainty and give the University needed guidance as to when personnel- and investment-related matters may be discussed in closed session.

The University has previously filed a petition for writ of mandate arising out of the same case, which this Court denied. *Regents of the University of California v. Superior Court*, No. A103797. But the primary focus of that Petition was the trial court's decision to require the disclosure of Internal Rates of Return for the University's private equity investments—an issue that has now been resolved. That Petition did not raise any issues concerning the “personnel exemption” set forth in Education Code Section 92032(b)(7), because the trial court had not ruled on the University's claims under that statute when the prior Petition was filed. And while the Petition did address the scope of Section 92032(b)(4), in opposing the Petition Real Parties argued—and Petitioner agreed—that “review of the trial court's disclosure order regarding the minutes and tapes of the Closed Sessions is premature” because “the trial court has not issued a final order with respect to the minutes and tapes of the Closed Session[s].” Real Parties' Opposition to Petition for Writ of Mandate (No. A103797) at 41-42; Petitioner's Reply Memorandum in Support of Petition for Writ of Mandate (No. A103797) at 19. Having successfully argued to this Court that the prior Petition should be denied because, *inter alia*, it could not raise any issue concerning disclosure of the minutes and tape of the Meetings, Real Parties are judicially estopped to contend that the summary denial of that Petition forecloses consideration of the issues presented here. *See Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 181 (1997) (“It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite”) (citation and internal quotation marks omitted; brackets in original). Nor does *res judicata*

apply, because the summary denial of a petition is not a decision on the merits. *See Kovis v. Howard*, 3 Cal. 4th 888, 895-96 (1992).

## PETITION FOR WRIT OF MANDATE

Petitioner Regents of the University of California alleges:

1. The University of California owns and manages investment funds with assets of approximately \$50 billion. 1st Pet. Ex. 24, at 305 ¶3.<sup>1</sup> These funds help pay for endowed chairs, research, scholarships, and employee pensions. *Id.* Regents set broad policies governing the funds, but neither the Regents as a group nor individual Regents take part in selecting specific investments. *Id.* The University Treasurer implements Regental policies and manages the funds. *Id.*

2. Prior to mid-2000, the University's public equity portfolio had been highly concentrated in a relatively small number of stocks, sometimes as few as sixty, picked by in-house analysts. *Id.* at 306 ¶6. The portfolio focussed on large capitalization companies. *See*

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<sup>1</sup>The trial court record consists of three parts. Copies of the trial court pleadings and transcripts that predate September 5, 2003, were attached Exhibits to the Petition for Writ of Mandate filed in No. A103797 and will be cited as "1st Pet. Ex." A copy of the petition exhibits in No. A103797 will be lodged with the Court simultaneously with the filing of this Petition, together with a motion asking the Court to take judicial notice of the pleadings and exhibits filed in that proceeding.

Superior Court pleadings dated after September 5, 2003, including the transcript of the trial court's October 23, 2003 hearing, will be found in another set of Exhibits filed simultaneously with this Petition, and will be cited as "2d Pet. Ex." All exhibits are consecutively paginated and will be cited by both tab number and page number.

In addition, the trial court record includes the minutes and transcript that are the subject of this proceeding, which were submitted to the trial court for *in camera* review and returned to Petitioner once that review was complete. These documents are included in a volume of Confidential Exhibits to the Petition filed pursuant to Rule 12(c)(1), and will be cited by tab number and page number as "Conf. Ex. \_\_\_, at \_\_\_." (The page references to the transcript of the October 29 Meeting are to the original pages.)

*id.* at 342. Such concentration is generally recognized to involve substantial risk. *Id.* at 306 ¶6. In addition, the University’s public equity investment decisions were made by an in-house staff of analysts who attempted to “pick” stocks, in essence betting on the success of a relatively small number of companies rather than investing in the market more broadly. *Id.* This strategy is rejected by almost all of the major public investment funds. *Id.*

3. Before 2000, the University had no asset allocation policy that established limits on the portion of its portfolio that could be put into any particular types of investments. *See id.* at 305 ¶5. Nor had it established performance benchmarks for those investments. *Id.* Asset allocation policies and performance benchmarks are both prudent and standard for large investment funds. *Id.*

4. These practices began to change in 2000. In March of that year, the University for the first time adopted an asset allocation policy. *Id.* It also adopted a formal benchmark for monitoring the performance of the University’s U.S. public equity investments. *Id.* at 306 ¶5.

5. David Russ became the Treasurer of the University in 2001. *See id.* at 332. After assuming that position, he compared the historical returns on the University’s internally managed equity portfolio to the returns the University would have received had it invested in broad-based index funds. *Id.* at 306 ¶6. This comparison showed that the University’s internal equity management group had produced lower returns over the prior decade than would have been generated by an index-based investment in the broad market. *Id.*

6. For that and other reasons, including the need to decrease the risks associated with a concentrated large capitalization strategy, Treasurer Russ recommended in the fall of 2002 that the Regents end internal management of the University’s public equity portfolio in favor of investment in broad index-based funds and a multiple manager/multiple strategy active portfolio. *Id.* In other words, this recommendation urged the University to move away from picking individual stocks toward broad investments in the market. *See id.* at

305-07 ¶¶5-6. This recommendation also urged that the University end its internal equity focus on large capitalization stocks, in favor of investing through multiple managers focused on different aspects of the equity market, including large-cap, mid-sized and small companies. *Id.* at 342.

7. As part of this recommendation, Mr. Russ recommended that all of the University's eleven existing internal equity managers be laid off and replaced by six new employees skilled at supervising outside managers. *Id.* at 328 ¶¶37, 358.

8. The Regents' Committee on Investments considered the Treasurer's recommendation at a meeting held in closed session on October 29, 2002 (the "October 29 Meeting"). At that meeting, the Committee approved this recommendation and voted to send it to the full Board of Regents. At a meeting on November 13, 2002 (the "November 13 Meeting"), the Regents met in closed session and approved the recommendation. *Id.* at 306 ¶6.

9. Ninety-seven percent of the stock sales approved by the Regents on November 13 were consummated between November 18 and November 30, 2002. 1st Pet. Ex. 24, at 670; *id.* 1st Pet. Ex. 40, at 970. During that period, the University sold more than \$15 billion in securities, realizing a profit of \$618 million. *Id.*

10. The meetings in October and November 2002 ("the Meetings") were held in closed session for two reasons. First, the Meetings concerned the performance and possible termination of the University's internal equity managers, and holding the Meetings in public might have invaded their personal privacy and potentially interfered with their search for new employment. *Id.* at 328-29 ¶37. Second, movement from a concentrated position in a relatively few stocks to investment in a 3000-stock index fund required the University to liquidate large portions of its then-current holdings. *Id.* at 328 ¶36.

11. On December 24, 2002, the Coalition of University Employees and Charles Schwartz, a retired faculty member at the University of California at Berkeley, sent the University a request

for documents under the PRA. 1st Pet. Ex. 2, at 13-16. The request sought disclosure of numerous categories of documents, including minutes and tapes of the Meetings. *Id.* at 13-15. The University produced numerous documents in response to this request, but did not disclose the minutes or tapes of the Meetings.

12. On April 1, 2003, Real Parties Coalition of University Employees, Charles Schwartz and San Jose Mercury News filed a petition for writ of mandate against Petitioner Regents of the University of California in Respondent Alameda County Superior Court. *Id.* at 3. Among other things, the petition sought disclosure of all records of the Meetings. *Id.* at 9 ¶2.

13. On July 24, 2003, Respondent Court entered an “Order Granting Petition for Writ of Mandate” (“July 24 Order”). 1st Pet. Ex. 61, at 1952-71. In this Order, the Superior Court acknowledged that the minutes of properly closed meetings are exempt from disclosure under the PRA and that Education Code Section 92032(b)(4) permits the Regents to hold closed sessions to consider “[m]atters involving the purchase or sale of investments for endowment and pension funds.” *Id.* at 1967. Nevertheless, it held that this statute permits the Regents to hold closed sessions only to discuss “the purchase or sale of particular specific investments.” *Id.* And while the Court acknowledged that portions of the Meetings might have come within its narrow interpretation of Section 92032(b)(4), it held that that statute does not justify exempting records relating “to past meetings where action has already been taken.” *Id.* at 1968. However, Government Code Section 11126.1 flatly exempts the minutes of closed sessions from disclosure under the PRA and contains no exception that permits disclosure once the decisions made during the closed session have been implemented.

14. The July 24 Order also stated conclusorily that Section 92032(b)(7) “did not justify closing the meetings at issue, at least not in their entirety.” *Id.* at 1969. However, at the time this ruling was issued, the Superior Court had not reviewed the minutes or transcript of the Meetings. Accordingly, it ordered Petitioner to: (1) conduct a

further review of the documents “to determine if there are any references to individual employees or any other matters that Respondent believes would violate the privacy rights of its employees”; and (2) submit redacted documents to the court for *in camera* review. *Id.* at 1969-70.

15. In accordance with this portion of the order, Petitioner submitted unredacted and redacted copies of minutes of the Meetings. 1st Pet. Ex. 87, at 2208-10. It also submitted unredacted and redacted copies of a transcript of the October 29, 2002 meeting, together with a “Redaction Chart” listing and providing a brief justification for each of the redactions. 2d Pet. Ex. 1, at 1-5; Conf. Exs. 1-7.

16. After reviewing the minutes and transcript *in camera*, Respondent issued a “Further Order on Petition for Writ of Mandate Pursuant to Court’s *In Camera* Review.” 2d Pet. Ex. 5, at 24-27. This Order provided, *inter alia*, that if any party objected to its terms, the Court would set the matter for hearing. *Id.* at 26. Petitioner did object (2d Pet. Ex. 6), and a hearing was held on October 23, 2003. *See* 2d Pet. Ex. 9.

17. After the hearing, Respondent issued an “Order after Hearing on Petition for Writ of Mandate Pursuant to Court’s *In Camera* Review (the “November 14 Order”). 2d Pet. Ex. 7, at 30-33. Although the Court had now reviewed the minutes and transcript of the Meetings, this Order did not explain why the Meetings’ extensive discussion of the performance and dismissal of the University’s internal equity staff was not properly closed under Education Code Section 92032(b)(7). Instead, the court held only that nothing in the minutes or transcripts could be redacted unless “the proposed redacted materials mention[ed] any individual employee(s) by name or . . . violate[d] the privacy rights of any such individual(s).” *Id.* at 32. Applying this standard, the court required Petitioner to release the minutes and transcript of the Meetings with no redactions in the minutes and only a few redactions in the transcript for proper names and attorney-client privileged communications. The November 14

Order also provides that it shall be stayed until January 11, 2004. *Id.* at 33.

18. Under Government Code Section 6259(c), the November 14 Order is not appealable as a final judgment but may only be reviewed by petition for writ of mandate. Real Parties served Petitioner by hand with notice of entry of the November 14 Order on November 17, 2003. 2d Pet. Ex. 8, at 40. Under Government Code Section 6259(c), Petitioner has twenty days from that date, or until December 8, 2003, to file this Petition.

19. The trial court's November 14 Order threatens Petitioner with irreparable injury. Disclosure of personnel matters such as the evaluation and dismissal of University employees threatens the Regents' ability to discuss such matters in private, as expressly authorized by Education Code Section 92032(b)(7), and to make personnel decisions on the basis of candid, confidential opinions. Disclosure of investment policy and allocation matters discussed by the Regents in closed session could impair the University's ability to realize profits and avoid losses on investments. Even worse, the trial court's order confronts the Regents with the possibility that the minutes and tapes of all properly closed meetings will become subject to mandatory disclosure under the PRA once the decisions made at the meetings are implemented. If this is the law, no confidential meeting will remain confidential for long, and the statutes authorizing closed sessions for a variety of purposes will be rendered pointless.

20. In issuing the November 14 Order the Superior Court abused its discretion, for the reasons discussed in the Memorandum that follows, which Petitioner incorporates herein by reference.

21. In addition to seeking a writ of mandate, Petitioner seeks a stay of Respondent's November 14 Order pending disposition of this Petition. Granting a stay will prevent the appeal from becoming moot and protect the Regents from suffering irreparable injury, as outlined above.

22. Petitioner is also entitled to a stay because it has shown probable success on the merits. As discussed in more detail in the

Memorandum that follows, which is incorporated herein by reference, the Superior Court's November 14 Order is fatally flawed. It contradicts Government Code Section 11126.1, eviscerates Education Code Section 92032(b)(7) and improperly rewrites Education Code Section 92032(b)(4).

23. Because the temporary stay of the November 14 Order entered by the trial court expires on January 11, 2004, the Court should act on Petitioner's stay request by that date.

24. All of the nonconfidential exhibits accompanying this Petition are true copies of original documents on file with Respondent Court, except Exhibit 9, which is a true copy of the original reporter's transcript of the October 23, 2003 hearing. The confidential exhibits to the Petition, which will be filed under seal, are the documents that were submitted to the Superior Court for *in camera* review. The nonconfidential and confidential exhibits are incorporated herein by reference as though fully set forth in this Petition.

WHEREFORE, Petitioner prays:

1. That this Court issue its alternative writ of mandate and/or order to show cause ordering Respondent to set aside its November 14 Order and enter a new order denying Real Parties' motion for a writ of mandate with respect to the minutes and transcript of the Meetings; or in the alternative, to show cause why a peremptory writ as set forth above should not issue;

2. That, upon return of the alternative writ and/or the hearing on the order to show cause, or alternatively in the first instance, a peremptory writ issue ordering Respondent to set aside its November 14 Order and enter a new order denying Real Parties' motion for a writ of mandate with respect to the minutes and transcript of the Meetings;

3. That this Court stay the November 14 Order pending disposition of this Petition;

4. That this Court set this matter for hearing at the earliest time consistent with its calendar;
5. That Petitioner be awarded its cost of suit; and
6. That Petitioner be awarded such other and further relief as may be just and proper.

DATED: December \_\_\_\_, 2003.

Respectfully,

JEROME B. FALK, JR.  
STEVEN L. MAYER  
HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
A Professional Corporation

JAMES E. HOLST  
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By: \_\_\_\_\_  
STEVEN L. MAYER

*Attorneys for Petitioner*

## VERIFICATION

I, David Russ, declare:

I am the Treasurer and Vice-President for Investments of the University of California. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on December 5, 2003, at Oakland, California.

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DAVID RUSS

## **MEMORANDUM OF POINTS AND AUTHORITIES**

The Superior Court expressly recognized that Government Code Section 11126.1 exempts the minutes and tapes of a properly closed meeting from disclosure under the Public Records Act. 1st Pet. Ex. 61, at 1966-67. Accordingly, we first examine whether the Meetings were properly closed, and then look at the applicable standards for disclosure under Section 11126.1.

### **I.**

#### **THE MEETINGS WERE PROPERLY CLOSED UNDER EDUCATION CODE SECTION 92032(b)(7).**

Education Code Section 92032(b)(7) permits the Regents to meet in closed session to discuss “[m]atters concerning the appointment, employment, performance, compensation, or dismissal of university officers or employees.” Because the Meetings concerned the appointment, employment, performance and/or dismissal of one University officer (the former Treasurer) and eleven University employees (the internal equity managers and their replacements), the Meetings were properly closed under that statute.

#### **A. The Superior Court’s Apparent Interpretation Of The Statute Is Erroneous.**

In holding that the minutes and transcript of the Meetings had to be disclosed under the Public Records Act, the Superior Court did not analyze Section 92032(b)(7), much less explain why the Meetings were not properly closed under its terms. Instead, it stated conclusorily that that statute “did not justify closing the meetings at issue, at least not in their entirety.” 1st Pet. Ex. 61, at 1969. However, *the Superior Court issued this ruling before it had reviewed the minutes or transcript of the Meetings.*

Surprisingly, the trial court did not revisit this issue after conducting its *in camera* review and discovering precisely what the participants in the Meetings discussed. Its November 14 Order did not

explain why the Meetings’ extensive discussion of the performance and dismissal of the University’s internal equity staff was not properly held in closed session under Section 92032(b)(7). Instead, the court simply held that nothing in the minutes could be redacted because “none of the proposed redacted materials mention any individual employee(s) by name or in any way violate the privacy rights of any such individual(s).” 2d Pet. Ex. 7, at 32. With respect to the transcript, the Superior Court’s Order contained even less analysis, merely stating conclusorily that “the proposed redactions in the partial transcript of the October 29, 2002 meeting are in large part not well taken.” *Id.* Accordingly, Respondent ordered the University to disclose the minutes and transcript in full, except for redacting the names of five individuals named in the transcript.<sup>2</sup>

Although the court did not explain its reasoning, both its July 24 Order—which required the University to redact the minutes and tape in the first instance—and the November 14 Order focus on the names of individuals and the possibility that disclosure might invade the privacy of specific employees. Thus, the July 24 Order required the University to identify “any references to individual employees or any other matters that Respondent believes would violate the privacy rights of its employees.” 1st Pet. Ex. 61, at 1969-70. Similarly, as just discussed, the November 14 Order held that nothing in the minutes could be redacted because “none of the proposed redacted materials mention any individual employee(s) by name or in any way violate the privacy rights of any such individual(s).” 2d Pet. Ex. 7, at 32. Thus, the trial court seems to have believed that Section 92032(b)(7) permits a closed session *only* if individual employees are identified by name or disclosure would compromise some individual’s privacy rights.

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<sup>2</sup>The Superior Court also permitted Petitioner to redact attorney-client communications (2d Pet. Ex. 7, at 33), but no issue exists concerning those redactions.

No case—not one—supports such a cramped interpretation of the “personnel exemption” contained in the State’s open meeting laws. Indeed, it is wrong as a matter of both law and logic. In the first place, the “personnel exemption” contained in the Brown Act and similar statutes is not limited to preventing disclosures that would compromise some individual’s privacy. To the contrary, Section 92032(b)(7) exempts from disclosure all “[m]atters concerning the appointment, employment, performance, compensation, or dismissal of university officers or employees”—without any need to make a separate showing that disclosure would compromise the privacy of an individual employee. For example, the Court of Appeal in *Duval v. Board of Trustees*, 93 Cal. App. 4th 902 (2001), recognized that the Brown Act’s comparable authorization to discuss “evaluation of performance” in closed session extends to the “criteria for such evaluation” and “the process for conducting the evaluation.” *Id.* at 909. Yet the *Duval* court did not require a showing that discussion of such matters would invade the privacy of the evaluated employee.

Moreover, the courts have recognized that protecting privacy is only one of several purposes served by the “personnel exemption.” As the Court of Appeal stated in *San Diego Union v. City Council*, 146 Cal. App. 3d 947 (1993), “the underlying purposes of the ‘personnel exception’ are to protect the employee from public embarrassment *and to permit free and candid discussions of personnel matters by a local governmental body.*” *Id.* at 955 (emphasis added); *accord Duval*, 93 Cal. App. 4th at 908. Thus, the trial court erred in focusing on privacy as the *sine qua non* for exemption under Section 92032(b)(7).

The Superior Court’s apparent belief that Section 92032(b)(7) applies only when a single employee is mentioned by name is even less defensible. The reasons why closed sessions are appropriate to discuss the performance and termination of particular employees do not disappear when those evaluations and terminations are made collectively—for example, by evaluating the performance of an

office or a work group—rather than individually. Indeed, when multiple terminations are at issue—as was the case here—the stakes, and the consequent need for candor, are even greater. Nor are the privacy and reputational interests of the terminated employees decreased merely because they were terminated as a group.

This is particularly true where, as in this case, the group of terminated employees is small and its members are easily identifiable. Here the group of employees whose performance and dismissal were discussed by the Regents during the Meetings comprised all of the eleven internal equity managers employed by the Treasurer’s Office. *See* Conf. Ex. 2, at 102:19-22, 106:3-7. These individuals thus formed a discrete group, the members of which were easily identifiable by potential employers and others in the same field. Indeed, during the October 29 Meeting the Regents were given a chart that listed *each* employee to be terminated, by title and number (*id.* at 104:16; *see* 1st Pet. Ex. 24, at 359) and publicly available reports of the Treasurer’s Office matched each title with an individual employee’s name. *See id.* at 369. The fact that no names were expressly mentioned *at the Meetings* is thus irrelevant.

Finally, the Superior Court seemed to think that Section 92032(b)(7) contains a hitherto unnoticed, silent exception for personnel matters of great public interest. Thus, the Superior Court suggested that this case is different from the University’s decision to grant tenure to a professor, or make some comparable personnel decision, because the University officials in question were managing “jillions of dollars” and lots of people “have an interest in their pension.” 2d Pet. Ex. 9, at 48:8-14. However, Section 92032(b)(7), like the “personnel exemptions” to comparable statutes, does not contain any provision requiring open meetings to discuss personnel decisions that involve lots of money or are otherwise of interest to the public. The courts are not free to add exceptions to the statute that do not appear in its text, particularly when Section 92032(b)(7) contains its own exceptions to the general rule that “[m]atters concerning the appointment, employment, performance, compensation, or dismissal

of University officers or employees” may be discussed in closed session.<sup>3</sup> *See, e.g.*, CODE CIV. PROC. §1858 (courts interpreting statutes are “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted”); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 573 (1998); *In re Hoddinott*, 12 Cal. 4th 992, 1002 (1996).

**B. The Meetings Were Properly Closed Under A Correct Interpretation Of Section 92032(b)(7).**

As discussed above, Education Code Section 92032(b)(7) permits the Regents to meet in closed session to discuss “[m]atters concerning the appointment, employment, performance, compensation, or dismissal of university officers or employees.” Had the trial court applied the plain language of the statute, instead of the cramped interpretation discussed above, it would have found that the Meetings were properly closed.

The Treasurer’s recommendation that the University eliminate its eleven internal equity managers included an evaluation of the prior performance of these individuals, a recommendation that they be laid off, and a further recommendation that they be replaced by new employees to supervise the external managers that the University intended to use in the future to manage its public equity portfolio. *See pp.6-7, supra*. Hence, the Regents’ discussion of the Treasurer’s recommendation is replete with statements concerning these subjects. For example, the discussion during the October 29

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<sup>3</sup>After setting forth the general rule in its first sentence that University personnel matters, including employee and officer compensation, may be considered in closed session, Section 92032(b)(7) goes on to provide that “[c]ompensation for the principal officers of the regents and the officers of the University” shall be set in open session. *Id.* It also defines precisely who “the principal officers of the regents and the officers of the University” are and what their “compensation” consists of. *Id.*

Meeting included the following statements relating to employee performance:

- One Regent asked Treasurer Russ to reconcile his assessment of the previous Treasurer's investment performance with the reports the Regents had received from the previous Treasurer. Conf. Ex. 2, at 91:21-92:10. The Treasurer's response commented on the data submitted to the Regents by the previous Treasurer. *Id.* at 92:11-15.
- Later on in the meeting another participant quoted the Treasurer's evaluation of "a lot of the individuals who were managing" the Treasurer's Office. *Id.* at 125:9-12.
- A few moments later, the same speaker referred to the results of a "manager by manager" review of the Treasurer's internal equity managers that was undertaken to determine whether any of these individuals should be retained by the University in some capacity. *Id.* at 125:18-23.

Similar statements appear in the minutes of the November 13 Meeting:

- During that meeting, Treasurer Russ again explained the termination of the existing internal equity managers and gave his opinion of their performance. Conf. Ex. 6, at 113-14.
- At the same meeting, a Regent gave his opinion of the "whole approach" undertaken by the prior Treasurer. *Id.* at 115.

The Meetings also included an extensive discussion of the process by which the University's eleven internal equity managers would be terminated. *See, e.g.*, Conf. Ex. 2, at 99:23-100:4, 102:19-105:8, 106:3-11, 109:4-113:10, 118:11-22, 119:17-127:4, 127:10-14. Thus, the Regents discussed how many people would be terminated and who they would be (*id.* at 102:19-22), why the existing managers were not being hired to supervise the University's new outside managers (*id.* at 103:24-104:5, 106:6-107:1, 125:18-23), and when and how the faculty, staff and unions would be notified (*id.* at

119:17-122:13). Indeed, as noted above, the Regents were shown a chart that identified by title and number *each* of the positions that would be eliminated under the Treasurer’s proposal. *Id.* at 104:16, 1st Pet. Ex. 24, at 359.

Still other statements made during the Meetings related to the appointment of new investment managers to replace the terminated employees. For example, during the October 29 Meeting, the Treasurer commented unfavorably on the motivations of some of the then-existing applicants for employment by the Treasurer’s Office. Conf. Ex. 2, at 107:11-16.

As the foregoing summary indicates, substantial portions of the Meetings fall within this exemption. For example, much of the Meetings focused on the “performance” of the University’s then-existing equity managers, which is one of the bases for holding a closed session under Section 92032(b)(7). But the Meetings also discussed—at great length—the impending “dismissal” of the University’s eleven internal equity managers and the “appointment” or “employment” of six differently skilled employees to manage the University’s new outside managers. Consequently, while the Regents could have held the Meetings in closed session to discuss *any one* of the subjects listed in Section 92032(b)(7), the Meetings discussed *four* of them: “appointment,” “employment,” “performance,” and “dismissal.” Accordingly, the Meetings were properly held in closed session.<sup>4</sup>

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<sup>4</sup>Real Parties argued below that the discussion in the Meetings wasn’t privileged “because the [Regents’ Committee on Investments] held a similar discussion in open session at its September 18, 2002 meeting.” 2d Pet. Ex. 2, at 10. That is not true. The September 18 meeting did not discuss the Treasurer’s recommendation to eliminate the University’s internal equity managers and hire outside managers to manage the University’s U.S. equity portfolio for the simple reason that that proposal had not yet been made. Accordingly, there was no discussion of terminating University employees at that meeting, and only a brief remark by one Regent concerning the performance of the University’s internal equity managers. *See* 1st Pet. Ex. 40, at 999 (statement by Regent Blum).

No case construes Section 92032(b)(7). But cases construing the comparable provision of the Brown Act (GOV'T CODE §54957)—which is *narrower* than Education Code Section 92032(b)(7)<sup>5</sup>—prove the point. In the first place, the courts have stated that this statute permits “the majority of personnel matters to be discussed freely and candidly in closed session”—with open sessions permissible only when an employee requests a public hearing to contest “specific complaints or charges.” *Duval*, 93 Cal. App. 4th at 908 (quoting *Bell v. Vista Unified Sch. Dist.*, 82 Cal. App. 4th 672, 682 (2000) (internal quotation marks omitted)). Moreover, the courts have broadly construed the Brown Act’s authorization to consider “evaluation of performance” in closed session. Thus, in *Duval v. Board of Trustees*, the Court of Appeal held that Section 54957’s authorization to meet in closed session to consider “evaluation of performance” is not “limited to the annual or periodic comprehensive, formal, and structured review of job performance commonly envisioned in a typical personnel manual or employment contract.” 93 Cal. App. 4th at 909. Instead, the statute authorizes a closed session to “review of an employee’s job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance.” *A fortiori*, the Regents could meet in closed session to discuss the Treasurer’s systematic evaluation of the University’s eleven internal equity managers, which was integrally connected to his recommendation that a new staff be hired to implement the proposed new investment policy. *See pp.6-7, supra.*

The October 29 Meeting also included comments by the Treasurer as to *how* the existing employees were being evaluated.

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<sup>5</sup>Education Code Section 92032(b)(7) permits the Regents to meet in closed session to discuss employee or officer “compensation.” Government Code Section 54957 contains no comparable language, and has therefore been held not to permit closed sessions dealing with that subject. *San Diego Union v. City Council*, 146 Cal. App. 3d 947 (1983).

*See* Conf. Ex. 2, at 126:4-8. These statements, too, were properly made in closed session. In construing the Brown Act, the courts have held that a local legislative body can not only conduct its actual evaluation of employee performance in closed session, but may also discuss “the criteria for such evaluation” and “the process for conducting the evaluation,” as long as “these matters constitute an exercise of . . . discretion in evaluating a particular employee.” *Duval*, 93 Cal. App. 4th at 909. The Treasurer’s statements fit comfortably within this exception.

*Duval* also demonstrates that the Regents had the right to meet in closed session to discuss both the termination of the University’s internal equity managers and the mechanics of how the termination would be accomplished. As just noted, a local legislative body’s right to discuss the “evaluation of performance” by employees in closed session includes the right to discuss how that evaluation shall be conducted. *See id.* at 909. By the same token, the Regents had the right to discuss in closed session both *whether* the Treasurer’s eleven existing internal equity managers would be terminated *and how* the termination was to occur. *See, e.g.,* Conf. Ex. 2, at 109:4-113:10, 119:17-125:3, 126:9-127:13, 131:17-132:5.

The Regents’ discussion of the performance and termination of these eleven University employees did not lose its protection under the Brown Act simply because that discussion occurred as part of a larger discussion concerning the management of the University’s internal equity portfolio. In 63 Op. Cal. Att’y Gen. 153 (1980), the Attorney General issued a formal opinion addressing whether the governing body of a local agency could meet in closed session to discuss establishing new administrative positions. In concluding that it could not, the Attorney General stated that “the establishment of new administrative positions would not usually be a proper subject for an executive session . . . because the positions usually are not yet in existence, and hence have no incumbents.” *Id.* at 156-57. However, the Attorney General went on to say that “in some situations the question might arise in the context of a reorganization which

might involve a discussion of the job performance of particular individuals.” *Id.* at 157. In that event, the Attorney General concluded, the Brown Act would permit a closed session: “*If such were the case, then the sessions would then fall within the ambit of the rule that section 54957 permits executive sessions to discuss the job performance of individuals, so long as the individuals are ‘employees’ within the meaning of section 54957.*” *Id.* (emphasis added).<sup>6</sup>

This rule fits this case like a glove. No one disputes that the Meetings concerned a discussion by the Regents of a proposal to reorganize the management of the University’s internal equity portfolio. *See pp.6-7, supra.* That discussion necessarily involved “a discussion of the job performance of particular individuals”—*i.e.*, the University’s eleven internal equity managers. Those eleven people were unquestionably “university officers or employees” within the meaning of Section 92032(b)(7). Hence, under the Attorney General’s opinion, the Regents’ discussion of their “performance” and “dismissal” was properly held in closed session.<sup>7</sup>

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<sup>6</sup>The opinions of the Attorney General are normally accorded “considerable weight” by the courts. *See, e.g., Freedom Newspapers, Inc. v. Orange County Employees Retirement Sys.*, 6 Cal. 4th 821, 829 (1993). “This is especially true” when it comes to the Brown Act “since the Attorney General regularly advises many local agencies about the meaning of the [statute] and publishes a manual designed to assist local governmental agencies in complying with the Act’s open meeting requirements.” *Id.*

<sup>7</sup>Real Parties relied below on the fact that the relevant agenda item for the October 29 Meeting did not list Section 92032(b)(7) as a justification for having a closed session, but only Section 92032(b)(4). 1st Pet. Ex. 40, at 844, 991; 1st Pet. Ex. 45, at 1308; 2d Pet. Ex. 2, at 10. In reaching the merits of Petitioner’s Section 92032(b)(7) claim, the Superior Court implicitly rejected any claim that this omission prevented the University from invoking the statute. This ruling was correct. No case holds that the agenda for a closed session held pursuant to more than one statute must identify every such statute. Nor does any case hold that the rights of University’s employees not to have their performance evaluated or their termination discussed in open session vanishes because the agenda item for the session was incomplete.

## II.

### **THE MEETINGS WERE PROPERLY CLOSED UNDER EDUCATION CODE SECTION 92032(b)(4).**

The Superior Court's decision that release of the minutes and transcript of the Meetings was not barred by Education Code Section 92032(b)(4) suffers from many of the same defects as its analysis of subdivision (b)(7). Here, too, the trial court ordered disclosure without any finding that the entire meeting was improperly closed. Here, too, the trial court interpreted the statute to create exceptions that do not appear in its text. And just as the trial court improperly limited the "personnel exemption" to discussions of a single employee, it limited the "investment exemption" to discussions concerning the purchase or sale of a single stock.

Education Code Section 92032(b)(4) provides: "The Regents of the University of California may conduct closed sessions when they meet to consider or discuss: . . . (4) [m]atters involving the purchase or sale of investments for endowment and pension funds." The Superior Court held that this section did not apply to the meetings because they were not focussed on "particular specific investments" (1st Pet. Ex. 61, at 1967) and that, even if they were, the minutes would no longer be exempt from disclosure once the purchase or sale of investments under discussion had been consummated. *Id.* at 1968-69. As a result of these rulings, the Superior Court ordered the minutes and transcript disclosed without finding that the Meetings had been improperly closed under the statute. As we now show, all these rulings were erroneous.

#### **A. The Meetings Were Properly Closed Under Education Code Section 92032(b)(4) Because They Concerned The Sale Of \$15 Billion Worth Of Securities.**

As discussed above, the Meetings concerned a recommendation by the Treasurer to eliminate the University's internally managed equity portfolio and to replace it with investments in broad, index-based funds supervised by outside managers. 1st Pet. Ex. 24, at 328

¶36. Thus, the Treasurer recommended moving from a concentrated position in only 156 equity stocks to positions in about 3000 stocks via index funds. *Id.* at 305-07 ¶¶5-6. Implementing this proposal involved the sale of \$15.1 billion in assets, with the sales producing a \$618 million gain. *Id.* at 329 ¶38, 670.

These meetings thus necessarily “involv[ed] the purchase or sale of investments.” Yet the Superior Court accepted Real Parties’ argument that Section 92032(b)(4) should not be read literally, and that a meeting could only be closed if it addressed the purchase or sale of “*particular specific investments*, rather than investment strategy in general.” Pet. Ex. 61, at 1967 (emphasis added). For several fundamental reasons, this ruling was in error.

In the first place, the court interpreted the statute as if its exemption was only for meetings “involving the purchase or sale of *a particular specific investment*[.]” The italicized words are, of course, nowhere to be found in the statute that the Legislature enacted. The Superior Court’s reading adds three limiting words to the statute—and changes “investments” to “investment.” Here, again, the court violated the canon of statutory interpretation that where the Legislature could readily have included restrictive language in a statute but did not do so, courts should not supply it. *See* p.18, *supra*.

Moreover, the court’s interpretation would effectively render the statutory exemption a nullity. If it applied only to Regents meetings held for the purpose of determining whether to buy or sell a particular investment, the statute would be a dead letter because the Regents *never* decide whether to sell or purchase a particular stock. 1st Pet. Ex. 24, at 305 ¶3. The trial court’s interpretation therefore violates a second fundamental canon of statutory interpretation: that courts should “reject interpretations that render particular terms of a statute mere surplusage, [and] instead [should] giv[e] every word some significance.” *City of San Jose v. Superior Court*, 5 Cal. 4th 47, 55 (1993). Indeed, if the trial court’s interpretation of Section 92032(b)(4) were correct, a spokesman for the University would not

have referred to its statutory predecessor as an “essential exemption”—in a statement that Real Parties themselves cited to the Superior Court. *See* 1st Pet. Ex. 45, at 1304.

Finally, the Superior Court’s distinction between a meeting to discuss the sale of a “particular specific” investment and one to discuss selling the Regents’ entire internal equity portfolio is illogical. The Superior Court conceded that the University would have reason to discuss a proposal to sell shares of a particular stock in closed session. 1st Pet. Ex. 61, at 1968. But in October and November 2002 the Regents discussed a proposal to sell 156 “particular specific” stocks—*i.e.*, its internal equity portfolio. 1st Pet. Ex. 24, at 328, 329 ¶¶36, 38. There is no reason in law or logic why a meeting to sell one stock should be confidential and a meeting to sell 156 stocks should not be. Indeed, the Treasurer’s proposal to sell the University’s internal equity portfolio—the content of which was public information (*see id.* at 328 ¶36)—*was* a proposal to sell each of the 156 “particular specific” stocks held at the time of the Meetings. Thus, the Meetings were properly closed.

The Superior Court believed that its narrow reading of Section 92032(b)(4) was justified by its legislative history. 1st Pet. Ex. 61, at 1968. Not so. The legislative history referred to dealt with a different exemption, now found in Section 92032(b)(6). *See* 1st Pet. Ex. 45, at 1304-05. That exemption applies to discussion of “[t]he acquisition or disposition of property, *if discussion of these matters in open session could adversely affect the regents’ ability to acquire or dispose of the property on the terms and conditions they deem to be in the best public interest.*” EDUC. CODE §92032(b)(6) (emphasis added). The history of *that* provision sheds no light on the (b)(4) exemption, which applies to all discussions “involving the purchase or sale of investments”—plural—with no requirement that disclosure would “adversely affect the regents’ ability to acquire or dispose” of those investments. Indeed, the omission from Section 92032(b)(4) of language comparable to that found in Section 92032(b)(6) plainly indicates that the Legislature did not intend to impose any such

requirement in the former statute. “Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent.” *Craven v. Crout*, 163 Cal. App. 3d 779, 783-84 (1985) (holding that where a similar section of the Code of Civil Procedure explicitly authorized the court to amend a money judgment at any time, regardless of whether the moving party appeared before entry of judgment, the fact that the applicable section “contains no similar language is an unmistakable indication that the Legislature did not intend that section to authorize modification of an entered judgment”). Hence, the trial court’s order cannot be justified by Real Parties’ assertion below that holding the Meetings in closed session was unnecessary to protect the University’s ability to carry out the discussed transactions profitably.

The trial court attempted to justify its ruling on the ground that Section 92032(b)(4) should not be construed “so broadly as to permit the closing of any meeting in which any discussion whatsoever about investments takes place.” 1st Pet. Ex. 61, at 1968. But Petitioner never contended otherwise. It argued only that the Meetings were properly closed because the asset allocation issues discussed “involved *the purchase or sale* of investments.” See 1st Pet. Ex. 7, at 185-86 (emphasis added). That is all the statute required to properly close the Meetings.

**B. The Closure Of The Meetings Under Section 92032(b)(4) Did Not Become Improper Once The Transactions Approved In The Meetings Had Been Consummated.**

Despite its cramped interpretation of Section 92032(b)(4), the trial court did not hold that the Meetings had been improperly closed in their entirety under that statute. Instead, it held that “while there might—and the Court emphasizes might—have been some aspects of those meetings that could invoke Education Code § 92032(b)(4), such would not justify withholding records related to past meetings

where action has already been taken.” 1st Pet. Ex. 61, at 1968. This ruling, too, is erroneous.

Government Code Section 11126.1 expressly provides that the “minute book” of a closed meeting is exempt from Public Records Act disclosure “and shall be kept confidential.”<sup>8</sup> This statute contains no time limits. Whether there should be such limits, and what they should be, is a quintessentially legislative question. Here, too, the courts are not free to add exceptions to a statute that do not appear in—indeed, that obviously contradict—the statutory test. *See* p.18, *supra*. Thus, if the Meetings were properly closed at the time they occurred, Section 11126.1 makes the “minute book” of these sessions confidential indefinitely.

The Superior Court’s holding that Section 92032(b)(4) does “not justify withholding records related to past meetings where action has already been taken” (1st Pet. Ex. 61, at 1968) improperly applies an open meeting statute to a dispute about disclosing records under the PRA. Section 92032(b)(4) addresses only the *prospective* issue of whether a Regents meeting to discuss “matters concerning the purchase or sale of investments” may be held in closed session. It simply does not address the *retrospective* issue of whether and when the records of a closed session meeting *that has already occurred* may be disclosed. *That* issue is addressed by Government Code Section 11126.1, which, as just discussed, precludes any disclosure of closed session “minute books.” Hence, the Superior Court erred in interpreting Section 92032(b)(4) to trump the express and contradictory language of Government Code Section 11126.1.

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<sup>8</sup>The “minute book” of a closed session is defined by statute as “a record of topics discussed and decisions made” at each closed session. GOV’T CODE §11126.1. The “minute book may, but need not, consist of a recording of the closed session.” *Id.* Logically, the “minute book” also includes a transcript made from the tape recording.

**C. The Trial Court's Interpretation Of Section 92032(b)(4) Cannot Be Defended On The Basis Of A Waiver Theory That Real Parties Never Advanced And The Trial Court Never Adopted.**

In the prior writ proceeding, Real Parties did not even attempt to defend the trial court's ruling that Section 92032(b)(4) "does not justify withholding records related to past meetings where action has already been taken." 1st Pet. Ex. 61, at 1968. Instead, Real Parties argued that "[i]n 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." Real Parties' Opposition to Petition for Writ of Mandate (No. A103797) at 46 (emphases added). This contention is based on the fact that the University disclosed some details regarding the University's new investment strategy in late November 2002 and January 2003 (1st Pet. Ex. 40, at 967-68, 970), and eventually disclosed the written presentation that the Treasurer discussed during the October 29 Meeting (1st Pet. Ex. 24, at 334-63).

Real Parties' weasel words—"in essence" and "apparently"—give the game away. The trial court made no finding of waiver. *See* 1st Pet. Ex. 61, at 1966-70. That is not surprising, inasmuch as Real Parties never asserted any such theory. *See* 1st Pet. Ex. 3, at 58-60 (opening memo); 1st Pet. Ex. 45, at 1303-09 (reply memo). To the contrary, Real Parties argued exactly what the Superior Court held: that "Section 92032(b)(4) does not justify withholding documents related to *past meetings*, where action has already been taken." 1st Pet. Ex. 3, at 59 (emphasis in original).

The Superior Court's interpretation of Section 92032(b)(4) cannot be defended on the basis of a "waiver" theory that Real Parties never advanced and the trial court never adopted. Moreover, Real Parties' waiver theory would negate many of the provisions of both the Bagley-Keene Act and the Brown Act that permit closed sessions. Both of these statutes contain numerous provisions authorizing public agencies to meet in closed sessions to discuss

proposed actions that later become public. *See, e.g.*, GOV'T CODE §11126(a)(1) (appointment, employment or dismissal of state employee); *id.* §11126(c)(3) (permitting closed session deliberations on matters subject to state Administrative Procedure Act); *id.* §11126(c)(5) (conferring of honorary degrees); *id.* §54956.8 (local agencies may hold closed sessions to discuss real property transactions). Indeed, both statutes contain provisions that *compel* the public disclosure of actions taken in closed session. *Id.* §§11125.2, 54957.1. Hence, these statutes do not waive closed session confidentiality every time the ultimate decision reached in closed session is disclosed to the public. Indeed, if the law were otherwise, and after-the-fact disclosure of the specific proposal discussed during a closed session compelled disclosure of the minutes and tapes of the meeting, little would be left of the closed meeting provisions in either statute.

Real Parties' new-found "waiver" theory is bad policy, as well as bad law. Participants in a closed session often express themselves with candor that might be inappropriate in an open forum. Their discussions should not be revealed to the public even if the public agency later discloses the proposals adopted during the closed session. If the law were otherwise, the rationale for permitting closed sessions would be lost, since no participant in such a session could ever be sure that what he or she was saying would remain confidential.

### III.

#### **GOVERNMENT CODE SECTION 11126.1 EXEMPTS THE MINUTES AND TRANSCRIPT OF THE MEETINGS FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT.**

We have shown in Parts I and II that the Meetings were properly closed under Education Code Sections 92032(b)(4) and 92032(b)(7). If the Court accepts either of those arguments, it need read no further, because even the trial court acknowledged that Government Code Section 11126.1 exempts the minutes and tran-

script of a properly closed meeting from disclosure under the Public Records Act. 1st Pet. Ex. 61, at 1966-67. If, however, the Court disagrees with our analysis, it must still decide what remedies are appropriate under that statute.

At the very least, *in camera* review and selective disclosure of the minutes and transcript of a closed meeting violates Section 11126.1 if a substantial part of the meeting was properly closed. *See* Part III(A), *infra*. Indeed, although the Court need not reach the issue, the “minute book” of a closed meeting is permanently exempt from disclosure under Section 11126.1, even if the meeting should have been open to the public, at least in the absence of a “clear” statutory violation. *See* Part III(B), *infra*.

**A. The Minutes And Tapes Of The Meetings Are Exempt From *In Camera* Review And Disclosure As Long As A Substantial Part Of Each Meeting Was Properly Closed.**

Government Code Section 11126.1 first requires state agencies to keep a “minute book” that contains “a record of topics discussed and decisions made” at each closed session. The statute next provides that the “minute book may, but need not, consist of a recording of the closed session.” GOV’T CODE §11126.1. Finally, the statute provides that the “minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act . . . and shall be kept confidential.” *Id.* This statute, which is part of the Bagley-Keene Open Meeting Act, applies to the Regents. EDUC. CODE §92030.<sup>9</sup>

Government Code Section 11126.1 does not authorize the courts to subject the “minute book” of a closed session to *in camera* review to determine whether every statement made during the

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<sup>9</sup>Education Code Section 92030 provides that “[a]ll meetings of the Regents of the University of California shall, except as otherwise provided in this article, be subject to [the Bagley-Keene Open Meeting Act].” No provision of the article in which Section 92030 appears exempts the Regents from Government Code Section 11126.1.

meeting deserves its own individual exemption under the Public Records Act. Indeed, the plain terms of the statute prohibit such piecemeal disclosure. Because the “minute book” is “not a public record subject to inspection” under the PRA, no public agency need sift through it to release portions that are “reasonably segregable,” as the PRA requires for documents subject to its terms. GOV’T CODE §6253(a). And because the “minute book . . . shall be kept confidential,” no court can review the “minute book” line-by-line and word-by-word and disclose particular words that, in the court’s view, did not themselves warrant discussion *in camera*.<sup>10</sup> Accordingly, assuming *arguendo* that Section 11126.1 permits *any* disclosure of the “minute book”—which, of course, includes the tape of the meeting—such disclosure is impermissible as long as some reasonable or substantial part of the meeting was properly closed.

This construction of Section 11126.1 reflects common sense, as well as the statutory language just discussed. In providing that the confidential “minute book” of a closed session may consist of a “recording” of the proceeding, the Legislature must have realized that not every word spoken during a closed meeting would justify holding the meeting in closed session or be exempt from disclosure under the Public Records Act, if it stood alone. Yet the Legislature did not require public agencies to segregate and disclose those portions of the tape or the transcripts of a closed meeting that did not justify the closed session under the Bagley-Keene Open Meeting Act or qualify for an individual exemption under the PRA. Nor did the Legislature authorize courts to review the tapes and order disclosure

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<sup>10</sup>Section 11126.1 does provide that “[t]he minute book [of a closed session] shall be available to members of the state body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction.” As discussed below, however, the statute does not contain any language authorizing the court to disclose the contents of a closed session after *in camera* review of the minutes or tapes, even if it determines that the meeting was improperly closed, unless the Court has first found *a priori* statutory violation of the Bagley-Keene Act. See pp.35-36, *infra*.

of every snippet that did not invade an identifiable employee’s privacy. Instead, the Legislature did just the opposite: it established a blanket exemption under the PRA for the minute book of a closed session and provided that the minute book “shall be kept confidential.” GOV’T CODE §11126.1.<sup>11</sup>

The Superior Court in this case did exactly what Section 11126.1 forbids. Instead of keeping the “minute book” of the Meetings confidential, as the statute requires, it ordered those documents released to the public. This was error. As long as a substantial part of each Meeting was properly closed, the confidentiality provided by Section 11126.1 must remain sacrosanct.

**B. Disclosure Of The Minutes And Transcript Would Be Improper Even If Neither Of The Meetings Were Properly Closed.**

We have shown in Part III(A) that Government Code Section 11126.1 prohibits disclosure of the minutes and transcript, as long as a substantial portion of each Meeting was properly closed. But even if that were not true, and the Meetings were improperly closed *in their entirety*, disclosure would still be unauthorized. The reason is simple: the Open Meeting Act provides the exclusive remedies for improperly closing a meeting, and those remedies do not include disclosure of the “minute book” in such circumstances.

The Bagley-Keene Open Meeting Act—which applies to the Regents unless contradicted by the specific provisions of the Education Code (*see* EDUC. CODE §92030)—gives members of the public express judicial remedies in the event a state agency has improperly closed a meeting. First, a member of the public may commence an action “for the purpose of stopping or preventing

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<sup>11</sup>As discussed below, the Bagley-Keene Act does contain some exemptions to the general rule that the contents of a closed session are confidential, but those exemptions do not include disclosure of the minute book to the public in the circumstances of this case. *See* pp.35-36, *infra*.

violations or threatened violations of [the Act] or to determine the applicability of [the Act] to past actions or threatened future action by members of the state body.” GOV’T CODE §11130(a). Second, an action may also be brought “for the purpose of obtaining a judicial determination that an action taken by a state body in violation” of two specified sections of the Act (Government Code Sections 11123 and 11125) is null and void. *Id.* §11130.3. Neither of these statutes authorize a court to publicly release the minutes or tapes of an improperly closed meeting.

To the contrary, the only statutory authorization for disclosing the contents of an improperly closed session to the public is contained in Government Code Section 11130(c). That statute provides that *if* the court has previously found a violation of the Open Meeting Act, ordered the agency to tape future meetings, and the agency is *then* shown to have violated the Act again, the court may order *in camera* review of the tape and disclose the tape to the public under limited circumstances. *Id.* §11130(c)(4) (“If, following the in-camera review, the court concludes that disclosure of a portion of the recording would be likely to materially assist in the resolution of the litigation alleging violation of this article, the court shall, in its discretion, make a certified transcript of the portion of the recording a public exhibit in the proceeding”).

To be sure, the Bagley-Keene Act provides that “[t]he minute book [of a closed session] shall be available to members of the state body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction.” *Id.* §11126.1. But this statute—in contrast to Section 11130(c)—does not contain any language authorizing the court to disclose the contents of a closed session after *in camera* review of the minutes or tapes. Instead, it simply provides that the minute book—which includes tapes of a closed meeting (*id.*) “shall be available” to the court. The omission from Section 11126.1 of language comparable to that found in Section 11130(c) plainly indicates that the Legislature did not intend

to authorize such disclosure when it enacted the former statute. *See Craven v. Crout*, 163 Cal. App. 3d 779, 783-84 (1985).<sup>12</sup>

No case construes these provisions of the Bagley-Keene Act. But identical statutes were construed in *Kleitman v. Superior Court*, 74 Cal. App. 4th 324 (1999), which involved the provisions of the Brown Act. In that case, a citizen of Mountain View brought an action against Mountain View City Council members, alleging that a closed session violated the Brown Act. *Id.* at 326. To substantiate his claims, he sought discovery of the council members' recollection of what they had discussed during the closed session. The trial court permitted discovery, and the council members filed a petition for writ of mandate in the Court of Appeal. In granting the writ, and denying discovery, the court held that

the Brown Act provides for disclosure of the proceedings which took place during a closed session in only two situations: (1) in camera review by the trial court of the minute book when it is alleged that a violation of the Brown Act has occurred during a closed session; and (2) in camera review *and disclosure* of the tape recording of a closed session where there exists a prior judgment that the legislative body held unlawful closed sessions, a court order to make tape recordings, and a factual showing that another violation has occurred. (*Id.* at 333 (citation omitted; emphasis added))

*Kleitman* thus recognizes that public disclosure of the contents of a closed meeting is authorized only in the second category (review of tapes previously required to be made by court order after the court has found a violation), and not the first category (*in camera* review to determine if a violation has occurred in the first instance). This holding applies to the Bagley-Keene Open Meeting Act. Like the Brown Act, the Bagley-Keene Act provides for in camera review

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<sup>12</sup>In contrast to Government Code Section 11126.1, Section 11124.1(b) provides that “[a]ny tape or film record of an open and public meeting made . . . by or at the direction of the state body shall be subject to inspection pursuant to the California Public Records Act.” But a meeting that was closed to the public, for whatever reason, is obviously not “an open and public meeting” covered by this statute.

by a court “if a violation of this chapter is alleged to have occurred at a closed session.” GOV’T CODE §11126.1. Consequently, even if the Court correctly held that the Regents violated the Bagley-Keene Open Meeting Act or the Education Code in connection with the Meetings, the available remedies are listed in Government Code Sections 11130 and 11130.3, and do not include disclosure of what occurred during those Meetings.

Nor does Government Code Section 11126.1 provide for disclosure of the minutes and tapes of an improperly closed meeting. As discussed above, that statute provides simply that the “minute book” of a closed meeting is not a public record under the Public Records Act and shall be kept confidential. Although it would have been easy for the Legislature to do so, the statute does not make these provisions dependent on a finding that the meetings were properly closed. Instead, the specific statutes that govern disclosure of the contents of an improperly closed meeting, Government Code Sections 11130 and 11130.3, authorize disclosure only in extremely limited circumstances that do not exist here.

This interpretation of the relevant statutes makes perfect sense. Participants in a closed session are entitled to rely on their counsel’s advice that the meeting has been properly closed. Their discussions should not be revealed to the public even if a court later determines that the meeting was improperly closed. If the law were otherwise, the rationale for permitting closed sessions would be lost, since no participant in such a session could ever be sure that what he or she was saying would remain confidential. In contrast, if a court has previously ordered the agency to tape its meetings under Government Code Section 11130(b), the agency and its members will be on notice that the tape is subject to review and release by a court and can act accordingly.

One Court of Appeal held almost twenty years ago that the provision of the Brown Act that is comparable to Section 11126.1 “does not apply to closed sessions held in violation of the act.” *Register Div. of Freedom Newspapers, Inc. v. County of Orange*,

158 Cal. App. 3d 893, 907 (1984) (emphasis omitted). But the court offered no analysis or explanation to support this *ipse dixit*. Moreover, at the time of this decision, the Brown Act did not contain the remedy provisions construed in *Kleitman*—in particular, the provisions of Government Code Section 54960 limiting disclosure of the tape of a closed meeting. Finally, *Register Division* involved “a clear violation of the Brown Act” (*id.*), because no provision of that statute even arguably authorized a closed session to consider the subject of the meeting in question. Here, in contrast, the Regents’ reliance on the plain language of Education Code Sections 92032(b)(4) and (b)(7) was reasonable and in good faith. Hence, the court should follow *Kleitman*, the more recent and better-reasoned decision.

#### IV.

#### **THE COURT SHOULD ISSUE A STAY OF THE TRIAL COURT’S RULING PENDING DISPOSITION OF THE PETITION.**

In addition to seeking a writ of mandate reversing the November 14 Order, Petitioner also seeks a stay of the order pending disposition of this Petition. Because the temporary stay entered by the trial court expires on January 11, 2004 (2d Pet. Ex. 7, at 33), this Court should act on Petitioner’s stay request by that date.

Government Code Section 6259(c) provides, in relevant part, that a stay of an order compelling disclosure under the PRA “shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits.” Petitioner satisfies both of these criteria.

The employees who were terminated due to the University’s change in investment policy have already lost their jobs. Disclosing candid statements concerning the qualifications of those employees made during a properly closed session would literally add insult to injury. These employees should be free to go about their lives, without suffering the added and irreparable injury caused by the Superior Court’s November 14 Order.

The Order also places the University and the Regents in an impossible position. Unless the trial court's order is reviewed and overturned, the University can have no assurance that *any* sensitive discussion concerning the qualifications or dismissal of an employee or officer will remain confidential. Similarly, disclosure of the minutes and tapes of the Regents' closed sessions dealing with investments will impair the Regents' ability to discuss investment policies in the future without adversely impacting the University's portfolio. Indeed, the trial court's ruling that statements made during a closed session must be disclosed once the decisions made during that meeting have been implemented threatens the University's ability to maintain the confidentiality of statements made during *any* closed meeting. If the Regents cannot be assured that statements made during a properly closed meeting will remain confidential, the candor that closed meeting statutes seek to promote will be impaired.

Petitioner can also show a likelihood of success on the merits. As discussed above, the trial court's decision to compel disclosure of the minutes and transcript misconstrues three separate statutes: Government Code Section 11126.1, Education Code Section 92032(b)(4), and Education Code Section 92032(b)(7). Indeed, the November 14 Order contradicts the plain language and obvious meaning of each of these statutes: it orders disclosure flatly prohibited by Section 11126.1, it holds that meetings which concerned employee performance and dismissal were not properly closed under Section 92032(b)(7), and it holds that meetings which concerned the purchase and sale of investments were not properly closed under Section 92032(b)(4).

Although Government Code Section 6259 requires a petitioning party to show probable success on the merits, the statute does not require a finding that the University will inevitably prevail. To the contrary, the appellate courts have often granted stays in PRA cases even though the ultimate decision was in favor of disclosure. *See, e.g., California State Univ., Fresno Ass'n, Inc. v. Superior Court*, 90 Cal. App. 4th 810, 821 (2001) (order that required university to

disclose documents stayed pending appeal even though appellate court ultimately held that PRA required university to disclose documents); *Connell v. Superior Court*, 56 Cal. App. 4th 601, 605 (1997) (stay granted even though appellate court ultimately upheld trial court's order granting disclosure, modifying order only to conform to requester's original PRA request). Indeed, we know of no published decision where a party required to disclose documents under the PRA has been denied a stay pending disposition of a petition for writ of mandate.

While denial of a stay will moot this proceeding, cause irreparable injury to the University's terminated employees, impair the University's ability to invest its endowment and pension funds, and destroy the candor of closed sessions, granting a stay will not damage Real Parties. The University has already disclosed abundant information about the decisions made at the Meetings, including the written presentation made by the Treasurer to the Regents' Committee on Investments. *See* 1st Pet. Ex. 24, at 329 ¶38, 334-63. There is no public interest in the immediate disclosure of additional information, such as the precise reasons why the Treasurer decided to terminate the eleven employees, instead of retaining them to implement the new investment strategy. Consequently, the grant of a stay will not disserve the public interest while its denial would cause irreparable injury to the University and the terminated employees.

**CONCLUSION**

The Petition should be granted. The Superior Court's November 14 Order should be stayed pending disposition of the Petition.

DATED: December \_\_\_\_, 2003.

Respectfully,

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## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION AND SUMMARY OF ARGUMENT	1
PETITION FOR WRIT OF MANDATE	5
MEMORANDUM OF POINTS AND AUTHORITIES	14
I.    THE MEETINGS WERE PROPERLY CLOSED UNDER EDUCATION CODE SECTION 92032(b)(7).	14
A.    The Superior Court's Apparent Interpretation Of The Statute Is Erroneous.	14
B.    The Meetings Were Properly Closed Under A Correct Interpretation Of Section 92032(b)(7).	18
II.   THE MEETINGS WERE PROPERLY CLOSED UNDER EDUCATION CODE SECTION 92032(b)(4).	24
A.    The Meetings Were Properly Closed Under Education Code Section 92032(b)(4) Because They Concerned The Sale Of \$15 Billion Worth Of Securities.	24
B.    The Closure Of The Meetings Under Section 92032(b)(4) Did Not Become Improper Once The Transactions Approved In The Meetings Had Been Consummated.	27
C.    The Trial Court's Interpretation Of Section 92032(b)(4) Cannot Be Defended On The Basis Of A Waiver Theory That Real Parties Never Advanced And The Trial Court Never Adopted.	29

## TABLE OF CONTENTS

	<b>Page</b>
III. GOVERNMENT CODE SECTION 11126.1 EXEMPTS THE MINUTES AND TRANSCRIPT OF THE MEETINGS FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT.	30
A. The Minutes And Tapes Of The Meetings Are Exempt From <i>In Camera</i> Review And Disclosure As Long As A Substantial Part Of Each Meeting Was Properly Closed.	31
B. Disclosure Of The Minutes And Transcript Would Be Improper Even If Neither Of The Meetings Were Properly Closed.	33
IV. THE COURT SHOULD ISSUE A STAY OF THE TRIAL COURT'S RULING PENDING DISPOSITION OF THE PETITION.	37
CONCLUSION	40

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Bell v. Vista Unified Sch. Dist.</i> , 82 Cal. App. 4th 672 (2000)	2, 21
<i>California State Univ., Fresno Ass’n, Inc. v. Superior Court</i> , 90 Cal. App. 4th 810 (2001)	38
<i>City of San Jose v. Superior Court</i> , 5 Cal. 4th 47 (1993)	25
<i>Connell v. Superior Court</i> , 56 Cal. App. 3d 601 (1997)	39
<i>Craven v. Crout</i> , 163 Cal. App. 3d 779 (1985)	27, 35
<i>Duval v. Bd. of Trustees</i> , 93 Cal. App. 4th 902 (2001)	2, 16, 21, 22
<i>Freedom Newspapers, Inc. v. Orange County Employees Retirement Sys.</i> , 6 Cal. 4th 821 (1993)	23
<i>In re Hoddinott</i> , 12 Cal. 4th 992 (1996)	18
<i>Jackson v. County of Los Angeles</i> , 60 Cal. App. 4th 171 (1997)	4
<i>Kleitman v. Superior Court</i> , 74 Cal. App. 4th 324 (1999)	35, 37
<i>Kovis v. Howard</i> , 3 Cal. 4th 888 (1992)	5
<i>Register Div. of Freedom Newspapers, Inc. v. County of Orange</i> , 158 Cal. App. 3d 893 (1984)	36, 37
<i>San Diego Union v. City Council</i> , 146 Cal. App. 3d 947 (1993)	16, 21
<i>Stop Youth Addiction, Inc. v. Lucky Stores, Inc.</i> , 17 Cal. 4th 553 (1998)	18

## TABLE OF AUTHORITIES

	Page
<b>Statutes</b>	
GOV'T CODE	
§6253(a)	32
§6259	38
§6259(c)	10, 37
§11123	34
§11124.1(b)	35
§11125	34
§11125.2	30
§11126(a)(1)	30
§11126(c)(3)	30
§11126(c)(5)	30
§11126.1	<i>passim</i>
§11130	36
§11130(a)	34
§11130(b)	36
§11130(c)	34
§11130(c)(4)	34
§11130.3	34, 36
§54956.8	30
§54957	2, 21
§54957.1	30
§54960	37
CODE CIV. PROC. §1858	18
EDUC. CODE	
§92030	31, 33
§92032(b)(4)	<i>passim</i>
§92032(b)(6)	26
§92032(b)(7)	<i>passim</i>
CAL. R. CT. 12(c)(1)	5
<b>Other Authorities</b>	
63 Op. Cal. Att'y Gen. 153 (1980)	22, 23

An extra section break has been inserted above this paragraph. Do not delete this section break if you plan to add text after the Table of Contents/Authorities. Deleting this break will cause Table of Contents/Authorities headers and footers to appear on any pages following the Table of Contents/Authorities.