

REICKER, PFAU,
PYLE & MCROY LLP
ATTORNEYS AT LAW
MEMORANDUM

To: Lila Deeds, Interim CEO

From: Alan A. Blakeboro, Esq.

Re: Policy Pertaining to Public Records Act Requests

Date: July 21, 2011

You have asked us for further clarification of current legal authorities pertaining to disclosure of member records pursuant to the Public Records Act. Historically, it was the practice of SBCERS, consistent with that of other county retirement systems, to withhold the names of members when requested to produce information regarding the amount of retiree pensions. We supported that practice as protective of member privacy rights within the scope of Government Code Section 31532. However, amendments to the PERS statute requiring production of such information regarding PERS retirees, as well as judicial decisions mandating production of salary information regarding active employees caused some systems to reconsider their policies.

We resisted recommending change in SBCERS policy regarding production until a consensus of legal authority began to emerge in the summer of 2010. A copy of our memorandum recommending a change in policy dated August 25, 2010 is attached.

Nothing that has occurred since August, 2010 has altered our conclusions regarding this issue. Since that time, additional trial court decisions compelling disclosure of retiree names in conjunction of production of pension information have been issued in Sonoma, San Diego, San Bernardino and Ventura counties. In addition, other systems have modified their policies voluntarily consistent with action taken by SBCERS.

More importantly, two published decisions have been issued by courts of appeal in the last three months reaching the same conclusion as trial court decisions that the public policy of the Public Records Act favoring disclosure outweighs the obligation of retirement systems to protect member privacy. Those decisions, *San Diego County Employees Retirement Ass. v. Superior Court* 2011 WL 2535585 (June 28, 2011) and *Sacramento Employees Retirement Ass. v. Superior Court* (2011) 195 Cal.App.4th 440 are now controlling authority mandating disclosure of member information consistent with the policy adopted by SBCERS in August, 2010. Absent further published decisions reaching a contrary conclusion, these opinions appear to settle the law with respect to the issue of disclosure of member names and pension information.

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MEMORANDUM

To: Board of Retirement

From: Alan A. Blakeboro, Esq.

Re: Policy Pertaining to Public Records Act Requests

Date: August 25, 2010

1. Background

The Public Records Act, Government Code Section 6250 et seq. (the "PRA") provides a procedure whereby members of the public can request access to public records in the possession of public agencies. Pursuant to the terms of the PRA, a member of the public is entitled to receive access to public records unless there is an applicable exception to disclosure set forth in the statute. Although it is our understanding that SBCERS has never adopted a formal policy for responding to PRA requests, it routinely responds to such requests, and provides public access to its records unless an exception to disclosure applies. Where there is some question as to whether disclosure is appropriate, staff consults with counsel and, in some instances, Board input is obtained.

One difficulty in responding to some PRA requests involves striking the appropriate balance between the policy of the law favoring broad disclosure of records pertaining to the public's business, and the countervailing policy embodied in Government Code 31532, that the privacy of member records be preserved. From time to time, SBCERS has received requests for information pertaining to the amount of pensions earned by particular members and various groups of members. It has been the informal policy of SBCERS, based on advice of counsel, to provide information pertaining to the amount of pension benefits paid to members, but not to link the disclosure of such information to the identity of particular members. Such policy has been rooted in concern for preservation of member privacy pursuant to Government Code Section 31532.

Over the last several years, there have been a number of legal developments pertaining to this issue. In 1995, Government Code Section 20230 was adopted

pertaining to the confidentiality of California Public Employees' Retirement System (CalPERS) member records which specifically provided that benefit payments made to CalPERS retirees are not confidential and may be released to the public. More recent judicial decisions have reinforced the public's right to information under the PRA regarding the salaries of active members.

International Federation of Professional and Technical Employees v. Superior Court (2007) 42 Cal.4th 310; *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278.

With this backdrop, PRA requests were made in 2009 by interest groups and media organizations to virtually all 1937 Act Systems for disclosure of information regarding pensions paid to system retirees, specifically those whose paid pensions in excess of \$ 8,333.33 per month, or \$ 100,000 per year. The response of 1937 Act systems to these requests were divergent. Some systems, including CCERA and FCERA, took the position that such records should be disclosed, because the disclosure requirements of the PRA outweighed policies favoring member privacy embodied in Section 31532. The majority of 1937 Act systems, including SBCERS, were hesitant to disclose such information without further direction from the courts, particularly in light of the fact that the Legislature has never acted to amend Section 31532 to conform to the disclosure requirements of Section 20230 applicable to CalPERS members, and declined to do so. The response of SBCERS to two such requests in 2009 were consistent with its historic policy to disclose the amount of pensions received by affected members, but not to disclose the identify of those members.

2. Legal Actions with Respect to PRA Requests.

Since the Spring of 2009, there have been at least four legal challenges to disclosure of records regarding the amount of retiree pensions, brought in Contra Costa County, Stanislaus County, Orange County and Sacramento County. Each challenge has resulted in a trial court decision mandating disclosure of member records. In the Contra Costa case, CCCERA took the position that the records were subject to disclosure pursuant its public records act disclosure policy, and litigation ensued between the organization requesting records and retiree groups who sought to prevent disclosure. Subsequent litigations in Stanislaus, Orange and Sacramento counties, directly challenged refusals by the retirement systems to provide records.¹

Although the trial court decisions in these four counties are not binding precedent on SBCERS, the similarity of the reasoning of those decisions, the

¹ In early July, SBCERS received a renewed request for records in light of the recently decided case in Orange County. We have obtained an extension to September 1, 2010 to respond to that request in light of ongoing discussions regarding SBCERS' policy pertaining to such requests.

unanimity of the opinions, and the action of at least three of the affected systems to proceed to produce requested records, rather than seek appellate review of those decisions, have led us to the conclusion that there is now a sufficient consensus of legal authority to support a modification of SBCERS' historical policy regarding disclosure of records regarding the amount of pensions received by its retirees.²

3. *Proposed Policy.*

One potential response to the above developments would simply be a modification of SBCERS informal policy to provide for production of documents and/or information consistent with the above referenced trial court decisions. However, we believe it would be in the long term interests of SBCERS and its members for the Board to adopt a formal policy regarding response to Public Records Act requests to guide staff not only as to current requests for information, but for response to future requests that may involve somewhat different issues.

The attached policy for the Board's consideration is a policy patterned after a recently amended policy adopted by CCCERA. The advantages to this policy, or a similar policy, is that it provides clear guidelines as to how PRA requests should be responded to, and provides the membership of SBCERS with a clear understanding of the sorts of records in which an expectation of privacy can be maintained, and the sorts of records which are within the scope of the public's right to have information, as consistently determined in the above referenced trial court litigations. The attached policy also incorporates comments and suggestions made by the Operations Committee at its July meeting, and adds a further provision suggested by fiduciary counsel confirming staff's intended policy to provide notice to members when records are sought, particularly when only a small number of members are affected by the request.

² It is our understanding that CCCERA, SCERA and OCERS have proceeded to produce the records requested and than no appellate challenges to the trial court decisions in those counties have been made. The decision of the Superior Court in Sacramento County, *Sacramento Bee, First Amendment Coalition v. SCERA*, Case No. 34-2010-80000514 was rendered on July 9, 2010. It is our understanding that SCERA has indicated an intention to appeal the trial court decision, over the objection of the Board of Supervisors in that County.