

March 23, 2005

Senator Joe Simitian  
State Capitol, Room 4062  
Sacramento, CA 95814

Dear Senator Simitian;

I write to express opposition to your bill SB 439 in its present form. (The latest draft I have seen is dated 3/16/05.) This legislation is promoted by the University of California, ostensibly to assist its investment program for endowment and pension funds. My criticism, detailed below, is that this draft allows too great an exemption from the disclosure requirements of the state's Public Records Act. Some alternative proposals are also provided.

First, some background. I am a retired professor on the Berkeley campus of UC, thus a beneficiary of the University of California Retirement Plan, which is administered by The Regents. Over the past several years I have watched closely the activities of the Regents' Committee on Investments, the UC Treasurer's Office, and their outside consultant – and found much to criticize. (Details of my critiques are posted on the website <http://socrates.berkeley.edu/~schwartz> .)

On a number of occasions I found that University officials did not provide documents which I had requested and they persisted in conducting closed meetings on investment policy matters which I thought contravened the state's Open Meetings Law. Finally, two years ago, together with a large group of UC employees (the clerical workers' union), we filed a lawsuit against The Regents on several issues surrounding their investment activities. We won on almost every point of that suit, despite the University's appeal all the way to the California Supreme Court.

One issue, about which University officials made the biggest fuss, concerned their investments in venture capital funds: the court decided that overall performance information (the IRR, Internal Rate of Return) should be publicly disclosed. It is this item which is at the core of your present legislative proposal.

In the course of the trial, UC's lawyers presented a slew of declarations from venture capital firms which argued against what they viewed as excessive disclosures that would be harmful to their business practices. A careful reading of those documents led me to two conclusions: that disclosure of the overall IRR data was not a real problem; that disclosure of deeper information, such as data on the portfolio companies within any given VC fund, could indeed be harmful to successful VC investment programs.

Therefore, it was at my suggestion that our lawyer, Karl Olson, wrote to The Regents, in November 2003, offering to assist them in drawing some "line of demarkation" on what information about such investments might be kept from public disclosure. It was not until the middle of 2004 that we got any response: Regent David Lee, newly appointed as Chair of the Committee on Investments, suggested that we two meet and discuss these matters. We did. Preliminary discussions led to a more formal meeting, in September, involving parties on both sides; I submitted and

reviewed a detailed set of proposals; they said, “We’ll get back to you.” They never did that. The next thing I learned was that UC officials were making their own approach to legislation; and that brings us up to SB 439.

It appears to me that UC officials have gone way overboard, seeking exemptions from public disclosure on various investment matters that go well beyond what was previously deemed appropriate. Let me offer my own proposals, with rationales.

**A.** Exempt from public disclosure only: Information regarding the portfolio positions in which Venture Capital funds invest.

There is no good reason to exempt the other categories of documents listed in the current draft – due diligence materials, quarterly and annual reports, meeting materials, Limited Partnership and related agreements. To the extent that such documents may contain “information regarding the portfolio positions”, that portion could be redacted before public disclosure, following the exemption stated above for such information.

Also, the original arguments were only about Venture Capital funds, where the long time span of such investments and the competitive situation of their portfolio companies supported the need for confidentiality at that level of information. The University’s attempt to extend this exemption to all “Alternative Investments” is unwarranted.

**B.** In presenting the list of information on Alternative Investments that should be disclosed, the bill should include some phrase such as, “including but not limited to the following ...” The whole philosophy of Public Records Law is to establish public access as a broad public right, with exemptions drawn specifically and narrowly; therefore, making a discrete list of things to be disclosed is a troublesome idea.

**C.** Education Code Section 92032(b) now provides that “The Regents of the University of California may conduct closed sessions when they meet to consider or discuss: ... (4) Matters involving the purchase or sale of investments for endowment and pension funds...” The court ruled that they had overstepped the bounds of that exemption from Open Meetings law, accepting our view (based upon substantial study of the legislative history) that closed meetings could be allowed “only when they include discussions regarding the purchase or sale of particular specific investments, rather than investment strategy in general.” [Emphasis added.] I suggest that Education Code Section 92032(b)(4) be amended to include this underlined phrase.

While The Regents have held fewer closed sessions on “Investment matters” under this legal exemption since the conclusion of our lawsuit, they have held some - and I am at a loss to understand what sort of topics they talked about behind those closed doors. The mystery here is the fact that UC’s Treasurer, in declarations to the court, stated that the regents do not ever consider particular investments themselves.

I would be happy to meet with you and/or your staff to discuss any of these issues further, if that would be helpful. (510-642-4427   schwartz@physics.berkeley.edu )

Sincerely,

Charles Schwartz  
Professor Emeritus

cc: Karl Olson, Mary Higgins, David Lee, Bill Bagley