EXHIBIT 2

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September 20, 2011

Maurice G. Knaizer
Deputy Attorney General
Public Officials, State Services Section
State Services Building
1525 Sherman Street, 7th Floor
Denver, CO 80203

Re: Record Request Submitted by Treasurer Walker Stapleton

Dear Deputy Attorney General Knaizer:

Carole Wright, Chairwoman of PERA's Board of Trustees, has asked that we respond to your September 8, 2011 correspondence to her and Meredith Williams regarding our legal opinion dated August 25, 2011. While we respect your interpretation of the laws relevant to Treasurer Stapleton's request for PERA member information, our opinion remains unchanged: the disclosure of member information to Treasurer Stapleton in the form requested does not comport with any specific fiduciary function. Moreover, if such disclosure is permitted, Treasurer Stapleton's use of the information could result in a violation of the confidentiality protections afforded under PERA Law and a breach of his fiduciary duty. Accordingly, the Trustees have acted appropriately and consistent with the fiduciary requirements of PERA Law and their general fiduciary duty in rejecting Treasurer Stapleton's disclosure request.

We will address in turn each of the points you raised.

I. Fiduciary Responsibilities of Board Members

Generally, we agree with the statements made in the first section of your September 8, 2011 letter that "the fiduciary with two hats wear only one at a time and wear the fiduciary hat when making fiduciary decisions." (*Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) [quoted in our Aug. 25, 2011 Letter to Wright at p. 13].)

In exercising their fiduciary duty, it is appropriate for the Trustees to consider the possibility that Treasurer Stapleton could use the requested information while wearing the

"wrong hat," specifically, for purposes extraneous to his role as a PERA trustee and a fiduciary. Inherent in the fiduciary duty is the obligation to use one's best judgment to anticipate the future outcome of current actions and prevent foreseeable harm. (*See Delaware v. Irving Trust Co.*, 92 F.2d 17, 19 (2d Cir. N.Y. 1937) [indicating "trustee is under a duty to exercise due diligence to prevent loss"]; *see also New Jersey Title Ins. Co. v. Caputo*, 748 A.2d 507, 514 (N.J. 2000) [stating "where facts suggesting fiduciary misconduct are compelling and obvious, it is bad faith to remain passive and not inquire further"]; *Citibank, N.A. v. Park-Kenilworth Indus., Inc.*, 109 B.R. 321, 323 (N.D. Ill. 1989) [approving trustee's intervention in lawsuit to prevent foreseeable loss to estate assets].) If a fiduciary has a reasonable belief that certain actions will lead to a breach of fiduciary duty and of statute—such as the requirement in PERA Law section 24-51-213(1) to maintain member information in confidence—then the fiduciary must take action to prevent the violation. The fiduciary must not wait for the harm to occur, and then attempt to "put the toothpaste back in the tube."

The case cited in your letter does not contradict this premise. In *McCabe v. Capital Mercury Apparel*, 752 F. Supp. 2d 396, 397 (S.D.N.Y. 2010), the plaintiff and other vested participants alleged that the company's CFO and the Employee Stock Ownership Plan Administrative Committee breached their fiduciary duty to the class by applying a year-old valuation of the company that did not reflect its fair market value at the time of the distribution. Plaintiff's argument was based on speculation that a new appraisal would have yielded higher returns. (*Id.* at pp. 409–10.) The court held that it was prudent to use the year-old valuation to distribute class members' interests in the Plan. (*Id.* at p. 412.)

You have asserted that the *McCabe* case stands for the proposition that "speculation about possible future actions is insufficient standing by itself." (Sept. 8, 2011 letter at p. 2.) We believe that this is a somewhat selective interpretation of the court's view. A more complete statement is found in the actual wording of the opinion:

> In any event, speculation about the possible results of an interim valuation between June 30, 2008 and June 30, 2009 is incidental to the issue of whether defendants breached their duty of loyalty. The propriety of fiduciary action is not dependant on its outcome, but on its purpose—fiduciaries are not required to be prescient or infallible in their decision-making, but to exclusively pursue the interests of beneficiaries.

(*Id.* at p. 410.) This more comprehensive discussion makes clear that the *outcome* of a fiduciary action is not necessarily determinative of a fiduciary breach; however, its *purpose* can be if it does not "exclusively pursue the interests of beneficiaries."

Treasurer Stapleton has continually refused to state a valid fiduciary purpose for which he needs this specific information. Moreover, given the atypical data requested, and his actions and statements regarding PERA, the Trustees can reasonably conclude such data would be used

for a purpose other than his expressed fiduciary duties as a Trustee of PERA. Therefore the fact that his ultimate use of the disclosed information may or may not violate PERA Law is secondary to the fact that his request does not square with a valid fiduciary purpose that is in the exclusive interest of PERA beneficiaries.

Of final note, *McCabe* addresses beneficiaries seeing to challenge the conduct of a fiduciary. *McCabe* does not address the responsibilities of a fiduciary, such as the Trustees, who are obligated by law to evaluate the conduct and actions of co-fiduciaries. We believe that in this scenario, the Trustees must be held to a higher standard in protecting the members from a potential fiduciary breach.

II. The Role of the State Treasurer on the PERA Board

We disagree that Treasurer Stapleton "remains the only board member who, by law, has specific duties and responsibilities relating to the investment, utilization and expenditure of public funds." By law all PERA Trustees have an equal duty to protect the public monies allocated to the PERA fund. (*See* PERA Law § 24-51-207(2)(a), (3).) This duty is expressed in the General Assembly's 1987 transfer of investment authority from the State Treasurer to the entire Board. We are otherwise at a loss to find how your discussion of the State Treasurer's role on the Board relates to the situation at hand.

Both in our analysis and in your analysis in the first section of your letter regarding fiduciary responsibilities, all parties acknowledge that there is the potential for Treasurer Stapleton to have a conflict of interest. Treasurer Stapleton presumably agrees to abide by the theory that he wears "two hats." The complication, however, is that he has requested specific information in his fiduciary role that (1) is not consistent with any statutory fiduciary duty under PERA law; (2) may well be converted to use for a non-fiduciary function; and (3) could result in a violation of the confidentiality protections afforded PERA members pursuant to Section 24-51-213(1).

We would concede that the General Assembly found value in retaining the Treasurer's position on the Board. To conclude, however, that the Treasurer has enhanced duties above and beyond those of the remaining Trustees—which are somehow frustrated by his inability to review the atypical data requested—is a leap that the Trustees should not make. Such a conclusion is not supported by the expressed language of PERA Law or the established tenants of fiduciary duty.

III. The Trustees Must Evaluate the Totality of the Circumstances To Determine Whether Treasurer Stapleton Will Breach His Fiduciary Duties of Loyalty and Care

Each Trustee must adhere to PERA Law, including the confidentiality provisions by which Treasurer Stapleton admits he is bound. As stated before, the Trustees must assess the totality of the facts—including the potential that Treasurer Stapleton will breach

confidentiality—and act prudently. We agree that certain information should be available to all Trustees in the performance of their duties. Nonetheless, we cannot reconcile Treasurer Stapleton's request for specific information from individual records of the top 20% of PERA recipients (i.e. annual retirement benefits, year of retirement, age of retirement, zip code of residence, and employer division) with any fiduciary duty to PERA members.

Treasurer Stapleton's concern about the long-term viability of the fund is certainly valid. His concern, however, is more appropriately addressed by the General Assembly because it relates to the design of the plan. So-called "settlor" functions, as described in our August 25, 2011 letter, include decisions relating to the establishment, design and termination of plans and are not fiduciary activities. (U.S. Dept. of Labor Advisory Op. 2001-01A (Jan. 18, 2001).) Indeed, the General Assembly has already confronted the plan's design by passing Senate Bill 10-001, which seeks to eliminate PERA's unfunded liability and to provide an opportunity to return PERA to long-term sustainability. On those occasions that it was deemed necessary and appropriate to designate the plan design function, the General Assembly has proven quite capable of doing so. (*See, e.g.*, PERA Law § 24-51-211(b) [authorizing the Board to submit "specific comprehensive recommendations to the general assembly" to address funding deficiencies]; *see also* PERA Law § 24-51-614 [authorizing auditor general to conduct comparative studies of various pension program alternatives].) The General Assembly has yet to delegate the design function to Treasurer Stapleton.

Additionally, you indicate that Treasurer Stapleton must have access to the data to allow him to prepare or review the annual report to the Governor "regarding the policies, financial condition, and administration of the association." (PERA Law § 24-51-204(8).) The General Assembly specifically authorized the Board or its designated agent to prepare and transmit these various reports including, most significantly, the Summary Annual Report ("SAR") and the Comprehensive Annual Financial Report ("CAFR"). The collection of data requested by Treasurer Stapleton is not, however, consistent with preparing the SAR or the CAFR. In fact, the requested information could neither prove nor disprove the veracity of such reports. Moreover, it is not Treasurer Stapleton's duty to prepare or verify the SAR or the CAFR. Rather, the compilation of the CAFR relies on the combined efforts of PERA staff, management and its outside consultants and actuaries. Accordingly, we are at a loss to link the need for the requested information to the duties expressed in PERA Law section 24-51-204(8).

IV. The Board Does Not Have a Duty To Provide the Information to Treasurer Stapleton

While your citation to black-letter law on trusts and trustees is greatly appreciated, you gloss over the reality that the roles of different types of fiduciaries vary. For example, the corporate manager/shareholder relationship in closely-held corporations is functionally different than the manager/shareholder relationship in a publicly-traded corporation, and that difference has been acknowledged as requiring different levels of fiduciary duty. (*See* Brent Nicholson,

The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation, 30 AM. BUS. L.J. 513 (1992).) As a further example, a trustee acting for a family trust has different responsibilities than the trustee of a state-wide pension fund. In practice, strict overarching rules regarding trustees' duties cannot and are not applied.

Your argument that a trustee must have "access to all trust records and all information about trust assets and beneficiaries" is therefore too generalized and would lead the PERA Trustees down a dismal path. By this rationale, Treasurer Stapleton would be expected to have full access to review all records for each of PERA's 478,000-plus members and retirees. If so, then presumably his failure to review each record for any pertinent information implies a breach of his fiduciary duty. Alternatively, does his request suggest that his fiduciary responsibilities extend to the top 20% of members whose accounts he has sought to review? In either case, we respectfully assert that it is inappropriate and out of context to benchmark the access and evaluation obligations of a trustee to a $40 billion statewide fund by those stated in your letter.

In sum, we hold firm to our view that Treasurer Stapleton's request is not consistent with an appropriate fiduciary function and could lead to a violation of the confidentiality provision of PERA Law and a violation of his duty of loyalty. Thank you for the opportunity to test and reinforce these conclusions.

Very truly yours,

John A. Nixon

cc: Carole Wright, Chairwoman, PERA Board of Trustees
Maryann A. Motza, Vice Chair, PERA Board of Trustees
Meredith Williams, PERA Executive Director
Gregory W. Smith, Chief Operating Officer/General Counsel
Patricia P. Hollenbeck, Esquire *(Admitted in Colorado)*