

This Tentative Ruling is made by Judge Jeffrey Brand The motion of petitioner Muchnick to require the Regents to disclose a 141 page police report relating to the death of Ted Agu is DENIED.

PROCEDURE

The order of 11/21/18 continued this motion to permit supplemental briefing on the legal standard and to permit the parties to present evidence regarding the tentative legal standard. (Monarch Healthcare v. Superior Court (2000) 78 Cal.App.4th 1282, 1286.)

PUBLIC RECORDS ACT - LEGAL FRAMEWORK.

The California Public Records Act states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code 6250.) This principle is also stated in the state Constitution as follows: "The people have the right of access to information concerning the conduct of the people's business, and, therefore ... the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const, Art I, Sec. 3(b)(1).)

The public is entitled to inspect public records unless one of the exceptions stated in the Act applies. (Gov. Code 6253 (a) & (b)). A public entity can assert that responsive public records are exempt from production under the CPRA one of the Govt Code 6254 specific exemptions or the Govt Code 6255, the catch-all exception.

As a matter of statutory interpretation, the court reads the exemptions narrowly. (Commission on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 305; County of Los Angeles v. Superior Court (2012) 211 Cal.App.4th 57, 60.) As a matter of evidence, the public entity has the burden of proving that an exemption applies. (Gov. Code 6255.)

FACTS

The UC Berkeley Police Department responds whenever anyone is injured on campus. The Department responds for several reasons: (1) the officers are trained in first-aid, (2) the officers conduct an investigation, if appropriate, for potential criminal cases, and (3) the officers conduct an investigation, if appropriate, for other purposes. (Bennett Dec., para 3.) UCB policy is that when a police officer responds to an incident, then it becomes a police matter. (Bennett Dec., para 3.)

Regarding deaths specifically, the UC Berkeley Police Department investigates any death on campus as if it were a criminal matter. (Benningson Dec, para 3; Bennett Supp, para 7.) The Department investigates all deaths, whether by natural cause, suicide, homicide, or otherwise. (Benningson Dec, para 3.) The Department assigns a detective to all such investigations. (Benningson Dec, para 3.) The Department investigates all deaths to ensure that any potentially relevant evidence is collected in a timely manner and preserved in the event that the death is later confirmed to be a criminal matter. (Bennett Supp, para 7.)

Ted Agu was a student at UC Berkeley who played football. On 2/7/14, Ted Agu died during a football practice. The initial report to the Department indicated that Agu had a preexisting medical condition. (Benningson Dec, para 4.)

The UC Berkeley Police Department conducted an investigation into Ted Agu's death. (Benningson Dec, para 1-15.) Even though the initial report was that the death was due to a preexisting medical condition, the Department could not rule out criminal activity until the coroner completed his investigation. (Benningson Supp. Dec., para 6, Bennett Supp Dec., para 8)

Detective Benningson oversaw the investigation and he created and used a binder to maintain his investigative materials. (Benningson Dec, para 3, 6-8.) The binder contained incident reports, narrative reports, property receipts, information from the coroner, and other records. (Benningson Dec, para 9.) The Department closed the investigation on or about 6/10/14 when it received word from the coroner about the cause of Agu's death. (Benningson Dec, para 8, Bennett Supp, para 9.)

The Department did not investigate on behalf of any other campus unit, such as the Student Conduct Office or the Athletic Department. (Benningson Dec, para 7, Bennett Supp, para 10.) The Department's investigation was solely for purpose of determining whether a crime had been committed. (Benningson Supp, para 7.) The UCB Athletic Department conducted a separate investigation into the strength and conditioning program. (Gilman Dec., Ko Dec.) The UCB Student Conduct Office did not conduct an investigation. (Benningson Supp, para 7.)

THE BINDER IS A PUBLIC RECORD AND INCLUDES PUBLIC RECORDS.

The binder and the records in the binder are public records because they are "writing[s] containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency." (Gov. Code 6252(e); Regents of University of California v. Superior Court (2013) 222 Cal.App.4th 383, 398-399.)

APPLICABILITY OF THE GOVT CODE 6254(F) EXEMPTION TO THE BINDER AND THE RECORDS IN THE BINDER.

The Regents is withholding the binder under the Govt Code 6245(f) exemption for investigations and investigatory records. The privacy of Ted Agu's family is not at issue. The Regents obtained a waiver from the family of Ted Agu and subsequently released public records concerning him to petitioner. (Goldstein Dec filed 3/27/18, para 9; Gordet Dec. filed 4/9/18, para 8.)

The Regents relies on Govt Code 6254(f), which states:

[T]his chapter does not require the disclosure of any of the following records: ... (f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of ... any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.

The Regents has presented evidence that a police detective collected information as part of his investigation and placed that information in the binder. This suggests that the binder and its contents are exempt under Govt Code 6254(f). A public agency may, however, not shield document from disclosure with bare assertion that it relates to investigation. (Williams v. Superior Court (1993) 5 Cal.4th 337, 356.)

GOVT CODE 6254(F) DOES NOT EXEMPT ALL RECORDS OF "ANY STATE OR LOCAL POLICE AGENCY"

The supplemental brief of the Regents appears to argue that the Govt Code 6254(f) exception applies to all records of "any state or local police agency" and that the qualifier of "for correctional, law enforcement, or licensing purposes" applies only to "any other state or local agency." (Regents Supp Brief filed 12/7/18 at 3-4.) This is matter of statutory construction.

The plain language of Govt Code 6254(f) is that the exemption applies to "Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of ... any state or local police agency." Govt Code 6254(f) appears to presume that all state or local police agencies are engaged in "law enforcement" and therefore does not expressly qualify the exemption with "for correctional, law enforcement, or licensing purposes." In contrast, the exemption for "any other state or local agency" covers a wide range of entities that serve a wide range of purposes and therefore qualifies the exemption with "for correctional, law enforcement, or licensing purposes."

Govt Code 6254(f) does not, however, exempt any and all records created by "any state or local police agency." The exemption requires a state or local police agency to demonstrate that the allegedly exempt records are ""Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures."

WHAT IS AN "INVESTIGATION" FOR PURPOSES OF GOVT CODE 6254(F)?

The Govt Code 6254(f) exception for investigations applies only if the records were created or compiled for purposes of law enforcement investigations. "[N]ot every inquiry is an "investigation" in the relevant sense." (American Civil Liberties Union Foundation v. Superior Court (2017) 3 Cal.5th 1032, 1042 ("ACLU").)

"The records of investigation exempted under section 6254(f) encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." (Haynie v. Superior Court (2001) 26 Cal.4th 1061, 1071.) Furthermore, "The adjective 'law enforcement,' as used in [Govt Code 6254(f)], refers to law enforcement in the traditional sense—that is, to the enforcement of penal statutes, etc." (State of California ex rel. Division of Industrial Safety v. Superior Court (1974) 43 Cal.App.3d 778, 784.) (See also Dixon v. Superior Court (2009) 170 Cal.App.4th 1271, 1277 ["As for the legal point, the decisions with which we agree construe this investigatory file exemption as applying only when there is "a concrete and definite prospect" of "criminal law enforcement" proceedings"].)

Just as the attorney-client privilege and the related CPRA exemption under Govt Code 65254(k) apply only when a lawyer is acting qua lawyer and not as a business agent (Los Angeles County Bd. of Supervisors v. Superior Court (2016) 2 Cal.5th 282, 295-296) the Govt Code 6254(f) exception applies only when a police agency is conducting a criminal law enforcement investigation.

The court has found no law stating what standard a police agency must meet to demonstrate that an investigation is serving a law enforcement purpose and qualifies as a Govt Code 6254(f) exempt law enforcement investigation. The court articulates a standard because the court is uncomfortable with an "I know it when I see it" standard. (In re Martinez (2013) 216 Cal.App.4th 1141, 1153 ["Justice Potter Stewart's famous observation, "I know it when I see it" ..., besides being an unsatisfactory solution, is not necessarily as foolproof as it sounds"].)

The court starts from the proposition that under Haynie and ACLU a public entity cannot meet its burden of proving that the Govt Code 6254(f) law enforcement investigation exemption applies solely by presenting evidence that the police collected the information and/or conducted the investigation. As noted in Haynie, 26 Cal.4th at 1071, "Often, officers make inquiries of citizens for purposes related

to crime prevention and public safety that are unrelated to either civil or criminal investigations." The police agency must demonstrate that the action had a criminal law enforcement purpose.

Neither Haynie nor ACLU articulated a legal standard for what constitutes an "investigation." Haynie, 26 Cal.4th at 1071, concluded "The records of investigation exempted under section 6254(f) encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." Haynie did not elaborate on what a police agency or public entity must establish to meet that standard. Haynie instead made a fact specific finding that "Here, the investigation that included the decision to stop Haynie and the stop itself was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission." (26 Cal.4th at 1071.) ACLU also made a fact specific conclusion. ACLU, 3 Cal.5th at 1042, states, "We recognize that it may not always be an easy task to identify the line between traditional "investigation" and the sort of "bulk" collection at issue here. But wherever the line may ultimately fall, it is at least clear that real parties ALPR process falls on the bulk collection side of it."

The court can identify several plausible standards:

1. The "reasonable suspicion of criminal activity" standard for a police officer to conduct an investigatory stop. (People v. Brown (2015) 61 Cal.4th 968, 981.) (See also People v. Wells (2006) 38 Cal.4th 1078, 1082-1083.)
2. The "probable cause" standard for issuing a search warrant or making an arrest in pursuit of an investigation. (People v. French (2011) 201 Cal.App.4th 1307, 1315; Gillan v. City of San Marino (2007) 147 Cal.App.4th 1033, 1044-1045.)
3. The "dominant purpose" of the investigation standard, borrowed from the "dominant purpose" standard used for determining the existence of an attorney relationship and thus the applicability of the attorney-client privilege and the Govt Code 6254(k) exemption to the CPRA. (Los Angeles County Bd. of Supervisors v. Superior Court (2016) 2 Cal.5th 282, 295; Uber Technologies, Inc. v. Google LLC (2018) 27 Cal.App.5th 953, 966.)

The court will apply the "reasonable suspicion of criminal activity" standard to differentiate the collection of information as a first-responder or generic investigation from a law enforcement investigation. This standard adequately addresses the underlying question of whether the police would have had reason to initiate a law enforcement investigation. "[W]here a reasonable suspicion of criminal activity exists, the public rightfully expects a police officer to inquire into such circumstances in the proper exercise of the officer's duties." (People v. Brown (2015) 61 Cal.4th 968, 981.) A "reasonable suspicion of criminal activity" is cause

to initiate a law enforcement investigation even if it was not the dominant purpose for initiating the investigation. (*Whren v. United States* (1996) 517 U.S. 806 (rejecting argument regarding traffic stop as a pretext to search for drugs and holding that the officers' subjective motivation did not invalidate the search otherwise justified by objective facts].)

The "probable cause" standard is too high because the Govt Code 6254(f) exemption relates to the initiation and continuation of an investigation and not to whether the facts give probable cause to search a specific location or to arrest a particular suspect.

The "dominant purpose" of the investigation standard is a poor fit because the creation of an attorney-client relationship is a voluntary act between two persons whereas a police investigation for law enforcement purposes serves a public function.

The "reasonable suspicion of criminal activity" standard does not consider whether the investigation eventually lead to a referral to the District Attorney to consider criminal charges. "Law enforcement officers may not know whether a crime has been committed until an investigation of a complaint is undertaken. An investigation may be inconclusive either as to the cause of death or the circumstances in which the death occurred. A fire may be suspicious, but after investigation be found to have an accidental or natural origin." (*Haynie*, 26 Cal.4th at 1070.) An investigation can be exempt under Govt Code 6254(f) even if at the conclusion of the investigation no charges are filed.

The court has considered *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271. In *Dixon*, a person was found dead in an open field with bullet wounds to her body, the coroner conducted an autopsy, and there was eventually a criminal trial for murder. On those facts, the court found that the coroner and autopsy reports were "investigatory files compiled for law enforcement purposes." (170 Cal.App.4th at 1279.) In *Dixon*, there was more than a death. In *Dixon*, "The coroner and autopsy reports investigated the death of a person left in an open field with multiple bullet wounds." (170 Cal.App.4th at 1278.) This more than met the "reasonable suspicion of criminal activity" standard.

The Supplemental brief of the Regents filed 12/7/18 argues that the "reasonable suspicion of criminal activity" standard should not apply. The Regents asserts (correctly) that the standard is based in criminal law. (Supp Brief at 1:24-28.) This court adopts the established criminal law standard for when a police officer may conduct an investigatory stop as the CPRA standard for when a police agency may successfully assert the investigation exemption. In both situations the standard concerns when a police agency's collection of "bulk data" (ACLU) or a police officer's general observations of the world around her or him or transform into an

"investigation." The Regents does not propose an alternate standard. The court does not like to make decisions based on the "I know it when I see it" standard. Regarding the Regents' argument that the standard is too high, the court notes that the "reasonable suspicion" standard is probably the lowest substantive standard in criminal or civil law.

WAS THE UC BERKELEY POLICE DEPARTMENT CONDUCTING AN "INVESTIGATION" FOR PURPOSES OF GOVT CODE 6254(F)?

Applying the "reasonable suspicion of criminal activity" standard to the current record, the court finds that the Regents has met its burden of demonstrating that the Department's investigation was a law enforcement investigation. A public entity asserting that an investigation is a law enforcement investigation under Govt Code 6254(f) must present "a particularized and objective basis for suspecting ... criminal activity." (People v. Brown (2015) 61 Cal.4th 968, 981.)

The Regents has demonstrated that the Department had a reasonable suspicion of criminal activity when it first learned of Ted Agu's death. The UC has a policy that the Department investigates all deaths on campus. The policy is based on the seriousness of death and prudential concerns about treating all deaths as criminal investigations until the coroner completes her or his investigation and determines the cause of death. (Benningson Dec, para 5, 6; Bennett Supp, para 7, 8, 9.) This is a "particularized and objective basis" for the policy. The seriousness of a death justifies a blanket policy that all deaths must be investigated for potential criminal conduct. The Department's investigation of Ted Agu's death was therefore an "investigation" for purposes of the CPRA's Govt Code 6254(f) exemption for law enforcement investigations.

The court has considered that the coroner has a duty to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths. (Govt. Code 27491.) The coroner has an obligation to notify the police only when the coroner has "a reasonable ground to suspect that the person's death has been occasioned by the act of another by criminal means." (Govt. Code § 27491.1.) The law that a death does not automatically present a "reasonable suspicion of criminal activity" for the coroner's reporting purposes does not compel the conclusion that a death does not present a presumptive or automatic "reasonable suspicion of criminal activity" for purposes of a report to the police.

The Regents has not demonstrated that the Department had a fact specific reasonable suspicion of criminal activity arising from the specific facts of the incident when it first learned of Ted Agu's death. The Department was following its policy under which it investigates all deaths as potentially due to criminal activity.

The court considered whether the Regents and/or UCB conducted any investigation other than the Department's investigation. The court considered this issue in the context of evaluating the credibility of the Regents. If the UC treats any death on campus as so serious that it warrants a criminal investigation, then the Regents would presumably conduct inquiry into the circumstances surrounding any death on campus for the purpose of reviewing issues relating to student conduct and safety. The absence of a separate investigation would have raised credibility questions regarding whether the Department's concern with campus deaths was overstated and/or whether UCB was using the Department's law enforcement investigation as a cloak for a student conduct and safety investigation.

The Regents conducted a separate investigation regarding the UCB Athletic Department's strength and conditioning program. (Gilman Dec., Ko Dec.) The Department did not investigate on behalf of any other campus unit, such as the Student Conduct Office or the Athletic Department. (Benningson Dec, para 7.)

ARE THE BINDER AND ITS CONTENTS EXEMPT UNDER GOVT CODE 6254(F)?

The court considers whether the binder and its contents are (1) records of an investigation, (2) records of intelligence information or security procedures, and/or (3) investigatory or security files. (American Civil Liberties Union Foundation v. Superior Court (2017) 3 Cal.5th 1032, 1039.)

The binder is a record of an investigation. The fact that an investigation file (or binder) includes a non-exempt public record is itself exempt information. "[A] document in the file may have extraordinary significance to the investigation even though it does not on its face purport to be an investigatory record and, thus, have an independent claim to exempt status." (Haynie v. Superior Court (2001) 26 Cal.4th 1061, 1069-1070.) Govt Code 6254(f) "protects materials that, while not on their face exempt from disclosure, nevertheless become exempt through inclusion in an investigatory file." (Williams, 5 Cal.4th at 354.) The Department's investigation was covered by Govt Code 6254(f), so the Regents is not required to produce the binder because to do so would identify what materials the detective thought were relevant to his investigation. The Regents would have to produce the public records in the binder if they were available elsewhere at UCB.

The contents of the binder are not records of intelligence information. The Regents does not make this argument.

Some of the contents of the binder might be investigatory records. Public records that are not exempt elsewhere as "investigatory" records do not become exempt because they are subsequently used for an investigation or placed in an investigation file. (Haynie v. Superior Court (2001) 26 Cal.4th 1061, 1069.) The

detective might have collected non-exempt records and placed them in the binder. If the Regents had a public record that was not exempt before it was placed in the binder, then it would still not be exempt and the Regents must produce the public record. The Regents would not be required to disclose that a record had been in the binder.

CONCLUSION

The motion of petitioner Muchnick to require the Regents to disclose a 141 page police report relating to the death of Ted Agu is DENIED. The Regents has demonstrated that the Department's investigation of the death of Ted Agu was a law enforcement investigation for purposed of the Giovt Code 6254(f) exemption for "investigations conducted by ... any state or local police agency."

The court direct the parties to meet and confer regarding what issue remain in this case. If issues remain, then the court cannot enter judgment. (Lauderdale v. U & I Equipment Co. (1969) 271 Cal.App.2d 140, 142 ["A trial court has no authority to enter multiple final judgments determining multiple issues between the same parties to an action"].) If not further issues remain, then the Regents is to prepare, circulate, and submit a proposed judgment. (CRC 3.1312.)