Roy S. Gordet, State Bar No. 103916
Law Office of Roy S. Gordet
235 Westlake Center #452
Daly City CA 94015
Tel. (650) 757-6147
Fax (650) 735-3380
Email roy@copyrightdirection.com

Attorney for Petitioner Irvin Muchnick

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

IRVIN MUCHNICK, Petitioner, vs. UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS, Respondent.	Case No. RG17857115 HAYWARD DIVISION Memorandum of Points and Authorities in Support of Motion to Require Respondent to Disclose Unredacted Relevant Responsive Requested Documents Related to or Referencing Ted Agu and to Disclose the 141 Page Campus Police Report Hearing Date: August 1, 2018 Time: 9:00 a.m. Judge: Hon. Jeffrey S. Brand Dep't: 511 Petition Filed: April 18, 2017

MEMORANDUM OF POINTS & AUTHORITIES

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I. Introduction and Purpose of this Motion

The Court issued a Tentative Ruling in advance of the April 26, 2018 hearing on a motion concerning whether Respondent has an obligation to prepare a Vaughn Index of those documents that Respondent is withholding in response to Petitioner's primary Public Records Act request concerning documents surrounding the death of Ted Agu, documents surrounding an altercation between two football players, and "...any documents with a general review of the strength and conditioning program for Cal football players." (quoting from Petitioner's original CPRA request, not from the Court's Tentative Ruling.)

Flowing from that initial Tentative Ruling, the Court has since issued an amended Tentative Ruling in which the Court endorsed 19 categories that the Court and the parties expect will help to focus Respondent in disclosing relevant and meaningful documents, and will also allow Respondent to promptly produce a meaningful and comprehensive Vaughn Index covering those non-FERPA protected documents in Respondent's possession, this despite the fact that the Tentative Ruling held that FERPA provides Respondent cover from referencing certain documents that may or may not be in its possession. (Petitioner still disagrees that FERPA prevents inclusion on a Vaughn Index of even those documents justifiably exempt under FERPA.)

Following on the Tentative Ruling, with the newly articulated categories, Respondent has agreed to produce documents in its possession on a rolling basis as they become known to Respondent that are not exempted by FERPA or exempted on other grounds. At some point, it is presumed, even if the Court does not reconsider its ruling on the breadth of FERPA as it relates to information to be disclosed by a Vaughn Index, as to documents being withheld by Respondent on grounds other than FERPA, Respondent will produce a comprehensive Vaughn Index, although that is not the subject of this instant Motion.

Rather, the purpose of this instant Motion is based on the Court's invitation to either party to "file a preliminary motion on the legal issues of whether FERPA and the student's right to privacy survives a student's death and the related issues of whether the surviving parents have rights under FERPA, whether they can assert their child's privacy interests and whether they have their own privacy interests." The Tentative Ruling also questioned why these privacy issues related to Ted Agu continued to be in dispute in light of the authorization obtained from the Regents from the Agu family to disclose these documents. (See Exhibit 3 - Email thread between Michael Goldstein and Agu family lawyers)

This Motion addresses these privacy issues. This Motion also accepts the Court's assent in open Court to Petitioner's desire to address in this Motion a related question: whether a 141-page campus police report related to the death of Ted Agu should be immediately disclosed without redaction to Petitioner, or alternatively, with redaction if Respondent can so justify.

II. Respondent Has Failed to Embrace Its Statutory Obligation to Collaborate with Petitioner to Open Respondent's Records that Are Not Exempted and Has Instead Sought to Obfuscate

A. Exhibit 1 (Issues Index) Seeks Clarification of Respondent's Contentions without Overlap

There is a disturbing pattern of conduct by Respondent of interspersing subdued facts and theories that spill over into what should be straightforward issues amenable to decision by the Court. As the clearest example of this, as explained below, we have the issue of the belated request to the Agu family for authorization to have documents released by Respondent. In conjunction with this instant Motion and the Status Conference Hearing, both to be heard on August 1, 2018, Petitioner has set forth those important issues that Respondent should address in advance of that hearing as appear in the Issues Index submitted as Exhibit 1 to this Motion. Respondent can promote efficiency in this collaborative process by addressing and providing forthright answers to those issues set out in

Exhibit 1. The Court should order responses if Respondent declines to respond substantively in its Response to this Motion.

B. Purpose of CPRA and the Applicable Burden of Proof Strongly Favor Petitioner

It bears repeating that, as stated in *County of Santa Clara v. Superior Court,* (2009) 170 Cal App 4th 1301, 1319 (internal quotation marks omitted):

"The CPRA was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. [citation] Legislative policy favors disclosure. [citation} All public records are subject to disclosure unless the Public Records Act expressly provides otherwise. [citation]"

It has further been held that "[t]he CPRA embodies a strong policy in favor of disclosure of public records. ..." (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1392–1393.) Disclosure of public records is the default, nondisclosure is defensible only if the records "come within a specific disclosure exemption," and these exemptions "are construed narrowly." (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1275.) "All public records are subject to disclosure unless the Public Records Act expressly provides otherwise." (*BRV, Inc. v. Superior Court (*2006) 143 Cal.App.4th 742, 751)

If the records sought pertain to the conduct of the people's business there is a public interest in disclosure. The weight of that interest is proportionate to the gravity of governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate. [citation]) The existence and weight of this public interest are conclusions derived from the nature of the information. [citation]) As this court put it, the issue is whether disclosure would contribute significantly to public understanding of government activities. [citation]
County of Santa Clara, supra, at 1324

C. Respondent Has the Burden to Demonstrate that Segregability Is Not Practicable

As Petitioner pointed out in its Response to the Protective Order re Vaughn Index, CPRA holds that if only part of a record is exempt, the agency is required to produce the remainder, if segregable. (§ 6253, subd. (a) and 6257) In other words, "the fact that a public record may contain some

confidential information does not justify withholding the entire document." *State Bd. of Equalization v. Superior Court,* (1992) Cal.App. 4th 1177, 1187.

Moreover, as noted below in Section V, with particular reference to Government Code Section 6255(a), agencies have been held to the standard of showing an "overbalance" of confidentiality in their favor when claiming that a privacy exemption should apply. Notwithstanding, somehow it has fallen to Petitioner to file this instant Motion to force the required disclosures. Although Petitioner has accepted the call to file this instant Motion, Respondent has the burden to justify each of its excuses and claimed exemptions for withholding documents under whatever theory Respondent has previously asserted or will plop on the table in a revised form or in a completely new form when responding to this instant Motion.

D. Respondent's Shifting Grounds for Withholding or Disclosing the Agu Documents

Respondent has famously claimed that merely disclosing the number of documents referring to a student is prohibited by FERPA. It is unclear whether Respondent similarly claims that disclosing the number of documents would also violate a student's privacy rights. Thus, it is unclear whether there exist Agu documents, to use a short hand reference, that Respondent will claim must be withheld based on the catch-all provisions of Government Code Section 6255, which Respondent relied on in its Motion for Protective Order re Vaughn Index but had no meaningful discussion of the applicable balancing test for asserting privacy rights. Both Government Code Sections 6254 and 6255, as well as the Constitutional right to privacy, entail a public interest balancing test analysis that was referred to glancingly without a meaningful discussion applying the balancing test to the facts of this case. Nor was there any meaningful discussion of a balancing test on the part of Respondent in the Joint Report submitted to the Court on May 11, 2018.

E. Respondent Never Admits in its Pleadings that a Deceased Student Has No FERPA Rights, but Admits It to the Agu Family

Lest it be thought that the avoidance of a real examination of the facts of this case applied in a balancing test was not intentional, submitted as Exhibit 3 is the email thread of Respondent's counsel with the Agu family lawyers seeking "authorization" to disclose certain documents to Petitioner. Respondent stated therein: "In our view, FERPA and privacy rights are no longer available to us as exemptions, in light of his death. We are left with a public interest balancing test argument (under section 6255)." Granted, prior to the Motion for Protective Order re Vaughn Index, Respondent produced (mostly inconsequential and repetitive) Agu documents consisting of email messages with attachments, and also led Petitioner to believe that the documents were being disclosed solely because permission had been obtained. It is unclear and subject to speculation why at that juncture Respondent decided to seek authorization from the Agu family, rather than seeking that authorization immediately after receiving Petitioner's original PRA request.

But the most telltale revelation is the fact that Respondent never voluntarily offered in its Motion for Protective Order that Respondent admits, as it must, that FERPA protections do not apply to a deceased student. Thus, at a minimum, all of Respondent's arguments concerning why FERPA bars any disclosure about even the number of documents concerning Agu have no basis under the facts as they relate to any Agu documents since Petitioner first conveyed his CPRA requests. It is conceded that Respondent still retained the ability to make its FERPA arguments as to the other living students who may be mentioned or referenced, but, at least as to Agu, the holding of *Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 25-26 (hereinafter "*Labor & Workforce*") on "deliberative process" privilege has no applicability; at a minimum, Respondent should have conceded that as to documents concerning Agu that do not reference other students, with no FERPA restriction, Respondent was not barred from either disclosing the documents, or, at a minimum, preparing a Vaughn Index. There is no reason to believe, and Respondent never argued, that the *Labor & Workforce* holding that Respondent contends prevents

listing documents in a Vaughn Index should also apply to documents being withheld on grounds of Section 6255 or the California Constitution, at least not in any overt way: The argument was that the deliberative process privilege enunciated in *Labor & Workforce* is analogous to FERPA obligations, particularly as to Respondent's arguments made in open Court where it was consistently FERPA and more FERPA, and this intentional misdirection is reflected in the Court's Tentative Ruling which refers only to FERPA as justification for granting Respondent's wish to avoid preparing a Vaughn Index as to responsive documents .

The Court's amended Tentative Ruling fortunately was able to see through these attempts at obfuscation at some level as reflected in the invitation to prepare this instant Motion. Respondent has declined to act on the Court's invitation to voluntarily weigh in on some of these issues. Petitioner's more pointed request immediately following the May 17, 2018 hearing for a copy of the Agu Settlement Agreement was complied with on June 1, 2018. (See Gordet Declaration Para. 7 and Section VIII below.)

It cannot be over-emphasized that Respondent admitted to the Agu family lawyers that FERPA was "probably not available" and that Respondent would probably be "required to rely on a balancing test" (Exhibit 3). As will be explained in Sections V and VI below, Respondent's position is extremely weak for withholding any of the Agu documents, with or without a waiver, because the facts of this case make plain that the real purposes of Petitioner, as opposed to the superficial purposes that Respondent falsely and unjustifiably attributed to Petitioner in Respondent's Motion for Protective Order re a Vaughn Index and since the parties began to engage through counsel about the Petitioner's CPRA requests, are investigative journalism related to alleged issues of institutional malfeasance and negligent individual conduct involving the death of a student athlete and a possible cover-up related to that death. The public interest balance lands overwhelmingly in Petitioner's favor, as explained in Sections V and VI below.

Respondent has also referred to at least one other responsive document that it claims is protected by the attorney client privilege and which Respondent apparently has refused to identify in any way. Again, with all of Respondent's hooting and hollering about FERPA as an effective distraction, that document at a minimum should have been identified as part of a Vaughn Index if it was related to Agu (with no FERPA restriction), or some type of privilege log in compliance with California discovery statutes and practice, in light of the fact that FERPA no longer applies to any Agu documents.

III. A Student's Privacy Rights Do Not Survive Past Death

Exhibit 2 to Petitioner's "Response to Motion" dated April 9, 2018 consisted of a Department of Education letter setting forth the position that a FERPA exemption no longer applied when the student is deceased. (Re-submitted with this Motion as Exhibit 2). In its Reply Brief filed on April 17, 2018, the Regents did not offer contradicting authority or otherwise contest this established proposition, so it should be conceded for purposes of this Motion. Indeed, submitted as Exhibit 3 is recent correspondence between Respondent's counsel and the Agu family attorneys. The earliest entry of the email thread, written by counsel for Respondent, states as follows:

> I am writing to you to see whether the family would consent to our disclosing responsive records. There are about 30 such documents and I'd be glad to share them with you. In our view, FERPA and privacy rights are no longer available to us as exemptions, in light of his death. We are left with a public interest balancing test argument (undersection 6255). We will likely make that argument but we are writing to see whether the family (1) would consent to the release of the records or, in the alternative, (2) wants to intervene in the attached writ action. Our next CMC is February 27 and we are on the verge of filing CMC statements. (emphasis added)

It is puzzling that Respondent never stated in pleadings before this Court that FERPA no longer applies as to the documents mentioning or concerning Agu in light of the long-established policy position of the Department of Education letter (Exhibit 2) and in light of its candid admission to the Agu family attorneys. With this concession out in the open, the Court may have viewed the appropriateness of a Vaughn Index in a different light.

Indeed, as stated subsequently by Respondent's counsel to Petitioner's counsel as submitted to the Court by Respondent in Respondent's attachment to the Joint Status Report dated May 11, 2018, after the Court's first iteration of the Tentative Ruling:

> As to Mr. Agu, I suspect something like that, if responsive, would be barred by the right to privacy because it concerns Mr. Agu and, consequently, its disclosure may harm his family but, as I have told you (see more below in response to your Topic IV discussion), our communications with the Agu family included a request by them that, while they consented to our disclosing to Mr. Muchnick the Agu records we showed them that, in our view, were exempt under the CPRA because they were barred by the right to privacy, and with that consent we did indeed disclose them to Mr. Muchnick, they said they wanted us to provide them for their review any other documents we had identified that we believed were responsive but exempt under the CPRA so they could decide whether or not to waive and permit release. (emphasis added)

The mystery here is why Respondent is bending over backwards to defend FERPA rights or parallel rights of privacy when it knows that FERPA no longer applied to Mr. Agu because he is deceased, and as will be demonstrated in Section V below, the right of privacy in California is personal to the owner and is extinguished upon the person's death. Petitioner requested in its earlier motion for a protective order that the Court find that the unique "deliberative process" privilege that forms the basis of the vaunted *Labor & Workforce* holding applies under the facts of this case. The Court should find that the holding of *Labor & Workforce* does not apply to any relevant privacy rights of this Petition aside from the FERPA restrictions Respondent has already espoused. Such a ruling is further supported for the reasons proffered in Petitioner's Response to Motion for Protective Order re Vaughn Index (filed April 9, 2018) and for the reasons proffered in Sections V and VI below. Petitioner seeks to flush out Respondent's position on these issues now and to have the Court provide guidance on these important issues so that this entire matter can be resolved without further delay. In open Court, Respondent harps on FERPA, but makes a sotto voce, almost always literally in a parenthetical accompanying reference to rights of privacy in its Motion for Protective Order without ever actually engaging in a balancing test based on facts supported by declaration or otherwise. But there appears to be no authority for applying the *Labor & Workforce* holding on privilege to any of the published CPRA cases based on a weighing of privacy rights and at the same time banning a Vaughn Index/document log, although for that matter there was no authority for applying the *Labor & Workforce* holding in a CPRA case involving FERPA obligations. But there is a body of authority under California law involving Vaughn Index and CPRA, and presumably if there were a CPRA case involving a weighing of rights of privacy resulting in the barring of a Vaughn Index, Respondent would have brought that case to the Court's attention.

Nonetheless, in an effort to conflate issues and muddle the discourse, almost a year after the filing of the Petition, Respondent reached out to the Agu family and then promotes to the Court and to Petitioner how it obtained the family's authorization, when it was not even required. Moreover, obtaining the authorization could have been accomplished a year ago, or much earlier, when Respondent received the original PRA request, which Respondent, with its extensive experience with FERPA and CPRA issues and litigation, well knew. And Respondent continues to promise the Agu family that before releasing any future documents that come to light Respondent will seek their authorization despite the fact that FERPA is clearly no longer an obstacle to disclosure and despite the fact that the Agu family has no standing to object on privacy grounds to any disclosures related to the deceased Mr. Agu. Petitioner submits that there is something going on beneath the surface of Respondent's strategies and actions that has not yet bubbled to the surface.

IV. General Principles of the Tort of Invasion of Privacy in California

In California, the tort of invasion of privacy may be proved by four different theories: (1) public disclosure of private facts; (2) intrusion into private places, conversations, or other matters; (3) presentation of the plaintiff to the public in a false light; and (4) misappropriation of image or personality. *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.

In California the right of privacy is purely a personal one. *Kelly v. Johnson Publishing Co. (1958) 160 Cal App.2d 718, 721* "[I]t cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded." (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62) "'The action cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity. The cause of action does not survive the individual, and cannot exist after death – a plaintiff must plead and prove that *his* privacy has been invaded. [citations] Further, the right does not survive but dies with the person. *Flynn v. Higham* (1983) 139 Cal App 3d 677, 683

Petitioner's research revealed one prominent exception to this established principle, but it is to no avail to Respondent or the Agu family (if the Agu family should wish to intervene.) This exception is found in *Catsouras v. Department of California Highway Patrol*, (2010) 181 Cal App 4th 856, 870 where the court endorsed the long line of cases holding that the privacy right is extinguished upon death and cannot be asserted by the surviving family members, even as to media references to the death of the decedent, but held a family may assert a tort claim in the case of "…the dissemination of death images of a decedent." The court in *Catsouras* stated:

> ...California case law has not heretofore addressed the precise issue before us, having to do with gruesome death images that were in the control of law enforcement officers and allegedly disseminated out of sheer morbidity or gossip, as opposed to any official law enforcement purpose or genuine public interest.
>
> *Id*. at 873

Clearly *Catsouras* had special facts that were expressly part of the court's holding. Petitioner has no interest in any photographs or other visual images of a deceased person in responsive documents, and any such images, if they existed, can be identified as line items in the Vaughn Index. Otherwise, the privacy interests of the Agu family are irrelevant to the Petition, and in any case, Respondent has no standing to assert any privacy rights on behalf of the Agu family. *See Lewis v. Superior Court* (2017), 3 Cal. 5th 561, 560-570 (Constitutional rights are "personal" and may only be asserted on behalf of others who are impeded in asserting their own rights, and notice to such third parties generally prevents others from asserting the rights of the third parties.)

V. Respondent's Reliance on the Catch-all Provision of Section 6255 Has Boundaries Set By the Required Balancing Test

As stated by the California Supreme Court in *Los Angeles County Board of Supervisors v. Superior Court*, (2016) 2 Cal 5th 282, 291:

> Section 6255(a)—CPRA's catchall provision [citation]—permits an agency to withhold a public record if the agency demonstrates "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (§ 6255(a).) [citation] This "provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." [citation] Whether such an overbalance exists may depend on a wide variety of considerations, including privacy [citation]; public safety [citation] and the "expense and inconvenience involved in segregating nonexempt from exempt information." [citation] (emphasis added)

Indeed, as noted above, Respondent has privately (to the Agu family lawyers – see Exhibit 3) indicated that it intends to rely on this balancing approach as to any documents that the Agu family would be unwilling to authorize. This is odd when one considers that as part of these same communications Respondent indicated that FERPA does not apply to a deceased student. In so doing Respondent appears to be working against Petitioner's legitimate interests to bring into the sunshine all of the facts surrounding the death of a student athlete and how the university handled this tragic event.

To date, Respondent has demonstrated no competing interest superior to Petition's interest in revealing more to the public about what really happened surrounding the tragic events of the Cal football team and how university administrators and training staff reacted to the tragic events. There has been no showing by Respondent that the expense and inconvenience of segregating disclosable from non-disclosable information outweighs Petitioner's legitimate news gathering and investigative journalism. *State Bd. of Equalization v. Superior Court*, (1992) Cal App. 4th 1177, 1190. The burden of making a sufficient showing is on Respondent. *Id*.

VI. The Constitutional Right to Privacy Also Requires a Thorough Balancing Test Demonstrating Serious Privacy Rights to Be Protected Greater than the Investigative Purposes

Based on Respondent's counsel statements to the Agu family lawyers (Exhibit 3) as well allusions to privacy rights beyond FERPA but with scant analysis of what privacy rights are at stake and of whom, it appears that Respondent's references to privacy as a ground for withholding would be based on Government Code Sections 6254 and 6255, which is discussed in the preceding section.

However, it is possible that Respondent will rely on a California Constitutional right of privacy in an attempt to shield information from Petitioner. In speculating as to possible future arguments and strategies of Respondent, Petitioner reminds the Court that the process here is backward: it is the Respondent that bears the burden under CPRA of justifying exemption claims; it is not for the Petitioner to be required to engage in guessing games. Once again, Petitioner, for whom the presumptions of a right to obtain documents is beyond question, is placed in the undesirable position of having to argue against only a vague and under-developed legal theory of privacy without knowledge of the nature of the documents. But Petitioner accepts the challenge because Petitioner seeks to resolve this controversy as promptly as possible and to obtain the documents to which he is entitled under CPRA.

Thus, as stated by the court in *Rains v. Belshe,* (1995) 32 Cal App. 4th 157, 171, quoting *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal. 4th 1:

"The *Hill* analysis requires us to assess section 1418.8 in terms of whether it will have an unconstitutional result because the following circumstances are present: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct . . . constituting a serious invasion of privacy." (citing *Hill* at 39-40.)

The court in *Rains* explained that a balancing test is required for this analysis:

"The diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.' The comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law." (again citing *Hill* at 37.)

The court in *Rains* went on to hold:

"Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (again citing *Hill,* at 38.)

As stated in *International Federation of Professional and Technical Engineers v. Superior Court,* (2007) 42 Cal 4th 319, 330, the privacy case cited by Respondent as part of its Motion for Protective Order re Vaughn Index: "A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." Respondent has made absolutely no showing that the disclosure of any of the records that Petitioner seeks will violate any such norms, which explains why in open Court Respondent harps on FERPA which, according to Respondent, requires no such showing. In order to prevail on some form of privacy argument other than FERPA Respondent would be required to provide substantial information about the substance of the records in order to demonstrate that a true violation of an individual's privacy will occur as part of the required balancing test. It is obvious that there is no such violation as to any of the persons involved. Rather, if high level administrators have engaged in malfeasance, notwithstanding the embarrassment they would endure, clearly that would be outweighed by the public good of bringing to light such malfeasance. As to the "altercating" students Hinnant and Hale, their actions in a public place would be entitled to limited rights of privacy. *Daniel S. v. Board of Education of York Community High School,* 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (holding that not even FERPA protects

information which appears in school records but would also be "known by members of the school community through conversation and personal contact.") A serious privacy right is not necessarily implicated by having one's name appear in an interview transcript.

There is no doubt that Petitioner's investigative work and goals deserve the utmost deference. Respondent has come forth with no documents or other circumstantial evidence that the disclosure of documents related to an altercation between student athletes arguably instigated by a Cal coach, or a football training session in which a student athlete died ostensibly due to negligence by the university, implicates any significant privacy right of any individual. At this point there is reason to believe that the individuals whose rights may be impinged upon are modest compared to the investigation into who was responsible for the death of a student athlete and how a world-leading public university may have sought to minimize its responsibility for such a death or how the university would be portrayed to the public. No doubt administrators at the vortex of recent scandals involving student athletes at universities like Baylor University, Penn State University and Michigan State University wanted to prevent the disclosure of documents exposing how those administrators handled those incidents.

It also defies logic that FERPA was intended to abet a cover-up merely because a student's name appears in a report or a student provided testimony concerning what was observed during a reprehensible act where the subject matter is totally unrelated to a student's grades or educational records. *See DeFeo v. McAboy*, 260 F. Supp. 2d 790 (E.D. Mo. 2003) (campus police department law enforcement records, generated as the result of an incident in which one student struck another with his automobile, were expressly held not to be "education records" within the meaning of FERPA.)

Indeed, Respondent never cited a case with a holding that supports this blanket power of FERPA to bar the mention of a student's name, besides *Labor & Workforce,* which of course has nothing to do with FERPA.

VII. The 141 Page Campus Police Report Must Be Disclosed Without Delay

According to 20 U.S.C. § 1232g(a)(4)(B)(ii): "The term 'education records' does not include records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."

On page 4 of Respondent's Reply Brief on the Motion for a Protective Order (filed April 17, 2018), Respondent states: "The Regents is not withholding law enforcement unit records from Petitioner on the grounds that they are protected by FERPA." It was ambiguous whether Respondent has no such documents, or Respondent is withholding the campus police report on a ground other than FERPA.

In preparing the Joint Report filed with the Court on May 11, 2018, Respondent indicated that a proposed category concerning campus police reports would be acceptable to Respondent, but Respondent also stated that it was unaware if this campus police report or related responsive documents existed. (Respondent's attachment to Joint Report filed on May 11, 2018) Petitioner then pointed out in the attachment to the Joint Report as to a proposed Category (7) that Petitioner already had acquired and published a document on his blog, i.e. the transcript of a deposition in the Agu family civil lawsuit against Respondent herein given by an Alameda County Sheriff's Office lieutenant, that contradicts the tentative premise that there exist no responsive documents falling within such a category (Gordet Declaration Para. 6). Petitioner has since provided further information to Respondent, namely a table of contents of the 141-page campus police report, corroborating the existence of such a campus police report. (Gordet Declaration Para. 7)

According to 20 U.S.C. § 1232g(a)(4)(B)(ii) of FERPA, campus police reports are not entitled to exemption status. The entire 141-page report of the campus police report should be produced to Petitioner immediately without redaction, unless Respondent can justify specific redactions. This is further supported by *DeFeo v. McAboy,* 260 F. Supp. 2d 790, 795 (E.D. Mo. 2003).

VIII. Agu Settlement Agreement Should Have Been Disclosed Earlier with Related Documents

There is a formal settlement agreement that resulted in the termination of the Agu lawsuit and the payment of $4.75 million to the Agu family. On June 1, 2018, Respondent delivered to Petitioner's counsel a copy of the Agu Settlement Agreement following a very specific request as part of the formalizing of new "categories" as per the Court's Tentative Order (Declaration of Roy S. Gordet)

The question is raised: as to the main CPRA request that is the subject of this Petition, how could the Agu Settlement Agreement not have been responsive to a request seeking documents related to Ted Agu or to the incident in which he died? It is unclear whether Respondent contends that FERPA or privacy interests barred the disclosure of this settlement document prior to obtaining the authorization from the Agu family.

To foreclose at least one potential ground for Respondent's failure to earlier disclose the Agu Settlement Agreement, it is noted that the court in *City of Los Angeles v. Axelrad,* (1996) 41 Cal App. 4th 1083, 1088 confirmed the holding of *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 901: "Thus, the County's claims settlement committee is a 'local agency' under the [California Public Records Act] and the documents relating to settlement of a private personal injury claim with public funds constitute 'writings' containing information regarding 'the conduct of the public business,' subject to public inspection and disclosure under the [California Public Records Act]. (§§ 6253, 6256.)" (*Id.* at p. 901)

Any non-privileged documents related to the Agu Settlement Agreement should also be disclosed. If privileged, they should be identified as part of a privilege log.

IX. Conclusion

The Court should hold that a deceased student has no FERPA rights and no privacy rights under the CPRA and the California Constitution; and that the Agu Family lacks standing to assert privacy rights formerly belonging to Ted Agu. Under the Court's framework of the (amended) Tentative Order, documents being withheld under non-FERPA exemption claims should either be immediately produced on a rolling basis as they are identified (and with the addition of new categories to make the records requests more focused and effective), or they should be accounted for in a Vaughn Index. If Respondent's Response does not adequately address those points raised in this Motion and in the accompanying Issues Index (Exhibit 1), Respondent should be ordered to address all such issues and produce all responsive documents in order to clarify the outstanding issues and move this Petition to a resolution without further delay.

Lastly, Respondent should produce to Petitioner without delay the 141-page campus police report because a campus police report is expressly not exempted under FERPA and there has been no showing of invasion of any privacy rights.

Dated: June 11, 2018

Respectfully submitted,

Roy S. Gordet, Attorney for Petitioner Irvin Muchnick