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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 IRVIN MUCHNICK,) Case No. RG17857115
12)
13 Petitioner,) Reservation Number 1972714
14 vs.) HAYWARD DIVISION
15 UNIVERSITY OF CALIFORNIA, BOARD OF)
16 REGENTS,) Petitioner’s Reply Memorandum in Support of
17) Motion to Require Respondent to Disclose
18 Respondent.) Unredacted Relevant Responsive Requested
19) Documents Related to or Referencing Ted Agu
20) and to Disclose the 141-Page Campus Police
21) Report
22)
23)
24)
25)
26)
27)
28)

Hearing Date: August 1, 2018
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. Brand
Dep’t: 511
Petition Filed: April 18, 2017

PETITIONER’S REPLY MEMORANDUM

I. Introduction and Relief Requested

Respondent mocks Petitioner and this Court’s procedures by unilaterally deciding that Respondent has the right to set the schedule for how this case should proceed notwithstanding Petitioner’s properly noticed Motion. Respondent has intentionally and in bad faith refused to respond on the

1 merits to Petitioner’s Motion. The purpose for formulating a list of categories was to enable
2 Respondent to more efficiently search for responsive documents. Once a document is located, like
3 the 141-page campus police report that admittedly cannot be protected under FERPA, the category
4 it may fall into is irrelevant to any privacy issues related to that document. In any case, Respondent
5 does not have the right to dictate the substance, the timing, or the structure of a motion filed by
6 Petitioner. For the reasons stated, Petitioner requests that the Court order Respondent to
7 immediately produce to Petitioner the 141-page campus police report, to immediately produce to
8 Petitioner all non-privileged documents related to the Agu litigation settlement agreement, and to
9 file and serve the overdue response on the merits to Petitioner’s Motion within nine court days of
10 the Court’s Order thereon. Depending on Respondent’s imminent actions, Petitioner reserves the
11 right to seek further remedies, including sanctions, for Respondent’s contempt of the Court’s
12 procedures.

13 II. Respondent’s Unjustified Refusal to Respond on the Merits Permits the Court to Grant
14 Petitioner’s Motion

15 A. Timeline of this Motion

16 This Motion was filed on June 11, 2018. As expressly stated in the Motion, the Court in its
17 Tentative Ruling had invited either party to file a motion addressing certain privacy issues. In open
18 Court, the Court assented that Petitioner’s Motion could also specifically demand the disclosure of
19 the 141-page campus police report that Respondent has until very recently claimed no certain
20 knowledge of. The parties also agreed in open Court, again with the Court’s assent, that as
21 Respondent came across additional documents to disclose, Respondent would disclose same to
22 Petitioner on a “rolling basis” prior to the next scheduled Case Management Conference on August
23 1. (Gordet Declaration ¶ 8) As of the date of filing this Reply Memorandum, Respondent has not
24 disclosed a single additional document. (Gordet Declaration ¶ 9)

25 As set forth in the email correspondence submitted as Exhibit 1 with Respondent’s unjustified
26 request for postponement of this Motion, inaccurately captioned by Respondent as a “Response,”
27 Respondent requested that Petitioner withdraw its Motion on June 21, 2018. Respondent sat on its
28 hands until July 19, 2018. On the afternoon of the last day under CCP Section 1005 that its
Response was due, Respondent served its “Response”.

1 B. Respondent's Decision to Not Move for a Continuance or for a Protective Order Establishes
2 Respondent's Continued Bad Faith Dilatory Tactics

3 As noted previously by the Court, Respondent has an affirmative obligation under Gov. Section
4 6253.1(a) to work collaboratively with Petitioner to meet the goals of the California Public Records
5 Act in furtherance of Petitioner's legitimate investigative journalism goals. Instead, as has been
6 demonstrated in earlier pleadings, Respondent prefers to put up roadblocks and to delay at every
7 turn. At the last hearing, the Court acknowledged that further delay diminishes and undercuts what
8 Petitioner seeks to achieve, and this Petition should proceed at a more rapid pace. (Gordet
9 Declaration ¶ 10) Notwithstanding, although it appeared to be of dubious justification, in line with
10 previous dubious similar claims of short staffing etc. in the Public Records Department of
11 Respondent, Petitioner begrudgingly assented to having the next deadline for disclosures set for
12 August 1. (Gordet Declaration ¶ 7) Respondent's delay and concomitant refusal to respond to this
13 Motion on the merits was an abuse of Petitioner's cooperation.

14 If Respondent were genuinely motivated to move this case forward, and if Respondent sincerely
15 believed these purported reasons it has offered up in lieu of responding on the merits, Respondent
16 had well-established and superior alternatives to waiting until the very last day to file its non-
17 response. Respondent had the following alternatives:

18 i. Ex Parte Application for a Continuance

19 California Rules of Court Rule 3.1103(b) [Rules 1.10 and 2.20 apply in law and motion
20 proceedings] provides that a party may make application for good cause for a continuance to take
21 any action required under the Rules of Civil Procedure. To gain its strategic advantage,
22 Respondent elected to eschew this more efficient approach for the obvious reason that it may have
23 resulted in the Court rejecting Respondent's illogical interpretation of the Order vis-à-vis the
24 Tentative Rulings. And it would probably have had the result of requiring Respondent to file a
25 response on the merits in advance of the August 1 hearing date, as required under CCP Section
26 1005.

27 ii. Ex Parte Motion for Protective Order

28 Alternatively, under California Rules of Court Rule 3.1201, Respondent could have promptly
brought this matter to the Court *ex parte* to vindicate those reasons espoused in the email
correspondence attached with Respondent's non-response to this Motion as Respondent's Exhibit
1. Instead, by taking no action for more than five weeks, Respondent guaranteed that it will have
significantly more time to respond on the merits and continue its well-honed obstructionist tactics

1 of weaving staggered issues as described in this Motion’s opening Memorandum. These delay
2 tactics go back to Petitioner’s original Public Records Act requests beginning in April of 2016. (See
3 Paragraphs 6 – 9 of Petition.) By granting the relief Petitioner seeks by this Motion, specifically the
4 disclosure of the 141-page campus police report and all non-privileged correspondence surrounding
5 the Agu Settlement Agreement, the Court will allow Petitioner to promptly resume his
6 investigation and reporting on the underlying events and will also enable both parties and the Court
7 to see what other documents may need to be disclosed and to see what other documents may have
8 been wrongfully withheld.

9 III. Production of the 141-Page Campus Police Report Is in Keeping with Respondent’s General
10 Public Records Act Disclosure Practice

11 A. Respondent Has Already Disclosed a Campus Police Report to Petitioner Related to this Petition

12 Submitted as Exhibit H with the original Petition is a UC campus police report related to the
13 altercation between Hinnant and Hale. As noted from the face of the document and as alleged in
14 Paragraph 8 of the Petition, this campus police report was disclosed by Respondent’s PRA
15 department to the *Daily Cal* months before it was disclosed to Petitioner. In any case, it is clear that
16 Respondent discloses campus police reports without suffering substantial harm. Moreover, basing a
17 refusal to disclose on a ground that actually contradicts a pattern of practice of disclosure under the
18 CPRA has been held to be obstructionist conduct. *See State Bd. of Equalization v. Superior Court*
19 (1992) 10 Cal.App.4th 1177, 1193. Respondent accepted this possibility (of forced disclosure)
20 when Respondent took the strategic step of refusing to move *ex parte* for either a continuance or a
21 protective order, and ultimately refusing to respond on the merits under CCP Section 1005.
22 Moreover, Respondent’s position stated in open Court that it was uncertain of the existence of this
23 campus police report is perplexing. But this is in keeping with Respondent’s tactics of feints,
24 diversions, new theories, newly found documents, etc. as set forth in this Motion’s Memorandum.
25 Respondent’s delay in producing the 141-page report is prejudicing Petitioner in reporting on these
26 events in a timely manner. The campus police report should be disclosed immediately.

27 B. *In Camera* Review is an Acceptable Alternative in the Interim

28 Alternatively, as a way of moving this matter forward without further delay and if the Court has
concerns about a disclosure detrimental to Respondent, the Court should order Respondent to lodge
the 141-page campus police report with the Court for an *in camera* review pursuant to Government
Code Section 6259(a) To be clear, Petitioner is not advocating, at least not yet, that the Court

1 undertake an *in camera* review of all the documents that Respondent claims or may eventually
2 claim are exempt. Rather, this *in camera* review could immediately resolve to some degree a main
3 issue of Petitioner's pending Motion and, if the Court agrees that the campus police report should
4 be disclosed, will allow Petitioner to move forward because it appears that this report will be
5 significant to Petitioner's investigation. It will also demonstrate to Respondent there are
6 consequences for abusing and undermining the procedures on which Petitioner and the Court rely.

7 Petitioner's counsel informed Respondent on June 25, 2018 that Petitioner's counsel set the
8 return date of the Motion to coincide with the previously set August 1 Case Management Hearing.
9 in order to consolidate and make the motion and hearing procedure more efficient for all concerned,
10 including the mere setting of the return date (Gordet Declaration ¶¶ 3 and 4) Moreover,
11 Respondent's counsel was also informed on June 25, 2018 as noted in the email correspondence
12 submitted by Respondent, Petitioner would be severely prejudiced by a continuance of the August 1
13 hearing date for the reason that Petitioner's counsel, in reliance on the August 1 hearing date set by
14 the Court, purchased tickets to Sydney, Australia for a combined business and vacation trip from
15 August 4 to August 26. (Gordet Declaration ¶ 5) Petitioner was entitled to set this date. It was not
16 for Respondent to override this scheduling of the Motion without seeking leave of Court. As a
17 consequence of Respondent's brazen and manipulative conduct, and it order that Petitioner not be
18 further prejudiced, it is reasonable for the Court at a minimum to order the immediate disclosure of
19 the campus police report for the Court's *in camera* review and eventually order disclosure of the
20 report to Petitioner as soon as the Court completes its *in camera* review.

21 IV. Correspondence Surrounding the Agu Litigation Settlement Agreement Should Be Disclosed

22 For virtually the same reasons set forth in the preceding section, Respondent should either produce
23 immediately all documents related to the Agu Settlement Agreement (itself a document that
24 Petitioner has inexplicably withheld until recently), or should produce these associated documents
25 for immediate *in camera* review by the Court. The Agu Settlement Agreement could not have
26 existed in a vacuum, i.e. there must be correspondence documents, internal emails, etc. If there are
27 attorney client privileged documents, the Court should order that Respondent immediately confirm
28 the existence of such attorney client privileged documents and further order Respondent to prepare
and serve a privilege log within 30 days of the date of the Court's Order.

V. The Weak Reasons for Refusing to File a Response on the Merits Demonstrate Respondent's Bad Faith

1 A. Respondent Incredibly Claims It Needs to Determine Categories Before Responding to the
2 Privacy Arguments Surrounding the Campus Police Report

3 Respondent claims that it should be excused from responding to the privacy issue arguments
4 because this will be part of its report on categories requested by the Court that it has until August 1
5 to complete. But the Court's original Tentative Rulings made very clear, and as was made even
6 clearer in colloquy in open Court, the privacy issues are separate from the category issues. The
7 Court specifically requested clarification from both parties about the privacy issues by separate
8 motion. As for the privacy issues, it matters not which specific categories or list of categories are
9 devised by the Court, by Respondent or by Petitioner. As suggested by the Court, devising
10 categories is only a means to assist all concerned to determine what Respondent should be
11 searching for and to determine if a document is covered by a FERPA exemption. Despite
12 Respondent's obfuscations and concealments, everyone at long last now knows that the campus
13 police report exists. No one needs to put it in a category in order to search for it, this because we
14 already know it exists. In other words, it does not matter what category the campus police report
15 falls under in order to determine if the privacy arguments and the other arguments set forth in
16 Petitioner's Motion provide Respondent with a safe harbor for its refusal to disclose this report
17 much earlier. The campus police report is a campus police report - let it be its own category for all
18 Petitioner cares, or part of any category Respondent desires: the issue is, as framed by the Court
19 and as discussed in Petitioner's Motion: are there privacy issues that prevent its disclosure, or not?
20 Petitioner's Motion could not have been clearer on this point.

18 B. Respondent Had No Basis to Claim that It Was Necessary to Complete the Categorization and
19 Production Before Responding

20 Thus, as demonstrated in the preceding section, there is no need for Respondent to assemble or for
21 the parties to collaboratively finalize the "categories" report before responding to the privacy issues
22 of this Motion. The privacy issues, particularly as discussed in open Court and in the Tentative
23 Rulings, are not dependent on the finalization of the categories or categorizations. Demonstrating
24 how Respondent is wont to shift its positions as suits its purposes, in the email correspondence
25 submitted as Respondent's Exhibit 1, Respondent argued that the Motion was premature because
26 Respondent will not have completed its document searching until the Court-imposed deadline of
27 August 1. That frivolous argument has fallen away in the "non-response" to Petitioner's Motion
28 because as of the date of filing this Reply, Respondent has disclosed zero additional documents to
Petitioner since the last Court hearing. If there are no further disclosures, or if there are but meager

1 because as of the date of filing this Reply, Respondent has disclosed zero additional documents to
2 Petitioner since the last Court hearing. If there are no further disclosures, or if there are but meager
3 disclosures, prior to August 1, Respondent is further exposed as merely attempting to stymie and
4 delay Petitioner at every opportunity. Respondent claimed staffing issues for seeking the August 1
5 due date for its report on categorizations and for further disclosures. (Gordet Declaration ¶ 7) In
6 light of this pending Motion, if Respondent deemed it so vital to complete the search before filing
7 its Response on the merits and to make the Case Management hearing more meaningful, then
8 Respondent should have sought to speed up the search process, which, it should be emphasized, has
9 so far returned no documents. Respondent is all about adhering to court scheduling when it suits its
10 own purposes, not at all when it does not.

11 C. The Court's Order Never Stated or Implied that Petitioner Should Not File this Motion

12 In the email correspondence submitted as Respondent's Exhibit 1, Respondent claimed that by
13 omitting from the eventual Order the Tentative Ruling's invitation to file a motion on privacy, the
14 Court "revoked" its prior invitation. This "revoke" terminology did not make it into Respondent's
15 non-response to the Motion after Petitioner exposed in the email correspondence how illogical it is,
16 but a slight modification persists, equally without merit. If Respondent believed its illogical
17 contention that the use of "or" was a pronouncement that the Court no longer wished to hear
18 promptly from the parties on the issue of the issue of privacy or the disclosure of the 141-page
19 campus police report, the Court could have easily so stated. There was no reason for the Court to
20 repeat in the eventual final Order the Court's invitation concerning a possible privacy motion when
21 it was never stated in the Tentative Ruling as a mandate, so there was no reason for it to be included
22 in the final Order.

23 VI. Conclusion

24 Respondent has delayed response and downplayed Petitioner's PRA requests from the outset and
25 has now unilaterally decided it did not have to respond on the merits to Petitioner's Motion on
26 privacy. Petitioner observed the Rules of Civil Procedure and Respondent has not. The Court must
27 force Respondent to meet its obligations for the reasons set forth. A proposed Order is being
28 submitted.

Dated: July 24, 2018

Respectfully submitted,


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