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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA

11 IRVIN MUCHNICK,
12 Petitioner,
13 vs.
14 UNIVERSITY OF CALIFORNIA, BOARD OF
15 REGENTS,
16 Respondent.

) Case No. RG17857115
)
) HAYWARD DIVISION
)
) MOTION AND MEMORANDUM IN
) SUPPORT OF MOTION REQUESTING
) ORDER FOR RESPONDENT TO DISCLOSE
) CAMPUS POLICE REPORT (THE BINDER)

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21 Hearing Date: November 21, 2018
22 Time: 9:00 a.m.
23 Judge: Hon. Jeffrey Brand
24 Dep't: 511
25 Petition Filed: April 18, 2017
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1 I. Introduction and Summary: Documents of Cal’s Campus Police Are Not Automatically Exempt
2 Under Section 6254(f) and Should Be Disclosed Under These Facts.

3 This Motion presents a fundamental application of the California Public Records Act (“CPRA”).
4 Petitioner Irvin Muchnick (“Petitioner”), a journalist and author, seeks documents of a public
5 university, Respondent Regents of the University of California (“Respondent”). This Motion’s
6 purpose is to demonstrate that Respondent failed in its statutory obligation to disclose 141 pages of
7 a group of documents generated or compiled by Respondent’s campus police department following
8 the death of University of California-Berkeley (“Cal”) football player Ted Agu (“Agu”). Those 141
9 pages, which Respondent prefers to characterize as a binder of separate documents or reports (the
10 “Binder”), should be disclosed to Petitioner without further delay for the reasons that will be set
11 forth. Respondent did not acknowledge the existence of the Binder despite the fact that the
12 documents clearly were responsive to Petitioner’s original CPRA request from 2016 for documents
13 related to the death of Agu. In communication with Petitioner and as stated by Respondent in open
14 court, Respondent contends that any document in Respondent’s campus police files is automatically
15 exempt from disclosure. Thus, the main legal issue to be determined by the Court by this Motion is
16 whether CPRA § 6254(f) defines a bright line with respect to every document under the watch of a
17 university’s campus police department. Petitioner submits that the Section 6254 exemption case
18 law, including the seminal *Williams v. Superior Court*, (1993) 5 Cal.4th 337, requires the Court to
19 examine all of the relevant facts concerning the underlying event that was the subject of the
20 investigations, the true and proffered purposes of the investigations, and the public benefits to be
21 gained from either withholding the documents or making the documents public. A close
22 examination of the facts and context of Petitioner’s original CPRA request will demonstrate that the
23 Court should order Respondent to disclose the Binder. This conclusion flows directly from CPRA’s
24 core mission to enhance public understanding of the workings of public entities and the justifiably
25 heavy burden the cases have placed on public entities for justifying non-disclosure under all of the
26 6254 exemptions.

27 From broader perspective, the Court is being asked to also examine the broader context that also
28 tips the scales heavily in Petitioner’s favor. These involve, first, the narrative underlying this public
records request as it relates to the Cal football program’s role in the national debate over the
pandemic of deaths in college football conditioning; and second, questions of possible malfeasance
both in that narrative and in this arduous process initiated by Petitioner two years ago in seeking the
documents that Respondent unjustifiably continues to fight to conceal. For purposes of the correct

1 ruling under the CPRA, the Court need not first conclude that malfeasance occurred, rather only
2 that by compelling the release of these withheld documents the Court can clarify and assist in
3 ongoing public discussion of alleged malfeasance. Controversy over the actions of a strength and
4 conditioning coach, as well as the recorded statement of a campus police chief to the effect that
5 circumventing CPRA is an important goal, should bear on the Court's findings and ultimate rulings.

6 II. The California Public is Entitled to the Facts Underlying the Tragic Death of a Cal Football
7 Player and to an Accounting in a \$4.75 Million Wrongful Death Lawsuit Settlement.

8 The Court is well acquainted with the background of this case set forth in the original Petition with
9 its Exhibits. On February 7, 2014, Agu collapsed and died during a drill in the offseason
10 conditioning program of the football team. On April 14, 2016, Respondent came to a \$4.75 million
11 settlement of a wrongful death lawsuit by the family of Agu in the Superior Court for Alameda
12 County, Case No. RG14735588. The use of tax- and tuition-subsidized funds to resolve private
13 litigation adds an extra layer of CPRA-implied accountability as it applies to the instant Motion.

14 III The Tragic Agu Death is But One of Dozens of Such Fatalities in College Football Since 2000.

15 A professional industry journal article published in 2017 documented twenty-seven non-traumatic
16 student-athlete deaths since 2000 during college football practice and conditioning (Exhibit 1), and
17 additional such fatalities occurred in 2018. Earlier this year, Jordan McNair ("McNair"), a student-
18 athlete at the University of Maryland ("Maryland"), died of complications from heat stroke in a
19 football conditioning event with striking similarities to the Agu death. (Exhibit 2) Within the past
20 month, the investigative program *Real Sports* on the cable television network HBO explored
21 college football deaths, and specifically the Agu death and its connections to the fatality in
22 Maryland and to the whole subject ("*Real Sports Report*"). (Exhibit 3, submitted as a DVD)

23 IV. Petitioner's Investigative Reporting on Cal Football Is Reinforced and Vindicated by a National
24 Media Investigation.

25 The *Real Sports* Report reinforced and supplemented reporting by Petitioner going back to three
26 months prior to the Agu death, when an altercation between two Cal student-athletes raised
27 allegations about a culture in the football conditioning program that devalued safety and left players
28 more vulnerable to tragic outcomes. (Exhibits A and D to Petitioner's Petition) The *Real Sports*
Report also was spurred, in part, by a report by ESPN quoting student-athletes on what they called
a "toxic culture" in the Maryland football conditioning program ("ESPN Report"). (Exhibit 2) It is
notable that subsequent to the ESPN Report, the Maryland president acknowledged "legal and
moral responsibility" and commissioned two comprehensive independent investigations of the

1 death by a consultant with medical background. (Exhibit 2) In addition, the Maryland football
2 strength and conditioning coach, Rick Court, resigned under pressure. (Exhibit 2)

3 There was no similar published investigative report by Cal in the Agu death, and Petitioner submits
4 that public discussion that would be inspired by the release of the Binder is the closest thing to
5 achieving the goals of the Maryland report that the citizens of California could ever hope to
6 achieve. Both Petitioner's journalism and the *Real Sports* Report raise questions swirling around
7 Damon Harrington, then the Cal football strength and conditioning coach, in both the Agu death
8 and the precursor student-athlete altercation. See Petition Paragraph 3 and Petition's Exhibit H,
9 Muchnick Decl. ¶ 2) and Exhibit 3 (the DVD) submitted with this Motion.

10 V. How the Existence of the Documents in Dispute in This Motion Came to Be Revealed Raises Its
11 Own Questions of Public Agency Malfeasance.

12 On July 16, 2015, Lieutenant Riddic Bowers, head of the Coroner Bureau of the Alameda County
13 Sheriff's Office ("Sheriff's Office"), was deposed in the Agu family lawsuit ("Bowers Deposition",
14 Exhibit 4). Here is the pertinent portion of the Bowers Deposition:

15 *Q. Okay. Are those two faxes that were sent over — the 21 pages and the eight pages, that the*
16 *University police department sent to the coroner, is that all of the documents that were provided to*
17 *your office by the University police?*

18 *A. As far as I know, yes.*

19 ...
20 *Q. Are you aware that the University of California Police Department report is not 29 pages that*
21 *were sent to you, but it's actually 141 pages?*

22 *A. Based on what you told me, I'm aware of that.*

23 *Q. Okay. Do you have any idea why the entire report was not sent?*

24 *A. I do not.*

25 *Q. Would it surprise you to know that there are witness statements that the University police*
26 *department took of two players that are not included in the reports they sent you?*

27 *A. Given that there are a significant number of pages that aren't here, it wouldn't surprise me that*
28 *there would be lots of things in there.*

Neither prior nor subsequent to the filing of this Petition did Respondent produce these 141 pages
or any portion thereof in response to Petitioner's original request to the campus compliance office.

As was previously indicated to both Respondent and the Court, Petitioner has what is believed to be
the table of contents of the Binder, submitted as Exhibit 9. (Muchnick Decl. ¶ 4) Exhibit 9 shows
that the Binder includes documents concerning two separate interviews with Damon Harrington,
whose actions surrounding the player altercation and the Agu death are a focus of both Petitioner's
ongoing investigative articles and the *Real Sports* Report. (Exhibit 3)

1 As explained in the next paragraph, it was not until more than a year following the filing of this
2 Petition that Respondent would even acknowledge the existence of the Binder, despite
3 Respondent's purported cooperation pursuant to a so-called document search "Algorithm"
4 consisting of names and terms devised cooperatively by the parties pursuant to a meet and confer
5 procedure that was intended to expediently uncover all responsive documents in Respondent's
6 possession.(Declaration of Roy S. Gordet ¶ 5)

7 On July 5, 2018, in an email to Petitioner's counsel, Respondent's counsel stated in part: "... [Y]ou
8 refer to a 141-page police report. I have seen the document I believe you are referring to. It is
9 exempt under section 6254(f) and The Regents will log it on any Vaughn Index the Court orders
10 The Regents to provide." (Exhibit 5) This position was repeated in open court as seen in Exhibit 6,
11 consisting of the transcript excerpt of Respondent's counsel's following representations to the
12 Court: "Why did we not know about the police report? Well, police reports are exempt under
13 6254(f), so there was no need if the Regents believed that there were any responsive police records
14 in response to the Public Records Act Request that Petitioner sent them on April 6, 2016. There was
15 no need for the Regents to go into the police department's records and look through those files to
16 see whether there were any responsive records because all those records would be exempt under
17 6254(f)." Respondent's expressed policy is contrary to the CPRA on various levels as explained in
18 Section VIII, *infra*.

19 In earlier motion practice in this case, Respondent strenuously argued against the preparation of a
20 Vaughn Index. That was before Respondent was compelled to admit that it was in possession of
21 this Binder related to the Agu death investigation. What other responsive documents did
22 Respondent knowingly or unknowingly fail to identify pursuant to Petitioner's original request and
23 pursuant to the Algorithm that the parties collaboratively devised? More specifically, what other
24 documents in the possession of Respondent's campus police have not been acknowledged and
25 identified?

26 VI. Internal Communications Show That Respondent Prioritizes Secrecy in Such a Way as to
27 Undermine the Objectives of CPRA.

28 On March 20, 2014, Margo Bennett, Chief of the Cal Campus Police Department ("Bennett"),
emailed in part to John Wilton, the vice chancellor for finance and administration: "John, regarding
the documents I gave you yesterday, please don't share the papers ... I put them together for you
(and Ann if needed) only. If others need the information, I am happy to give a verbal briefing, but

1 not documents. The case is not available for a PRA request and I'd like to keep it that way."

2 (Exhibit 7)

3 Petitioner cannot state with certainty whether Bennett was referring to any or all of the documents
4 in the Binder, but that is Petitioner's assumption. In any case, this communication is illustrative of
5 Respondent's obstructive posture with respect to its CPRA obligations. Petitioner submits that there
6 is no provision of the statute by which a case is "available for a PRA request" based on which
7 administrators, or how many administrators or other employees are privy to the documents. Or was
8 Chief Bennett thinking that this was a circle of trust that would maintain, perhaps contrary to legal
9 or ethical obligations, the confidentiality of the potentially damaging documents? In any case, the
10 police chief was emphasizing secrecy itself as an important value in the handling of the Agu death.
11 What has Respondent been hiding since before and after the filing of this Petition? And
12 specifically, does the Binder shed any further light on the Agu death incident and its aftermath? Do
13 Respondent's policies and actions constitute bad faith?

14 Respondent apparently believes that it can hand off inquiries about any type of conduct or events
15 affecting the university to its campus police department for investigation and expect to have cover
16 from CPRA concerning whatever reports are generated by such investigations and whatever
17 documents are associated with those investigations. Such a policy is not legally defensible and it is
18 not morally defensible.

19 Submitted as Exhibit 10 are three email messages recently produced by Respondent involving
20 Respondent's efforts to orchestrate for itself a positive public relations veneer shortly following
21 Agu's death. It is seen there that from the outset Respondent recognized that the cause of Agu's
22 death likely was an exertional collapse associated with sickle cell trait and not foul play. Clearly the
23 campus police department and Chief Bennett were not engaged in law enforcement activity when
24 they participated in these email exchanges and when the police department interviewed persons as
25 they investigated the circumstances surrounding Agu's death and Respondent's culpability related
26 to it. Indeed, in one of the emails Vice Chancellor Wilton asks Bennett "I wonder if we should
27 bring Dan M into the picture?" (Dan M refers to campus public relations director Dan Mogulof.)
28 (Gordet Decl. ¶ 4) Respondent's campus police department was being exploited to limit the legal
exposure of Respondent, which is a far cry from true law enforcement that would ostensibly seek
out the truth and justice of individual and institutional conduct. In that sense, Respondent's campus
police department is not always, and was not in this situation, acting the way a true public law

1 enforcement unit would act. As will be demonstrated in Section VIII. F. below, this conclusion
2 strongly supports the further conclusion that the Binder must be disclosed under Section 6254(f).

3 VII. Respondent Previously Released Campus Police Records Pursuant to Petitioner's PRA
4 Request and a Third Party's PRA Request.

5 On February 10, 2017, prior to the filing of this instant Petition, but months after Respondent's
6 request, Respondent released to Petitioner a campus police incident report; submitted as Exhibit H
7 with the original Petition is a UC campus police report related to the altercation between J.D.
8 Hinnant and Fabiano Hale months before the Agu death incident. (Muchnick Decl. ¶ 9) As noted
9 from the face of the document (Exhibit H of the Petition) and as alleged in Paragraph 8 of the
10 Petition, this campus police report was disclosed by Respondent's PRA department to the *Daily*
11 *Cal* newspaper months before it was disclosed to Petitioner. (Muchnick Decl. ¶ 9) This earlier
12 document disclosure in this very same case belies Respondent's alleged rationale that it does not
13 check campus police files in responding to PRA requests and that it does not disclose campus
14 police files under CPRA.

15 Moreover, the fact that this other campus police report was disclosed to two separate requesters
16 months apart negates any belated claim that the file was produced inadvertently. In any case,
17 Respondent's disclosure of the police report on the altercation demonstrates that Respondent is able
18 to disclose reports of its campus police involving acts of violence without suffering harm.

19 Moreover, Respondent cannot demonstrate that release of the reports related to the Agu death will
20 result in harm to the public or to any individuals. Most significantly, basing a refusal to disclose on
21 a ground that actually contradicts a pattern of practice of disclosure under the CPRA has been held
22 to be obstructionist conduct. *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th
23 1177, 1193. There is no public policy being furthered under the facts of this case and that supports
24 Respondent's concealment of these investigatory reports and any associated documents.

25 VIII. Case Law Interpreting Section 6254(f) Explains that the Section Does Not Grant a Blanket
26 Statutory Exemption for Every Document Generated by a Law Enforcement Agency.

27 A. Each Section 6254 Case Must Be Decided on Its Own Facts.

28 For the reasons explained in Sections VIII.E and VIII.F., not all files created by or located at the
Cal campus police department should be considered automatically exempt under Section 6254(f) or
automatically exempt under any other 6254 provisions on which Respondent might belatedly argue
for justifying its refusal to disclose. The case law makes clear that each Section 6254 case must be
decided under its own specific facts. *See, e.g. County of Los Angeles v. Superior Court* (2012) 211

1 *Cal.App.4th 57, 64* (“...because of the narrow construction given to Section 6254’s exemptions,
2 cases interpreting the Section 6254(b) pending litigation exemption have based upon the facts of
3 those particular cases, given it a more restricted reading.”) *See also Caldecott 243 Cal. App. 4th*
4 *212, 220* (after extensively reviewing numerous facts, conclusion was that the requested documents
5 “...concern a matter of public interest that on balance should be produced. School district did not
6 meet its burden to overcome a narrow construction of Section 6254, subdivision (c).” *Cf. American*
7 *Civil Liberties Union Foundation of Southern California v. Superior Court*, (2017) 3 Cal. 5th 1032,
8 1043 (CPRA’s Section 6255 “...contemplates a case by case balancing process...” which burdens
9 the proponent of nondisclosure to show “a clear overbalance on the side of confidentiality”.)

9 B. Public Policy and Burden of Proof under Section 6254.

10 As stated in *Caldecott v. Superior Court*, 243 Cal App 4th 212, 223:

11 The basic goal [of the CPRA] is to open agency action to the light of public review, with its core
12 purpose designed to “contribut[e] significantly to public understanding of the operations or
13 activities of the government.” [citations omitted];

13 As the *Caldecott* court further stated at page 223:

14 Here, as in *BRV*, there is a strong public interest in judging how [the administrator] responded to
15 Caldecott's claims, especially in light of his decision to almost immediately terminate Caldecott
16 without cause. Likewise, there is the same strong public interest in assessing how School District's
17 elected board treated the serious misconduct allegations against its highest ranking administrator.
18 The numerous newspaper articles and blogs included in the record confirm that. Disclosure will
19 shed light on School District's performance of its duties” [citing *BRV, Inc. v. Superior Court (2006)*
20 143 Cal App 4th 742, 755]

19 The parallels to the reproachable conduct of Respondent’s administrators and employees, such as
20 the strength and conditioning coach Harrington, are obvious. (Exhibits 3 and 8) It is in the public
21 interest to scrutinize Harrington’s conduct related to the altercation and Agu’s death, and
22 Respondent’s “highest ranking” administrators’ reactions to his conduct. (*Real Sports Report on*
23 *DVD, Exhibit 3 and Exhibit 8 concerning Cal’s faculty demanding accountability*) In congruence
24 with the reasoning of *Caldecott* and *BRV*, the nation-wide interest evidenced by the *Real Sports*
25 *Report (Exhibit 3)* of the identical issues raised by Respondent’s ongoing investigations of the Agu
26 death makes the disclosure of the documents in the public interest. Respondent should feel
27 compelled to admit that it has no countervailing public policy interest to promote.

27 According to *Marken v. Santa Monica-Malibu Unified School District*, 202 Cal.App.4th 1250,
28 1262:

28 These statutory exemptions from compulsory disclosure under the CPRA must be narrowly

1 construed.] Cal. Const., art. I, § 3, subd. (b)(2) [“[a] statute, court rule, or other authority, including
2 those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the
people's right of access, and narrowly construed if it limits the right of access”]; [citation]

3 The *Marken* decision was heavily relied upon in the *Caldecott* decision. And *Caldecott* quoted from
4 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63: “Exemptions under the
5 CPRA are to be narrowly construed and the the government agency opposing disclosure bears the
6 burden of proving that one or more [of the exemptions] apply in a particular case.’.” *See also* §
7 6255, subd. (a)

8 C. The Exemptions Under Section 6254 Are Permissive, Not Mandatory and Publishing the
9 Investigative Results Is in the Public Interest.

10 As noted further by the court in *Marken, supra* at p. 1262, with numerous citations, the exemptions
11 from disclosure provided by Section 6254 are permissive, not mandatory: Thus, Section 6254
12 exemptions allow nondisclosure but do not prohibit disclosure. Indeed, the penultimate sentence of
13 Section 6254 provides, “Nothing in this section prevents any agency from opening its records
14 concerning the administration of the agency to public inspection, unless disclosure is otherwise
prohibited by law.”

15 This puts Respondent in a precarious position. If CPRA prohibitions are not mandatory.
16 Respondent has offered not a single rationale for why it is in the public’s best interest to prevent
17 disclosure of the Binder. Petitioner contends that there is no public policy promoted in this case by
18 withholding the Binder. As implied by Chief Bennett’s statement that she and presumably others
19 associated with Respondent believed it will be best for Respondent to keep investigative documents
20 associated with the Agu death incident away from public scrutiny, presumably because there are
21 things to hide. Again, it seems fairly obvious that Chief Bennett’s statement is referring to some or
22 all of the Binder, but Petitioner cannot state that with certainty. It is clear in any case that
23 Respondent has not followed the same path as Maryland’s recent public investigation into a
24 football player’s death during a training session (Exhibit 2) Maryland did the right thing and
25 ordered a comprehensive outside objective audit with published results. (Exhibit 2) It did not assign
26 this duty to a law enforcement agency, but presumably to an objective consultant with experience
27 in such an investigation. Respondent’s campus police, by contrast, was used to investigate for the
28 self-serving purpose of minimizing legal and financial exposure, not for enforcing any laws or for
protecting citizenry (or Cal students) or bringing evildoers to justice. (See Exhibit 10 consisting of
emails concerning public relations strategies in which Chief Bennett was a recipient.)

1 In the context of another CPRA exemption provision, *Los Angeles County Board of Supervisors v.*
2 *Superior Court*, (2016) 2 Cal. 5th 282 stated the following:

3 ...Section 6255(a), which states that the PRA's catchall provision allowing a government agency to
4 withhold a public record if it can demonstrate that "on the facts of the particular case the public
5 interest served by not disclosing the record clearly outweighs the public interest served by
6 disclosure of the record." In determining the propriety of an agency's reliance on the catchall
7 provision to withhold public records, the burden of proof is on the agency "to demonstrate a clear
8 overbalance" in favor of nondisclosure. *Michaelis, Montanari & Johns on v. Superior Court (2006)*
9 *38 Cal.4th 1065, 1071*

10 Again, under the facts of this case, there is no public interest to be served by denying Petitioner
11 access to the Binder.

12 D. The Section 6254(f) Exemption Is Not "Absolute".

13 *Williams v. Superior Court* (1993) 5 Cal.4th 337 is considered a seminal case on the meaning and
14 application of Section 6254(f). First and foremost, and contrary to Respondent's pronouncement
15 that it had no obligation to even check its campus police files, *Williams* at page 346 expressly held
16 that "...it is clear that the exemption [6254(f) is not literally 'absolute.'" For examples, the fact that
17 Section 6254(f) requires the withholding public entity to provide a requester with extensive details
18 concerning the contents of the withheld documents or that accompanying Section 6259 authorizes a
19 court to review withheld documents *in camera* demonstrated to the *Williams* court that the
20 exemption was not intended to completely cut off public access merely because the files could be
21 considered law enforcement investigatory files. Other cases have also expressly affirmed that
22 Section 6254(f) is not "absolute." *Doubleday v. Ruh*, 149 F.R.D. 601, 610 (E.D. Cal. 1993) and
23 *American Civil Liberties Union Foundation v. Deukmejian*, (1982) 32 Cal.3d at 449-51.

24 *Williams* at p. 355 stated very plainly:

25 No one argues, and the law does not provide, that a public agency may shield a record from public
26 disclosure, regardless of its nature, simply by placing it in a file labelled "investigatory." That
27 extreme interpretation of the CPRA was rejected, shortly after the statute was enacted, in *Uribe v.*
28 *Howie*, (1971) 19 Cal.App.3d 194.

29 In other words, *Williams* and *Uribe* hold that a public agency is not at liberty to make its own
30 categorizations or characterizations of documents residing in law enforcement investigatory files
31 and automatically draw a conclusion that a document is exempt under Section 6254(f) without
32 having to identify all documents responsive to a PRA request. *Williams* clearly saw through this
33 type of subterfuge. Indeed, Chief Bennett's admonition to her cohorts in an email message (Exhibit
34 7) about intentions and measures to keep certain documents away from public scrutiny,
35 presumably in reference to some or all of the Binder, seriously calls into question Respondent's

1 motivation and any purported and belated justifications for characterizing every one of the
2 documents in the Binder as an investigatory file falling within the parameters of Section 6254(f).
3 Based on deposition testimony in this case and the table of contents of the Binder (Exhibit 9 and
4 Muchnick Decl. ¶ 11) Petitioner submits that the investigations contained in the Binder were not
5 undertaken for a law enforcement purpose. (See Section VIII.F. below)

6 *Williams* at p. 356 quoted *Uribe* as follows:

7 To say that the exemption created by subdivision (f) is applicable to any document which a public
8 agency might, under any circumstances, use in the course of [an investigation] would be to create a
9 virtual *carte blanche* for the denial of public access to public records. The exception would thus
10 swallow the rule. (*Uribe, supra*, 19 Cal.App.3d at pp. 212–213)

11 *Williams* at p. 356 unequivocally authorizes a court to determine if a particular document is
12 properly considered part of an investigatory file, or in the instant case, campus police file, which
13 supposedly would by definition render the file exempt, which is ostensibly Respondent's position;
14 however, based on email messages recently produced by Respondent, Chief of Police Bennett was
15 receiving messages concerning public relations strategies related to the Agu death (Exhibit 10)
16 which makes dubious any claims that the campus police inquiries were confined to law
17 enforcement and that each and every one of the documents in the Binder were for law enforcement
18 purposes. Petitioner submits that the investigation conducted by the campus police into the Agu
19 death incident never sought to gather evidence for any type of criminal prosecution and thus was
20 not for true law enforcement purposes. Indeed, presumably the Binder was conveyed to
21 administrators within the university, presumably with cover correspondence. If such
22 correspondence exists, or commentary by administrators about the Binder, does Respondent further
23 contend that such associated documents fall within the Section 6254(f) exemption?

24 In further support of this conclusion, based on the above-quoted deposition testimony of
25 Lieutenant Bowers of the Sheriff's Office (Exhibit 4), the campus police provided only a small
26 percentage of the documents to the Sheriff's Office. This creates a presumption that the purpose of
27 the documents generated were not truly intended for law enforcement purposes. Why hold back
28 relevant documents of the campus police investigation from the Sheriff's Office? Based on
deposition testimony reviewed by Petitioner, from day one there was no focus by the campus police
to pursue any individual as criminally responsible for the death of Agu. (Muchnick Decl. ¶ 10) This
conclusion is corroborated by the fact that the Sheriff's Office apparently was never called upon to
conduct a thorough investigation into the facts and circumstances of Agu's death. (Muchnick Decl.

1 ¶ 11) And the conclusion is further corroborated by the apparent fact that no grand jury was ever
2 convened and no criminal proceedings instituted. (Muchnick Decl. ¶ 12)
3 *Williams* expressly noted that the *Uribe* decision rejected the blanket exemption for investigatory
4 files argument because licensing in that case “was not the primary purpose [for which the files]
5 were compiled” and because they were not “being put to such a purpose at the time of trial.”
6 (*Uribe, supra*, 19 Cal.App.3d at p. 213) By parallel reasoning, law enforcement was not the
7 primary purpose for which the Binder was compiled because most of the files were never even
8 shared with the Sheriff’s Office. Petitioner submits that the true purpose of the interviews and other
9 documents in the Binder was intended to actually deflect criminal and civil responsibility from
10 Respondent as partially evidenced by the withholding of most of the Binder from the Sheriff’s
11 Office, by Chief Bennett’s desire to conceal the contents from a CPRA request (Exhibit 7), and
12 from the emails with public relations points pushing the public away from a sickle cell trait cause of
13 Agu’s death. (Exhibit.10)

14 E. Cases Interpreting *Williams* Confirm that Courts Must Consider the True Nature of the
15 Information and Documents Sought by a CPRA Request When Determining the Applicability of a
16 Section 6254 Exemption.

17 According to *Fredericks v. Superior Court* (2015) 233 Cal App 4th 209:

18 In construing such disclosure requests, the policy of the CPRA requires the courts to consider the
19 information that is being requested, not only the precise type of records that must be provided.
20 (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072 ; *Williams* at 348-49.) Pursuant to section
21 6254, subdivision (f)(1) and (2), even if a requested record (e.g., an investigatory file) is exempt
22 from disclosure, a law enforcement agency may be required to produce to the public the
23 information listed in those provisions (e.g., the “substance” of complaints or requests for assistance,
24 and any recorded description of the “factual circumstances surrounding the crime or incident”).
25 *Williams, supra*, at pp. 360-61.)

26 Thus, the 6254(f) requirement to provide extensive and specific factual details about the documents
27 being withheld acts as a safeguard against the type of abuse of the exemption that Respondent
28 engages in and advocates. The legislature evidently anticipated phony or exaggerated claims of
“law enforcement purposes” and sought to counter such forms of abuse by providing courts (and
CPRA requesters) with the means to expose them. In the instant case, Respondent has shirked its
statutory obligations, partially by strenuously arguing against a Vaughn Index which would have
provided at least some of the Section 6254(f) required information, and partially by Respondent’s
failure to even acknowledge the existence of the Binder until Petitioner placed it front and center
into this proceeding. (Exhibits 5, 6 and 9)

1 In analyzing whether files in the possession of a police department should be disclosed, the
2 *Fredericks* court at page 228 relied on the *Michaelis* court’s reasoning: “Neither party in the case
3 before us expressly briefed the application of the section 6255 balancing test. However, we are
4 required to read related statutory enactments as a whole.” (emphasis added) The *Fredericks* court at
5 page 228 then applied the Section 6255 balancing test to the Section 6254(f) exemption issues
6 concerning police records that were the subject of the dispute before it. (“Under section 6255, an
7 agency’s public interest showing about the reasons for nondisclosure, as opposed to disclosure, may
8 be considered along with the factors supporting the desired request. The overriding issue is
9 “whether disclosure would contribute significantly to public understanding of government
10 activities.”) It is worth repeating: the court applied this public policy inquiry to the question of
11 disclosure of documents where a Section 6254(f) exemption concerning law enforcement files was
12 in dispute.

13 Petitioner has demonstrated that the facts surrounding a) the cause of the Agu death, b)
14 Respondent’s concerted public relations strategy and reaction to the death, c) the attempt to
15 minimize public scrutiny at the time of the death and continuing to this day, d) the national interest
16 in this rash of college football-related deaths, e) the attempts to prevent disclosure under CPRA
17 before and subsequent to the filing of this Petition, and f) the specter of some type of malfeasance
18 on the part of certain persons associated with the football program or associated with the
19 university’s conduct following the tragic event, all point to the conclusion that it is overwhelmingly
20 in the public interest to lay bare the Binder. In other words, it is incongruous to permit Respondent
21 to hand off to the campus police department responsibility for an investigation and then shout
22 “Campus police files, stand back!” with the expectation those files are automatically exempt, in this
23 case and in the future. Most importantly, it is not in the public interest that the Binder be exempt in
24 light of the facts and broader circumstances presented by this Petition and this Motion.

25 Under this reasoning, stated from a slightly different perspective than the court’s analysis in
26 *Fredericks*, the Court should make its own determination on disclosure of purported law
27 enforcement investigative reports by taking into account the specific context of the “crime or
28 incident” and not base its decision on a mere arbitrary naming of the subject documents, such as,
for examples, “police record”, “law enforcement file”, or “investigatory file in the possession of the
police department”, as Respondent presumably will argue.

Although the public agency was seeking to avoid disclosure in the context of private versus public
email accounts, so the context was different, but the California Supreme Court recently stated

1 unequivocally, with citations, that it was "...unlikely the Legislature intended that a public agency
2 be able to shield information from public disclosure simply by placing it in a certain type of file."
3 (internal quotations omitted) *City of San Jose v. Superior Court* (2017), 2 Cal. 5th 608, 624. The
4 extensive statutory interpretation in this case emphasizes that a court is obligated to seek to apply
5 the strong principles of public disclosure mandated by the CPRA.

6 F. Related to the Issue of the Nature of the Sought After Documents, the Purpose for Creating the
7 Sought After Purported Law Enforcement Documents Should Be Taken Into Account.

8 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061 provides further support for Petitioner's Motion
9 from a related but slightly different angle. As stated in *Haynie* at page 1071:

10 [o]ften, officers make inquiries of citizens for purposes related to crime prevention and public
11 safety that are *unrelated* to either civil or criminal investigations. The records of investigation
12 exempted under section 6254(f) encompass only those investigations undertaken for the purpose of
13 determining whether a violation of law may occur or has occurred. (emphasis added.)

14 In the instant case, there was never a violation of law, so none of the investigatory reports should be
15 withheld. In the unlikely event that Respondent, which has the burden of proof, can demonstrate
16 that the campus police ever truly considered that there had been a violation of law, there surely
17 came a point in the Agu investigation when Respondent had no doubt that there had been no
18 violation of law. Under the reasoning of *American Civil Liberties Union Foundation of Southern*
19 *California v. Superior Court*, 3 Cal. 5th 1032, 1042 (2017) all investigatory reports or associated
20 documents files subsequent to such a determination of no violation of law should not be exempted.
21 It is self-evident that Respondent's campus police department's investigation never found a
22 violation or potential violations. The *Haynie* decision, *supra* 26 Cal. 4th at at pages 1070-71 further
23 emphasized:

24 "Our constitution requires that CPRA exemptions be narrowly construed, including the exemption
25 for "[r]ecords of investigations." (§ 6254(f).) Even before Proposition 59 was enacted, we
26 recognized that not every inquiry is an "investigation" in the relevant sense." (emphasis added)

27 G. Language of Section 6255 and Cases Interpreting It Provide Further Support that the Court in
28 Any Section 6254 Case Must Analyze the Facts in Light of Public Policy and the Stated Goals of
CPRA.

According to *Marken v. Santa Monica-Malibu Unified School Dist.*, 202 Cal.App.4th 1250, 1261:

Section 6255, subdivision (a), also permits a public agency to withhold other records if it can
demonstrate "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."

1 In Petitioner's view, this so-called "catch-all" should be a two-way street and its reasoning works
2 against Respondent, whether Respondent eventually relies on the "catch-all" or not. Section 6254(f)
3 is not "absolute", as demonstrated above. For many of the 6254 exemptions, such as 6254(c) for
4 personnel records as described at length in *Marken, supra* at p. 1261, the courts have made clear
5 that the public entity must show that the balance tips heavily in favor of the agency before the
6 exemption will be granted. These closely related statutory provisions should be interpreted in their

7 *Braun v. City of Taft* (1984), 154 Cal. App.3rd 332 offers still another example of this approach.

8 There the court weighed the facts of that case within a section 6254(c) framework to determine
9 whether the disclosure would constitute an unwarranted invasion of privacy that required a
10 consideration of almost exactly the same elements that should be considered under section 6255.

11 This overlapping analysis as between a Section 6254 exemption and a Section 6255 approach was
12 endorsed in *BRV, Inc. v. Superior Court, supra* at page 754. By logical deduction, the instant case
13 permits an application of the balancing test of Section 6255 in considering Respondent's legitimacy
14 in denying disclosure under Section 6254(f) just as it was used in *Braun* and in *BRV, Inc.* in
15 determining the legitimacy of denying disclosure under Section 6254(c). The burden of
16 demonstrating a need for nondisclosure is upon the agency claiming the right to withhold the
17 information. *Id.* at p. 345 As noted in Section VIII.B. *infra*, the public entity always carries a
18 heavy burden to prove an exemption from disclosure.

19 Last, and not least, as recently as 2017 in *American Civil Liberties Union Foundation of Southern*
20 *California v. Superior Court*, (2017) 3 Cal. 5th 1032 the California Supreme Court endorsed a
21 public interest balancing test in determining whether the 6254(f) exemption should be properly
22 invoked. The court again confirmed that there is no blanket rule making police records and police
23 investigation reports out of bounds under 6254(f). The court explicitly stated: "Accordingly, we
24 hold that real parties' process of ALPR scanning does not produce records of investigations,
25 because the scans are not conducted as part of a targeted inquiry into any particular crime or
26 crimes." *Id.* at 1042. Although the underlying facts are distinguishable, and the court concluded
27 that the records might be exempted under Section 6255 (but definitely not under 6254(f)) because
28 under the specific facts it was in the public interest to not disclose the subject documents, the
Supreme Court's holding on Section 6254(f) directly supports Petitioner's thesis that Respondent
can identify no "particular crime", indeed nor any victim. With no crime and no victim, any
alleged rationale under 6254(f) for maintaining the secrecy of the Binder's investigatory documents

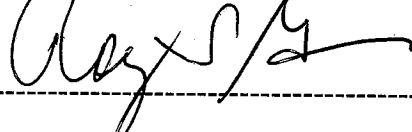
1 evaporates. As importantly, the court's careful analysis renders any argument that the Section
2 6254(f) exemption for law enforcement documents is absolute is exposed as indefensible.

3 Conclusion

4 It is not in the public interest and it is contrary to CPRA's purposes and policies for a public entity
5 like Respondent to conceal investigatory files by merely calling them law enforcement files after
6 having delegated an important investigation relevant to the greater public to its biased and in-house
7 police department. Case law interpreting CPRA empowers a court to determine for itself whether a
8 public entity's files, including law enforcement files, should be exposed to the light of day or
9 should be concealed. The Court should order Respondent to disclose the entire Binder to Petitioner
10 along with any administrative correspondence or comments about the Binder along with any other
11 files the campus police department possesses related to Agu, Agu's death, and Respondent's
12 conduct in the aftermath of Agu's death.

13 Executed in Oakland, California on October 15, 2018

14 Respectfully submitted,

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8 Attorney for Petitioner Irvin Muchnick

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

11 IRVIN MUCHNICK,

12 Petitioner,

13 vs.

14 UNIVERSITY OF CALIFORNIA, BOARD OF
15 REGENTS,

16 Respondent.

) Case No. RG17857115

) HAYWARD DIVISION

) DECLARATION OF IRVIN MUCHNICK IN
) SUPPORT OF MOTION REQUESTING
) ORDER FOR RESPONDENT TO DISCLOSE
) CAMPUS POLICE REPORT (THE BINDER)

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21 Hearing Date: November 21, 2018

22 Time: 9:00 a.m.

23 Judge: Hon. Jeffrey Brand

24 Dep't: 511

25 Petition Filed: April 18, 2017

26 I, Irvin Muchnick, under penalty of perjury, under the laws of California, state as follows:

27 1. Except as otherwise indicated, I make these statements based on my own knowledge. I am
28 competent to make these statements.

1 2. I have been publishing articles since November 2013 about the player altercation that preceded
2 the Ted Agu (“Agu”) death, and since February 2014 about the death itself.

3 3. In my articles I have commented that the overarching public health issue is the problem of non-
4 traumatic deaths in college football conditioning sessions and practices. Submitted with this Motion
5 as Exhibit 1 is a true and correct copy of a 2017 article from the *Journal of Athletic Training*,
6 entitled “NCAA Football Off-Season Training: Unanswered Prayers... A Prayer Answered,”
7 authored by Scott Anderson, head athletic trainer at the University of Oklahoma. The article states:
8 “Since 2000, 33 National Collegiate Athletic Association (NCAA) football players have died in
9 sport: 27 nontraumatic deaths and 6 traumatic deaths, a ratio of 4.5 nontraumatic deaths for every
10 traumatic death. On average, 2 NCAA football players die per season.”

11 4. I have acquired, and at my website published, what I was informed is the text of the table of
12 contents of the 141 pages of University of California-Berkeley (“Cal”) campus police documents
13 that are the subject of the dispute in this Motion. Submitted as Exhibit 9 is a document I typed
14 containing this text. I believe that it is accurate, and my counsel has shared this information with
15 Respondent’s counsel, who has not disputed its accuracy.

16 5. The issue described in Paragraph 2 above gained renewed national attention earlier this year with
17 an investigative report by ESPN on the circumstances of the football conditioning death of Jordan
18 McNair, a student-athlete at the University of Maryland. Submitted with this Motion as Exhibit 2 is
19 a true and correct copy of an article from the ESPN website, headlined “Report finds Maryland
20 culpable in McNair death,” which reports the findings of the first of two formal investigations of
21 the incident by the University of Maryland.

22 6. Last month the sports investigative program *Real Sports*, on the HBO network, broadcast a 20-
23 minute segment focused on the Jordan McNair death, the Agu death, and factual and thematic links
24 between them and other college football conditioning deaths. Submitted with this Motion as Exhibit
25 3 is an unedited DVD copy of the *Real Sports* segment, which includes both an interview with Trey
26 Cheek, a teammate of Agu’s on the Cal football team, and a videotape excerpt of the deposition of
27 former Cal football strength and conditioning coach Damon Harrington (“Harrington”) during the
28 Agu family’s lawsuit against the Respondent.

7. In 2016, a group of faculty members petitioned Cal to suspend Harrington and investigate his
actions in the Agu death according to Exhibit 8, which is a true and correct copy of a July 5, 2016,
article from the *San Francisco Chronicle’s* online version headlined “Faculty petition Cal: Suspend
contract, investigate coach.”

1 8. During the year 2016, I acquired and published numerous transcripts of depositions in the Agu
2 family lawsuit. Some of these deponents were former teammates of Agu's, such as Trey Cheek,
3 whose accounts of the November 2013 player altercation and the February 2014 Agu death differed
4 in obvious ways from the accounts given by Cal officials.

5 9. The campus police report attached as Exhibit H to the Petition showed that Respondent disclosed
6 it to both the *Daily Cal* and to myself.

7 10. Based on my reading of the deposition transcripts in the Agu lawsuit against Cal-Berkeley,
8 from day one there was no focus by the campus police to pursue any individual as criminally
9 responsible for the death of Agu.

10 11. Based on my investigations, including the reading of the deposition transcript of Lieutenant
11 Riddic Bowers, and to the best of my knowledge, the Alameda County Sheriff's Office was never
12 called upon to conduct a thorough investigation into the facts and circumstances of Agu's death
13 beyond what was undertaken by Cal campus police.

14 12. Based on my investigating and interviews and discussions with persons involved with the Agu
15 lawsuit, to the best of my knowledge, no grand jury was ever convened and no criminal
16 proceedings instituted against any person associated with either the student altercation or the Agu
17 death.

18 Executed at Oakland, California on October 15, 2018

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20 Irvin Muchnick
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
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) Case No. RG17857115

) HAYWARD DIVISION

) DECLARATION OF ROY S. GORDET IN
) SUPPORT OF MOTION REQUESTING
) ORDER FOR RESPONDENT TO DISCLOSE
) CAMPUS POLICE REPORT (THE BINDER)

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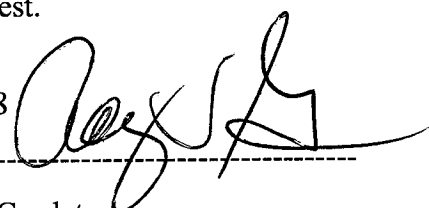
26 I, Roy S. Gordet, under penalty of perjury, under the laws of California, state as follows:

27 1. Except as stated otherwise, I make these statements based on my own knowledge. I am
28 competent to make these statements.

2. I am a Member of the Bar of California and admitted to practice before all courts in California.

- 1 3. I am counsel of record to Petitioner Irvin Muchnick in the above-captioned lawsuit.
- 2 4. Submitted as Exhibit 10 are three email messages recently produced by Respondent involving
- 3 Respondent's efforts to orchestrate for itself a positive public relations veneer shortly following
- 4 Agu's death. In one of these emails Vice Chancellor Wilton asks Chief Bennett "I wonder if we
- 5 should bring Dan M into the picture?" Dan M refers to campus public relations director Dan
- 6 Mogulof.
- 7 5. Respondent did not acknowledge the existence of the Binder, despite Respondent's purported
- 8 cooperation pursuant to a so-called document search "Algorithm" consisting of names and terms
- 9 devised cooperatively by the parties pursuant to a meet and confer procedure. The Algorithm was
- 10 intended to expediently uncover all responsive documents in Respondent's possession.
- 11 6. Submitted as Exhibit 4 is a true and correct copy of excerpts from the deposition transcript of
- 12 Lieutenant Riddic Bowers of the Alameda County Sheriff's Office.
- 13 7. Submitted as Exhibit 5 is a true and correct copy of email correspondence between Michael R.
- 14 Goldstein, counsel for Respondent and myself concerning the disclosure of the 141 pages.
- 15 8. Submitted as Exhibit 6 is a true and correct copy of excerpts from a transcript taken by the Court
- 16 Reporter of the hearing before the Court on August 1, 2018.
- 17 9. Submitted as Exhibit 7 is a true and correct copy of an email message dated March 20, 2018
- 18 from UC Berkeley's Chief of Police Margo Bennett to Vice Chancellor John Wilton concerning
- 19 not making certain documents subject to a PRA request.

20 Executed in Oakland, California on October 15, 2018

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22 Roy S. Gordet

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