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Fee Exempt – Gov. Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

IRVIN MUCHNICK,

Petitioner,

v.

UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS,

Respondent.

Hayward Hall of Justice

CASE NO. RG17857115

OPPOSITION BY RESPONDENT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO MOTION BY PETITIONER REQUESTING ORDER FOR RESPONDENT TO DISCLOSE CAMPUS POLICE REPORT (THE BINDER)

FILED CONCURRENTLY WITH DECLARATIONS: HARRY BENNIGSON, MAGUERITE BENNETT, LIANE KO, MICHAEL R. GOLDSTEIN

Hearing Date: November 21, 2018
Time: 9:00 a.m.
Judge: Hon. Jeffrey Brand
Dep't: 511
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INTRODUCTION

Here, in a nutshell, is Petitioner's argument: the exemption from disclosure codified in Section 6254(f) for law enforcement records is not absolute and the Public Records Act generally imports into all of the Section 6254 statutory exemptions the balancing test from Section 6255, or something like it; therefore, the Court should do so with Section 6254(f) in this case, and any such balancing favors no exemption here. (Memo. at 4:13-18.)

This argument is without merit. Section 6254(f) is not absolute, but only in the limited sense that it contains a *statutory* carve-out, and Petitioner does not (anywhere, including most significantly in the Petition), and cannot, claim The Regents failed to comply with that carve-out. Moreover, the carve-out does not support the giant logical leap Petitioner makes when he argues that importing the balancing test of 6255, or something like it, into 6254(f) is warranted by the fact that other subparts of 6254 contain that balancing test. As demonstrated below, those other subparts he highlights *expressly* import a balancing test. The Legislature, which has demonstrated by the other subparts that it knows how to import the balancing test into any subpart of 6254 when it intends to do so, tellingly omitted it in the case of 6254(f). The rules of statutory construction are an insurmountable barrier to Petitioner's overbroad interpretation. None of the cases Petitioner cites in his moving papers supports his argument and all of them undermine it. (Hence, his "public policy" arguments (voluminous exhibits too) are irrelevant to the Court's adjudication of the Section 6254(f) issue.) For these reasons, the Motion should be denied.

FACTUAL BACKGROUND – THE BINDER AND PETITIONER'S BELATED REQUEST FOR IT

In or about May of this year, long after he filed the Petition, Petitioner first requested from The Regents the disclosure of a "141-page campus police report on the Agu death." (Goldstein Decl., ¶ 2 & Exh. 1.) As it turns out, there is no such "report." It is a binder, compiled by Harry Bennigson, the UC Berkeley Police officer who oversaw the UC Berkeley Police Department's investigation into the circumstances surrounding the death of Ted Agu. (Goldstein Decl., ¶ 3; Bennigson Decl., ¶¶ 1-15.) The binder was produced in the wrongful death civil litigation. (Goldstein Decl., ¶ 4.) Petitioner appears to have gotten a copy of a deposition transcript in

which the examiner referred to the document. (Goldstein Decl., Exh. 1.)

As Detective Bennigson and Marguerite “Margo” Bennett, the UC Berkeley Chief of Police, testify in their declarations, Detective Bennigson oversaw the investigation and he used the binder to maintain all of his investigative materials in a single place for easy reference. (Bennigson Decl., ¶¶ 3, 6-8; Bennett Decl., ¶ 4.) The binder consists of materials that were generated during the investigation – nothing in it postdates the date on which the investigation was closed. (Bennigson Decl., ¶¶ 4-10.)

ARGUMENT

Section 6254(f) exempts the investigatory records of a “police agency” from disclosure. Petitioner does not dispute that the UC Berkeley Police Department is such an “agency.” Instead, he contends that the statute is not “absolute” and, because it is not “absolute,” there is room to graft onto it the balancing test codified in Section 6255, or something like it. He further argues that such a balancing test favors the disclosure of the binder. His argument is without merit.

I. THE BINDER IS EXEMPT FROM DISCLOSURE UNDER SECTION 6254(f)

As Detective Bennigson testifies in his declaration, he compiled the binder to assist him in overseeing the investigation into the circumstances surrounding the death of Ted Agu. The only documents in the binder are those that were part of the investigation itself. In his declaration, he describes, in detail, not only the circumstances under which he prepared the binder, but also its contents. (Bennigson Decl., ¶¶ 3-15.)

Section 6254(f) exempts from disclosure:

> “**Records of** complaints to, or **investigations conducted by, or records of intelligence information** or security procedures **of**, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and **any state** or local **police agency, or any investigatory** or security **files compiled by any** other **state** or local **police agency**, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.” (Emphasis added.)

By its plain language, Section 6254(f) exempts the binder. The binder consists of

"Records of . . . investigations conducted by, or records of intelligence information . . . of . . . any state . . . police agency." They are "investigatory . . . files compiled by any . . . state . . . police agency." In enacting this exemption, the Legislature was concerned about the confidentiality of certain records: "the animating concern behind the records of investigations exemption appears to be that a record of investigation reveals (and, thus, might deter) certain choices that should be kept confidential – an informant's choice to come forward, an investigator's choice to focus on particular individuals, the choice of certain investigatory methods. (*American Civil Liberties Union Foundation of Southern California v. Superior Court* (2017) 3 Cal.5th 1032, 1041.)

II. PETITIONER'S EFFORTS TO PIERCE THE EXEMPTION ARE WITHOUT MERIT

In his moving papers, Petitioner tries to overcome the insurmountable barrier presented by the plain language of Section 6254(f) by offering numerous arguments in favor of ignoring the plain language and grafting a balancing test onto it. None of his arguments has any merit.

A. The Regents Did Not "Hide" the Binder

In a misleading effort to taint the issue, Petitioner begins his brief by suggesting that The Regents hid the existence of the binder: "Respondent did not acknowledge the existence of the Binder despite the fact that the documents clearly were responsive to Petitioner's original CPRA request from 2016 for documents related to the death of Agu." (Memo. at 4:9.5-11.5.)[1]

Frankly, Petitioner's unduly overbroad 2016 CPRA request is what led to all of the confusion about what he was seeking, both before and after he filed the Petition. (*See* Opening Brief by Respondent The Regents of the University of California Re: Suitability of Vaughn Index in this Action [filed March 27, 2018] at 2:18-5:24 & Declarations of Liane Ko, Carrie Schmidt, and Michael R. Goldstein in support of that Opening Brief.) As explained above, it was not until May of this year that he brought the existence of the binder to The Regents' attention as a document he was particularly interested in.

More importantly, and to Petitioner's claim, The Regents was never required to

[1] On page 4 of the Memorandum, the lines of text do not line up with the line numbers on the page. This is because the line-spacing is too narrow. There are 32 lines of text on the page.)

"acknowledge the existence of the Binder." It was only required to determine whether requested records existed and exemptions applied, and to release responsive non-exempt records. (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072.) It did that. (Ko Decl., ¶¶ 2-4 & Exh. 1.) Beyond that, there was no requirement to provide a list of responsive documents: "The case law . . . has never approved or even mentioned a public agency's obligation to create a list and description of documents withheld at the prepetition stage." (*Id.* at p. 1074.) In late August, the Court ordered that The Regents provide a detailed category-by-category report to Petitioner and that Petitioner, in turn, provide detailed objections: "The responses and objections should address specific reasons for production or non-production, and include a factually specific discussion of CPRA, FERPA, the California Constitution, and/or any other basis to support production or non-production of the documents." Such a report would have made specific reference to the binder, as well as the grounds for withholding it, but Petitioner instructed The Regents to cease that effort so Petitioner could expedite the filing of the Motion. (Goldstein Decl., ¶¶ 5-6 & Exhs. 2 & 3.)

B. The Regents Did Not "Hide" Any Other Records

In furtherance of his misleading effort to taint the issue, in a section of his brief entitled "Internal Communications Show That Respondent Prioritizes Secrecy in Such a Way as to Undermine the Objectives of CPRA" (Memo. at pp. 7-8), Petitioner cynically mischaracterizes two sets of emails involving Chief Bennett, contending that she was seeking to hide documents and that she permitted her department to be used "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." (Memo. at 8:24-26.)

As Chief Bennett testifies in her declaration, Petitioner mischaracterizes both sets of emails. (Bennett Decl., ¶¶ 5-9.) In both, she was doing nothing more than conveying information to her direct supervisor. She was also cautioning him to protect the confidentiality of police records, a principle which the Legislature codified through its enactment of Section 6254(f). Petitioner's efforts to make more than that out of these heavily redacted documents is mere speculation.

1 **C. The Regents' Release of the Hinnant/Hale Incident Report Has No Bearing**

2 Petitioner contends that The Regents' release of the Hinnant/Hale incident report to him
3 and the *Daily Cal* amounted to a waiver or "demonstrates that Respondent is able to disclose
4 reports of its campus police involving acts of violence without suffering harm." (Memo. at 9:3-
5 21.) This argument is without merit.

6 Once The Regents releases an exempt record in response to a Public Records Act request,
7 it must release it to any future requestor. (Gov. Code, § 6254.5.) Selective release is
8 impermissible. (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656.) The Regents
9 released the Hinnant/Hale incident report both to the *Daily Cal* and to Petitioner. Liane Ko, the
10 Public Records Coordinator at the campus, explains the circumstances under which that report
11 was released, as well as responding to Petitioner's suggestion that there was something improper
12 about the timing of the release to him. (Ko Decl., ¶¶ 5-16 & Exhibits 2-3.)

13 But the exemptions codified in Section 6254 are permissive, not mandatory. An agency
14 may choose to release an exempt record. (Gov. Code, § 6254, penultimate paragraph: "This
15 section does not prevent any agency from opening its records concerning the administration of the
16 agency to public inspection, unless disclosure is otherwise prohibited by law.") There is no
17 authority – and Petitioner certainly cites none – for the notion that the release of one record in a
18 file constitutes a waiver as to any *other* records in the agency's files. Petitioner's reliance on
19 *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1193 is misplaced. The
20 "obstructionist conduct" the court was referring to had to do with the selective provision of a
21 Vaughn Index, not the selective disclosure of responsive and non-exempt records.

22 Finally, Petitioner's reference to "public policy" is misplaced. As explained below,
23 considerations of public policy have no place in the Court's application of the plain and
24 unambiguous language of Section 6254(f) to the facts of this case.

25 **D. No Section 6254(f) Case May Be Decided on Its Own Facts**

26 In a section of his brief entitled "Each Section 6254 Case Must Be Decided on Its Own
27 Facts" (Memo. at 9:24-10:8), Petitioner cites three cases using such words and phrases as "based
28 upon the facts of those particular cases" and "on balance" and "a case by case balancing process."

The implication, of course, is that Section 6254 cases must be decided on their facts, including a balancing of interests.

This argument, as well as the three cases Petitioner cites to support it, has no place in a motion concerning Section 6254(f). The first case Petitioner cites is *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57. This case concerned Section 6254(b) and the interpretation of "pertaining to pending litigation" in that statute. Petitioner has not pointed to *a single word or phrase* in the plain and clear language of Section 6254(f) that requires, or that the principles of statutory construction permit, reference to anything beyond that plain language. Equally misplaced is Petitioner's reliance on *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212. *Caldecott* is a Section 6254(c) case. By its very terms, Section 6254(c) requires considerations of public policy, because it exempts the release of records "which would constitute an *unwarranted* invasion of personal privacy" and, in assessing whether such an invasion is unwarranted, "we must weigh the public's interest in disclosure against protection of privacy interests." (*Id*. at p. 221.) No such terms in Section 6254(f) require any such assessment. Finally, Petitioner cites *American Civil Liberties Union Foundation of Southern California v. Superior Court*, *supra*, 3 Cal.5th at p. 1032. This is a Section 6255 case, and that statute expressly requires balancing of interests. Section 6254(f) contains no such language.

E. Petitioner Mischaracterizes the Burden of Proof Under Section 6254(f)

In the section of his brief entitled "Public Policy and Burden of Proof under Section 6254" (Memo. at 10:9-11:7), Petitioner contends that "Respondent should feel compelled to admit that it has no countervailing public policy interest to promote." Petitioner misunderstands or mischaracterizes an agency's burden of proof under Section 6254(f). Under Section 6254(f), The Regents has no burden to offer any public policy interest to support its exemption. The Legislature has already done that in its formulation of Section 6254(f): "a narrower but no less important interest is the privacy of individuals whose personal affairs are recorded in government files." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) The Regents' burden in defending its reliance on Section 6254(f) is solely to demonstrate that the responsive records it has withheld meet the description in the statute. The Regents has done that.

None of Petitioner's cases leads to a different result. As explained above, *Caldecott* is a Section 6254(c) case, and inapplicable for that reason. The same is true of *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, another Section 6254(c) (and Section 6255) case. So is *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, Petitioner's third case on this point.

F. "Permissive, Not Mandatory" Does Not Justify Burden-Shifting

In the section of his brief entitled "The Exemptions Under Section 6254 Are Permissive, Not Mandatory and Publishing the Investigative Results Is in the Public Interest" (Memo. at 11:8-12:8), Petitioner contends that the permissive nature of Section 6254 "puts Respondent in a precarious position. If CPRA prohibitions are not mandatory, Respondent has offered not a single rationale for why it is in the public's best interest to prevent disclosure of the Binder." Again, Petitioner misunderstands and mischaracterizes The Regents' burden under Section 6254(f). The permissive nature of Section 6254 does not put the burden on The Regents to justify (e.g., based on public policy) its decision to rely on the exemption and withhold responsive records. Petitioner's argument stands the statute on its head when he does exactly that, transforming the permissive nature of the exemption into a burden on the agency to justify its decision to rely on the permissive exemption. The plain language of the statute does not do that.

Petitioner's cases do not support such an argument either. *Marken* is inapplicable, for the reasons explained above. His reliance on *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282 and *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, "[i]n the context of another CPRA exemption provision" (Memo. at 12:1) – Petitioner is cryptically referring to Section 6255 – is equally misplaced because, as explained above, Section 6255 is a statute which, by its very terms, requires a balancing of interests. Section 6254(f) reflects the Legislature's balance of what it saw as the relevant interests.

G. Under *Williams v. Superior Court*, the Motion Should be Denied

In the section of his brief entitled "The Section 6254(f) Exemption Is Not 'Absolute' " (Memo. at 12:9-14:11), Petitioner contends that *Williams v. Superior Court* is "a seminal case on the meaning and application of Section 6254(f)."

Agreed – including the Supreme Court's response to "the Court of Appeal's decision to engraft the FOIA criteria onto California's statutory scheme." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 349.) Specifically, "subdivision (f), as the Court of Appeal interpreted it, would exempt investigatory records '*only to the extent* that disclosure of the information would' trigger one of the six FOIA criteria." (*Id*. at p. 350.) This was the Supreme Court's response:

> "The most obvious and important objection to the Court of Appeal's interpretation of subdivision (f) is that it finds no support in the statutory language. Our primary task in construing a statute is to determine the Legislature's intent, and '[t]he statutory language, of course, is the best indicator of legislative intent.' . . . In drafting subdivision (f) the Legislature expressly imposed several precise limitations on the confidentiality of law enforcement investigatory records. Clearly the Legislature was capable of articulating additional limitations if that is what it had intended to do." (*Ibid*.) (Citation omitted.)

The same can be said about Petitioner's effort on this motion to graft onto Section 6254(f) a balancing test such as that codified in Section 6255 or any exercise involving the balancing of interests.

Thus, when Petitioner focuses on the statement by the Supreme Court that "it is clear that the exemption is not literally 'absolute' " (Memo. at 12:12 [quoting *Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 346]), he is relying on the Court's observation that, "[i]n the first place, subdivision (f), itself, requires the disclosure of certain specified information. In the second place, section 6259 expressly authorizes the superior court, upon a sufficient showing, to examine records in camera to determine whether they are being improperly withheld." (*Id*. at pp. 346-347.) And, equally clearly, those provisions are plainly stated on the face of those two statutes (Sections 6254(f) and 6259) themselves. None of that can be fairly read to support what Petitioner is arguing in his motion, namely, that because Section 6254(f) is not "absolute," the Court is free to interpret it as it sees fit, even as far as grafting onto it a balancing test such as that codified in Section 6255. In fact, the foregoing excerpt from *Williams* – the one about the

Legislature – clearly states just the opposite. The Court is bound by the statute the Legislature drafted.

As to the Section 6254(f) carve-out itself (requiring the disclosure of certain specified information), Petitioner nowhere (including in the Petition) contends that The Regents failed to comply with that requirement. The Regents is aware of its obligation under Section 6254(f). (Ko Decl., ¶¶ 2-4.) In the case of Petitioner's request for information, The Regents fully complied. (Goldstein Decl., ¶ 7 & Exh. 4.)

As to Petitioner's reference to Section 6259 and having a court "review withheld documents *in camera*" (Memo. at 12:15), as the Supreme Court noted in *Williams*, such a review is appropriate only "upon a sufficient showing." (*Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 347.) Petitioner has made no such showing here. His efforts to do so in the Motion are based on incorrect facts (as the declarations of Chief Bennett, Detective Bennigson, Ms. Ko, and Mr. Goldstein all demonstrate) or mere speculation.

Petitioner's reliance on *Doubleday v. Ruh* (E.D. Cal. 1993) 149 F.R.D. 601 and *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440 does not add anything. *Doubleday* simply relied on *Williams*. If, beyond that authority, Petitioner is also relying on *Doubleday* for its discussion of piercing work product immunity claims, there is nothing in Section 6254(f) itself, or any of the case law expressly interpreting that statute, to support such a reading. *Deukmejian* involved the interpretation of the term "intelligence information." (*American Civil Liberties Union Foundation v. Deukmejian*, *supra*, 32 Cal.3d at pp. 449-452.) Although the binder contains "intelligence information," any such information is contained in these exempt "[r]ecords of . . . investigations conducted by . . . any state . . . police agency" and "investigatory . . . files compiled by any . . . state . . . police agency," which, under the plain meaning of the statute, are exempt independently of whether or not they contain "intelligence information."

Petitioner relies on *Uribe v. Howie* (1971) 19 Cal.App.3d 194, and the Supreme Court's reference to it in *Williams*, for the proposition that "the law does not provide[] that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in

1 a file labelled 'investigatory.'" (*Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 355.) *Uribe*
2 does not help Petitioner. That case involved the release of crop reports that had been compiled
3 for licensing purposes. As the court explained:

4 "In the course of their activities the regulatory agencies of this state accumulate
5 numerous records which may, under certain circumstances, be used in disciplinary
6 proceedings. Virtually any record so kept could be put to such use. To say that
7 the exemption created by subdivision (f) is applicable to any document which a
8 public agency might, under any circumstances, use in the course of a disciplinary
9 proceeding would be to create a virtual *carte blanche* for the denial of public
10 access to public records. The exception would thus swallow the rule. This could
11 not have been the intent of the Legislature." (19 Cal.App.3d at p. 194.)

12 Petitioner's use of these authorities to pry free the binder is based upon his
13 mischaracterization of Chief Bennett's emails (Petitioner's Exhibits 7 & 10) and his contention
14 that "the investigations contained in the Binder were not undertaken for a law enforcement
15 purpose." (Memo. at 12:26-13:5.) The declarations of Chief Bennett and Detective Bennigson
16 defeat both of these speculative claims. (Bennett Decl., ¶¶ 2-9; Bennigson Decl., ¶¶ 3-7, 16-17,
17 19-20.) There is no evidence that any document was simply put into the binder to hide it from
18 public scrutiny.[2] And, as Detective Bennigson testifies in his declaration, the binder consists of
19 documents that were part of his active, specific investigation into the circumstances surrounding
20 the death of Mr. Agu. (Bennigson Decl., ¶¶ 7-15.) Petitioner's only rebuttal is his speculative
21 assertions to support his theory about why the Court should disbelieve Detective Bennigson's
22 sworn testimony that the binder is made up solely of documents comprising his investigation.
23 (Memo. at 13:9-14:11.)[3]
24
25 [2] The emails relating to Chief Bennett (Petitioner's Exhibits 7 & 10), for example, are not there. (Bennigson Decl., ¶ 20.)
26 [3] Petitioner even speculates that "presumably the Binder was conveyed to administrators within the university, presumably with cover correspondence. If such correspondence exists, or commentary by administrators about the
27 Binder, does Respondent further contend that such associated documents fall within the Section 6254(f) exemption?" (Memo. at 13:17-20.) Detective Bennigson did not send the binder to any administrator. (Bennigson Decl., ¶ 18.) It
28 was produced to plaintiffs in the Agu wrongful death civil litigation. (Goldstein Decl., ¶ 4.) The production of a document under such circumstances does not constitute a public release under the Act. (Gov. Code, § 6254.5(b).)

H. *Fredericks v. Superior Court* Does Not Apply to this Case

In the section of his brief entitled "Cases Interpreting *Williams* Confirm that Courts Must Consider the True Nature of the Information and Documents Sought by a CPRA Request When Determining the Applicability of a Section 6254 Exemption" (Memo. at 14:12-16:5), Petitioner contends that the court in *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209 "applied [a] public policy inquiry to the question of disclosure of documents where a Section 6254(f) exemption concerning law enforcement files was in dispute." (Memo. at 15:9-11.)

Petitioner misapplies this case. Fredericks involved an interpretation of Subsection 6254(f)(2), the carve-out from the exemption, which identifies "information" that must be released (among the records, which are themselves exempt). (*Fredericks v. Superior Court*, *supra*, 233 Cal.App.4th at p. 216.) This feature of *Fredericks* is not hidden. The opinion begins this way: "This petition presents novel issues of law regarding a request made under the California Public Records Act (Gov. Code, § 6250 et seq.; CPRA) for disclosure of 'information' found in '*complaints or requests for assistance*' that were received by a local law enforcement agency, over a specified time period (§ 6254, subd. (f)(2))." (*Id*. at pp. 215-216 [emphasis added].) Subsection 6254(f)(2) carves out from the exemption, and requires the disclosure of, "the time, substance, and location of all *complaints or requests for assistance* received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved." (Gov. Code, § 6254(f)(2) [emphasis added].)

The court was addressing "*the interpretation of section 6254, subdivision (f)(2)*, about the temporal and substantive scope of disclosure that a local law enforcement agency must make under the CPRA." (*Id*. at p. 217 [emphasis added].) Moreover, it found the need to undertake such an interpretation only because it found the term "information" to be ambiguous: "the references to 'information' in section 6254, subdivision (f)(1) and (2) are ambiguous and should be read in context." (*Id*. at p. 233.)

As explained above,[4] the Petition has nothing to do with the Subsection (f)(2) carve-out. The Regents fully complied with its obligations under that carve-out provision. In the Motion, Petitioner is arguing that the binder, drawn wholly from the *investigatory file* associated with the circumstances surrounding the death of Mr. Agu, should be invaded and scrutinized. While the term "information" may be susceptible to interpretation – and the court in *Fredericks* interpreted it – the same cannot be said about "[r]ecords of . . . investigations" or "investigatory . . . files" (Petitioner nowhere says so in the Motion) and, in all events, *Fredericks* does not concern either of these terms, much less this main provision of Section 6254(f).

Even as to the Subsection (f)(2) carve-out, Petitioner speculates:

> "Thus, the 6254(f) requirement to provide extensive and specific factual details about the documents being withheld acts as a safeguard against the type of abuse of the exemption that Respondent 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 requestors) with the means to expose them." (Memo. at 14:21-24.)

Significantly, Petitioner cites no authority (legislative history or otherwise) to support this speculative claim. There is no support for it. Instead, Petitioner doubles down and claims "In the instant case, Respondent has shirked its statutory obligations, partially by strenuously arguing against a Vaughn Index, and partially by Respondent's failure to even acknowledge the existence of the Binder until Petitioner placed it front and center into this proceeding." (Memo. at 14:24-28.) The Court agreed a Vaughn Index was inappropriate in this case. (*See* Order dated June 11, 2018 ["ORDER: The court determines that on the facts of this case that it is not appropriate to require the Regents to prepare a detailed Vaughn index."].) And, as already explained,[5] The Regents had no obligation prepetition to expressly catalog any responsive records, including the binder, and The Regents promptly investigated Petitioner's claims about the existence of the "binder" as soon as he brought it to The Regents' attention. So where is the "shirking?"

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[4] *See supra*, at 9:3-7.
[5] *See supra*, at 3:26-4:6.

Petitioner's reference to the *Fredericks* court's reliance on Section 6255 is equally misplaced. In the paragraph preceding the one Petitioner quotes (*see* Memo. at 15:1-9), the court makes it clear that Section 6255 was an additional means by which a *narrower* disclosure – *not a broader one*, as Petitioner is seeking in the Motion – could be justified:

> "Under section 6253.1, the Department has a duty to assist the public in formulating reasonable requests and then to respond accordingly, by communicating the scope of the public information requested to the custodians of its records. The purposes of the CPRA should be honored through such a reasonableness standard, so that not only an agency response, but the request that generates it, are within reasonable boundaries that are appropriate in light of the statutory scheme. Section 6255, subdivision (a), expressly provides that an agency can justify withholding any record, even if no express statutory exemption from production applies, if the agency can show '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.' " (*Fredericks v. Superior Court*, *supra*, 233 Cal.App.4th at p. 228.)

Finally, Petitioner errs in relying on *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608. That case expanded the reach of public records to include personal accounts. By contrast, Section 6254(f) expressly exempts "[r]ecords of . . . investigations" and "investigatory . . . files."

I. *Detective Bennigson's Binder Was Drawn Solely From the Investigatory File*

In the section of his brief entitled "Related to the Issue of the Nature of the Sought After Documents, the Purpose for Creating the Sought After Purported Law Enforcement Documents Should Be Taken Into Account" (Memo. at 16:5-22), Petitioner contends that the binder should be released because "there was never a violation of law" or "there surely came a point in the Agu investigation when Respondent had no doubt that there had been no violation of law." The excerpt Petitioner quotes from *Haynie* speaks of "investigations *undertaken for the purpose of determining whether a violation of law may occur or has occurred*" (emphasis added), which is precisely what the records in the binder are. (Bennigson Decl., ¶¶ 3-7.) The fact that "there was

never a violation of law" (Memo. at 16:11-12) is irrelevant, and contrary to the law: "the exemption for investigatory files does not terminate with the conclusion of the investigation." (*Williams v. Superior Court*, *supra*, 5 Cal.4th at pp. 361-362.) As to "there surely came a point," there is nothing in the binder that postdates the end of the investigation.[6]

J. *Section 6255 Provides An Alternative Basis for* <u>*Exemption*</u>*, Not Disclosure*

In the final section of his brief entitled "Language of Section 6255 and Cases Interpreting It Provide Further Support that the Court in Any Section 6254 Case Must Analyze the Facts in Light of Public Policy and the Stated Goals of CPRA" (Memo. at 16:23-18:2), Petitioner expressly argues that the balancing test of Section 6255 should be grafted onto Section 6254(f). Petitioner misunderstands the application of the CPRA exemptions. Section 6254 and Section 6255 provide independent means by which *an agency* may seek to *exempt* records, not additional means by which a *requester* can *compel disclosure*. (*See Fredericks v. Superior Court*, *supra*, 233 Cal.App.4th at p. 228 ["Section 6255, subdivision (a), expressly provides that an agency can justify withholding any record, even if no express statutory exemption from production applies, if the agency can show '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.' "].)

In support of his argument that Section 6255 should be a "two-way street" (Memo. at 17:1), Petitioner relies on *Marken v. Santa Monica-Malibu Unified School District*, *supra*, 202 Cal.App.4th at p. 1250, *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, and *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th at p. 742. As explained above,[7] *Marken* and *BRV, Inc.* are Section 6254(c) cases and, for the reasons explained there, inapplicable here. So too is *Braun*.

The Legislature has struck a balance in the way it drafted and adopted Section 6254(f). That statute contains no balancing test. It is not the task of the courts to "rewrite the statute." (*Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 354.)

Finally, Petitioner cites *American Civil Liberties Union Foundation of Southern California v. Superior Court*, *supra*, 3 Cal.5th at p. 1032. This is a Section 6255 case, as

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[6] *See supra*, at 2:5-7.
[7] *See supra*, at 7:1-5.

explained above.[8] Petitioner describes the case this way: "the California Supreme Court endorsed a public interest balancing test in determining whether the Section 6254(f) exemption should be properly invoked." (Memo at 17:18-20.) *It did no such thing*. The Supreme Court expressly analyzed the applicability of both statutes separately and independently:

> "Therefore, the bulk collection of raw ALPR [automated license plate reader] data here is not exempt from disclosure under section 6254(f). We do not decide, however, whether an ALPR record that later becomes part of a more targeted investigation might properly be addressed under the investigatory file exemption (§ 6254(f)) which applies to certain 'materials that relate to the investigation' if there is a 'concrete and definite prospect of enforcement proceedings." (*Williams*, *supra*, 5 Cal.4th at p. 362; cf. *Haynie*, *supra*, 26 Cal.4th at pp. 1068–1069 [records of investigation exemption does not require concrete and definite prospect of enforcement].) We next consider whether the ALPR raw data may be withheld under section 6255(a)." (*American Civil Liberties Union Foundation of Southern California v. Superior Court*, *supra*, 3 Cal.5th at pp. 1042-1043.)

CONCLUSION

For the foregoing reasons, The Regents respectfully requests that the Court deny Petitioner's motion.

Dated: November 5, 2018

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[8] *See supra*, at 6:14-17.