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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

IRVIN MUCHNICK,

Petitioner,

vs.

UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS,

Respondent.

Case No. RG17857115

HAYWARD DIVISION

PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION REQUESTING ORDER FOR RESPONDENT TO DISCLOSE CAMPUS POLICE REPORT (THE BINDER)

Hearing Date: November 21, 2018
Time: 9:00 a.m.
Judge: Hon. Jeffrey Brand
Dep't: 511
Petition Filed: April 18, 2017

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I. Introduction and Summary

"And most important, it would effectively exclude the law enforcement function of state and local governments from any public scrutiny under the California Act, a result inconsistent with its fundamental purpose." *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440 at 449–51 (hereinafter "*Deukmejian*")

"The interest of society in ensuring accountability is particularly strong where the discretion invested in a government official is unfettered and only a select few are granted the special privilege. Moreover, the degree of subjectivity involved in exercising the discretion cries out for public scrutiny." *CBS, Inc. v. Block*, (1986) 42 Cal. 3d 646, 655

Respondent has doubled down on its position that if it shouts "Police files, stand back!" then a CPRA requestor, and a court, must both wilt before the grandiose power of the Section 6254(f) exemption. Respondent has not pled in the alternative or offered any backup position if the Court, as Petitioner implores, declines to endorse Respondent's extreme and untenable position that Section 6254(f) is impenetrable. Respondent has ignored Petitioner's most compelling arguments from Section 6254(f) cases, as will be explained below, and focused instead on nit-picking distinguishing aspects of Petitioner's cases and further is unable to rebut Petitioner's main thesis as stated most prominently in the California Supreme Court's recent and unequivocal interpretation of Section 6254(f) in *American Civil Liberties Union Foundation of Southern California v. Superior Court* (2017), 3 Cal. 5th 1032 (hereinafter "*ACLU SoCal*") involving documents in the possession of a law enforcement agency. By offering no fallback if the Court finds that Section 6254(f) is not a fortress for law enforcement to conduct itself without any public scrutiny, such as the fallback of relying on the balancing test of Section 6255(a), Respondent has conceded, as it must, that there is not one public policy argument in its favor.

It's 6254(f), or bust.

Further, Respondent has steered as clear from public policy as possible to the extent that it has conceded and not objected to the uncontradicted and overwhelming evidence of the national interest in football conditioning deaths, including the death of Ted Agu and Respondent's shameful culpability in that death and Respondent's equally shameful attempt to cover up its role in that death.

Respondent has also eschewed another available alternative or backup position, namely that the Court should undertake an *in camera* review. Respondent thus impliedly concedes that such an *in camera* review would prove what Petitioner's Motion has advocated, namely that the Court will see

for itself that the contents of the Binder will further public discussion and will be in the public interest. An *in camera* approach has been waived, along with any possible evidentiary objections to the "voluminous" evidence (using Respondent's term) submitted by Petitioner in support of his Motion.

II. Case Law Clearly Places Section 6254(f) Exemption Burdens on Public Entities.

Under both *Fredericks v. Superior Court*, (2015) 233 Cal App 4th 209 and *ACLU SoCal*, the Court has the right, and Petitioner will further argue the obligation, to force a public entity like Respondent to comply with the CPRA in such a way as to advance the CPRA's objectives and to further the public interest by requiring disclosure of law enforcement documents which presumptively under the CPRA must be disclosed unless Respondent can meet its heavy burden to justify that a particular exemption should apply. As pointed out in Petitioner's opening Memorandum, like the court in *Fredericks,* the Court here can *sua sponte* evoke the balancing approach of Section 6255 whether or not Respondent relies on the balancing approach of Section 6255 as part of its defense.

The quotations at the beginning of the Introduction and Summary make clear that police and their police files must be subject to scrutiny when considering the Section 6254(f) exemption. In *ACLU SoCal* the Supreme Court was not deterred by the fact that the files were in the possession of a police department before scrutinizing the facts in deciding whether or not the police were required to disclose the documents under Section 6254(f). Contrary to Respondent's focus on distinguishing the cases, often on trivial points, the fact that a Section 6254(f) exemption was upheld in the *Deukmejian* case just as it was in *Haynie v. Superior Court (2001) 26 Cal.4th 1061* and in *Fredericks* completely misses Petitioner's point: that the courts are more than willing to investigate facts underlying a law enforcement agency's claim that certain investigatory files should be exempt or not under Section 6254(f) before deciding whether the exemption should apply. It is therefore indefensible for Respondent to claim, as it did in open court, that it had no obligation to review or identify files in the possession of its campus police department – whether Section 6254(f) is a shield to disclosure is not Respondent's decision to make, but rather the Court's.

III. The Process by Which the Disputed Documents Came to Light Bears on the Court's Decision.

It would have been impossible for this Motion to have emerged at all had Respondent succeeded in continuing to sow confusion as to whether the documents even existed. Only after Petitioner presented the record from the Agu family civil lawsuit (whose $4.75 million settlement out of public funds, it must be added, is alone enough of a predicate for enhanced public scrutiny of

Respondent's handling of the death) did Respondent acknowledge that there is indeed a "binder" containing the mysterious 141 pages. With exceptional cognitive double-jointedness, Respondent now claims that somewhere along the way it had even disclosed the parameters of the documents' contents, as required when seeking to assert a 6254(f) defense to disclosure. Respondent did no such thing.

IV. *ACLU SoCal* Had a Specific Holding with Respect to the Applicability of Investigatory Files.

In *ACLU SoCal* the California Supreme Court found that the Section 6254(f) exemption would not prevent disclosure of investigatory files in the possession of law enforcement. This finding eviscerates Respondent's main thesis, even if the court there provisionally held that under Section 6255 the public policy weighing process came out in favor of the agency, so the files were not ordered released. However, even that conclusion was subject to caveat, as the court remanded to the lower court for further factual determination and analysis to see if there was a form in which the documents could be disclosed to that requestor in order to fulfill the objectives of the CPRA.

V. Respondent, Which Earlier Relied on Section 6255's Catch-all, Now Turns Its Back on It.

In responding to this Motion, Respondent has eschewed Section 6255 and has thereby conceded that it has not even a single public policy reason that weighs in its favor. But it was not always so. In Respondent's brief entitled "Opening Brief by Respondent the Regents of the University of California re: Suitability of Vaughn Index in this Action", filed with this Court on March 27, 2018, Respondent expressly relied on the catch-all exemption of Section 6255(a)'s balancing test. This was before it came to light that Respondent was concealing the Binder from the world, including from this Court. In that motion Respondent expressly relied on Section 6255's balancing test, but only in passing, with virtually no development of the alleged specific facts of Respondent's now essentially abandoned dubious claims related to a purported invasion of privacy of the deceased Ted Agu and Ted Agu's family. Thus, Respondent is fully cognizant of the balancing test of Section 6255(a), but evokes it inconsistently, and when cornered by the overwhelming evidence and the overwhelming public policy against its flouting of the CPRA in connection with the Binder, has here doubled down on its untenable position of the sanctity and inscrutability of police files, a position that furthers no objective other than a cover-up.

VI. An Exempted Law Enforcement Inquiry under Section 6254(f) Necessarily Involves Suspected Violations of Law, and the Agu Death Incident Had None.

Respondent relies heavily on *Haynie v. Superior Court* (2001) 26 Cal.4th 1061 in its Response. *ACLU SoCal, supra* at pages 1040-41 goes to great lengths to explain its interpretation of the

Haynie holdings in applying them to the facts before it. According to *ACLU SoCal* at page 1041, "*Haynie* at least implies that an inquiry must be somewhat targeted at suspected violations of law (*see Haynie, supra,* 26 Cal.4th at p. 1071) to qualify as an 'investigation' under section 6254(f). The mere fact of an inquiry is not enough."

ACLU SoCal at page 1041 further quoted as follows from the *Haynie* decision:

> Often, officers make inquiries of citizens for purposes related to crime prevention and public safety that are unrelated to either civil or criminal investigations. The records of investigation exempted under section 6254(f) encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred. If a violation or potential violation is detected, the exemption also extends to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency. Here, the investigation that included the decision to stop Haynie and the stop itself was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission. Records relating to that investigation are exempt from disclosure by section 6254(f). (emphasis added)

Thus, as interpreted by the California Supreme Court, the most important takeaway from both *Haynie* and *ACLU SoCal* for purposes of this instant Motion is that there are many situations where records of police investigations shall not be exempt under section 6254(f) and in the instant case it is up to the Court to make these determinations based on the facts presented by Respondent and Petitioner. Here Respondent has intentionally declined to provide the Court with the underlying facts of the Binder other than several self-serving comments with no objective reference to facts. In failing to provide adequate relevant information concerning the contents of the various documents in the Binder, as was its duty under the express terms of section 6254(f). Respondent must be forced to lie in its hidden bed. The entire Binder should be ordered disclosed.

As further stated in *ACLU SoCal* at page 1041 in explaining the *Haynie* holding:

"As we recognized in *Haynie*, however, 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." Thus, contrary to Respondent's arguments, certain public policy arguments are to be considered in determining whether investigatory documents should be disclosed, or not.

Most importantly for purposes of this Motion, the *ACLU SoCal* court examined the facts surrounding the documents and the police department's reasons for withholding, and refused to issue a pass merely because they were law enforcement investigation records. This completely

contradicts Respondent's entire defense, destroys it in fact. Further, as seen from the above quote, the court naturally considered policy reasons for why certain records should not be disclosed. In this case, Respondent has pointed to not a single policy reason, either in general or with reference to the specific facts of this case, that justified the ongoing concealment of the Binder. Nor has Respondent explained its conclusion that Section 6254(f) by its own language comprises all of the policy reasons considered by the legislature at the time of its enactment. Furthermore, there is nothing in its express language, nor has Respondent cited any legislative history, that forbids a court from considering policy reasons or, for that matter, the section 6255 catch-all in its own discretion. In other words, Petitioner's examples of cases where the 6255 catch-all or policy reasons were applied to other 6254 exemptions besides 6254(f) are not held by any court to be considered out of bounds in taking an approach that fulfills the goals of the CPRA and the California Constitution when considering the applicability of Section 6254(f).

ACLU SoCal at page 1042 ultimately held pursuant to its extensive Section 6254(f) inquiry as follows:

"Accordingly, we hold that real parties' process of ALPR scanning does not produce records of investigations, because the scans are not conducted as part of a targeted inquiry into any particular crime or crimes."

Applying this holding to the instant case, at a bare minimum, this Court and Petitioner are entitled to reject the uncorroborated and self-serving statements of Respondent's police department personnel concerning the documents that they created related to the investigation of the incident that led to Agu's death and its aftermath. Thus, Respondent was never justified in making its own biased decision to conceal campus police files on Section 6254(f) grounds or any other grounds, and Respondent should not be heard to now claim that the Court lacks the right to determine for itself whether or not the documents fall within the four corners of any exemption, including under both Section 6254(f) as well as Section 6255's balancing test.

Respondent's attempt to distinguish Petitioner's various cited cases on narrow grounds misses this point completely. The facts of cited cases like those Petitioner has cited are never going to be identical to a case at hand and Respondent's attempts to create distinctions fail to comprehend the legal principles based on the primary goals of the CPRA. There is no running away from this conclusion and it obligates the Court to analyze the specific facts surrounding the Binder, which analysis Respondent must lose because Respondent has in its desperation gambled away any

fallback courses of action for the Court by refusing to provide any legal arguments on this point nor any facts other than self-serving and uncorroborated statements by certain campus police personnel. To the extent that *Haynie* is part of a body of case law sending mixed signals, as even acknowledged in *ACLU SoCal* at pages 1042-43, the Court needs to come out on the side of disclosure, the central theme underlying the entire CPRA.

As stated in *Caldecott v. Superior Court.* (2015) 243 Cal.App.4th 21, 218-219:

"The CPRA embodies a strong policy in favor of disclosure of public records...." [citation]"Statutory exemptions from compelled disclosure are narrowly construed. [Citation.]"... "'[T]he government agency opposing disclosure bears the burden of proving that one or more [of the exemptions] apply in a particular case.' [Citations.]" (*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63; *see* § 6255, subd. (a).)

The text here concerning public policy obviously relates to all exemptions under the CPRA – there is no exclusion for sub-section f of Section 6254 and any attempt to isolate sub-section f from the rest of the exemptions is misguided.

VII. Petitioner's Initial CPRA Request Encompassed the Documents in the Binder as Did the Agreed Upon Search Algorithm

Respondent would have the Court believe that Respondent had no obligation to search for or disclose the Binder until Petitioner belatedly (in Respondent's view) made a specific request for it. First of all, there can be no doubt that the many documents comprising the Binder fall squarely within the four corners of Petitioner's original Public Records Act request of 2014 concerning Agu and the Agu incident. So for this reason alone this defense is ridiculous. Secondly, Respondent was required to collaborate with Petitioner from the outset. The parties dispute what should have occurred or actually did occur prior to Petitioner's filing of its Petition. In any case, as stated in the Court's "Tentative Ruling for May 17. 2018 Hearing re Vaughn Index": "CPRA'S PROCEDURAL REQUIREMENT – FOCUSING THE REQUEST The Regents is required to assist Petitioner in making a focused and effective request. (Gov. Code 6253.1(a).)" In that Tentative Order were listed the statutory exemptions asserted by Respondent, none of which is Section 6254(f). Petitioner has always contended, and now has further support for this contention, that Respondent has failed to sufficiently collaborate with Petitioner in focusing Petitioner's request and locating all responsive documents based on the language of the original request, both pre-Petition and post-Petition. How could Petitioner have specifically requested the Binder if Respondent concealed every aspect of its existence? It is also a mystery how the existence of the Binder did not come to

light despite the use of the so-called search Algorithm that the parties jointly devised and supplemented pursuant to meet and confer post-Petition.

Respondent repeatedly relied on FERPA restrictions in its refusal to disclose documents and to prepare a Vaughn Index. But FERPA § 1232g(b)(6)(A) expressly excludes campus police files from these privacy restrictions, so Respondent has no excuse for concealing these files in the possession of its campus police department.

Indeed, as was pointed out in Petitioner's opening Memorandum, and Respondent's unsubstantiated protestations to the contrary, Respondent never complied with the express requirements of Section 6254(f) in that Respondent never provided to Petitioner or to the Court the information required when a public agency relies on the 6254(f) exemption. Incredibly, Respondent appears to now be claiming that the passing reference to Section 6254(f), with no substantive details, in one of the formal responses of Liane Ko of Respondent's PRA office both acknowledges for all required purposes the existence of the Binder back in 2016 and also constitutes compliance with the conveying of the detailed information required when law enforcement withholds information from a requestor based on Section 6254(f). This claim is frivolous. It follows that any defense based on a claim that Petitioner was not sufficiently specific in his requests, either pre-Petition or post-Petition, is without merit and should be rejected.

Furthermore, the exchange between counsel cited by Respondent as acting as some form of waiver is equally without merit in light of the fact that the documents and the detailed information required of the Section 6254(f) exemption should have been provided years ago; Petitioner in that exchange was seeking to prevent Respondent from again grasping at straws that would enable it to claim that this Motion was not "ripe" and should be postponed. At this point, moreover, for the reasons stated in the opening Memorandum with Exhibits and the reasons stated in this Reply, Petitioner is entitled to all of the documents in the Binder, not just the detailed information related to the documents that Respondent should have provided years ago if Respondent had been acting properly pursuant to CPRA's requirements and purposes.

VIII. <u>The Release of the Police Report on Hinnant-Hale Incident Demonstrated that Respondent Releases Campus Police Department When It Feels Like It – the Timing of the Release is Irrelevant</u>

Petitioner is befuddled by the purpose or import of Respondent's Liane Ko Declaration submitted with Respondent's Response to the Motion with respect to the circumstances surrounding the disclosure and timing of the police report concerning the Hinnant-Hale incident. Petitioner's

Motion pointed out that the release of a different police report by the campus police to third parties as well as to Petitioner underscored a contradiction in Respondent's PRA practices concerning police files and their disclosure or non-disclosure, as the case may be. There is nothing in Ms. Ko's Declaration that addresses this inconsistency. This inconsistency under *State Board of Equalization v. Superior Court*, (1992) 10 Cal. App. 4th 1177, 1192 is evidence of obstruction when similar types of documents are inconsistently withheld from disclosure without a rational basis.

IX. Self-Serving Mere Opinion Statements by the Campus Police Personnel Are Undermined by Documents Produced by Respondent.

The only hint of an effort to engage facts and policy are in the declarations of two Berkeley campus police officers, and they are unavailing. Harry Bennigson simply makes circular, self-conclusory assertions of the department's noble intents. Police Chief Marguerite Bennett unsuccessfully attempts to dodge a central theme of the records of email messages: the placement of both herself and a lieutenant under her command in conversations involving not law enforcement, but public relations maneuvers in the wake of the Agu death. (Declaration of Irvin Muchnick and Exhibit 11) As stated in the Declaration of Harry Benningson: "The UC Berkeley Police Department's involvement in the events related to Mr. Agu began on February 7, 2014, when Stephanie Martinez, an officer in the Department, was dispatched to the report of a male subject who was reported to have had a pre-existing medical condition and was having a medical episode near the North tunnel of the Cal Memorial Stadium, which is within the Department's jurisdiction."

Thus, from the very first moment of the "investigation," it was clear that the investigation was not going to be "...part of a targeted inquiry into any particular crime or crimes." *Haynie, supra,* at p. 1071 There is no testimony or documents from any of Respondent's declarants to the contrary. Besides the use of the refrain in the declarations that "Mr. Muchnick is in error," there has been no testimony or evidence that contradicts Petitioner's assertions that the entire investigation was conducted by an in-house band in such a way as to protect the interests of Respondent and was never intended to determine any person's criminal culpability. Hypothetically, Respondent could produce portions of the Binder or testimony that would support a conclusion, not yet asserted by Respondent, that the investigation, or parts of it, was a "targeted inquiry into any particular crime or crimes" but has intentionally declined to do so in its Response or anywhere else. It should be emphasized that in this situation Respondent cannot again hoist FERPA as a reason why Respondent cannot produce any portions of the documents the way it did in the pleadings surrounding the production of a Vaughn Index.

There was an objective fact presented by Petitioner's Motion that Respondent does not rebut or even attempt to address, namely the fact that only a narrow portion of the Binder was submitted to the Alameda County's Sheriff's Department. Accordingly, Petitioner's conclusion has not been rebutted that Respondent was not truly seeking to pursue an objective criminal investigation or to bring any person to justice, or to have the full benefit of the larger resources of the Sheriff's Department. This leads to the conclusion that not all of the documents in the Binder were truly intended for law enforcement purposes. If a particular investigatory document was not intended for such a purpose by logical deduction it should not have the benefit of the 6254(f) exemption.

X. Respondent Has Declined to Alternatively Seek to Protect Truly Sensitive Segregable Portions.

CPRA holds that if only part of a record is exempt, the agency is required to produce the remainder, if segregable. (§ 6253, subd. (a) and 6257) In other words, "the fact that a public record may contain some confidential information does not justify withholding the entire document." *State Bd. of Equalization v. Superior Court,* (1992) Cal.App. 4th 1177, 1187. *See also Deukmejian* at page 453, fn. 13

In the unlikely event that the Court is receptive to what Petitioner submits are Respondent's brief's distractions, omissions, misrepresentations and unsuccessful attempts to distinguish cases and to minimize judicial holdings on the truly important CPRA issues, then the Court should still determine if there are any segregable portions of the Binder that should be disclosed. Respondent, with its all or nothing approach seeking to conceal all documents regardless of how it will advance the public interest, has not even suggested such an approach that conceivably could shed at least some light on Respondent's actions vis-à-vis the Agu death and its aftermath. For Respondent, the cover-up is paramount.

As stated in *County of Los Angeles v. Superior Court* (2016) 2 Cal 5th 282, 300:

"'[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." (*CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 653.) Instead, government agencies must disclose "[a]ny reasonably segregable portion" of a public record "after deletion of the portions that are exempted by law. (§ 6253, subd. (a).)"

XI. Conclusion

It will be in the public interest for the contents of the Binder to see the light of day. Respondent has made no showing that it will be harmed by the disclosure and no showing that it is not in the public interest to have the contents revealed so that the conduct of a public university and its officials can be scrutinized. Respondent has not met its burden. Section 6254(f) case law views this exemption

as an integral portion of the CPRA intended to meet the goals of the CPRA, not to unjustifiably enable law enforcement agencies, or in this case a public university, to evade the goals and principles of the CPRA. The Court should order that the Binder be produced immediately.

Respectfully submitted,

Nov. 9, 2018

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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IRVIN MUCHNICK,

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UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS,

Respondent.

Case No. RG17857115

HAYWARD DIVISION

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

Hearing Date: November 21, 2018
Time: 9:00 a.m.
Judge: Hon. Jeffrey Brand
Dep't: 511
Petition Filed: April 18, 2017

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

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

2. In paragraph 9 of her declaration in support of Respondent's brief in opposition to this Motion, Marguerite Bennett, chief of the Berkeley campus police, stated: "Mr. Muchnick is in error when

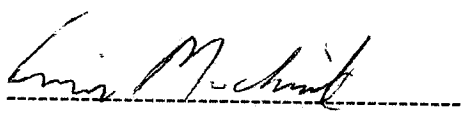
he implies that Mr. Wilton's question [in an April 21, 2014 email] was directed to me." Chief Bennett herself is in error. I implied nothing. I quoted the email, of which Chief Bennett was the first of two listed recipients, and I submitted the full document as Exhibit 10.

3. The email message cited in the above paragraph was one of numerous examples of evidently public relations-themed email messages among various UC Berkeley administrators in which Chief Bennett and another Berkeley campus police officer, Lieutenant Marc DeCoulode, were recipients, according to Respondent's nearly 400-page production to Petitioner in September. The following paragraphs are based on my notes from my reading of those documents. With few exceptions, the bodies of these emails were redacted in the September production under a claim of attorney-client privilege. However, the dates, times, senders, recipients, subject lines, and names of attached files were preserved.

4. Chief Bennett and Lieutenant DeCoulode were among the recipients of approximately ten email messages, from April 21, 2014, through April 23, 2014, with the subject line "Re: Ted Agu:- Cause of Death (Statement, Talking Points and Q&A)."

5. In addition, Chief Bennett and Lieutenant DeCoulode were among the cc recipients of an email, at 4:47 p.m. on April 21, 2014, from Christopher Patti, the chief campus counsel, to Wesley Mallette, a public relations official in the athletic department. The subject line was "Re: Ted Agu:- Cause of Death (Statement, Talking Points and Q&A)," and there was an attached file named "Talking Points and Q&A - Ted Agu - Coroners Report CMP Comments- 04114.docx." A true and correct copy of this email message, as it was presented in Respondent's September production, is attached as Exhibit 11.

Executed at Berkeley, California on November 8, 2018



Irvin Muchnick