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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 RESPONSE BRIEF OF PETITIONER RE RESPONDENT'S MOTION FOR PROTECTIVE ORDER RE PREPARATION OF A VAUGHN INDEX Hearing Date: April 26, 2018 Time: 9:00 a.m. Judge: Hon. Kimberly E. Colwell Dep't: 511 Petition Filed: April 18, 2017

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I. Introduction and Summary

In a feeble attempt to avoid public accountability for payment of $4.75 million to settle a lawsuit for the negligent death of a student-athlete in the Cal Golden Bears intercollegiate football strength and conditioning program, Respondent UC Regents ("Respondent") has misrepresented the pre-litigation communications of the parties and made overbroad claims of privacy exemptions under the Federal Educational Records Privacy Act, 20 U.S.C. § 1232g, *et seq.* ("FERPA") to justify its refusal to produce a Vaughn Index ("Vaughn") that would enable Petitioner and this Court to evaluate the legality of Respondent's meager document disclosures under the California Public Records Act. Incredibly, Respondent's FERPA arguments fail to cite even one FERPA decision from any jurisdiction in support of Respondent's position. Respondent's Motion for a Protective Order (the "Motion") should be denied in its entirety and Respondent should be ordered to produce a sufficiently detailed and comprehensive Vaughn Index within 30 days from the date of the Order by the Court requiring same.

II. Nature of a Vaughn Index in Relation to This Petition

The Vaughn is a fundamental tool of courts governing litigation such as this one under the California Public Records Act ("CPRA") and the Freedom of Information Act ("FOIA"). *ACLU of Northern California v. Superior Court* (2011) 202 Cal. App. 4th 55, 82-83. Petitioner will explain below why FERPA emphatically does not preclude production of a Vaughn. Privacy exemption claims under FERPA are, like any other privacy claim (such as the protection of a law enforcement record in an open investigation), routine line items appropriately reflected in a Vaughn, as well as in justifiable redactions of produced documents. Not to be overlooked, Respondent has the burden to prove that an exemption should apply. *American Civil Liberties Union of Northern California v. Superior Court*, (2011) 202 Cal. App. 44h 55, 81.

Petitioner concedes that the California courts have held that the CPRA does not "require" a government entity to prepare a Vaughn. However, Respondent uses this truism to further argue without justification that in this case a Vaughn would be "prohibited". This ridiculous proposition defies common sense and is not supported by the policy behind the CPRA and is not supported under the facts of this case, as will be explained below.

III. All of Petitioner's Requests Seek Public University Documents Concerning Incidents Central to Petitioner's Investigative Goal of Shining Light on the Actions of Respondent's Coaches and High Level Administrators

Before addressing FERPA case law in respect to a Vaughn, it is necessary to correctly frame the dispute other than by Respondent's distorted unilateral effort to mischaracterize it. Respondent wrongly and unjustifiably contends that Petitioner's CPRA undertakings are intended to violate the privacy of three individual students. A plain reading of Petitioner's CPRA requests set forth in the Petition demonstrates that the CPRA requests are part of Petitioner's diligent investigative journalism to obtain information about specified *campus incidents* in which there are, admittedly, *references to particular students*. There was no intention to obtain private information about these students or to invade their legitimate privacy rights. The FERPA discussion below will discuss the types of information about these students that could be protected (e.g. grade transcripts). But even if their names were deemed by the Court to be properly protected via some form of redaction procedure, CPRA does not contemplate wholesale cover-up of controversial events at public agencies simply because the name of a student lands in the middle of the account.

IV. Respondent Distorts the Substance and the Tenor of the CPRA Communications Prior to the Filing of this Lawsuit

Respondent provides a distorted view of the content of correspondence and discussions between Respondent's PRA Office and Petitioner with the apparent goal of diverting the Court to the erroneous conclusion that Respondent is entitled to some concessions or to an impermissible narrowing of the relevant issues of this dispute.

Petitioner urges the Court to decline any invitation to accept Respondent's slanted version of the pre-litigation background of this case. Exhibits to the Petition provide a comprehensive documentation of the correspondence during the administrative phase of this dispute. The details of correspondence involving Petitioner and his diligent and good faith attempts to force compliance with CPRA prior to the filing of the present lawsuit are not worth re-hashing at this juncture; suffice it to say that Petitioner disputes Respondent's characterizations of Petitioner's attempts to require compliance which were sufficiently summarized in the Petition with its Exhibits such that it was clear that Petitioner had exhausted his administrative remedies prior to filing suit. And Respondent's insinuation that Petitioner had some sort of obligation to meet and confer before filing his Petition is without basis in the law.

V. Respondent Omits Elements of the Meet and Confer Procedure Prior to the Filing of this Motion for a Protective Order

First, Petitioner concedes that elements of the meet and confer process after the filing of the Petition were constructive in the sense that it did result in Respondent's undertaking to search records with specific reference to names and criteria Petitioner requested. Beyond that, Respondent's account is distorted and misleading.

As part of this meet and confer procedure between counsel subsequent to the filing of the Petition, contrary to Respondent's assertions, there were no commitments or rejections as described by Respondent. The purported claim that Petitioner rejected an offer to permit Petitioner to inspect documents under a protective order is skewed. Respondent conveniently leaves out the fact that Respondent's idea was merely "floated" as a possibility, pending authorization that had not yet been obtained by counsel for Respondent, and there was no concrete offer permitting Mr. Muchnick to view the documents. (Gordet Declaration, ¶3) This current effort to exploit pre- or post-litigation communications as some form of evidence of intransigence or some concocted but under any circumstances irrelevant character flaw of Petitioner is a misguided attempt to buttress a

spurious argument in favor of a FERPA blanket defense that somehow should preclude the preparation of a Vaughn. Moreover, had Petitioner accepted an offer to review documents under a protective order, assuming hypothetically it had eventually been authorized by Respondent, this would have turned on its head the burden of proof by requiring Petitioner to get out from under the confidentiality obligations he hypothetically would have agreed to. No, Respondent is the party with the burden to show that the documents sought fall within a claimed exemption.

Respondent's Motion attempts to distract the Court into judging a purportedly tangled procedural history when in fact there has been a series of straightforward requests for documents, denials of those requests, and now, most importantly, a clearly articulated Petition under CPRA. Similarly, Respondent has injected the essentially irrelevant issue of its disclosure of some limited number of documents just before the filing of this Motion that Respondent claims it belatedly obtained after obtaining authorization from the deceased student athlete's family. (Gordet Decl., ¶8) These document disclosures are admittedly incomplete because Respondent further admits that there are other documents mentioning other students that it is not disclosing under FERPA, assuming *arguendo* that the limited disclosed documents related to the deceased Ted Agu are complete, which Petitioner seriously doubts.

Respondent apparently seeks to divert the Court and public attention from what this case is really about: the investigation by a diligent and committed investigative journalist with a proven track record into the cover-up of the tragic and unnecessarily premature death of a student athlete, an episode squarely inside the tragic recent history of numerous death and sexual abuse scandals and cover-ups at National Collegiate Athletic Association programs. (Muchnick Declaration, ¶¶ 5 and 6) The Court should apply CPRA here so as to maximize public agency transparency as intended by the statute and by the public policies that motivated the legislature to enact CPRA decades ago.

VI. False Pretenses for This Motion – Unfulfilled Promises

At the February 27. 2018 Case Management Hearing, Respondent's counsel represented in open Court that he could not reveal either *the number of documents being withheld* or even *a ballpark range of the number of documents being withheld*, because, he contended, such a disclosure is barred by FERPA. (Gordet Decl., ¶4) Counsel further represented this would be explained in Respondent's brief. (Gordet Decl. ¶5) To the extent that the Court might have been puzzled or even intrigued by this promise, Petitioner points out that Respondent has not included a single word, no less a complete argument, addressing this novel and intuitively absurd position.

VII. Purpose of CPRA and the Applicable Burden of Proof

As stated in *County of Santa Clara v. Superior Court*, (2009) 170 Cal App .4th 1301, 1329 (quotations omitted):

> The CPRA was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. [citation] Legislative policy favors disclosure. [citation} All public records are subject to disclosure unless the Public Records Act expressly provides otherwise." [citation] ….
> If the records sought pertain to the conduct of the people's business there is a public interest in disclosure. The weight of that interest is proportionate to the gravity of governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate. [citation])
> The existence and weight of this public interest are conclusions derived from the nature of the information. [citation]) As this court put it, the issue is whether disclosure would contribute significantly to public understanding of government activities. [citation]

"All public records are subject to disclosure unless the Public Records Act expressly provides otherwise." (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 751

The "expressly provides otherwise" of course refers to the various statutory exemptions, such as for law enforcement records (Cal. Gov't Code Section 6254(f)) In refusing to disclose certain documents or to even prepare a Vaughn in any format, Respondent has relied exclusively on one statute, FERPA. Curiously, Respondent states that it relies on this one

statutory exemption at page 7 of its brief, but confusingly attempts to vaguely refer to and bootstrap reliance on California Constitution privacy provisions. It is all to no avail.

VIII. Respondent Argues that FERPA Controls but Fails to Address the FERPA Case Law

In basing virtually its entire legal position on FERPA, Respondent cites only to several sections of the FERPA statute. Respondent seemingly would have this Court believe either that Respondent is unaware of this body of case law or that Respondent contends that it is irrelevant that the scope and application of FERPA's statutory language has been interpreted by numerous Federal and state courts.[1]. Submitted as Exhibit 1 to the Gordet Declaration is the relevant portion of an email thread between counsel concerning FERPA. (Gordet Decl. ¶7) In an attempt to expedite the progress of this lawsuit to a just resolution, after Respondent's counsel informally raised the issue of FERPA as preventing the release of the requested documents, Petitioner's counsel voluntarily provided to Respondent's counsel a short summary of relevant case law concerning FERPA based on Petitioner's counsel's independent research, and also explained why FERPA was inapplicable. Gordet Declaration ¶ 7, Ex.1) Incredibly, Respondent's Motion does not even acknowledge the holding of even of one of these cases shared with Respondent's counsel months ago, nor does Respondent's Motion cite to any FERPA case law whatsoever. Respondent should be held to have waived its right to argue in a Reply Brief against Petitioner's case law, cited below and also to some extent referenced in Exhibit 1, the email setting forth some applicable FERPA case law. The Court should not condone such ambush litigation tactics – Respondent has the burden of showing that its purported FERPA exemption defense is applicable under the facts of this case and should have presented its authorities in its Motion.

[1] Furthermore, in a conversation outside the courtroom after the first Case Management Hearing, counsel for Respondent said to Petitioner's counsel that Respondent's Office of General Counsel has attorneys with expertise in FERPA issues and he intended to consult with them on issues related to the application of FERPA when a student is deceased. (Gordet Decl. ¶6)

IX. FERPA Cases Relevant to the Issues of this Lawsuit Support Petitioner's Contention that a Vaughn Index Must Be Prepared

Thus, it has been held that FERPA applies to student records related to such things as grades but not to emails generated by university officials and educators related to an incident with broad university and public implications. *DeFeo v. McAboy*, 260 F. Supp. 2d 790 (E.D. Mo. 2003) (campus police department law enforcement records, generated as the result of an incident in which one student struck another with his automobile, were expressly held not to be "education records" within the meaning of FERPA.)

As noted by the court in *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991), the function of FERPA is "to protect educationally related information." "The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release educational information." *Id.* at 590 The court concluded that the plaintiff editor was entitled to complete information concerning the university's board of regents and its administrative entities, including the safety and security department, and could not exercise discretion in determining what records to release. A result similar to *Bauer v. Kincaid* was reached in *Student Press Law Center v Alexander* DC Dist Col, 778 F. Supp. 1227 (1991) where the Federal Court rejected claims that FERPA prevented the university from disclosing records related to students and law enforcement.

In *Ellis v. Cleveland Municipal School Dist.*, 309 F. Supp. 2d 1019, 1024 (N.D. Ohio 2004), the court held that incident reports related to substitute teachers' alleged corporal punishment of students, student and employee witness statements, and information related to subsequent discipline of substitute teachers did not contain information directly related to a student so as to be protected from discovery under FERPA. The court held that FERPA applied to disclosure of student records but not to teacher records that tangentially related to students. Again, Petitioner

in the instant case seeks to shed light on the conduct of the involved coaches and trainers, as well as the conduct of Cal administration officials who sought to address relevant issues in the aftermath of the two incidents at issue.

As noted in Section V, *supra*, Respondent's Motion refers to recently disclosed documents obtained pursuant to authorization from a deceased student's family, documents that Respondent was withholding previously. This is puzzling because it is widely recognized that FERPA privacy rights of a student do not apply following the death of that student. See Exhibit 2 to the Gordet Declaration, consisting of a Department of Education policy letter.

In conclusion, in the instant case, any documents, including email messages of coaches and administrators related to student eyewitness accounts or student conduct in connection with the two major incidents, are not protected from disclosure under FERPA, and, in any case, as far as Respondent's Motion is concerned, must be identified on a Vaughn to at a minimum permit Petitioner and the Court to evaluate the legitimacy of the claimed exemption. *American Civil Liberties Union of Northern California v. Superior Court, supra* at 83.

Furthermore, it defies common sense that the types of administrative email correspondence at various levels within the university concerning the two main incidents and responsive to Petitioner's CPRA requests are "educationally related information". Documents, such as reports or discussion of possible negative publicity concerning a physical altercation between student athletes and a deadly football training session where no grades are handed out, cannot qualify as "educational records" exempted from disclosure.

It should also not be overlooked that the cases generally hold that FERPA was designed to protect systematic, rather than individual, releases of sensitive information. *See, e.g., Daniel S. v. Board of Education of York Community High School*, 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) and *Ellis v. Cleveland Municipal School District, supra* at 1023-24. There will be no

"systematic" disclosure of documents if Respondent complies, as it must, with Petitioner's specific CPRA requests. It follows by logical deduction that identifying these types of documents on a Vaughn also will not violate FERPA. Moreover, FERPA does not protect information which might appear in school records but would also be "known by members of the school community through conversation and personal contact." *Daniel S., supra* at 954. The two incidents were witnessed by numerous student athletes.

Lastly, because public policy favors disclosure, all exemptions are narrowly construed. *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, 896. "All exemptions" includes any purported exemption based on FERPA. Respondent has not even addressed this issue of burden of proof in its Motion, presumably because it recognizes it cuts deeply against its unsustainable position. A government agency opposing disclosure bears the burden of proving that an exemption applies. *Id*.

X. Respondent Blithely and Inexplicably Ignores the Jurisprudence on Segregating Specific Portions of Responsive Documents that Do Not Disclose Confidential Information

CPRA holds that if only part of a record is exempt, the agency is required to produce the remainder, if segregable. (§ 6253, subd. (a)) In other words, "the fact that a public record may contain some confidential information does not justify withholding the entire document." *State Board of Equalization v. Superior Court, (1992),* 10 Cal.App.4th 1177, 1187; *See also, County of Santa Clara v. Superior Court,* 170 Cal.App.4th 1301. The blatant and unjustifiable failure to brief this central issue dooms Respondent's Motion. Respondent ignored the holding of *State Board of Equalization* even though Respondent's Motion cited the case for a different proposition. Thus, Respondent has failed to meet its burden to show that there are no non-segregable portions that can be produced pursuant to Petitioner's CPRA requests. Respondent has not even attempted to do so. It therefore follows that at a minimum, for the purposes of

Respondent's present Motion, Respondent has failed to demonstrate that the preparation of a Vaughn which would merely identify with sufficient specificity documents purportedly exempt under FERPA would violate CPRA policies or principles. This reasoning further underscores how nonsensical is Respondent's unsupported claim that revealing the number of documents being withheld would run afoul of the FERPA exemption.

XI. Cases Relied on by Respondent Are Irrelevant or Distinguishable

Respondent relies heavily on *Haynie v. Superior Court*, (2001) 26 Cal 4th 1061 for various purposes. First of all, this case is clearly distinguishable out the gate because it is not about a Vaughn during CPRA litigation but rather about a government agency's requirement, *before a petition is filed*, to prepare and convey an index of documents in response to a CPRA request; "The County does not challenge here the ability of a court to direct an agency, *once the petition has been filed*, to prepare a list of responsive records and provide it to the requesting party." (emphasis added) The *Haynie* court held: "We therefore conclude that the Court of Appeal erred in holding that such inventories or lists must be created as a matter of course as part of the agency's *initial response to CPRA requests*." (emphasis added) *Id*.

Petitioner concedes that that under *ACLU of Northern California v. Superior Court* (2011), 202 Cal. App. 4th 55, 81, CPRA does not mandate a Vaughn Index. Nonetheless, the cases hold that a government agency refusing to disclose documents pursuant to CPRA on the basis of some exemption(s) must provide sufficient information in the form of "some combination" of mechanisms, consisting most prominently of a Vaughn Index, *in camera* review, or declarations, that will enable the court to determine whether or not the agency's claims are well-grounded in fact and public policy. Indeed, *ACLU of Northern California, supra* at 81 , further notes: "A 'Vaughn Index' or other explanation provided by a defendant agency fails the nonsegregability test where a blanket declaration that all facts are so intertwined to prevent

disclosure under the FOIA does not constitute a sufficient explanation of nonsegregability." In the instant case, Respondent's plea that a declaration will be sufficient falls flat on its face because Respondent is unable or unwilling to articulate why the information in the purportedly exempted documents consists of educational records FERPA was intended to protect from disclosure. Respondent's argument further fails because, as noted at the outset, it has started from the false premise that Petitioner's purpose is to invade the privacy rights of the students, when Petitioner's goal has nothing to do with the students and everything to do with the apparent malfeasance of Cal athletic department staff and high-level university officials. Respondent should not be permitted to shirk its obligation to prepare a Vaughn by only submitting "a blanket declaration that all facts are so intertwined to prevent disclosure", which would also on its face be insufficient to "….constitute a sufficient explanation of nonsegregability." Any balancing of privacy rights versus the public interest heavily favors Petitioner.

XII. Conclusion - Petitioner Has Not Proven that Petitioner Should Not Prepare a Vaughn Index

Under CPRA, when alleged privacy rights or other exemptions are raised by the governmental respondent, this Court is charged with weighing the goals of journalists or others with legitimate inquiries, like Petitioner, in seeking to obtain documents that will further the common good and make transparent the conduct of public institutions, like Respondent. No doubt administrators at the vortex of recent scandals involving student athletes at universities like Baylor University, Penn State University and Michigan State University wanted to prevent the disclosure of documents exposing how those administrators handled those incidents. Respondent has not met its burdens of proof, and unsupported legal and factual contentions in its Motion tend to demonstrate that there is much Respondent hopes to conceal. It strains

credulity, as stated at page 9 of Petitioner's Petition, "...that there is not a single email generated by a UCB official .... that reflected administrative deliberation over how to handle the November 1, 2013 incident or the Agu Death, or, alternatively, that there is not a single legally segregable excerpt from such a document...." Petitioner is entitled to a Vaughn Index that will permit this Court as well as Petitioner to effectively and efficiently evaluate Respondent's claims of an exemption from disclosure. There is much more that Respondent will need to do to comply with its obligations under CPRA and under *City of Los Angeles v. Superior Court*, (2017) 9 Cal. App. 5th 272 affirming that discovery is available in CPRA cases, but for the moment, Petitioner requests only that Respondent's Motion be denied and that Respondent be ordered to prepare and serve a detailed and comprehensive Vaughn Index as required by courts in most CPRA petitions and virtually all FOIA actions.

Dated: April 9, 2018

Respectfully submitted,

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