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1 I. Introduction and Summary of this Supplemental Brief.

2 Respondent's argument is easily and accurately summarized as follows: Any death to which  
3 Respondent's in-house campus police is assigned is presumptively a criminal investigation until  
4 proven otherwise. The problem with the argument is that the Court specifically requested evidence  
5 of an investigation into criminal activity or merely suspected criminal activity. Obviously no  
6 evidence exists, *ergo* Respondent submits nothing more than longer versions of the same type of  
7 self-serving and tautological declarations submitted with its original response brief in opposition to  
8 this Motion. Respondent's "evidence" is a superficially more elaborate regurgitation of the  
9 testimony of campus police employees willing to do the bidding of their employer by protecting  
10 their employer and their own jobs, but even these biased declarants cannot come up with details or  
11 documented evidence of a targeted investigation of a crime or reasonable suspicion of same.

12 II. Respondent Has Again Changed Course Mid-Stream by Futilely Seeking Refuge in Section  
13 6255.

14 As emphasized in Petitioner's Response Brief, Respondent intentionally avoided any reliance on  
15 the public policy principles of Section 6255. That ship sailed. Respondent waived its right to make  
16 the Section 6255 arguments and the Court's invitation to submit proof of a criminal investigation  
17 was not an invitation for Respondent to present completely new arguments Respondent  
18 intentionally declined to assert with its opening brief. Faced with the impossible-to-achieve task of  
19 presenting evidence of a criminal investigation, Respondent scrambles to make public policy  
20 arguments under Section 6255.

21 There was a reason Respondent consciously avoided making public policy arguments earlier:  
22 Respondent has no evidence that withholding the documents in the Binder will promote the public  
23 interest. Thus, Respondent can point to no evidence and to no specific instances where the general  
24 types of public policy arguments favoring non-disclosure quoted from the case law by Respondent  
25 have any application to this specific case. For examples, there is no witness whose privacy, no less  
26 her life, will be jeopardized if her name is made public; there is no reference to a specific type of  
27 police interrogation methodology that will be compromised if documents in the Binder are made  
28 public; there is no victim whose life will be turned upside down if her identity is released. There is  
only a parroting of the general abstract language from the case law about reasons for applying  
public policy under any Section 6254 exemption or under 6255. Respondent makes feeble attacks  
on Petitioner's overwhelming public policy arguments applying facts, and Respondent attempts to  
unfairly demean and mischaracterize Petitioner's important mission in shedding light on

1 Respondent's actions resulting in the death of a student along with Respondent's attempts to cover  
2 up what happened and Respondent's culpability.

3 III. No Evidence of Criminal Investigation Submitted Besides Self-Serving Testimony.

4 Respondent presents no evidence that will support a conclusion that there was an investigation  
5 directed at criminal activity, locating somewhere a potential criminal suspect, or further  
6 investigation into a targeted suspect. In possible support of such claims related to a criminal  
7 investigation, Respondent could have submitted contemporaneous notes by a police officer or other  
8 first responder, testimony concerning specific conversations involving investigators, email  
9 messages within the campus police department or to persons outside the campus police department,  
10 and many other types of evidence that could demonstrate that there really was a "criminal"  
11 investigation or that there was any person within 100 miles of the incident who was considered a  
12 criminal suspect. Indeed, there is no use of the term "suspects" or "victim" in the declarations  
13 Respondent submits. The Court's Order requested evidence, not testimonials about how seriously  
14 Respondents' campus police take their job responsibilities.

15 The new iterations of declarations merely support Petitioner's thesis that Respondent abuses  
16 Section 6254(f) by using it to create a shield against disclosure of investigations that should be  
17 given light. Evoking Chief Bennett's previously quoted statement about keeping documents away  
18 from CPRA oversight, such routine tactics can be manipulated by Respondent to maintain the  
19 secrecy of investigations and documents that would otherwise be subject to required CPRA  
20 disclosure.

21 IV. Respondent Declined to Submit the Testimony and the Notes of the First Responding Campus  
22 Police Officer.

23 Stephanie Martinez testified at her deposition that she "was the responding officer at the scene" [of  
24 Ted Agu's death.] (Muchnick Declaration, Exhibit 12, page 9) Officer Martinez gave testimony at  
25 her deposition about the persons she interviewed at the scene and that she took notes. (Page 11 of  
26 Exhibit 12) She also confirmed that she had been informed before arriving at the scene that Agu  
27 had a "pre-existing condition", namely "Sickle Cell [sic]". (Page 23 of Exhibit 12). Because  
28 Respondent has avoided submitting any testimony of Officer Martinez and her notes, indeed  
Respondent has not even made a glancing reference to Officer Martinez, the person with the best  
knowledge of what Respondent did at the very inception of the campus police intervention at the  
scene, the conclusion is obvious: Officer Martinez's testimony and her notes would be harmful to

1 Respondent's untenable position that the campus police presence in truth was an investigation into  
2 criminal activity or that there was a true criminal aspect to the investigation.

3 As appears at page 11 of Exhibit 12:

4 Q. If you go to a scene and a witness tells you, "I saw X happen at such and such time," that  
5 something that's important for you to put in your report.

6 A [Officer Martinez} If it's pertinent information, correct, yes, we put [sic] in the report.

7 And as appears at page 28 of Exhibit 12:

8 Q. Did you have any involvement, whatsoever, in assisting Officer Bennigson with the  
9 investigation?

10 A. [Officer Martinez] No.

11 Thus, the lack of criminal suspicion resulted in Officer Bennigson not even consulting with the first  
12 officer on the scene, on top of the fact that Respondent has found no reason to submit the first  
13 responding officer's detailed reports to the Court. Based on these and other on point deposition  
14 excerpts highlighted in Exhibit 12, it is clear that Officer Martinez would testify that her  
15 questioning of witnesses at the scene had nothing to do with seeking the perpetrator of a crime and  
16 there is nothing in her reports that can support Respondent's conclusory statements in the  
17 declarations submitted with its Supplemental Brief. Witnesses at the scene would be the persons in  
18 the best position to assist with finding such a perpetrator if anyone, including Officer Martinez, had  
19 believed that there really was a perpetrator.

20 V. Respondent Cannot Hide Behind Secrecy or Privacy Concerns in Declining to Submit  
21 Supporting Evidence in the Binder.

22 Petitioner previously submitted as Exhibit 10 the Table of Contents of the Binder at issue in this  
23 Motion. These section headings reveal the kinds of documents within. It should be assumed that  
24 amongst all of the documents, including presumably notes of Officer Bennigson based on  
25 statements in his Declaration, there is no documentable evidence therein that is responsive to the  
26 Court's request for evidence of a criminal investigation or reasonable suspicion of criminal activity.  
27 First of all, pursuant to Section 6254(f), if claiming the exemption, under the express language of  
28 the statute, Respondent was already required to have provided extensive details about any such  
reports to a requestor, like Petitioner, even if the exemption were deemed to be applicable. Thus,  
assuming *arguendo* there were information in these 141 pages being withheld that would be  
evidence of a criminal investigation, Respondent has no excuse not to summarize in detail for the  
Court and the Petitioner their contents as part of its response to the Court. If there were any

1 evidence responsive to the Court's request for evidence of a criminal investigation, this would have  
2 been the time for Respondent to produce such evidence, even if just in summary form.

3 Secondly, Respondent had another alternative before submitting any supportive evidence. The  
4 Court has entered a stipulated protective order in this case. If there were any supportive evidence  
5 that Respondent believed was confidential, Respondent had the option to submit its supportive  
6 evidence pursuant to the protective order so as to maintain its confidential status. Again,  
7 Respondent declined this option.

8 VI. Respondent Gave Only 29 Pages to the Sheriff's Office, Not the Entire Binder.

9 Petitioner's response brief placed front and center that according to testimony of Lieutenant  
10 Bowers, Respondent's campus police handed over to the Sheriff's Office only 29 pages and not all  
11 of the pages in the Binder. (previously submitted Exhibit 4 consisting of Bowers' deposition  
12 testimony) There is no testimony or analysis in Respondent's previous briefing or in this  
13 Supplemental Brief offered concerning the 29 pages that was conveyed or about any  
14 communications with the Sheriff's Office. Why not? Respondent continues to try to ignore this  
15 significant fact that establishes that most if not all of the Binder was never used, and probably never  
16 intended to be used, for any criminal prosecution by the Alameda County Sheriff or by the  
17 Alameda County District Attorney. Respondent continues to be at a loss for words on this major  
18 point.

19 These omissions are evidence that there was no criminal activity, no criminal activity suspected or  
20 investigated, and nothing in the Binder that contradicts these conclusions. Indeed, it is further  
21 telling that no declaration from Lieutenant Bowers was obtained in support of the Court's request  
22 for evidence of a criminal investigation, presumably because there was nothing truthful that  
23 Lieutenant Bowers would testify to that would support the conclusion that anyone from U.C.  
24 Berkeley's campus police department and the Alameda County Sheriff's Office had said or written  
25 anything that would support a conclusion that the Sheriff considered this matter to be part of a  
26 criminal investigation or that there was any remote chance that there would be a criminal  
27 prosecution. Or that there was a victim of a crime. (It is telling that none of the testimony or  
28 documents submitted uses the word "victim". If there was never a victim, there was no crime.)

VII. Respondent Identifies Two Other Investigations but Provides No Substance About Them.

The Court requested to know whether Respondent "...conducted any other investigation regarding  
the death of Ted Agu..."

1 Respondent states in its brief: “The Regents, including UC Berkeley, conducted another  
2 investigation regarding the death of Ted Agu, concerning the strength and conditioning program,  
3 wholly apart from the UC Police Department’s criminal investigation (and UCPD played no role  
4 whatsoever in that other investigation).” This statement’s intentional ambiguity is deceptive.  
5 According to the testimony of Mr. Gilman, these reports were only about the strength and  
6 conditioning programs and did not investigate the death of Ted Agu. If Respondent had submitted  
7 these reports, the Court would have seen how little substance they contain and why they should not  
8 be accurately characterized as investigations into the incident in which Ted Agu tragically died. As  
9 set forth in the quotations in the Supplemental Muchnick Declaration being submitted concurrently,  
10 the reports combined had three fleeting and superficial references to Ted Agu. To allow the Court  
11 to see for itself the true nature and content of these reports, Petitioner submits with the  
12 Supplemental Muchnick Declaration the Tanji report as Exhibit 13 and the Table of Contents of the  
13 Joy-Brazil Report as Exhibit 14. The complete Joy-Brazil Report is available on the web at  
14 [https://chancellor.berkeley.edu/sites/default/files/sc\\_program\\_review\\_final\\_report.pdf](https://chancellor.berkeley.edu/sites/default/files/sc_program_review_final_report.pdf). A cursory  
15 review of these reports reveals that they are in stark contrast to the comprehensive investigation  
16 undertaken by the University of Maryland in the Jordan McNair death or the type of investigative  
17 reporting that Petitioner is attempting to bring before the public by seeking the responsive documents.  
18 A review of the strength and conditioning program is a far cry from an investigation into the details  
19 surrounding what happened to Ted Agu the morning of February 7, 2014. The only investigation into  
20 the Agu death was undertaken by the campus police department pursuant to the general policies  
21 described in the Bennigson Declaration. Again, those policies serve to protect the secrecy of campus  
22 police activities regardless of whether their activities and investigations concern criminal conduct or  
23 pursuit of a perpetrator of a crime. As stated in Petitioner’s brief, Section 6254(f) should not be used by  
24 an in-house police department beholden to a public university’s higher officials so as to erect an  
25 artificial barrier against legitimate CPRA inquiries concerning the conduct of the campus police or by  
26 the university’s officials where there is no suspected criminal activity.

23 VIII. The Court’s November 20, 2018 Order Was Not an Invitation to File a Motion for  
24 Reconsideration.

25 Respondent’s Supplemental Brief re-argues points that the Court has already decided. Petitioner will  
26 not repeat its earlier arguments. Petitioner feels compelled to point out that Respondent continues to  
27 base many of its arguments on trivial factual distinctions, this time between the facts in the case law  
28 relied on by the Court vis-à-vis the facts in the instant case while ignoring the more significant  
rationales for the holdings of the cases relied on by the Court.

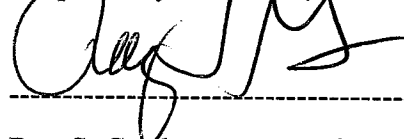
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2 IX. Objections to the Form and Content of Respondent's Declarants' Testimony.

3 Petitioner objects to the many conclusory statements in the Bennigson and Bennett Declarations. It  
4 is well established that declarations should state evidentiary facts rather than ultimate facts or legal  
5 conclusions. *Ware v Stafford* (1962) 206 CA2d 232, 237. ("To comply with requirements that they  
6 be clear and certain, allegations in an affidavit must show facts and circumstances from which the  
7 ultimate fact sought to be proved may be deduced by the court.") The facts should be set forth  
8 positively; a declaration that states only the conclusions or opinions of the declarant is insufficient.  
9 *Tri-State Mfg. Co. v Superior Court* (1964) 224 CA2d 442, 445. A court is "entitled to ignore" a  
10 declaration that contains "hearsay, opinion and supposition." *Inselberg v. Inselberg*, (1976) 56 Cal.  
11 App. 3d 484, 489. The weight to be accorded Respondent's declarations is further diminished by  
12 bias and self-interest of the declarants. *Taliaferro v. Taliaferro*, (1962), 203 Cal. App2d 649, 651.  
13 Thus, a statement such as the following found at Paragraph 12, page 8 of Chief Bennett's  
14 Supplemental Declaration, namely "If the Binder were disclosed to the public, it would reveal the  
15 materials Mr. Bennigson 'thought were relevant to his investigation'" is not admissible, besides the  
16 fact that it is deficient in providing what Respondent was charged with by the Court. There is no  
17 factual support for this statement - it is conclusory. The Bennett Declaration even appears to  
18 present legal argument and draw legal conclusion as she addressed specific points of the Court's  
19 November 20, 2018 Order. This is inappropriate on many levels. *See Ware v. Stafford, supra*, at  
20 pages 237-38. It is highly inappropriate to present a lay declarant addressing the legal issues of the  
21 Court Order. In any case, it is to no avail.

22 X. Conclusion.

23 Respondent cannot meet its burdens to show that it is in the public interest to hide these documents.  
24 The Court requested evidence of a criminal investigation or reasonable suspicion of criminal  
25 activity. Respondent instead gives legal argument and abstractions related to policies underlying  
26 what the in-house campus police department did in this case. There was no suspected criminal and  
27 there was no criminal investigation. Under the reasoning of the Court's Order of November 21,  
28 2018, the Binder should be turned over without delay.

Respectfully submitted,



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