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Fee Exempt – Gov. Code § 6103

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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

**SUPPLEMENTAL BRIEF IN SUPPORT OF  
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 BY:  
(1) HARRY BENNIGSON  
(SUPPLEMENTAL)  
(2) MAGUERITE BENNETT  
(SUPPLEMENTAL)  
(3) LIANE KO  
(4) NILS GILMAN**

Hearing Date: January 17, 2019  
Time: 9:00 a.m.  
Judge: Hon. Jeffrey Brand  
Dep't: 511  
Petition Filed: April 18, 2017

1 **INTRODUCTION**

2 As ordered in the Court’s November 21, 2018 Order, this Supplemental Brief addresses:  
3 “(1) the ‘reasonable suspicion of criminal activity’ standard, (2) whether the Regents or UCB  
4 conducted any other investigation regarding the death of Ted Agu, and (3) any other issues raised  
5 by the motion.” (Order dated November 21, 2018.)

6 As explained in detail below, (1) the “reasonable suspicion of criminal activity” is an  
7 inappropriately stringent standard and this case demonstrates that fact, but the standard is met  
8 here; (2) The Regents, including UC Berkeley, conducted another investigation regarding the  
9 death of Ted Agu, concerning the strength and conditioning program, wholly apart from the UC  
10 Police Department’s criminal investigation (and UCPD played no role whatsoever in that other  
11 investigation); and (3) even if Detective Bennigson’s binder is not exempt under section 6254(f),  
12 it is exempt under section 6255.

13 For these reasons, as well as those provided in the Opposition brief, The Regents  
14 respectfully requests that the Court deny Petitioner’s motion.

15 **I. THE “REASONABLE SUSPICION OF CRIMINAL ACTIVITY” STANDARD IS**  
16 **INAPPROPRIATELY STRINGENT AND THIS CASE DEMONSTRATES WHY,**  
17 **BUT THE STANDARD IS MET HERE**

18 In its November 21, 2018, order, the Court relies chiefly on two Public Records Act cases  
19 to demonstrate the need for, and applicability of, a “reasonable suspicion of criminal activity”  
20 standard. Both of those cases are distinguishable from the facts of the UC Berkeley Police  
21 Department’s investigation here.<sup>1</sup> The Court first relies on *American Civil Liberties Union*  
22 *Foundation of Southern California v. Superior Court* (2017) 3 Cal.5th 1032. That case involved  
23 “the bulk collection of raw ALPR [automated license plate reader] data.” (*Id.* at p. 1042.)

24 <sup>1</sup> As the Court clearly states in the Order, it finds the “reasonable suspicion of criminal activity” standard itself in  
25 *People v. Brown* (2015) 61 Cal.4th 968, 981 and *People v. Wells* (2006) 38 Cal.4th 1078, 1082-1083. But the issue  
26 in those cases was whether, under Fourth Amendment law, there were reasonable grounds to stop and detain  
27 someone. That body of law, of course, has a distinct and vibrant history and competing public policy interests. And  
28 the Public Records Act has its own, chiefly “ ‘a strong government interest in preventing and prosecuting criminal  
activity’ and to ‘protect[] witnesses, victims, and investigators, secure[] evidence and investigative techniques,  
encourage[] candor, [and] recognizes the rawness and sensitivity of information in criminal investigations, and in  
effect makes such investigations possible.’ ” (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 [internal  
citation omitted].) Those unique interests underlying the Public Records Act caution against the use of a “reasonable  
suspicion of criminal activity” standard here, as explained in this Supplemental Brief.

1           The investigation into the circumstances surrounding the death of Mr. Agu, by contrast,  
2 was not a “bulk” collection but, rather, an investigation specifically targeted toward an individual  
3 and the circumstances of that individual’s death. As both Chief Bennett and Detective Bennigson  
4 testified in their declarations accompanying The Regents’ Opposition brief, any death on campus  
5 is investigated as a police matter (officers do not appear on the scene simply as “first-responders,”  
6 but also as investigators). (Bennett Decl., ¶¶ 2-3; Bennigson Decl., ¶¶ 3, 5, 7, 17, 20.) In their  
7 Supplemental Declarations filed with this Supplemental Brief, they explain this reasoning in  
8 greater detail to address the concerns articulated in the November 21, 2018, Order. (Bennett  
9 Supp. Decl., ¶¶ 5-9; Bennigson Supp. Decl., ¶¶ 4-8.)

10           As the court explained in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1071, “[t]he  
11 records of investigation exempted under section 6254(f) encompass only those investigations  
12 undertaken for the purpose of determining whether a violation of law may occur or has occurred.”  
13 That, according to Chief Bennett and Detective Bennigson, is precisely why UCPD was  
14 dispatched to the scene of Mr. Agu’s death. In her initial declaration, the Chief testified that  
15 “[a]ny time anyone is injured at the campus, the Department responds. Our department is not  
16 only the first responder (because our officers have first aid and life-saving training), but also to  
17 commence an investigation, if appropriate, for potential criminal cases, *as well as for other*  
18 *purposes.*” (Bennett Decl., ¶ 3 [emphasis added]) As she clarifies with the help of her  
19 Supplemental Declaration, however, *deaths* are a distinct matter: “We investigate every death as  
20 if it were a criminal case.” (Bennett Supp. Decl., ¶ 7.) When it comes to death cases, there are no  
21 “other purposes.”

22           The fact Mr. Agu had a preexisting condition did not affect the Department’s approach.  
23 According to Detective Bennigson, “until we receive word from the coroner after the coroner  
24 concludes his investigation, we cannot determine whether something such as a pre-existing  
25 medical condition (and even with that, there may have been criminal activity which exacerbated  
26 that condition and therefore a pre-existing medical condition in-and-of-itself may not be sufficient  
27 to rule out criminal activity as a cause of death) was the sole cause without the intervention of  
28 criminal conduct.” (Bennigson Supp. Decl., ¶ 5.) The Supreme Court identified this issue in

1 *Haynie* – there is no “way to predict, at the outset, what might result in a lengthy or important  
2 investigation. One ‘third-rate burglary attempt,’ for example, ultimately toppled a president.”  
3 (*Haynie v. Superior Court, supra*, 26 Cal.4th at p. 1070.)

4 The Court also relies on *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271. That case  
5 involved a request for “the complete coroner and autopsy reports regarding [a homicide victim]  
6 from the El Dorado County Sheriff-Coroner.” (*Id.* at p. 1274.) In the court’s view, the records  
7 were exempt, but their exemption turned on the court’s analysis of that provision of 6254(f)  
8 which exempts “any investigatory . . . files compiled by any other . . . local agency for . . . law  
9 enforcement . . . purposes”:

10 “As noted, Dixon contends that coroner and autopsy reports are not  
11 expressly exempted in section 6254(f) and that coroners are not police or  
12 law enforcement agencies. What Dixon leaves out of her argument,  
13 however, is that section 6254(f) also exempts from disclosure ‘any  
14 investigatory . . . files compiled by any other . . . local agency for . . . law  
15 enforcement . . . purposes.’ ” (*Id.* at p. 1276.)

16 In its analysis, the court endeavored to distinguish the work of the coroner in the coroner’s  
17 capacity as “any other state or local agency” under section 6254(f) to determine whether the  
18 records at issue constituted records compiled “for correctional, law enforcement, or licensing  
19 purposes” under section 6254(f). In the court’s own words:

20 “No one can dispute that the office of the coroner, at a minimum, is a local  
21 agency. (See § 27460 et seq. [general duties of coroner].) The issue is  
22 whether the coroner, as part of his local agency duties, compiles  
23 investigatory files for law enforcement purposes. The answer is an  
24 emphatic yes.” (*Ibid.*)

25 The court’s entire analysis in *Dixon*, therefore, was based on the premise that the coroner  
26 was “any *other* . . . agency” and not “any . . . *police* agency.”<sup>2</sup> But the UC Berkeley Police

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28 <sup>2</sup> *Dixon* relies on *Uribe v. Howie* (1971) 19 Cal.App.3d 194. (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271,  
1277.) *Uribe* involved a petition to compel the release of pest control operator reports by the Riverside County

1 Department *is a police agency*. And the limitation exempting only those records compiled “for  
2 correctional, law enforcement, or licensing purposes” under section 6254(f) applies only to  
3 records “compiled by any other . . . agency.” In the case of records of a “police agency,” section  
4 6254(f) contains no such limitation. Accordingly, *Dixon* and its analysis do not apply to the facts  
5 of this case.

6 For these reasons, there was no need for the Court to adopt a standard as stringent as  
7 “reasonable suspicion of criminal activity” to determine whether the Binder qualified under  
8 section 6254(f) as exempt. This was a *targeted* investigation – not a “bulk investigation” –  
9 conducted by a *police agency* – not “any other . . . agency.”

10 Beyond these critical distinctions, there are strong public policy interests against  
11 employing such a standard in a case like this. In the Court’s November 21, 2018, Order, the  
12 Court notes that “The Regents makes the implicit argument that the investigation was a law  
13 enforcement investigation because any death raises a reasonable suspicion of criminal activity.  
14 The court is not persuaded.” In paragraph 7 of her Supplemental Declaration, Chief Bennett  
15 explains the strong policy reasons for treating all investigations of deaths as criminal  
16 investigations and why employing a “reasonable suspicion of criminal activity” standard would  
17 be harmful to those strong public interests.

18 Finally, even if the standard were adopted, it is met here. Detective Bennigson was faced  
19 with a deceased student. Although he may have been aware of a pre-existing medical condition,  
20 only the coroner could rule out the fact that there was no crime. Detective Bennigson lacked the  
21 medical expertise to do so, as he explains in his Supplemental Declaration.

22 **II. UC BERKELEY CONDUCTED A SEPARATE INVESTIGATION INTO THE**  
23 **STRENGTH AND CONDITIONING PROGRAM AND RELEASED ALL NON-**  
24 **EXEMPT RECORDS OF IT TO PETITIONER**

25 The second issue the Court asked The Regents to address was “whether the Regents or  
26 UCB conducted any other investigation regarding the death of Ted Agu.” UC Berkeley did  
27 conduct a separate investigation.

28 Agricultural Commissioner. Again, not a police agency.

1 Nils Gilman was Chief of Staff to the UC Berkeley Chancellor from June 2014 to July  
2 2017. As he explains in his declaration filed with this Supplemental Brief, there were two  
3 investigations into the strength and conditioning program used by the Athletics Department. The  
4 investigations were “separate and apart from the work of the Police Department and wholly  
5 unrelated to it.” (Declaration of Nils Gilman, ¶ 3.) Chief Bennett and Detective Bennigson  
6 confirm that the Police Department did not investigate the strength and conditioning program.  
7 (Bennett Supp. Decl., ¶ 10; Bennigson Supp. Decl., ¶ 7.) The police conducted their own  
8 investigation for law enforcement, and no other, purposes. Other units on campus conducted an  
9 investigation into different, non-law enforcement, purposes. The two were completely  
10 independent and focused on their own respective institutional missions.

11 All responsive and non-exempt records relating to the investigations into the strength and  
12 conditioning program were released to Petitioner, as Liane Ko, the UC Berkeley Public Records  
13 Coordinator, confirms in her own declaration filed with this Supplemental Brief. (Declaration of  
14 Liane Ko, ¶¶ 3-10.)

15 **III. THE BINDER IS EXEMPT NOT ONLY UNDER SECTION 6254(f), BUT ALSO**  
16 **UNDER SECTION 6255**

17 The third and final issue the Court asked The Regents to address was “any other issues  
18 raised by the motion.” In the Motion, Petitioner not only contends that the Court should graft a  
19 balancing test akin to section 6255 onto section 6254(f) – an argument which, for the reasons  
20 stated in the Opposition brief, is without merit – but also argues that, under a section 6255  
21 balancing test, or something like it, The Regents cannot meet its burden of demonstrating that the  
22 public interest in favor of withholding the Binder clearly outweighs the public interest in favor of  
23 disclosing it.

24 This claim also has no merit. As demonstrated both in *Fredericks v. Superior Court*  
25 (2015) 233 Cal.App.4th 209, 228, and in *American Civil Liberties Union Foundation of Southern*  
26 *California v. Superior Court, supra*, 3 Cal.5th at pp. 1042-1043, records that are not exempt  
27 under section 6254(f) may nevertheless be exempt under section 6255. Therefore, even if the  
28 Court determines that section 6254(f) does not exempt the Binder, section 6255 may do so. For

1 the following reasons, the Binder is independently exempt under section 6255.

2 There is a strong public interest in protecting the materials in the Binder. As the court  
3 explained in *Dixon*,

4 “The reasons for this law enforcement investigation exemption are  
5 obvious. The exemption protects witnesses, victims, and investigators,  
6 secures evidence and investigative techniques, encourages candor,  
7 recognizes the rawness and sensitivity of information in criminal  
8 investigations, and in effect makes such investigations possible. (See  
9 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1070–1071  
10 [112 Cal.Rptr. 2d 80, 31 P.3d 760] (*Haynie*); *Rackauckas, supra*,  
11 104 Cal.App.4th at pp. 175–177; *Williams v. Superior Court* (1993)  
12 5 Cal.4th 337, 354, 355 [19 Cal. Rptr. 2d 882, 852 P.2d 377] (*Williams*).)”  
13 (*Dixon v. Superior Court, supra*, 170 Cal.App.4th at p. 1276.)

14 Chief Bennett’s and Detective Bennigson’s declarations, based on their personal  
15 experience in law enforcement, confirm the view of the court in *Dixon*. (Bennett Supp. Decl.,  
16 ¶¶ 11-12; Bennigson Supp. Decl., ¶¶ 9-11.) As Chief Bennett further explains in paragraph 7 of  
17 her Supplemental Declaration,

18 “We investigate every death as if it were a criminal case. We do this for a  
19 very specific and strategic reason which goes to the heart of prudent  
20 investigatory practice and standards. The goal is to ensure that evidence is  
21 accurately, comprehensively, and, in a trustworthy manner, collected from  
22 the very beginning of the investigation, and to ensure that, once collected,  
23 such evidence is equally vigilantly maintained in order to keep the chain  
24 of custody pristine and its integrity intact for any future uses in law  
25 enforcement. This is distinct from the “bulk” collection referred to in the  
26 Court’s Order above. When my department investigates a death, the focus  
27 is on the decedent and all facts related in any way to the death, including  
28 physical evidence and witnesses. *The reason we approach the case in this*

1 way is, if it is later determined and confirmed that the death is a criminal  
2 case, we would have lost potentially critical evidence that we did not  
3 initially preserve if we treated it any other way. Yet all of this evidence  
4 would be equally subject to the risk of not being available (e.g., witnesses  
5 would be unwilling to provide truthful, candid testimony; investigators  
6 would be more circumspect in their methods of investigation) if there were  
7 a meaningful risk that it could be revealed in response to a Public Records  
8 Act request. Therefore, with a focus on the decedent and all physical  
9 evidence and witnesses related in any way to the death, our standard is to  
10 investigate every death as if it were a criminal case until we learn  
11 otherwise.” (Emphasis added.)

12 The public interest in favor of disclosure which Petitioner describes in his papers is clearly  
13 outweighed by the interests articulated above. Petitioner contends that deaths from conditioning  
14 programs are in the news, so it is a topic of public interest. As explained above, the campus  
15 conducted two investigations into the strength and conditioning program. Petitioner was provided  
16 with responsive non-exempt records about those investigations and the results have been made  
17 public. As also explained above, Detective Bennigson’s Binder has nothing to do with those  
18 investigations.

19 The public interest does not support the possible additional incremental value created by  
20 exposing the records of a law enforcement investigation, with the significant adverse  
21 consequences identified by Chief Bennett and Detective Bennigson, when any alleged  
22 deficiencies in the strength and conditioning investigations purportedly perceived by Petitioner or  
23 others are clear for all to see and can be criticized based on those perceived flaws themselves. A  
24 “fishing expedition” demanding the release of all law enforcement records will have unintended  
25 consequences exacting a rich price only to satisfy Petitioner’s curiosity.

26 Petitioner also contends that the circumstances under which the existence of the Binder  
27 came to light, as well as certain internal communications (his Exhibits 7 & 10), give rise to a  
28 public interest in disclosure of the Binder. As The Regents demonstrated in its Opposition brief,



1 Petitioner's arguments on both of these points are without merit. They are based on erroneous  
2 information or pure speculation.

3 **CONCLUSION**

4 For the foregoing reasons, as well as those in The Regents' Opposition brief, The Regents  
5 respectfully requests that the Court deny Petitioner's motion.

6 Dated: December 7, 2018

UNIVERSITY OF CALIFORNIA  
OFFICE OF THE GENERAL COUNSEL

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9 By:   
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