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Fee Exempt – Gov. Code § 6103

Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

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

OPENING BRIEF BY RESPONDENT THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA RE: SUITABILITY OF
VAUGHN INDEX IN THIS ACTION;
DECLARATION BY LIANE KO;
DECLARATION BY CARRIE SCHMIDT;
DECLARATION BY MICHAEL R.
GOLDSTEIN

Hearing Date: April 26, 2018
Time: 9:00 a.m.
Judge: Hon. Kimberly E. Colwell
Dep't: 511
Petition Filed: April 18, 2017

1 As stated in his CM-110 form filed on February 16, 2018, Petitioner seeks a “Vaughn
2 Index.” Because of the procedural posture of this case, and because of the nature of the records
3 Petitioner seeks – records relating to two¹ specific UC Berkeley students, identified by name in
4 Petitioner’s PRA requests, which are protected from disclosure by the Family Educational Rights
5 and Privacy Act of 1974 (FERPA) – under the facts of this case, a Vaughn Index is not only
6 unnecessary, but also prohibited.

7 A Vaughn Index may be appropriate in some cases and, where appropriate, the Court has
8 the authority to require one. *This is not one of those cases.* But a Vaughn Index is prohibited in
9 some cases, depending on the kinds of records at issue. *This is one of those cases.*

10 A Vaughn Index is unnecessary because, given the nature of this dispute, which has
11 become clarified through a lengthy and rigorous meet and confer process, the basis for The
12 Regents’ claim of exemption for any responsive records can be adequately articulated in a
13 declaration. An Index would be an unnecessary exercise in form over substance.

14 In this case, an Index is also prohibited. FERPA, as well as the right to privacy, prohibits
15 The Regents from disclosing any information about its students. Petitioner’s numerous Public
16 Records Act requests on which the Petition is based sought records related to three specific UC
17 Berkeley students, identifying each of them by name. Given the specificity of those requests, The
18 Regents was and is barred by FERPA and the right to privacy from releasing records. (That
19 single reason relates to all of the responsive records The Regents withheld from Petitioner. In
20 addition, at least one of them is also attorney-client privileged.) For the same reasons, The
21 Regents is prohibited from providing the kind of information that a Vaughn Index would typically
22 include. For these reasons, Petitioner’s request for an order compelling The Regents to provide
23 him with such an Index should be denied.

24
25
26 _____
27 ¹ As explained below, Petitioner initially requested records relating to three students. On
28 March 25, 2018, The Regents was given permission by the family of one of the students to release
records to Petitioner, and The Regents did so. As a result, the only records The Regents is
withholding as exempt are those that relate to two students.

1 **I. A VAUGHN INDEX IS UNNECESSARY GIVEN THE PROCEDURAL POSTURE**
2 **OF THIS CASE**

3 In his CM-110 form filed on February 16, 2018, Petitioner contends that he “submitted
4 over many months California Public Records Act requests to UC Regents and was stonewalled
5 and compelled to file this Petition because the Regents failed to comply with obligations under
6 the CPRA.” In that same filing, Petitioner further contends that “[a]ny possibility for preliminary
7 production of a partial or complete Vaughn Index, as stated in the Initial Joint Case Management
8 Report of November 8, 2017, collapsed when Respondent failed to meet their own stated deadline
9 for communicating a proposal, and also failed to return follow-up messages. Further discussion
10 of this matter between the parties no longer holds any promise of serving efficient adjudication of
11 the dispute.” In support of that contention, he refers to “the April 6, 2016, date of Petitioner’s
12 original CPRA request and in the now ten (10) months since the Petition was filed before this
13 Court, during which time there has been no progress.”

14 Petitioner’s description of the procedural posture of this case omits two very large and
15 meaningful pieces of the history and both of them bear directly on the question whether a Vaughn
16 Index is necessary and permissible here. The first piece relates to the events before the filing of
17 the Petition; the second piece relates to the events after that.

18 As to the events before the filing of the Petition, The Regents did not “stonewall”
19 Petitioner, as Petitioner alleges. Nor did any other conduct by The Regents “compel” Petitioner
20 to file the Petition. Petitioner is responsible for the delay. In a Public Records Act request dated
21 April 6, 2016, Petitioner sought the following records in pertinent part:

22 “I seek any and all written records, reports, or emails dealing with any internal
23 investigation within the University of California-Berkeley of the facts
24 surrounding:

- 25 (a) the death of Ted Agu; and
26 (b) an altercation between football players J. D. Hinnant and Fabiano Hale,
27 which occurred on or around November 1, 2013.” (Petition, Exh. F.)

28 All three of the individuals identified in the request – Messrs. Agu, Hinnant, and Hale –

1 are or were UC Berkeley students. Rather than reasonably meeting and conferring with The
2 Regents in connection with this initial request, Petitioner exacerbated what could have been a
3 smooth and timely process of responding to his initial request by sending additional requests
4 seeking the same information, and he sent those additional requests not only to the campus's
5 Public Records Coordinator, but also to other units at the campus, to another campus, and
6 elsewhere in the University, including the Office of the President. The effort resulted in a
7 confusing cobweb of a dozen requests, largely duplicative, and unduly burdensome to an
8 understaffed unit which does its best to respond to each request in the order in which it is
9 submitted. Those events are described in the Declaration of Liane Ko, the UC Berkeley Public
10 Records Coordinator, which is filed with this brief. (Declaration of Liane Ko.)

11 As to the events which followed the filing of the Petition, The Regents disagrees with
12 Petitioner's assertion, in his Attachment to his CM-110 form, that "there has been no progress"
13 since the Petition was filed. On the contrary, since the Petition was filed, The Regents has
14 undertaken to restore order to a process which was upended by Petitioner's multiple and
15 duplicative PRA requests. After a time-consuming effort to search for additional responsive
16 records, which The Regents voluntarily undertook at Petitioner's request, no records were
17 discovered beyond copies of those that were released before the Petition was filed. Those events
18 are described in the Declaration of Michael R. Goldstein, which is filed with this brief, and
19 summarized here. (Declaration of Michael R. Goldstein.)

20 The Petition was filed on April 18, 2017. After a preliminary effort to meet and confer by
21 phone and email in May, the parties met personally on June 5, 2017. Four days later, on June 9,
22 The Regents sent Petitioner a written proposal under which Petitioner would provide The Regents
23 with a list of individuals whose emails and other documents Petitioner wanted The Regents to
24 reexamine for records responsive to Petitioner's initial April 6, 2016, PRA request. To make the
25 process as efficient as possible, The Regents also asked Petitioner to furnish a list of search terms
26 to narrow the universe of emails that would have to be manually reviewed for responsiveness.
27 Petitioner ultimately provided The Regents a list of seven individuals (all of whose email
28 accounts were searched) and seven search terms or phrases, within the broad date range of

1 November 1, 2013 through April 6, 2016.

2 The search Petitioner asked The Regents to conduct yielded a voluminous collection of
3 records, only a small portion of which were responsive to the April 6, 2016, PRA request. The
4 process was not complete until October 17, 2017, due to the volume of records. Of the
5 responsive records, a portion was exempt and another portion was non-exempt. All of the non-
6 exempt records were duplicates of what The Regents had released to Petitioner before he filed the
7 Petition. Not a single new responsive and non-exempt record was discovered. All of the exempt
8 records are exempt under FERPA. They are also exempt under the right to privacy (Gov. Code,
9 §§ 6254(c), 6254(k) & 6255). At least one is also protected by the attorney-client privilege. This
10 examination of documents adhering to the protocols provided by Petitioner was conducted by
11 Carrie Schmidt, who describes it, as well as the results, in detail in a declaration filed with this
12 brief. (Declaration of Carrie Schmidt.)

13 After receiving a status report indicating that the filing of the Petition, and efforts
14 undertaken in response to it, led to the discovery of no additional responsive non-exempt records,
15 Petitioner expressed an interest in conducting discovery in order to challenge the exemptions – on
16 both the facts and the law – claimed by The Regents. The parties discussed the possibility of The
17 Regents furnishing a Vaughn Index as a preliminary measure, in order to streamline discovery.
18 Unfortunately, after The Regents began the process of preparing the Index, and analyzing the
19 records in its possession that were responsive to Petitioner’s request, it determined that FERPA,
20 in addition to other exemptions (viz., privacy), prohibited The Regents from providing any useful
21 information on a Vaughn Index.

22 As an alternative, The Regents also proposed permitting an “attorney’s eyes only”
23 inspection of the withheld records. Petitioner rejected that proposal.

24 As a second alternative, The Regents also asked Petitioner if he would be interested in an
25 inspection of the withheld records by Petitioner personally under a protective order. Petitioner
26 rejected that proposal as well.

27 As a third alternative, The Regents proposed in December that Petitioner consider
28 obtaining waivers from the students whose records are being sought, to release The Regents from

1 its obligations under FERPA and the students' and their families' privacy rights. To The
2 Regents' knowledge, Petitioner never pursued that option. On its own initiative, The Regents
3 initiated communications with the family of one of the students – Ted Agu – to obtain their
4 consent to permit The Regents to release responsive records related to him to Petitioner. The
5 Regents received a final decision from the family on March 25, 2018, consenting to the release,
6 and the records were immediately sent to Petitioner.

7 In connection with this overture to the Agu family, Petitioner misstates a third piece of the
8 procedural history in his CM-110 form, which also has some bearing on Petitioner's request for
9 an Index because The Regents' overture, which turned out to be successful for Petitioner's
10 purposes, mooted the part of that request which relates to any records concerning Mr. Agu. In his
11 CM-110 form (filed on February 16, 2018), Petitioner states "Respondent represented that
12 Respondent would provide Respondent's proposed insert for the CM Statement by Thursday,
13 February 15. On Friday, February 16, Respondent sent a message that it wished to delay the
14 filing of the Joint Case Management Statement due to a potential new development that
15 Respondent believed could potentially 'impact' the case. . . . This case needs to move forward.
16 Further delaying tactics are unacceptable."

17 As described in the Declaration of Michael R. Goldstein, filed with this brief, and as noted
18 immediately above, The Regents was in the process of obtaining the Agu family's consent to
19 release records to Petitioner, and was actively engaging in that process, but The Regents had not
20 obtained a final answer by February 15, when The Regents anticipated providing Petitioner with
21 The Regents' portion of the CM-110 form. It was a development in that process which led The
22 Regents to request a delay in the filing of the Joint Case Management Statement, which Petitioner
23 criticizes in the language excerpted above from his CM-110 form. As noted above, The Regents
24 finally received the family's consent on March 25, 2018.

25 In light of the procedural posture of this case, a Vaughn Index is unnecessary, and would
26 promote form over substance with no benefit. Unlike FOIA, the California Public Records Act
27 does not require the preparation of a Vaughn Index. (*Haynie v. Superior Court* (2001) 26 Cal.4th
28 1061, 1074-1075; *American Civil Liberties Union of Northern California v. Superior Court*

1 (2011) 202 Cal.App.4th 55, 83.) But a court may order the preparation of an Index. (*Labor &*
2 *Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 25-26; *State Bd. of*
3 *Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1183-1184, 1191-1192.)

4 An Index is never required for its own sake and, depending on its purpose, another tool
5 may be more suitable than an Index, which is the case here. In *Williams v. Superior Court* (1993)
6 5 Cal.4th 337, 344, the court ordered the agency to lodge under seal the exempt records and to
7 provide the petitioner with an index of those records. In *State Board of Equalization*, the court
8 ordered the Board to provide a list of documents to the petitioner so the petitioner could refine its
9 request and exclude unwanted documents. (*State Bd. of Equalization v. Superior Court, supra*,
10 10 Cal.App.4th at pp. 1183-1184.) In some cases, the purpose is to provide the petitioner with a
11 “meaningful opportunity to contest” the basis for a claimed exemption and the court the ability to
12 adjudicate the issue. (*American Civil Liberties Union of Northern California v. Superior Court*,
13 *supra*, 202 Cal.App.4th at p. 83; *see Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285,
14 292 [purpose of providing specific factual description of documents is to permit judicial
15 evaluation of claim of privilege]; *Catalina Island Yacht Club v. Superior Court* (2015)
16 242 Cal.App.4th 1116, 1130 [precise information required for adequate log varies from case to
17 case based on privilege asserted and underlying circumstances].)

18 Based on the circumstances of the case, something other than an Index, if anything, may
19 be required. As the court explained in *ACLU*, “[i]n federal circuits that do not require a ‘Vaughn
20 Index,’ and also in California courts, an adequate factual basis may be established, depending on
21 the circumstances of the case, through affidavits, a Vaughn Index, *in camera* review, or through a
22 combination of these methods.” (*American Civil Liberties Union of Northern California v.*
23 *Superior Court, supra*, 202 Cal.App.4th at p. 83 [quotations, citations omitted].)

24 *In camera* review “should not be resorted to lightly” and “is generally disfavored.” (*Id.* at
25 p. 87 [quotations, citations omitted]; *see also Times Mirror Co. v. Superior Court* (1991)
26 53 Cal.3d 1325, 1347, fn. 15 [“We have never construed this section to compel an *in camera*
27 review where – as here – such review is unnecessary to the court’s decision, and we decline to do
28 so here.”].) It is limited to the “appropriate case.” (*California First Amendment Coalition v.*

1 *Superior Court* (1998) 67 Cal.App.4th 159, 174.)

2 A declaration, if anything, would be more than adequate in this case to provide Petitioner
3 with a “meaningful opportunity to contest” The Regents’ claim of exemption in this case, and the
4 Court with a meaningful way to adjudicate the issue. As explained above, following The
5 Regents’ responses to Petitioner’s PRA requests, as well as the extraordinary efforts The Regents
6 undertook after he filed the Petition to assure Petitioner that all reasonable sources of responsive
7 records were searched, all of the responsive records The Regents continues to withhold from
8 Petitioner are being withheld on the basis of FERPA’s prohibition against the disclosure of
9 student records (one or more of those documents is also attorney-client privileged), in addition to
10 the students’ right to privacy. As explained further below, the problem presented by Petitioner’s
11 PRA requests is that he sent The Regents a targeted request, seeking records about specific
12 students, identified by name. FERPA prohibits The Regents from providing any records under
13 those circumstances because any record, by virtue of the way Petitioner formulated his request,
14 will necessarily be a record about that student. Those are student records. The right to privacy
15 protects this information for the same reasons.

16 All of this can be restated, under penalty of perjury, in a declaration. The Regents’
17 contention that the applicability of FERPA (and the right to privacy) is that broad, as well as
18 Petitioner’s anticipated opposition to that claim, can be adjudicated based on that evidence,
19 without the need for a Vaughn Index repetitively stating the same basis for each document so
20 withheld. An *in camera* review would only confirm the truth of that testimony – that all records
21 so withheld related in some way to that student – and therefore would be an unnecessary
22 imposition on the Court given the adequacy of the declaration.

23 Such confirmation – indeed, even the declaration itself – would in The Regents’ view be
24 superfluous. After all, Petitioner sought records relating to specific students. If a document is
25 about one of those students, then it is likely responsive. But, for the same reasons, it is also
26 protected by FERPA (and the right to privacy). The Regents’ view is that all such records are
27 protected by FERPA (and the right to privacy). The Regents is either right or wrong about that.
28 If Petitioner wishes to challenge the proposition, then he can do so, and the Court can adjudicate

1 the issue, without any evidence at all.

2 For these reasons, under the specific facts and procedural circumstances of this case, a
3 Vaughn Index is unnecessary.

4 **II. A VAUGHN INDEX IS PROHIBITED BECAUSE OF THE NATURE OF THE**
5 **RECORDS PETITIONER SEEKS**

6 Even if a Vaughn Index were helpful in this case, FERPA, as well as students' right to
7 privacy, prohibits its use here. Courts recognize and respect the obligations of agencies where "a
8 list of documents withheld may also reveal information ordinarily deemed exempt from
9 disclosure." (*Haynie v. Superior Court, supra*, 26 Cal.4th at p. 1075.) In such cases, a Vaughn
10 Index is impermissible. In *Labor & Workforce Development Agency v. Superior Court, supra*,
11 19 Cal.App.5th at p. 12, the court vacated a trial court order "directing the preparation of an index
12 of documents that itself would reveal the identities of third parties with whom the Agency
13 communicated confidentially during the deliberative process." (*Id.* at pp. 26, 36.) Such a
14 disclosure would have revealed information protected by the deliberative process privilege. (*Id.*
15 at pp. 26-31; see *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540
16 [defining deliberative process privilege].)

17 **FERPA.** The records Petitioner has requested, as well as any information about them, are
18 protected by FERPA. Under the Public Records Act, section 6254(k) exempts from disclosure
19 "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law."
20 FERPA is federal law. Because The Regents receives federal funds, it is subject to the federal
21 regulations implementing FERPA. (*See* 34 C.F.R. § 99.1.)

22 FERPA regulates how educational institutions manage "education records." The statute
23 defines "education records" as materials which "(i) contain information directly related to a
24 student; and (ii) are maintained by an educational . . . institution." (20 U.S.C. § 1232g(a)(4)(A);
25 34 C.F.R. § 99.3.) FERPA requires that an eligible student provide written consent before an
26 educational institution discloses "personally identifiable information from the student's education
27 records." (34 C.F.R. § 99.30(a).) FERPA defines "personally identifiable information" to
28 include: "Information requested by a person who the educational agency or institution reasonably

1 believes knows the identity of the student to whom the education record relates.” (*Id.* § 99.3.) By
2 virtue of the way Petitioner formulated his PRA requests – seeking information about specific
3 students, by name, and therefore requiring The Regents to release records relating to those
4 students – the requests require the disclosure of records where Petitioner “knows the identity of
5 the students to whom the education record relates.”

6 Because of its broad definition of “education record,” FERPA prohibits The Regents not
7 only from releasing the records themselves, but also from disclosing any information that a
8 Vaughn Index would require, because such an Index would “contain information directly related
9 to a student.” This includes information about the number of responsive documents, which an
10 Index, listing documents line-by-line, would provide, as well as any details about those
11 documents, because all of that is “information directly related to a student.”

12 **PRIVACY.** Our Constitution protects the right to privacy. (Cal. Const., art. I, § 1.) In
13 enacting the Public Records Act, the Legislature was mindful of that right. (Gov. Code, § 6250
14 [“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, . . .”].)
15 As section 1798.1 of the Civil Code expressly provides, “[t]he Legislature declares that the right
16 to privacy is a personal and fundamental right protected by Section 1 of Article I of the
17 Constitution of California and by the United States Constitution and that all individuals have a
18 right of privacy in information pertaining to them.” The Act exempts from disclosure information
19 protected by the right. (Gov. Code, § 6254(k).) The Act also expressly exempts from disclosure
20 “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted
21 invasion of personal privacy.” (Gov. Code, § 6254(c).) It also exempts records from disclosure
22 where “the public interest served by not disclosing the record clearly outweighs the public interest
23 served by disclosure of the record.” (Gov. Code, § 6255(a).) The disclosure of public records
24 requires the balancing of two fundamental yet competing public interests: “the public’s interest
25 in disclosure and the individual’s interest in personal privacy.” (*International Federation of*
26 *Professional and Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 329-330.)

27 As the enactment of FERPA clearly demonstrates, there is a strong public interest in
28 maintaining students’ right to privacy concerning information in the possession of the educational

1 institutions they attend. As illustrated above, the statute, as well as the regulations implementing
2 it, demonstrate not only the strength of the public interest, but also the expansive breadth of its
3 reach. UC Berkeley students, including the students identified in Petitioner's PRA request, are
4 entitled to the privacy within the scope of that protection. By contrast, there is minimal, if any,
5 public interest in invading that privacy to obtain records, if any exist, relating to the participation
6 of two students in an altercation at their college. This is a matter for the students and, if such an
7 altercation did occur, University disciplinary authorities, in a confidential setting. (See UC
8 Berkeley Campus Code of Student Conduct
9 (http://sa.berkeley.edu/sites/default/files/Code%20of%20Conduct_January%202016.pdf), Section
10 VII(A)(2) [student discipline records are confidential].)

11 As far as Petitioner's current request before the Court is concerned – for a Vaughn Index –
12 there is certainly no public interest in disclosing the contents of a Vaughn Index where the sole
13 purpose is to aid the parties and the Court in the management of litigation. And, as explained
14 above, in this case, an Index would not enhance either Petitioner's ability to respond to the
15 position The Regents is taking in its opposition to the Petition or the Court's ability to adjudicate
16 the issue. At a minimum, and as The Regents already offered to Petitioner but he rejected, such
17 information could easily be shared out of public view (under seal or via a protective order).

18 **CONCLUSION**

19 For the foregoing reasons, The Regents respectfully requests that Petitioner's request for
20 an order compelling The Regents to provide him with a Vaughn Index be denied.

21 Dated: March 27, 2018

22 UNIVERSITY OF CALIFORNIA
23 OFFICE OF THE GENERAL COUNSEL

24 By: 
25 Michael R. Goldstein

26 Attorneys for Respondent
27 THE REGENTS OF THE UNIVERSITY
28 OF CALIFORNIA

1 **DECLARATION OF LIANE KO**

2 I, LIANE KO, declare:

3 1. I am the UC Berkeley Public Records Coordinator. I have held that position since
4 February 2012. My responsibilities include processing all Public Records Act requests for the
5 campus, as well as all inquiries about Public Records Act requests. Unless indicated otherwise, I
6 have personal knowledge of the following facts, and if called as a witness I could and would
7 testify competently to those facts.

8 2. I am very familiar with the numerous Public Records Act requests Irvin Muchnick
9 submitted to The Regents starting in or about March 2016 relating to UC Berkeley students Ted
10 Agu, J. D. Hinnant, and Fabiano Hale.

11 3. On April 6, 2016, my office received an email containing a Public Records Act
12 request from Mr. Muchnick. In it, he requested the following records in pertinent part:

13 "I seek any and all written records, reports, or emails dealing with any internal
14 investigation within the University of California-Berkeley of the facts
15 surrounding:

16 (a) the death of Ted Agu; and

17 (b) an altercation between football players J. D. Hinnant and Fabiano Hale, which
18 occurred on or around November 1, 2013."

19 4. Beginning two days later, on April 8, 2016, he emailed me seeking an update
20 about the status of the request. This is just one of many emails he sent my office seeking updates.
21 Each time I received such an email from him, I had to cease my work on pending PRA requests,
22 including his, to review and, if appropriate, respond. All of this takes considerable time.

23 5. On the same date, he submitted a second PRA request seeking salary information
24 about one of the UC Berkeley coaches. He sent it not only to me, but also to several UC Berkeley
25 media personnel.

26 6. On April 12, 2016, he sent a third PRA request for information about employment
27 contracts for the head football coach. He sent it not only to me, but also to the Athletics
28 communications personnel.

1 7. On April 14, 2016, I sent him a 10-day acknowledgement letter relating to his
2 April 6 PRA request and he replied.

3 8. On April 29, 2016, he emailed me and Athletics communications personnel
4 seeking information about expired employment contracts for one of the coaches. On that same
5 day, which was a Friday, he asked whether my office's logs of PRA requests were "public
6 records" and, if so, if he could come to my office to inspect the logs of such requests for that
7 previous two months.

8 9. On May 2, 2016, he emailed me that he was cancelling his April 29, 2016 request
9 about expired employment contracts and resubmitting it as a "formal PRA request," even though
10 his initial request was already being treated as a PRA request.

11 10. In addition, on May 2, 2016, which was a Monday, before he gave me any
12 opportunity to respond to his Friday email, he emailed me a PRA request for a copy of my "PRA
13 log," before I could respond to his Friday inquiry about logs. He was not the only person
14 emailing me. Yet these repetitive and quick succession emails he kept sending me took me time
15 to review, as testified above, along with all of my other obligations to other PRA requestors.

16 11. On May 5, 2016, he wrote to someone in the Alameda County Sheriff's Office,
17 and cc'd me and the UC Berkeley Police Department Chief, going on at length and in great detail
18 about his review of a lawsuit and saying he would be submitting a new PRA request. That took
19 time to review but it had no bearing on my work; he could have just submitted a new PRA
20 request.

21 12. On the same day, he emailed the UC Davis Public Records Office, and cc'd me
22 and the Office of the President Public Records Office, about a PRA request he was submitting to
23 Davis. There was no need for him to include me about a PRA request Davis yet I had to take the
24 time to read and evaluate his email.

25 13. On May 8, 2016, he submitted a PRA request for the testimony of a former
26 football player in a civil lawsuit. On the same day, he submitted the identical request to UC
27 Police Department, which had to take the time to forward it to me. None of that was necessary
28

1 because he had already submitted the request to me and I am the Public Records Coordinator for
2 the entire campus. Yet I had to take the time to process that communication.

3 14. On June 30, 2016, he wrote to our Public Affairs personnel and cc'd me and
4 Athletics Communications inquiring about, and complaining, that he had seen an article in the
5 San Francisco Chronicle about the testimony of the former football player in a civil lawsuit
6 referred to above, as well as about a report about the strength conditioning program at UC
7 Berkeley and demanded that the two documents be released immediately. He wrote it at 8:00am.
8 On the same day, at noon, he wrote to Public Affairs, Communications, and cc'd me, demanding
9 a response by the close of business the same day.

10 15. On July 1, 2016, he emailed me, and cc'd Public Affairs, telling me Public Affairs
11 sent him the strength conditioning program report, but had told him the testimony was exempt,
12 and asked me for an update. That was a Friday and the email was 5:00 a.m. At 11:56 a.m., he
13 emailed me again repeating the same request.

14 16. On July 5, 2016, the day after the July 4 holiday, he emailed me again asking for a
15 response to his July 1 emails. That was July 5, Tuesday, at 4:23 a.m. At 12:15 p.m., the same
16 day, he wrote to Charles Robinson, the General Counsel of The Regents, cc'd me, cc'd the PRA
17 Coordinator at UC Davis, and cc'd the Public Affairs Officer at UC Berkeley, complaining that
18 my office and the UC Davis office were not responding to him. This, again, required my
19 attention, to the exclusion of other work. At 1:48 p.m., a staff member at UC Davis responded
20 that the PRA Coordinator was out on vacation. Sometime thereafter the same day, Mr. Muchnick
21 wrote again to Mr. Robinson complaining about the UC Davis staff member's response.

22 17. On July 17, 2016, Mr. Muchnick asked for a status update for his April 6 request.
23 He cc'd Mr. Robinson. Whenever Mr. Robinson received such an email from Mr. Muchnick,
24 Mr. Robinson had to make sure the matter was being adequately addressed, so numerous
25 individuals in his office were consulted, all of whom, in turn, needed my response. All of this
26 took a meaningful amount of time, including my own. July 17 was a Sunday.

27 18. On July 19, 2016, two days later, he wrote to President Napolitano, cc'd me, and
28 cc'd Mr. Robinson, asking that she order my office to respond to him. This, in turn, generated a

1 series of follow up communications, as described above. This is because the University is very
2 responsive when someone has a complaint. It generates a process to ensure that the University is
3 responsive to inquiries. All of it ended up affecting me because none of them was necessarily
4 aware of what I was doing so I had to assure them that Mr. Muchnick's requests were receiving
5 appropriate treatment, along with all other members of the public who seek assistance from my
6 office.

7 19. On July 20, 2016, the following day, he wrote to Public Affairs, cc'd me,
8 complaining that UC Davis had informed him that they had no records.

9 20. On July 28, 2016, he emailed Public Affairs a media question, the Public Affairs
10 Officer was away from the office, so he wrote to the Chancellor about it. On July 30, which was
11 a Saturday, he wrote to Public Affairs, cc'd the Chancellor, and said he had not heard from
12 anyone so he had to publish his story. On August 1, a Monday, he wrote again demanding a
13 response. That same day, Public Affairs instructed him that, for public records, Mr. Muchnick
14 had to communicate with my office, which Mr. Muchnick should have known.

15 21. On August 1, 2016, he emailed me seeking all a copy of all PRA requests
16 submitted to my office from April 1, 2016 through July 31, 2016, from any requestor. In order
17 for me to identify such requests, I had to review all of my emails, because I do not file requests
18 separately from communications about requests. All of this took an enormous amount of time.
19 Making matters worse, in the case of his requests, was that he would often email me not only to
20 the email account "PRA@berkeley.edu" but also to my individual account
21 "lianeko@berkeley.edu". All of this had to be reviewed to comply with his request.

22 22. On August 16, 2016, he emailed me complaining about the timeline to fulfil his
23 April 6 request and demanded a full response and update. That was a Tuesday. On Friday, he
24 forwarded the same email to me, asking for a response. That was August 19 at 8:40 a.m. The
25 same day, at 3:43 p.m., he wrote to Mr. Robinson, cc'd me, and cc'd another senior counsel at the
26 General Counsel, complaining that we were taking too long to respond to his August 16 status
27 update request, which he had submitted just three days earlier.

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1 23. On August 21, 2016, Mr. Robinson wrote him telling him his request had been
2 directed to the appropriate personnel. I was cc'd.

3 24. On August 23, 2016, I sent him an estimate of 2-4 weeks for a production of
4 records in response to his April 6 request.

5 25. On September 9, 2016, he submitted another PRA request, this time for the
6 employment contracts for the former UC Berkeley Athletic Director. That was a Friday. On
7 Monday, he emailed me again asking me to acknowledge his request and give him a time
8 estimate. Under the PRA, we have 10 days to provide a response letter. Mr. Muchnick knows
9 this. There was no need for this additional and harassing correspondence, all of which took time
10 for me to review and process.

11 26. On September 20, 2016, at 10:52 a.m., he emailed me for another status update for
12 his April 6 request. The following day, at 6:35 a.m., he wrote again asking the same question. At
13 5:01 p.m., he emailed me, and cc'd the UC Berkeley campus counsel, complaining that he did not
14 hear back from me and complaining that his April 6, 2016 inquiry had not been fulfilled. This
15 generated yet additional correspondence I had to process. On September 22, at 5:00 p.m., he
16 emailed Mr. Robinson, cc'd me and the UC Berkeley campus counsel, and cc'd another senior
17 General Counsel senior lawyer, complaining about the purported lack of response. Such short
18 and repetitive deadlines were not only harassing, but also disruptive to our entire process,
19 requiring the devotion of time that could have been spent on his and other requestors' requests.

20 27. I replied, at 6:16 p.m. that his request was in line for processing and the estimate
21 was 4-6 weeks. At 6:20 p.m., he replied asking when the clock started to run on that estimate.

22 28. On the same day, at 6:35 p.m., I told him it was from September 22, I explained
23 that his was not the only requests that my office had to process. At 7:19 p.m., he emailed my
24 office, cc'd Mr. Robinson, complaining that he was going to follow up with Mr. Robinson and the
25 President.

26 29. On September 23, 2016, at 7:58 a.m., a Friday, he wrote to the President, cc'd
27 Mr. Robinson, cc'd the UCOP Compliance Officer, cc'd the campus counsel, and me,
28 complaining again.

1 30. On September 26, 2016, a Monday, he emailed the same people again for a
2 response.

3 31. At September 29, 2016, at 10:40 a.m., the UCOP Public Records Coordinator
4 responded, reminding him that all campuses have separate Public Records offices so he should be
5 directing his communications to Berkeley. He also tried to explain why such requests take time
6 to process. At 11:06 a.m., Mr. Muchnick replied, and cc'd all of the same people, including the
7 President, the General Counsel, the campus counsel, and me.

8 32. On October 1, 2016, a Saturday, he emailed me, cc'd the same people (the
9 President, Mr. Robinson, campus counsel, UCOP Compliance Officer, UCOP Public Records
10 Coordinator), forwarding a copy of his article about the purported delaying in responding to his
11 PRA request.

12 33. On November 3, 2016, he emailed me for another status update. Since the initial
13 April 6, 2016, request, we had made substantial and ongoing progress. On April 14, we
14 acknowledged the request. On July 21, we released records and explained that some information
15 was exempt. In addition, his April 6 request was not very specific so it took a significant amount
16 of time to search for responsive records. His November 3 request was at 5:03 p.m. At 6:34 p.m.,
17 I responded to him. At 6:38 p.m., he asked me for the next target date.

18 34. On November 7, 2016, the following Monday, at 6:27 a.m., he asked again about
19 his November 3 request. Again, all of this took time to process.

20 35. On November 29, 2016, he asked for a status update again. That was at 3:59 p.m.

21 36. On November 30, 2016, at 10:17 a.m., he asked for an update to the 3:59 p.m.
22 email the previous day. Mr. Muchnick was demanding immediate attention.

23 37. On December 1, 2016, at 9:52 a.m., he emailed the President, the UCOP Public
24 Records Coordinator, Mr. Robinson, the UCOP Compliance Officer, the campus counsel, me (to
25 both addresses, as he commonly did, as explained above), complaining that he had not received a
26 response. At 9:58 a.m., he got the UCOP Compliance Officer's message that she had retired so
27 he forwarded it to the Compliance Officer's successor. At 5:09 p.m., I emailed him that we
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1 planned to release records before the University holiday. (I did that. On December 15, we
2 released the records.) At 5:11 p.m., he replied.

3 38. On December 14, 2016, 2:54 p.m., he emailed me asking if “prior to the holiday”
4 meant on or before December 24. At 4:39 p.m., I replied, telling him we planned to release the
5 records the same week. That was a Wednesday. At 4:47 p.m., he replied. The following day, we
6 released the records.

7 39. On December 15, 2016, at 10:43 a.m., responded to the release, warning me that
8 he might follow up with more requests.

9 40. On December 16, 2016, a Friday, he emailed me, cc’d the President,
10 Mr. Robinson, the UCOP Compliance Officer, the UCOP Public Records Coordinator, and
11 campus counsel, thanking me for the records but complaining that it was not complete. (The
12 UCOP Public Records Coordinator had already cautioned him to restrict his communications to
13 my office. His inclusion of others repeatedly led to further communications from them, which I
14 had to address rather than devoting time to responding to PRA requests, including his.) The
15 email contained a copy of an article Mr. Muchnick had written.

16 41. In that same email, he requested additional records, which he described as “then-
17 Vice Chancellor Wilton’s charge letter, the scope-of-work document, and other things referred to
18 in the article.” It was not clear to me what he was requesting when he simply referred to “other
19 things referred to in the article,” which was a reference to the article he included in the email.

20 42. So I replied to him at 2:31 p.m., explaining that he should email my office with a
21 request clarifying the records he was seeking. At 2:44 p.m., he replied, listing the items he
22 wanted.

23 43. I made an effort to try to dissuade him from unnecessarily including others as a
24 matter of course in all of his correspondence, as he was now beginning to do, because of the
25 corresponding expansion of communications such unnecessary additions was causing, and I did
26 this by significantly altering my work practices by responding immediately to all of his emails, to
27 get back to him before he had the chance to write to all of the others. This practice is against the
28 public interest because I felt forced to devote extra attention, and give special treatment, to him.

1 There are many other requestors whose work suffered as a result of my altering my practice to
2 respond immediately to him rather than organizing my work in a more fair way, responding to
3 inquiries on a first-come, first-served basis, or alternative means which allowed my office to work
4 as efficiently and cost-effectively for the public and the University.

5 44. On December 20, 2016, I released records to him. He replied to thank me.

6 45. On December 22, 2016, he submitted another PRA request. Our office was closed
7 for the holiday at that time. After the holiday, on January 19, 2017, I responded to him. My
8 response was at 5:56 p.m. At 10:00 p.m., he emailed me, cc'd the usual people (the President,
9 Mr. Robinson, campus counsel, UCOP Public Records Coordinator, UCOP Compliance Officer),
10 complaining that my 5:56 p.m. acknowledgement was inadequate and inappropriately treated his
11 request as a new request rather than a follow-up on an already pending request. On Monday,
12 January 23, he wrote to the same individuals informing us all that he would be writing his article.

13 46. Moving on to his next PRA request, on January 2, 2017, the first day after the end
14 of the holiday, he emailed me (at both email addresses, creating duplicate emails), submitting
15 another PRA request.

16 47. On February 10, 2017, I released a record in response to his December 22 request,
17 and informed him about all applicable exemptions preventing us from disclosing other records
18 relating to that request. I told him that we now considered the December 22 request closed. He
19 replied the same day, a Friday, that he would be consulting with counsel because he disputed my
20 claim that the request was closed.

21 48. On February 13, 2017, he wrote the usual personnel (the President et al.) asking if
22 my February 10, 2017, statement to him that the December 22 request was now closed meant to
23 encompass all pending requests or just the December 22 request. I had clearly told him that just
24 the December 22 request was now closed. On February 15, 2017, I reiterated that fact to him.
25 My general practice in responding to PRA requests, especially with someone like Mr. Muchnick
26 who submits multiple PRA requests, is to keep the requests separate and distinct by using a
27 unique subject line for all emails relating to each respective request. In my February 10, 2017,
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1 email to him closing the December 22 request, I employed the unique subject line that I had used
2 throughout all of my correspondence with him relating to that December 22 request.

3 49. On February 16, 2017, at 4:14 p.m., Mr. Muchnick replied to me (copying the usual
4 personnel), asking for the status of all of his requests. He stated his belief that we had not
5 adequately responded to his requests.

6 50. On February 21, 2017, he emailed the usual personnel asking the same questions.
7 I replied the same day telling him that I would review our records.

8 51. On February 27, 2017, at 1:00 p.m., he emailed me for the same information. In
9 addition, he noted that we had provided him a copy of the police report relating to the locker
10 room altercation incident nine months after we had provided it to the *Daily Californian* student
11 newspaper. The requests were not the same. At 1:02 p.m., he emailed me yet again, with a
12 grammatical correction to his earlier email. This, again, took additional time for me to review.

13 52. On February 28, 2017, he emailed the usual personnel, including his article, and
14 asking for information or comment in response to his claim in his article about his belief that it
15 was taking too long to respond to his PRA requests.

16 53. On March 9, 2017, he asked for the status of his request for a list of open and
17 closed requests.

18 54. On March 14, 2017, he wrote the President (cc'ing the usual personnel),
19 complaining about the amount of time it was taking to get his update of open and closed requests.

20 55. On March 16, 2017, he forwarded his March 14 email to the same group of people
21 (because he had gotten no response in two days).

22 56. On March 23, 2017, I informed him about two requests that were still open – his
23 January 2, 2017, request and his August 1, 2016, request. As to the former, the document was not
24 yet available; as to the latter, as explained above, the request required a very time-consuming
25 process to respond.

26 57. On March 24, 2017, Mr. Muchnick's lawyer, Roy Gordet, sent me a letter asking
27 for a list of open and closed requests for Mr. Muchnick. It took me time to research and create
28 the list. I provided the list to him on March 30.

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DECLARATION OF CARRIE SCHMIDT

I, CARRIE SCHMIDT, declare:

1. I am a paralegal in the Office of the General Counsel to The Regents of the University of California and am one of the paralegals responsible for the above-captioned litigation. Except as qualified, I have personal and firsthand knowledge of the facts set forth in this declaration and, if called as a witness, could and would competently testify thereto under oath.

IDENTIFICATION OF RESPONSIVE DOCUMENTS

2. After the Petition was filed in this case, and, according to my understanding, as the result of a meet and confer process, Petitioner provided The Regents a list of seven individuals whose emails and other documents The Regents agreed to search, as well as seven search terms or phrases to narrow the search, all within the date range of November 1, 2013 through April 6, 2016. I understand that Liane Ko, the UC Berkeley Public Records Coordinator, managed that search.

3. My role in the process was to review the documents generated by the search to determine whether any of them were responsive to Petitioner’s April 6, 2016, Public Records Act request. After I identified responsive documents, I then culled that stack to segregate those documents that were protected by one or more exemptions to the Public Records Act. Finally, I compared any remaining responsive, non-exempt documents against the collection of documents I understand the campus produced to Petitioner before he filed the Petition.

4. The search Petitioner asked The Regents to conduct yielded a voluminous collection of records, only a small portion of which were responsive to the April 6, 2016, PRA request. Of the responsive records I identified, a majority of the records were exempt. I also identified a number of non-exempt records that were duplicates of records The Regents released to Petitioner before he filed the Petition. Not a single new responsive and non-exempt record was discovered.

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FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT EXEMPTION

5. I am familiar with the definition of “education records” under the Family Educational Rights and Privacy Act of 1974. All of the responsive documents I reviewed, as testified above, meet that definition because they either identified or concerned one of the students listed in Petitioner’s April 6, 2016, Public Records Act request. Indeed, that same fact was what made them responsive to that request in the first place when I reviewed the collection of documents generated by the search process described above.

ATTORNEY-CLIENT PRIVILEGE

6. At least one of the responsive documents is also protected by the attorney-client privilege.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Oakland, California on March 26, 2018.



Carrie Schmidt

1 Mr. Muchnick before he filed the Petition. Not a single new responsive and non-exempt record
2 was discovered. All of the exempt records are exempt under FERPA and, in addition, to the right
3 to privacy (Gov't Code secs. 6254(c) and 6255). At least one is also protected by the attorney-
4 client privilege.

5 6. After receiving my status report indicating that the filing of the Petition, and
6 efforts undertaken in response to it, led to the discovery of no additional responsive non-exempt
7 records, Mr. Gordet expressed an interest in conducting discovery in order to challenge the
8 exemptions – on both the facts and the law – claimed by The Regents. Mr. Gordet and I
9 discussed the possibility of our furnishing a Vaughn Index as a preliminary measure, in order to
10 streamline discovery. Unfortunately, after my team and I began the process of preparing the
11 Index, and analyzing the records in our possession that were responsive to Petitioner's request,
12 we determined that FERPA, in addition to other exemptions (viz., privacy), prohibited The
13 Regents from providing any useful information on a Vaughn Index.

14 7. As an alternative, I also proposed to Mr. Gordet the idea of our permitting an
15 "attorney's eyes only" inspection of the withheld records. Petitioner rejected that proposal.

16 8. As a second alternative, I also asked Mr. Gordet if Mr. Muchnick would be
17 interested in an inspection of the withheld records personally under a protective order. Petitioner
18 rejected that proposal as well.

19 9. As a third alternative, I proposed to Mr. Gordet in December that he and
20 Mr. Muchnick consider obtaining waivers from the students whose records are being sought, to
21 release The Regents from its obligations under FERPA and the students' and their families'
22 privacy rights. To my knowledge, they never pursued that option. Accordingly, I initiated
23 communications with the family of one of the students – Ted Agu – in an effort to obtain their
24 consent to permit The Regents to release responsive records related to their son to Petitioner. I
25 had a number of communications with the family's lawyer. This spanned a considerable time
26 period. I received an email confirming a final decision by the family from their lawyer on
27 March 25, 2018, consenting to the release. I immediately emailed the records to Mr. Gordet.

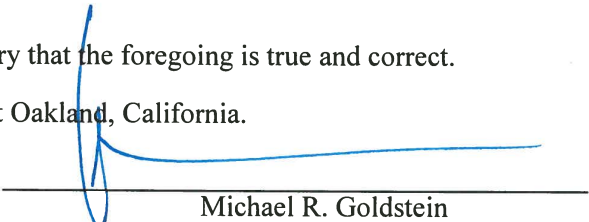
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1 10. In his CM-110 form (filed on February 16, 2018), Mr. Gordet states “Respondent
2 represented that Respondent would provide Respondent’s proposed insert for the CM Statement
3 by Thursday, February 15. On Friday, February 16, Respondent sent a message that it wished to
4 delay the filing of the Joint Case Management Statement due to a potential new development that
5 Respondent believed could potentially ‘impact’ the case. . . . This case needs to move forward.
6 Further delaying tactics are unacceptable.”

7 11. As testified above, during this time, I was in the process of obtaining the Agu
8 family’s consent to release records to Petitioner, and I was actively engaging in that process, but I
9 had not obtained a final answer by February 15, when I anticipated providing Mr. Gordet with
10 The Regents’ portion of the CM-110 form. It was a development in that process which led me to
11 request a delay in the filing of the Joint Case Management Statement, which Mr. Gordet criticizes
12 in the language excerpted above from his CM-110 form. As noted above, I finally received the
13 family’s consent on March 25, 2018.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on March 27, 2018, at Oakland, California.



Michael R. Goldstein

1 **Case Name: Irvin Muchnick v. University of California,**
2 **Board of Regents**

Case No. RG17857115

3 **PROOF OF SERVICE BY E-MAIL**

4 (Code Civ. Proc., § 1013(g))

5 I, the undersigned, say: I am over 18 years of age, employed in Alameda County,
6 California, and not a party to the subject cause. My business address is Office of the General
7 Counsel, 1111 Franklin Street, 8th Floor, Oakland, California 94607-5200.

8 On March __, 2018, I served the attached:

9 OPENING BRIEF BY RESPONDENT THE REGENTS OF THE UNIVERSITY OF
10 CALIFORNIA RE: SUITABILITY OF VAUGHN INDEX IN THIS ACTION;
11 DECLARATION BY LIANE KO; DECLARATION BY CARRIE SCHMIDT;
12 DECLARATION BY MICHAEL R. GOLDSTEIN

13 by e-mailing a copy thereof to the following individual at the following e-mail address:

14 Roy S. Gordet, Esq.
15 The Law Office of Roy S. Gordet
16 235 Westlake Center, No. 452
17 Daly City, CA 94015
18 e-mail: roy@copyrightdirection.com

19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed on March 27, 2018, at Oakland, California.

21 
22 _____
23 Julie Felkins

24 4838-6921-0208.1