SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

20STCP01226 January 20, 2022
GOVERNMENT ACCOUNTABILITY & OVERSIGHT, P.C. 1:30 PM
vs THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: Cindy Cameron/CSR 10315
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): James K.T. Hunter (Telephonic) (x)

For Respondent(s): Raymond A. Cardozo (x) (Telephonic)

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing and is argued.

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The court partially adopts its tentative ruling as modified as the order of the court and is set forth in this minute order.

Petitioner Government Accountability & Oversight, P.C. ("Petitioner" or "GAO") petitions for a writ of mandate directing Respondent The Regents of the University of California ("Respondent" or "Regents") to provide copies of all documents requested by Petitioner pursuant to its requests for records dated November 14, 2019, and December 18, 2019, pursuant to the California Public Records Act ("CPRA"). (See First Amended Verified Petition ("FAP") Prayer ¶ 2.) Petitioner also prays for a judicial declaration that Respondent violated the CPRA by failing to provide timely responses to the CPRA requests, failing to produce records, and improperly redacting certain records. (Id. Prayer ¶ 1.)

Motion in Limine No. 1 – Denied. See Ruling in Minute Order dated December 14, 2021

Motion in Limine No. 2 – Denied. While a CPRA requestor's subjective motivations are irrelevant to the right of public access, the procedural history and discovery proceedings discussed by Gherini and Buck have some potential relevance to Petitioner's contentions that Respondent unduly delayed its CPRA response/production, to the sufficiency of Respondent's CPRA response, and to the balancing of interests under Government Code section 6255.

Petitioner's Evidentiary Objections

Carlson, Mapes, and Mnookin Declarations – See Ruling in Minute Order dated December 14, 2021 at page 10 of 15.

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Gherini Declaration
Items 1, 3-7, 9 – Overruled.
Items 2, 8 – Sustained

Buck Declaration
Items 1-2 – Overruled.
Item 3 – Sustained.

Background

On November 14, 2019, Petitioner served a CPRA request ("November 2019 Request") on Respondent seeking any emails sent to or from two UCLA law professors, Ann Carlson and Cara Horowitz, during the period April 25, 2016, through November 14, 2019, that were to, from, or included various email addresses, including an email address ending with "@douglasemmett.com," "@nextenergytech.com," and "@state.ma.us." (FAP ¶ 3, Exh. 1; Administrative Record ("AR") 1-4.)

The November 2019 Request stated the reason for making the request, as follows: "This request is being made in the public interest, and furnishing this information will benefit the public's understanding of recent events regarding climate litigation and municipalities which have been filing lawsuits against energy companies and working closely with attorneys general also to pursue opponents of the 'climate' policy/political agenda. This information is being requested for the purpose of understanding how state institutions are involved, if at all, in the larger effort feeding this litigation industry." (AR 2-3.) In its opening brief, Petitioner refers to this stated reason as the "Climate Litigation/Regents Interface." (See Opening Brief ("OB") 1.)

This request relates to emails by faculty who are affiliated with the UCLA School of Law, Emmett Institute on Climate Change & the Environment ("Emmett Institute"). (AR 434.) Petitioner seeks emails evidencing the donor relationship between UCLA School of Law and its professors, including Professors Carlson and Horowitz, and Dan Emmett ("Emmett"), the namesake and principal founder of the Emmett Institute. (OB 1:22-24.) In its opening brief, Petitioner summarizes certain emails between Carlson and Emmett that, according to Petitioner, "deal with the Climate Litigation/Regents Interface." (OB 1-4.)

On December 18, 2019, Petitioner served a CPRA request ("December 2019 Request") on Respondent seeking documents relating to UCLA's processing of the November 2019 Request

through its Information Practices office, including information relating to other CPRA requests processed by Information Practices in 2019. (FAP ¶ 20, Exh. 9; AR 435, 444-448.)

The Records Management and Information Practices office ("Information Practices") handles all CPRA requests received by UCLA. (AR 434.) On or about January 10, 2020, Respondent produced about 1,000 pages of records responsive to the November 2019 Request. Respondent produced approximately 1,000 pages of additional documents on February 14, 2020. (AR 435.)

Due to the COVID-19 pandemic, in or around March 2020, employees in Information Practices transitioned to working remotely. While work continued, the transition had an impact on the pace of work. (AR 436.)

On March 26, 2020, Respondent produced an additional 789 pages of records responsive to the November 2019 Request and indicated it was still processing the request and that additional time was needed. (AR 436, 453.) According to Petitioner, these initial productions included only "a single category of documents (i.e., electronic case filing notices), and from only one of the identified faculty (Horowitz). No emails regarding the Climate Litigation/State Institution Interface, or any substantive topic, were included." (AR 354 ¶ 4.)

On May 1, 2020, Respondent made its "final production" of records responsive to the December 2019 Request. (AR 435, ¶ 7; see also FAP ¶ 27.)

On August 31, 2020, Respondent made its fourth and final production of 1,031 pages documents in response to the November 2019 Request. In total, Respondent produced approximately 3,822 pages of records in response to the November 2019 Request. (AR 436.) Petitioner indicates that "[t]he 8/31/20 Production did ... include some substantive emails evidencing the financial relationship between Professors Carlson and Horowitz and Dan Emmett." (AR 354.)

On August 31, 2020, Respondent also stated that it had redacted certain information and withheld certain documents based on one or more claimed exemptions. Respondent also stated that it withheld certain documents that were not public records within the meaning of the CPRA. (AR 5-6, 354.)

Petitioner requested a privilege log identifying the documents withheld. On December 16, 2020, Respondent provided two separate privilege logs: (1) an Exemption Log listing 120 separate documents and (2) a Not Public Record Log listing 544 separate documents (AR 355, 54-143.) On July 1, 2021, as part of a discovery response, Respondent produced an amended exemption

log, which asserted additional claims of exemption with respect to many of the documents specified in the original exemption log. (AR 356, 8-53, 145-198.)

In this writ action, and as analyzed below, Petitioner contends that Respondent's responses to these CPRA requests are deficient and incomplete. (See FAP ¶¶ 42-43.)

Procedural History

On April 1, 2020, Petitioner filed a verified petition for writ of mandate pursuant to the CPRA against Respondent. On May 4, 2020, Petitioner filed a first amended verified petition.

Respondent contends that Petitioner filed this writ action prematurely during the "height of the [Covid-19] pandemic" and while Respondent was "still processing" the CPRA requests. (Oppo. 6.) Respondent also contends that Petitioner has "harassed" it with "unnecessary discovery" and "duplicative demands." (Oppo. 6-8.) The court is not persuaded by these arguments. Petitioner's CPRA requests were made in November 2019 and December 2019. Given the time that had elapsed, and Respondent's duty to respond and produce the public records "promptly," Petitioner was well within its rights to file the petition in April 2020. As discussed in prior rulings, while discovery in a CPRA action is limited to some degree, a CPRA petitioner may nonetheless pursue discovery that would help prove its claims. The court finds it unnecessary to further address these contentions.

On June 15, 2020, Respondent filed an answer.

On September 1, 2020, the court held a trial setting conference, set the petition for hearing on June 15, 2021, and set a briefing schedule.

On April 19, 2021, Petitioner filed a motion for order advancing dates for expert witness disclosures and discovery. On May 5, 2021, Respondent filed its opposition. On May 11, 2021, Petitioner filed a reply. On May 18, 2021, the court heard oral argument and denied Petitioner's motion.

On February 4, 2021, the court granted the parties' request to continue the hearing on the writ petition to September 14, 2021. The court set a new briefing schedule.

On July 13, 2021, the court approved the parties' stipulation to continue the hearing on the writ petition.

Starting October 15, 2021, the parties filed 24-page opening and opposition briefs for the writ hearing that substantially exceeded applicable page limits of 15 pages. (See Cal. Rules of Court, Rule 3.1113(d); Los Angeles Superior Court Local Rules, Rule 3.231(i).) On December 10, 2021, the court ordered the parties to file opening and opposition briefs that do not exceed 20 pages. The court has received the parties' amended opening and opposition briefs, Petitioner's reply, and the parties' joint administrative record.

On December 14, 2021, the court ruled on Petitioner's motion in limine No. 1 and some of Petitioner's evidentiary objections.

On December 15, 2021, Petitioner filed a "Notice of Significant New Authority."

Summary of CPRA; Burden of Proof; and Standard of Review

Pursuant to the CPRA (Gov. Code § 6250, et seq.), individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also County of Los Angeles v. Superior Court (2012) 211 Cal.App.4th 57, 63.) The CPRA defines "public records" as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 6252(e).)

Article I, Section 3(b) of the Constitution affirms that "[t]he people have the right of access to information concerning the conduct of the people's business." The Constitution mandates that the CPRA be "broadly construed," while any statute "that limits the right of access" must be "narrowly construed." (See Nat'l Lawyers Guild v. City of Hayward (2020) 9 Cal.5th 488, 507.) The CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." (Gov. Code § 6257.5.)

While the CPRA provides express exemptions to its disclosure requirements, these exemptions must be narrowly construed and the agency bears the burden of showing that a specific exemption applies. (Sacramento County Employees' Retirement System v. Superior Court (2013) 195 Cal.App.4th 440, 453.)

A public agency also has the burden to demonstrate that it properly withheld records on the grounds they are non-responsive to a CPRA request or do not constitute public records. (ACLU of Northern Cal. v. Sup.Ct. (2011) 202 Cal.App.4th 55, 83-86.) ""Because the agency has full knowledge of the contents of the withheld records and the requester has only the agency's affidavits and descriptions of the documents, its affidavits must be specific enough to give the requester 'a meaningful opportunity to contest' the withholding of the documents." (Id. at 83; see also Getz v. Sup.Ct. (2021) 72 Cal.App.5th 637.)

Government Code sections 6258 and 6259 set forth the scope of the trial court's review of a writ petition under the CPRA. "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter." (Gov. Code § 6258.) "Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why the officer or person should not do so." (§ 6259(a).) "If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, the court shall order the public official to make the record public. If the court determines that the public official was justified in refusing to make the record public, the court shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure." (Id. § 6259(b).)

Analysis

Deliberative Process Privilege

The privilege log shows that Respondent withheld 95 records that are responsive to the November 2019 Request based on the deliberative process privilege. Eighty-six of these documents, numbers 1, 3, 15-31, 33, 35-37, 39, 40, 42-62, 64-84, 87, 88, 90, 91, and 93-107, were "email threads" withheld on the grounds that they include pre-decisional "internal fundraising discussions" (hereafter "Fundraising Documents".) Nine of these documents, numbers 108, 110, 112, 114, and 116-120, were email threads withheld on the grounds that they concern "pre-publication academic research" (hereafter "Pre-Publication Documents"). Multiple attachments to these emails were also withheld based on the stated ground that they are "attachment[s] to email." (See OB 5-9; AR 8-53, 145-198.)

The California Supreme Court has held that there is a CPRA exemption for "'not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated.'" (Golden Door Properties, LLC v. Sup.Ct. (2020) 53 Cal.App.5th 733, 789; see Times Mirror Co. v. Sup. Ct. (1991) 53 Cal.3d 1325, 1344.) The party claiming this deliberative process exemption must show that on the facts of a particular case "the public interest in nondisclosure clearly outweighs the public interest in disclosure." (Citizens for Open Government v. City of Lodi (2012) 205 Cal.App.4th 296, 306; see Gov. Code § 6255.) The public agency "must describe the justification for nondisclosure with reasonably specific detail and demonstrate that the information withheld is within the claimed privilege or exemption." (Golden Door Properties, supra, 53 Cal.App.5th at 790.)

Fundraising Documents

The privilege log provides the following "exemption explanation" for the Fundraising Documents:

The record concerns pre-decisional internal discussions ... regarding how to raise private funds relating to, among other things, strategies and particular donor interactions which, if subject to public disclosure, would chill the candor of such discussions or preclude them entirely. As a result, disclosure would hamper the University's ability to raise private funds that are essential to funding education, scientific, medical and other academic pursuits that the University would be unable to fully fund with public funding alone. Comparable internal pre-decisional deliberative discussions are not only exempt in other public entity contexts, but are also not subject to disclosure at comparable private universities. As a result, the University would be at a disadvantage in raising private funds when compared to its counterparts at private universities if the University's internal discussions regarding private donors were subject to disclosure. While not all donor information may be protected in all circumstances where the records relate to formal agreements reached for expenditures of public funds, see, e.g., California State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal. App. 4th 810, 833-835 ..., here, these emails are internal discussions among UCLA employees about potential fundraising strategies. If such information were disclosed, public university employees will not feel free to candidly discuss potential fundraising strategies and targets, which will severely limit the university's ability to secure the private funding it needs to supplement other sources of funding for its operations. This is similar to express exemptions for drafts and constitutes deliberative

process such that this information is exempt from disclosure.... Pursuant to the Court's rulings, the University may offer lay witness opinion declarations or percipient fact declarations consistent with and supporting the above explanation. (AR 145-198.) 1

In California State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal. App. 4th 810, cited in the privilege log, a university "proposed a $103 million multipurpose arena on its campus, the Save Mart Center, to be funded primarily by private donations .... In exchange for a generous gift to the [university foundation] ... donors may obtain luxury suites in the arena for five-, seven or ten-year terms. The donors enter into license agreements ... for use of the luxury suites. Some of the donors who obtained luxury suites requested to remain anonymous." (Id. at 816.) In a CPRA request, the Fresno Bee sought documents from the university "concerning the identity of the individuals and/or companies that purchased luxury suites in the arena."

The Court of Appeal held that the requested documents were not exempt under the catchall exemption in Government Code section 6255. The Court found a public interest in disclosure of the requested documents, including the identities of the donors, because, inter alia, "the Save Mart Center utilized public funds for a public multipurpose arena on land owned by a public university." (Id. at 833.) The Court found that the university did not show a "clear" overbalance on the side of confidentiality. As relevant here, the Court stated:

The University further asserts that large donations will be canceled if promises of confidentiality are breached. First, the University has set forth no competent evidence that licensees demanded, or University or Association personnel promised, confidentiality.... Second, any claims by the University that donations will be canceled are speculative, supported only by inadmissible hearsay. Statements by University personnel that disclosure of the licensees will "likely" have a chilling effect on future donations, resulting in a "potential" loss of donations, are inadequate to demonstrate any significant public interest in nondisclosure. (CBS, Inc. v. Block, supra, 42 Cal.3d at p. 652 ["mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records"];....

The unsupported statements constitute nothing more than speculative, self-serving opinions designed to preclude the dissemination of information to which the public is entitled. There is no admissible evidence in the record that any license agreements will be canceled if licensee names are disclosed to the public. Any genuine concerns of donor withdrawals should have been presented with competent evidence through an in camera hearing, which then could have been evaluated on appeal. (Fresno, supra, 90 Cal.App.4th at 834-835.)

Respondent contends that Fresno is "inapposite." (Oppo. 11.) The court disagrees. The Fresno Court analyzed the section 6255 balancing of interests, which also applies to a deliberative process claim, in the context of fundraising records related to a public university. While the facts from Fresno are not identical to those here, the Court's analysis provides some relevant guidance for that balancing test, including with respect to the agency's evidentiary burden.

Respondent relies heavily on Times Mirror, supra. (Oppo. 9-13.) The Times Mirror Court held that "the courts' focus … is less on the nature of the records sought and more on the effect of the records' release. The key question in every case is 'whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion.'" (Times Mirror, Co., supra, 53 Cal.3d at 1342.) The newspaper in Times Mirror sought the governor's appointments schedules and calendars, and the Supreme Court affirmed the trial court's order of non-disclosure. The Court reasoned: "Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." (Id. at 1343.)

Here, Respondent's privilege log identifies (1) the general "nature" of the withheld document (e.g., "email thread"); (2) the sender(s), recipient(s), and persons "cc'd" on the email; (3) the message subject, attachment names, and file names; (4) the date the message was sent and the date any file modified; and (5) an "exemption explanation." (See AR 145.) While Counsel should confirm this at the hearing, it appears that the privilege log is not verified by any custodian of records with personal knowledge about the emails (e.g. Professors Carlson or Horowitz.) For all 86 documents, the privilege log provides the identical statement that the documents "concern[] pre-decisional internal discussions … regarding how to raise private funds relating to, among other things, strategies and particular donor interactions."

Respondent also relies on generalized statements in the declarations of Professor Ann Carlson, UCLA Foundation Chair John Mapes, and UCLA School of Law
Dean Jennifer Mnookin. (AR 603-607, 751-758.) Relevant statements from these declarants include the following:

• Professor Carlson: "Sometimes, when engaging in pre-decisional deliberations about donors or fundraising, it is useful to consult knowledgeable and trusted advisors who are not University employees. Efficient and effective decision-making is aided when deliberative processes can occur in private and include trusted advisors who are not University employees. If emails

discussing fundraising strategies with such trusted advisors during the pre-decisional deliberative process were not exempt and were subject to compelled disclosure, the ability of senior University officials to consult with knowledgeable persons who can provide helpful and valuable input would be impaired, harming the public's interest in the effectiveness, efficiency and quality of decision-making by public entities. For example, Daniel Emmett is a strong supporter of and deeply knowledgeable with regard to the Emmett Institute. To brainstorm fundraising ideas for the Institute, I have consulted Mr. Emmett on occasion to get input on fundraising ideas. I understand several of the documents that Information Practices withheld as exempt involved such deliberative emails with Mr. Emmett." (AR 606.)

• Foundation Chair Mapes: "In strategizing about fundraising for the UCLA Foundation, I and others participating in the strategy discussions regularly discuss individual donors and how best to approach them. Based on my professional experience engaging in philanthropic activities on behalf of the UCLA Foundation for many years, I believe it would harm fundraising, and therefore, harm the public's nterest, if any member of the public could compel disclosure of those internal strategy discussions. Such disclosure could make it difficult for me and others within the University to candidly discuss potential donors and how to approach them. As a donor, I also would find it troubling if any member of the public could compel disclosure of any internal deliberations that talk about me as a donor or any personal or social emails that I have with UCLA employees. I could be embarrassed if emails that discussed how to approach me for donations or if personal and social exchanges with UCLA employees unrelated to UCLA's work were available to the general public, and disclosure of those discussions might embarrass those who participated in the discussions as well. Through my work on the UCLA Foundation, I appreciate that it its inevitable and necessary for fundraisers to discuss individual donors privately. But I personally would prefer not to see the disclosure of discussions about me. In my life experience, discretion and privacy are important in interpersonal relations." (AR 751-752.)

• Dean Mnookin: "In the course of our fundraising campaigns, I frequently communicate with Law School faculty and staff as well as trusted advisors about who we should approach about making a donation and how best to approach them. We discuss matters such as donor solicitation strategies, our thoughts about donors' interests and how our own goals might link to those; plans for potential fundraising events and how to conduct such activities. The discussions in question occur prior to reaching a decision; indeed, they are meant to help make the decision of how best to proceed.... Disclosure of internal communications that reflect discussions about fundraising strategy that occur before a decision is made would also impair the Law School's relationship with donors. Were public disclosure of such communications required, it would make it untenably difficult for me and others within the University to candidly discuss potential donors

and how to approach them.... Effective fundraising is a "retail" effort—it often involves internal discussions of individual donors and what we know about them that might inform how best to approach them. Disclosure of such discussions could potentially embarrass the speakers, the donors or both." (AR 754-755.)

Petitioner offers several declarations to show the public interest in disclosure of the "Fundraising Documents" and to rebut the opinions provided by Carlson, Mapes, and Mnookin. (See AR 236-263, 296-345.) Among others, the record includes declarations of William Happer, a professor of physics, emeritus, at Princeton University, and Richard Lindzen, who has a Ph.D. in applied mathematics from Harvard, held professorships at University of Chicago, Harvard, and the Massachusetts Institute of Technology, and is a fellow of the American Meteorological Society, the American Geophysical Union and the American Association for the Advancement of Science.

Professor Happer declares: "Regardless of which side of the climate change debate is correct, or closer to being correct, the public should know all it can about any influence, direct and obvious or indirect and covert, that is being utilized by donors such as Dan Emmett who have a clear political agenda as Climate Emergency Alarmists, including any fundraising strategies, priorities or uses of the Emmett Center. The political agenda being promoted by Dan Emmett and the Emmett Center (the 'Climate Emergency Alarmists' Agenda') is inherently one of imposed scarcities. To the extent this agenda is realized, it will affect virtually every aspect of the lives of Californians. All Californians, whether they agree or disagree with the Climate Emergency Alarmists, have an interest in determining whether, and to what extent, the Regents, which is primarily supported by the taxes of its citizens, the UCLA Law School and/or any of its faculty, have been influenced, or subject to bias or an appearance of bias, in the research conducted, the papers published, the opinions expressed, the subjects taught, the scholarships awarded and other influences including a need or a desire to adhere to, or avoid impeding, the Climate Emergency Alarmists' Agenda." (AR 242-243.)

Professor Lindzen provides a general discussion of his opinions about climate science and the public interest in disclosure of the Fundraising Documents. (AR 247-250.) He concludes as follows: "Under the assumption that CO2 emissions are responsible for an alleged climate crisis, we are proposing policies that call for a radical revolution of the energy economy and indeed the economy as a whole. Left largely unsaid is that the proposed policies will have virtually no impact on climate regardless of what one thinks about climate. That is to say, we are pursuing a purely symbolic response to a wholly improbable crisis. However, also unsaid is that the proposed policies represent a very real threat to the economy, the reliability and affordability of

energy, and, for the billions of people in the developing world, we are foreclosing the opportunities for a better life.... Given the implications of proposed policies, the public clearly is entitled to a full disclosure of what is at stake. It is important to understand why institutions like Emmett Center appear to support what is a painful but purely symbolic policy, and what Prof. Carlson is offering them.... [D]epending on what is found, interference with university fund raising might not always be a bad thing." (AR 250.)

The declarations summarized above, as well as the privilege log, suggest that some or all of the 86 Fundraising Documents, or some material in them, may fall within the deliberative process privilege. While none of the parties to the emails (including Professor Carlson) have described the emails in any detail, the privilege log provides some basis to conclude that the emails involve pre-decisional internal discussions about fundraising strategies. The Carlson, Mapes, and Mnookin declarations also provide some evidence that disclosure of such emails could be against the public interest. Disclosure could discourage candid discussion among public university decisionmakers regarding fundraising strategies and could also embarrass donors and thereby discourage donations to public universities.

However, as noted by Professor Lindzen, the public interests involved "depends on what is found" in the withheld emails and attachments. The emails requested by the November 2019 Request necessarily involve persons in the UCLA School of Law, Emmett Institute on Climate Change & the Environment, including Professor Carlson and Dan Emmett. There is a strong public interest in the topic of climate change, including a public interest in learning about the "Climate Litigation/Regents Interface," as described by Petitioner in the November 2019 Request. Professors Happer and Lindzen also provide some evidence that there is a public interest in the financing of the Emmett Institute because it engages in climate change related research and litigation and is based at a public university. The withheld emails about "fundraising strategies" would appear to have some relevance to that general topic of public interest.

However, other than these general observations, the court cannot weigh the public interests involved on this record. Respondent, which has the burden, has not provided a sufficient evidentiary record for CPRA review. "To carry its burden, the [public agency] must describe the justification for nondisclosure with reasonably specific detail and demonstrate that the information withheld is within the claimed privilege or exemption. This process cannot require an agency to disclose the very information it seeks to protect. Having both the burden of proof and all the evidence, the agency has the difficult task of justifying its withholding the documents without compromising that very act by revealing too much information.... However, declarations

supporting the agency's claims of exemption 'must be specific enough to give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine whether the exemption applies.' '[T]he agency must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information.' 'Conclusory or boilerplate assertions that merely recite the statutory standards are not sufficient.'" (Golden Door Properties, LLC v. Sup.Ct. (2020) 53 Cal.App.5th 733, 790.)

In Golden Door, the agency sought to withhold 1,900 documents based on the deliberative process privilege. The agency submitted a privilege log similar to the one provided by Respondent. The agency also relied on a declaration, like the Carlson and Mnookin declarations, that "avoids discussing any individual document and instead discusses the 1,900 documents as one enormously large unified group." (Golden Door, supra at 791.) Similar to the Carlson, Mnookin, and Mapes declarations, the declarant in Golden Door made "broad conclusory claims, but these merely echo public policies underlying claims of privilege." (Id. at 791.) "There is no specific explanation of the role played by any of the 1,900 documents in the deliberative process, or why disclosure would be harmful—other than these generalities." (Id. at 792.) The Court of Appeal held that this showing did not satisfy the agency's burden of proof but concluded that the agency should be afforded an opportunity to submit additional evidence in support of the claimed exemption. (Ibid.)

While the declarations here appear somewhat more detailed than the declaration in Golden Door, and while fewer documents are at issue, the circumstances here are similar to Golden Door. Respondent provides no specific context of the fundraising discussions or why disclosure of the specific discussions at issue would be harmful to the public. The court cannot say, in the abstract, that the balancing of interests necessarily tilts in favor of non-disclosure of internal emails about fundraising strategies that may support climate change research or advocacy at a public university. Given the relatively large number of documents at issue (86 emails plus attachments), more detailed evidence was required for Respondent to meet its burden of showing a "clear overbalance" on the side of confidentiality. For example, the court might view an email that discusses strategies to target a named potential donor differently than one which discusses donation strategies in general.

Finally, Petitioner contends that inclusion of Dan Emmett in many of the fundraising emails at issue waived the privilege because it was not an "internal" deliberation. (OB 7; see Ardon v. City of Los Angeles (2016) 62 Cal. 4th 1176, 1190.) As Respondent concedes, Emmett is "a third party who is not a University employee." (Oppo. 12.) Government Code section 6254.5 states in relevant part: "Notwithstanding any other law, if a state or local agency discloses a public record

that is otherwise exempt from this chapter, to a member of the public, this disclosure shall constitute a waiver of the exemptions specified in Section 6254 or 6254.7, or other similar provisions of law." However, as Petitioner notes, Respondent relies on the public interest balancing in section 6255 and not section 6254 or 6254.7. (OB 7, fn. 8.) While a similar provision for internal government documents is found in section 6254(a), Respondent does not rely on that statutory exemption. Courts have also held that the inclusion of interested third parties does not necessarily preclude application of the catchall exemption in section 6255. (See Humane Society of U.S. v. Sup.Ct. (2013) 214 Cal.App.4th 1233, 1242, 1263-64.) Emmett appears to be an interested third party in the alleged fundraising discussions at issue. On this record, the court cannot conclude that inclusion of Emmett in the emails waived the deliberative process privilege. However, the court cannot make any final determination of that issue without more specific information about each email.

On this record, Respondent does not meet its burden to prove that it properly withheld any of the Fundraising Documents as exempt. There appears to be some, reasonable probability that Respondent could meet its burden through supplemental declarations. For example, the chilling effect of disclosing the names and personal identifying information of targeted potential donors may be stronger than that involved in disclosure of a discussion of fund-raising activities in general, or those targeted to groups of persons not identified by name. Under Golden Door, the court is inclined to allow supplemental declarations.

Pre-Publication Documents

The privilege log states that Respondent withheld the nine Pre-Publication Documents because the records "concern pre-publication academic research .... The public interest in non?disclosure particularly applies because this record concerns drafts of academic texts whose disclosure would chill academic freedom, particularly research into sensitive or controversial topics...." (AR 197-198.)

The privilege log describes these nine documents as "email threads with attachments" between Professor Ann Carlson and Dan Emmett or demmett@douglasemmett.com.

In her declaration, Professor Carlson states: "When I am conducting academic research in anticipation of later producing an academic work, the process of getting input from others is critical to my work. Sources who speak with me trust me to quote them correctly. From time to time, I will, prior to publication, communicate with a source to confirm that the quotation I am attributing to them is accurate. If my initial draft of a quote is inaccurate, the source corrects it....

I also sometimes share with sources a draft of a chapter or passage to seek their review and input on the ideas I am developing. This back and forth contributes to and improves my final draft. The disclosure of such pre-publication communications also would harm my ability to engage in such collaborations, as sources would be less willing to provide the kind of frank and candid comments that are most helpful if they knew all such comments could be disclosed to the entire public.... I believe sources will be less likely to collaborate with me if there is a danger that preliminary discussions with sources, drafts or other pre-publication communications are released. It will be damaging if my pre-publication academic research is 'scooped' prior to publication by compelled disclosure, as others could take the ideas I and others collaborating with me have developed and appropriate that intellectual property to produce and publish material that would steal the thunder from my publications." (AR 606-607.)

The privilege log cites to Humane Society of U.S. v. Sup.Ct. (2013) 214 Cal.App.4th 1233 as support for withholding the Pre-Publication Documents. In Humane Society, supra, "an animal advocacy group petitioned for disclosure of records concerning ongoing research relating to a proposed voter initiative. The Regents of the University of California opposed disclosure under section 6255 on the grounds that releasing the records would be contrary to the public interest by making it more difficult to conduct future research studies. The Regents presented the testimony of the expert who directed the study. He expressed his opinions, based upon his years of experience doing research, about the harm that would be caused by release of the requested information. The Court of Appeal pointed out that given the expert's experience, it was not speculation for him to opine about what would occur if the records were made public. The court could receive the opinion and consider it in its section 6255 balancing test." (Los Angeles Unified School Dist., supra, 228 Cal.App.4th at 244-245, summarizing Humane Society.)

Based on the facts of the case before it, Humane Society held that disclosure of prepublication research communications would "fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research." (Humane Society, supra, 214 Cal.App.4th at 1267.) While the Court found some public interest in disclosure, including to ensure that the research for the voter initiative used sound methodology, the Court noted that publication of the final research report, which would include methodology, diminished the public interest in disclosure of the pre-publication records. (Id. at 1268-69.)

Humane Society also stated the following with respect to the balancing of interests: "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 the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate.'....

[I]n assigning weight to the general public interest in disclosure, courts should look to the 'nature of the information' and how disclosure of that information contributes to the public's understanding of government." (Humane Society of U.S. v. Sup.Ct. (2013) 214 Cal.App.4th 1233, 1268.)

In the instant case, neither the privilege log nor Professor Carlson describe the nature of the pre-publication research at issue. However, since Professor Carlson sent or received all nine emails, her statements quoted above – concerning collaboration with sources – presumably refer to the withheld documents. Thus, the record and reasonable inferences from it support that the nine email threads at issue involve Carlson communicating with a source she trusts, apparently Dan Emmett, about the content of academic works she has not yet published.

The court finds a strong public interest in non-disclosure of such emails and attachments. As stated by Professor Carlson, "disclosure of such pre-publication communications … would harm [her] ability to engage in such collaborations, as sources would be less willing to provide the kind of frank and candid comments that are most helpful if they knew all such comments could be disclosed to the entire public." (AR 606-607.) Pre-publication disclosure could also allow other legal scholars to "steal the thunder from [Carlson's] publications." (Ibid.)

To show a public interest in disclosure, Petitioner cites the declarations of Professors Happer and Lindzen. (OB 8-9 and fn.13.) Most relevantly, Professor Happer declares: "With regard to the risk that the disclosure of any or all of the nine emails exchanged between Professor Carlson and Dan Emmett would constitute a threat to academic freedom, particularly research into sensitive or controversial topics, real scientific research is not threatened by the disclosure of drafts. Even assuming (implausibly) that Professor Carlson was actually engaged in seeking to obtain information or comments from Dan Emmett as part of her preparation of a research paper intended for future publication (as opposed to make a major donor feel catered to and privy to advance information), scientists routinely circulate preliminary results, and report on preliminary results at conferences. In fact, the more attention given to honest scientific work, the better it is for the authors." (AR 245.)

Professor Happer does not respond to the harm from disclosure discussed by Professor Carlson. The circulation of preliminary results by scientists is not the same as a law professor publicly disclosing her discussions with a source prior to publication. Furthermore, similar to the final published report in Humane Society, there are various alternatives that address Professor Happer's concerns about the public being able to see what researchers at a public university are "working on." (AR 245 ¶ 24.) Presumably Professor Carlson's research leads to published

academic articles or speaking engagements, which can be reviewed by the public.

Professor Happer and Petitioner, in reply, speculate that the nine Pre-Publication Documents were exchanged "to make a major donor feel catered to and privy to advance information." (Reply 7, citing AR 245:8-9.) However, as Petitioner notes, the privilege log shows attachment of what appears to be draft book chapters or articles, which Petitioner stipulates need not be produced. (Reply 7.) The evidence sufficiently shows that the emails concern pre-publication communications with Emmett concerning Carlson's academic research.

Petitioner also asserts that Respondent waived the privilege because the emails were with Emmett, "a major donor to Carlson and the Emmett Center." (OB 9.) Since Emmett appears to be the "source" with whom Carlson collaborated, he was an interested party in the email and disclosure did not waive the privilege. (Humane Society of U.S. v. Sup.Ct. (2013) 214 Cal.App.4th 1233, 1242, 1263-64 [upholding balancing of interests for non-disclosure of academic researcher's communications with outside Board of Advisors].)

The court has weighed and considered a detailed explanation from that professor (Carlson) of the reasons that disclosure of the withheld emails would be against the public interest. The court has also weighed Petitioner's counter declarations from Professors Happer and Lindzen. For the reasons discussed, the court finds a clear overbalance on the side of confidentiality. Accordingly, the petition is DENIED as to the Pre-Publication Documents and attachments. (See AR 197-198, Documents Nos. 108-120.)

FERPA and Right of Privacy

The amended privilege log states that Respondent withheld eight documents on the following grounds: "This record contains personally identifiable information protected from disclosure by the Family Education Rights and Privacy Act (FERPA). Further, the public interest in protecting student information and protecting academic freedom by allowing candid discussions between students and professors outweighs the public interest in disclosure of such documents. .... This record implicates a student's right to privacy and is thus exempt from disclosure." (AR 146-147; see Documents Nos. 7-14.) The original privilege log only asserted the FERPA exemption. (AR 9.)

The privilege log states that these eight documents are emails sent to Cara Horowitz, a UCLA law faculty member, and apparently sent from a student. It appears the student names are redacted. Sean Hecht is a recipient of some of the emails. The emails are dated in August and

September 2017. The message subject of all emails, except one, is "Re: thanking you summer fellowship supporters." (AR 146-147.) According to the privilege log, the subject for document No. 14 is "thanking your summer funding supporters." (AR 147.) It is unclear if "your" and "funding" are typographical errors or if the subject line for this email was different. Respondent's counsel should explain at the hearing.

Respondent does not dispute that the emails are responsive to the November 2019 Request, meaning they must have been sent to, from, or included the subject email addresses, including "@douglasemmett.com," "@nextenergytech.com," and "@state.ma.us." (See AR 1.) For clarity, Respondent should explain why the privilege log does not list these addresses as a sender, recipient, or "cc."

Petitioner does not dispute that the emails were sent from students. FERPA protects students' educational records from public disclosure. The act defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A).)

In Moghadam v. Regents of the University of California (2008) 169 Cal. App. 4th 466, cited by Petitioner, the Court of Appeal considered whether student exams were records within the meaning of the Information Practices Act of 1977. The issue had not been decided before, so the Court of Appeal relied in part on the U.S. Supreme Court's construction of the phrase "education records" in FERPA. In that case, the Supreme Court "noted that under FERPA, an educational record is one 'maintained by an educational agency or institution or by a person acting for such agency or institution.'" (Moghadam, supra at 479, discussing Owasso Independent School Dist. No. 1-011 v. Falvo (2002) 534 U.S. 426.) The Supreme Court also noted that FERPA requires " 'a record' " of access for each pupil, which must be kept " 'with the education records.'" (Falvo at 434-435.) "This suggests Congress contemplated that education records would be kept in one place with a single record of access.... FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar." (Ibid.) Relying on Falvo and the language from FERPA, the Moghadam Court concluded "that, like FERPA, the IPA applies only to institutional records that are preserved in the ordinary course of business by a single, central custodian. In a university context, registration forms and transcripts would be typical of such records." (Moghadam, supra at 480.)

While Respondent is correct that Moghadam concerned the IPA, the Court of Appeal's analysis relied heavily on a statutory interpretation of FERPA. In that context, Moghadam is some

authority that FERPA "applies only to institutional records that are preserved in the ordinary course of business by a single, central custodian." In response to a special interrogatory, Respondent conceded: ""No, the Regents do not contend that any of the EXEMPTION LOG – FERPA DOCUMENTS were preserved in the ordinary course of business by a single, central custodian like a University registrar." (AR 270:6-271:2, 358:25-359:2.) Furthermore, Respondent cites no authority for the proposition that emails of university students are "education records" under FERPA. In any event, the court finds any FERPA concerns could largely be met by redacting the personal identifying information of the students.

In the amended log, served July 1, 2021, Respondent also asserted the catchall exemption under section 6255 and the right of privacy as grounds for withholding the entirety of the student emails. Petitioner argues that Respondent waived the privileges by failing to assert them with its original privilege log in December 2020. (OB 9-10.) Petitioner cites no California authority in support. Petitioner cites Maydak v. DOJ (D.C. Cir. 2000) 218 F.3d 760, 765, 767-68, which held that the government was precluded on appeal from invoking a FOIA exemption it did not make in the district court. The Circuit Court stated: "We have plainly and repeatedly told the government that, as a general rule, it must assert all exemptions at the same time, in the original district court proceedings." Here, Respondent did assert the claimed exemptions in this writ action and before the parties briefed the merits. While it would have been better if Respondent asserted the exemptions in the original privilege log, Petitioner does not show that the delay constitutes a waiver under CPRA.

On the merits, Respondent contends: "The records consist of emails between Horowitz and UCLA students discussing their summer fellowships funded by Daniel Emmett. The students have a compelling privacy interest in the non-disclosure of their personal academic and career discussions with their professor, and disclosure could lead to targeting of these students—just as GAO has targeted the UCLA climate change professors. The professors chose a faculty position in which PRA disclosure is part of the job. The students are still in formative years and should be allowed to learn and make choices without privacy intrusions and harassment." (Oppo. 14-15.)

"Compliance with CPRA is not necessarily inconsistent with the privacy rights .... Any personal information not related to the conduct of public business, or material falling under a statutory exemption, can be redacted from public records that are produced or presented for review. (See § 6253, subd. (a).)" (City of San Jose v. Sup.Ct. (2017) 2 Cal.5th 608, 626; see also Cal. Const. Art 1, § 1 [constitutional right of privacy].)

"The party claiming a violation of the constitutional right of privacy established in article I,

section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." (International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Sup.Ct. (2007) 42 Cal.4th 319, 338-339.)

Here, the students have a privacy interest in their names and identities. While the court is not persuaded that disclosure of their identities will lead to harassment, as Respondent speculates, Petitioner also does not identify any public interest in disclosure of the students' names and identities. There is no inherent reason to believe that disclosure of the students' names would shed light on Respondent's performance of its statutory or public duties, and Petitioner identifies none. Redaction of the student names is appropriate. (See LAUSD v. Sup.Ct. (2014) 228 Cal.App.4th 222, 241 ["Where disclosure of names ... would not serve this purpose, denial of the request for disclosure has been upheld"].)

Once student names and identities are redacted, however, it is unclear on this record why there would be a public interest in non-disclosure. Respondent fails to provide evidence that disclosure of the email discussions, with student names redacted, would somehow reveal the students' identities.

Respondent also provides insufficient information about the nature of the email discussions for the court to conclude that, even with redacted student names, there is a "clear overbalance" on the side of confidentiality. The subject of the emails – "thanking you summer fellowship [or funding] supporters" – suggests the emails involve a discussion about or statement of appreciation for fellowships funded by Dan Emmett or another UCLA donor. The exact nature of the discussions is unclear on this record. To the extent any "academic discussion" was involved, the court cannot find without additional context that disclosure would necessarily interfere with "academic freedom." Because the emails may involve a discussion of funding provided to a public university, the court also cannot say in the abstract that there is no public interest in the emails. Furthermore, Respondent has the burden of proof to show that the balance tilts for non-disclosure. On this record, Respondent does not meet that burden.

The petition is DENIED IN PART as to Documents Nos. 7-14 in the amended privilege log. Respondent may redact the student names. Otherwise the documents must be produced.

Anti-Semitic Harassment

Respondent withheld one email on the following basis: "The record concerns pre-decisional

internal discussions ... Further, the emails in this chain are not responsive to the subject of the instant Public Records Request ... because Daniel Emmett was involved in a personal capacity as a university supporter. ... Further, the right to privacy of the students at issue, as well as the need for staff and faculty of public institutions to be able to discuss and respond to harassment allegations clearly outweighs any disclosure of these internal discussions...." (AR 146, document 5.)

~~The privilege log describes the email as an email thread with attachment dated September 5,~~ 2016, from Ann Carlson to Lindsey Williams, and with Dean Mnookin, Donna Colin, and Cara Horowitz copied. The subject line is redacted. Respondent does not dispute that the emails are responsive to the November 2019 Request, meaning they must have been sent to, from, or included the subject email addresses, including "@douglasemmett.com," "@nextenergytech.com," or "@state.ma.us." (See AR 1.)

Petitioner's counsel indicates that he represents the victim of the subject claim of anti-Semitic harassment, Milan Chatterjee. (OB 11-12; AR 359, 350-351.) In a separate CPRA request for the email at issue, Chatterjee stated his purpose for requesting the record as follows: "The stated purposes of this request within the meaning of California Government Code § 6253.1 are to allow a determination of (1) how UCLA Law School dealt with a claim of anti-Semitic harassment, and in particular whether that claim of harassment was accorded the same consideration, and treated with the same seriousness, as claims of harassment against members of other groups that may be deemed more worthy or deserving of protection, and whether any of the comments or recommendations of the persons involved in the email chain reflect a dismissal or diminishment of the seriousness of such a claim of harassment, (2) whether the claim of anti-Semitic harassment was accorded any special treatment or consideration by reason of the fact that the requested email chain includes a September 4, 2016 email from a UCLA donor which was forwarded to UCLA major donor Dan Emmett (as referenced at lines 13-14 of page 5 of 86 (bearing a page number 4 at the bottom) of the Supplemental Responses), thereby suggesting that at least one, and potentially two, major donors to Regents had indicated an interest in such claim, and (3) if and why the September 4, 2016 email from a UCLA donor included in the email chain was not segregable from the remainder of the email chain." (AR 359:11-25, 350-351.)

In opposition, Respondent does not argue or show that the withheld email is not responsive to the express terms of the November 2019 Request. (Oppo. 11:15-24.) Rather, Respondent contends: "[W]hile the public has an interest in the points GAO identifies at page 12 of its revised opening brief ...., Times Mirror holds that interest is served by making public the Dean's response, after deliberation. To expose pre-decisional deliberations over how to respond would impair her

ability to 'think out loud' with others .... Moreover, because this response involved a student, the public interest in student privacy recognized in FERPA also supports non-disclosure." (Oppo. 11.)

By all accounts, the withheld email involves an internal discussion within the UCLA School of Law, which included Dean Mnookin, of an allegation of anti-Semitic harassment. For the reasons articulated by Petitioner and Chatterjee, and as acknowledged by Respondent, there is a public interest in disclosure of this email, including to learn how law school faculty and administration at a public university dealt with an allegation of anti-Semitic harassment. Respondent is correct that the deliberative process privilege applies to such internal, pre-decisional deliberations. However, to withhold the record under the CPRA, the party claiming the deliberative process exemption must show that on the facts of a particular case "the public interest in nondisclosure clearly outweighs the public interest in disclosure." (Citizens for Open Government, supra, 205 Cal.App.4th at 306; see Gov. Code § 6255.) That the pre-decision deliberations might lead to some post-deliberation action does not prove that there is no significant public interest in disclosure. Furthermore, the specific nature of the internal discussion matters to the court's balancing of the interests. Respondent has not lodged the email for in camera review or described its contents in any detail in a declaration. Accordingly, Respondent does not meet its burden under section 6255 on this record.

Respondent does not prove that FERPA applies to the email for the reasons stated above. Any privacy interests can be addressed through redaction.

However, because there is a sufficient probability that Respondent could meet its burden through in camera review or supplemental declarations, the court will continue the hearing for further proceedings. At the hearing, Counsel should address the appropriate supplemental proceedings for the court to determine whether this email was properly withheld.

Attachments to Exemption Claim Documents

Sixteen (16) of the Exemption Claim Documents (the "Attachments") are supported in the Amended Exemption Log solely by the following Explanation: "Attachment to email". Accordingly, in those instances where the court overrules the exemption claim made to a parent email, any attachment(s) to such email must also be ordered produced. (See OB 12.) The supplemental proceedings ordered by the court will also apply to the attachments.

Records Withheld as Not Public Records

The Definition of "Public Records" is Broad

The CPRA defines "public records" as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 6252(e).)

Article I, Section 3(b) of the Constitution affirms that "[t]he people have the right of access to information concerning the conduct of the people's business." The Constitution mandates that the CPRA be "broadly construed." (See Nat'l Lawyers Guild v. City of Hayward (2020) 9 Cal.5th 488, 507.)

Respondent contends that a "public record" only includes such records "required by law to be kept by [the public] official," or "'necessary or convenient to the discharge of his official duty.'" (Oppo, 15, citing San Gabriel Tribune v. Super. Ct. (1983) 143 Cal.App.3d 762, 774.) San Gabriel Tribune did not so hold, but rather quoted such statement from a 1962 case. That cited case did not involve the CPRA, which was enacted in 1968. Moreover, San Gabriel Tribune also quotes with approval the following Assembly Committee report for the CPRA:

"'This definition is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to "the conduct of the public's business" could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities.' Assembly Committee on Statewide Information Policy California Public Records Act of 1968. 1 Appendix to Journal of Assembly 7, Reg. Sess. (1970), see also 53 Ops. Cal. Atty. Gen. 136, 140-143 (1970)." (58 Ops. Cal. Atty. Gen. 629, 633-634 (1975).) (San Gabriel Tribune, supra at 774.)

More recent cases, including one cited by Respondent, also state that the definition of "public records" is "broad and intended to cover every conceivable kind of record that is involved in the governmental process." (Board of Pilot Commissioners v. Sup.Ct. (2013) 218 Cal.App.4th 577, 592.)

Respondent's narrow definition of "public records" to apply only to records "required by law to

be kept by [the public] official," or "'necessary or convenient to the discharge of his official duty" is not persuasive or supported by authority. The court applies the broad definition set forth in section 6252(e) and Board of Pilot Commissioners.

Purely Personal Records

Three hundred and eight (308) of the withheld documents ("Purely Personal Documents") are supported in the privilege log by the following explanation: "This email contains purely personal conversation, and does not relate to the conduct of the public's business.... Further, this correspondence was not relied upon by the public entity in carrying out its business...." (AR 55-124; see Document Nos. 13-15, 50-52, 59-114, 130-194 and 197-377.) Respondent does not dispute that the emails are responsive to the November 2019 Request, meaning they must have been sent to, from, or included the subject email addresses, including "@douglasemmett.com," "@nextenergytech.com," or "@state.ma.us." (See AR 1.) The privilege log provides no further information about these emails, such as the senders or recipients, the subject lines, dates, or general topic of discussion. While Professor Carlson and Dean Mnookin provided generalized statements about use of "university email account[s] to communicate about personal matters," neither describes any of the 308 withheld documents at issue. (AR 605, 756.)

A public agency has the burden to demonstrate that it properly withheld records on the grounds they are non-responsive to a CPRA request or do not constitute public records. (ACLU of Northern Cal. v. Sup.Ct. (2011) 202 Cal.App.4th 55, 83-86.) ""Because the agency has full knowledge of the contents of the withheld records and the requester has only the agency's affidavits and descriptions of the documents, its affidavits must be specific enough to give the requester 'a meaningful opportunity to contest' the withholding of the documents." (Id. at 83; see also Getz v. Sup.Ct. (2021) 72 Cal.App.5th 637.)

Because there are 308 documents at issue, because the emails appear to have been exchanged with or included a major donor to the UCLA School of Law (Dan Emmett), and because neither the privilege log nor Respondent's declarations provide sufficient information about the contents of the withheld documents to support a public records determination, Respondent has failed to show on this record that it properly withheld the Purely Personal Documents. Petitioner argues that even "personal" emails with a donor are related to the public's business, because maintaining a relationship with the donor is part of the overall fundraising strategy. Here the volume of "purely personal" emails with Dan Emmett would tend to support that proposition.

However, because there is a sufficient probability that Respondent could meet its burden with

respect to at least some of the documents, the court will continue the hearing for supplemental declarations and supplemental information regarding the documents withheld. At a minimum, Respondents should provide further information about the emails including senders or recipients, the subject lines, dates, and general topic of discussion.

Unaffiliated Entities Documents and Attachments

One hundred and seventy (170) of the withheld documents (the "Unaffiliated Entities Documents") are supported in the log by the following explanation: "This email was sent or received by [Carlson or Horowitz] in her capacity as a [board member or supporter] of a private entity unaffiliated with UCLA. This writing does not relate to the conduct of the public's business, and is therefore not a public record under The Public Records Act." (AR 54-142; see Document Nos. 1-12, 115-129 and 391-533.)

An additional eleven (11) of the documents (the "Unaffiliated Entities Attachments") are supported in the log by the following explanation: "This document is an attachment to an email was sent or received by Ann Carlson and Dan Emmett capacity as a board member of a private entity unaffiliated with UCLA. This writing does not relate to the conduct of the public's business, and is therefore not a public record under The Public Records Act." (AR 142-143; see Document Nos. 534-544.)

In its Responses to Special Interrogatory Nos. 40, 45, 50 and 55, Respondent has identified the referenced "unaffiliated entities" as (1) the Environmental Law Institute ("ELI"), (2) Campbell Hall Day School ("Campbell Hall"), and (3) Los Angeles Waterkeepers ("LA Waterkeepers"). (See AR 362-377.)

Respondent does not dispute that these emails are responsive to the November 2019 Request, meaning they must have been sent to, from, or included the subject email addresses, including "@douglasemmett.com," "@nextenergytech.com," or "@state.ma.us." (See AR 1.) The privilege log provides no further information about these emails, such as the senders or recipients, the subject lines, dates, or general topic of discussion. While Professor Carlson and Dean Mnookin provided generalized statements about use of "university email account[s] to communicate about personal matters," neither describes any of the withheld documents at issue. (AR 605, 756.)

Contrary to Respondent's assertion, the unverified statement in the privilege log that these emails and attachments were sent or received in Horowitz's, Carlson's, or Emmett's capacities as board members of ELI or LA Waterkeepers does not, standing alone, prove that the records do not

relate to the conduct of the public's business. (Oppo. 15-16.) Notably, both ELI and LA Waterkeepers appear to be environmental organizations, which suggests a plausible connection to Professors Carlson's and Horowitz's work with the Emmett Institute on Climate Change & the Environment. In any event, the record is deficient for the court to determine which specific records do, or do not, relate to the conduct of the public's business.

The issue is different as to those documents that relate to their service as board members of Campbell Hall. Petitioner does not identify Campbell Hall as an environmental organization. Petitioner states: "If there are any emails that are not directly to Emmett from Carlson or from Carlson to Emmett that relate their service as board members of Campbell Hall (i.e., Document Nos. 116-129 (AR 69-71), those emails would not relate to 'the conduct of the public's business.'" (OB 17, fn. 28.) . The court is not convinced that this conclusion should be limited to emails not directly between Emmett and Carlson, as long as the topic is their service as Campbell Hall board members. The parties should identify at the hearing which documents this would encompass. Subject to further argument, the court finds these documents are not public records.

Because there are 181 documents at issue, because the emails appear to have been exchanged with or included a major donor to the UCLA School of Law (Dan Emmett), and because neither the privilege log nor Respondent's declarations provide sufficient information about the contents of the withheld documents to support a public records determination, except as described above, Respondent has failed to show on this record that it properly withheld the Unaffiliated Entities Documents and Attachments. However, because there is a sufficient probability that Respondent could meet its burden through supplemental declarations and log information, the court will continue the hearing for further proceedings.

Petitioner's Remaining Contentions

In its petition, Petitioner prays for a judicial declaration that Respondent violated the CPRA by failing to provide timely responses to the CPRA requests, failing to produce records, and improperly redacting certain records. (FAP Prayer ¶ 1.) The opening brief requests "declaratory relief detailing the specific actions of Regents which obstructed and delayed that inspection." (OB 20.)

Petitioner argues that Respondent violated the CPRA in a number of ways, including: (1) failing to conduct a reasonable search for records responsive to the CPRA requests; (2) failing "to segregate reasonably segregable material as required by Government Code § 6253"; (3) producing several partial productions of records; (4) using three-point font in the original

exemption log; (5) amendment of the log shortly before the trial brief was due; and (6) including exemptions in the log that Petitioner believes are unfounded. (See OB 4, fn. 3 and OB 17-20.) Some of these latter points, including use of three-point point or amendment of the privilege log, are not persuasive evidence of "obstruction" and need not be discussed further. The court focuses on Petitioner's arguments about improper delay, redaction, and "obstruction" of CPRA inspection.

Government Code section 6253(b) states that "each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available." Section 6253(c) states: "Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or their designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available."

Section 6253(a) also states: "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law."

Here, Respondent produced approximately 3,822 pages of responsive records between January 10, 2020, and August 31, 2020. Due to the COVID-19 pandemic, in or around March 2020, employees in Information Practices transitioned to working remotely. While work continued, the transition had an impact on the pace of work. (AR 436.) At Petitioner's request, Respondent produced a detail privilege log in December 2020. (AR 355, 54-143.) On July 1, 2021, as part of a discovery response, Respondent produced an amended exemption log, which asserted additional claims of exemption with respect to many of the documents specified in the original exemption log. (AR 356, 8-53, 145-198.) Petitioner conducted discovery in this action, which may have somewhat delayed the trial date. Without court authorization, Petitioner's counsel also filed an opening brief that substantially exceeded applicable page limits, which required amendment and also contributed some to the delay in trial.

While Respondent's response to and production of records for the November 2019 and December 2019 Requests did take substantial time, Respondent sufficiently explains the production process of Information Practices and the impact from the Covid-19 pandemic. Also, the parties dispute Respondent's duty to produce many documents, as discussed above. The delay in Petitioner obtaining a final judicial resolution as to those documents is not attributable entirely to Respondent. The court notes that, as a general matter and for various reasons, public agencies often have difficulty responding to public records requests in the quick timeframe set forth in Government Code section 6253. The court does not condone such delay, but also must recognize the practical reasons for such delay, some of which are legitimate. For instance, in this case, the Covid-19 pandemic may have contributed some to the delay. Under the totality of the circumstances, the court is not persuaded that Respondent violated the CPRA as a result of alleged delay in responding to the CPRA requests. Even if a technical violation occurred, the court is not persuaded that a judicial declaration should issue related to delay.

Petitioner contends that Respondent sought to obstruct disclosure of "those emails that were among the Requested Records which disclosed information regarding the Climate Litigation/Regents Interface, and in particular the CCI Introduction/Solicitation." (OB 18.) Petitioner defines "CCI Instruction/Solicitation" to include certain exchanges between Carlson and Emmett in June 2019 in which Carlson offered to introduce Emmett to a group, apparently the "Center for Climate Integrity," that is involved in "nuisance litigation against the oil industry" and "focused on sophisticated communication efforts to make the public and public officials aware of the oil industry's campaign to deceive the public about climate change." (OB 2-3; see AR 355-356.) Petitioner asserts that such emails were not produced with the August 31, 2020 production of records, but rather on January 15, 2021, in response to a follow-up CPRA request. (OB 2; AR 355.)

Petitioner also contends that the January 15, 2021, production "included a partially-redacted nineteenth page (AR 199, the 'Smog and Flying Email') which Regents had claimed in the Exemption Log was exempt in its entirety as related to 'pre-publication research.'" (OB 3, citing AR 53.) According to Petitioner, the first paragraph of this Smog and Flying Email, now unredacted, "disclosed information regarding the Climate Litigation/Regents Interface (i.e., that the CCI Introduction/Solicitation resulted in Emmett meeting with CCI on July 15, 2019)." (OB 3.) Petitioner contends: "It is incomprehensible that Regents somehow failed to turn up the 'newly discovered' emails provided in response to PRR 2 and PRR 3 when PRR 1 was processed. GAO suspects the explanation lies in the difference in who conducted the searches – namely, Carlson and her assistant with respect to PRR 1 and UCLA's IT staff with respect to PRR 2 and PRR 3." (OB 4, fn. 3.)

The court has reviewed Petitioner's record citations, as well as Respondent's record citations in opposition. (See Oppo. 18-19; see e.g. AR 434-437 [Baldridge Decl.] and AR 603-607, 759-760 [Carlson and Sonley Decls.].) As noted by Respondent, an agency must undertake a reasonable search in response to a CPRA request. (See City of San Jose v. Sup.Ct. (2017) 2 Cal.5th 608, 627.) Based on the court's review of the record before it, including Petitioner's citations, the Baldridge, Carlson, and Sonley declarations, and Respondent's privilege log, the court has insufficient reason to conclude that Respondent did not conduct a reasonable search for records, that Respondent improperly redacted any records, or that Respondent intentionally "obstructed" Petitioner's inspection rights. Petitioner's arguments about alleged delay in production of emails related to the "CCI Instruction/Solicitation" or redaction of the first paragraph of the "Smog and Flying Email" do not convince the court that Respondent conducted an unreasonable search or otherwise sought to obstruct public inspection.

It is possible that the court's views on these issues could change depending on the results of the supplemental proceedings required for the documents specified in the privilege log. However, at present, the court is not persuaded by Petitioner's arguments concerning delay and obstruction and is not inclined to grant a judicial declaration that Respondent violated the CPRA. Should the court decide that Respondent has improperly withheld or redacted certain records, a writ of mandate directing compliance would appear to be a sufficient remedy in this case.

In Camera Review; and Special Master

In camera review of the unredacted records is permitted under the CPRA. The agency claiming the exemptions should make a sufficient showing to justify the in camera review. (See e.g. Gov. Code § 6259(a); see American Civil Liberties Union of Northern Cal. V. Sup. Ct. (2011) 202 Cal.App.4th 55, 74 ["Because the agency opposing disclosure bears the burden of proving that an exemption applies," it has the burden to submit evidence, including for in camera review]; see also Id. at 87 ["a trial court's prerogative to inspect documents in camera 'is not a substitute for the government's burden of proof, and should not be resorted to lightly'"].)

As discussed, on this record, Respondent has not met its burden of proof to withhold nearly all of the documents at issue. However, for the reasons discussed, the court is inclined to permit Respondent to prove its stated exemptions and/or "non-public-record" withholdings through more detailed, supplemental declarations and log information.

With the possible exception of Document 5, the court does not find in camera review appropriate

at this time. It is the Respondent's burden, in the first instance, to provide sufficient information regarding withheld documents, and the basis upon which they are withheld. Respondent has not done that here.

Conclusion

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After hearing argument, the court orders as follows:

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The petition is DENIED as to the Pre-Publication Documents and attachments. (AR 197-198, Documents Nos. 108-120.)

The petition is Granted as to Documents Nos. 7-14 in the amended privilege log, but Respondent may redact the student names.

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Counsel stipulate that the Campbell Hall documents (116-129) need not be produced.

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With respect to the remaining documents, respondent is to provide supplemental declaration and log information to the court by February 10, 2022. Respondent is not to lodge any of the documents for in camera review except document 5. Petitioner may file a response, not to exceed twenty pages, by February 24, 2022.

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The hearing on the petition for writ of mandate is continued to April 7, 2022, at 1:30 p.m. in Department 82.

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Notice is waived.

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FOOTNOTE:

1- The privilege log also stated that "in some instances, the information contained in internal fundraising discussions constitutes a trade secret under Evidence Code 1060...." (AR 145-198.) In opposition, Respondent makes no attempt to prove a trade secret exemption, does not meet its burden, and forfeits the issue.