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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, P.C., Petitioner, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. 20STCP01226 **DECLARATION OF CHRISTOPHER HORNER IN SUPPORT OF PETITION FOR WRIT** Trial Date: December 14, 2021 (*Reserved*) Time: 9:30 a.m. Place: Dept. 82 Petition filed: April 1, 2020

I, Christopher Horner, declare:

INTRODUCTION

1. I make this declaration in support of the Petition for Writ filed by Petitioner Government Accountability & Oversight, P.C. ("GAO") in the above-captioned proceeding against Respondent The Regents of the University of California ("Regents"). In this Declaration, I address the Regents' response to the California Public Records Act ("CPRA") request at issue in this matter, PRR 19-7464[1], based on my involvement with the request, its processing, and Regents' litigation of same, and also set forth my opinions based on my experience with open records requests in

[1] While the Amended Petition also references a second related CPRA request made by GAO subsequent to PRR 19-7464 (i.e., PRR 19-7567), GAO has determined that the trial on the Amended Petition should exclusively address the issues raised regarding PRR 19-7464 since those are the issues of the greatest general import.

California and nationwide. Except as qualified, I make this declaration based on my personal and firsthand knowledge of those facts hereinafter set forth and could and would testify competently thereto under oath if called as a witness.

2. I obtained my *Juris Doctor* from Washington University in St. Louis in 1991 and am admitted to practice law in the District of Columbia. I have spent the majority of my professional work since 1997 requesting or assisting others in requesting, assessing and disseminating public information, pursuant to state and federal open records laws. Those pursuits have been the principal focus of my work for more than the past decade. These requests typically seek public information to educate about how public institutions have been or are being used, with whom, and how they came to be used that way. These requests require litigation when an agency does not respond as prescribed in the relevant statute or withholds all or parts of records in ways with which I, my colleagues or my client do not agree is proper. I have made, provided legal assistance in other parties making, and/or participated in litigation over hundreds of such requests to federal agencies, state executive and attorneys general offices and other agencies, and over two dozen academic institutions.

3. I began using open records laws nearly a quarter century ago to explore public-private interplay following, and in great part inspired by, a revelatory stint with a Houston-based energy company in 1997, for which I briefly served as director of federal government relations (in a non-attorney capacity). I was gone from the company's ranks within weeks, about four years before it found itself in the news and its very name, Enron, became a cultural metaphor. Soon after beginning at Enron I helped create an uncomfortable work environment for myself by voicing concerns over the company's leading role in what was becoming a "global warming" industry, which I later learned I was not alone in doing (*infra*). I was particularly struck by a meeting I had attended on the company's behalf, in a large national law firm's Washington, D.C. conference room among a Who's Who of environmentalist pressure groups as well as senior representatives of individual companies and trade associations representing several industry sectors, discussing how, despite public and congressional opposition, to ensure U.S. participation in a "global warming" treaty that several months later would be called the Kyoto Protocol. Industry participants, like Enron, which had bought uneconomic assets or otherwise made financial arrangements ("bets") in anticipation of

getting this agenda in place — which assets would then be rewarded by government policies — joined with, e.g., the Union of Concerned Scientists (see, *infra*) to lobby for policies in the name of the threat of catastrophic man-made global warming. This would soon be re-branded as "climate change" and "clean energy economy."[2] I had to that time been unaware of just how widespread are these "Baptist-and-Bootlegger coalitions," which is the term coined by then-Professor and now Dean Emeritus at Clemson University, Bruce Yandle.[3] As set forth in a series by Lawrence Solomon of Canada's *Financial Post* exposing industry's driving role behind the Kyoto pact (subsequently extended by, e.g., Copenhagen and Paris climate agreements) and related policies, Enron was the early ringleader of the global warming industry:

> Enron Chairman Kenneth Lay...saw his opportunity when Bill Clinton and Al Gore were inaugurated as president and vice-president in 1993. To capitalize on Al Gore's interest in global warming, Enron immediately embarked on a massive lobbying effort to develop a trading system for carbon dioxide, working both the Clinton administration and Congress. Political contributions and Enron-funded analyses flowed freely, all geared to demonstrating a looming global catastrophe if carbon dioxide emissions weren't curbed. An Enron-funded study that dismissed the notion that calamity could come of global warming, meanwhile, was quietly buried.
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> To magnify the leverage of their political lobbying, Enron also worked the environmental

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[2] After the November 2009 "Climategate" email scandal as well as poll-testing of the issue led "global warming" to be been rebranded "the climate crisis" and the focus shifting to a line that somewhat nods to the actual genesis of the agenda, "the clean energy economy." See, e.g., Edward Felker and Stephen Dinan, "Democrats urged to play down 'global warming'", *Washington Times*, June 19, 2009 https://www.washingtontimes.com/news/2009/jun/19/party-memo-urges-democrats-to-fix-pitch-on-climate/; to the displeasure of some advocates, see, e.g., "When did 'climate change' become 'clean energy'?" (print and syndication title (see, e.g., https://madison.com/ct/news/opinion/column/maxwell-t-boykoff-when-did-climate-change-become-clean-energy/article_78e0aaec-6a34-5439-b721-31085e6041a8.html), Washington Post, February 5, 2012, https://www.washingtonpost.com/opinions/a-dangerous-shift-in-obamas-climate-change-rhetoric/2012/01/26/gIQAYnwzVQ_story.html; speaking of re-branding, the Post has elected for the more ominous and lecturing on-line title, "A dangerous shift in Obama's 'climate change' rhetoric".

[3] See, e.g., Testimony before the United States Senate Committee on Environment and Public Works Honorable Barbara Boxer, Chairman On the U.S. Climate Action Partnership Report, Fred L. Smith, Jr., President, Competitive Enterprise Institute, February 13, 2007, available at https://govoversight.org/wp-content/uploads/2021/09/fred.writtentestimony.senate.pdf. "[Yandle's] theory's name, first elucidated in 1983, is meant to evoke 19th century laws banning alcohol sales on Sundays. Baptists supported Sunday closing laws for moral and religious reasons, while bootleggers were eager to stifle their legal competition. Thus, politicians were able to pose as acting to promote public morality, even while taking contributions from bootleggers."

> groups. Between 1994 and 1996, the Enron Foundation donated $1-million to the Nature Conservancy and its Climate Change Project, a leading force for global warming reform, while Lay and other individuals associated with Enron donated $1.5-million to environmental groups seeking international controls on carbon dioxide.[4]

In December 1997, immediately on the heels of the Kyoto negotiation and several months after I had departed the company, Enron's John Palmisano wrote a memo titled "Implications of the Climate Change Agreement in Kyoto & What Transpired" to senior Enron executives. Palmisano was Enron's point-man on the issue (e.g., two months later Mr. Palmisano wrote a related memo to colleagues which opened with, "You know that I am responsible for developing "climate change" polices that promote our products and services"[5]). That December 1997 memo noted, *inter alia*, "this treaty is exactly what I have been lobbying for," "This agreement will be good for Enron stock!!," "if implemented, this agreement will do more to promote Enron's business than will almost any other regulatory initiative," "Enron has immediate business opportunities which derive directly from this agreement," "Enron now has excellent credentials with many 'green' interests including Greenpeace, [World Wildlife Fund], [Natural Resources Defense Council], German Watch, the U.S. Climate Action Network, the European Climate Action Network, Ozone Action, WRI, and Worldwatch," and therefore that "This position should be increasingly cultivated and capitalized on

[4] Lawrence Solomon, "Enron's Other Secret", *Financial Post* (Canada), May 30, 2009, available at https://ep.probeinternational.org/2009/05/30/enrons-other-secret/. This was "real money" at the time.

[5] Memo from John Palmisano to Steve Kean, Cynthia Sandherr, February 28, 1997, available at https://climatelitigationwatch.org/wp-content/uploads/2021/10/2.28.97-Palmisano-memo-describing-his-role-and-Enron-moves.pdf. Other records offer a revealing exchange between Palmisano and an Enron colleague, Robert Bradley, who opposed such rent-seeking, Subject line: "Climate Change/ work with me to make Enron rich." https://climatelitigationwatch.org/wp-content/uploads/2021/10/6.3.98-Palmisano-Work-with-me-to-make-Enron-rich-email.pdf; Bradley's response at https://climatelitigationwatch.org/wp-content/uploads/2021/10/6.3.98-Bradley-response-to-Palmisano-Work-with-me-to-make-Enron-rich-email.pdf.

(monitized)." (sic)[6] These and other subsequent revelations confirmed that monetizing a "global warming" industry through government policy was a major component of Enron's business strategy. Enron planned on making money trading ration coupons, or "carbon credits", and from government policies that, e.g., directed revenues to the then-world's largest windmill company which Enron had recently purchased (Zond Wind, which became Enron Wind). Economists call these policies "rents" and the practice of arranging for the policies "rent seeking".[7] Again quoting Lawrence Solomon, "We all know that the financial stakes are enormous in the global warming debate—many oil, coal and power companies are at risk should carbon dioxide and other greenhouse gases get regulated in a manner that harms their bottom line. The potential losses of an Exxon or a Shell are chump change, however, compared to the fortunes to be made from those very same regulations."[8]

4. Enron documents which later emerged reference a meeting, in the run-up to Kyoto, in August 1997 in the Oval Office with Lay and both President Clinton and Vice President Al Gore.[9] There, Lay advocated his position in favor of the President joining the pact expected to be proposed in Kyoto, favoring wind and solar energy and targeting denser hydrocarbon energy sources with the

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[6] Memo from John Palmisano, "Implications of the Climate Change Agreement in Kyoto & What Transpired" (1997), available at https://web.archive.org/web/20110820070144/http://www.politicalcapitalism.org/enron/121297.pdf. See also, e.g., January 27, 1998 "Policy Analysis" memo from Rob Bradley to Ken Lay, "Global Warming Comments," "Enron has aided the cause of regulating greenhouse gases more ably than any other company in the U.S. and has earned credibility and goodwill with the environmentalist groups", https://climatelitigationwatch.org/wp-content/uploads/2021/10/1.27.98-Bradley-memo-to-Ken-Lay-Global-Warming-Comments.pdf.

[7] "Cap-and-trade" legislation was for a time the approach selected by the political class, including Enron. See, e.g., Jim Tankersley, "Industry Leaders join Obama on emissions limits," *Los Angeles Times*, May 18, 2009, discussing the passage, at long last (in one legislative house, only), of the Waxman-Markey "cap-and-trade" legislation. See also President Obama's serial use of language in support of these policies, that he would "*finally make clean energy the profitable* kind of energy in America" (emphasis added)(in, e.g., 2010 State of the Union address, https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address).

[8] Lawrence Solomon, "Enron's Other Secret", *Financial Post* (Canada), May 30, 2009. See also, Robert Novak, "Enron's Secret Energy Plan: Chairman's shameless backing of the Kyoto treaty was all about corporate greed," *Chicago Sun-Times*, January 17, 2002.

[9] See, e.g., Memorandum from Robert Bradley to Ken Lay, Global Climate Change Debate & Meeting with Clinton, August 1, 1997, https://climatelitigationwatch.org/wp-content/uploads/2021/10/8.1.97-Bradley-memo-to-Ken-Lay-Global-Climate-Change-Debate-Meeting-with-Clinton.pdf.

rationing program called "cap-and-trade" as a Kyoto "mechanism" — in disregard of unanimous Senate instruction to the contrary just over a week prior, on July 25, pursuant to Article II, Sec. 2 of the U.S. Constitution[10]. Notwithstanding this Senate advice that it would not consent, President Clinton did in fact enter Kyoto by the signature, on November 12, 1998, of Acting Ambassador to the United Nations Peter Burleigh. At the time, when I was still a mere six years out of law school, these coalitions and the cavalier approach to, e.g., "advice and consent" in pursuit of a political and business agenda rather shocked my naïve, younger self. The terrible economic and social costs of these "global warming" policies were not yet fully manifest, such as "energy poverty"-induced spikes in hypothermia among seniors and the poor from intentionally higher energy prices, and indeed their magnitude not fully foreseen, such as the energy crises presently unfolding across the world to which the suite of "climate" policies have served as indispensable instigators.[11] Instead, it was my Enron experience that prompted my early use of the federal Freedom of Information Act (FOIA) to probe further into the role of that company and others in advancing this agenda in the federal government, specifically the relationships, the costs, and the agendas of those serving in government. These requests sought records pertaining to the scientific, economic, and political aspects of this agenda, moving to a range of issues as they emerged or developed. With the extensive and increasing role played by academia in this campaign, this ultimately brought me to making or assisting in making requests of public universities. In the two-and-a-half decades since that revelation of rent seeking and Baptist and Bootlegger coalitions and particularly the most recent dozen years, I have maintained a strong emphasis in my work on open records requests, litigation,

[10] S. Res. 98, July 25, 1997, https://www.congress.gov/bill/105th-congress/senate-resolution/98.
[11] At least one memo did hint at these consequences. "Maybe Enron can dodge the macro problem and have our micro benefits, but then again I have to think that a politicized international energy market for any reason will create as much or more downside than upside." April 1, 1999, Rob Bradley memo to Ken Lay and Jeff Skilling, "Subject: Topic of Discussion for Advisors Meeting," available at https://climatelitigationwatch.org/wp-content/uploads/2021/10/4.1.99-Bradley-memo-to-Lay-and-Skilling-re-Enron-role-and-perils-of-politicized-international-energy-industry.pdf.

and advice mostly in areas pertaining to energy and environment. I made and have continued pursuing requests on behalf of several public policy and governmental transparency groups, including Petitioner GAO on the request at issue in this matter.

5. My efforts are often successful in obtaining and broadly disseminating public information, through discussion in, e.g., the *Wall Street Journal* news, editorial and opinion pages, *Washington Times* news and opinion pages among other print outlets, as well as numerous on-line outlets. *Politico* wrote in its June 2013 article "Master of FOIA" that my work is that of "a determined digger" who "bedevils the White House" with Freedom of Information requests. This alludes to my having discovered then-U.S. Environmental Protection Agency Administrator Lisa Jackson's use of a false-identity email account in the name of "Richard Windsor," in violation of the Federal Records Act and of course increasing the chance that FOIA productions seeking Ms. Jackson's public-record correspondence as EPA Administrator would not be properly located or released. *Politico* noted, *inter alia,* "Horner's far from a pioneer in using FOIA, of course. Environmental groups file most FOIA requests with EPA, and businesses often use the law to acquire information on competitors." In 2014 *The Hill* named me one of its "100 People to Watch" for these efforts[12], and the *Washington Examiner* wrote that "Horner has been busy busting what he sees as absurd global warming claims and the federal government's deepening lack of transparency"[13]. I have given addresses on the topic of my open records work in numerous places throughout the United States, and, e.g., to policy-attuned audiences in London and Munich (some of whom I am heartened to see have picked up the mantle and begun their own public-record efforts with success). Recipients of information requests and their allies also target my work for criticism, particularly when the requests seek records from academic institutions and remarkably (as in this

[12] http://thehill.com/business-a-lobbying/315837-100-people-to-watch-this-fall-?start=7.
[13] http://washingtonexaminer.com/chris-horner-foia-watchdog-demands-transparency-from-governments-global-warming-advocates/article/2544632.

case) on the grounds that these requests reflect *the wrong kind of people* seeking access to public information. I have also been the subject of numerous open records requests made to state and federal agencies by other parties, including pressure-group activists and journalists, seeking to learn and disseminate information about how public institutions are used and with whom, which I understand to be part of the package of dealing with public entities.

6. I have written four books, three of them on energy and environmental policy and politics, two of which were national best-sellers. Three of my books included a focus on information obtained through public record requests as well as on efforts to fight the release of such information. One of these books addressed in detail the "Climategate" affair. That involved the anonymous release of thousands of pages of correspondence opening a window onto the taxpayer-financed climate-science industry, many of which records were subject to numerous open records laws — state and federal, and non-U.S. — but whose custodians, according to correspondence among themselves, were not interested in complying with or otherwise responding to requests for data (even, expressly, because that could assist the requesters in possibly finding fault with the scientists' claims, which scrutiny was previously deemed an elementary component of science). This reluctance led to one principal having, according to correspondence, "conveniently lost many emails,"[14] "moved all their emails from all the named people off their PCs and they are all on a memory stick,"[15] suggested to colleagues "to delete all emails at the end of the process" just in case it turns out the records are subject to open records laws,[16] admitting in an email to colleagues that he "deleted loads of emails" despite at first claiming, publicly, "We've not deleted any emails or data

[14] https://tomnelson.blogspot.com/search?q=conveniently+lost+many+emails.
[15] Id.
[16] https://tomnelson.blogspot.com/2012/01/email-4778-may-2009-phil-jones-to.html.

here at [his institution]"[17] while also instructing a colleague "delete after reading - please!,"[18] and, "With the earlier FOI requests re David Holland, I wasted a part of a day deleting numerous emails and exchanges with almost all the skeptics. So I have virtually nothing. I even deleted the email that I inadvertently sent. There might be some bits of pieces of paper, but I'm not wasting my time going through these".[19]

7. Other behavior obstructing public access to public records, which I have personally experienced in my work, involves facts similar to those present in the matter at issue here, when institutions task individuals with conducting the initial canvass for potentially responsive records to be turned over for review and possible release, even though these individuals are also principals in (i.e., authors of or parties to) the requested records. As noted herein, this situation has coincided with officials, including faculty, impeding the records request including, e.g., asserting that some or all potentially responsive records are not "public records" under the law in question, or anyway would be exempt if they were, and so the individual does not turn them over for further processing.

8. Relevant thereto, it is my practice often to take notes during certain calls, e.g., with opposing counsel or parties with whom I do not yet have an established working relationship. I took notes during GAO's November 19, 2018, introductory call on this matter with Regents' counsel John Gherini. These notes reflect, *inter alia,* "Faculty members are doing the search" and "Faculty instructed to produce all responsive docs + IT + legal who determine exemptions…" (underlining and ellipses in original).

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[17] Leo Hickman, "Climate scientist at centre of leaked email row dismisses conspiracy claims," The Guardian, November 24, 2009, https://www.theguardian.com/environment/2009/nov/24/climate-professor-leaked-emails-uea.

[18] http://tomnelson.blogspot.com/2011/11/climategate-2_8905.html.

[19] Id. See also, https://climateaudit.org/2011/02/23/new-light-on-delete-any-emails/, and Department of Commerce Inspector General's report available at Department of Commerce, Office of Inspector General, "Response to Sen. James Inhofe's Request to OIG to Examine Issues Related to Internet Posting of Email Exchanges Taken from the Climatic Research Unit of the University of East Anglia, UK," February 18, 2011, pp. 12–16, available at https://www.oig.doc.gov/OIGPublications/2011.02.18-IG-to-Inhofe.pdf.

9. My notes show that I also added a comment in the margin next to the latter, underlined item, "a la GMU". This is a reference to a 2015 request I made with the Competitive Enterprise Institute (hereafter "CEI") under the Virginia Freedom of Information Act (VFOIA) to George Mason University ("GMU"), another public university whose faculty, like UCLA's (see, *infra*), were engaged in advocacy encouraging legal prosecution of opponents of the "climate" agenda. That request ultimately required litigation after a GMU faculty member who was allowed to conduct the search for records to be processed simply denied the existence of responsive records. (I discuss this in more detail, *infra*). This was untrue, and a Virginia court ultimately ordered the production of what proved to be many hundreds of pages of responsive public records,[20] including extensive correspondence among academics about and seeking to instigate use of the Racketeer Influenced and Corrupt Organization statute ("RICO") against opponents of the "climate" agenda, and, *inter alia*, details of the acquisition and distribution of outside donor funding for University academics' climate advocacy.

10. Therefore, I am aware that this sort of obstruction occurs and, as detailed herein, in my experience it disproportionately occurs in response to requests made to public universities, rather than with requests to other public institutions such as regulatory agencies or attorneys general.

11. The use of public institutions in pursuit of the Climate Change Agenda, whether academia or law enforcement, is of great public interest, and is a principal area of focus of GAO which publishes the website ClimateLitigationWatch.org. The Climate Change Agenda is the source of or basis for much financial support by private, outside parties to these institutions and officeholders who obtain substantial contributions to use their institutions in assisting this effort.

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[20] *Horner et al. v. Rector and Visitors of George Mason University*, CL15004712-00, Circuit Court for the City of Richmond). Order and records available at https://climatelitigationwatch.org/wp-content/uploads/2018/05/Maibach-RICO-docs-II-finally-produced-in-full.pdf, https://climatelitigationwatch.org/wp-content/uploads/2018/08/GMU-Puerto-Rico-docs-not-1.pdf.

Universities, mostly private institutions such as the University of Chicago, Harvard, Columbia, New York University law schools, but also the University of California at Los Angeles and University of Minnesota School of Law have taken it upon themselves, in concert with activists, the plaintiff's tort bar, major financial contributors, and state attorneys general, to institute and to extensively assist a national campaign of legal actions against ideological opponents (UCLA Law Prof. Cara Horowitz described this campaign in an email to her Institute's principal non-governmental benefactor Dan Emmett as entailing "going after climate denialism—along with a bunch of state and local prosecutors nationwide")[21]. Of course, "climate denialism" is not an offense in the United States, at present, and in my opinion the term is shorthand for pursuing (with "prosecutors nationwide") those viewed as standing in the way of certain desired "progress". That campaign has led to attorney general investigations of private parties[22], and targeted more than 100 research and advocacy groups, scientists and other private parties and entities.[23] One of these is the Competitive Enterprise Institute, with which I was affiliated for twenty years, including at the time it was subpoenaed in 2016[24] (and which I still represent in one ongoing open records suit against a state attorney general).

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[21] "Hi Dan, Thought you would like to hear that Harvard's enviro clinic, UCLA Emmett Institute, and the Union of Concerned Scientists are talking together today about going after climate denialism [sic]—along with a bunch of state and local prosecutors nationwide. Good discussion." April 25, 2016 email from UCLA Law School's Cara Horowitz to Dan Emmett, namesake and funder of the Harvard and UCLA centers, Subject: See, e.g., https://climatelitigationwatch.org/on-the-subject-of-recruiting-law-enforcement-email-affirms-origin-of-prosecutorial-abuses/.

[22] *People of the State of New York v PricewaterhouseCoopers and Exxon Mobil Corporation*, New York State Supreme Court, New York County, No. 451962/2016, and 1:17-cv-2301 in U.S. District Court, Southern District of New York; *People of the State of New York v. Exxon Mobil Corporation*, Supreme Court of New York Index No. 452044/2018; *Commonwealth of Massachusetts v. Exxon Mobil Corporation*, Suffolk County Superior Court, 19-3333.

[23] *See, e.g.,* Valerie Richardson, "Exxon climate change dissent subpoena sweeps up more than 100 U.S. institutions", Washington Times, May 3, 2016, https://www.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/; Walter Olson, "Massachusetts AG to Exxon: hand over your communications with think tanks", June 16, 2016, https://www.overlawyered.com/2016/06/+setts-ag-exxon-hand-communications-think-tanks/.

[24] See https://cei.org/publication/first-amendment-fight-ceis-climate-change-subpoena/.

12. As has been detailed in numerous pleadings and judicial rulings[25], this campaign flowed from a 2012 legal strategies meeting in La Jolla, California convened to contemplate the general failure of legislative efforts to impose the Climate Change Agenda and a campaign to use courts to overcome that failure. Co-Executive Director of the University's Emmett Institute on Climate Change and the Environment (the "Emmett Institute" or "Emmett Center") Horowitz asserts the Emmett Institute also is dedicated to this objective (FN 39, *infra*). The summary of the La Jolla meeting stated, *inter alia*, "State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light. In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery."[26] The same report also stated, "Equally important was the nearly unanimous agreement on the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[27] A memorandum opinion issued by the Texas State Court of Appeals recently characterized this campaign as "Lawfare".[28]

13. Public records already obtained from UCLA and other institutions affirm certain details of the University's role, through its faculty's involvement in their official UCLA capacities, in this effort first led by activist groups and the Attorneys General (AGs) of Massachusetts and New

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[25] See, e.g., See *Exxon Mobil Corporation v. Schneiderman*, 17-cv-0230 and *Exxon Mobil Corp. v. City of San Francisco, et al.*, Tx. Sup. Ct. 20-0558.

[26] Climate Accountability Institute, *Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control* (Oct. 2012), page 11, http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf (Summary of the Workshop on Climate Accountability, Public Opinion, and Legal Strategies).

[27] Id. at 27.

[28] Memorandum Opinion by Justice Kerr, *San Francisco, et al., V. Exxon Mobil Corp.* Court of Appeals for the Second Appellate District (TX), No.02-18-00106-CV, at p. 48, https://eidclimate.org/wp-content/uploads/2020/06/1284000-1284588-02-18-00106-cv-majority-opinion-kerr.pdf.

York, later joined by other AG offices. This role has included participating in a March 2016 "secret meeting at Harvard"[29] to brief not only state attorneys general staff and activists, but "prospective funders"[30] of a coordinated campaign pushing "potential state causes of action against major carbon producers"[31], which is the subject of great media and public interest due to the controversial origin of — and collaboration involved in — these investigations. GAO attached a true and correct copy of the "secret meeting at Harvard" agenda to its petition as Exhibit 2. A public record obtained from the California Office of Attorney General (OAG) titled "Technical Advisors and Experts" lists Prof. Horowitz among the presenters at that briefing, expressly as the "Andrew Sabin Family Foundation Co-Executive Director of the Emmett Institute on Climate Change and the Environment, Co-Director, UCLA Environmental law Clinic, UCLA School of Law, Los Angeles, CA."[32]. The agenda, obtained by the Energy & Environment Legal Institute by court order in open records litigation brought against the Vermont Attorney General's Office by a different group with which I also worked, shows that at this meeting, Prof. Horowitz advocated "climate" related "Consumer

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[29] This is according to one academic who presented there. "I will be showing this Monday at a secret meeting at Harvard that I'll tell you about next time we chat. very [sic] exciting!" April 22, 2016, email from Oregon State University Professor Philip Mote to unknown party, Subject: [REDACTED], and "I'm actually also planning to show this in a secret meeting next Monday—will tell you sometime." April 20, 2016, Philip Mote email to unknown party, Subject: [REDACTED]. Both obtained from Oregon State University on March 29, 2018, in response to a January 9, 2018, Public Records Act (PRA) request. https://climatelitigationwatch.org/wp-content/uploads/2019/09/Mote-emails-re-_secret-meeting_-at-Harvard.pdf.

[30] "We will have as small number of climate science colleagues, as well as prospective funders, at the meeting." March 14, 2016, email from Frumhoff to Mote; Subject: invitation to Harvard University—UCS convening. Obtained under same PRA request cited, Id. https://climatelitigationwatch.org/wp-content/uploads/2018/08/BOOM-OAGs-flew-in-for-briefing-for-UCS-prospective-funders.png.

[31] "Confidential Review Draft—March 20, 2016, Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal, and Historical Perspectives." Obtained in Energy & Environment Legal Institute v. Attorney General, Superior Court of the State of Vermont, 349-16-9 Wnc, December 6, 2017. https://climatelitigationwatch.org/wp-content/uploads/2018/08/FN-55-Harvard-AGs-briefing-UCS-fundraiser-agenda-copy.pdf.

[32] See https://climatelitigationwatch.org/wp-content/uploads/2018/04/Union-of-Concerned-Scientists-Technical-Advisors-and-Experts-1.pdf.

protection claims" be brought by attorneys general against energy companies. The Massachusetts Attorney General's Office sent five attorneys to this briefing,[33] and its subsequently filed complaint against Exxon Mobil for "potential violations of the Massachusetts consumer protection statute" is now pending in a Massachusetts state court.

14. After learning of this Harvard agenda, in 2018 I drafted and was the individual signatory of two initial CPRA requests to Regents, assigned numbers 18-5367 and 18-5666, on behalf of the Competitive Enterprise Institute. Regents' refusal to produce certain information in response led to litigation, *Competitive Enterprise Institute v. The Regents of the University of California*[34]. Records produced in discovery in *CEI v. Regents* include correspondence showing Profs. Horowitz and Carlson sought to impede Regents releasing records responsive to those requests (discussed in more detail, *infra*). Included among the responsive records was Prof. Horowitz's breathtaking email to her principal (non-governmental) benefactor Dan Emmett, "Hi Dan, Thought you would like to hear that Harvard's enviro clinic, UCLA Emmett Institute, and the Union of Concerned Scientists are talking together today at Harvard about going after climate denialism--along with a bunch of state and local prosecutors nationwide. Good discussion." (Written and sent from that "secret meeting"). GAO attached a true and correct copy of this email as produced by UCLA to its petition as Exhibit 3.

15. Based on the delays Regents created, on the privileges Regents both invented and abandoned, and on Regents' withholdings and ultimate releases of information, it is my opinion from that *CEI v. Regents* litigation that, whether the institution shared or merely adopted the faculty's

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[33] *See, e.g.*, March 17, 2016, email from OAG's Melissa Hoffer to Harvard Law School's Shaun Goho, Subject: RE: SAVE THE DATE—HLS/UCS Meeting on April 25, 2016, listing Andy Goldberg, Glenn Kaplan, Christophe Courchesne, Richard Johnson as participants in addition to herself. https://climatelitigationwatch.org/wp-content/uploads/2019/10/MA-AAG-Hoffer-to-HLS-on-MA-OAG-attendees.pdf.

[34] Superior Court of California, County of Los Angeles, Case Number 18STCP02832.

reluctance to release the requested records, this reluctance manifested itself in Regents' approach to processing those requests, and ultimately, to the litigation effort to forestall the records' release. In my opinion, that reluctance also has manifested itself in the instant matter, as described herein.

16. It is my experience that a reluctance to comply with open records laws and viewing them as somehow optional or at minimum avoidable, like the above-demonstrated reluctance manifested in the Climategate records, makes it necessary on occasion and most typically involving requests sent to academic institutions to remind the recipients that their views on a requester's identity, perspective, and motive are irrelevant to whether information is public and/or whether or how it should be processed and released. That is because this obstruction, whether because it is part of a Noble Cause Corruption[35], the result of ideological biases, or fear of embarrassment is a violation of (at minimum) the basic principles, longstanding precedent and often express statutory language. Regents' own admission in this case proves it is yet one more such instance.

17. It is my experience that, with exceedingly rare exception, universities are the institutions most reluctant to cooperate with public records requests, indeed are most profligate in offering false "no records" responses, and that this is compounded by administrations asking the faculty whose correspondence or other records is sought to make the initial determination whether they possess any responsive records.

18. Consistent with this reluctance and attitude, it is my opinion that — despite substantial public financing in the scores of billions of dollars nationally per year — academic institution officials and their faculties often hold and act on the view that lawmakers were mistaken to include public schools in open records statutes, or anyway that universities shouldn't be forced to

[35] See, e.g., "Noble cause corruption is corruption caused by the adherence to a teleological ethical system, suggesting that people will use unethical or illegal means to attain desirable goals, a result which appears to benefit the greater good." Bayley, Bruce. "Noble cause corruption: Do the ends justify the means?", *PoliceOne*, February 12, 2010, https://www.police1.com/chiefs-sheriffs/articles/noble-cause-corruption-do-the-ends-justify-the-means-SCKX3VQGkXYSFhUb/.

comply with these laws. Related or not, it is also my experience that requests to universities disproportionately result in the employment of *ad hominem* as somehow relevant, and particularly in support of the idea of selective application of open records laws (the "bad person" (non-)defense) which Regents has adopted in this matter. Of course, demands that open records laws be applied unevenly so as to afford unequal rights of access to public information inherently require irrelevant *argumentum ad hominem* to justify such unequal access. The argument against the person, rather than on the law, is sometimes — as in this case — expressed by the institution, though more typically is the work of supporters or surrogates. In my opinion this is likely because it is that it is well known among those tasked with processing open records laws that these considerations are inherently irrelevant.

19. It is my opinion for reasons explained herein that Regents' imposition of numerous delays and obstructions in its processing of the requests at issue here, continuing throughout the course of this litigation, is the result of these considerations.

20. I base this opinion on my experience with custom, practice, statutory language and what is reasonable under open records laws generally and CPRA particularly; I also base this on the delays Regents created, the engineered impediments both abandoned and maintained to this day, Regents' withholdings and ultimate partial releases of information, failure to apply a good faith effort to segregating reasonably redacted and public information, and late addition of other exemption claims in the face of an initial claim being exposed as untenable, all showing a predetermination to withhold, and an overriding priority of withholding, certain information. Also informing my conclusion is Regents' "supplemental productions" including "newly discovered" records once Prof. Carlson and her assistant were no longer involved in processing, all of which previously withheld records pertained to the Center for Climate Integrity and Dan Emmett and all of which happened to neatly meet GAO's expressed description of what the request sought. It is my

opinion that in this *GAO v. Regents* litigation once again, whether the institution shared or merely adopted the faculty's reluctance to release the requested records, Regents' approach to processing the requests and, ultimately, to the litigation effort to forestall the records' release, was impermissibly driven at least in material part by faculty bias.

21. Like other open records statutes, the CPRA affords no agency charged with implementing it the luxury of believing, or of pretending, that a requester's identity or motive is relevant to whether a record is public, or privileged. It matters not *who* the requester is. As the Orgon Department of Justice puts things in the context of its Public Records Law (citations omitted), "Generally, the identity, motive, and need of the person requesting access to public records are irrelevant. Interested persons, news media representatives, business people seeking access for personal gain, persons seeking to embarrass government agencies, and scientific researchers all stand on an equal footing."[36] Yet here Regents have affirmed in the course of this litigation that it indeed does so believe (or is pretending to believe), otherwise, even boasting that its view of the requester can properly inform its processing of the request.

22. Specifically, Regents claimed that, "In addition to the explanations set forth in the NPR Log, the following facts support Respondent's claim that certain documents are not public records subject to the PRA:... Petitioner GAO is an out of state non-profit not registered in California that appears to have a particular climate-related agenda supportive of fossil fuel industry as shown by public information available about the organization." (Supplemental Responses to Certain Special Interrogatories served by email by Arleen A. Swenson on GAO's counsel on July 1, 2021, Supplemental Response To Special Interrogatory No. 37 (Set Four))[37]. This confession was so

[36] https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual/i-public-records/.

[37] Regents reaffirmed this position in its August 16, 2021, Response(S) To Special Interrogatory Nos. 217, 218.

startling that GAO afforded Regents the opportunity to walk back its position that requester's identity and perceived motive informed Regents' processing, and now defense, of 19-7464 or alternatively to plainly own it. In response, Regents refused to stop digging and reaffirmed this position in its August 16, 2021, Response To Special Interrogatory No. 217, 218 And Responses To Petitioner's Third Set Of Requests For Production, Response To Request For Production No. 33.

23. With the Regents having asserted that the identity of the requester is relevant "context" for how it processed the request at issue here, including whether information is public or not or exempt or not, I provide context for the Regents' identity-based approach to implementing CPRA, which context is clearly relevant for its striking resemblance to equally (and in some cases, adjudicated) improper behavior that, while almost *de rigueur* among academic institutions, has been the subject of judicial "smackdown" elsewhere (*infra*) for its thoroughgoing impropriety.

GAO'S REQUEST 19-7464 AND REGENTS' PROCESSING THEREOF

24. When GAO filed its Verified Petition on April 1, 2020, it set forth Regents' processing of PRR 19-7464 ("the CPRA Request" or "19-7464") to that time. A key fact in this matter involves "supplemental productions" months after Regents' processing of 19-7464 had concluded and, most intriguingly in my opinion, once a certain, conflicted faculty member and her assistant were no longer tasked with sorting records for potential release (¶ 39, *infra*). I have introduced my experience with and understanding of this practice of such conflicted processing, on which I expound, *infra*. Regarding "supplemental productions", it is my experience that these are rare, but do occur in a small minority of requests. In my experience, such responses typically issue at the federal level, after an agency consulted with another agency whose "equities" were invoked in the records sorted for processing, and which second (or third) agency responds with its own position on releasing the implicated records after the recipient agency had completed its processing of the other potentially responsive records. In my experience it is exceedingly rare, such that I do not

recall (though cannot rule out) ever encountering an instance where a "supplemental production" came from the agency that had completed its processing, declared it closed, but "discovered" responsive records later.[38] So not only did the principal custodian of requested records ("Information Practices", or "IP"), allow a conflicted faculty member (a principal in the requested correspondence) and her assistant to conduct the screen for potentially responsive records, and declare that no other records were responsive, but months later, after a search for other of that faculty member's correspondence that this time was conducted by other than the conflicted party, it declared that additional records were located regarding the first request *which records had not been acknowledged and passed along for processing after the conflicted search.* These specifics make this particular "discovery" of supplemental records truly, again in my experience over nearly twenty-five years of open records work and to the best of my recollection, *sui generis*. They also join with other factors explained herein to strongly suggest a pattern by Regents of obstructing production of records that illuminate the Climate Change Agenda ("Climate Change Agenda Records").

25. Details supporting this include the following. Each of CEI's and GAO's CPRA requests discussed herein implicated or expressly sought records concerning two UCLA (Law

[38] In response to a follow up GAO request, PRR 20-8525, Regents did produce one "Additional Responsive Document"; however, *this was not likely a record that existed* but was just missed at the time of Regents' initial search and production. Instead, Regents' initial production of the records responsive to PRR 20-8525, which were its Forms APM -025 for 2016 through 2019 for Prof. Carlson, "ANNUAL REPORTING FORM FOR CATEGORY I & II OUTSIDE ACTIVITIES," appear to have all been created in response to the PRA request, revealing that the required annual forms had never been completed (all were signed and dated by Prof. Carlson on December 6, 2020, which was the day before the production, and all lacked the required departmental chair signature ("The department chair's signature affirms the form was received and reviewed. Corrective actions should be implemented for time reports (days) that are above the annual limit and for unapproved Category I activities." Form APM -025)). The "additional responsive record" later produced, for 2019-2020, appears to be a newer form of recording such activities. As such, although the PDF document's "properties" are all blank, the facts suggest this record did not exist at the time of the original production but like the initial release was also produced in the remedial effort to create required, but never previously completed, reporting files, and is of an entirely different class than other "supplemental productions" altogether: it was released later because UCLA had yet to create it.

School) faculty's work with private outside parties, including law enforcement, to develop theories of litigation against, and pursue as targets of investigation, perceived opponents of a political and policy agenda (the "Climate Change Agenda"). That Agenda is shared by these outside parties, certain faculty, and the University's Emmett Institute on Climate Change and the Environment for which the faculty work.[39] Those faculty are Prof. Cara Horowitz and Prof. Ann Carlson (presently on leave). *CEI v. Regents* litigation produced records that GAO, which publishes the website ClimateLitigationWatch.org, concluded warrant follow up scrutiny to better understand this climate industry and the role therein of public institutions. Two of those GAO subsequent requests are at issue in this matter.

26. In the *CEI v. Regents* matter over CPRA requests 18-5367 and 18-5666, records indicate faculty efforts to impede processing of at minimum the first of these requests (responsive records included, e.g., the remarkable "going after climate denialism along with a bunch of prosecutors" email noted, *supra*), which CEI submitted in February 2018 and which sought records pertaining to the "secret meeting." For example, in a March 7, 2018, email to UCLA's Information Practices staff, Prof. Horowitz wrote, *inter alia*, "Ann and I would like to discuss this request with counsel in our office. Would that be possible? Perhaps sometime early next week?." Later, on March 29, 2018, Prof. Horowitz wrote to IP about the Harvard event emails, *inter alia*, "I believe that some of these emails, or some portions of these emails, should not be disclosed under the PRA because disclosure may not serve the public interest. Please let's discuss next week." On April 3, 2018, IP responded, in part, "we can touch base about the concerns you note below". Prof. Carlson

[39] "[O]ur Emmett Institute on Climate Change and the Environment…was founded as the first U.S. law school center dedicated to fighting climate change through law and policy". https://law.ucla.edu/centers/environmental-law/emmett-institute-on-climate-change-and-the-environment/events/5279/2019/4/22/Climate-Change-on-Trial-c--An-Earth-Day-Conversation-with-Julia-Olson-Lead-Attorney-for-Landmark-Childrens-Climate-Lawsuit/ at 0:10 – 0:25. Prof. Cara Horowitz.

apparently shared her colleagues' desire to withhold some of these public records. On January 18, 2019, IP's principal point of contact, Marisa Hawkins, wrote again to Carlson: "I am in the process of reviewing the documents you produced in response to the first CEI request, and I have a couple of questions regarding one of the email chains you had flagged as a possible concern. Would you have time for a quick call on Tuesday to discuss it?".[40] Numerous other records produced by the Regents indicate that this consultation did occur.

27. These delays played out with the University projecting, then pushing off, its response dates, anywhere from six weeks to three months at a time, over and again until finally CEI filed suit on November 6, 2018. As with 19-7464, by the time CEI filed its Petition UCLA also had not substantively responded, nor provided any indication it was in fact processing, CEI's CPRA #18-5666 submitted in May 2018. It is my opinion that subsequent discussions with the University in the course of that litigation, in which I participated with lead, local counsel James Hunter, support the conclusion that the University had not in fact substantively processed CEI's CPRA #18-5666 prior to suit being filed.

28. It is my experience that Regents' practices in responding to CPRA requests for Climate Change Agenda Records includes both (a) the unjustified delay of responses to, and the unjustifiably delayed production of documents demanded in, requests for Climate Change Agenda Records, and (b) the assertion of unwarranted claims of exemption and also sweeping and improper claims of "not public records" in attempts to avoid the production of key Climate Change Agenda Records.

29. It is my opinion that these practices are intentional. Indeed, as long ago as September 2012, UCLA published a Statement on the Principles of Scholarly Research and Public Records

[40] These statements were produced on April 19, 2019, in Regents' First Response to Request for Production in that matter, at pages 173, 12, 173, 173, 231 of 328, respectively.

Requests (the "September 2012 Statement on Principles of Scholarly Research and Public Records Requests") which remains in effect today that states, in relevant parts, as follows:

> "... faculty scholarly communications must be protected from PRA and FOIA requests to guard the principles of academic freedom, the integrity of the research process and peer review, and the broader teaching and research mission of the university. Moreover, these requests have increasingly been used for political purposes or to intimidate faculty working on controversial issues. These onerous, politically motivated, or frivolous requests may inhibit the very communications that nourish excellence in research and teaching, threatening the long-established principles of scholarly research. ... *Faculty often choose research topics that are highly relevant to society and therefore may generate strong reactions*. These topics may be controversial and highly politicized (*e.g.* global warming) ... Faculty must be free to work on these important topics without fear of retribution, threats or interference." (Italics in original.)

GAO attached a true and correct copy of the September 2012 Statement on Principles of Scholarly Research and Public Records Requests to its petition as Exhibit 4.

30. GAO's Request 19-7464 sought Profs. Carlson and Horowitz correspondence during the period April 25, 2016 through November 14, 2019 that were to, from or included four specified email domains, two of which email domains are used by two individuals who, public records show, are the principal outside parties underwriting these efforts at this public institution. 19-7464 also sought any correspondence of two UCLA Law faculty with the Massachusetts Office of the Attorney General which apparently took what the March 2016 "secret meeting at Harvard" agenda indicates was Prof. Cara Horowitz's requested course of action, soon thereafter suing a private party for climate-related "consumer protection" offenses.[41]

31. PRR 19-7464 as drafted required just a "keyword" search to identify potentially responsive records, as opposed to subjective analysis for, e.g., "records relating to" some topic.

[41] *Commonwealth of Massachusetts v. Exxon Mobil Corporation*, Suffolk County Superior Court (MA), 19-3333.

32. In PRR 19-7464, GAO expressly stated its reason for making the request (the "Climate Litigation/Regents Interface") 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."

GAO attached a true and correct copy of that Request to the Petition as Exhibit 1.

33. The CPRA encourages the requester to explain its purpose to "[a] Assist the member of the public to identify records and information that are responsive to the request." Government Code § 6253.1. As such, GAO described what it sought, asserting the kind of information it sought, and what public understanding this would inform. As discussed herein, and in Petitioner's Opening Trial Brief, Regents has spent months having turned this and CPRA on its head to apply the law as a *withholding* statute on this basis, as opposed to a disclosure statute, grounded in Regents' disapproval of the requester's identity and purpose.

34. When processing 19-7464, Regents took an initial extension of time on November 25, 2019, claiming "[t]he need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request." Regents did not claim the other permissible reasons, (a) "[t] need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in the request", (b) "[t]he need for consultation, which shall be conducted with all practicable speed, with two or more components of the agency having substantial subject matter interest therein", or (c) "[t]he need to compile and/or extract data." Regents' November 25, 2019, Additional Time Explanation concludes with the representation that "IP will further respond to your request no later than the close of business on December 9, 2019." (Underlining in original.) On December 9, 2019, Regents wrote that "[a]s required under Cal. Gov't Code § 6253(c), … we are now able to provide you with the

estimated date that the responsive documents will be made available to you, which is March 26, 2020." Subsequently, over the course of three productions (on January 10, 2020, February 14, 2020, and March 26, 2020), and as of when GAO filed this suit on April 1, 2020, Regents produced 2,794 pages exclusively of electronic case filing (ECF) notices, not one page of which after five months contained anything else, whether substantive discussion or indeed any discussion whatsoever, than ECF notices which required zero review or other processing for exemptions and could and should have been released in full as a class (they were) at once, rather than dribbled out over months, as all of these would have surfaced in the same search of the one email account. No emails regarding the Climate Litigation/Regents Interface, or any substantive topic, were included. This was the state of play when GAO initiated the instant proceeding on April 1, 2020, because Regents had produced only a single category of documents (ECF notices) out of eight covered by the request, and from only one of the two identified faculty (Horowitz).

35. In summary and avoiding recitation of several other steps in the process detailed in GAO's Petition, after more than five months, Regents' response to PRR 19-7464 consisted only of three partial productions of a single category of documents (i.e., electronic case filing notices) which by their nature are not subject to exclusion review for, as they would not contain, exempt material. As a class, these ECF notices are immediately releasable with no such review, and no such delays. All these records were sent to Prof. Horowitz, none of the responsive records Regents produced were sent to Prof. Carlson; all include only the same one email domain out of four email domains named in GAO's request; and none include any of the other three domains named therein although we now know many such responsive records exist. Each of these productions avoided releasing any responsive records that include the cited email domains of the Emmett Institute's namesake benefactor, or any substantive emails, although we now know many such responsive records exist.

36. Because all of the ECF notices that Regents dribbled out over the course of three tranches and several months were sent to the same UCLA email account, and all are responsive for precisely the same reason, they would have all been returned in the same search for responsive records. ECF notices for these cases for which Prof. Horowitz entered an appearance for an *amicus curiae* inherently contain no potentially privileged information. For these same reasons there simply is no reason that all ECF notices could not and should not have been produced as a class at once, meaning at least all as soon as they turned up in the canvass for responsive records, unless Regents sought to delay ultimate release of responsive records which met what GAO expressly described was what it sought (the "Climate Litigation/Regents Interface") somehow (e.g., by limiting its search to shorter periods of time than 19-7464 covered, then conducted another partial search later, and another again later still). In my opinion, that constitutes *intentional* delay, and obstruction of the request. Delaying production of this category of records both at first and then, when produced, in several tranches each separated by six weeks is transparently a delaying tactic. Given the facts, which include Regents' History of CPRA Violations Regarding Requests for Climate Change Agenda Records, in my opinion there is no plausible basis other than Regents' desire to delay and obstruct GAO's ability to promptly obtain properly requested Climate Change Agenda Records. Further, all of the records specified in PRR 19-7464 could and should have been produced by the December 9, 2019 date at the latest given that (a) PRR 19-7464 provided search terms and dates, requiring no subjectivity for e.g., records "related to" some subject but instead required only a computer keyword-and-dates search and (b) the only explanation offered by Respondent as to why it had been unable to process this request was that the *physical location* of the requested *electronic* records to UCLA email domains was in a different location than the office processing the request.

37. It is my opinion that these delays were deliberate and driven by Regents' disinterest in releasing Climate Change Agenda records and its subsequently acknowledged bias against GAO

on the basis of the requester's identity and perceived motive, for the reasons stated herein. Facts supporting this conclusion include the following.

38. On August 31, 2020, the day before the Trial Setting Conference ("TSC"), Regents finally stated that it (1) was concurrently producing all remaining public records that were not subject to one of a number of claimed exemptions (the "8/31/20 Production") and (2) was withholding additional documents on the ground that they were not public records. The 8/31/20 Production again included zero emails regarding the Climate Litigation/Regents Interface.

39. Adding to this is Regents' response to a follow up PRA request by GAO (PRR 20-8371) triggered by a reference, in one of the emails included in the 8/31/20 Production, to the "Center for Climate Integrity".[42] On January 15, 2021, Regents wrote to claim it "discovered" numerous pages responsive to 19-7464, releasing them four and a half months after Regents stated that it had completed its production in response to PRR 19-7464 on August 31, 2020, which records *for the first time* in these productions did in fact directly address the Climate Litigation/Regents Interface (the "1/15/21 Production") GAO had detailed in 19-7464 as the focus of its interest. These came in a production of 169 pages of records in response to PRR 20-8371, together with a letter stating that certain of the records being produced were also responsive to PRR 19-7464 and constituted a "supplemental production of records" discovered in the course of responding to PRR

[42] More specifically, the bottom email of a July 10, 2019, email trail included in the 8/31/20 Production (page 838) referred to "a meeting with Dan [Emmett] and people from the Center for Climate Integrity". Since within days of the 8/31/20 Production, Center for Climate Integrity was revealed to be providing attorneys for "climate" litigants to initiate litigation, GAO served PRR 20-8371on September 15, 2020 requesting, *inter alia*, "all emails dated during the four-month period of May 1, 2019 through August 31, 2019 … that (1) were sent by or to … UCLA law faculty member Ann Carlson and (2) which include, anywhere in the email, i) Center for Climate Integrity, ii) @climateintegrity.org and/or iii) CCI".

20-8371.[43] Eighteen of the nineteen pages of the 1/15/21 Production (pages 151 to 168) which were also responsive to PRR 19-7464 were "newly-discovered," and consisted of eight emails between Carlson and Dan Emmett, all of which deal with the Climate Litigation/Regents Interface (the "1/15/21 Climate Litigation/Regents Interface Production")(The nineteenth page (page 150) was previously acknowledged by Regents in response to 19-7464 but withheld in full, identified in the December 16, 2020 Exemption Log (Record 139) as "pre-publication academic research", withholding even the email's Subject. Petitioner has demonstrated in discovery in this case that these pages only surfaced when someone other than Prof. Carlson or her assistant performed a search for such records, in response to a follow up request which inherently had some overlap with 19-7464 (See, Defendant's Objections and further responses to Plaintiff's Sixth Set of Interrogatories, page 31, Response to Interrogatory No. 112, lines 16 through 26; see also Deposition of Ann Carlson, pp. 43-44.).

40. Notably, the supplemental production on January 15, 2021, prompted by a follow-up, pressure-testing PRA request PRR 20-8371 not only contained the only documents ever produced by Regents in response to PRR 19-7464 that discuss the specific subject which PRR 19-7464 states quite clearly and up-front was the reason for that request ("the Climate Litigation/Regents Interface"). (GAO 1/22/21 Status Report, Exhibit 3 at pages 3 through 20.) Further, with the exception of one email, Regents had neither previously acknowledged nor in any way revealed the existence of these records even in Regents' December 2020 Privilege Log. That exception, page 150 of 159, was the July 18, 2019 "smog and flying" email, which Regents withheld in full when, unlike the other "Interface" emails, Prof. Carlson/her assistant turned it over to IP for processing. However,

[43] Notably, both PRR 20-8371 and PRR 19-7464 required only a "keyword" search for responsive terms, not subjective analysis. Therefore, it is incomprehensible (and not credible) that these "newly discovered" emails somehow failed to turn up when PRR 19-7464 was processed, but not during the subsequent processing of PRR 20-8371. GAO suspects the explanation lies in the difference in who conducted the searches and screened the records for responsiveness – namely, Professor Carlson and her assistant with respect to PRR 19-7464 and UCLA's IT staff with respect to PRR 20-8371.

at that time Regents withheld even the Subject: field, "smog and flying" as purportedly giving away too much information about pre-publication research being forwarded by Prof. Carlson to a select member of the public, a major donor to both her and her employer. Only because GAO sent this follow up PRA request did Regents belatedly produce copies of numerous documents which Regents previously denied existed and now concedes were responsive and therefore should have been, but were not, previously produced in response to PRR 19-7464. Only because GAO sent this follow up PRA request do we know about the thoroughly unsupportable claim of privilege for even the title "smog and flying" as well as at least the first paragraph of two paragraphs of that email's contents.

41. On July 23, 2021, in response to a further follow up PRA request by GAO ("PRR 21-8912") triggered by multiple references to the Center for Climate Integrity in several of the emails included in the 1/15/21 Production, Regents produced 98 pages of documents (the "7/23/21 Production"), together with a letter stating that one of the documents being produced was within the search parameters of PRR 19-7464 but did not constitute a second "supplemental production of records" discovered in the course of responding to PRR 21-8912 because it purportedly is not a public record.[44] In fact, (1) the document in question, dated September 9, 2019, is a public record that should have been located and produced,[45] (2) Regents including that statement in this response but not the response to 19-7464 defies explanation even were one to accept it, and (3) the email reflects the successful consummation of the above quoted CCI Introduction/Solicitation that was only belatedly disclosed by Regents in its first "supplemental production" on January 15, 2021. Had

[44] Once again, like PRR 19-7464 and PRR 20-8371, PRR 21-8912 required only a "keyword" searches for responsive terms, not subjective analysis. Therefore, it is incomprehensible (and not credible) that Regents somehow failed to turn up the "newly discovered" emails in response to PRR 20-8371 and PRR 21-8912 when PRR 19-7464 was processed. GAO suspects the explanation lies in the difference in who conducted the searches – namely, Professor Carlson and her assistant with respect to PRR 19-7464 and UCLA's IT staff with respect to PRR 20-8371 and PRR 21-8912.

[45] See Part III, B, infra.

Regents disclosed this previously it would have suggested the existence of the other records Regents had not released, or even acknowledged existed.

42. Then, on August 16, 2021, Regents acknowledged (indeed volunteered) its position that GAO's identity and motive is a factor in Regents' processing of 19-7464 (page 16, lines 13-14 of Regents' Supplemental Responses and its August 16, 2021, Response to Request for Production No. 33). GAO tested that with further interrogatories and Regents affirmed this position in its August 16, 2021, Response(s) To Special Interrogatories Nos. 217, 218.

43. This recalls my notes, cited above, taken during GAO's November 19, 2018, introductory call on this matter with Regents' counsel John Gherini. In addition to the points already cited about allowing faculty to determine what would be reviewed for possible release, these notes reflect Mr. Gherini "Asked about motivation for request." Regents' concerns over GAO's intentions for these public records was on its mind early in, and subsequently helped guide, its processing.

44. My experience with open records laws informs my opinion that a requester's identity and purpose are relevant only for certain limited purposes. These purposes do not include whether the records are public or exempt (but, e.g., in determining fee waivers, if a party demonstrates the ability and intention to broadly disseminate information; also, in cases where disclosure of information about an individual is limited to disclosure to that individual. Neither apply here). Specific exceptions to this general principle in fact expose Regents' position for the bias-driven position that it is. Again, turning to the Oregon Department of Justice commenting on Oregon's Public Records Law, we see that a requester's purpose can be relevant if certain personal identifying information is not necessary to be released given it does not assist the requester's purpose — revealing that motive is possibly relevant but for precisely the *opposite* of Regents' rationale, of grounding its withholding of information educating on the institution's role in the anti-fossil fuel industry *because* GAO's purpose *is* to educate on the public institution's role in the anti-fossil fuel

industry.

45. These factors and open records laws' inherent biases toward disclosure, with narrow construction of exclusions and broad interpretation of language, informs the decision whether disclosure is clearly outweighed by its interest in non-disclosure. It is my opinion that, as an agency charged with implementing the CPRA, it is inconceivable that Regents is unaware that the Act itself, in Government Code § 6257.5, as well as precedent cited by Regents in this proceeding, *Los Angeles Unified School Dist. v. Superior Court* (Cal. App. 2d Dist. 2014) 228 CA 4th 222, 248-252, fn. 18, 175 CR3d 90, 109 ("*LAUSD v. Superior Court*") [46] makes clear that the requester's motive or identity do not inform how a CPRA request is to be processed.

46. In my opinion Regents' inability to resist acknowledging that its processing was influenced by its view of GAO as holding an agenda that is contrary to faculty's/Regents', i.e., as being the wrong kind of requester, further informs a conclusion that Regents' desire to not produce records responsive to 19-7464 has led to the delays and obstruction of this request, including inventing excuses to not produce records, as described herein. In my opinion this also is instructive

[46] It is well-established that under the federal FOIA on which CPRA is modeled — and judicial precedent applying FOIA, which Regents' counsel has repeatedly cited as being strongly influential in this matter — "As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester," and "As we have repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (the latter quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149); see also *Lynch v. Dep't of the Treasury*, No. 98-56368, 2000 WL 123236, at *4 (9th Cir. Jan. 28, 2000) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)); *Parsons*, 1997 WL 461320, at *1 ("[T]he identity of the requestor is irrelevant to the determination of whether an exemption applies."); *United Techs. v. Federal Aviation Administration*, 102 F.3d 688, 692 (2d Cir. 1996) (rejecting plaintiff's argument that Exemption 4 (deliberative process) should be applied "on a requester-specific basis," because, *inter alia*, "[t]he FOIA was not intended to be applied on such an individualized basis"); *Swan v. Securities and Exchange Commission*, 96 F.3d 498, 499 (D.C. Cir. 1996) ("Whether [a particular exemption] protects against disclosure to 'any person' is a judgment to be made without regard to the particular requester's identity."); *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), *cert. granted, judgment vacated on other grounds & remanded*, 486 U.S. 1029 (1988). "In sum, [the FOIA requester's] need or intended use for the documents is irrelevant." *North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989).

about Regents' strained claims of privilege and non-public record status. Also, Regents itself does have seemingly related motivations to *shield* such records, as a body that collects millions of dollars in support of the climate litigation industry and its anti-resource extraction efforts from parties who stand to benefit financially, be it because of a solar-energy products, metals trading or other business that stands to benefit in the event of certain policy outcomes.

47. Regarding Regents' claims about nine emails exchanged between Professor Carlson and Dan Emmett that, if released in whole or in part, would supposedly constitute a threat to academic freedom, particularly what it declares is "research into sensitive or controversial topics," it is my opinion that this also is further evidence of Regents inventing reasons to not release records to a disfavored requester. The claim is particularly curious given Carlson's selective release of supposed research to a major donor. It is my opinion that real research is not threatened by the disclosure of this correspondence to parties beyond the donor to whom Prof. Carlson has already disclosed it, whether it purportedly contains draft material or not, and that this invocation of a threat to academic freedom and chilling effect on research has no merit. 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 seeking to make a major donor feel catered to and privy to advance information), researchers routinely circulate preliminary results, and report on preliminary results at conferences. In fact, the more attention given to honest research, the better it is for the authors. Further, I note an item on the UCLA Faculty Association's own website commenting on legislatures having applied open records laws to academic institutions — in an article profiling the Union of Concerned Scientists no less, a group with whom both Profs. Carlson and Horowitz work and which Regents invokes in its August 16, 2021 effort to justify processing a request based on the requester's motive and identity:

> "'It's just gibberish to say these laws stifle research,' said David Cuillier, director of the University of Arizona School of Journalism and a member of the Society of Professional

> Journalists's [sic] freedom of information committee. 'These are government scientists funded by taxpayers, and the public is entitled to see what they're working on.'"[47]

48. In her deposition, Prof. Carlson acknowledged her view of the request at issue in this matter as "being used for political purposes or to intimidate faculty working on the issue of global warming." Carlson Deposition Transcript, pp. 33-34. It is my opinion for reasons stated herein that the obstruction of 19-7464 was born, at least in part, of this perspective. It is similarly my opinion for the same reasons that Regents' processing was born at least in part by Carlson's association with and promotion of the Climate Change Agenda and those seeking to litigate it into effect. There is overwhelming evidence of Prof. Carlson's strong bias in support of this agenda and campaign. It is my opinion these biases and this ideological stridency left her feeling justified in thwarting the CPRA request at issue in this matter, and played a role in the outcome including the necessity for, and Regents' conduct of, this litigation.

49. In my opinion the most reasonable conclusion from the statements made by Profs. Horowitz and Carlson related herein is that they view frustrating disfavored CPRA requests as a minor but regardless justifiable act and, in my opinion, they have done so. The evidence that Prof. Carlson is possessed of sufficient ideological and political zeal such that she might, like other academics (noted *supra* and discussed in greater detail, *infra*), impede production as the facts suggest did occur includes, *inter alia,* Prof. Carlson's comments in a 2020 Society of Environmental Journalists' web event, which was posted publicly, in which she said, "I worry sometimes that I go over the edge" on this issue, that her "gloves have come off" and that she has abandoned a prior posture of "being sort of a neutral talking head expert type," and the view that they are "protect[ing] our planet" (see Petitioner's Opening Trial Brief) from "the greatest environmental existential threat

[47] "Article Reminds: Public University emails (and other documents) are not private," March 20, 2016, https://uclafacultyassociation.blogspot.com/2016/03/article-reminds-public-university.html (last viewed September 8, 2021).

to humankind".[48] It is my opinion that this view manifested itself in Regents' and specifically Carlson's processing of PRA request 19-7464, the details of which GAO learned during discovery. Specifically, Carlson provided no records to IP until March 2020 (Prof. Horowitz did turn over records to IP in December 2019, then again in March and May 2020)(Regents' Response to Special Interrogatory 1). Regents for the first time then produced Carlson records — and indeed non-ECF records, and only after being sued — in August 2020, in a now demonstrably incomplete production purportedly of all Carlson's responsive records. This, we now know, excluded the records neatly fitting GAO's further description, in its request 19-7464, of what it sought. Only because GAO sent PRR 20-8371, a "trust but verify" move which hindsight makes clear was warranted, did we learn of these significant withholdings, which were subsequently "discovered" when neither Carlson nor her assistant were involved in screening potentially responsive records. The best scenario for Regents in explaining this supplemental production is a prior failure to perform a complete search, which by some remarkable chance resulted in excluding from the processing a small handful of records which were by far the most relevant records.

50. It is my opinion that this obstruction also manifests itself in the withholding in full of the Carlson-Emmett "smog and flying" email in response to 19-7464, and its subsequent partial release mostly redacted in Regents' processing of that pressure-testing CPRA request 20-8371. Unlike all the other, most-relevant "Interface" emails explored, above, Regents did previously acknowledge this email in its processing of PRR 19-7464 but withheld it in full, shielding even the title in the Exemption Log as purportedly pre-publication research that if released would cause a chilling effect on academic freedom. That "GAO - PRA Exemption Log 20201214", entry 120, cited Regents' reason for the withholdings of "smog and flying," including even that Subject field, as:

[48] https://www.youtube.com/watch?v=Q7p1DxjGIj0; see also https://westernwire.net/fair-and-balanced-not-necessarily-the-goal-for-environmental-reporters-says-sej/ beginning at 1:50 of 2:28 minutes.

> "The record concerns pre-publication academic research in which the public interest in non-disclosure clearly outweighs the public interest in disclosure. 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. See, e.g., Humane Society of the United States v. Superior Court (Regents of the Univ. of Calif.), (2013) 214 Cal. App. 4th 1233 (upholding Regents' decision to withhold UC Davis researchers' prepublication of research data from public records request."

There is no legitimate argument that even what Regents ultimately partially released gave away too much about pre-publication research, which nonetheless was already and inherently shared with a select member of the public. I do not recall in my extensive experience a case where the exemption or privilege log itself makes clear on its face that the claimed exemption(s) does not apply. Further, the since-released paragraph concerns Carlson's efforts to introduce the Rockefeller Family Fund's Director to Dan Emmett for a fundraising pitch for the Center for Climate Integrity — withheld on the basis that its release threatened a chilling effect on academic freedom and reflected academic research. "Thanks again for meeting with the CCI/Rockefeller folks on Monday. I'm glad I got to see their presentation and am thinking about ways the Emmett Institute might collaborate with them." In addition to proving false claims of "academic freedom" and "chilling effect," this proves Regents also declined to segregate and release reasonably segregable responsive and plainly non-privileged information and allegedly privileged information, as is required. Government Code § 6253.

51. Regents' claims of exemption in full and of "not public records" not only are not well taken, but the volume of Regents' withholding of complete records informs an assessment of that same, serial failure to segregate. This failure to segregate is made ever more obvious by the near-total absence of records with content redacted (outside of contact/personal identifying information). The belatedly, partially released "smog and flying" stands out in that respect, and such absence of redacted records with reasonably segregable information in the face of withholding large numbers of records in full is, by logic and in my experience, not evidence of a light hand on redaction. It is instead typically reflective of precisely that refusal to redact reasonably segregable information.

Further, of course, is that with extremely rare exception, purely factual information such as to, from, date and, typically, Subject represent a bare minimum of non-privileged information which every email contains (the ultimate release of such basic and purely factual information *in logs* affirms its non-privileged nature, and again illuminates the failure to segregate).

52. The "smog and flying" email which Regents refused to review for segregation of releasable information — and even withheld the plainly not-privileged title "smog and flying," thereby temporarily obscuring the obviousness of the impropriety[49] — embodies the disingenuousness of Regents' complaint about the burden of segregating information (which, regardless of this complaint, is statutorily required). When Regents belatedly and partially released "smog and flying" in response to a different request it revealed that, despite the claim of pre-publication academic research to withhold the entirety, the record contained at minimum one full paragraph, previously withheld, that "in its entirety does not relate to any academic research [Carlson was] engaged in at that time". Carlson Deposition at p. 55 of 136. This also affirms that, while Carlson and Horowitz may have been responsible for delays and obstruction, clearly the first reviewer failed to bother with redaction of reasonably segregable information as required.

53. Similarly, Regents still has not offered its rationale why the most reasonable explanation — failure to segregate — is *not* the reason behind withholding in full each of the 86 fundraising emails. Each of these inherently, by virtue of the request's search parameters, include as (segregable) part or parts of the email "thread" correspondence which Regents had already shared with a select member of the public (Emmett). In addition, the Amended Exemption Log establishes

[49] Regents' first three productions of four in 19-7464 were ECF notices, which as a class include no privileged information for redaction. The fourth production of 1031 pages on 8/31/20 included only one record showing material effort at redaction, most of a paragraph from Prof. Carlson to Emmett. Out of the total four productions, there were fewer than two dozen individual, typically short redactions, which context indicates were generally about travel, scheduling, availability and personal (e.g., health) matters, and one comment about a matching donation.

that thirty-eight (38) of the Fundraising Documents[50] were not "internal email communications" because, as the Log asserts, they were sent to, from or copied to Dan Emmett, affirming waiver pursuant to Government Code § 6254.5 (the manifestly intentional and selective disclosure to one member of the public was not coincidentally to a major donor to Carlson and the Emmett Center).

54. Of course, an institution's reluctance to produce particular records and desire to impede processing of requests can carry the day until late in the litigation over such behavior, and it is my opinion that that is occurring in this matter. In addition to Regents' reflexive and telling invocation of the "pro-fossil fuel agenda" concern as a factor, facts supporting my opinion that Regents continue, as part of this litigation, creating impediments and a series of delays to deny release of records, possibly to wear the requesting entity down, and at minimum to greatly postpone Regents' ultimate release of responsive records also include Regents' claim, in response to discovery requests for production and interrogatories, that the Emmett Institute's receipt of "significant" funding from private sources also provides relevant context to how it processed 19-7464. When pressed for elaboration on the relevance of such a claim, Regents subsequently abandoned this claim. Similarly, Regents' reluctance to disclose records at issue here beyond its preferred members of the public (and its belief in selective disclosure) extended so far as threatening in August 2021 to seek a protective order for any records released to requester *under the Public Records Act*, which prohibits selective disclosure, before again backing down when challenged.[51]

55. As discussed in Petitioner's Opening Trial Brief, Regents claimed patently invalid bases for exemption, e.g., FERPA, despite case law *litigated by the Regents* disallowing that specific claim. Further, on July 1, 2021, 6 ½ months after purportedly finalizing its position in its initial

[50] Nos. 15, 17, 22, 26-28, 30, 31, 37, 43, 45-50, 52-59, 61, 62, 64, 67, 68, 70, 71, 74, 77, 78, 83, 91, 95 and 97.

[51] See, respectively, August 11, 2021 and August 12, 2021 emails, Ray Cardozo to Jim Hunter, Subject: GAO Discovery Extension.

Exemption Log, in its Supplemental Responses and Exemption Log to Certain Special Interrogatories Regents added entirely new exemption claims with respect to 104 of the 120 documents specified in the original Exemption Log, and also asserted new justifications with respect to all 544 of the documents specified in the NPR Log. For example, regarding the eight FERPA records, over six months after it served its original Exemption Log on December 16, 2020, Regents added academic freedom and right to privacy as exemptions applying to these records, in seeming acknowledgement of the inapplicability of the FERPA claim after GAO pointed this out ("As Petitioner appears to contest that FERPA supplies the basis for an exemption from disclosure here…". Regents' April 1, 2020, Objections and Responses to Petitioner's Seventh Set of Special Interrogatories, Response to Special Interrogatory No. 209. See also Petitioner's Opening Trial Brief at p. 12). In my opinion this is one of numerous factors, as described herein, revealing Regents' predetermination to withhold, and an overriding priority of withholding, records responsive to GAO's request particularly if they involve major donor Emmett. This is also my opinion regarding Regents' machinations to avoid releasing the "Anti-Semitic Harassment Document" (see Petitioner's Opening Trial Brief at pp. 13-16). This came after forcing GAO to struggle to obtain the first, transparently inadequate, unreadable Exemption Log in 3-point font in December 2020 ("By default, Microsoft Office Excel 2010 uses …font size 11")[52] (Regents finally produced a readable version on March 3, 2021), to remedy the inadequacies and update the records after Regents' positions had changed several times as GAO was preparing its opening brief for the originally scheduled trial date.

SIMILAR PAST, RELEVANT EXPERIENCES WHICH ALSO INFORM MY OPINION

56. Government Code § 6257.5, as well as precedent cited by Regents in this proceeding, *Los Angeles Unified School Dist. v. Superior Court* (Cal. App. 2d Dist. 2014) 228 CA 4th 222, 248-

[52] See, e.g., https://kb.blackbaud.com/knowledgebase/Article/40350, which default size continues in later versions, see, e.g., https://support.microsoft.com/en-us/office/change-the-font-size-931e064e-f99f-4ba4-a1bf-8047a35552be.

252, fn. 18, 175 CR3d 90, 109 ("*LAUSD v. Superior Court*")[53] makes clear that the requester's motive or identity do not inform how a request is to be processed. Nonetheless, it is my experience that invocation of the requester's identity is a near-ritual in defense of shielding "climate"-related records from release from academic institutions under open records laws. However, it is rare for an institution itself, rather than surrogates or defenders, to acknowledge this motivation. As such, it is my opinion that Regents offers a very instructive "tell" through its inability to resist the impulse to try and make requester's motive and identity relevant, affirming its approach in this matter is informed, improperly, by application of a non-existent "bad requester" exemption to its internal approach to implementing CPRA.

57. However, the identities and motives of the parties involved in *processing* a records request can be highly relevant, for example when the most conflicted parties imaginable influence decisions to release or withhold records and even, as here, to serve as gatekeepers in conducting the initial canvass for potentially responsive records. As noted in the discussion of the GMU request and litigation, *supra*, I am familiar with this situation including when a party to the requested

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[53] It is well-established that under the forerunner of state open records laws, the federal FOIA on which CPRA is modeled — and judicial precedent applying which Regents' counsel has repeatedly cited as being strongly influential in this matter — "As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester," and "As we have repeatedly stated, Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (the latter quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149); see also *Lynch v. Dep't of the Treasury*, No. 98-56368, 2000 WL 123236, at *4 (9th Cir. Jan. 28, 2000) (upholding district court's decision to not consider identity of requester in determining whether records were properly withheld under Exemption 7(A)); Parsons, 1997 WL 461320, at *1 ("[T]he identity of the requestor is irrelevant to the determination of whether an exemption applies."); *United Techs. v. Federal Aviation Administration*, 102 F.3d 688, 692 (2d Cir. 1996) (rejecting plaintiff's argument that Exemption 4 (deliberative process) should be applied "on a requester-specific basis," because, *inter alia*, "[t]he FOIA was not intended to be applied on such an individualized basis"); *Swan v. Securities and Exchange Commission*, 96 F.3d 498, 499 (D.C. Cir. 1996) ("Whether [a particular exemption] protects against disclosure to 'any person' is a judgment to be made without regard to the particular requester's identity."); *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988). "In sum, [the FOIA requester's] need or intended use for the documents is irrelevant." *North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989).

correspondence denies the existence of such correspondence when allowed to so serve. Putting aside a distinction that GMU did not declare the records that it previously denied existed, once it acknowledged them, constituted a "supplemental production," that scenario is closely analogous to the instant matter. Then, as here, the records which the GMU professor denied existed were in fact subsequently "discovered" *once someone other than the conflicted professor* took responsibility for the production (after we initiated litigation and presented the court with several responsive records that we could prove existed). I wrote in 2012 in my fourth book about this practice of allowing conflicted parties to serve as the gatekeeper of potentially responsive records. It is precisely to avoid such conflicted parties conducting the search, as encountered during matters I discuss, herein, that for some time I included and advised others to include in records requests a provision to the effect that allowing this practice "creates an impermissibly conflicted process in allowing a faculty member who is likely to have a personal interest in or animus toward avoiding disclosure of any records relating to issues on which they engage in advocacy or activism, particularly to the requesting entity". In fact, that language is taken from GAO requests to Regents PRR 20-7906, 20-8347, sent after Regents' practice became manifest, of asking Profs. Carlson and Horowitz to decide what records were potentially responsive. After experience showed that this did not deter institutions, I ultimately dropped that language, leaving the matter to resolution in the event of litigation.

58. One such instance involved the National Oceanic and Atmospheric Administration (NOAA). As concluded by the Department of Commerce Inspector General,[54] a NOAA official invented a rationalization so as to not process certain "climate"-related requests (that she really was working for the United Nations whenever sending or receiving whatever records were responsive). Recently, the context of University of Texas denied any records existed that were responsive to a request about Professor David Spence's work with, *inter alia*, Prof. Carlson and an outside plaintiffs' "climate" tort legal and public affairs team. Since another institution had released various such responsive correspondence visibly copying him at his University address (those records had prompted the request to Texas in the first instance), that matter is now under review by the Texas Attorney General, pursuant to state law. As detailed, *supra*, I have also experienced the issue of faculty impeding a request with George Mason University in Virginia, after the professor declared to his administration that he had no records responsive to a request. Once again, other universities which did comply with their respective laws produced records which demonstrated this was untrue, and ultimately a Virginia court ordered all the records released. Discovery in that case proved this was not an oversight but an intentional decision made by the faculty member. That also was the only plausible explanation given he also was the organizer of the faculty effort that the Virginia Freedom of Information Act (VFOIA) request focused on (encouraging "RICO" prosecution of opponents of the climate agenda). We learned about the academics' improper responses because of disparate

[54] See, e.g., "For years, NOAA sought to hide official agency records from public view by asserting that a NOAA employee, Dr. Susan Solomon, was "detailed" to the IPCC, and therefore all of her records could be withheld from the public. In response to this assertion, the Department of Commerce (DOC) Office of the Inspector General (OIG) conducted a review which "found no evidence that the Co-Chair [Dr. Solomon] was "detailed" as such via, for example, a Memorandum of Understanding or SF-52 Request for Detail… Because of this finding, the OIG concluded that "NOAA did not adequately process these FOIA requests."
https://www.oig.doc.gov/OIGPublications/2012.11.15-Hall-Johnson-to-IG-Request-Letter.pdf
Citing to Letter from Todd Zinzer, Inspector General, Department of Commerce to Senator James Inhofe (OK), February 18, 2011. I encountered a similar experience with the same agency and indeed the same individual, in its processing of NOAA FOIA No. 2010-00199.

compliance with open records laws among their peers' institutions; in the absence of judicial enforcement of these laws, counting on such breaks will remain the principal if not sole means of keeping covered institutions compliant with their statutory obligations under these laws.

59. Just as some parties apparently believe, wrongly, that there are "the right kind of requester" and "the wrong kind of requester" under open records laws, and that the identity of the requester can influence processing of information requests, it is my experience and fairly well-documented that processing is influenced based upon parties' views of "the right kind of academic" and "the wrong kind of academic". Certain academics' records are to be shielded at all costs, while the wrong kind of academic's records are promptly released. One of my first requests for public information from a university sought records of a faculty member working on "climate" issues at the University of Virginia (herein "UVA"). What transpired offers a widely reported (with varying degrees of spite and accuracy) instance of the double-standard applied to record requests made of academic institutions, of the sort which I believe to be on display in Regents' processing of the request at issue here. That UVA request was inspired by (and indeed mimicked) requests sent to the same school by the pressure group Greenpeace. Greenpeace had sent a VFOIA request seeking "all emails" of Professors Pat Michaels and Fred Singer pertaining to a particular subject, among many other categories of their documents, "to bring greater transparency to the climate science discussion of the past decade through this *legal* FOIA request for the email correspondence and financial and conflict-of-interest disclosures of Dr. Patrick Michaels and Dr. S. Fred Singer." (italics in original)[55].

[55] December 16, 2009, Virginia FOIA request sent to Ms. Elizabeth Wilkerson of UVA by Kert Davies, Research Director, and James Trowbridge, Research Fellow, Greenpeace. Obtained under VFOIA and Available at https://govoversight.org/wp-content/uploads/2021/09/2009-12-16-Trowbridge-Greenpeace-Michaels20Singer.pdf. As "Research Director" for several years, Davies would likely have been responsible for Greenpeace's practice a few years prior of taking my trash (and, at the same time and in their minds apparently related, that of White House aide Phil Cooney) before pickup each week, another element of its information-gathering operation. In discovery in this case, Regents produced records in support of its claim that GAO's identity is relevant to Regents' processing of this request including materials which quote Kert Davies as a relevant authority.

Drs. Michaels and Singer were two faculty working on "climate" issues, if complicit in participation in what Greenpeace described in its correspondence with UVA as "climate change disinformation campaigns" (that is, disagreeing with Greenpeace's campaigning). Greenpeace's request(s) prompted no claims of being a threat to research or heralding the death of science. There were no cries then that such requests violate academic freedom, whether the garden variety or as a constitutional right, which claims are in my experience reserved for requests by differently minded requesters. When this request made the news and prompted follow-up inquiries, Greenpeace reflected on its pursuit and concluded it had erred: Actually, Greenpeace wrote to UVA, it needed a faster response, which it declared should make life easier for the University.[56]

60. One year later, in January 2011, I bestowed the ultimate flattery of imitation upon Greenpeace in the form of a request to UVA on behalf of a public interest group seeking records from the very same department. Although the legislature had not changed VFOIA in the interim, this adaptation of Greenpeace's earlier request for records of "climate" academics prompted breathless insistence that using the Act to obtain records pertaining to "climate" academics was abusive and threatened the release of "personal" or "private emails", and, of course, a "chilling effect" on all that is desirable in our academic institutions. This umbrage came from the establishment press, as well of course as from acknowledged activists and more openly partisan outlets. The specifics of the expressed indignation revealed the real objection, which was that I was *the wrong kind of requester*. The *Washington Post* was particularly indelicate on this score, in its Memorial Day 2010 editorial dedicated to this request – titled "Harassing climate-change researchers."[57] While the *Post* editors

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[56] Davies emailed UVA, in pertinent part, "I understand from the news wires today you are getting FOIA requests from several angles and would like to expedite our request to create as little further work for you as possible." May 24, 2010 email from Kert Davies to Elizabeth Wilkerson, https://govoversight.org/wp-content/uploads/2021/09/2010-5-25-Davies20picks20up20conversation.pdf.

[57] May 29, 2011, https://www.washingtonpost.com/opinions/harassing-climate-change-researchers/2011/05/27/AG1xJMEH_story.html.

acknowledged that *of course the paper avails itself of transparency laws as much as the next party*, they cited with distaste the title of one of my books and that, after all, serious people do not question claims about climate science or give credence to "the trumped-up 'Climategate' scandal," all as evidence that my use of such laws was abusive. The paper failed to comment on our model, Greenpeace's request, or to articulate an argument grounded in the law for the underlying thesis that certain requests, from disfavored parties or challenging favored causes, should be fought most vigorously. The *Post*, which earlier published the Pentagon papers, also failed to acknowledge a critical point that is highly relevant here: Virginia's public universities routinely provided such records of academics, even the specific class of records we sought, on the very same subject matter, but only when the requested records pertained to faculty whose work is viewed as problematic for the climate movement.[58] It is my opinion that the *Post's* viewpoint, that the wrong people using open records acts reveals a loophole that must be closed, is similarly at play in this matter.

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[58] See, e.g., Norm Leahy, "The Washington Post's FOIA double standard," Washington Examiner, May 31, 2011, http://washingtonexaminer.com/local/local-opinion-zone/2011/05/washington-posts-foia-double-standard/145787. Leahy also notes "it is interesting to see this newspaper, the very one that, back in the day, risked much to publish the Pentagon Papers in an effort to get the truth out there, should appear so upset when a former state employee's emails are required to be made public under a long-standing Virginia law promoting openness." See also Steve Milloy, "The Washington Post produces a bigoted editorial against the public's right to know," WattsUpWithThat.com, May 30, 2011, http://wattsupwiththat.com/2011/05/30/the-washington-post-produces-a-bigoted-editorial-against-the-public-right-to-know/. "[T]he Washington Post criticized climate skeptics for using the Freedom of Information Act to pry documents concerning Climategater Michael Mann from the University of Virginia. The Post labeled the skeptics' FOIA efforts as "harrassing" [sic] and "nuisance tactics." The Post, however, has been entirely silent on Greenpeace's efforts to FOIA documents from the University of Virginia concerning Pat Michaels, University of Delaware concerning David Legates and from Harvard University concerning Willie Soon and Sallie Baliunas …And I'll add the post [sic] has been entirely silent on the fact the George Mason University, when asked by USA Today reporter Dan Vergano to produce documents related to the whole vindictive DeepClimate (Dave Clarke) and John Mashey assault on [Professor Edward] Wegman and Said at GMU. Vergano asked for "expedited service" and requests that "fees be waived". Not only did GMU comply, they did so quickly, without complaint, waived fees, and provided everything on a USB flash drive they sent to USA Today's Vergano."

61. Statistician and well-known user of open records laws and publisher of ClimateAudit.org Stephen McIntyre, who also helped uncover the scientific scandal at the root of "Climategate" revelations, wrote the following around the time of the furor over this UVA request:

> "The difference in how academic institutions have responded to the seemingly similar requests in respect to [George Mason University's Prof. Edward] Wegman and [Climategate figure and former UVA Prof. Michael] Mann is quite startling. George Mason gave expedited service to a request for Wegman's emails; the U of Virginia has done the opposite. George Mason turned over Wegman's correspondence with an academic journal without litigation; the University of Virginia has spent hundreds of thousands of dollars on litigation. Multiple academic lobby groups protested the production of Mann's emails as a matter of principle; the same organizations were and remain silent in respect to Wegman." https://climateaudit.org/2011/05/28/the-vergano-foi-request/.

Here, Mr. McIntyre refers to a record of such disparate treatment by academic institutions depending on the identity of the requester:

> * The aforementioned requests of the very same University of Virginia for records and emails of academic scientists. Drs. Patrick Michaels and Fred Singer, the former of whom was ultimately forced out as state climatologist by a nonscientist politician who did not share Dr. Michaels' views on science.
>
> * *USA Today* writer and global warming enthusiast Dan Vergano pursued the records of George Mason University professor Edward Wegman, who had produced research critical of the global warming "Hockey Stick" (Mann, et al.). Records suggest that Vergano was working with Michael Mann's coauthor, Raymond Bradley. In that matter, GMU complied quickly, without complaint, waived fees, and provided everything on a USB flash drive.
>
> * A request of the University of Delaware for the records and emails of an academic scientist, Dr. David Legates, who also was subsequently ushered out as state climatologist for his skeptic views on alarmist "climate change" claims. The University of Delaware, which in my experience rigidly enforces that state law's requirement of state citizenship with climate "skeptic" requesters and otherwise resists release of records pertaining to its treatment of Dr. Legates, nonetheless provided Greenpeace even more records than those it requested because, "while the law did not *require* him to give Greenpeace all the documents [University counsel] had requested from Legates, the law did not *prohibit* him from requiring Legates to produce them."[59]
>
> * Requests of Harvard-Smithsonian for the records and emails of two academic scientists, Drs. Sallie Baliunas and Willie Soon. In turning over requested emails to Greenpeace,

[59] See, e.g., Jan Blits, "Climate-Change Shenanigans at the U. of Delaware," Minding the Campus dot org, May 19, 2014, https://www.mindingthecampus.org/2014/05/19/climate-change_shenanigans_at_/.

Harvard-Smithsonian acknowledged that, while not actually covered by FOIA, it wanted to comply with the spirit of the act.

62. For its part, Greenpeace's spokesman asserted to the media that our UVA request and its were not at all similar because our "fishing expedition" — a talking point also invoked by the *Post* — had an entirely different "objective" than Greenpeace's request that Davies submitted.[60] There is the "tell" again, much like Regents' here: our more modestly framed request was "fishing" because of who we were, a risible comparison when one examines Greenpeace's (apparently non-fishing) request which immodestly sought, *inter alia*, "Copies of all correspondence (written, electronic or oral), including but not limited to letters, emails, faxes, reports, meeting and teleconference agendas, minutes, notes, transcripts, tape recordings and phone logs generated by or involving either Dr. Patrick Michaels or Dr. S. Fred Singer regarding global climate change (a.k.a. global warming). c) Copies of all correspondence to, from or regarding Dr. Patrick Michaels or Dr. S. Fred Singer and containing any or a11 of the following subjects..."[61] While absurd, Greenpeace's excited utterance implying, like the *Washington Post* editors, that there are "good" requesters and

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[60] Will Goldsmith, "Mann stays in the hot seat: UVA fights requests for climate scientist's work," Cville Weekly, https://www.c-ville.com/Mann_stays_in_the_hot_seat/. Last viewed August 17, 2021.

[61] Those subjects were "New Hope Environmental Services, Intermountain Rural Electric Association, Cato Institute, Senator James Inhofe, Senator John McCain, ExxonMobil, Koch Industries, Americans for Prosperity, Heartland Institute, Competitive Enterprise Institute, Cato Institute, The Advancement of Sound Science Coalition, Science and Environmental Policy Project, Frontiers of Freedom Institute and Foundation, Federalist Society for Law and Public Policy Studies, Environmental Conservation Organization (ECO), former Governor George Allen, Michael Mann, MBH98 (a.k.a. the "hockey stick"' graph), the University of East Anglia, Dr. James Hansen, the Intergovernmental Panel on Climate Change (IPCC), Dr. Rajendra K. Pachauri, the Kyoto Protocol, United Nations Framework Convention on Climate Change (UNFCCC), UNFCCC Conference of Parties (COP), Greenpeace." The request also sought "a) A listing of all grants in support of research for Dr. Patrick Michaels and for Dr. S. Fred Singer. b) Copies of all correspondence (written, electronic or oral), including but not limited to letters, emails, faxes, reports, meeting and teleconference agendas, minutes, notes, transcripts, tape recordings and phone logs generated by or involving either Dr. Patrick Michaels or Dr. S. Fred Singer regarding global climate change (a.k.a. global warming)... d) Copies of conflict-of-interest and outside income disclosures for Dr. Patrick Michaels and for Dr. S. Fred Singer. e) Copies of current and past curricula vitae for Dr. Patrick Michaels and for Dr. S. Fred Singer."

"bad" requesters opens a window into the disparate consideration of open records requests depending upon the requester that, it is my opinion, Regents have admitted is at play here.

63. At the trial stage challenging UVA's refusal to produce records, counsel for Dr. Michael Mann,[62] the former UVA faculty member whose Climategate-related work was at issue in our request, and whom the University counsel acknowledged at argument it requested intervene in the matter, argued the conjured "bad requester" exemption to VFOIA at length. After indulging the *ad hominem* for pages and pages of transcript, the court in Prince William County inquired as to its relevance:

> THE COURT: Let me interrupt you a second.
> MR. FONTAINE: Yes, sir.
> THE COURT: Modern American debate seems to require us to accuse adversaries of improper motives. We see that in the public forum all the time. What if, for general purposes, all of those bad motives are true? How does it effect the legal right to FOIA protection? Are we -- do we have a purity of heart test before we apply FOIA's legislative acts?
> MR. FONTAINE: No, Your Honor, the law on that is quite clear. It is not really the Court's function to try to weigh the motives.
> THE COURT: Well, then, why are you arguing that to me?

64. This University of Virginia request went to the state Supreme Court. Although that court sided with the University, *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 756 S.E.2d 435 (Va. 2014), most if not all of the same records sought in *ATI v. UVA* were ultimately ordered to be released by the University of Arizona, by that State's Supreme Court (one of Mann's co-authors, Malcom Hughes, was a faculty member at Arizona).[63] The University of

[62] Mann famously appeared in correspondence asking him to contact a colleague working for the federal government and ask that colleague "delete any emails" as part of a broader effort to arrange for such deletions, and the U.S. Department of Commerce Inspector General (see, *supra*) found of the individual, Eugene Wahl, "he believes that he deleted the referenced emails at the time".

[63] *Energy & Environment Legal Institute v. Board of Regents*, Superior Court for Pima County, C2013-4963.

Arizona's Opening Memorandum at the trial stage, filed mere days after the Virginia Supreme Court ruled against ATI, on July 14, 2013, foreshadowed Regents' counsel's "bad requester" position with GAO in this matter, as its first argument.[64] To no avail, however.

65. The University of Arizona case also shows that the parade of horribles that we are told will follow applying of the law to *all* institutions covered by the legislature, including public universities, always fails to materialize as predicted.

66. I am aware of one state attorney general's office which attempted the "bad requester" approach and admitted it influenced the office's processing of a records request, also with a party I represented, only for the office to be shamed for the gambit by the court and in the local press. As a local paper's editorial excoriated the behavior:

> The office of the Attorney General still refused to release public documents related to that case. In so refusing, Chief Assistant Attorney General Bill Griffin made two arguments in an April hearing. First, he argued, the attorney general's office never has to comply with public records laws because *everything* the office does is protected by the attorney-client privilege. Second, Griffin argues, the attorney general doesn't have to share public information with people it doesn't like. Specifically he said: "We get a request from [Energy and Environment Legal Institute] and so one thing we might consider is where are they — who are these people?" Griffin said in a transcript of the hearing. "Where are they going with this? And we Google them and we find, you know, coal or Exxon or whatever — and so we're thinking this is — we better — we better give this some thought before we — before we share information with this entity." To Griffin's second argument, plaintiff attorney Hardin pointed out, "They disclose what they feel like and they don't disclose what they don't feel like… And now it's come out in oral argument that one of the things that they do to determine who's entitled or who they will provide public records to is they do a Google Search. So my clients don't have rights under the Public Records Act because a Google search conducted by Attorney General's employees says that they're bad people, basically, and I just don't think that's what the law is," Hardin continued. "I believe that the law is neutral. I believe that it applies to all of the citizenry." And Judge Teachout agreed. "The public has a legitimate interest in transparency as to some of its undertakings, particularly those of an administrative or operational nature," Teachout wrote in her ruling. "Thus, while many documents possessed by the Attorney General will be confidential or privileged, [the public records act] cannot be read to reflect legislative intent that all records in the Attorney General's office would be completely exempt." Of course not. And if Griffin had bothered with the Constitution (or law) while in law school (or even third-grade civics)… he wouldn't have

[64] Available at https://climatelitigationwatch.org/wp-content/uploads/2021/09/2014-07-31-Respondents-Opening-Memorandum_CORRECTED-copy.pdf.

made such ludicrous arguments. We're pleased by Judge Teachout's reminder that the Attorney General enjoys no statutory privilege to ignore the law for political expedience.[65]

67. Also, whatever the relevance or irrelevance to those cases or to the instant matter, the fact remains that open records laws are perfectly permissible tools for members of the public who *do* seek to restrict the direction of private funds to public universities. The most notorious example is the UnKoch My Campus movement, which used Virginia's Freedom of Information Act to divorce the school from accepting money from any of several charitable foundations associated with Charles Koch, Claude R. Lambe, and David Koch.[66] Nonetheless, and nodding to Regents' position claiming relevance of motive and identity, I note that a principal motivation behind that VFOIA campaign, which did obtain voluminous material about the University's fundraising, was an *anti*-fossil fuel agenda. Curiously, the identity of the requester did not influence the court in that group's relevant litigation, only the identity of the *recipient* of the particular request (a foundation which is a privately held corporation separate from the public University, which the court found is therefore not a public body under VFOIA).

68. In practice, including the above-described history, it is my experience that certain parties, disproportionately represented among journalists and academics, believe that open records laws were designed *for them*, and the wrong kind of people do not have the same rights of access. In my opinion this matter embodies that perspective among (particularly academic) records request recipients, that if the requester has the wrong perceived objectives the request is resisted, to unlawful lengths. This turns on its head the old liberal ideal that the open records laws are tools to protect the taxpayers and the public. According to the laws' terms, they are to be construed liberally in favor of disclosure, their exemptions interpreted narrowly and applied without regard for political sacred

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[65] "Editorial: AG Smackdown," Caledonian Record, August 2, 2017, https://www.caledonianrecord.com/opinion/editorial/editorial-ag-smackdown/article_74349fc7-f869-5862-b6cd-19a6a7f8c94d.html.

[66] See, e.g., "Sunset Statement: Transparent GMU Will Now Be Known As UnKoch GMU," http://www.unkochmycampus.org/unkochgmu.

cows. They are not to be reinvented as certain, correct constituencies find the moment requires. Selective bias and self-preservation are not legitimate grounds for applying laws. To bow to that is an abuse of open records laws. It is my opinion, based upon the totality of the events in this matter, and Regents' processing of the CPRA requests by Competitive Enterprise Institute with which I was involved, that Regents employs this same perspective and it is at play in the instant matter, manifested in the faculty's efforts to impede release of records responsive to our requests, and in Regents' defense thereof in this Court.

69. The rhetorical fallacy of *argumentum ad hominem* is deployed to change the subject; it is not an argument but a confession that one's arguments are lacking. In this case, it is my opinion for reasons stated herein that Regents resorting to an extra-statutory *ad hominem* justification of its refusal to produce responsive records, and otherwise failing to comply with CPRA, is nonetheless useful as a "tell" about its processing of and decisions to withhold records responsive to 19-7464.

70. It is my opinion and experience that public records laws generally are grounded in the principle of keeping governments and covered public institutions accountable, with tools to discourage as well as to defeat efforts by officials working within such covered institutions who obstruct faithful application of the law. It is my opinion that the instant matter reflects an intentional effort to obstruct access to public records, in the form of delay but also other steps to remove from, or avoid placing in, the review process responsive requested records. It is my opinion that this behavior began with internal efforts to impede release of records based upon the subject matter of the records requested being "controversial and highly politicized (*e.g.* global warming)" (Regents' own "telegraphed" bias, see *supra*), and also based upon the requester's identity, both of which are wholly improper if far too typical in academic settings as which has been acutely documented involving "climate"-related requests. It is my opinion that this represents one of the most exaggerated such examples of such behavior, in part due to the apparent deliberation it entails, by

which I mean the breadth, within the institution and its defense, of the apparent agreement and/or assistance with the obstruction. In my opinion this is illustrated in part by the numerous "red flags" noted, *supra*, and Regents' failure to at any point recognize and address them and how these factors might impact its compliance with CPRA. Related, it is my opinion for the reasons detailed above that this commitment to predetermined withholdings has continued in Regents' litigation tactics, including but not limited to Regents' invocation through counsel of exemptions it knows or should know do not apply under precedent Regents itself litigated, and its adding further exemption claims after this was pointed out to it.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on October 14, 2021 at Keswick, Virginia.

Christopher Horner