IN THE COURT OF APPEALS FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

SAMUEL A. PERRONI

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

Respondent,

JIM McDONNELL, IN HIS OFFICIAL CAPACITY AS LOS ANGELES COUNTY SHERIFF AND THE COUNTY OF LOS ANGELES (SUED AS THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT)

Real Parties in Interest.

From the Superior Court for the County of Los Angeles
The Honorable James C. Chalfant
Case No. BS 159430

VERIFIED PETITION FOR WRIT OF MANDATE TO ENFORCE THE CALIFORNIA PUBLIC RECORDS ACT PURSUANT TO GOVERNMENT CODE § 6259(c)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioner knows of no entity or person that requires disclosure under subsections (1) or (2) of Rule 8.208(e).

Respectfully Submitted,

Dated: February 28, 2017

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SAMUEL A. PERRONI
Petitioner *Pro Se*

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INTRODUCTION

This writ petition presents issues arising from the Superior Court's partial denial of Petitioner's Petition for Writ of Mandate directing the Real Parties in Interest, Jim McDonnell, in his official capacity as Los Angeles County Sheriff and the County of Los Angeles (sued as the Los Angeles County Sheriff's Department and hereinafter referred to as "LACSD"), to produce public records pursuant to the California Public Records Act (hereinafter "CPRA") relating to the death of film actress Natalie Wagner, also known as Natalie Wood (hereinafter "Wood") who drowned off Catalina Island on November 29, 1981[1]. *(Ex. 19. Rec. 233-283).*

The records of the 1981 case, which began and concluded (after twelve (12) days) as an accidental celebrity drowning *(Ex. 29, Rec. 633-634; Ex. 39, Rec. 965-969)*, were known by Petitioner to have been disclosed to at least two members of the public (author Suzanne Finstad and reporter Sam Kashner) in 2000 and 2001. (Ex. 29, *Rec. 571-572; 637-638).* In mid-2015, Petitioner made written requests for records contained in the LACSD 1981 archive files, including but not limited to, reports, notes, witness statements and photographs, as well as, similar records created in a November, 2011 reactivation of the 1981 case that was concluded in

[1] Petitioner's Writ was also directed to Mark A. Fajardo, M.D., as Los Angeles County Medical Examiner-Coroner and the Coroner's Office. At the first trial hearing, the Superior Court granted disclosure of the "Miller Report" and requested additional evidence before ruling on the balance. *(Ex. 6, Rec. 26).* However, before the court ruled, the parties settled the Coroner claims. *(Ex. 16, Rec.170).*

January, 2012. *(Ex. 29, Rec. 436-438; 469-476).* When the LACSD denied Petitioner's requests, a CPRA petition was filed. (*Ex.* 19, *Rec.* 233-283).

Following trial briefing with evidence submissions, and arguments at four hearings, the Superior Court entered Judgment on January 26, 2017, concluding that Petitioner was a prevailing party as to, among other things, 274 LACSD records from the 1981 case. (*Ex.* 3, *Rec.* 9-10). However, the Superior Court denied disclosure pursuant to § 6254(f) of the balance of the 1981 records and all of the 2011 records. (*Ex.* 3, *Rec.* 9-10). The Superior Court also denied Petitioner's request for *in camera* examination of the 2011 records. (*Ex.* 18, *Rec.* 198-199). And, although found to be a prevailing party, the Superior Court denied Petitioner's request for attorney fees pursuant to § 6259(d) because Petitioner, an Arkansas attorney, who was seeking public records for public dissemination, did not meet the conditions outlined in *Trope v. Katz (1995) 11 Cal. 4th 274*. (*Ex.* 11, *Rec.* 52-54). This issue will be the subject of a separate appeal.

Prior to Judgment, the Superior Court also denied two motions to compel filed by Petitioner and sanctioned Petitioner $3,000 for failure to fully comply with a rule of civil procedure because discovery under the CPRA was not available to Petitioner and for allegedly failing to confer. (*Ex.* 6, *Rec.* 16-26).

The Superior Court's decision denied public access involving the transparency and accountability of a public agency in the handling of public business. Under the CPRA, non-disclosure orders are reviewable only by writ, not by direct appeal. *Gov. Code § 6259(c)*. Petitioner therefore has no other adequate

remedy at law. *Powers v. City of Richmond, (1995) 10 Cal. 4th 85 Cal. 85, 113 – 114.*

ISSUES FOR REVIEW

Writ review is necessary to address important CPRA issues, *i.e.*, (1) what constitutes an "investigatory file" under the § 6254(f) disclosure exemption; (2) the scope and application of § 6254(f); (3) the standard for holding that public records are undisclosable under § 6254(f); (5) the existence of a due process violation when a public agency refuses to answer discovery concerning CPRA disclosure exemption defenses and thereafter is allowed to submit evidence on those exemptions at trial; (5) the correct burden of proof for denying a § 6254.5 waiver claim; (6) whether a Superior Court should apply Evidence Code §§ 412 and 413 when considering a false declaration of fact based on hearsay and the existence of a more reliable witness; (7) the need to conduct an *in camera* review of records claimed to be exempt pursuant to § 6254(f); and (8) whether the Superior Court abused its discretion in awarding discovery sanctions against Petitioner.

The Superior Court also shifted the burden of proof from the LACSD concerning their alleged disclosure exemptions, sustained an exemption based on conclusions and hearsay, and disregarded substantial evidence that the § 6254(f) exemption and defense to Petitioner's waiver claims was false and unmeritorious.

VERIFIED PETITION FOR WRIT OF MANDATE AND/OR OTHER EXTRAORDINARY RELIEF

I. Jurisdiction and Timeliness of Petition

Jurisdiction over this matter lies in this Court pursuant to Gov. Code § 9256(c), which provides that a Superior Court's CPRA order denying access is "immediately reviewable by petition to the appellate court for an issuance of an extraordinary writ." Also, the imposition of sanctions may be raised in the discretion of this Court as a part of the Writ process. *CCP § 904.1(b)* This action was filed in Los Angeles County Superior Court pursuant to CPRA § 6258 and *CCP § 1085, et seq.*

This petition is timely. Under Gov. Code § 6259(c), a petition must be filed "within twenty days after service…of a written notice of entry of the order, or within such further time not exceeding an additional twenty days as the trial court may for good cause allow." If the notice is served by mail, the period within which to file the petition shall be increased by five days." Written notice was served on Petitioner by mail on February 3, 2017 (*Ex.* 1, *Rec.* 2-4) and the Superior Court, for good cause, extended the period to file the petition until March 2, 2017. (*Ex.* 18, *Rec.* 229).

II. Parties

Samuel A. Perroni is the Petitioner in the CPRA action before the Superior Court. Petitioner is a member of the public and, along with the public, is

interested in the outcome of these proceedings and the LACSD's accountability in their duties and operations.

Respondent Superior Court of the State of California, County of Los Angeles, is a duly constituted court, exercising judicial functions in connection with the subject litigation. The Honorable James C. Chalfant, presiding in Respondent Court, issued an order denying, in part, Petitioner's petition to compel disclosure of the public records in question. A true and correct copy of the trial court's order is submitted as *Record Exhibit 3, p. 9-10.*

Real Parties in Interest are, Jim McDonnell, in his official capacity as Los Angeles County Sheriff and the County of Los Angeles (sued as the Los Angeles County Sheriff's Department). Real Parties in Interest are a public official and agency (as provided in the CPRA) and Respondents in the action below.

III. Procedural History

A. Petitioner's CPRA Request to the Los Angeles County Medical Examiner-Coroner's Office.

The Coroner requests and responses stretched between March 30, 2015 and August 24, 2015. (*Ex.* 29, *Rec. 434-435; 441-468).* After the Superior Court partially granted Petitioner's writ on the Coroner's records, the parties settled their dispute. (*Ex.* 16, *Rec.* 170).

B. Petitioner's CPRA Request to the Los Angeles County Sheriff's Department.

Petitioner made his first request to the LACSD for records on May 19, 2015. (*Ex.* 29, *Rec. 469-470).* Petitioner heard nothing. (*Ex.* 29, *Rec. 799).* So,

Petitioner made another request on July 2, 2015. (*Ex.* 29, *Rec. 471)*. On July 16, 2015, nearly two months after his first request, Petitioner received a letter from the LACSD Homicide Bureau refusing disclosure and stating that all records Petitioner requested were exempt. (*Ex.* 29, *Rec. 472)*. On July 30, 2015, Petitioner sent a letter to Sheriff McDonnell, pointing out, among other things, how exemption waiver had occurred and proposing a compromise. Petitioner never heard from the Sheriff. (*Ex.* 29, *Rec. 473-476; 799).*

C. Proceedings, Post-Petition Disclosure and Summary of Proof

After Petitioner sued, the LACSD filed an Answer admitting that Petitioner was seeking public records from public agencies, *i.e*., the LACSD and Coroner. (*Ex. 20, Rec. 285-295).* However, the LACSD also asserted twenty-one (21) "affirmative defenses," for nondisclosure, many of which were CPRA disclosure exemptions. (*Ex. 20, Rec. 290-294).*

Petitioner immediately propounded requests for admission. (*Ex. 29, Rec. 507-543)*. However, before the Requests were due, the LACSD conceded that 273 pages of records from the 1981 file, including 32 photographs of a yacht and its dinghy, were subject to disclosure and, in fact, disclosed same, (*Ex. 29, Rec. 800),* confessing later the disclosure was because of waiver. *(Ex. 38, Rec. 909-910)*. The basis for the specific items disclosed (which became the subject of a court ordered re-opening of discovery for Petitioner to take a second deposition of Detective Ralph Hernandez (*Ex.* 15, *Rec. 158-159)*), was revealed in Hernandez's second deposition (taken on November 9, 2016) to be a purported telephone conversation

between Hernandez (who began working in Homicide in 2008) and Finstad after Petitioner filed suit. *(Ex. 29, Rec. 587; Ex. 46, Rec. 1067-1069)*. On May 3, 2016, during his first deposition, Hernandez had refused to answer, based on privilege, Petitioner's question as to what was talked about during the Finstad conversation. (*Ex.* 29, *Rec. 612-614*). Hernandez also testified in his first deposition that (a) he didn't know if anyone had given anything out of the file to Finstad and (b) he wasn't sure if Finstad was one of the authors that had been given access to the file. (*Ex. 39, Rec. App. 989-995).*

Also, in the conversation, Finstad allegedly told Hernandez she was permitted to see items from the 1981 Wood file at the LACSD Homicide Bureau. *(Ex. 46, Rec. 1074)*. The LACSD had previously admitted in written discovery that Finstad, author of *Natasha*, a Wood biography (*Ex. 29, Rec. 512-513; 637-638*) and Kashner, a reporter for *Vanity Fair* (*Ex. 29, Rec. 571-572),* had been given access to portions of the 1981 LACSD file on Wood. (*Ex.* 29, *Rec. 512-513).* But, the LACSD didn't disclose what they saw or were given. In addition, in responses to Petitioner's First Set of Interrogatories and Requests for Production, the LACSD provided a fax cover sheet from the Homicide Bureau which indicated that five pages were faxed to Finstad on March 5, 2003. (*Ex. 29, Rec. 570).* The fax was sent two years after Finstad's book was published. According to Hernandez's first deposition testimony, the LACSD purportedly does not know what was sent to Finstad in 2003. (*Ex.* 29, *Rec. 615).*

The LACSD also stipulated that Gavin Lambert, an author who wrote another biography, *Natalie Wood*, in 2005 referred to LACSD files, interviews and information *(Ex. 29, Rec. 667-678)*. Finally, in his first deposition testimony, Hernandez, who became involved in the case in 2011, testified he gave Marti Rulli, author of *Goodbye Natalie, Goodbye Splendour*, information from the files, but he "didn't recall" what. (*Ex.* 29, *Rec. 617-618; 679-684).*

On November 18, 2011, according to testimony and public statements by Lt. John Corina, the Supervisor of Investigations assigned to the Wood case, the LACSD decided to "[pull] the case off the shelf and take a look at it…see if it was worth looking at again." (*Ex. 29, Rec. 700).* According to Captain David Smith, Corina's supervisor, the case was "reactivated." (*Ex. 29, Rec. 767).* However, on January 10, 2012, approximately two months after Lt. Corina's statements, the Chief of Detectives, William McSweeney, after consultation with Lt. Corina and Capt. Smith, stated publicly that "they had uncovered no new evidence…that Natalie Wood's death was a homicide" and "he was doubtful that more investigating would change the overall conclusion that Natalie Wood's death was an accident." (*Ex. 29, Rec. 779-781).*

During trial briefing, the LACSD submitted a solitary declaration from Hernandez to support their § 6254(f) exemption and waiver defense. (*Ex.* 38, *Rec. 912-914).* In the declaration, Hernandez claimed that (a) "all of the Sheriff's Department's 1981 and 2011 files are part of the ongoing investigation of the Natalie Wood matter, and the Department's investigation into whether a violation

of law had occurred and, if so, the circumstances of its commission as to the death of Natalie Wood" and (b) he was "able to determine that the persons who were provided access to the Sheriff's Department's 1981 files (Finstad and Kashner) were provided access to the following items: The first complaint report…by the Sheriff's Department (Officer Krull); the Supplementary Report…by…(Office Rasure); photographs of the *Splendour*, without photographs of Natalie Wood (Wagner) remains; telephone messages; and investigator notebooks;" and (c) "the Natalie Wood file remains open to date, and the investigation is still ongoing. The purpose of the investigation is to determine whether a violation of law has occurred; and if it has, to uncover information surrounding the commission of the violation, who committed it, and how." *(Ex. 38, Rec. 912-914)*.

The declaration was subsequently challenged by Petitioner as containing false statements and statements that were patently inconsistent with sworn testimony given by Hernandez in his first and second depositions. *(Ex. 39, Rec. 947-949)*. Before the first trial hearing Petitioner had objected to the declaration as conclusory, without foundation, based on hearsay and in violation of Petitioner's due process rights. *(Ex. 41, Rec. 1008-1014; Ex. 43, Rec. 1029-1036)*.

The Hernandez declaration was also filed after Petitioner submitted deposition evidence from Corina, Hernandez, and Smith, where they refused to state, based on a claimed Evidence Code § 1040 privilege, whether there was an ongoing **homicide investigation**; an investigation of **any possible violation of the law**; whether there were any **suspects in a homicide investigation**; whether the

LACSD was investigating what it believed **might be criminal conduct**; or whether the LACSD was investigating what it believed to be **a violation of the law**. (*Ex. 29, Rec. 610-612, 627-628, 703-709, 770-773).*

Petitioner was able to prove, however, that the LACSD file classification number had **not** changed from what it was in 1981, *i.e.*, 081-00898-1873-**496** ("Person dead, Accidental Drowning") to "**011**" ("Homicide") from the time the case was reactivated in 2011 to the time Petitioner's CPRA requests were refused. (*Ex.* 29, *Rec. 472, 633, 774-775, 799).*

Three (3) trial hearings took place between September 27, 2016 and January 26, 2017 on Petitioner's claims of the inapplicability of § 6254(f), and other purported defenses, waiver (on the balance of the 1981 records) and due process violations. *(Ex. 15, Rec.111-166; Ex. 16, Rec. 168-176; Ex. 17, Rec. 178-195; Ex. 18, Rec. 197-231).* After stating that, "[t]he Court accepts that there is no prospect of criminal enforcement in the Natalie Wood matter" and that he (the Court) didn't believe "there is a live investigation any more than you [Petitioner] do," the Superior Court denied Petitioner's remaining records request. *(Ex. 10, Rec. 42; Ex. 15, Rec. 130).* In addition, although granting Petitioner's request for an *in camera* review of the balance of the 1981 records (and finding disclosable records), the Superior Court denied the same request on the 2011 records based on the fact that Petitioner "had not made a *prima facie* case that the 2011 file has been improperly withheld." *(Ex. 11, Rec. 51).* The Superior Court also denied Petitioner's request for attorney fees. (*Ex. 11, Rec. 52-54)*

D. Discovery Proceedings

At the second scheduling hearing, the Superior Court set the trial for September 13, 2016 (rescheduled to September 27, 2016), with Petitioner's opening trial brief due on June 29, 2016. *(Ex. 5, Rec. 14)*. As a product of Petitioner's CPRA claim, and the affirmative defenses asserted by the LACSD, Petitioner promptly attempted to take the depositions of knowledgeable witnesses in the Sheriff's Department, among others, as was his right. *C.C.P. § 2017.010* ("Discovery may relate to the *claim or defense* …of any other party to the action."). (Emphasis added). The deposition discovery attempts were met with the wholesale instruction of witnesses by counsel not to answer citing Evidence Code § 1040. *(Ex. 29, Rec. 581-632, 685-712, 757-778)*. The same objection was asserted in response to Petitioner's written discovery attempts. *(Ex. 29, Rec. 489-497, 507-517, 519-535, 536-539, 540-543, 544-558).*

On June 8 and June 21, 2016**,** Petitioner filed two motions to compel, including briefs, supporting Declarations, Separate Statements and other pleadings, *(Ex. 22, Rec. 301-303; Ex. 23, Rec. 305-324; Ex. 24, Rec. 326-360; Ex. 25, Rec. 362-365; Ex. 26, Rec. 367-385; Ex. 27, Rec. 387-393).* The Superior Court denied the motions and assessed sanctions. *(Ex. 6, Rec. 16-26)*.

IV. Absence of Other Remedies

Petitioner has no plain, speedy, and adequate remedy other than the relief sought in this petition. *Gov. Code § 6259(c).*

V. Evidence and Authenticity of Exhibits

The Record accompanying this petition, bound and filed concurrently under separate cover, with 5 volumes not exceeding 300 pages per volume, and entitled "Record in Support of Verified Petition for Writ of Mandate to Enforce California Public Records Act Pursuant to Gov. Code § 6259(c)," contains true and correct copies of the original documents they purport to be. All exhibits contained in the record are incorporated herein by reference as if fully set forth in this petition.

VI. Prayer for Relief

Petitioner prays that this Court grant the following relief:

1. Issue a preemptory writ of mandate, or other appropriate relief, directing the Superior Court to set aside that portion of its January 26, 2017 Order and Judgment in favor of the Real Parties in Interest and enter an Order and Judgment as appropriate in favor of Petitioner, consistent with the decision of this Court.

2. Grant Petitioner his costs on appeal;

3. Set aside the sanction order; and

4. Grant such other relief as this Court deems proper and just.

Respectfully Submitted,

Dated: February 28, 2017

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Samuel A. Perroni, Petitioner *Pro Se*

VERIFICATION

I, Samuel A. Perroni, do hereby declare:

1. I am the Petitioner in this action. I have read this pleading and have personal knowledge of the matters asserted therein and, on that ground, allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 28, 2017 at North Little Rock. Arkansas.

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SAMUEL A. PERRONI

MEMORANDUM BRIEF

I. Standard of Review

In reviewing a Superior Court's order under the CPRA, an appellate court "conduct[s] an independent review of the trial court's ruling" and reviews the orders "on their merits." *Times Mirror Co. v Superior Court (1991) 53 Cal. 3d 1325, 283 Cal. Rptr. 893.* The Court of Appeals "accept[s] the trial court's express and implied factual determinations if supported by the record, but [undertakes] the weighing process anew." *County of Santa Clara v. Superior Court, (2009) 170 Cal. App.4th 1301, 1323.* The Superior Court's factual determinations, are tested by the substantial evidence standard. *Pasadena Police Officers Assn. v. Superior Court (2015) 240 Cal. App. 4th 268, 283, 192 Cal. Rptr. 3d 486.* And, the construction and interpretation of the CPRA is a question of law which is reviewed *de novo*. *Ibid.*

II. Broad Disclosure of Public Records is Mandated by the CPRA

As a "local agency" under Gov. Code § 6252(a), the LACSD has a duty to provide records access to a petitioner who has made a request pursuant to Gov. Code § 6253. Under Gov. Code § 6253.1, state agencies have a duty to respond to requests for disclosure of information in public records and to do all they can to identify disclosable records, including assisting the requester in formulating reasonable requests. See, *Community Youth Athletic Center v. City of National City (2013) 220 Cal. App. 4th 1385, 1417, 164 Cal. Rptr. 3d 644.* Finally, §

6253(d) provides, in part, "[n]othing in this chapter shall be construed to permit an agency to delay, or obstruct the inspection…of public records."

III. Disclosure of the Records Sought is Mandated by the Public Policy Established in the CPRA

The CPRA disclosure requirements are to be interpreted broadly. *Sutter's Place v. Superior Court, (2008) 161 Cal. App. 4th 1370*. But, exemptions to the CPRA are construed narrowly and the burden of proof is on the Respondents. *City of Los Angeles v. Superior Court (Axelrad), (2000) 82 Cal. App. 4th 819, 98 Cal. Rptr.2d 564*. Moreover, since the passage of Proposition 59, the CPRA goals have been elevated to constitutional status, requiring other statutes and court rules to be construed to accomplish its aims. *Savaglio v. Walmart Stores, Inc., (2007) 149 Cal. App. 4th, 588, 597, 57 Cal. Rptr.3d 9* ("…Proposition 59 requires us to broadly construe a statute or court rule if it furthers the people's right of access, and to narrowly construe the same if it limits the right of access.")

Finally, both the CPRA and its interpretive case law make clear that a person has the right to access public records. And, no justification for seeking the records need be made. *Marylander v. Superior Court, (2000) 81 Cal. App. 4th 1119, 97 Cal. Rptr.2d 439.*

IV. The Superior Court Erred in Applying an Incorrect Burden of Proof in Determining Petitioner's § 6254.5 Waiver Claim for the Balance of the 1981 LACSD Records.

The Superior Court denied the balance of Petitioner's waiver claim because Petitioner failed to prove waiver by "clear and convincing evidence." *(Ex. 11, Rec. 51).*

Suzanne Finstad was shown and given something from the 1981 Wood LACSD file before her book was published in 2001 and after her book was published in 2003. Moreover, Sam Kashner was given access to the 1981 LACSD file and Hernandez gave Rulli information from the files. *(Ex. 29, Rec. 616-617; Ex. 38, Rec. 909-910, 913).* There is no credible evidence as to what it was – particularly the Finstad disclosure in 2003. But, the LACSD cannot, consistent with the CPRA mandates, hide behind a defense of, "we don't know" or "we can't recall." Consequently, the logical inference is that, at least for the 2003 Finstad disclosure, it was something that has not been disclosed to Petitioner. But, in considering and weighing this, the Court must keep in mind the strong public policy in favor of disclosure. *Unified School Dist. v. Superior Court, (2014) 228 Cal. App. 4th 222, 237, 175 Cal. Rptr. 3d 90.*

In their Answer, the LACSD denied there had been any waiver and refused to disclose **any** records. *(Ex. 29, Rec. 482-487).* On April 7, 2016, over four months after Petitioner filed suit and one month after the Superior Court fixed the trial briefing schedule *(Ex. 13, Rec. 71),* the LACSD admitted that Finstad and Kashner had been given access to portions of the LACSD 1981 archive files (*Ex.* 29, *Rec. 512-513).* But, on April 27, 2016, they refused, based on privilege, to give

the names, addresses of exemption witnesses and their evidence. *(Ex. 29, Rec. 551-553).*

Notwithstanding, Petitioner sought to determine exactly what Finstad and Kashner had access to by taking depositions. Petitioner had obtained Hernandez's name, along with the names of two other officers, through newspaper articles. (*Ex. 29, Rec. 800).* With considerable effort, the depositions of those officers finally took place on May 3, 2016. (*Ex. 29, Rec. 581-632, 685-712, 757-778).* During Hernandez's deposition, Petitioner, facing much resistance from the Detective and his counsel, drilled down on the members of the public who were given or had access to the 1981 files. *(Ex. 29, Rec. 616-621).* After volunteering that he knew he was subject to the penalties of perjury, Hernandez testified that (a) he didn't know if anyone had given anything out of the file to Finstad and (b) he wasn't even sure if Finstad was one of the authors that had been given access to the file. *(Ex. 39, Rec. 989-993).* Hernandez also testified that he had no contact with Kashner and that he gave Rulli information from the files – but he "didn't recall" what. *(Ex. 29, Rec. 616-618).*

Moreover, Hernandez testified that he had a conversation with Finstad in 2016 (before his deposition) but, on instructions of counsel, refused, based on privilege, to answer what he and Finstad talked about or how many times he talked to her. *(Ex. 29, Rec. 612-614).* Because of the refusal to answer that question, along with many other questions (because of privilege objections), Petitioner filed two motions to compel which were denied. *(Ex. 6, Rec. 26).*

Petitioner's opening trial brief presents an overwhelming case for waiver on the LACSD 1981 records and the Miller Report. *(Ex. 28, Rec. 404-406)*. Thirty days later, the LACSD Respondents filed their trial brief which included a confession of waiver and a single, solitary declaration addressing Petitioner's waiver claims and the LACSD's § 6254(f) exemption. *(Ex. 38, Rec. 909-911; 912-914)*. The declaration was executed by Hernandez on July 15, 2016 and, among other things, lists what Finstad and Kashner were given "access" to in the 1981 files, concluding with a baseless assertion of what Finstad and Kashner did **not** see. *(Ex. 38, Rec. 913)*. In response, Petitioner filed his rebuttal trial brief on August 16, 2016 and pointed out the stark inconsistencies between Hernandez's first deposition and his declaration on the subject of Ms. Finstad. *(Ex. 39, Rec. 948-949)*. Petitioner also raised due process of law by objecting to the LACSD's refusal to provide witness names and evidence; claiming their custodian of records (Hernandez) did not know if Finstad was one of the authors that had been given access to the 1981 files; and then presenting a trial declaration – not subject to cross-examination - and saying not only were Finstad and Kashner given access to the files, but what they purportedly saw and did not see. *(Ex. 43, Rec. 1029-1036)*.

Petitioner's due process argument was discussed in depth during the September 27, 2016 trial hearing. *(Ex. 15, Rec. 129-139)*. Because of those arguments, the Superior Court stated:

> I will also say that I didn't find the Declaration [Hernandez] enormously persuasive. ****

> Even if you leave aside the declarations, it's your burden to show on waiver that these – some documents were given to somebody else who is a member of the public that were not given to you, and you haven't done that. *(Ex. 15, Rec. 130).*

After that comment, Petitioner pointed out that he was trying to do exactly that in the Hernandez deposition when he asked about Finstad and was told, by the very "custodian" of the files, that he didn't know whether Finstad had been given access. Petitioner then raised the question of cross-examination concerning the list of things Hernandez said Finstad had access to because Hernandez was not in the Homicide in 2000-2001. The Superior Court stated:

> He was not. And it's pretty hard – unless they kept a record of what they gave, which, apparently, they didn't because, otherwise, he would have been easily able to tell you what she got. *(Ex. 15, Rec. 135).*

After that observation, the Superior Court agreed that Petitioner could prove waiver by circumstantial evidence. *(Ex. 15, Rec. 136).* Then the Superior Court stated,

> Why didn't you ask Hernandez, "You spoke to Finstad. What is her contact information? Give me her address, her phone number so I can talk to her." *(Ex. 15, Rec. 136).*

After Petitioner pointed out again that Hernandez, on the advice of counsel, had refused to answer what Hernandez and Finstad discussed, the Superior Court stated:

> Yeah. Well, I do think that you should have been able to ask that question, what you talked to her about.

> She's not – there's no privilege there." *(Ex. 15, Rec. 136).*

After saying the Hernandez declaration was "pretty vague," *(Ex. 15, Rec. 137)* the Superior Court asked the LACSD's counsel how Hernandez could know that the documents in his declaration are the documents that have been disclosed to the public, and counsel stated:

> MR. BARER: By reviewing the files and doing investigation within the firm –
> THE COURT: ****There must be some basis.
> MR. BARER: Yes.
> THE COURT: Mr. Perroni, if you want to depose Mr. Hernandez again and ask him what his basis is for paragraph 7, you may do so. Next issue. *(Ex. 15, Rec. 138-139).*

After further discussion on another issue, opposing counsel claimed Petitioner had waived his right to take another deposition because trial briefing was completed and discovery was closed. *(Ex. 15, Rec. 157-158)*. The Superior Court rejected that argument stating:

> ****Well, if Hernandez had provided no declaration, I would not be permitting him to reopen discovery. This is an issue of evidence presented in opposition for trial. ******** but the two things I said he could ask about, to receive his assurance of due process or otherwise that Mr. Hernandez's statements in his declaration are accurate, you know, I am exercising my discretion to permit that. *(Ex. 15, Rec. 159).*

So, Petitioner took the second deposition of Hernandez on November 8, 2016 and filed it with the Court on November 9, 2016. *(Ex. 46, Rec. 1057-1084).* In that deposition, Hernandez admits, for the first time, that the discussion he had

with Finstad before his May 3, 2016 deposition was, in fact, about the LACSD 1981 records access. (*Ex. 46, Rec. 1067-1068, 1075).* This testimony proves that Hernandez testified falsely in his first deposition when he said he didn't know if Finstad was even one of the authors that had been given access to the 1981 files. In addition, Hernandez testified in the second deposition that he didn't know what Kashner saw. *(Ex. 46, Rec. 1069).* This proves Hernandez's declaration statement concerning the list of records disclosed to Kashner is false. *(Ex. 38, Rec. 913).*

Hernandez would not say in his second deposition that his declaration list constituted **all** of the records Finstad saw, instead he testified, "They are the only things that she said she was given access to." *(Ex. 46, Rec. 1070).* Finally, with respect to his meaning of "access," Hernandez testified that Finstad told him (16 years after the fact) that "they were allowed to look at the reports and…all this stuff" and he "believed" Finstad told him she examined the records "at the Homicide Bureau." *(Ex. 46, Rec. 1073).* Hernandez didn't know how Kashner saw the file. *(Ex. 46, Rec. 1074).*

So, the reasonable inferences to be drawn from the proof is that two authors weren't given any documents, they were instead allowed to examine things in the file at the Homicide Bureau. And, the LACSD offered **no** credible evidence proving how they decided what to disclose to Petitioner based on their previous disclosures to Finstad and Kashner. For example, Harnandez, in his second deposition, states that Finstad told him she saw "photographs of the *Splendour*." *(Ex. 46, Rec. 1069).* But, he doesn't say what photographs nor limit the

photographs. Yet, the LACSD gave Petitioner 32 photographs of the exterior and interior of the *Splendour* with separate photographs of a companion dingy. *(Ex. 29, Rec. 800).* Consequently, the Petitioner disclosure decision appears to have been selective and based on rank, vague hearsay. In other words, the LACSD gave Petitioner what they wanted him to see and the Hernandez declaration is not only based on objectionable conclusions and hearsay, it is laced with falsities.

When applying the law to the facts, it should be noted that the trial procedures applied in this CPRA permitted the admission of declarations in lieu of direct testimony at trial. *LA Superior Court Rule 3.231.* However, a Superior Court should never prevent a "full and fair opportunity to the parties to **present all competent, relevant, and material evidence** bearing upon any issue properly presented for determination."[2] *Elkins v. Superior Court, (2007) 41 Cal. 4th 1337, 1357.* Moreover, the Superior Court is obliged to consider that "written testimony

[2] After Petitioner was permitted to reopen discovery and learned for the first time that Hernandez discussed the 1981 records with Finstad before he testified under oath that he did not know if Finstad was given access to the 1981 files, Petitioner argued that due process required that the LACSD be ordered to provide Finstad's contact information so that Petitioner could take her deposition on the question of exactly what she saw at the Homicide Bureau. *(Ex. 49, Rec. 1107-1108).* The Superior Court denied this request as being "untimely" because "discovery has ended." *(Ex. 11, Rec. 52).* The Superior Court also said that Petitioner "had the opportunity to request Finstad's contact information during discovery, and to compel the Department to provide it." *(Ex. 11, Rec. 52).* In making this ruling, the Superior Court relied upon the declaration of the LACSD's counsel. *(Ex. 11, Rec. 52; Ex. 50, Rec. 1182).* Counsel's declaration statements (which are not evidence) flies in the face of its statement in its papers in opposition to Petitioner's request for a Finstad deposition that the LACSD would not have provided the contact information even if Petitioner had requested it because it was "privileged." *(Ex. 50, Rec. 1182).*

is substantially less valuable for purpose of evaluating credibility (citation omitted). *Ibid., 1358.* And, "particularly where credibility and veracity are at issue…written submissions are a wholly unsatisfactory basis for a decision." *Ibid.* Yet, in this case, the Superior Court based its decisions on waiver (and the § 6254(f) exemption) solely upon the written, untruthful and vague declaration of a witness who based his sworn statements and conclusions on the vague, hearsay statements of another witness. There are no circumstances where this should amount to substantial evidence. *County of Riverside v. City of Marrieta, (1998) 65 Cal. App. 4th 616, 627, 76 Cal. Rptr.2d 606 ("Evidence is substantial if it is reasonable in nature, credible and of solid value.")*

Evidence Code § 412 provides that the Superior Court "should (have) distrust[ed]" the LACSD's evidence on what was waived because they had the sole and exclusive ability to secure sworn testimony of Finstad. That testimony would have set forth under oath exactly what records (including photographs) she saw, when she saw the them, where she saw them, and who gave her access and the LACSD intentionally did not present that evidence. The LACSD also had the ability to obtain testimony from someone who worked at the LACSD at the time of the public disclosures. Not only did the LACSD fail to do that, they failed to tell the Superior Court why.

The reasoning behind Evidence Code § 412 was set forth by the California Supreme Court over 150 years ago in *Bagley v. Administrators of McMickle Eaton, et al, (1858) 9 Cal. 430.* The Court explained:

> The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat.

The *Bagley* rule on weaker and less satisfactory evidence was eventually codified in the State of California in the Code of Civil Procedure § 2061 and § 1963(5) before it was codified in Evidence Code § 412. Those statutes, in tandem, provided that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust and that the evidence willfully suppressed would be adverse if produced. *Breland v. Traylor Engineering and Manufacturing Co., (1942) 52 Cal. App. 2d 415, 425-26*.

It is, therefore, reasonable to ask why there are no declarations from Finstad, Kashner, or members of the LACSD who had personal knowledge of the disclosures. The answer could reasonably be the LACSD knows it would "expose" and "defeat" their claims.[3] *Bagley, supra*.

[3] Petitioner filed an Evidentiary Objection on September 9, 2016, stating that the Hernandez Declaration, paragraphs 6, 7, 9, 10, and 11, lacked foundation; contained speculation; and lacked personal knowledge. *(Ex. 41, Rec. 1008-1014)*. Those objections were overruled. (*Ex. 41, Rec. 1009)*. Petitioner also filed a supplemental due process objection on September 23, 2016. *(Ex. 43, Rec. 1029-1036)*. The Court recognized the merit of this objection when it permitted the second deposition of Det. Hernandez. Then, the day after Hernandez's second deposition and the day before the November 10, 2016 trial hearing, Petitioner filed

The Second District Court of Appeals had the occasion to examine a case of this nature in *Woods v. Corsey, (1948) 89 Cal. App. 2d 105, 110* when it recognized that, "[m]anifestly, less detailed proof is required to establish a plaintiff's claim where the defendant has full knowledge of the facts and is in a better position to prove them."

Since Respondents have not shown exactly what Finstad and Kashner saw when they could have done so, the Superior Court should have drawn the adverse inference that Finstad and Kashner saw everything in the 1981 file at the Homicide Bureau. And, the Superior Court concluded as much when it said at the September 27th hearing, "[i]f they were given the file to look through, the whole file is disclosable." *(Ex. 15, Rec. 145).*

Yet, even though the Superior Court expressed doubt as to the credibility of the Hernandez declaration, the Court credited it in its September 27, 2016 Tentative Decision when it stated:

> **4. Release of LACSD File Documents**
>
> During the years after the Wood investigation file was closed, non-County persons obtained access to portions of the LASD's 1981 file, including the first complaint report from the LASD 1981 investigation (Officer Kroll), the LASD supplementary report from the 1981 investigation (Officer Rasure), photographs of the *Splendour* without photographs of Wood's

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another objection to Hernandez's declaration based on due process, hearsay and lack of personal knowledge. *(Ex. 47, Rec. 1086-1091).* That objection was overruled at the November 10, 2016 hearing as "untimely" *(Ex. 17, Rec. 190)* - even though the Court had allowed discovery to be re-opened for evidence "in opposition" and Petitioner had only confirmed the true evidentiary defects the day before.

> remains, telephone messages, and investigator notebooks. Hernandez Decl. ¶¶ 6-7. The Department never provided access to the autopsy photographs, photographs of Wood's remains, or the Miller Report. Hernandez Decl. ¶ 7. *(Ex. 10, Rec. 38).*

Then, in its **Analysis** the Court states:

> **4. Waiver by Disclosure**
> The evidence of disclosure does not create an inference that any author received more documents than Perroni. *(Ex. 10, Rec. 44).*

> 2. **The Section 6954(f) Exemption**
> LASD investigators interviewed witnesses, investigated the Splendour, and performed other investigative tasks in order to determine whether a crime occurred. See Hernandez Decl. ¶7. *(Ex. 10, Rec. 41).*

The Superior Court also assumed that because an author didn't refer to something in his/her book or article, they didn't see it in the 1981 files - stating that one would have expected author Finstad to publish any "significant" previously undisclosed material. *(Ex. 10, Rec. 44).*

First, inferences may not be predicated upon mere conjecture. *Vaccarezza v. Sanguinetti, (1945) 71 Cal. App. 2d 687, 692, 163 P.2d 470.* Next, without sworn evidence from the author, this amounted to the Superior Court drawing a **favorable** inference for the LACSD based on speculation about what an author didn't refer to or might determine is "significant." Taking that proposition further, the LACSD, through Hernandez, claims that Finstad and Kashner saw photographs of the *Splendour* "without photographs of (Wood's) remains" and disclosed those to Petitioner after suit was filed. *(Ex. 38, Rec. 913).* Yet, there is

no mention of those photographs in Finstad's book or Kashner's article. *(Ex. 29, Rec. 571-580, 637-653).* Does that mean they weren't disclosed or that the authors didn't think they were "significant" enough to mention? Or, perhaps, it means the authors were shown all photographs in confidence and off the record. The reasonable inference is, however, that is why the LACSD made sure through objections and false testimony that Petitioner could not depose Ms. Finstad.

A court proceeding is supposed to be a search for the truth. *Breland, supra, 426* ("The rule of these code sections [Section 412 and 413 predecessor code sections] and cases is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts."). However, instead of applying §§ 412 and 413 and coupling that with Petitioner's other waiver evidence, the Superior Court merely held that Petitioner had the burden of proving waiver by "clear and convincing evidence" (without addressing Evidence Code §§ 412 and 413) and that Petitioner should have somehow wrangled Finstad's contact information out of the LACSD before his trial brief was to be filed when he was not aware that the basis of the Hernandez declaration was a telephone call Hernandez had with Finstad until after the Superior Court had apparently ruled. *(Ex. 11, Rec. 51).* That was error.

The question was not why the Petitioner had not obtained the deposition of Finstad, it was why the LACSD had not. *Bagley, Breland and Woods v. Corsey, supra.*

The burden of proof in this special proceeding (*Wenzler v. Municipal Court of Pasadena Jud. Dist., (1965) 235 Cal. App. 2d 128, 45 Cal. Rptr. 541)* is preponderance of the evidence unless provided by law in the CPRA. *Evidence Code § 115.* The CPRA contains no burden of proof for a *§*6254.5 waiver claim and there is no authority for the judicial imposition of a burden of proof beyond preponderance of evidence. *Ibid.* The Superior Court cited *Ardon v. City of Los Angeles, (2016) 62 Cal. 4th 1176, 1189* in support of its "clear and convincing evidence" burden requirement. However, Petitioner has carefully read *Ardon* and the burden of prove for a CPRA §6254.5 waiver claim is not discussed.

When Petitioner proved that waiver occurred with respect to the 1981 records, it became the LACSD''s burden to prove that the disclosure was limited to specific documents. *Woods v. Corsey, supra ("…less detailed proof is required to establish plaintiff's claim…."); LA Unified School Dist. v. Superior Court, (2007) 151 Cal. App. 4th 759, 60 Cal. Rptr.3d 445, p. 7 (Agency must justify withholding any records by demonstrating that non-disclosure outweighs disclosure).*

A. The Superior Court Erred in Relying Upon a Factual Evidentiary Declaration that was Without Foundation and Based on Hearsay.

The portions of the Hernandez declaration that pertain to Petitioner's waiver claim are contained in paragraphs 6 and 7. *(Ex. 38, Rec. 913).* Based on the sworn testimony of Hernandez in his second deposition, the sole basis for the statements contained in paragraphs 6 and 7 is an alleged telephone conversation

between him and Finstad that took place sometime between the date Petitioner filed his Verified Petition (November 18, 2015) and May 3, 2016, when Hernandez gave his first deposition. *(Ex. 39, Rec. 989-993).*

LA Sup. Ct. Rule 3.231(h) states that "evidence is to be presented by way of declarations, deposition testimony, and documentary evidence and that while the court has discretion to do so, it will rarely permit oral testimony." Consistent with this directive is that declarations be made on personal knowledge and set forth admissible evidence. See, *e.g., CCP§ 437c(d)*

"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated. *Evidence Code § 1200(a).* Of course, hearsay evidence is inadmissible unless it falls under one of the recognized exceptions. *Evidence Code § 1200(b).* And, a constitutional requirement for an exception to the hearsay rule is the reliability of the statement. *See, e.g., Crawford v. Washington, (2004) 541 U.S. 36, 41, 124 S.Ct. 1354, 158 L.Ed.2d 177, 192-196.* As a consequence, hearsay evidence is generally incompetent and inadmissible without statutory or decisional authorization or absent stipulation or waiver by the parties. *In re Cindy L., (1997) 17 Cal. 4th 15, 26-27, 69 Cal. Rptr.2d 803* and *Windigo Mills v. Unemployment Insurance Appeals Board, (1979) 92 Cal. App.3d 586, 597, 155 Cal. Rptr. 63.* While Rule 3.231(h) allows declarations, it was error for the Superior Court to use Hernandez's hearsay declaration to support a finding of

what was disclosed by the LACSD to the public. See, *i.e., In the Matter of Dickson, 2015 WL 4628891.*

The sole reason the Superior Court permitted Petitioner to re-open discovery was to "test," through cross-examination, Hernandez's representations that certain specific items were disclosed to the public before they were disclosed to Petitioner. *(Ex. 15, Rec. 159).* It was, therefore, error for the Court not to sustain Petitioner's hearsay objection to paragraphs 6 and 7 of Hernandez's deposition after it was shown that his representations were based on hearsay (arguably double hearsay) *(Ex. 46, Rec. 1067, 1069)* from an untested witness the LACSD could have, and should have, presented.[4]

B. Petitioner was Denied a Meaningful Hearing When the Superior Court Denied Petitioner's Request to Obtain More Reliable Waiver Evidence After the LACSD Fraudulently Precluded Petitioner From Obtaining It Earlier.

"The guarantee of procedural due process – a meaningful opportunity to be heard – is an aspect of the constitutional right of access to the courts for all persons, without regard to the type of relief sought. *California Teachers Association v. State of California, (1999) 20 Cal. 4th 327, 338-339, 20 Cal. 4th 327, 338-339, 84 Cal. Rptr.2d 425*. The hallmark of a meaningful hearing is the ability to cross-examine and confront witnesses. While both the federal and state constitutions confine the express right of confrontation to criminal cases *(U.S.*

[4] Petitioner made three unsuccessful formal objections to the Hernandez declaration based on hearsay, lack of foundation, and due process. (*Ex.* 41, *Rec.* 1008-1014; Ex. 43, Rec. 1029-1036; Ex. 47, Rec. 1086-1091).

Constitution 6th Amen.; Cal. Const., Art. 1, §15), parties in civil proceedings also have a due process right to cross examine and confront witnesses. See, *e.g.*, *Willner v. Committee on Character, (1963) 373 U.S. 96*; *McLaughlin v. Superior Court, (1983) 140 Cal. App. 3d 473, 481-482, 189 Cal. Rptr. 479.* Furthermore, the fundamental right to a meaningful hearing includes the opportunity to examine evidence and witnesses. *In re James Q., (2000) 81 Cal. App. 4th 255, 96 Cal. Rptr. 595, 602-603*.

The record shows that the LACSD blocked every effort on Petitioner's part to obtain evidence supporting his waiver claim. The obstruction included refusing to answer specific deposition questions relating to a conversation Hernandez had with Finstad and presenting false testimony to prevent Petitioner from learning and testing the basis of Hernandez's declaration statements before the Superior Court said it was "too late." *(Ex. 17, Rec. 190).* Without saying it, the Superior Court obviously recognized the problem concerning the cross-examination of Hernandez. However, when Petitioner learned the truth, *i.e.*, that Hernandez's declaration was based on his conversation with Finstad, and presented it to the Superior Court, Petitioner was faulted for purportedly making an untimely request when he asked to depose Finstad. *(Ex. 11, Rec. 52).*

The issue presented is straight forward. Can a public agency refuse to answer a discovery request or deposition question directly relating to a claim or affirmative defense and then submit a hearsay declaration, which is not subject to cross-examination, purporting to support the agency's position on the claim or

affirmative defense? When a party submits a false, hearsay declaration, if you cannot confront/cross-examine through discovery because the party refuses to answer, and you cannot confront/cross-examine at trial under the procedural rules setting out how a CPRA hearing is to proceed, then a petitioner has been denied due process and a meaningful hearing. *Willner* and *In Re James Q, supra.*

V. The Superior Court Erred in Refusing to Conduct an *In Camera* Review of the 2011 Records.

Prior to the second scheduling hearing, Petitioner filed a comprehensive request for *in camera* review in the form of a motion based on the LACSD's alleged affirmative defenses. *(Ex. 13, Rec. 66-67)*. The Superior Court asked for any requests for *in camera* review to be included in the opening trial brief. *(Ex. 13, Rec. 67)*. Petitioner followed the Court's instructions. *(Ex. 28, Rec. 414)*.

When the parties appeared for trial on September 27, 2016, the Court issued a Tentative Decision which did not include a ruling on Petitioner's request for *in camera* review. (*Ex.* 10, *Rec.* 34-46). However, there was considerable discussion on the subject during the hearing. *(Ex. 15, Rec. 143-147)*. Ultimately, the Superior Court agreed to review the 1981 LACSD records and made no ruling on the 2011 records. *(Ex. 15, Rec. 145, 160)*. The 2011 records were to be addressed on November 10, 2016. *(Ex. 15, Rec. 160)*. So, Petitioner raised *in camera* review again. *(Ex. 16, Rec. 174-175)*. At the November 10th hearing, the Superior Court told Petitioner to file another motion and it would be considered at the January 26, 2017 hearing. *(Ex. 16, Rec. 174-175)*. At that hearing, the request

was denied because the Superior Court said he had already ruled on the motion and Petitioner had not made a "*prima facie* case that the 2011 file has been improperly withheld in order to trigger an in camera review."[5] *(Ex. 11, Rec. 51).* Notably, when the Superior Court examined the 1981 records *in camera* it found several records that were disclosable. *(Ex. 16, Rec. 175; Ex. 17, Rec. 180-182).*

Although not reflected in the Tentative Decision, Petitioner obtained a holding from the Superior Court that the ruling denying disclosure of the balance of the 1981 records and the 2011 records was based solely on § 6254(f). *(Ex. 16, Rec. 173-174).* Section 6259(a) plainly states that in deciding whether a record is disclosable, the Court **shall** examine the records *in camera* unless the exemption

[5] To be candid with this Court, Petitioner was confounded by the procedures used by the Superior Court to make its rulings in this case. The hearing transcripts reveal that the Superior Court, even though providing documents entitled "Tentative Decision" to the parties immediately before the hearing, actually considered the "Tentative Decision" to be a final ruling. In other words, the parties were handed something that was supposed to be tentative and their oral argument was to be an attempt to change the Superior Court's mind from something he had already decided. An example of this is found in the "Tentative Decision" prepared before the January 26, 2017 hearing. *(Ex. 11, Rec. 48-54).* On page 4 of that Decision, the Court states, "The Court has ruled on Perroni's mandamus case." Frankly, Petitioner is at a loss to understand how the Superior Court could have re-opened discovery for him to submit additional evidence in rebuttal *(Ex. 15, Rec. 159);* tell Petitioner "the case (was not) over until November 10" when Petitioner asked about preparation of the judgment *(Ex. 15, Rec. 164);* ask for briefs on the issue of waiver and *in camera* review of the 2011 records on November 10 (*Ex. 17, Rec. 184-186);* and then state it had already ruled on the mandamus case. Petitioner's understanding of a "Tentative Decision" was that it was not a final order. *CRC Rule 3.1590(b).* And, Petitioner was under the impression that the submission of reliable evidence, coupled with his oral arguments, was his trial. *LA Sup. Ct Rule 3.231(l).* In this case, the trial was apparently over when Petitioner entered court on September 27, 2016.

claims are based on privilege. If so, the mandates of Evidence Code § 915(b) come into play. The LACSD claimed that the Superior Court need not review the records *in camera* to deny the Petition because the exemption was absolute, *(Ex. 38, Rec. 911),* citing *Williams v. Superior Court, (1993) 5 Cal. 4th 337, 356, 19 Cal. Rptr.2d 852*. However, *Williams* does not support their position. The precise language of *Williams* is, however, instructive:

> ….the exemption (Section 6254(f)) is not unlimited. A public agency may not shield a document from disclosure with the bare assertion that it relates to an investigation. ****However, when a Petitioner has made a *prima facie* showing that documents are being improperly withheld (§ 6259) the Court logically must review the documents and hear the agency's claim for withholding them in order to determine whether they actually relate to the investigation and, thus, properly belong in the file. Only through such an examination can the Court ensure that an agency has not co-mingled investigatory materials with other documents that have no legitimate claim to confidentiality. …."a proper function of the Court under [Section] 6259" is "to conduct an in camera review to segregate exempt from non-exempt materials." (*Williams, 5 Cal .4th at p. 356*)

In other words, the Superior Court is supposed to determine (before making a ruling) that what the LACSD claims (as a § 6254(f) exemption) is, in fact, true with respect to each record individually. *Gov. Code § 6255.* Presently, what we have is the bare assertion by a records custodian who lacks credibility, in the face of un-contradicted sworn testimony by his superiors that no homicide investigation had taken place and a finding by the Superior Court that there was **no ongoing**

criminal investigation,[6] that the 2011 file contained exempt records. (*Ex.* 15, *Rec.* 130).

The LACSD admitted the records Petitioner seeks are public records. *(Ex. 20, Rec. 285-290).* The LACSD refused to disclose them based on disclosure exemption § 6254(f). *(Ex. 20, Rec. 291).* That is Petitioner's *prima facie* showing. Without a claim of privilege, § 6259(a) controls and an *in camera* review is required.

VI. The Superior Court Erred in Failing to Narrowly Construe § 6254(f) and Improperly Expanded the Scope of § 6254(f)

Throughout this litigation, as in *Williams v. Superior Court, (1993) 5 Cal. 4th 377, 19 Cal. Rptr.2d 882,* the LACSD has maintained that the § 6254(f) exemption is absolute - citing *Haynie v. Superior Court, (2001) 26 Cal. 4th 1061. (Ex. 38, Rec. 903-906).* And, without substantial evidence, the Superior Court accepted this reasoning. *(Ex. 10, Rec. 41-43, 45).* However, *Williams*, and its progeny, teach us that is not so. *Williams, supra, p. 346.* And, the striking similarities between *Williams* and this case continue with the LACSD maintaining

[6] The LACSD had the ability to present much stronger evidence and chose, instead, to present weaker evidence from a witness who did not work for the department in 1981 or 2000-2001 and whose credibility is in serious doubt. This would permit this Court, pursuant to Evidence Code §§ 412 and 413, to distrust Hernandez's declaration on the issue of an investigation and to draw an adverse inference that the re-activation was nothing more than what Lt. Corina said it was - a renewed inquiry into the accidental death of a celebrity for curiosity. *(Ex. 29, Rec. 700).* Furthermore, *Williams, supra, footnote 12,* states that custodians of law enforcement records do not have unreviewable power to decide whether § 6254(f) requires disclosure.

that the exemption is so absolute as to preclude "even review in camera." *Williams, supra, p. 347; (Ex. 50, Rec. 1177-1178).* That position was also adopted by the Superior Court. *(Ex. 11, Re\\c. 51).* The result was that the Superior Court failed to conduct the investigatory file analysis so carefully announced by the Supreme Court in *Williams* (citing *Uribe v. Howie (1971) 19 Cal. App. 3d 194*).

The *Williams* analysis starts with the question of what constitutes a "law enforcement record?" To answer that question, *Williams* begins with the proposition that, "[n]o one argues, and the law does not provide, that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labelled 'investigatory.'" *Id., p. 355.* Secondly, the primary purpose for which the files were compiled must be determined and whether the file was being put to such a purpose at the time of any request for disclosure. *Ibid.* Next, the exemption for investigatory files applies only "when the prospect of enforcement proceedings is concrete and definite." *Ibid.* In other words, a file becomes an investigatory file, "when the prospect of enforcement proceedings becomes concrete and definite" and that requirement must occur "at the time a file is created." *Id., p. 359.* Then, if it is determined to be an "investigatory file," information created for the file becomes "investigatory" material and exempt under the statute. *Id., p. 355, 362.* Logically, therefore, *Williams* stands for the proposition that you must have the creation of an investigatory file before you can have an investigation record. Finally, "a public agency may not shield a document

from disclosure with the bare assertion that it relates to an investigation." *Id., p. 356.*

The Superior Court's announced reasoning was that an investigatory file comes into being if the Sheriff dispatches investigators and there is "any possibility, and it can be a remote possibility, of potential criminal activity." (*Ex.* 15, *Rec.* 127). While agreeing with Petitioner that Natalie Wood was "Hollywood royalty," the Superior Court assumed, without proof, that the only reason (or purpose) the LACSD could have had for going to Catalina Island was because there was a "possibility" of "potential criminal activity."[7] *(Ex. 15, Rec.127-128).* That is where the Superior Court ran afoul of the scope of § 6254(f) and failed to hold the LACSD to its burden of proof.

Uribe and *Williams* establish that there is a distinct difference between an investigation where there is the "possibility of potential criminal activity" and an investigation "when the prospect of enforcement proceedings becomes concrete and definite." The former leaves it to unquantifiable chance. The latter is subject to reasonable judicial assessment. Section 6254(f) only applies when the latter has occurred. Otherwise, every file and its contents created by the LACSD would be exempt because there is always the "possibility" of "potential criminal activity" in

[7] The Superior Court applied the same reasoning to the Coroner, *i.e.*, "there is no reason for the Coroner to conduct an autopsy if everyone knows it was as accident." However, Gov. Code § 27491 requires the Coroner to autopsy all "deaths known or suspected as resulting in whole or in part from or related to [an] accident" and all "deaths due to drowning" and it was Natalie Wood – "Hollywood royalty."

any situation involving law enforcement and that is certainly not the criteria for the exemption. *Williams, supra, p. 362.*

So, what are the established facts in this case? The death case of a world famous celebrity was opened as an accident (*Ex.* 29, *Rec. 634; Ex. 39, Rec. 965-969*) and officially closed twelve (12) days later as - **"Person Dead, Accidental Drowning."** (*Ex.* 29, *Rec. 602, 609-610, 633; Ex. 39, Rec. 982-983*). There was no evidence offered that the LACSD investigated Wood's death for believed criminal conduct in 1981. Dr. Noguchi, the Coroner at the time, even testified that before his autopsy report was prepared, there was no indication from the LACSD that Wood's death was the result of "foul play." (*Ex.* 29, *Rec. 633-634; Ex. 39, Rec. 960-961, 965-969).* That is why the autopsy reports were made public. *(Ex. 29, Rec. 447-454).* Otherwise, they would have been subject to the holding in *Dixon v. Superior Court, (2009) 170 Cal. App. 4th 1271, 88 Cal. Rptr.3d 847.*

The LACSD told the Superior Court in its opening brief that "[t]he **determining factor** for [a § 6254(f)] "investigation records" exemption) is "whether the investigation was to determine whether a **crime was committed** and if so, how…" citing *Haynie v. Superior Court, (2001) 26 Cal. 4th 1061, 1070-71.* (Emphasis added). *(Ex. 35, Rec. 867; Ex. 38, Rec. 904).* In other words, the purpose of the investigation.[8] However, *Haynie* is not this case. *Haynie* began with

[8] In this case, the purpose for the 1981 inquiry is undisputed and set forth in unmistakable terms in the official report. *(Ex. 29, Rec. App. 633).* It was to "investigate the circumstances surrounding the death of Natalie Wood Wagner."

a citizen complaint reporting a "possible crime and the [police] department's response thereto." *Id., 1061.* Wood's case began in 1981 with Deputy Kroll, the LACSD first responder, preparing a report of an accidental drowning of a celebrity. *(Ex. 29, Rec. 634).* Also, the *Haynie* action began as a pre-litigation discovery tool by the actual suspect of the crime and the Supreme Court said it had no reason to believe the deputies who stopped Haynie "were not investigating **a report** of what they believed might be **criminal conduct.** (See, *e.g.*, Pen. Code, § 12031 (the crime of carrying a concealed weapon))." (Emphasis added) *Id., 1070.*

Other than counsels' inadmissible statements in their trial brief (*See, Van de Camp v. Bank of America, (1988) 2004 Cal. App. 3d 819, 843)*, the LACSD submitted no admissible or credible evidence that in 1981 there was a report of what the LACSD believed might be criminal conduct. The only thing offered by the LACSD was the vague, unsupported, and conclusory statements of Hernandez in a declaration (not subject to cross-examination or meaningful rebuttal), parroting *Haynie*, *supra*., that in 2011, the LACSD was conducting an investigation into determining whether "a violation of law (has/had) occurred and, if so, the circumstances of its commission as to the death of Natalie Wood." *(Ex. 38, Rec. 913-914).*

Furthermore, in *Haynie*, the CPRA request was made 11 days after the criminal complaint. In this case, the CPRA request was made 34 years after a

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Not, as *Haynie* said, for the purpose of determining "whether a violation of the law…has occurred." *Haynie, supra, p. 1071.*

report of an accidental drowning and over four (4) years after the case was "reactivated." *(Ex. 19, Rec. 280-283; Ex. 29, Rec. 767).*

In order to reconcile the *Haynie* passages relied upon by the Superior Court *(Ex. 29, Rec. 436-438)* with the holdings in *Williams v. Superior Court, supra., pgs. 355-356* and *Uribe v. Howie*, *supra*, an investigation must have its foundation in the existence of a "report of a suspected crime" and the investigation by a law enforcement agency into what they believed was "criminal conduct." *Ibid.*

The LACSD wanted the Superior Court to assume that is what happened in 1981 and 2011 (in the face of compelling evidence to the contrary) and they were successful. (*Ex.* 6, *Rec.* 16-26). Furthermore, the Superior Court appears to have taken the position, without proof, that if a celebrity dies in California and the Sheriff shows up, the officers must have believed criminal conduct was involved. *(Ex. 15, Rec. 127-129).* That position expands § 6254(f) beyond its stated scope, broadly construes a CPRA exemption and shifts the burden to Petitioner to prove the assumption is wrong.

Even *Haynie* states, "[i]t is not enough that an agency label its file 'investigatory' and suggest that enforcement proceedings may be initiated at some unspecified future date…. To say that the exemption created by subdivision (f) is applicable to any document which a public agency might, under any circumstance, use in the course of [an investigation] would be to create a virtual *carte blanche* for the denial of public access to public records. The exception would thus swallow the rule." *Id.,1069.* Finally, *Haynie* said "we do not mean to shield

everything law enforcement officers do from disclosure" and limited its holding to "[r]ecords relating to [the Haynie] investigation...." *Id., 1071.*

CPRA cases are to be decided on a case-by-case basis. *Bertoli v. City of Sebastopol, (2015) 23 Cal. App. 4th 353, 377, 182 Cal. Rptr.3d 308.* Yet, the Superior Court, in this case, created an absolute rule for the § 6254(f) exemption.

On November 18, 2011, an accidental death case of a celebrity was reactivated and the LACSD presented no evidence that there had been an investigation of believed **criminal** conduct before or since. *(Ex. 29, Rec. 700-701).* Hernandez's trial declaration lacks substance and credibility. Even the Superior Court said,

> I will also say that I didn't find the [Hernandez] declaration enormously persuasive. For example, I agree with you that I don't think it is a live investigation any more than you do, even though the declaration of Detective Hernandez says it's an open investigation. *(Ex. 15, Rec. 130).*

In fact, there is no mention of "criminal" or "crime" anywhere in Hernandez's declaration *(Ex. 38, Rec. 912-914)* and the LACSD cannot discharge its burden with unsupported conclusions. See, *i.e., Wherry v. Rambo, (1950) 97 Cal. App. 2d 569, 572* and *Rackanckas v. Superior Court, (2002) 104 Cal. App. 4th 169, 176, 128 Cal. Rptr.2d 234.*

The only crimes the LACSD could have been investigating in 1981 were murder, manslaughter or negligent homicide. Thirty years later, since all of those crimes, except murder, were long ago barred by the statute of limitations, *Penal*

Code §§ 779 – 804; People v. Morgan, (1978) 75 Cal. App. 3d 3, the LACSD would have had to be investigating a suspected murder. The LACSD, five years after reactivating an accidental drowning case, provided no evidence they were investigating a suspected homicide, much less a murder. If they were, even the official information privilege for ongoing criminal investigations expires after a reasonable time. *County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 768.* Thirty-five years is beyond reasonable.

A. The Superior Court Applied an Incorrect Standard in Holding that the Remaining LACSD Records Were Exempt Pursuant to § 6254(f).

The Superior Court applied a strict, absolute standard in this case based on *Haynie, i.e.,* if a law enforcement officer responds to the scene of a celebrity death, all records created from that point are absolutely exempt from disclosure forever because it is to be assumed that the officer is investigating possible criminal activity. (*Ex.* 6, *Rec. 25; Ex. 15, Rec. 128*). That is, even though the Superior Court acknowledged it did not exist *(Ex. 15, Rec. 124),* it created a celebrity death exemption to the CPRA.

Finally, *Haynie* did not overrule *Uribe, Williams,* or any of its progeny. All *Haynie* did was reject an attempt to limit the investigation exemption to investigation records where the likelihood of enforcement has ripened into something concrete and definite. *Haynie, supra,* While the Superior Court implied, citing *Haynie,* that Petitioner was claiming the § 6254(f) exemption did not apply because the files were closed *(Ex. 6, Rec. 24-25),* that was never Petitioner's

position. Petitioner's claim has been, and is now, that the LACSD did not prove by substantial evidence that a report was filed of a suspected crime which caused the LACSD to believe that criminal conduct existed thereby resulting in the creation of an investigatory file under § 6254(f) and making the record contents exempt. *(Ex. 15, Rec. 123-129; Ex. 28, Rec. 395-415; Ex. 39, Rec. 939-997).*

B. Petitioner's Due Process Rights were Violated When the Superior Court relied Upon the Hernandez Declaration

The same argument that Petitioner made in Point IV.B., *supra*. is applicable here. Petitioner took the depositions of three LACSD officers familiar with the 2011 reactivated case to determine, under oath, whether the § 6254(f) exemption claim was a sham. *(Ex. 29, Rec. 581-632, 685-712, 757-778).* Petitioner was met with nothing but unmeritorious privilege objections and instructions to the officers not to answer the questions. (*Ex. 29, Rec. 583-585, 687-688, 760).* Thereafter, the Superior Court refused to order the officers back to a deposition to answer the questions based on the proposition that such questioning was not permitted under the CPRA. *(Ex. 6, Rec. 21-24).* Then, the Superior Court relied on an uncross-examined declaration on the very matters Petitioner was unable to discover in denying his claim against the LACSD. *(Ex. 6, Rec. 18-26).* As a result, Petitioner was denied due process and a meaningful hearing pursuant to *Willner v. Committee on Character, supra*.

VII. The Superior Court Abused its Discretion in Imposing Sanctions Under CCP §§ 2031.310(h) and 2023.010(h)(i).

The Superior Court held that Petitioner could not "take merits discovery in a CPRA case." *(Ex. 14, Rec. 101-103).* Specifically, the Superior Court ruled that "nothing in those statutes, or elsewhere in the CPRA, provides for discovery in a CPRA action," and the Court believed "that discovery in a CPRA case generally should be limited to the facts concerning the efforts to comply with the request." *(Ex. 6, Rec. 16).* That was error.[9]

The LACSD did not object to Petitioner conducting discovery. In fact, the LACSD participated in discovery by answering requests for admission, answering special interrogatories, answering requests for production, and participating in five depositions. *(Ex. 29, Rec. 489-570, 581-636, 685-795).* It wasn't until the LACSD filed their opposition to Petitioner's Motions to Compel, that they argued discovery was completely unavailable in CPRA cases. *(Ex. 35, Rec. 860-861).*

The Civil Discovery Act really should make short work of this issue. It states that, "'action' includes a civil action and a special proceeding of a civil nature," *CCP § 2016.020(a),* and that "…any party may obtain discovery…in the pending action…." The Legislature fully intended the CDA to apply to special proceedings and a CPRA action is a special proceeding. *Northern California Police Practices Project v. Craig, (1979) 90 Cal. App. 3d 116, 122, 153 Cal. Rptr. 173.* Finally, the CDA has been held to apply to special proceedings. See, *People*

[9] This issue will be the subject of a separate appeal along with the Superior Court's denial of attorney fees to an undisputed prevailing party.

v. Superior Court of Santa Cruz County, (2001) 94 Cal. App. 4th 980, 114 Cal. Rptr.2d 760.

In every deposition, Petitioner was met with a firestorm of objections. But, the focus of Petitioner's Motion to Compel Deposition Answers were **some** of the seventy-five (75) instances where counsel instructed witnesses not to answer based on an alleged privilege application of Evidence Code § 1040 – the official information privilege – and the case of *Haynie v. Superior Court, supra,* a pre-petition case. Petitioner was attempting to prove to the Superior Court that the reason given for not disclosing what was obviously public records was a sham; that the Wood accidental death case was "reactivated" in 2011 for curiosity and the claimed affirmative defenses were false. *(Ex. 25, Rec. 362-365; Ex. 27, Rec. 387-393).*

Most of the deposition question objections were based on an alleged Evidence Code § 1040 privilege. In an attempt to show the privilege objection was baseless, Petitioner cited *County of Orange v. Superior Court, supra.* and *Michael P. v. Superior Court, (2001) 92 Cal. App. 4th 1036, 113 Cal. Rptr.2d 11*. In *Michael P.,* the Court stated that the § 1040 privilege was a conditional privilege. *Id. at 1043*. Furthermore, the Court in *Michael P.*, citing the California Supreme Court in *Shepherd v. Superior Court, (1976) 17 Cal. 3d 107, 130 Cal. Rptr. 257 (overruled on other grounds),* stated that a decision whether a public entity can withhold information as privileged under § 1040(b)(2) "requires that the trial court consider with respect to each item of material [sought] … whether there is a

necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." *Id. at 1043.*

Petitioner reasoned further that, assuming the questions asked for confidential information, the LACSD could not, under any circumstances, show a risk of harm to an ongoing criminal investigation by answering the disputed questions and disclosing whether a criminal investigation existed and whether the LACSD had developed suspects, even if they might, based on a claim of privilege, properly refuse to disclose who the suspects were. *See, i.e., Hernandez v. Superior Court, (2003) 112 Cal. App. 4th 285, 293-294, 4 Cal. Rptr.3d 883.* (*Ex. 26, Rec. 367-385).*

Because of Petitioner's claims, and the defenses asserted by the LACSD, Petitioner maintained he should be able to conduct discovery on the records that remained undisclosed and the LACSD's defenses. *CCP § 2017.010* ("Discovery may relate to the **claim or defense** …of any other party to the action.") (Emphasis added). Petitioner also submitted it was disingenuous for the LACSD to rely on *Haynie v. Superior Court, supra* for some type of unidentified privilege because *Haynie* was unmistakably a pre-petition case about the scope of a CPRA request. *(Ex. 26, Rec. 373).*

Petitioner propounded interrogatories that addressed specific affirmative defenses enumerated in the LACSD's Answer and asked for, "…evidence you will present…and…the witnesses or witnesses…you will use to present this evidence." *(Ex. 29, Rec. 547-548, 551-553).* The LACSD objected based on attorney work

product and cited *Snyder v Superior Court, (2007) 157 Cal. App. 4th 1530, 1536. (Ex. 29, Rec. 546).* Sufficient factual information to evaluate the privilege claim was not provided by the LACSD. *CCP § 2031.240(c)(1).*

Petitioner reasoned that *Snyder* was inapplicable because the LACSD did not convince the Superior Court that disclosure of the evidence and witnesses to support their defenses, would "reveal the attorney's tactics, impressions, or evaluation of the case or would result in opposing counsel taking undue advantage of the attorney's industry or efforts." *See, CCP § 2018.020, et seq.* and *Coito v. Superior Court, (2012) 54 Cal. 4th 480, 142, Cal. Rptr.3d 607. (Ex. 26, Rec. 367-385).*

Petitioner filed his motions to compel (as diligently as possible) on June 8 and June 21, 2016. *(Ex. 22, Rec. 301-303; Ex. 25, Rec. 362-365).* The LACSD took its full 30 days to respond. *(Ex. 33, Rec. 820-838).* Petitioner's opening trial brief was due on June 29, 2016. The opening trial brief was timely filed before the August 9, 2016 discovery hearing (the earliest Petitioner could obtain). *(Ex. 14, Rec. 91; Ex. 28, Rec. 395).* Everything Petitioner was trying to obtain was evidence Petitioner was attempting to gather to either rebut the LACSD's defenses or to rebut the LACSD's attempt to limit the 1981 waiver claim. Yet, the Superior Court seemed to believe that somehow the motions to compel were untimely because Petitioner had already filed his opening trial brief as ordered. *(Ex. 14, Rec. 91, 104).*

The Superior Court made it clear at the discovery hearing that he did not like discovery motions and that he was compelled to award sanctions against Petitioner because he denied the motions to compel. *(Ex. 14, Rec. 86-87).* The Superior Court also made it clear that he was imposing sanctions because Petitioner failed to fully comply with CRC Rule 3.1345 relating to Separate Statements and that constituted a "lack of substantial justification." (*Ex.* 6, *Rec. 19-20*; *Ex. 14, Rec. 105, 107).*[10] The Superior Court's order is to be reviewed for abuse of discretion. *Clement v. Alegree, (2009) 177 Cal. App. 4th 1277, 1285, 99 Cal. Rptr.3d 791.*

To begin with, sanctions are not unconditionally mandatory under CCP §§ 2031.310(h) and 2023.010(h)(i) because that would amount to no exercise of discretion. Under the rules, the Superior Court must exercise discretion and the Superior Court acknowledged that imposing sanctions was indeed discretionary. *(Ex. 14, Rec. 88).* Having the opinion that a court must impose sanctions any time someone loses a discovery motion constitutes a failure to exercise the very

[10] Petitioner questions whether CRC Rule 3.1345 applies to privilege objections because those objections do not constitute a "response" as contemplated by the rule. This is particularly true when the identical objection is made to nearly every written discovery request or deposition question. Such a rule would require repeating multiple times the "same statement of factual and legal reasons for compelling further responses" that is required by CRC 3.1345 (c)(3). A memorandum brief is also required to be included with a motion to compel. *CRC § 8.808(a)(2)*. Petitioner filed two briefs – both of which included the exact material required by CRC 3.1345(c)(3). *(Ex. 23, Rec. 305-324; Ex. 26, Rec. 367-385).* In this case, Petitioner substantially complied with CRC Rule 3.1345(c)(3). To say otherwise is putting form over substance.

discretion the rule requires. *Ashburn v. AIG Financial Advisors, Inc. (2015) 234 Cal. App. 4th 79, 96, 183 Cal. Rptr. 3d 679 ("…failure to exercise discretion is 'itself an abuse of discretion.'")* Also, the purpose of sanctions is not to provide a weapon for punishment. *Parker v. Wolters Kluwer U.S., Inc., (2007) 149 Cal. App. 4th 285, 301, 57 Cal. Rptr.3d 18.*

California discovery sanctions have their basis in abuse or misuse of the discovery process rather than a good faith effort to raise serious claims of discovery abuses by the opposing party. *Cedar Sinai Med. Ctr. v. Superior Court, (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 248; CCP §§ 2023.10(d), (e), (f) and (g).* It is a dangerous rule, indeed, to make *pro se* petitioners in CPRA cases choose between exercising a right under the rules or being sanctioned if they lose before filing a discovery motion. A decision of that nature only encourages agencies opposing *pro se* petitioners to obstruct efforts to enforce discovery rights. No *pro se* petitioner, even an out of state lawyer, could fully master every procedural rule that applies in California CPRA litigation. Because of that, consideration should be given by a Superior Court to the presence of substantial compliance. A procedural failure should not support an award of sanctions without a finding that the procedural failure was an intentional act designed to delay the proceedings or in defiance of a court order. See, *Vasquez v California School of Culinary Arts, (2014) 230 Cal. App. 4th 35, 40, 178 Cal. Rptr.3d 10.* In *Vasquez*, the Court stated that, "[s]ubstantial justification means that a justification is clearly reasonable because it is grounded in both law and fact." Merriam-Webster's Dictionary,

defines justification as “an acceptable **reason** for doing something.” ("Justification." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 27 Feb. 2017). (Emphasis added). Petitioner’s reason for filing the motions was not to violate a rule of procedure in preparing the papers. Moreover, Petitioner substantially complied with the rule on Separate Statements – particularly when he submitted two of them, as well as thirty (30) pages of detailed briefs. *(Ex. 23, Rec. 305-324; Ex. 24, Rec. 326-360; Ex. 26, Rec. 367-385; Ex. 27, Rec. 387-393).*

The clear purpose of sanctions is to keep parties from taking up valuable court time with baseless discovery motions amounting to gamesmanship, delay, or fraud. See, *i.e., R.S. Creative, Inc. v. Creative Cotton, Ltd., (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr.2d 253* and *Clements v. Alegre, supra*. That simply was not established in this case. All the Superior Court kept saying was, “You can’t do it.” *(Ex. 14, Rec. 89-90, 100, 102).* When Petitioner asked how the Court was persuaded under the law that he could not ask the questions in dispute? The Superior Court said, “Because that defeats the entire purpose of the CPRA, which is intended to be…an expeditious way of getting documents from a public agency that is relatively painless for the asking party and …for the government agency, and the trial court’s decision is subject to swift review by way of mandamus ....” *(Ex. 14, Rec. 88-89).* That might be true when the government agency acts in good faith or the issues are purely matters of law. But, that is not this case.

Moreover, a genuine dispute existed in this case. Petitioner was attempting to discover Respondents’ affirmative defense evidence and the basis for the claim

of disclosure exemptions. This must be available in a CPRA case because of the nature of the case. Routinely, a petitioner requests a record. The agency refuses based on a claimed disclosure exemption and petitioner challenges the exemption as meritless or a sham. Petitioner was denied the ability to challenge in this case, particularly when the issues of no investigatory file and claims of limited waiver in a 35-year old case were in hot dispute.

Petitioner had reasonable justification under the law for asking the Superior Court to rule on the discovery disputes. In this case, where, for example, there was no law that said Petitioner could not seek discovery in a CPRA case, he could hardly be found to be acting without substantial justification in attempting to enforce discovery rights clearly set forth in the Civil Discovery Act.

Finally, there was no substantial basis for concluding that Petitioner did not confer with counsel before filing the motions when he submitted a detailed sworn declaration stating that he did and the methods he attempted. *(Ex. 24, Rec. 330; Ex. 27, Rec. 390-391)*. And, the methods used by Petitioner to resolve the disagreement were not contradicted by the Respondents. (*Ex.* 33, *Rec.* 837). The parties were at an impasse and the LACSD did nothing or suggested nothing to establish "that additional [conferring] appeared likely to bear fruit." *Clement v. Alegree, supra. 1293*. Petitioner made a concerted effort to resolve the matter and opposing counsel's statements that Petitioner did not confer in good faith had their basis in the fact that Petitioner did not agree with opposing counsel. Conferring in good faith does not mean conceding the argument, *Clement v. Alegre, supra. 1294*,

and opposing counsel clearly knew that before asserting something counsel knew was disingenuous.

It was simply unjust to sanction Petitioner $3,000 without the Superior Court notifying counsel that it intended to do so and offering Petitioner an opportunity to correct any procedural deficiencies. It cannot be denied that whether Petitioner is an attorney or not, the procedural rules surrounding the filing of a CPRA petition and litigating in California courts, are imposing, to say the least. While this Petitioner remained undeterred after being sanctioned, most *pro se* litigants under the CPRA would have folded their tent after participating in a hearing like the one held on August 9, 2016.

VIII. Conclusion

For all the foregoing reasons, Petitioner respectfully requests this Court to issue a preemptory writ of mandate, or other appropriate relief, directing the Superior Court to set aside its January 26, 2017 Judgment and Order and to issue a new order granting Petitioner's Writ Petition in part or in its entirety or, alternatively, that this Court conduct an *in camera* review of the records and order the Superior Court to modify its order consistent with this Court's order.

Respectfully submitted,

Dated: February 28, 2017

_____
Samuel A. Perroni
Petitioner Pro Se

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court, Rules 8.486(a)(6) and 8.204(c)(1) that this Verified Petition for Writ of Mandate is proportionally spaced, has a typeface of 13 points, and contains 13,547 words, excluding the cover, the Tables, and the Certificate, which is less than the total number of words permitted by the rules of Court. Counsel relies on the word count of the Microsoft Word 2013 word-processing program used to prepare this brief.

Dated: February 28, 2017

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Samuel A. Perroni
Petitioner Pro Se

PROOF OF SERVICE

I, the undersigned, am the assistant to the Petitioner herein and am over the age of 18 years, and not a party to the above-entitled action. My business address is 424 West 4th Street, Suite A, North Little Rock, AR 72114.

On February 28, 2017 I served the foregoing document, described as VERIFIED PETITION FOR WRIT OF MANDATE TO ENFORCE CALIFORNIA PUBLIC RECORDS ACT PURSUANT TO GOV. CODE § 6259(c), on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

The Honorable James. C. Chalfant — Respondent
Los Angeles County Superior Court
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Counsel for the Real Parties in Interest were also served with 5 volumes of the record concurrently with the Verified Petition of Mandate referred to above.

XXX BY MAIL

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same date, with postage thereon fully prepaid, at Little Rock, Arkansas, in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 28, 2017, at North Little Rock, Arkansas.

_____

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Assistant to Samuel A. Perroni, Esq.

SERVICE LIST
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