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6 Attorneys for Plaintiffs and Petitioners
7 PARI ZAHAU, MARY ZAHAU-LOEHNER
8 and DOUGLAS LOEHNER

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

11 PARI ZAHAU, MARY ZAHAU LOEHNER)
12 and DOUGLAS LOEHNER,)

13 Petitioners/Plaintiffs,)

14 v.)

15 SAN DIEGO COUNTY SHERIFF'S)
16 DEPARTMENT; WILLIAM D. GORE, in)
his official capacity as Sheriff of San Diego)
County; and DOES 1 through 20, inclusive,)

17 Respondents\Defendants.)

Case No.: 37-2020-0024682-CU-MC-CTL
(Petition filed: February 20, 2020)
(FAP filed: July 13, 2021)

PETITIONERS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO RESPONDENTS'
MOTION FOR PROTECTIVE ORDER

"IMAGED FILE"

Date: March 25, 2022
Time: 1:30 p.m.
Dept.: 72
Judge: Hon. Timothy B. Taylor

19 **I. INTRODUCTION**

20 On July 13, 2011, Rebecca Zahau was declared dead, having been found naked, with
21 her ankles bound tightly together, her hands tied behind her back, a gag in her mouth and a
22 noose around her neck. (First Amended Petition ("FAP") ¶12). Less than two months later,
23 on September 2, 2011, Sheriff William Gore shocked the community at a press conference
24 where he pronounced that his Department had determined Rebecca's death was a suicide.
25 (FAP ¶13). At that time Respondents publically disclosed the evidence that had been
26 collected, and discussed the analysis and conclusions of the Department's investigating
27 officers. (*Id.*)

1 On October 27, 2011, in response to Petitioners' demand under the California Public
2 Records Act ("CPRA") for the Sheriff's investigation files, the Sheriff responded by giving
3 Petitioners a large volume of documents, along with a letter from Robert Faigin, the
4 Sheriff's Director of Legal Affairs, confirming that the Department was "not merely
5 releasing the information required by statute, **but releasing the complete investigative file.**"
6 (FAP ¶16, Exhibit G, at pg. 150-51; Faigin Decl., Ex. A).

7 Based on the Mr. Faigin's letter attesting that the "complete investigative file" was
8 being produced, which was served concurrently with the allegedly "complete investigative
9 file," Petitioners assert that the Department expressly waived any and all rights to withhold
10 documents it otherwise might have had under Government Code §6254(f), i.e., "files that
11 reflect the analysis or conclusions of the investigating officers." (FAP ¶17).

12 On April 4, 2018, after reviewing all the evidence collected by the Sheriff, and
13 hearing testimony from Sheriff Department officers involved in the investigation, a civil
14 jury in the wrongful death action filed by Rebecca's family, found Adam Shacknai, the
15 brother of Rebecca's multi-millionaire pharmaceutical tycoon boyfriend, Jonah Shacknai,
16 liable for Rebecca's death. (FAP ¶14).

17 On April 16, 2018, after initially stating that he stood by his decision that Rebecca
18 committed suicide, Sheriff Gore publicly stated that he would reopen the investigation in
19 light of the jury's verdict, but that the investigation would not be completed until after the
20 upcoming election. (FAP ¶19). During the course of his campaign for reelection, Sheriff
21 Gore made numerous public comments designed to convince the public that he was actually
22 reopening the investigation. (FAP ¶20).

23 However, Petitioners allege that this lie was part of a cleverly orchestrated deception
24 designed to delay public scrutiny of the Sheriff's botched, or even worse, corrupted,
25 investigation regarding Rebecca's death, until after the election. Petitioners further allege
26 that in fact Sheriff Gore was not having the matter reexamined by an "independent" group
27 of three officers. (*Id.*) Rather, his instructions to the "team" of officers were so restrictive
28 that it would be virtually impossible for the team to do anything other than support Sheriff

1 Gore's initial determination. (FAP ¶¶20-22). Petitioners allege that the instructions from
2 Sheriff Gore to the "independent panel" are not part of the investigative file as they do not
3 "reflect the analysis or conclusions of the investigating officers," and therefor should be
4 produced. (See Government Code §6254(f)). (FAP ¶34 and ¶45).

5 Moreover, since Sheriff Gore publicly disclosed his instructions regarding the
6 "reopened investigation" to the "independent panel" on numerous occasions, (*Id.*), there is
7 no basis for withholding documents reflecting these same instructions. And the only reason
8 for the Sheriff to fight a request for disclosure of his instructions is because they will
9 expose his misrepresentations to Rebecca's family and reveal the fraud he has perpetrated
10 on the public, because the actual instructions he gave the so-called "review panel" are very
11 different from what he led the public to believe.

12 **II. ISSUES PRESENTED**

13 This Petition raises issues regarding: (1) Whether documents reflecting the actual
14 instructions that Sheriff Gore gave to the officers involved in the second review of the
15 Zahau matter fall within the definition of ". . . investigatory or security files compiled by
16 any other state or local agency for correctional, law enforcement, or licensing purposes " set
17 forth in Govt. Code § 6254(f), and are thus exempt from public disclosure, and if so: (2)
18 Whether Sheriff Gore publishing these instructions to the public on multiple occasions
19 results in any exemption being waived in favor of the public's right to records necessary to
20 determine if elected officials are being honest, as proscribed in the CPRA.

21 This matter also raises the issue of whether the Sheriff's Department expressly
22 stating to the Petitioners that the Department was "releasing the complete investigative file"
23 to them, results in a waiver of any exemption the "investigative file" had under Govt. Code
24 § 6254(f). (See, Decl. of Robert Faigin, Ex. A (10/27/11 letter to Petitioners' attorney)).

25 In order to make a determination of these issues, the Court will need to have a
26 sufficient factual background regarding the documents that are retained by the Sheriff as
27 part of the "investigatory files" for the two Zahau investigations, what documents are
28 retained that relate to the investigation but are not classified as part of the "investigation

1 file,” and because Sheriff Gore’s instructions to the team on the alleged “reexamination” of
2 Rebecca’s death were oral, what documents exist that reflect the substance of Sheriff
3 Gore’s instructions. Thus, Petitioners have noticed the depositions of the persons most
4 knowledgeable about the Sheriff’s document retention and destruction policies as they
5 pertain to documents relating to the investigation and “reinvestigation” of Rebecca’s death,
6 and the Deposition of the person with most knowledge about Sheriff Gore’s instructions
7 that were given to the reexamination team, and where these instructions appear in relevant
8 documents, i.e., Sheriff Gore.

9 **III. LEGAL STANDARD FOR PROTECTIVE ORDERS**

10 An order denying the taking of a deposition is the ultimate in protective orders, and
11 situations will seldom arise where an order that the deposition shall not be taken will be
12 appropriate. *Beverly Hills Nat. Bank & Trust Co. v. Superior Court* (1961) 195 Cal.App.2d
13 861. The party objecting to the taking of the deposition has the burden of showing good
14 cause for such an order. *Id.*, see also *Department of Health Services v. Superior Court*
15 (1980), 104 Cal.App.3d 80.

16 **III. APPLICATION OF THE CALIFORNIA PUBLIC RECORDS ACT**

17 The California Public Records Act ("CPRA") is designed to hold government
18 accountable through transparency by virtue of access to information. (Gov't Code §6250 et
19 seq.; *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 173). Thus, the CPRA
20 embodies a strong policy in favor of disclosing public records. *California State University,*
21 *Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 831; *Rogers v. Superior*
22 *Court* (1993) 19 Cal.App.4th 469, 476. To support this policy, agency records must be
23 disclosed unless they come within a specific disclosure exemption. (*Id.*, at p. 831).
24 Moreover, these exemptions are to be construed narrowly. (*Id.*); *City of San Jose v.*
25 *Superior Court* (1999) 74 Cal.App.4th 1008, 1018).

26 As discussed below, Respondents’ refusal to produce documents in this matter is
27 exactly the type of circumstance that the CPRA is designed to address.

28

1 **IV. THE COUNTY WAIVED THE RIGHT TO WITHHOLD PRODUCTION OF**
2 **THE INITIAL INVESTIGATION FILE**

3 To support a finding of waiver, there must be an existing right, actual or
4 constructive knowledge of the right's existence, and either an actual intention to relinquish
5 it or conduct so inconsistent with any intent to enforce the right as to induce a reasonable
6 belief that it has been relinquished. (*In re Marriage of Paboojian* (1987) 189 Cal.App.3d
7 1434, 1437, 235; *Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292,
8 298, 205 Cal.Rptr. 455.). The existence or non-existence of a waiver generally involves
9 issues of fact. (*Id.*, at 1438-39).

10 Here, the Respondent is clearly aware it had the right to withhold parts of the initial
11 investigative file. The October 27, 2011 letter from the Department to Petitioners discusses
12 the exemption, in detail. (FAP ¶16, quoting Exhibit G, pg 150-51; Faigin Decl., Ex. A).
13 After noting that, "Law enforcement investigatory records in California are exempt from
14 mandatory disclosure under the California Public Records Act . . ." thus acknowledging the
15 "right" to withhold documents, the Department states that: "***The Sheriff's Department is***
16 ***complying with this requirement not merely by releasing the information required by***
17 ***statute, but by releasing the complete investigative file.*" (FAP ¶16, at 4:23-5:5, quoting**
18 Exhibit G, at pg. 153(emphasis added). The Sheriff's written statement is clearly sufficient
19 to make it a question of fact as to the Sheriff's "actual intention to relinquish" the
20 exemption, or alternatively, to constitute "conduct so inconsistent with any intent to enforce
21 the right" as to induce a reasonable belief that it has been relinquished. (See, *In re*
22 *Marriage of Paboojian, supra*, 189 Cal.App.3d at 1437.

23 Moreover, a review of the Declaration of Robert Faigin attached as Exhibit D to Mr.
24 Deak's Declaration, confirms at paragraph 2 that in October 2011 the Sheriff released "the
25 entire investigative file" to Petitioners. In the next paragraph Mr. Faigin states that he did
26 not intend to waive any exemption, however, it is clear from the terms of the letter and his
27 declaration that the Sheriff was expressing his intent to not waive the exemption as to third
28 parties, not as to Petitioners. To the contrary, he allegedly gave the "entire investigative

1 file" to Petitioners (Faigin Decl., at 2:4-8). Giving the documents to Petitioners *ipso facto*
2 waived the disclosure exemption as to them.

3 That said, Mr. Faigin later states that the Sheriff never intended to "waive any
4 exemption or privilege that allowed the Sheriff to withhold any record related to the Zahau
5 Investigation, including any record ***that was or was not disclosed*** per the Bremner Letter as
6 part of the "investigative file." (*Id.*, at 3:11-16 (emphasis added)). So was the whole
7 investigative file disclosed or not disclosed? Contrary to Respondents' argument that Mr.
8 Faigin's declaration is made in good faith and answers all the questions necessary for the
9 Court to make a decision, the circular argument in Mr. Faigin's declaration shows why it is
10 necessary to further ferret out what documents have been retained regarding the Zahau
11 investigation in order to compare them with what was given to Petitioners, and thus
12 determine what is part of the "investigatory file" and what is not.

13 Petitioners have asked the Sheriff to produce correspondence between officers
14 involved in the initial investigation and all interdepartmental memoranda, detective notes
15 and detective workbooks, (FAP ¶¶27, Ex. B), and records in the initial investigation
16 reflecting why the Sheriff did not endeavor to obtain the cell phone records of Adam
17 Shacknai (i.e., the individual whom the civil jury found responsible for Rebecca's death),
18 (FAP ¶¶27 and 29, Ex. B and D). These records are either part of the investigative records
19 for the initial investigation for which the exemption has been waived, or they are not part of
20 the investigative files and thus, again, not exempt. Either way, the Court can't decide how
21 to treat any of the records from the initial investigation that were not included in the
22 "complete investigative file" given to Petitioners until their existence is confirmed, as well
23 as why they were not produced. Thus, discovery by way of deposition is now necessary to
24 determine whether the documents Petitioners request exist, and how they are classified by
25 Respondents.

26 Sheriff Gore's multiple statements to Rebecca Zahau's family and the public are also
27 either not exempt, or the exemption has been waived by prior publication, such as the
28 following comment the Department made at the December 6, 2018 press conference: "The

1 Sheriff's Department created a review team and conducted a fresh assessment of the case.
2 They reevaluated existing evidence with a fresh perspective and explored theories raised
3 during the recent civil trial." (FAP Exhibit F, pg. 00010)(Emphasis added). At this time all
4 that Petitioners are seeking as to the reopened investigation are documents reflecting the
5 instructions that Sheriff Gore gave to the "review team," allegedly charged to conduct a
6 "fresh assessment" and reevaluate existing evidence."

7 Although, as argued below, Petitioners contend that these instructions do not fall
8 under the §6254(f) exemption, if they did, such protection was waived by the Sheriff
9 publicly disclosing what the "review team" was allegedly instructed to do, on multiple
10 occasions. Such publications show that Sheriff Gore clearly either wanted to convince the
11 public that the Department was performing a fresh investigation, or at a minimum acted in
12 a manner so inconsistent with any intent to keep what the "review team" was doing secret,
13 so as to induce a reasonable belief that any right to secrecy over what the team was doing
14 had been relinquished. (See, *In re Marriage of Paboojian, supra*, 189 Cal.App.3d at 1437).
15 Accordingly, any exemption to production of documents relating to his instructions to the
16 "review team" have been waived.

17 **V. THE INSTRUCTIONS SHERIFF GORE GAVE TO OFFICERS**
18 **REGARDING THE ALLEGEDLY REOPENED INVESTIGATION DO NOT**
19 **FALL UNDER THE PROTECTION OF GOV'T CODE §6254(f)**

20 Although, as argued above, Petitioners submit that if any exemption attached to
21 Sheriff Gore's instructions to the "review team, the exemption was waive by virtue of the
22 Sheriff publishing his instructions to the "review team" on numerous occasions, Petitioners
23 further assert that such instructions are not protected from disclosure under Gov't Code
24 §6254(f) because they do not constitute "that portion of those investigative files that
25 reflects the analysis or conclusions of the investigating officer." Rather, these instructions
26 would necessarily have been given before any analysis had even started, and thus well
27 before any "conclusions of the investigating officer(s)" had been made.

28 All that Petitioners are asking for regarding these instructions is documentation to
confirm that what Sheriff Gore advised the "review team" to do is consistent with what he

1 told the public they were doing. As alleged in the FAP, Petitioners believe that Sheriff
2 Gore's statements to the public were intended to make the public believe that he was
3 reopening the investigation, when in fact these representations were intentionally deceptive
4 and cleverly orchestrated to hide Sheriff

5 Gore's true intention and plan, which was to give lip service to the investigation
6 while putting constraints on the "review team" that were so stringent they could not do
7 anything other than support Gore's prior decision. (FAP ¶¶20 and 34). This is precisely the
8 type of circumstance that the CPRA was enacted to address. (*Marken v. Santa*
9 *Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1271-72 (the CPRA
10 promotes the "strong public policy supporting transparency in government)).

11 It should also be noted that courts will not generally support a party using privilege
12 from disclosure as both a shield and a sword. (See, *Ford v. City of Los Angeles* (2020) 47
13 Cal.App.5th 277, 286; *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, as
14 modified (2013)). Here, Sheriff Gore disclosed documents otherwise protected from
15 disclosure under §6254(f) that supported the Department's controversial decision that
16 Rebecca committed suicide, and now appears to be hiding incriminating documents
17 undermining his decision based on §6254(f) protection. He also misrepresented his
18 instructions to the reexamination team and then interposed exemption from disclosure to
19 hide the truth. Although this matter does not involve an attorney-client privilege where this
20 doctrine typically applies, the public policy concerns it raises are just as pertinent here.

21 In his Declaration, Sheriff Gore admits that on April 18, 2018 he gave the
22 instructions on how the reexamination of Rebecca Zahau's death was to be handled. (Gore
23 Decl., ¶ 2). He further states that he never provided written instructions and therefore his
24 instructions do not exist in written form. (*Id.*) In Ms. Kamphoefner's declaration she states
25 that she did not find the Sheriff's instructions in any emails, and that no one involved in the
26 reexamination recalled receiving the instructions in written form. (Kamphoefner Decl., ¶¶
27 11-17).

28

