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DAVID T. HARDY
TUCSON, AZ

June 29, 2011

VIA HAND DELIVERY

Mr. Jon Fischer
Executive Director
CALIFORNIA FISH AND GAME COMMISSION
P.O. Box 944209
Sacramento, CA 94244-2090

Re: California Department of Fish and Game's Proposed Ban of Traditional Lead-Based Ammunition in State Wildlife Areas and Ecological Reserves

Dear Mr. Fischer:

We write on behalf of our clients the National Rifle Association ("NRA") and the California Rifle & Pistol Association Foundation ("CRPAF"), as well as numerous individual firearm ammunition manufacturers and dealers within California.

On behalf of our clients, and in anticipation of the Department of Fish and Game ("Department") considering a proposal to ban traditional lead-based ammunition in State Wildlife Areas and Ecological Reserves, our office has recently been requesting information regarding certain scientific studies that the Department apparently believes may support the adoption of the proposed regulations.

Before the California Fish and Game Commission ("Commission") takes any action on the Department's proposed regulations to ban traditional lead ammunition in any State Wildlife Areas and Ecological Reserves, the NRA and CRPAF believe the Commission should be aware of the many obstacles that our office has encountered in this information gathering process. We have faced great difficulties in trying to obtain public information and data, which allegedly justify and support the scientific conclusion that the use of lead ammunition should be banned in these areas.

Unfortunately, our efforts to obtain the information and original data upon which the authors of certain studies relied in reaching their conclusions have been partially thwarted by state agencies. In fact, it has been so difficult to get some data that our office has been forced to file lawsuits against the Department and against The Regents of the University of California in order to obtain documents requested pursuant to the California Public Records Act ("CPRA"). As a result, the Department ultimately provided *some* responsive documents, but only after the lawsuit was filed.

In addition to the documents requested from the Department, our office is attempting to obtain the original data relied upon by University of California, Davis (“U.C. Davis”) researchers in the studies entitled “*Impact of the California Lead Ammunition Ban on Reducing Lead Exposure in Golden Eagles and Turkey Vultures*” (the “Impact of Lead Ammunition Ban” study) and “*Lead Exposure in Free-Flying Turkey Vultures Is Associated with Big Game Hunting in California*” (the “Lead Exposure” study). These studies were funded by the Department with taxpayer money, yet U.C. Davis has not given forthright responses to our clients’ CPRA requests regarding the original data collected in preparing the studies.

Indeed, our clients were initially denied access to *any* requested documents because U.C. Davis’ claimed they were exempted from production under the CPRA pursuant to an alleged “researcher’s privilege.” (See Attachment 1). U.C. Davis claims that this “researcher’s privilege” exempts all public documents relating to an “unpublished” study. There is, however, no such privilege found in the CPRA, nor are there any published cases supporting the contention that such a privilege exists, particularly when the research is being used to influence public policy.

Once we established that the U.C. Davis studies referenced above *had in fact been published* and discussed in public forums to promote proposed lead ammunition ban regulations, U.C. Davis then provided *some* information, purporting to have provided our office with all the original data. To the contrary, however, U.C. Davis has yet to fully release all related documentation and original data collected in preparing the studies.¹

Similarly, the University of California, Santa Cruz (“U.C. Santa Cruz”) has asserted the same “researcher’s privilege” regarding its publically-funded research and original data. U.C. Santa Cruz has denied us access to these public records, claiming it will take them approximately *a year and a half* to produce documents responsive to our CPRA request for studies evaluating the alleged effects on wildlife due to ingestion of lead-based ammunition. (See Attachment 2). U.C. Santa Cruz to our dismay, explains that this unreasonable and inappropriate delay is, in part, due to the general disarray of its own research records. Moreover, U.C. Santa Cruz has stated that some of the original data may no longer exist due to the admitted “practice” of one U.C. Santa Cruz researcher to “discard underlying data and analysis once the data is published in a scholarly journal.” (See Attachment 3).

Ultimately, the denial of access to public records by U.C. Santa Cruz forced our office to commence more litigation to obtain the information requested by our clients and required by the Commission to evaluate the legitimacy of the conclusions reached in the studies, which the Commission will be asked to rely on for the proposed lead ban regulations.

¹The NRA and the CRPAF have received only the results of the blood tests done to check for lead in turkey vultures and golden eagles. However, the studies at issue herein clearly indicate that further underlying data were utilized in the studies. For example, page 2 of the Lead Exposure study indicates that “capture location (GIS coordinates), sex, age class, body weight, basic morphometric measurements, and body condition score” were collected for each vulture. Similarly, page 2 of the Impact of Lead Ammunition study indicates that substantially identical data were collected. This is in addition to other documents requested that relate to the studies, such as emails. To date, none of that information has been provided to the NRA or the CRPAF.

One of the prime examples of this inherent problem that our office has encountered on numerous occasions involves the many issues associated with the California condors. The condors are an endangered species to which only a select few individuals have access, most of which are non-governmental organizations working in conjunction with governmental agencies. The California condors are alleged to be a sentinel species used in numerous scientific studies that conclude lead-based ammunition be banned in California. Yet much of the information regarding the condors are not made available through CPRA requests. By denying public access to numerous public records concerning the California condors, the government stifles any real and meaningful public participation in the debate regarding the propriety of the government's regulatory actions.

The obstacles and conflicts encountered by our clients are indicative of a fundamental problem plaguing full, open and informed debate on regulations to ban lead-based ammunition, which includes the proposed lead ammunition ban regulations in State Wildlife Area and Ecological Reserves. Access to this information and data is crucial to facilitating independent analysis and verification of the "science" used to justify the proposals to ban the use of traditional lead-based ammunition. Considering the controversial nature of this issue, only a fair and independent review and analysis of the original data collected in preparing these scientific studies will promote an objective scientific debate regarding the veracity of the data presented and the conclusions reached in the studies. This is something the Commission should insist upon before making any decision on these issues. To the extent that you, or the Commission, can assist our office in obtaining this information, our clients would be extremely grateful.

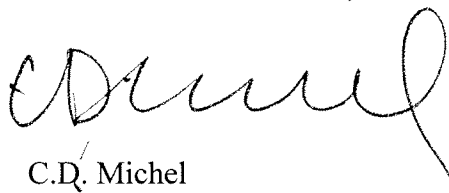
The Commission should seriously consider the fact that it is receiving, and will be asked to rely on, science paid for, performed and published by the same governmental agencies and non-governmental organizations that desire the Department's proposed regulations to ban the use of lead-based ammunition in State Wildlife Areas and Ecological Reserves. NRA and CRPAF respectfully request that the Commission take no action based on the aforementioned studies, or any other studies for which information and original data has been withheld.

Any underlying information and original data should be provided to the public for review and analysis in order to promote a meaningful and open debate on this subject. Provided that transparency is the ultimate goal of the CPRA, and the aforementioned scientific studies are truly based on an objective interpretation of the original data, then there is no reason why responses to our clients' CPRA requests for information and original data should have been delayed or denied.

We welcome any questions or concerns you may have regarding this matter.

Sincerely,

MICHEL & ASSOCIATES, P.C.



C.D. Michel

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CDM/wls

Enclosures

CC: President, Jim Kellogg
Vice President, Richard B. Rogers
Commissioner, Michael Sutton
Commissioner, Daniel W. Richards
Commissioner, Jack Baylis

Attachment 1

UNIVERSITY OF CALIFORNIA, DAVIS

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SANTA BARBARA • SANTA CRUZ

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Facsimile: (530) 752-4931

February 28, 2010

SENT VIA EMAIL & U.S. MAIL

Justus J. Britt
Michel & Associates, P.C.
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802

RE: California Public Records Act Request – PRAR # 12.1.10 – UC Davis – Study Research

Dear Mr. Britt,

This letter serves as a follow up to our telephone conversation on or shortly after February 15, 2011 during which I provided you with an update on the status of your request. I apologize for the delay in sending you this letter, which you requested after our call. As I told you on the call, I was working on competing deadlines which I had to meet before I could turn to this. And then I came down with the flu.

I contacted Dr. Christine Kreuder Johnson after receiving your call inquiring about the status of your request. Dr. Kreuder Johnson told me that as of the date she and I spoke there were no publications of their research that was performed under Grant No. T-12-1, and/or Interagency Agreement #P068593, however, an article has been submitted to a journal for peer review.

As indicated in my December 17, 2010 letter, until the research is published, the related data and analyses are exempt from disclosure under the "researcher's privilege," and the public interest balancing test provided by Government Code section 6255. Once the article that was submitted to a journal for peer review is accepted for publication the researchers will forward to me all the records that relate to that publication, which are responsive to your request. I do not anticipate that my review of the materials will take long, so I hope to be able to provide you with information about the availability of documents soon after the publication.

You stated that there had already been a publication titled "Lead Exposure in free-flying scavenging birds in California," as identified in item 3 of your request. That paper was actually a 3 page report of preliminary findings that was provided to the California Department of Fish and Game (CDFG) by the researchers. I contacted the CDFG to find out if they had already provided your firm with a copy of that report, as it would not be our campus' practice to release progress or preliminary reports until

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the research had actually resulted in a publication that was available to any member of the public. I did not get a definitive answer as to whether that report had already been provided; I was told that the CDFG does not maintain records of what was released. Since it is uncertain whether that preliminary report was already provided to you by another agency, our campus maintains its position that all records related to the research project, including preliminary reports made to the granting agency, are exempt from disclosure until the research is published.

As I indicated in my December 17, 2010 letter, we anticipate disclosing all of the records you have requested when the related research is published. Based on our phone conversation, I believe you wish to receive records on a rolling basis, as they become available after publication so I will update you once I learn of the publication of any of the researcher's findings and I will provide you with an estimated time by which records you requested that relate to that publication will be available.

If you have any questions please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Lynette Temple". The signature is fluid and cursive, with the first name being more prominent.

Lynette Temple
Information Practices Coordinator
(530) 752-3949

- c: Dr. Walter M. Boyce, Co-Director, VM Wildlife Health Center
- Dr. Christine Kreuder Johnson, VM Wildlife Health Center

Attachment 2



OFFICE OF THE CAMPUS PROVOST AND EXECUTIVE VICE CHANCELLOR

200 Kerr Hall, 1156 High Street, Santa Cruz, CA 95064
Phone: (831) 459-3885 FAX (831) 459-2760

VIA EMAIL AND U.S. POST

April 29, 2011

Justus Britt, Esq.
Scott Franklin, Esq.
Michel & Associates, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

Re: December 1 and December 7, 2010 Requests for Information under the California Public Records Act

Dear Mr. Britt and Mr. Franklin:

I write in reply to Mr. Franklin's email, received April 25, 2011, regarding your December 1 and December 7, 2010 requests for information under the provisions of the California Public Records Act (CPRA). Mr. Franklin seeks clarification concerning my April 22, 2011 letter (attached for reference); specifically, whether University of California, Santa Cruz (UCSC) "...has determined it is not going to produce documents for which a production exemption has been asserted... including an exemption based on extraordinary burden..." Additionally, Mr. Franklin inquires if UCSC has completed its search for records responsive to both requests, exclusive of those in possession of Dr. Gwiazda, Dr. Smith, and Dr. Finkelstein.

UCSC is willing to provide records of all relevant analytical data related to published articles to the extent that it was retained, but it will take some time, as explained below.

December 1, 2011 request – Analytical Data for Published Articles

Regarding published articles, as explained in my April 22, 2011 letter, records containing relevant analytical data, to the extent retained, are comingled with documents which are either irrelevant to your December 1, 2010 request and/or contain, in whole or in part, unpublished data. The researchers themselves are the only qualified individuals able to determine relevant disclosable material through line by line review of potentially countless hard copy and electronic records. Because of the length of time it will take, explained in detail below, for Drs. Smith and Finkelstein to conduct the necessary examination of their records in order to identify records, if any, responsive to your requests, we do not believe that the records, if any exist, are reasonably segregable and therefore, on the basis of Government Code Section 6253(a), we object to conducting any such examination. (*See also* ACLU v. Deukmejian (1982) 32 Cal. 3d 440, 453-54 -- release not required where, under Section 6255, burden of segregating exempt from nonexempt information would outweigh any possible utility of disclosure). Without waiving that objection, however, and in the interests of complying with the California Public Records Act to the extent possible, we are willing to conduct that examination, but it will take a significant amount of time to do so, as described in detail as follows.

Dr. Smith estimates identifying and segregating disclosable analytical data records would require at least 160 hours of his time. Dr. Smith is an extremely busy academic with a very full schedule. He oversees a research laboratory with four staff, four PhD graduate students (three first year and one second year), and approximately

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20 undergraduate student researchers. He is the Principal Investigator (PI) on two large National Institutes of Health (NIH) studies and one National Park Service study requiring close and regular interaction with colleagues at other universities and government agencies in the U.S. and abroad. The NIH studies are in their crucial early years and possess strict research schedules involving animal model and human epidemiological studies that cannot be modified without compromising the studies. He is also a co-Investigator on three additional large studies with investigators elsewhere – each with unique research requirements and strict timelines. In addition, he serves on numerous graduate student research and exam committees for other students within and outside his department. On top of this, Dr. Smith has a full teaching schedule, teaching a new graduate and undergraduate course this quarter, and he is slated to teach two and a half courses starting fall quarter. Finally, Dr. Smith serves on multiple departmental, divisional, and university administrative committees. Combined, these efforts routinely require 50 – 60 hours per week. Allowing for his other important ongoing work, including the work described above, Dr. Smith estimates he could at most devote approximately two hours per week to this task; that is, to search for, identify, and segregate relevant, disclosable records is estimated to take approximately 80 weeks.

Dr. Finkelstein estimates it would take approximately 60 hours of her time to determine if she possesses any disclosable material. In addition, she would need to locate, if possible, a functioning Mac computer with a floppy disk drive. Dr. Finkelstein is “research faculty,” meaning she has no security of employment and that all of her salary comes from research funds that she must raise; thus, a substantial portion of her non-salaried time (approximately 20 hours per month) is devoted to identifying and writing grants for her future employment. Dr. Finkelstein is PI on two large grants that are also in their crucial initial stages of starting, and she is co-Investigator on two other funded studies. Similar to Dr. Smith, Dr. Finkelstein’s research projects have strict deadlines with deliverables that have to be met to satisfy the granting agency’s requirements – missing and/or delaying these deadlines would be detrimental to Dr. Finkelstein’s research efforts as well as potentially jeopardize her ability to secure future funding. In addition to her research projects, Dr. Finkelstein is co-advising a graduate student, and is the principal research advisor for two undergraduate students. Typical for academics, Dr. Finkelstein also has many professional service obligations that have strict deadlines; for example, she is a Review Editor for the International Journal, EcoHealth, serves as a reviewer for many scientific journals, gives academic and public seminars multiple times per year, and is a regular guest lecturer for several undergraduate classes at UCSC. Further diminishing her available free time to take on another significant project such as that required in order to respond to your CPRA requests, Dr. Finkelstein is currently working only 50% time, since she is on a reduced effort schedule for personal reasons. She will be remaining on a 50% work schedule for the foreseeable future, and at some point increase her schedule to 75%. Allowing for other important ongoing work, including the work described above, Dr. Finkelstein estimates she could devote approximately 1-2 hours per week to the task; that is, to segregate relevant, disclosable records is estimated to take approximately 30-40 weeks.

Dr. Gwiazda separated from UCSC this week. However, Dr. Gwiazda has surrendered to the University his laptop which may contain electronic documents relevant to your request; Dr. Gwiazda retained no hard copy documents. At this time, the University is unable to estimate the amount of time necessary to identify the universe of relevant disclosable material which may be on the laptop. Dr. Smith is the only person qualified to examine the laptop and determine whether there is any relevant disclosable material on it. In the future, UCSC intends to provide a more substantive estimate of time required to cull through this material, after Dr. Smith has had an opportunity to conduct a preliminary examination of the laptop.

These are good faith estimates of the amount of time reasonably required to identify and segregate disclosable relevant records. Please note the researchers have been unable to analyze the amount of time with any certainty. Once the examination is underway we will contact you if the estimate needs to be adjusted. Additionally, please advise whether you would like these records released to you as they become available or if you prefer to wait until all records are compiled.

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Because of the breadth of the scope of your December 1, 2010 request, and for the reasons articulated above (and in my April 22 letter), the volume of responsive documents is impossible to estimate at this time. Additionally, because Dr. Smith's research relates to measurement of lead, prioritizing the scope of your request will likely enable the researchers to more quickly locate records you may be interested in inspecting first; one suggestion to focus your request, for example, is to identify a specific published article or topic (e.g., other than "lead").

To clarify, no additional analytical data records exist related to Molly Church's dissertation provided to you March 18 (word file entitled "CPRA Britt Rex Rell Church THESIS FINAL.doc"). For your information, all actual final data is included in this document.

December 7, 2010 request – Analytical Data

Regarding analytical data responsive to your December 7, 2010 request, a manuscript is being drafted relevant to the data related to condors, including "303", and is estimated to be submitted for publication in the fall of 2011 (as per my April 22, 2011 letter). Researchers anticipate journal publication in December 2011, after which all relevant analytical data in support of the final data published in the article would be made available to you.

Records UCSC will not produce

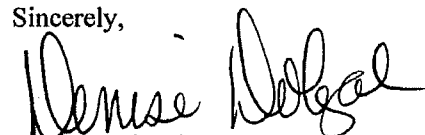
UCSC intends to withhold production of three email attachments based on exemptions explained in my April 22, 2011 letter; specifically, attachments to emails on pages 225-226, 227-229, and 240-243 of documents provided to you March 18, 2011. The public interest served by not disclosing these records clearly outweighs the public interest served by disclosure of the records. (Government Code Section 6254(a) and 6255).

Similarly, based on exemptions articulated in my April 22 letter, UCSC will not produce records of analytical data that have not yet been published in a peer reviewed scientific journal as the public interest served by not disclosing these records clearly outweighs the public interest served by disclosure of the records. (Government Code Section 6255).

To summarize and in answer to your questions, UCSC intends to produce relevant records of analytical data that have already been published. As stated above, following publication of the journal article related to "303" UCSC is happy to share relevant analytical data with you. UCSC does not intend to produce records of unpublished analytical data based on exemptions asserted in my April 22, 2011 letter. Setting aside documents potentially in the possession of Dr. Smith or Dr. Finkelstein, UCSC has completed its search for records responsive to the two requests at issue.

Please do not hesitate to contact me with questions at (831) 459-4003 or ddolezal@ucsc.edu.

Sincerely,


Denise Dolezal
Information Practices Analyst

Enclosure

Attachment 3



OFFICE OF THE CAMPUS PROVOST AND EXECUTIVE VICE CHANCELLOR

200 Kerr Hall, 1156 High Street, Santa Cruz, CA 95064
Phone: (831) 459-3885 FAX (831) 459-2760

VIA EMAIL AND U.S. POST

April 22, 2011

Justus Britt, Esq.
Scott Franklin, Esq.
Michel & Associates, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

Re: December 1 and 7, 2010 Requests for Information under the California Public Records Act and April 7, 2011 Pre-Litigation Demand

Dear Mr. Britt and Mr. Franklin:

I write in response to your April 7, 2011 letter demanding documents pursuant to your two above-referenced California Public Records Act (CPRA) requests. Your letter raises many issues which I will address in detail below. I will also reference matters that arose during our telephone calls of April 4, 2011 and April 14, 2011.

Documents Produced – Clarification Requested

On April 4, 2011, Mr. Franklin asked the University to clarify which pages of documents already produced relate to which document request. To clarify, pages 1 through 224 of the documents produced on March 18, 2011 respond to your December 1, 2010 request for documents related to 2001 through 2006 research; pages 225 through 252 respond to your December 7, 2010 “303” request. The word file entitled “CPRA Britt Rex Rel1 Church THESIS FINAL.doc” responds to the December 1, 2010 request. The two .TIF files respond to the December 7, 2010 request.

In your April 7 letter you ask the University to clarify the basis for the redactions in certain emails dated October 5 and 6, 2010. Please note that pages 250 and 251 were redacted pursuant to Government Code section 6254(c), as disclosure of the information “...would constitute an unwarranted invasion of personal privacy...” Specifically, the redacted portions of these documents contain unrelated personal information that is not within the scope of your request and has nothing whatsoever to do with the research information you seek.

On page 2 second paragraph of your April 7 letter you state “...several produced emails indicate the presence of attachments that do not appear to have been produced...”. To clarify, three email attachments were withheld from production. The attachment you reference in footnote 3 of your letter, titled “20091208_DraftPressRelease (condor death).docx”, was never received by UCSC and is therefore not in the University’s possession.

Two of the three withheld email attachments relate to a draft press release (attachments to emails pages 225-226 and 227-229). These were withheld pursuant to Government Code Section 6254(a) as interagency drafts not retained in the ordinary course of business. The drafts contain inaccurate and incomplete information. Therefore, the public interest in withholding

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clearly outweighs the public interest in disclosure. (*See also* California Government Code Section 6255). The University is unclear as to which agency initially composed the draft press release. UCSC researchers were engaged briefly for fact-checking purposes only. The researchers understood the information would only be included in a press-kit. The researchers became aware of the National Park Service (NPS) posting on the internet only after UCSC received your December 7, 2010 CPRA request. I believe that the posting has since been taken down, at UCSC's request, and the University does not have a copy of it.

The final withheld attachment was appended to an email from Curtis Eng to Myra Finkelstein dated August 2, 2010 (pp. 240-243). This attachment was withheld pursuant to Government Code Section 6255, as the public interest served by not disclosing these records clearly outweighs the public interest served by disclosure of the records. Specifically, the attachment contains Los Angeles Zoo animal medical files sent to UCSC researchers to explore, in collaboration with the Zoo, lead exposure related to health outcomes of Zoo patients with the further intent to conduct statistical analysis for future peer reviewed publication. The Zoo provided these documents to UCSC researchers with the clear expectation that they would be held in confidence. The Zoo owns the records; UCSC researchers did not generate the health records of the condors. Disclosure of these records would negatively impact the University's future collaborative efforts with the Zoo, as Zoo officials would be reluctant to share their animal medical files if there were the possibility of disclosure under CPRA. Moreover, disclosure of these records would seriously undermine the ongoing work of UCSC researchers by stifling their collaborative relationships with others. In particular, disclosure of Zoo records would diminish the confidence of other potential research collaborators in the University's ability to protect privileged data owned by others. Therefore, the Section 6255 balancing in this case is clearly in favor of non-disclosure. The information is similarly exempt from disclosure pursuant to the "official information" privilege, for information acquired in confidence by a public agency, where disclosure of the information is against the public interest. (California Evidence Code Section 1040, incorporated pursuant to Government Code Section 6254(k)).

Documents withheld pursuant to Government Code Section 6255 relevant to December 1, 2010 request – unpublished data

The CPRA does not require the University to create records in order to respond to a request. Therefore, UCSC respectfully declines to provide a listing of specific documents withheld as suggested on page three, footnote 4, of your letter. Generally, the documents withheld contain data related either to your expressly stated issue, "...the alleged connection between hunting with lead-based ammunition and health problems observed in California condors..." (April 7, 2011 letter, page 3) or Dr. Smith's ongoing research related to lead paint exposure. They have been withheld because they contain analytic data that has not as yet been fully analyzed, published in scholarly journals, or shared with an outside agency. The documents are thus protected from disclosure under Government Code Section 6255.

As I previously explained in my March 7, 2011 letter to you, the courts have consistently recognized a "researcher's privilege" based upon a strong Constitutional interest in the right of scholars to conduct research without interference and in furtherance of academic freedom. Premature disclosure of analytic data in proposed or ongoing research will clearly result in a chilling effect on academic research. (*See e.g., Dow Chemical v. Allen*, 672 F.2d 1262 (7th Cir. 1982) -- noting the possibility for misappropriation of research results, the fear of additional disclosure in the future and potential harm to the integrity of the research to the researchers' careers.)

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In addition, the analytic data and other research-related material being withheld under Government Code Section 6255 are analogous to the deliberative materials that were protected from disclosure in two California court decisions: California First Amendment Coalition v. Superior Court, 67 Cal. App. 4th 159 (Cal. App. 3d Dist. 1998); and Times Mirror Co. v. Superior Court, 53 Cal. 3d 1325 (Cal. 1991). Those cases protect the right of public officials to “think out loud” or engage in candid internal deliberations without the chilling effect of public disclosure of those deliberations. The academic process is founded on the principle that researchers are free to think out loud and make mistakes privately before they decide what conclusions are supported, and it is their published conclusions that should be open to public view and scrutiny. The public interest in protecting the academic freedom of researchers in this way clearly outweighs the public interest in prematurely disclosing analytical data prior to publication of the research. (Government Code Section 6255)

To clarify the facts of the current matter, the research is in varying stages of completion and the data is still being compiled and analyzed. When the research is published in a scholarly peer-reviewed journal, all the underlying data and statistical analysis relied upon for the publication will be available to the public, including you. Subsequent to my April 4 letter to you, we learned that a **manuscript** is being drafted relevant to the data related to condors and is estimated to be submitted for publication in the fall of 2011. Researchers anticipate journal publication in December 2011, after which the relevant data would be made available to the public.

In your letter you state that “those associated with UCSC have repeatedly made their condor-related findings available between 2006 and the present,” (April 7, 2011 letter, page 4). Accordingly, you claim, the data is not confidential and the University cannot claim a “researcher’s privilege.” To be blunt, your statement of the facts is incorrect. On the contrary, there has been no publication of data concerning UCSC researchers’ proposed or ongoing research. To the extent findings have been presented at scholarly conferences or government agency meetings, such presentations and/or “abstracts” were preliminary only and do not constitute the publication of scholarly research. For example, abstracts prepared for scientific meetings (e.g., Kathryn Parmentier, et al., *Feather Isotopes Reflect History and ALAD Inhibition Shows Sub-Clinical Toxicity in California Condors* – cited in your April 7 letter, page 4) are not anonymously peer-reviewed which is the cornerstone supporting the publication of scientific papers.¹

The abstracts you cite reveal preliminary interpretation of results only. Information revealed in abstracts only summarizes what is needed to convey the preliminary findings. Similarly, Donald Smith presented preliminary interpretations at 2007 California Fish & Game Commission meetings to which you refer. (April 7 letter, page 4) If scientists were forced to turn over all the underlying data in their ongoing research merely because they had presented an abstract or preliminary summary of that research at a meeting or agency presentation, it would undermine their scientific ownership of the data and threaten the very concept of intellectual discourse among research peers. Specifically, a competitor could then seek all original underlying data and incorporate those data into his/her research before they were peer reviewed and published by the scientist who generated the data. Moreover, scientists present their preliminary and ongoing work at scholarly meetings in order to obtain feedback from their colleagues. If researchers thought they were under an obligation to release data that was still preliminary and

¹ Peer review promotes publication of papers that are unbiased and of high scientific credibility as judged by anonymous review by researchers’ scientific peers.

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not yet fully analyzed because preliminary interpretations were presented at a meeting or conference, they would not be presenting at scientific conferences -- this would ultimately undermine and inhibit the scientists' ability to develop and further their research to the public's detriment.

Underlying Data for Published Articles - December 1, 2010 request

Regarding underlying research data related to records of published articles provided to you on March 18, I was only recently able to connect with Dr. Roberto Gwiazda. As I explained in my phone conversation with Mr. Franklin, Dr. Gwiazda currently holds only a *non-salaried* appointment with UCSC and has spent very little time on campus over the past several years. I now understand that it is possible that Dr. Gwiazda may have responsive University records in his possession concerning research which has already been published (see e.g., Molly Church, et al., "*Ammunition Is the Principal Source of Lead Accumulated by California Condors Re-Introduced to the Wild*", published in the Journal of Environmental Science Technology in 2006 -- cited in your April 7 letter, page 4), as well as data related to Dr. Smith's ongoing unpublished research. However, according to Dr. Gwiazda, his records are not easily identified. Rather, he would have to examine his records one by one to make certain not to disclose any ongoing unpublished research data. Given that your request covers a five year period (2001-2006), he believes this exercise would be extraordinarily time-consuming as the number of documents is potentially quite large, and the word "lead" was an extremely common term used in the Smith laboratory during those years. Is there a way to narrow your focus?

Please note that Dr. Smith's practice has been to discard underlying data and analyses once the data is published in a scholarly journal. Again, in view of Mr. Franklin's recent clarification in our telephone conversation of April 14, 2011 that the scope of your requests is not limited to the "...alleged connection between hunting with lead-based ammunition and health problems observed in California condors..." (as was suggested in your April 7 letter), it is possible that some published data, unrelated to condors, is in Dr. Smith's possession. However, I understand from Dr. Smith that it would be extraordinarily burdensome for him to search for this data. Much of it is co-mingled with data that is either not relevant to your requests or that is related to ongoing research which has not yet been published, thus requiring line by line assessment of countless hard copy and electronic copy documents. Likewise, Dr. Finkelstein possesses published data, also unrelated to condors. However, again, we are informed that it would be extraordinarily burdensome to retrieve as it would require going through boxes of disorganized files and floppy disk back-ups and CD back-ups, none of which are categorized or easily identified. It would take days to discern relevance and would interfere with her ongoing research projects. Research data is not organized in an easily searchable manner; rather, it is intermingled with data with other concurrent projects. The University is not obligated to compile records where it would be extraordinarily burdensome to do so, because the burden on the University to produce the records would clearly outweigh the public benefit in obtaining the information. (Government Code Section 6255; American Civil Liberties Union Foundation v. Deukmejian, 32 Cal. 3d 440 (Cal. 1982)). Again, is there a way to narrow the focus of your request to help us with this issue?

Finally, for your information, Molly Church, a former UCSC graduate student and current UC Davis Veterinary Resident, has confirmed she has no responsive records in her possession.

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Documents withheld pursuant to Government Code Section 6255 relevant to December 7, 2010 request

You claim that UCSC researchers provided “*results*” of their analysis of “analytic data” responsive to this request to the National Park Service (NPS) and the Ventana Wildlife Society (VWS). Therefore, you contend, it is disingenuous for the University to claim the confidential protection of the researcher’s privilege. However, again, UCSC researchers provided preliminary findings only to these agencies. You have been provided with the same information that was disclosed to those entities.

To clarify, there are two types of analyses that UCSC typically conducts on fragments submitted to them by a research collaborator; the first type results in preliminary findings, to rule in or out whether a fragment submitted by an agency is consistent with lead. It is common for these agencies to submit different fragment types retrieved from condors to UCSC so as to quickly understand whether or not the fragments are lead based. If lead based, the agencies may treat the lead poisoning case in a particular way to prevent lead exposure toxicity from progressing; if not lead based, they treat the case differently. It is essential for veterinarians and wildlife managers to understand fragment characteristics. *Knowing this information is integral in the development of an appropriate management plan to prevent lead poisonings of California condors.*

Regarding the second type of test, when/if the fragment is determined by UCSC to be consistent with lead, further analysis and data collection may be pursued (e.g., stable lead isotopic analysis) as aligned with the researcher’s intellectual interest. In connection with the December 7, 2010 request at issue, the test results to which you refer have not been fully analyzed. Ongoing scrutiny and analysis is planned once the researcher has completed current research projects. Again, you are asking the University to release underlying research data related to ongoing research. The public interest in non-disclosure of this information clearly outweighs the public interest in disclosure. (Government Code Section 6255) As discussed above, the premature release of data prior to the scholarly publication of research results would impede and potentially harm our researchers’ ability to compete with their peers and collaborate with other researchers, and ultimately undermine their scientific careers to the detriment of the public.

UCSC understood that the information it was providing to the NPS and VWS would immediately be used by the parties to manage potential lead exposure in California condors; it is irrelevant that the parties with whom the information was shared in an emergent context subsequently engaged, as you claim, in “active public debate regarding the alleged link between lead-based ammunition use and California condor health issues.” (April 7, 2011 letter, page 5)

Finally, the abstract you reference on page 4 of your April 7 letter (“M.E. Finkelstein, presentation of findings that lead ammunition is the most plausible source of exposure [presented at the Society of Toxicology annual meeting held March 6-10, 2011]”) was not related to “303” (the subject of your December 7, 2010 document request), and contains no analytic data. In any event, and as noted above, this and similar conferences are part of the preliminary scholarly activity associated with the scientific process. The fact that public interest may have been piqued by this presentation is entirely irrelevant to the University’s disclosure obligations.

In summary, condor-related data, including data specific to “303” (the subject of your December 7, 2010 request), is anticipated to be published and available for public inspection in December

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2011. Moreover, can you help us focus your request in connection with potentially existing data regarding published research (December 1, 2010 request)? Please feel free to contact me at (831) 459-4003 or via email ddolezal@ucsc.edu.

Sincerely,

A handwritten signature in cursive script that reads "Denise Dolezal". The signature is written in black ink and is positioned above the printed name.

Denise Dolezal
Information Practices Analyst