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Brian@gurwitzlaw.com

Attorney for Defendant

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

DEC 13 2011

ALAN CARLSON, Clerk of the Court

*R. Lucey*  
BY R. LUCEY

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

30-2011

**Cathy Thomas,**

Petitioner,

vs.

**Anthony Rackauckas, Jr.,** in his  
capacity as Orange County  
District Attorney,

Respondent.

Case No. 00529489

**Verified Petition for Writ  
Of Mandate**

Code of Civ. Proc., §§ 1085-1086;  
Govt. Code, § 6258.

**Introduction**

This writ proceeding arises out of the recent homicide of Kelly Thomas, a mentally ill, homeless man killed by members of the Fullerton Police Department. The district attorney's office is prosecuting two of the involved police officers with murder and manslaughter charges.

Petitioner Cathy Thomas is the mother of Kelly Thomas. As her son's legal representative, she is statutorily-entitled through the California Public Records Act (CPRA) to obtain specified records from the district attorney in relation to the case, even though criminal charges are pending. (See Gov. Code, § 6254, subdivision (f).)

1 While conceding that petitioner falls within the class of individuals  
2 normally entitled to these documents, the district attorney has denied her  
3 CPRA request for various, conclusory reasons. The denial letter shows a  
4 startling lack of respect for his CPRA duties, insofar as the district attorney  
5 seeks to exempt *every single document in his possession*. Even if the district  
6 attorney's purported justifications for CPRA exemption had merit as to  
7 certain records (a point petitioner does not concede), it is inconceivable that  
8 this rationale would apply to every record in his possession, and that other  
9 remedies (e.g., redaction and/or protective orders) would not protect the  
10 interests he advances.

11 This writ petition is therefore necessary to compel the district attorney  
12 to fulfill the duties imposed upon him by law.

### 14 Allegations

15 By way of this verified petition, petitioner affirmative alleges the  
16 following:

17 1. Petitioner Cathy Thomas is a resident of the County of Orange,  
18 State of California.

19 2. Respondent Anthony Rackauckas, Jr., is the Orange County  
20 District Attorney.

21 3. Petitioner is the mother of Kelly Thomas, a homeless  
22 schizophrenic man who was unlawfully killed by members of the Fullerton  
23 Police Department.

24 4. Respondent is prosecuting two police officers for Mr. Thomas's  
25 homicide in *People v. Cicilnelli, et al.* (Orange Co. Sup. Ct. No. 11CF2575).

26 5. In a letter dated October 7, 2011 (and attached hereto as  
27 Exhibit A), petitioner made a California Public Records Act (CPRA) request of  
28 respondent, seeking "access to, and copies of, all records that [his] office

1 possessed relating to [his] investigation of the case against his killers, to the  
2 extent the materials are subject to disclosure under Government Code  
3 section 6254, subdivision (f).”

4 6. Section 6254, subdivision (f), generally provides crime victims  
5 with access to specified records in a criminal prosecution, even though the  
6 case is still pending.

7 7. Respondent wrongly denied Ms. Thomas’s request in a letter  
8 dated October 14, 2011. (See Exhibit B, attached.)

9 8. In that letter, respondent conceded that as the murder victim’s  
10 mother, Ms. Thomas “does indeed fall within the classification of individuals  
11 listed in Government Code section 6254, subdivision (f).”

12 9. Respondent nonetheless denied access to, and copies of, the  
13 records at issue, based on the conclusory grounds that their release could  
14 result in witnesses intimidation, jeopardize the investigation and prosecution  
15 of the defendants, prevent the empaneling of a jury, and deny a fair trial.

16 10. The district attorney made no good faith effort to comply with  
17 the CPRA. Even assuming for argument’s sake that there was some  
18 justification to withhold one or more records, it strains credulity to believe  
19 that this justification would apply to each and every document in his  
20 possession.

21 11. The justifications advanced by respondent are meritless for a  
22 number of reasons. These reasons will be addressed in detail depending on  
23 the contents of his answer – if any – to this petition. Suffice it to say, the  
24 records requested are not confidential materials that remain exclusively  
25 within the possession of law enforcement. To the contrary, this is discovery  
26 that has presumably been released already to the defendants in the  
27 underlying criminal case. Just as Penal Code section 1054 et seq. required the  
28 disclosure to these defendants, Government Code section 6254, subdivision

1 (f), requires disclosure to the victim's next-of-kin.

2 12. This writ proceeding is authorized by Government Code  
3 section 6258 as the remedy to enforce petitioner's right to review the records  
4 at issue here.

5 **Request for Relief**

6 Petitioner respectfully seeks the following:

7 1. That the court issue an alternative writ of mandate ordering  
8 respondent to release the records sought by petitioner, or show cause why  
9 such an order should not issue.

10 2. That attorney fees and costs be paid by the Orange County  
11 District Attorney, as required by Government Code section 6259, subdivision  
12 (d).

13  
14 Respectfully submitted this 13th day December, 2011.

15  
16 The Law Office of Brian Gurwitz, APC

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19 By: 

20 Brian N. Gurwitz  
21 Counsel for Petitioner  
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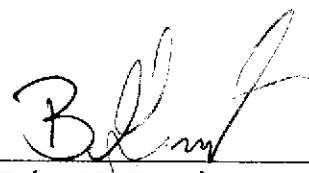
**Verification**

I, Brian Gurwitz, declare:

I represent petitioner in this writ proceeding. I have prepared this petition and know its contents. I have knowledge of all matters set forth herein and know them to be true, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

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

Executed this 13th day of December, 2011 in Tustin, California.

  
\_\_\_\_\_  
Brian N. Gurwitz

Eth A.



THE LAW OFFICE OF  
**BRIAN GURWITZ**  
A PROFESSIONAL CORPORATION

CERTIFIED CRIMINAL LAW SPECIALIST • STATE BAR OF CALIFORNIA • BOARD OF LEGAL SPECIALIZATION

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CELL: 714-925-2675

EMAIL: Brian@Gurwitzlaw.com

www.Gurwitzlaw.com

October 7, 2011

Tony Rackauckas  
Orange County District Attorney  
401 Civic Center Drive West  
Santa Ana, California 92701

Re: California Public Records Act Request concerning *People v. Cicinelli, et al.*  
(11CF2575)

Dear Tony:

As you know, I represent Cathy Thomas in connection with the murder of her son, Kelly Thomas.

I respectfully request that we be provided access to, and copies of, all records that your office possesses relating to your investigation of the case against his killers, to the extent the materials are subject to disclosure under the Government Code section 6254, subdivision (f).

Ms. Thomas falls within the classification of individuals entitled to receive these records for two reasons. First, she is a "victim" of the "incident" investigated by your office. (See, e.g., Cal. Const., Art. I, § 28, subd. (e) [defining "victim" to include the parents of a deceased crime victim].) Second, my client is an "authorized representative" of her son since he died intestate, and without children or a spouse, and thus she is statutorily entitled to pursue wrongful death and survivorship claims against the perpetrators of his homicide. (See, e.g., Code of Civ. Proc. § 377.60.)

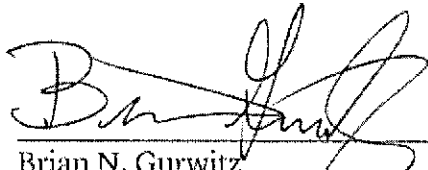
The requested records include, but are not limited to, all audio and video recordings of Mr. Thomas's beating. These recordings are subject to disclosure insofar as they memorialize the "statements of the parties involved in the incident." (Govt. Code, § 6254, subd. (f); see also Govt. Code, § 6252, subd. (e) [defining "public records" to include audiovisual recordings, as opposed to simply transcripts of the statements contained on the recordings].)

I will note that neither my client nor I desire to release into the public domain any material that might jeopardize your ability to obtain a conviction against the defendants in this case. To that end, I am willing to receive the copies of the records

subject to a mutually-agreeable court order that prohibits me or my client from making further copies of the records, or publicizing the contents thereof.

Thank you very much.

Sincerely,



Brian N. Gurwitz  
Counsel for Cathy Thomas

Exh. B.



OFFICE OF THE  
**DISTRICT ATTORNEY**  
ORANGE COUNTY, CALIFORNIA  
TONY RACKAUCKAS, DISTRICT ATTORNEY

**JIM TANIZAKI**  
SENIOR ASSISTANT D.A.  
VERTICAL PROSECUTIONS/  
VIOLENT CRIMES

**WILLIAM FECCIA**  
SENIOR ASSISTANT D.A.  
SPECIAL PROJECTS

**MARY ANNE MCCAULEY**  
SENIOR ASSISTANT D.A.  
BRANCH COURT OPERATIONS

**JOSEPH D'AGOSTINO**  
SENIOR ASSISTANT D.A.  
GENERAL FELONIES/  
ECONOMIC CRIMES

**JEFF MCLAUGHLIN**  
CHIEF  
BUREAU OF INVESTIGATION

**LISA BOHAN - JOHNSTON**  
DIRECTOR  
ADMINISTRATIVE SERVICES

**SUSAN KANG SCHROEDER**  
CHIEF OF STAFF

October 14, 2011

Mr. Brian N. Gurwitz  
1422 Edinger Avenue  
Suite 100  
Tustin, CA 92780

Re: Public Records Act Request concerning *People v. Cicinelli, et al.*

Dear Mr. Gurwitz:

In compliance with Government Code Section 6253, this letter addresses your Public Records Act request dated October 7, 2011, which this office received the same day via email. This letter constitutes our formal response, which is made within that statutorily required time, to your public record demand.

In your letter, you requested the following information: "[A]ccess to, and copies of, all records that your office possesses relating to your investigation of the case against his [Kelly Thomas'] killers, to the extent the materials are subject to disclosure under the Government Code section 6254, subdivision (f)."

Since the materials are being requested on behalf of Cathy Thomas, the mother of Kelly Thomas, she does indeed fall within the classification of individuals listed in Government Code Section 6254, subdivision (f), who would be entitled, at some point in time, to the information contained within that subdivision, including the names & addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, and the statements of all witnesses, other than confidential informants.

However, as you are aware, our office is currently prosecuting Manuel Anthony Ramos and Jay Patrick Cicinelli for their criminal participation in the beating-death of Kelly Thomas, as reflected in Orange County Superior Court case number 11CF2575. As such, to release the materials at this juncture, including the names and addresses of all persons involved in or witnesses to the incident, along with statements of all of the witnesses, would clearly endanger the successful completion of the investigation and the case against the defendants.

Furthermore, the suggested "mutually-agreeable court order" prohibiting further copies of the records or publicizing of the contents of the material, along with the asserted aversion to releasing the material or jeopardizing the ability to obtain a conviction, will not be sufficient to prevent endangerment of the successful completion of the investigation and prosecution. The premature release of any information

REPLY TO: ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

WEB PAGE: [www.OrangeCountyCA.com](http://www.OrangeCountyCA.com)

MAIN OFFICE  
401 CIVIC CENTER DR. W.  
P.O. BOX 808  
SANTA ANA, CA 92701  
(714) 834-3000

NORTH OFFICE  
1275 N. BERKELEY AVE.  
FULLERTON, CA 92631  
(714) 773-1400

WEST OFFICE  
6141 13<sup>TH</sup> STREET  
WESTMINSTER, CA 92683  
(714) 866-7201

HARBOR OFFICE  
4601 JAMBREE RD.  
NEWPORT BEACH, CA 92660  
(949) 476-4600

JUVENILE OFFICE  
341 CITY DRIVE SOUTH  
ORANGE, CA 92668  
(714) 935-7024

CENTRAL OFFICE  
401 CIVIC CENTER DR. W.  
P.O. BOX 808  
SANTA ANA, CA 92701  
(714) 834-3662

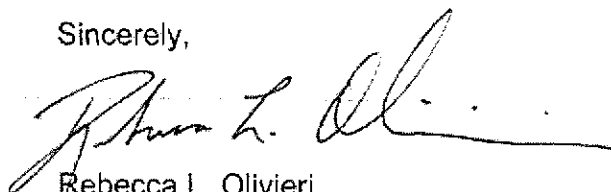


will not only make it difficult to impanel an impartial jury, but it may also tend to prevent a fair trial. Moreover, permitting the review of the materials in the investigative file at this point could result in potential interference with witnesses due to influence, or even intimidation. While there may be a shared interest in the prosecution of these defendants, our office has a separate and compelling interest in the criminal prosecution and bringing the perpetrators to justice, an interest that will be jeopardized by the premature disclosure of the investigative materials.

Therefore, notwithstanding the rights of Ms. Thomas to the information listed in Government Code Section 6254, subdivision (f), we are asserting the exception to Government Code Section 6254, subdivision (f), and will not be releasing the information at this time. We will consider this request pending and will release the information as soon as there is a change of circumstance.

If you disagree with the positions I have taken in this letter, I am willing to reconsider my views based on any reasons you wish to present or any legal authorities you wish to cite.

Sincerely,

A handwritten signature in dark ink, appearing to read "Rebecca L. Olivieri", with a long horizontal flourish extending to the right.

Rebecca L. Olivieri  
Senior Deputy District Attorney  
Special Prosecutions Unit

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Brian N. Gurwitz 171862 1422 Edinger Avenue, Suite 100 Tustin, California 92780 TELEPHONE NO.: 714-880-8800 FAX NO. (Optional): 714-880-8801 E-MAIL ADDRESS (Optional): Brian@Gurwitzlaw.com ATTORNEY FOR (Name):		<b>FOR COURT USE ONLY</b>          CASE NUMBER:  TBD   JUDGE:  DEPT.:
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Orange STREET ADDRESS: 700 Civic Center Drive West MAILING ADDRESS: CITY AND ZIP CODE: Santa Ana, CA 92701 BRANCH NAME: Central		
PLAINTIFF/PETITIONER: Cathy Thomas DEFENDANT/RESPONDENT: Anthony Rackauckas, Jr.		
<b>PROOF OF SERVICE—CIVIL</b> <b>Check method of service (only one):</b> <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input checked="" type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service		

(Do not use this proof of service to show service of a Summons and complaint.)

- At the time of service I was over 18 years of age and not a party to this action.
- My residence or business address is:  
1422 Edinger Avenue, Suite 100 Tustin, California 92780
- ☐ The fax number or electronic notification address from which I served the documents is (complete if service was by fax or electronic service):
- On (date): I served the following documents (specify):  
Verified Petition for writ of mandate.

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

- I served the documents on the person or persons below, as follows:
  - Name of person served: Orange County District Attorney Tony Rackauckas
  - ☒ (Complete if service was by personal service, mail, overnight delivery, or messenger service.)

Business or residential address where person was served:

401 Civic Center Drive West, Santa Ana, CA 92701

- ☐ (Complete if service was by fax or electronic service.)

(1) Fax number or electronic notification address where person was served:

(2) Time of service:

☐ The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

- The documents were served by the following means (specify):

- ☒ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

(Continued on back)

CASE NAME

CASE NUMBER:

Thomas v. Rackauckas

TBD

6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (specify one):
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):
- c. ☐ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)
- e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Date:

B. GURWITZ

(TYPE OR PRINT NAME OF DECLARANT)

B. Gurwitz

(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

## DECLARATION OF MESSENGER

- ☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date):

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

Date:

(NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)