Case No. D060415

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT - DIVISION ONE

MINCAL CONSUMER LAW GROUP,

Petitioner and Appellant,

vs.

CITY OF CARLSBAD,

Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT CITY OF CARLSBAD

From the Superior Court of the State of California,
County of San Diego, Case No. 37-2010-0057548-CU-WM-NC
The Honorable Thomas P. Nugent, Judge

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APPLICATION

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") respectfully applies for permission from the presiding justice to file the *Amicus Curiae* Brief contained herein.

The members of the League expend significant public resources responding to requests for crime-related information under the Public Records Act. While the members of the League are committed to the disclosure of public records, they contend that the California Legislature's adoption of Assembly Bill 277, which amended Government Code section 6254, subdivision (f) ("Section 6254(f)"), codified the status quo of releasing limited, contemporaneous crime-related information and reflected a policy decision to balance competing interests of protecting the public's right to know what crimes and arrests have occurred with the interests of protecting public agencies from the burdens of extensive record retention and disclosure requirements that may otherwise harm investigations, witnesses and/or victims of crimes. Because judicial implementation of this legislative policy decision is important to their members, the League seeks leave to file this Brief.

The League is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee,

which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The League has a direct interest in the legal issues presented in this case because its members will be directly impacted by the resolution of the question of whether releasing crime related information from the last thirty (30) days satisfies the legislative intent of Section 6254(f) to codify the tradition of releasing contemporaneous information or whether more extensive and burdensome disclosures requirements attach to Section 6254(f). Such requests for individualized information are common, and often result in lengthy disputes, such as the one here. The League believes that judicial confirmation of the Legislature's policy decision represented by Section 6254(f) will help prevent future disputes over this very common question.

In addition, the proposed Brief will assist the Court in deciding the issue presented in the appeal by highlighting for the Court the statewide implications of the decision for the cities that record and make available contemporaneous crime related information. The decision could not only significantly alter how individual cities in California respond to requests for such information but could also significantly impact the obligation of cities to record, retain and redact vast amounts of information. Uncertain or

indefinite retention requirements, additional recording of crime-related information, and individualized redaction of all crime records over extensive historical time periods consume valuable public resources. Cities rely upon the balance struck by Section 6254(f) to ensure public access to contemporaneous crime-related information without overburdening staff time and public funds. The League's statewide perspective on this statewide issue will assist the Court in deciding the appeal.

For these reasons, the League respectfully requests leave to file the *Amicus Curiae* Brief contained herein.

Dated: July 2, 2012

BEST BEST & KRIEGER LLP

By: Rebecca Andrews

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I.

INTRODUCTION AND STATEMENT OF THE CASE

This case presents an important issue regarding the application of Government Code section 6254, subdivision (f) ("Section 6254(f)") to records of crime related information, which are developed and maintained by Respondent, the City of Carlsbad ("City"). Section 6254(f) represents the Legislature's policy decision to balance the public's right to know certain contemporaneous crime-related information with reasonable disclosure obligations for public agencies. After briefing and oral arguments on MinCal Consumer Law Group's ("MinCal") writ petition seeking to compel the City to produce certain records under the Public Records Act, the trial court found that disclosure of crime-related information from the previous thirty (30) days fulfills the legislative intent behind Section 6254(f). As this finding correctly implements the policy decision made by the Legislature in Section 6254(f), the trial court's order denying MinCal's petition should be affirmed.

The factual and procedural history of this case illustrate why judicial confirmation of the Legislature's policy decision reflected in Section 6254(f) is important to the League. MinCal, Petitioner and Appellant, submitted a series of letters to the City requesting information on the victims of identify theft and ultimately sought the time and date of all reports as well as the name and age of victims and factual circumstances

surrounding four (4) incident types over a nine (9) month period. (Clerk's Transcript ("CT") 025, 027, 029.)

Pursuant to Section 6254(f), the City made available daily logs of crime-related information for the previous 30 days, noting that information older than 30 days is not "contemporaneous" but rather historical and beyond the scope of Section 6254(f). (CT 028.) The daily logs did not contain the names and ages of victims due to technical limitations in recording the information. (CT 044-046.) Further, consistent with the practice of other law enforcement agencies in the San Diego County area and throughout California, the City does not maintain logs older than 30 days. (CT 044, ¶ 6; 045, ¶ 12.) Providing historical crime-related data would thus require law enforcement agencies to create a record not otherwise in existence or to undertake indefinite records retention obligations. (See, *ibid.*)

Although the City made its daily logs for the previous 30 days available to MinCal in accordance with Section 6254(f), MinCal filed a petition for a writ of mandate to compel disclosure of historical information. (CT 001-011.) After briefing and oral argument, the trial court found that Section 6254(f) does not mandate law enforcement agencies to record any specific information, does not require disclosure of historical information, and that 30 days is a reasonable interpretation of the term "contemporaneous." (CT 062-063.)

Disputes similar to the one at issue in this case have played out or are currently playing out in California. In light of the unsettled meaning of the term "contemporaneous," it is important to have clarity on Section 6254(f). This Court should confirm the trial court's interpretation and application of Section 6254(f)'s "contemporaneous" disclosure requirement as reasonably meaning information from the previous 30 days. Such an opinion will assist law enforcement agencies throughout California as they receive and respond to similar requests for crime-related information.

II.

ARGUMENT

A. THE LEGISLATURE MADE A POLICY DECISION TO BALANCE COMPETING INTERESTS AND THE TRIAL COURT PROPERLY INTERPRETED AND APPLIED THE LEGISLATIVE INTENT OF SECTION 6254(f)

When reviewing questions of statutory construction, the Court looks first to the words of the statute. If the statutory language is clear and unambiguous the Court's inquiry ends. (See *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250.) Where a statute's language is ambiguous or susceptible of more than one reasonable interpretation, the Court may turn to extrinsic aids such as legislative history to assist in interpretation. (*Ibid.*)

MinCal argues that Section 6254(f) requires disclosure of crime-related information more than 30 days old. The City argues that 30 days is a

reasonable interpretation of the requirement to disclose "contemporaneous" information established by the Second Appellate District Court of Appeal in *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 595 ("*Kusar*").) Because neither the statutory language nor the Court in *Kusar* conclusively define the term "contemporaneous," the statutory language is ambiguous as it relates to the length of time for which a law enforcement agency must disclose crime-related information. (See *Kusar, supra*, 18 Cal.App.4th at p. 596.) Consideration of the Legislature's intent assists in defining "contemporaneous" as reasonably limited to a 30-day time period.

1. Legislative History of Section 6254(f) Properly Balances Competing Public Interests

When the Legislature amended Section 6254(f) in 1982, it created a balance between the public's right to know certain crime-related information and the obligations on a public agency to retain and disclose historical information. The legislative history of Section 6254(f), subdivisions (f)(1) and (f)(2) begin with Assembly Bill 909 ("AB 909"), from the 1981-1982 Regular Session of California's Legislature. (Request for Judicial Notice ("RJN"), Exhibit A, Assem. Bill No. 909 (1981-1982 Reg. Sess.) as enrolled Sept. 19, 1981.) AB 909 passed both the Senate and Assembly and was enrolled to the Governor on September 19, 1981.

The California Newspaper Publishers Association supported AB 909 because some police departments that formerly provided such information

had started closing all records of police activity to the press in retaliation for critical press accounts in some cities. (See RJN, Exhibit B, Sen. Com. on Judiciary, Report on Assem. Bill No. 909 (1981-1982 Reg. Sess.) as amended July 6, 1981, p. 2.) The California Newspaper Publishers Association, concerned that such denial of access "may hamper effective press reporting of criminal activity in a community," asserted that "original entry documents" constituting running accounts of police activity, such as incident logs and booking sheets, should be made available to the general public. (See *id.* at p. 3.)

The resulting language of AB 909 required state and local law enforcement agencies to make all original entry documents available to the general public with limited exceptions. (See RJN, Exhibit C, Assem. Off. of Research, Concurrence in Senate Amendments, Assem. Bill No. 909 (Reg. Sess. 1981-1982) as amended Sept. 10, 1981, pp. 1-2.)

Governor Brown's Legal Affairs Secretary recommended the Governor veto AB 909 because the term "original entry documents" was too broad. (See RJN, Exhibit D, Gov. Off. of Legal Affairs Sec., Enrolled Bill Report on Assem. Bill No. 909 (1981-1982 Reg. Sess.) as enrolled Sept. 18, 1981.) As used in AB 909, "original entry documents" implicated "almost all . . . records" and would require disclosure of detailed statements from victims and witnesses, requests for warrants and applications for business licenses. (*Ibid.*) Such documents exceeded the intent of the

sponsors who wanted legislation that provided access to "essential factual information sich [sic] as what crimes have been reported and who has been arrested." (*Ibid.*)

On October 1, 1981, Governor Brown vetoed AB 909 and its overly broad disclosure requirements, stating,

> [T]his bill is overly broad and may force the disclosure of confidential information, deter citizens from fully cooperating with law enforcement officials and cause needless additional emotional trauma for victims. I call upon the press and the law enforcement leaders to work together next year on mutually acceptable legislation that serves both the public safety and right to know.

(RJN, Exhibit E, Gov. Off. Veto Message on Assem. Bill No. 909 (1981-1982 Reg. Sess.) as enrolled Sept. 18, 1981.)

In response to the Governor's veto message and request to news and law enforcement agencies to agree on acceptable language, a modification to an existing bill, Assembly Bill 277 ("AB 277"), was proposed. (RJN, Exhibit F, Assem. Bill No. 277 (1981-1982 Reg. Sess.) as chaptered, Mar. 1. 1982; *Kusar, supra,* 18 Cal.App.4th at p. 599.) The proposed modification was the result of the cooperation of the California Newspaper Publishers Association and the California Peace Officers Association to balance their respective interests in ensuring the public's right to know what crimes and arrests are occurring with reasonable disclosure obligations on law enforcement agencies. (*Kusar, supra,* 18 Cal.App.4th at p. 599, fn 16.)

As adopted by both houses, enrolled to the Governor and signed into law, AB 277 limited the nature of information required to be released to the general public to basic information on arrestees and crimes. (*Kusar, supra,* 18 Cal.App.4th at p. 599 fn. 16.) AB 277 also limited the extent of information to be released to "contemporaneous" information. (*Id.* at pp. 598-599.) AB 277 thus "continue[d] the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information to the press. . . . AB 277 . . . require[s] no departure from, but simply mandate[s], what has been basic and customary at common law and, indeed, what many law enforcement agencies were then doing as a matter of course." (*Kusar, supra,* 18 Cal.App.4th at pp. 598-599.)

Interpreting this legislative history, the court in *Kusar* correctly concluded that Section 6254(f) codifies what had been a traditional disclosure of basic information regarding crimes to the press, and in so doing, established an appropriate balance between competing policy interests. Limiting disclosures to certain contemporaneous crime-related information balanced concern for preventing secret arrests on the one side against mandating excessive disclosure requirements on law enforcement agencies on the other side. This balance codified the customary practices of

law enforcement agencies and did not expand disclosure requirements. (*Kusar*, *supra*, 18 Cal.App.4th at pp. 598-599.)

The trial court's decision correctly interprets and applies *Kusar* to the case at issue, and in so doing, properly implements the policy balance established by the Legislature.

2. Legislative history of Section 6254(f) supports a traditional 30-day period for disclosing crime records

The City's 30-day disclosure period properly implements the Legislature's policy balance struck in AB 277 by ensuring the release of "contemporaneous" crime-related information without expanding traditional disclosure obligations.

Although neither Section 6254(f) nor *Kusar* identify the exact point when contemporaneous information becomes historic information, they recognize the Legislature's intent to preserve rather than expand traditional disclosure practices. (*Kusar*, *supra*, 18 Cal.App.4th at pp. 598-599; see also RJN, Exhibit B, at p. 3.) Law enforcement agencies throughout California have traditionally made their daily logs of individualized arrest information available to the public and to the media for 30-day periods. (See CT 045.) A 30-day time frame constitutes a reasonable interpretation and application of the "contemporaneous" disclosure requirement by making records of recent crimes and arrests available to the public so as to provide the public with current crime information and to prevent secret

arrests. (See CT 062-063.) A 30-day time frame also implements the Legislature's intent to preserve existing disclosure practices rather than expand them. A more expansive disclosure period would constitute a departure from the common law tradition codified by AB 277 and would expand the obligations traditionally assumed by law enforcement agencies.

Because the Legislature intended to codify the status quo disclosure practices and the City's traditional practice of disclosing daily logs for the previous 30 days fulfills the Legislature's intent, the trial court's order denying MinCal's write petition should be affirmed.

B. THE LEGISLATURE MADE A POLICY DECISION TO REJECT MORE EXTENSIVE DISCLOSURE OBLIGATIONS AND THE TRIAL COURT PROPERLY IMPLEMENTED THE LEGISLATURE'S INTENT

A court has no authority to require actions exceeding the Public Records Act's requirements. (See *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074 ("*Haynie*").) In *Haynie*, the Court of Appeal improperly enlarged an agency's burden under the Public Records Act by requiring the agency to produce a log of all records that may be responsive when the agency denies a request for records. (*Haynie, supra*, 26 Cal.4th at p. 1074.) Such a mandate was an improper enlargement of the Public Records Act, in light of the specific requirements applicable to denials, which require an agency to "set forth the names and titles or positions of each person responsible for the denial[.]" (*Ibid.*; see also Gov. Code,

§ 6253, subd. (b).) Although an agency may voluntarily create a log, no statute requires a public agency to create a log when the agency denies a request. By vetoing AB 909's expansive requirements and signing the more restrictive AB 277 into law, the Governor and Legislature intended to reject disclosure requirements not otherwise present in Section 6254(f).

The trial court properly interpreted and applied Section 6254(f) and its legislative intent by declining to impose additional record retention and creation obligations while simultaneously maintaining the public's right to access contemporaneous crime-related information. A judicially created mandatory disclosure period exceeding the traditional 30-day period would impose obligations on city law enforcement agencies which are not present in the Public Records Act. As discussed in detail above, the Legislature intended to codify traditional disclosure practices. Law enforcement agencies in California have traditionally disclosed crime-related information for 30-day periods and do not maintain historical information beyond this 30-day time period. (See, e.g., CT 044-045.)

Requiring disclosure of traditionally "historical" information older than 30 days would constitute an improper judicial expansion of the Public Records Act by imposing a document-retention requirement or, alternatively, by imposing a document-creation requirement. (See *Haynie, supra*, 26 Cal.4th at p. 1074.) Because law enforcement agencies do not maintain daily logs after 30 days, a request for crime-related information

older than 30 days would require the agency to create a record that does not exist. Such a requirement is an improper expansion of the Public Records Act. (See *ibid.*) As an alternative to creating records responsive to a request for historic crime related information, law enforcement agencies could elect to retain daily logs indefinitely. However, the Public Records Act is not a document retention statute and judicial creation of a retention requirement is an improper expansion of the Public Records Act. (See *ibid.*)

A 30-day disclosure period for crime-related information also maintains the Legislature's intent to protect the public's access to certain crime-related information without compromising victim safety or compromising investigations. Although MinCal argues that the City violated the Public Records Act by failing to record or provide information on victims due to deficiencies in the City's record keeping system, the Public Records Act does not require meticulous record keeping or establish what information a dispatch service should record. Instead, Section 6254(f)(2) requires disclosure of information, however imperfect or incomplete, "to the extent the information . . . is recorded[.]" A court exceeds its authority by transforming a disclosure statute, such as the Public Records Act, into a document creation or retention statute as urged by MinCal. The trial court properly refused to expand the Public Records Act, as this Court should do as well.

Expanding the Public Records Act to require recording and disclosure of the information as urged by MinCal also violates the express provisions of Section 6254(f). Due to technological limitations, City law enforcement officials often do not record victims' names. (CT 044-046.) And, to the extent victim information may be recorded, the City's technological limitations prevent officials from distinguishing between victims and those reporting an incident. (CT 044-046.) Section 6254(f) provides for the protection of victim and witness privacy and of the security of ongoing investigations. (Gov. Code, § 6254, subd. (f).) A recordation and disclosure requirement that would compromise such privacy and security by requiring law enforcement agencies to release information without being able to confirm whether the information would threaten a victim, witness or investigation upsets the balance struck by the Legislature and directly contradicts the express limitations of Section 6254(f).

Because the trial court properly declined to expand the Public Records Act and, in so doing properly implemented the policy balance established by the Legislature in AB 277, this Court should affirm the trial court's order denying MinCal's writ petition.

III.

CONCLUSION

For all the reasons set forth above, the League requests that this Court affirm the trial court's order denying MinCal's writ petition.

Dated: July 2, 2012

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 2,629 words, not including tables or this certificate, according to the word count function of the word-processing program used to produce this brief. Therefore, the number of words in the brief complies with the requirements of California Rules of Court, rule 8.204(c)(1).

Dated: July 2, 2012

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PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 655 West Broadway, Suite 1500, San Diego, California 92101. On July 2, 2012, 2012, I served the documents described as:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT CITY OF CARLSBAD and **MOTION REQUESTING JUDICIAL NOTICE**

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Executed on July 2, 2012, at San Diego, California.

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

Wanda Roybal

SERVICE LIST
MiniCal Consumer Law Group v. City of Carlsbad
Court of Appeal Case Number D060415

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Clerk of the San Diego Superior Court for delivery to Dept. N-30 Hon. Thomas P. Nugent 325 South Melrose Vista, California 92081 **((via 1st Class Mail)**	San Diego County Superior Court Case No. 37-2010-0057548-CU-WM-NC (1 copy)
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