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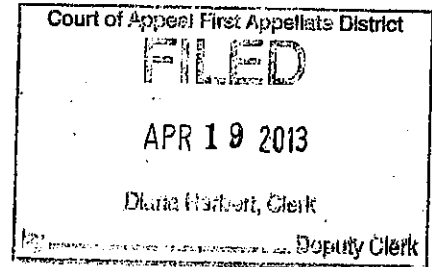


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April 18, 2013

Honorable Justices
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102



Re: Application for Leave to File Letter Brief as Amicus Curiae and Amicus Curiae Letter Brief In *Regents of the University of California v. Superior Court* (Reuters America LLC, Real Party in Interest) Case No. A138136

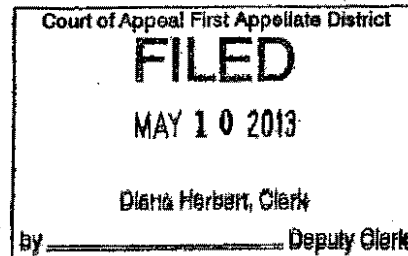
Honorable Justices,

The League of California Cities ("League") respectfully submits this Application for Leave to File a Letter Brief as Amicus Curiae and Amicus Curiae Letter Brief in the above-titled matter in order to bring to the Court's attention issues of concern to cities statewide.

Application for Leave to File Letter Brief as Amicus Curiae

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 having such significance. The League appears frequently before the Courts of Appeal and Supreme Court as amicus curiae on matters affecting local government.

This Application for Leave to File Letter as Amicus Curiae and Amicus Curiae Letter was served on the parties to Case No. A138136 as indicated in the attached certificate of service (CA Rules of Court 8.200(c)(4)).



Amicus Curiae Letter Brief to the Court

The merits have been ably and exhaustively briefed by the Regents. The League will not repeat the arguments made and authority cited by the Regents, except to underscore the importance of judicial fidelity to the language of the California Public Records Act ("CPRA"). That statute defines "public records" as including "any writing containing information relating to the conduct of the public's business *prepared, owned, used, or retained* by any state or local agency regardless of physical form or characteristics." Gov't. Code § 6252(e) [*emphasis added*].

Despite the fact that the concept of "constructive possession" does not appear in the statutory language cited above, the trial court ordered the Regents to "make an objectively reasonable effort to obtain Fund Level Information" based on the court's conclusion that "[t]he Regents might have constructive possession of the Fund Level Information." Order filed February 4, 2013 at 19 & 16. This judicially-created concept of "constructive possession" of records actually held by third parties and that are not prepared, owned, used or retained by a government agency, and the associated open-ended order to attempt to obtain such records, are extraordinarily far-reaching actions with myriad adverse implications for cities and other entities subject to the CPRA.

The *Regents* order goes far beyond the legislative intent articulated when the CPRA was enacted (and that is now reflected in the California Constitution): "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't. Code § 6250. See also Cal. Const. Art I, §3, subd. (b)(5). Cities and other government agencies should not be required to attempt to obtain from third parties records that the government agency did not create, does not own, did not review or rely on in making governmental decisions and conducting the public's business, and does not possess, merely because a private party believes the government should have obtained the information, or seeks the information for its own use. The possibility that a contract may authorize a government agency to obtain from a third party records that the agency did not prepare, does not own, did not use, and does not retain should not be used to judicially expand the government's duties under the CPRA. This is particularly true where the judicial expansion of the CPRA is inconsistent with the purpose of the CPRA, and the careful balance of sometimes competing interests that the CPRA maintains.

Permitting private parties to require the government to obtain information not used or kept as part of the governmental process does not implicate the public's right to be informed how its business is being conducted, and would in effect authorize private parties to direct how the government should operate. To maintain a balance between open government and government effectiveness, it is critical that the CPRA not be

Honorable Justices

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expanded so as to impose new duties on the government that do not actually afford the public information on the conduct of its business, but that instead would interfere with the conduct of the public's business.

As a practical matter, the order in the *Regents* case would impose a substantial burden on public agencies regarding records not possessed by the agency. Agencies could be required to request third-party records, potentially without an express right to do so. Agencies would be unable to verify whether all potentially-responsive records have been reviewed or are being provided, absent the cooperation of the third-party believed to possess the records. If a third-party is uncooperative in responding to a public agency request for records, must the agency bring litigation at public expense to attempt to obtain them? If a third party refuses to cooperate with a public agency in response to a records request, and the requester brings an action against the agency under the CPRA, as in the *Regents* case, and the public agency is found to have "constructively possessed" the records, the agency will be susceptible to an award of the requester's attorneys' fees, even though the agency does not control the records. Gov't. Code § 6259, subd. (d). Also, public agencies are unable to bring declaratory relief actions to oppose requests for records the agency has not prepared, owned, used or retained. *Filarsky v. Superior Court* (2002) 28 C4th 419, 423, 429. Moreover, public agencies are susceptible to "reverse Public Records Act actions" brought to oppose agency requests for third-party records not prepared, owned, used or retained by the agency. *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 CA4th 1250, 1266-1269. The additional burdens and related costs imposed on public agencies under the *Regents* order do not further the purposes of the CPRA, but would undermine the ability of the government to operate openly and effectively, including cost-effectively.

For these reasons, the League urges the Court to reverse the decision of the Alameda County Superior Court. Further the League requests the Court to narrowly focus its decision on the operation of Government Code section 6254.26, which was enacted in 2005 specifically to deal with the narrow issue of the "alternative investment vehicle" records that are the subject of the dispute between the Regents and Reuters. The League suggests the Court avoid any broader pronouncements regarding the general definition of "public records" under the CPRA and avoiding any affirmation of a broad "constructive possession" doctrine under the CPRA.

Respectfully Submitted,



Caroline L. Fowler

City Attorney, City of Santa Rosa

On Behalf of the League of California Cities

PROOF OF SERVICE

**Regents of the University of California v. Superior Court
(Reuters America LLC, Real Party in Interest)
Court of Appeal, First District, Division 2; Case No. A138136**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Sonoma, State of California. My business address is 100 Santa Rosa Avenue, Santa Rosa, CA 95404.

On April 18, 2013, I served true copies of the following document(s) described as:

**Application for Leave to File Letter Brief as Amicus Curiae and
Amicus Curiae Letter Brief**


on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Santa Rosa City Attorney Office's practice for collecting and processing correspondence for mailing. On the same day that the 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 declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 18, 2013, at Santa Rosa, California.



Kathy M. Viall
Assistant to Caroline L. Fowler,
City Attorney of Santa Rosa

SERVICE LIST

**Regents of the University of California v. Superior Court
(Reuters America LLC, Real Party in Interest)
Court of Appeal, First District, Division 2; Case No. A138136**

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4 copies

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PUBLIC INFORMATION (our website address is www.courts.ca.gov)
Pursuant to California Rules of Court, Rule 8.70 and Misc. Order 13-1 (Eff. 5/1/13), the First District Court of Appeal requires the filing of an original and 3 paper copies and the submission of an electronic copy of the following documents:

- Appellant's Opening Brief
- Respondent's Brief
- Appellant's Reply Brief
- Amicus Curiae Brief
- Petition for Rehearing
- Answer to Petition for Rehearing
- Answer to Amicus Curiae Brief
- Letter Brief
- Petition for Writ of Habeas Corpus
- Petition for Supersedeas
- Petition for Writ of Mandate, Prohibition or Certiorari
- Petition for Extraordinary Writ
- Petition for Writ of Review (WCAB, PUC, ALRB, PERB)
- Opposition, Reply, Answer, Return or Traverse
- Service Copy of Petition for Review(1 copy and electronic copy)
- Supporting documents if bound separately(original and electronic copy)
- Exhibits if bound separately(original and electronic copy)

Pursuant to California Rules of Court, Rule 8.70 and Misc. Order 13-1 (Eff. 5/1/13), the First District Court of Appeal requires the following documents be filed electronically in lieu of submission of any paper copies:

- Civil Case Information Statement
- Certificate of Interested Entities or Persons
- First Application for Extension of Time (Civil, Criminal, Juvenile)
- Stipulation for Extension of Time (Civil Case)
- Notice of Change of Address
- Substitution/Association of Attorney (Civil Case)
- Request for Oral Argument
- Service Copy of Omission Letter to Superior Court
- Appellant's brief pursuant to People v. Wende
- Appellant's brief pursuant to Conservatorship of Ben C.
- Appellant's brief pursuant to In re Phoenix H.

acp

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adsv