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January 24, 2013

Via Federal Express

Honorable Tani G. Cantil-Sakauye, Chief Justice
Honorable Joyce L. Kennard, Associate Justice
Honorable Marvin R. Baxter, Associate Justice
Honorable Kathryn M. Werdegar, Associate Justice
Honorable Ming W. Chin, Associate Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin Liu, Associate Justice
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Los Angeles County v. Superior Court* (*Anderson-Barker*)
Supreme Court Case No. S207443

To The Honorable Chief Justice and Associates Justices:

Pursuant to rule 8.500(g), California Rules of Court, the League of California Cities ("League") urges the court to grant review in the above case. 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, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

As set forth in the November 16, 2012 opinion of the Court of Appeal (*County of Los Angeles v. Superior Court* (2012) 2012 WL 5693844), the facts are as follows:

An attorney with the firm representing the plaintiffs in a pending civil rights action against the County of Los Angeles sought disclosure under the California Public Records Act ("CPRA") of defense counsel billing invoices and time records, and evidence of the County's related payment. The County argued the documents were privileged attorney-client communications and work product, and exempt from disclosure under the CPRA's "pending litigation" exemption. (Gov. Code, § 6254, subd. (b).) The trial court ruled the time records should be redacted to show only the information that was not work

product—including the hours worked, the identity of the attorney(s) and the amount charged. Further, the pending litigation exemption did not apply to the redacted and other documents requested since they were not "records specifically prepared for use in [the] litigation." As a result, they must be produced. The County filed a writ with the Court of Appeal challenging the ruling, contending the redacted documents were exempt from disclosure under the pending litigation exemption. The court denied the writ petition, but this court granted review and transferred the matter back to the Court of Appeal for additional briefing. Citing *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, the court denied the writ petition again. The court held that substantial evidence supported the trial court's conclusion that the "dominant purpose for preparing the documents was not for use in litigation but as part of normal record keeping and to facilitate the payment of attorney fees . . . ." The County has filed a petition for review of the decision.

The League strongly urges the court to grant the County's petition. As a threshold matter, interpretation of the CPRA is a matter of great significance to public entities across the state. Public entities and public employees necessarily participate in litigation on an ongoing basis as part of conducting the public business. It is therefore vital that clear guidelines be set with respect to application of the CPRA to public records that relate to pending litigation. In addition, public entities must often retain outside counsel to prosecute and defend actions in the public's interest. As a result, public entities throughout the state, including municipalities, have a strong interest in having clear guidelines established for the production of attorney-fee information as it relates to pending litigation.

In its publication, *The People's Business: A Guide to the California Public Records Act* (2008), the League has interpreted the Act as generally requiring disclosure of legal billing statements showing the amount billed to a city, except for any billing detail reflecting an attorney's impressions, conclusions, opinions, legal research or strategy. However, the text notes the potential application of the pending litigation exception of section 6254(b). (See *The People's Business, supra*, at p. 58, Frequently Requested Information and Records, entry for Legal Billing Statements [citing authority for disclosure of redacted statements: "but see Gov. Code, § 6254(b) as to the disclosure of billing amounts reflecting legal strategy in pending litigation"].)

This court has not addressed the scope of the CPRA exemption for pending litigation as set forth in Government Code section 6254, subdivision (b) since *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363. Moreover, in *Roberts*, the court addressed the pending litigation exemption of section 6254, subdivision (b) only in distinguishing it from the attorney-client privilege. In *Roberts*, the court held that a city attorney's communication to the city council concerning a non-litigation matter fell within the

attorney-client privilege. (5 Cal.4th at p. 381.) The court contrasted the attorney-client privilege with the pending litigation exception of section 6254, subdivision (b), noting that the pending litigation exemption was in fact broader than the attorney-client privilege in terms of the scope of material that might be covered, although at the same time it was somewhat narrower in that it could be invoked only when litigation was "pending." (*Id.* at p. 372.)

Since *Roberts*, as the Court of Appeal here noted, the lower appellate courts have, consistent with the purpose of the CPRA, construed the pending litigation exception somewhat narrowly. Although the exception by its plain terms applies to any record "pertaining" to pending litigation, courts have narrowed it by limiting its scope to documents prepared by or at the direction of a public entity for use in litigation. (Exh. 1 to County of Los Angeles Petition for Review ("Slip Opinion") 2, citing *Fairley v. Superior Court*, *supra*, 66 Cal.App.4th at p. 1414.) In addition, the lower appellate courts have recognized that in some instances documents may be prepared by public employees for multiple purposes, both in anticipation of possible litigation, or for routine risk management or other reasons. Thus, in *Fairley*, the court applied a "dominant purpose" test to determine whether a document was prepared for purposes of litigation and hence shielded from disclosure by section 6254, subdivision (b), or whether in fact its dominant purpose was for matters not related to litigation and hence subject to production.

The League submits that review is warranted in this case because the Court of Appeal has not fully analyzed the scope of the pending litigation exception of section 6254, subdivision (b) as applied to the amount of attorney fees paid in pending litigation. The decision adversely affects every public entity in the state, which will now be routinely bombarded with ongoing requests for fee amounts in pending cases that will result, at the very least, in increased administrative costs, and quite possibly compromise the defense and prosecution of such actions. Such burdens should not be imposed absent full consideration of the applicable issues.

As a threshold matter, the Court of Appeal erred in its application of the dominant purpose test, by failing to consider litigation management as the ultimate purpose for submission and payment of fee invoices in pending litigation. As the Court of Appeal acknowledges, the attorneys' billing information was prepared only because of the existence of the litigation. (Slip Opinion at p. 5 ["the records in question *relate* to pending litigation and, indeed, would not have existed but for the pending litigation"]; emphasis in original.) The Court of Appeal finds a "dual purpose" by applying the highest level of generality as to the nature of the documents, i.e., that they were designed for the "dominant purpose" of "normal record keeping and to facilitate the payment of attorney fees on a regular basis." (*Id.*) But, of course, the "record keeping" and "payment of attorney fees" exist for the very purpose of monitoring and controlling the

litigation. The Court of Appeal's suggestion that such records have only an "ancillary use in litigation—for example, in connection with a request for attorneys fees" (*id.*) ignores cost as generally the driving force of litigation management.

As any client who has retained an attorney knows, and indeed any attorney who has been retained by a party will confirm, the amount of fees being expended in litigation and its relationship to the overall objectives being achieved, is often the chief focus of the relationship itself. Monitoring and payment of attorneys fees has a direct—indeed perhaps the most direct—impact on the manner in which litigation is conducted. There is arguably nothing "ancillary" about amounts paid to counsel for defending or prosecuting suits on behalf of public entities.

In addition, information about amounts paid in the course of ongoing pending litigation potentially affords litigants opposing a public entity a tactical insight to exploit for purposes of accelerating litigation at a particular point, prolonging litigation, or even timing a settlement demand, and hence puts public entities at the very sort of disadvantage that the litigation exemption was designed to avoid. As this court noted in *Roberts*, the purpose of the exemption was to make certain that those litigating against a public entity did not have advantages over public entities by procuring information relating to prosecution of the litigation that would not otherwise be available in discovery. (5 Cal.4th at p. 372.) Yet, that is potentially the sort of information that the Court of Appeal has authorized disclosure of here.

The Court of Appeal's decision does not fully address these important considerations, which are necessarily germane to determining the scope of the pending litigation exemption of section 6254, subdivision (b) as applied to attorneys fees billings. Because litigation by and against public entities is necessarily ubiquitous, it is vital that this court set down clear guidelines for future cases. For this reason, the League strongly urges the court to grant review.

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates

By: _____
Timothy T. Coates
Counsel for League of California Cities

TTC:plh
cc: Attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 24, 2013, I served the foregoing document described as: AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES' LETTER IN SUPPORT OF PETITIONER COUNTY OF LOS ANGELES on the interested parties in this action by serving:

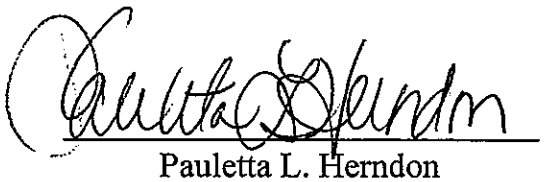
******* See Attached Service List *******

(✓✓) **By Envelope** - by placing () the original (✓✓) a true copy thereof enclosed in a sealed envelope addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices:

(✓✓) **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on January 24, 2013, at Los Angeles, California.

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



Pauletta L. Herndon

Los Angeles County v. Superior Court (Anderson-Barker)
California Court of Appeal Case No. B239849
Supreme Court Case No. S207443

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