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November 1, 2018

The Honorable Tani Cantil-Sakauye, Chief Justice of California
and the Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Richard Sander, et al. v. State Bar of California, et al.***
26 Cal.App.5th 651 (August 23, 2018)
1st Appellate Case No. A150061, A150625/Supreme Court Case No. S251671

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The League of California Cities provides the following opposition to the October 22, 2018 request for depublication filed with the Court by Plaintiffs and Petitioners Richard Sander and the First Amendment Coalition ("Petitioners"). The League of California Cities is an association of 475 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.

The First District held that while the California Public Records Act no doubt requires a public agency to "produce nonexempt responsive computer records in the same manner as paper records and can be required to compile, redact, or omit information from an electronic record" it does not require a public agency "to create a new record by changing the substantive content of an existing record or replacing existing data with new data." (Slip Op. at 19.) As cities in California continue their efforts to efficiently and fully respond to the extensive public records requests they receive each year and as those agencies and the public move away from paper and toward electronic formats, the holding in this case provides the guidance that is needed to ensure a balance between privacy rights and transparency while maintaining consistency across public agencies. As such, Petitioners' request for depublication should be denied.

Public Agencies Are Not Required to Create New Records

"The California legislature in 1968, recognizing that 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state' [citation], enacted the California Public Records Act which grants access to public records held by state and local agencies." *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66-67. Codified at Cal. Gov. Code §§ 6250, et. seq., the Act "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies." *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425-426 (*Filarsky*). Section 6253 provides "every person [] a right to inspect any public record." The Act defines 'public records' broadly 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..." Cal. Gov. Code § 6252(e). To be clear, the Act provides access to public records. Fundamentally, Petitioners seek to expand the definition of "public records" to include writings which are not in existence and must be created in response to a request, a definition well beyond this Court's holding in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608. As such, Petitioners' argument is fundamentally flawed and should be rejected.

In *City of San Jose,* this Court had occasion to perform a statutory interpretation of the term "public record" and determined that there are four aspects to a "public record," which are: (1) a writing, (2) with content relating to the conduct of the people's business, (3) prepared by, or (4) owned, used or retained by any state or local agency. *Id.* at 616. The Act defines a "writing" as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Gov. Code § 6252(g). The Court construed the term "public record" broadly in favor of public access to include anything prepared by employees or elected officials that relate to the business of the public agency which the public agency actually or constructively possesses. *Id.* at 621 – 623.

Inherent in *City of San Jose's* analysis was the existence of a writing. However, it is not a stretch, given the structure and purpose of the Act to limit the definition of a "public record" to an existing writing, rather than one that must be created. Such a proposition is supported by the basic rule of the Act "that an agency must comply with a request if responsive records can be located with reasonable effort" *Cal. First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165-166. Certainly, a public entity cannot identify and produce what does not exist. Further, nowhere in the Act is a public entity required to prepare new records, or even create an "inventory of potentially responsive records" when responding to a request. *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075 ["we find nothing in the act itself that mandates any action other than opening for inspection the records identified as coming within the scope of the request or providing copies thereof..."]; *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 400 ["Similarly to the FOIA, no language in the [Act] creates an obligation to create or obtain a particular record when the document is not prepared, owned, used, or retained by the public agency."].

The Act is fundamentally concerned with access to public records. The Act provides specific procedures that a public entity must follow in responding to a request including generally determining within 10 days whether the request seeks public records in the possession of the agency that are subject to disclosure. *Filarsky, supra,* 28 Cal.4th at 426. Public records are writings with content related to the people's business prepared by, owned, used or retained by a local agency. *City of San Jose, supra,* 2 Cal.5th at 616. A non-existent record cannot to meet the criteria announced by this Court in *City of San Jose* and therefore cannot be a "public record" subject to production under the Act. Non-existent records fail to meet the definition of "writing" contained at § 6252(b), do not have content relating to the people's business, are not prepared by the public agency, and are not owned, used or retained by the public agency.

In summary, non-existent records in their non-existent state cannot be produced and are not subject to production under the Act. The fundamental role of the Act is to provide the public access to public records; however, the public cannot access what is not there.

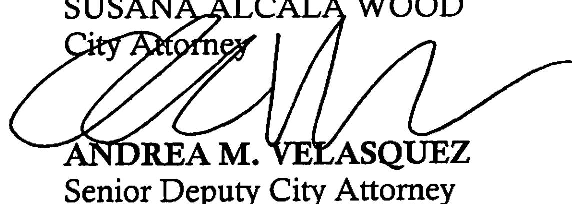
<u>The First District's Opinion Provides Clear Guidance for Public Agencies</u>

The First District's opinion is significant because it provides clear guidance to public agencies confronted with "thousands upon thousands of public records requests" each year, with the "number of requests [] increasing each year" to "staggering" proportions. *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1189. While "public entities... must function under these pressures... with finite resources" this Court must recognize that the Act is not a statute requiring public entities to create documents. Indeed, the judicial remedy set forth in the Act is limited to the disclosure of improperly withheld public records, as opposed to the failure to create a new public record. The Act "provides no judicial remedy...for any purpose other than to determine whether a particular record or class of records must be disclosed." *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 126.

As was the case in the trial and appellate courts, Petitioners' position stretches the definition of public record too far, expanding it beyond recognition and into the non-existent and seeks to impose drastic consequences on public agencies to create new records to respond to requests made under the Act. The League of California Cities respectfully requests that this court reject Petitioners' request for depublication.

Sincerely,

SUSANA ALCALA WOOD
City Attorney



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PROOF OF SERVICE

CASE NAME: *Richard Sander, et al. v. State Bar of California*
COURT: Supreme Court of California
CASE NUMBER: S251671

I declare that:

I am employed in the County of Sacramento, California. I am over the age of eighteen years and not a party to this action; my business address is 915 I Street, Room 4010, Sacramento, CA 95814-2604. On the date executed below, I served the following document(s):

LETTER IN RESPONSE TO REQUEST FOR DEPUBLICATION OF
Richard Sander, et al. v. State Bar of California, et al.
DATED OCTOBER 22, 2018

on the parties in the above-named case.

☒ BY EMAIL OR ELECTRONIC DELIVERY THROUGH TRUEFILING:

☒ BY UNITED STATES MAIL: I served the attached document by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Sacramento, California, addressed as follows:

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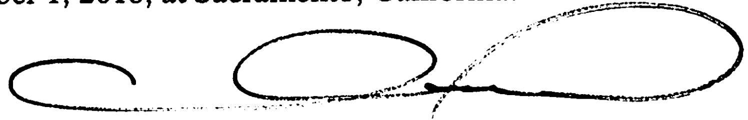
I declare under penalty of perjury that the foregoing is true and correct, and that the declaration was executed on November 1, 2018, at Sacramento, California.



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☒ BY UNITED STATES MAIL: I served the attached document by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Sacramento, California, addressed as follows:

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Clerk of the Court
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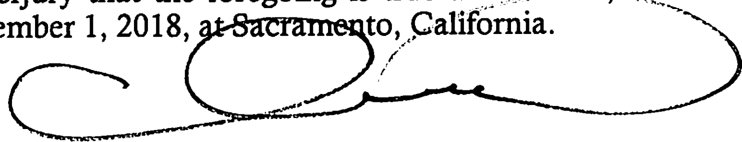
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct, and that the declaration was executed on November 1, 2018, at Sacramento, California.



CHRISTINA WILL