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February 1, 2013

The Honorable Chief Justice Tani G. Cantil-Sakauye
And Honorable Associate Justices
Supreme Court of California
Ronald Reagan State Office Building
300 South Spring Street, 3rd Floor
Los Angeles, CA 90013

Re: *County of Los Angeles v. Superior Court (Anderson-Barker)*
Supreme Court Case No. S207443
Amicus Curiae Letter in Support of Los Angeles County's Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The California State Association of Counties ("CSAC") respectfully submits this letter as *amicus curiae* in support of the Petition for Review filed by the County of Los Angeles in the above-referenced matter, pursuant to California Rules of Court, Rule 8.500, subdivision (g). The Office of the Sonoma County Counsel is special counsel for CSAC for the purpose of submitting this letter on its behalf. CSAC urges this Court to accept review of the underlying Court of Appeal decision (referred to herein as *Anderson-Barker*, and published at 211 Cal.App.4th 57) based on the following.

A. Interests of *Amicus Curiae*

CSAC is a non-profit corporation with a membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case presents an issue affecting all counties. Specifically, it has determined that the underlying Court of Appeal decision limits the application of an exemption contained in the California Public Records Act (Government Code § 6250, *et seq.*, hereinafter "CPRA"), found at Government Code § 6254, subdivision (b) ("§ 6254(b)"), in a manner that does not comport with its language or legislative purpose.

CSAC and its member counties are strongly committed to the principles of open government and the goals, objectives, and intent of the CPRA. We applaud the public's interest in the conduct of county business, and strive to disclose public records to ensure a well-informed citizenry. Nevertheless, there are times when it is necessary to withhold confidential information from the public to permit counties to properly perform their government functions, including their ability to defend themselves in lawsuits brought by the public.

The California Legislature recognized counties' and other public agencies' need to maintain a balanced footing in litigation contexts when it enacted the CPRA exemption found in § 6254(b), which is often referred to as the "pending litigation ('PL')" exemption. The PL exemption permits counties to refrain from disclosing public records "pertaining to pending litigation," until that litigation is closed. The Court of Appeal in the decision below applied a judicially-created rule which changed the express language of the PL exemption. The result of its decision is that public records the Legislature had intended to exempt from disclosure under the CPRA during the course of a litigation are no longer protected, such as documents prepared in connection with a litigation but which fall outside the scope of attorney-client or work product protections. Accordingly, the primary purpose of the PL exemption, to protect such ancillary records that were prepared in connection with a pending litigation (but not "for use" in the litigation), has now been lost.

The Court of Appeal's decision thus prejudices counties (and other public agencies) in the litigation context, by requiring them to disclose information regarding the number of hours of attorney services performed and dollars invoiced during the pendency of the litigation. While such information is ultimately relevant to a public inquiry on the use of public resources and funds, the issue is one of timing: there is no public interest to be served in disclosing information regarding attorney services or costs while the case is pending. On the other hand, disclosing such information to a county's adversary in litigation will have the negative impact of also disclosing how the county is utilizing its resources in a particular litigation while it is pending – which will also impliedly disclose information regarding a county's strategy and case valuation. Requiring counties to disclose such information to their adversaries will unbalance the scales of justice and prejudice them in mediation and settlement negotiations, as well as at trial.

B. Reasons for Granting the Petition for Review

The Court of Appeal held that the PL exemption in § 6254(b) did not permit Los Angeles County to retain the confidentiality of certain information contained in its outside litigation counsel's billing records (including the hours worked, the identity of the person performing the work, and the amount charged) as well as its payment records for such bills. It reached this conclusion by finding that the attorney invoices were not "prepared for use in litigation," and that the "dominant purpose" of such records was "as part of normal recordkeeping and to facilitate the payment of attorney fees on a regular basis." (*Anderson-Barker*, 211 Cal.App.4th at 67.) For purposes of this letter, this judicially-created limitation of § 6254(b) shall be referred to as the "dominant purpose rule." The haphazard construction of this rule, and previous courts' failures

to apply rules of statutory construction to interpret § 6254(b), has led to the statute being interpreted in a fashion that no longer comports with its legislative intent or purpose.

1. Judicially-Created Exceptions to the Application of the Pending Litigation Exemption of § 6254(b) have Rendered it Duplicative of the Attorney-Client and Work Product Protections Incorporated Under § 6254(f)

Under the PL exemption, a public agency may refuse a request under the CPRA to disclose any record “*pertaining* to pending litigation to which the public agency is a party ... until the pending litigation ... has been finally adjudicated or otherwise settled.” (Gov’t Code § 6254(b), emphasis added.) This exemption was enacted in addition to the provisions of subdivision (k) of the same statute, which permit a public agency to exempt from disclosure under the CPRA “records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” (Gov’t Code § 6254(k).) Accordingly, the PL exemption is necessarily broader in scope than existing privileges enforceable under other means, such as the attorney-client privilege and work product doctrine.

Nevertheless, the underlying Court of Appeal’s decision interprets the PL exemption in § 6254(b) to be essentially co-extensive with the attorney-client privilege and work product doctrines. It reached this conclusion without applying statutory rules of construction, relying instead solely on former case law. Accordingly, a review of those former cases is required to shed light on the Court’s interpretation and application of the statute. Such a review reveals that none of the courts which have interpreted § 6254(b) applied the proper rules of statutory construction, and many of them misconstrued both the nature and purpose of the PL exemption.

Specifically, in the instant case, the Court of Appeal relied on the decision in *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, to interpret the PL exemption of § 6254(b) and apply the dominant purpose rule to claims of exemption made under it. The *Fairley* decision, in turn, relied on statements made in dicta in the decision of *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1420-1421 (“We agree with the construction of the pending litigation exemption advocated by the court in *City of Hemet*.”).) The first step to unravel the derivation of the dominant purpose rule under § 6254(b) thus lies in the *City of Hemet* Court’s analysis.

In *City of Hemet*, the Court of Appeal stated that, “[i]f disclosure under CPRA would not hamper the City’s reasonable efforts to defend itself in a lawsuit, there is no public purpose to be served by denying disclosure, and a substantial public purpose to be served by requiring disclosure.” (*City of Hemet*, 37 Cal.App.4th at 1420.) The Court then found that the public interest in agency litigation “is served by adopting a limited construction of the ‘pending litigation’ exemption in section 6254, subdivision (b): a document is protected from disclosure only if it was specifically prepared for use in litigation.” (*Id.*) To support this proposition, the Court cited the case of *State of California ex rel. Division of Industrial Safety v. Superior Court (Bourne)* (1974) 43 Cal.App.3d 778, 783.

However, the *Bourne* decision contains no reference to the construction *City of Hemet* applied to § 6254(b), nor did the *Bourne* Court utilize statutory construction principles to interpret § 6254(b). In the *Bourne* case, the Court of Appeal addressed the State's claim that documents containing information regarding the collapse of a bridge were privileged and should not have been ordered produced in a tort litigation under several statutes, including § 6254(b). The *Bourne* Court found that this exemption was not applicable to the case because it was so limited. (*Bourne*, 43 Cal.App.3d at 783.) The Court stated that § 6254(b) "essentially provides public agencies with the protection of the attorney-client privilege, including work product, for a limited period while there is ongoing litigation." (*Id.*) The *Bourne* Court held that, because the trial court's order did not require disclosure of any documents coming within the attorney-client privilege, the PL exemption provided under § 6254(b) was irrelevant to the issues therein.

Bourne's conclusion, that § 6254(b) is co-extensive with the attorney-client privilege and work product doctrine, is fundamentally incorrect. In fact, a separate exemption, § 6254(f), incorporates those privileges for purposes of precluding their disclosure under the CPRA. In addition, while the PL exemption provided under § 6254(b) is limited in time (it lasts only until completion of the litigation), the exemptions protecting the attorney-client privilege and work product doctrine are not time limited, but continue indefinitely. These distinctions were not recognized by the Court in *City of Hemet* when it established the dominant purpose rule.

The question which then arises is, where did the dominant purpose rule originate? It appears that the *City of Hemet* Court borrowed the dominant purpose rule from case law interpreting the attorney-client privilege and attorney work product doctrine. (*City of Hemet*, 37 Cal.App.4th at 1419, citing *Holm v. Superior Court* (1954) 42 Cal.2d 500, 507, and *Vela v. Superior Court* (1989) 208 Cal.App.3d 141, 149.) Pursuant to that rule, if a communication serves a "dual purpose" -- one related to the provision of legal services and one unrelated to that purpose -- then the Court should look to the dominant purpose for the communication as well as the attorney's scope of work to determine whether the communication is protected. (*See e.g., Holm*, 42 Cal.2d at 507.) While this rule has ready applicability to such privilege issues, it has no relationship to the broader exemption provided under § 6254(b), because that exemption is not solely aimed at protecting confidential communications.

After *City of Hemet*, courts have expressly rejected the idea that the PL exemption in § 6254(b) should be co-extensive with the attorney-client and work product protections. In *Fairley*, the Court held that § 6254(b) was not duplicative of § 6254(k), because § 6254(b) "confers upon public agencies a broader exemption from disclosure" than both the attorney-client privilege and the work product doctrine. (*Fairley*, 66 Cal.App.4th at 1421, fn 5.) However, the Court of Appeal's application of the dominant purpose test in the instant case undermines this distinction.

If attorney billing records generated in connection with the pending litigation do not fall within the PL exemption of § 6254(b) (as such documents certainly "pertain" to a pending litigation), then what types of records would fall within that exemption other than attorney-client

or work product materials? The work product doctrine is quite broad: it protects not only writings created by a lawyer in anticipation of a lawsuit, but also “writings prepared by an attorney while acting in a nonlitigation capacity.” (*Laguna Beach County Water Dist. v. Superior Court* (2004) 124 Cal.App.4th 1453, 1461, quoted citation omitted; *see also* Cal. Code of Civ. Proc., § 2018.010, *et seq.*) Under the Court of Appeal’s decision in this case, it is difficult to imagine any documents which could fall under the temporary PL exemption of § 6254(b) that would not also be permanently protected from disclosure under privileges per § 6254(k). In other words, there appear to be few or no types of documents that would be prepared “for use” in a litigation that would not also be covered by the attorney-client or work product protections.

It thus appears that in attempting to prevent public agencies from using the PL exemption of § 6254(b) to justify a refusal to disclose records created in the ordinary course of business outside the litigation context, the Courts of Appeal have developed such a narrow interpretation of the exemption as to effectively gut it. The PL exemption has now been rendered cumulative and duplicative of the exemption provided for attorney-client and work production protections under § 6254(k). Instead of interpreting the statutory language of § 6254(b), the Courts of Appeal have re-written it to apply differently than the plain, ordinary meaning of its words require.

Neither the Court of Appeal in the instant case, nor any previous courts adopting the dominant purpose rule when interpreting and applying the PL exemption of § 6254(b), have engaged the appropriate statutory rules of construction, as addressed below.

2. Applying Rules of Statutory Construction Requires a Different Interpretation Than the Court of Appeal Applied to § 6254(b)

Even though exemptions provided under the CPRA should be narrowly construed, courts remain bound by the rules of statutory construction when interpreting them. The fundamental underpinning of statutory construction is to determine the intent of the Legislature “so as to effectuate the purpose of the law.” (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230, quoted citation omitted.) To do so, courts must turn “first to the words themselves for the answer,” and are required to give effect to statutes “according to the usual, ordinary import of the language employed in framing them.” (*Id.*, quoted citations omitted.) “If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.” (*Id.*, citations omitted.) “When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear,” and various parts of statutory enactments “must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.” (*Id.*, quoted citations omitted.)

None of the Courts of Appeal which have reviewed § 6254(b) appear to have employed these rules of statutory construction to analyze the plain, ordinary meaning of its words to interpret it and harmonize it within the statutory framework.

The language of § 6254(b) expressly provides an exemption for records “*pertaining to pending litigation to which the public agency is a party*” until that litigation has terminated. (Gov’t Code § 6254(b), emphasis added.) The word “pertain” is defined in the Oxford English dictionary as “be appropriate, related, or applicable to.” The Random House Dictionary (online unabridged, 2013) contains as its first definition for the word *pertain*, “to have reference or relation; relate: *documents pertaining to the lawsuit.*” In other words, based on its plain, ordinary meaning, the phrase “pertaining to pending litigation” means any document that relates to the pending litigation. When using the plain and unambiguous meaning of the words contained in § 6254(b), all documents that relate to a pending litigation should be exempt from disclosure under the CPRA during the course of the litigation. This interpretation harmonizes the PL exemption of § 6254(b) with the attorney-client and work product exemptions incorporated into § 6254(k), and renders a reading of the statutes non-duplicative.

It is noteworthy that the California Attorney General issued an opinion in 1988 on the meaning of the phrase “pertaining to pending litigation” as used in § 6254(b). (*See* 71 Ops.Cal.Atty.Gen 235, 238-239 (1988).) It utilized dictionary definitions for the salient terms, and concluded that in using such phrase the Legislature intended to exempt those documents that would be generated as a result of a litigation “to deal with it.” (*Id.*) Said another way, the Attorney General concluded that the PL exemption applies to “records that are prepared in connection with specific ‘litigation’ to which a public agency has become a party.” (*Id.*, at 241.) Under this interpretation of § 6254(b), all documents regarding the services provided by attorneys to public agencies in a particular litigation (including their billing invoices and related payment records) would be exempt from disclosure under the CPRA during the pendency of the litigation. This interpretation is more limited than the plain words of the PL exemption suggest.

If this Court were to grant review of this matter, and were it to apply the rules of statutory construction, it is possible that this Court may determine that a broad reading of the phrase “pertaining to pending litigation” as used in the statute does not comport with the underlying policy objectives of the CPRA, particularly as they relate to documents prepared outside the context of a pending litigation in an agency’s ordinary course of business. However, it is certain that the purpose of § 6254(b), which prevents the CPRA from prejudicing public agencies during the course of a litigation, is not satisfied by the Court of Appeal’s extraordinarily limited interpretation of the statute.

In light of the fact that no court has yet properly applied the rules of statutory construction to interpret the PL exemption of § 6254(b), CSAC requests this Court to take this issue on review, as it presents a matter of great significance to its member counties.

C. Conclusion

CSAC believes that the Court of Appeal's opinion below will have far-ranging and negative impacts upon counties across the state. A requirement to disclose attorney billing and related information during the pendency of a litigation places counties at a strategic disadvantage in the very litigation to which that information relates, compromising their ability to negotiate for effective outcomes. In addition, the process of producing such records will require expenditure of substantial resources to gather, redact, and copy them, at a time when resources are short and in high demand. Because the public interest in reviewing attorney billing records and related information can be served at the conclusion of the litigation, there appears no public interest in requiring disclosure during the course of the litigation. Accordingly, neither the express language of § 6254(b) nor the public policies underlying the CPRA support the Court of Appeal's decision in this case. For these reasons, CSAC respectfully urges this Court to grant Los Angeles County's petition for review herein.

Respectfully submitted,

Anne L. Keck
Deputy County Counsel, Sonoma County
As Special Counsel for CSAC

Attachment: *Proof of Service*

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. §§ 1013a(3) and 2015.5)

I am employed in the County of Sonoma, California; I am over the age of 18 years and not a party to the within action; my business address is 575 Administration Dr., Rm 105A, Santa Rosa, California. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. On February 1, 2013, following ordinary business practice, I served the foregoing ***Amicus Curiae Letter in Support of Los Angeles County's Petition for Review*** on the parties in said cause, by placing on that date at my place of business, a true copy thereof, enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited with the United States Postal Service that same day in the ordinary course of business addressed as follows:

John Krattli, Acting County Counsel Jonathan McCavery, Deputy County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713	Robert Mann, Esq. Donald W. Cook, Esq. Mann & Cook 3435 Wilshire Blvd., Suite 2900 Los Angeles, CA 90010
Los Angeles County Superior Court Stanley Mosk Courthouse-Central District Atten: Honorable James C. Chalfant 111 N. Hill Street, Dept. 85 Los Angeles, CA 90012	Court of Appeal Division Eight 300 South Sprint Street Fl. 2, N. Tower Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 1, 2013, at Santa Rosa, California.

Eileen Shired