



August 5, 2022

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

Re: Letter in Support of Petition for Review
Public.Resource.Org v. Superior Court, No. S275575

Dear Chief Justice Cantil-Sakauye and Associate Justices,

Pursuant to Rule 8.500(g) of the California Rules of Court, the First Amendment Coalition (“FAC”) submits this letter urging the Court to grant review and transfer the above-referenced matter to the Court of Appeal. The issue of public access to law governing the public’s conduct deserves far more than the Court of Appeal’s summary denial. Joining this letter are Californians Aware and Reporters Committee for Freedom of the Press.

I. Interests of Amici Curiae

FAC is a California non-profit corporation dedicated to freedom of speech and governmental transparency. FAC provides legal information and consultations to journalists, academics, bloggers, and community members regarding access rights under the Freedom of Information Act and California’s various open government laws. FAC files amicus briefs in important appeals, both in state and federal courts, including the United States Supreme Court. In addition, FAC files litigation to defend and expand the rights of the public and press under access laws, including the California Public Records Act (“CPRA”). (See, e.g., *Becerra v. Superior Court (First Amendment Coalition)* (2020) 44 Cal.App.5th 897).

Californians Aware (“CalAware”) is a nonpartisan, non-profit advocacy group with a board comprised of journalists, current and former government officers and employees, and public interest advocates. Its mission is to foster the improvement of, compliance with, and public understanding of open government laws throughout the State of California.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono

legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

II. Why Review Should Be Granted

As argued in the Petition for Review, this Court should grant review and transfer the matter to the Court of Appeal for reasoned decision on a key issue of first impression in California—whether the public has a right to disclosure of regulations governing its conduct in an accessible and transparent manner.

“Openness in government is essential to the functioning of a democracy.” (*Int’l Fed’n of Prof’l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328.) The rules embedded in the California Code of Regulations are quintessential public records. They permeate the lives of millions of Californians and pervasively regulate the conduct of public agencies, private businesses, and natural persons. Yet the Office of Administrative Law refused to provide a machine-readable copy of the regulations in response to petitioner’s request.

As the Petition for Review discusses, a thoughtful and thorough decision from the Court of Appeal is necessary to examine whether a public agency may avoid its obligation to disclose public records by the mere expedient of housing them with a private entity. As the Legislature has directed, “Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter.” (Gov. Code, § 6270, subd. (a).). This case presents important questions about interpreting that statute, which has not apparently been the subject of any published decision, and applying it to a contract on which an agency is relying to defeat disclosure of public records.

Apart from that issue, review and transfer are necessary to ensure a reasoned decision on the proper construction of the term “possession of the agency” in the California Public Records Act (“CPRA”). (Gov. Code, § 6253, subd. (c).) Discussing that term, courts have applied concepts of “actual and constructive possession” drawn from other areas of the law. (*Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710 [citing cases about possession of hotel rooms and firearms].) In doing so, those courts apparently ignored California’s constitutional command that the CPRA “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” (Cal. Const., Art. I, § 3, subd. (b)(2).). However the term “possession” might be understood in other contexts, it must be construed broadly to further the right of access to public records “prepared, owned, used, or retained by any state or local agency regardless of physical form or

characteristics,” no matter where they are located. (Gov. Code, § 6252, subd. (e).) This matter should be transferred to the Court of Appeal for exploration of that issue.

Finally, review and transfer are necessary for a reasoned decision addressing the contention that statutes which say nothing about withholding public records can create exemptions from disclosure found nowhere in the CPRA’s text, in apparent derogation of the CPRA’s plain command that public records may only be made “exempt from disclosure by express provisions of law.” (Gov. Code § 6253, subd. (b).)

III. CONCLUSION

For the foregoing reasons, this Court should grant review and transfer the matter to the Court of Appeal, as requested in the Petition for Review.

Very truly yours,

FIRST AMENDMENT COALITION



John David Loy
Legal Director

cc: All counsel via TrueFiling.