No. S194708

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SIERRA CLUB,
Petitioner
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE,
Respondent.

COUNTY OF ORANGE,
Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION 3, NO. G044138

ORANGE COUNTY SUPERIOR COURT
Honorable James J. Di Cesare
No. 30-2009-00121878-CU-WM-CJC

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

FEDERAL CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

I. ORANGE COUNTY ATTEMPTS TO CONVERT AN ISSUE OF LAW, REVIEWED *DE NOVO*, INTO AN ISSUE OF FACT, REVIEWED FOR SUBSTANTIAL EVIDENCE, BY CHARACTERIZING THE TRIAL COURT'S LEGAL CONCLUSION AS A FACTUAL DETERMINATION

When a reviewing court is called upon to construe a statutory scheme, the Court accords no deference to the trial court's determination. (*An Independent Home Support Service, Inc. v. Superior Court*, (2006) 145 Cal.App.4th 1418, 1424.) Questions of statutory interpretation are reviewed *de novo*. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.)

Orange County posits that because the trial court made a factual finding that the OC Landbase data in a GIS file format is part of a computer mapping system, then it follows that the OC Landbase is exempt from the PRA pursuant to Section 6254.9.[1] (Answer Br., pp. 8-9; 11; 20-26.) Orange County's analysis and application of the standard of review on appeal is fatally flawed for the following reasons:

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[1] The California Public Records Act shall hereinafter be referred to as "PRA." Unless otherwise indicated, all statutory references refer to the California Government Code.

First, the Court of Appeal ("Fourth District") summarily rejected Orange County's position that statutory construction of Section 6254.9 should be reviewed under a substantial evidence standard. (Opn., p. 7 ["Our standard of review is *de novo.*"].) Thus, because the scope of review is limited by the Fourth District's ruling, this Court may disregard Orange County's faulty argument at the outset.

More importantly, Orange County provides no support for its position, as the case law relied upon in the Answer Brief is distinguishable from the case at bar. For example, Orange County's reliance upon *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 and *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, is misplaced (Answer Br., p.8), because those cases involved challenges to the trial court's *balancing of interests* under Section 6255 of the PRA, which involves questions of fact properly reviewed for substantial evidence.

Furthermore, "[f]actual findings made by the trial court will be upheld if based on substantial evidence. But the interpretation of the

[CPRA], and its application to *undisputed facts*, present questions of law that are subject to [independent] appellate review. " (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1275, quoting *BRV, Inc. v. Superior Court (2006)* 143 Cal.App.4th 742, 750 [emphasis added].) Here, all relevant facts are undisputed. (5 PA 1081-1084).

In *Dixon*, upon which Orange County relies in arguing for the substantial evidence standard, the appellate court reviewed the trial court's decision relating to PRA Section 6254(f)'s exemption for "investigatory files of a local agency for law enforcement." (*Dixon v. Superior Court, supra,* 170 Cal.App.4th at p. 1274.) The court first interpreted Section 6254(f), using rules of statutory interpretation. (*Ibid.* at p. 1275.) But then it had to review the trial court's factual finding regarding the disputed factual issue of whether the coroner files (i.e., autopsy reports) were sufficiently for the purposes of law enforcement. (*Id.* at pp. 1276-1278.) Thus, the appellate court in *Dixon* reviewed the trial court's factual finding concerning whether those particular coroner reports "inquire into and determine circumstances, manner and cause of a suspected homicide death

opinion cannot be imputed to the Legislature, nor is it binding upon this Court, despite Orange County's implied claims to the contrary. (See, e.g., Answer Br., p. 36; see also *Burden v. Snowden* 2 Cal.4th 556, 564, [court held that the declarations of two officers as to what was commonly known as "police officers" at the time of the passage of the Bill of Rights Act are "not logically probative of the Legislature's intent in enacting the Bill of Rights Act."]; *United Business Com.* v. *City of San Diego* (1979) 91 Cal.App.3d 156, 170, ["The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of Legislation upon the same subject, public policy, and *contemporaneous* construction."][emphasis added].)

Instead, the proper and relevant inquiry is what the *Legislature meant by including the term* "computer mapping systems" in subd., (b) of Section 6254.9. Since the Legislature did not define the term anywhere in the PRA, the meaning must be gleaned, if at all, by using rules of statutory interpretation. The trial court did not do this. Thus, Orange County cannot transform the trial court's

Statement of Decision, which never properly construed Section 6254.9 (5 PA 1347-1362), into an instrument to tie the hands of the reviewing Court.

II. THE CALIFORNIA CONSTITUTION REQUIRES SECTION 6254.9 BE NARROWLY CONSTRUED TO EXCLUDE COMPUTER SOFTWARE ONLY, AND NOT COMPUTER DATA

The California Constitution mandates the judiciary employ a unique rule of statutory interpretation for laws involving the right of public access to government information, stating: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, 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).) This portion of the Constitution's Declaration of Rights requires the judiciary to narrowly construe Section 6254.9.

Orange County wrongly states Sierra Club's position with respect to the California Constitution's role in construing Section 6254.9. Sierra Club does not argue that the California Constitution "abrogates" Section 6254.9, as Orange County suggests. (Answer

where there is a concrete and definite prospect of criminal law enforcement proceedings." (*Id.* at p. 1278, nt. 3.)

In this case, the question is whether, as a matter of law, "computer mapping system" refers to mapping software and not the mapping data the software processes. (see Opening Br., pp. 19-20; 32; 41-47.) There is no dispute that the OC Landbase is a database containing no software -- the parties have stipulated as such. (5 PA 1083) Thus, what is at issue in this case is a statutory definition of computer mapping system, which is purely a question of law, not a fact-based inquiry. (See e.g., 3 PA 763 [Real Party's brief stating, "[T]he parties largely agree on the facts, but disagree on the legal interpretation of Section 6254.9[.]".) Thus the present inquiry is not analogous to that in *Dixon.*

Moreover, the trial court's purported factual determination as to what constitutes "computer mapping systems" for purposes of Section 6254.9 was based on the opinion of Mr. Robert Jelnick, a long-time employee of Orange County, as to what he believed "computer mapping systems" means. However, Mr. Jelnik's

Br., p. 42.) Nor does Sierra Club argue that it "repeals or nullifies" Section 6254.9. (Answer Br., p. 43.) Rather, Sierra Club argues that art. I, § 3(b) is itself, essentially, a canon of construction used to interpret arguably ambiguous disclosure statutes' and applied before resorting to legislative history or any extrinsic aid.

Thus, the role of the art. I, § 3(b) of the California Constitution in this case is as follows: if the Court finds Sierra Club's and Orange County's interpretations equally valid, then the Constitution is the ultimate tie-breaker; if there is any question as to the statute's interpretation, then the Constitution definitively answers it, and a court is to err on the side of disclosure of the OC Landbase.

Faced with a clear constitutional mandate favoring Sierra Club's position, Orange County cites inapplicable case law for the proposition that Sierra Club's interpretation of art. I, § 3(b) would require this Court to deviate from well-settled rules of statutory interpretation in construing a statute "liberally in light of its remedial purpose". (Answer Br., p. 43, citing *Meyer v. Spint Spectrum L.P.* (2009) 45 Cal.4th 634, 645.) First, Section 6254.9 is not a

remedial statute. Second, Sierra Club is not advocating this Court construe Section 6254.9 "liberally." In fact, it is just the opposite. Sierra Club is requesting this Court follow the California Constitution and limit the reach of Section 6254.9's exclusions.

Orange County claims that Proposition 59 merely "codified" the pre-existing rule that exclusions from the PRA or exemptions from disclosure must be narrowly construed. (Answer Br., p. 42.) This is a mischaracterization. In fact, Proposition 59 raised rules of statutory interpretation with respect to government access and information disclosure statutes to the level of a *constitutional right.* As one court observed, "With the passage of Proposition 59 effective November 3, 2004, the people's right of access to information in public settings now has ***state constitutional stature***..." (*Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 703-704 [citations omitted, emphasis added].)[2]

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[2] Proposition 59 goes beyond existing law and established a new mandate that any future legal authority limiting the right of access must be adopted with express findings. Art. I, § 3(b)(2) specifically mandates:

Furthermore, Orange County advances the unsupportable argument that Proposition 59 did nothing to alter rules of statutory interpretation in any way with respect to the PRA. (Answer Br., p. 43.) But adding a rule of statutory interpretation is precisely what Proposition 59 accomplishes.

Proposition 59 "Requires that statutes or other types of governmental decisions, including those already in effect, be broadly interpreted to further the people's right to access government information. The measure, however, still exempts some information from disclosure, such as law enforcement." (California Secretary of the State, *California Official Voter Information Guide,* Analysis of Proposition 59 (2004) <http://vote2004.sos.ca.gov/propositions/prop59-analysis.htm> [As

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> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, **shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access**. *A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.*
>
> [emphasis and italics added.]

of Jan. 21 2012].) Proposition 59's effects were acknowledged to likely "result in additional government documents being available to the public." (*Ibid.*)

Adopting Sierra Club's interpretation would not, in Orange County's words, "impose on the statute a construction not reasonably supported by the statutory language" or "abandon long-established rules of statutory construction." (Answer Br., p. 43, citing *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 645; Answer Br., p. 44.) On the contrary, as addressed herein, Sierra Club's statutory interpretation of Section 6254.9 is derived from the 2005 Attorney General Opinion and the 2009 Sixth District Court of Appeal Opinion in *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, both of which are well-reasoned and sound; further, the imposition of the constitutional mandate merely solidifies the reasonableness of Sierra Club's position.

In order to overcome the presumption that a record is a "public record" subject to disclosure under the PRA, and especially given the constitutional mandate, a statutory exclusion (such as

Section 6254.9) must be clearly expressed and leave no room for doubt. (See *Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 709 [given the constitutional mandate, all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary.].) Art. I, § (b)(2) of the California Constitution merely requires any doubt be resolved in favor of disclosure.

Orange County wishes to circumnavigate the constitutional requirement in art. I, § 3(b)(2) and persuade this Court to refrain from employing a narrow construction of Section 6254.9. To that end, Orange County implies that art. I, § 3(b)(5) prohibits the judiciary from narrowly construing a previously-enacted statutory exclusion such as Section 6254.9. (Answer Br., p. 43.) Neither the plain language of the Constitution, nor the context of Proposition 59, nor case law, supports this concept.

Contrary to Orange County's inference, art. I, § 3(b)(5) cannot reasonably be construed to preclude the application of Proposition 59 to Section 6254.9 just because Section 6254.9 was enacted before

the passage of Proposition 59. (Answer Br., p. 43.) To follow Orange County's reasoning would be contrary to the express language in art. I, § 3(b)(2) which specifically directs the narrow construction rule be applied to statutes "**in effect on the effective date of this subdivision**." (Cal. Const. art I, § 3(b)(2) [emphasis added].) Likewise, using well-settled principles of statutory construction under Sierra Club's analytical framework, narrowly interpreting Section 6254.9 neither repeals nor nullifies the software exclusion and Orange County does not explain how it would. (Answer Br., pp. 43, 44.) Software, including GIS software, remains and would remain excluded from the PRA's reach.

Finally, Orange County's concern that Sierra Club's analytical framework invites "great uncertainty" is neither explained nor understandable. (Answer Br., p. 44.) Merely urging this Court to give real effect to the People's intent embodied in art. I, § (3)(b) of the California Constitution's Declaration of Rights does not invite uncertainty.

III. ORANGE COUNTY'S INTERPRETATION OF SUBDIVISIONS (B) AND (D) OF SECTION 6254.9 IS UNREASONABLE, ILLOGICAL AND WOULD LEAD TO AN ABSURD RESULT; THEREFORE THIS COURT SHOULD REJECT ORANGE COUNTY'S STATUTORY INTERPRETATION OF SECTION 6254.9.

In advocating for its unreasonable interpretation of Section 6254.9(a) term "computer software," Orange County strenuously argues that the word "includes" is a term of enlargement, so that Section 6254.9(b) "enlarges" the meaning of "computer software" from its usual and customary sense, to include computer mapping *data* such as GIS file-formatted data of the OC Landbase. (Answer Br., pp. 13; 25.) Orange County's argument that "includes" enlarges the meaning of "computer software" to include computer *data* is an invitation to broadly construe a statutory provision limiting access to government records in contravention of the constitutional mandate that such provisions be narrowly construed. (Cal. Const., art. I, § 3(b)(2).) Orange County's invitation should thus be declined.

Moreover, since the word "includes" possesses a variety of meanings depending upon context, there is no hard and fast rule that "includes" is a term of enlargement, as even Orange County seems to acknowledge. (Answer Br., p.13, quoting case law as

follows: "[t]he term includes is ***ordinarily*** a word of enlargement..."[emphasis added].) California courts have interpreted "includes" in other ways, depending on the context and the statute's framework. (*State Compensation Ins. Fund v. Comp. Appeals Board* (1977) 69 Cal.App.3d 884, 887; *Coast Oyster Co. v. Perluss* (1963) 218 Cal.App.2d 492, 501; *Ex Parte Martinez* (1942) 56 Cal.App.2d 473, 477.)

"Includes" is merely a parameter that, depending on the context in which the term is found, can be either expansive or limiting. The cases cited by Orange County, at page 13, involve statutes where "includes" is followed by a broadening word. (See *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 639 ["...includes...*every*..."]; *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774 ["...includes *any* communication..."]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582 ["...includes *all* the time the employee is suffered..."]; *Ornelas v. Randolph* 4 Cal.4th 1095, 1101 ["...includes *any* recreational purpose..."]; *Patton v. Sherwood* (2007) 152 Cal.App.4th 339, 346 [...includes *any* person...]; *Associated Indemnity*

Corp. v. Pacific Southwest Airlines (1982) 128 Cal.App.3d 898, 905 ["...includes *every* person..."] [emphasis added].)

Moreover, ultimately, Orange County misconstrues the idea of "enlargement" and "limitation" in the context of the general rule that "includes", is "ordinarily a term of enlargement rather than limitation." (*Ornelas v. Randolph, supra* (1993) 4 Cal. 4th at p. 1101.) This phrase repeated in much case law and relied on by Orange County does not mean that the mere presence of "includes" in the statute enlarges the meaning of "software." Instead, this phrase means that "software" is not "limited" to the items that follow "includes." For example, there may be other types of "software" that can be excluded from disclosure under Section 6254.9(b) besides "computer programs, computer mapping systems, and computer graphics systems." In that sense, "includes" is a term of "enlargement" because the list is not exhaustive. But, again, the presence of "includes" does not give a court *carte blanche* to enlarge the term "software" to items that are not within its class. Thus, since "data" is not in the same class (or nature or scope) as "software,"

"software" should not be enlarged to include it. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, overruled on other grounds by *Luna v. Hoa Trung Vo*, 2010 U.S. Dist. LEXIS 121543 [principle of *ejusdem generis* provides that where specific words follow general words in a statute or vice versa, "the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated."].)

Orange County ignores Sierra Club's other arguments regarding the interpretation of Section 6254.9(b). Remarkably, Orange County largely ignores the long-standing maxim that when a statute contains a list or catalogue of items, the meaning of each should be determined by reference to the others avoiding an interpretation that makes a term markedly dissimilar from another in the list. (See Opening Br., p. 21; see, also, *Martin v. Holiday Inns* (1988) 199 Cal.App.3d 1434, 1437-1438 [court ruled statute of limitations was restricted to things of a nature similar to or consistent with "wearing apparel, trunks, valises," etc., so that the bronco and trailer did not fall within the nature of the items

included].) Thus, "computer mapping systems," "computer programs," and "computer graphic systems" should be construed uniformly and in parallel. This argument goes unanswered by Orange County.

Another point left unaddressed by Orange County, is that even if subd., (b) is a "definition" of subd., (a) 's "computer software," a court is not bound by the definition if it would lead to an unreasonable reading of the statute. (Opening Br., p. 25.)

Instead of addressing some of Sierra Club's arguments head-on, Orange County offers an unusual interpretation of Section 6254.9(d), in an attempt to justify its strained reading of subd., (b). (Answer Br., pp. 18-20.) Section 6254.9(d) provides:

> Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this chapter.

Perhaps realizing that this subdivision presents problems for Orange County's chosen interpretation of Section 6254.9, it insists subdivision (d) makes a distinction between "information" and "records," so that providing the *information* in the OC Landbase as

Orange County did, albeit in non-GIS file format, is sufficient for purposes of PRA compliance. (Answer Br., pp. 19-20.)

In support of its reading of subd. (d), Orange County relies on two inapplicable cases interpreting the PRA's "investigative records" exemption in Section 6254(f). (Answer Br., pp. 18-19, citing *Williams v. Superior Court* (1993) 5 Cal.4th 337 and *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.)

Orange County believes that *Williams* and *Haynie* require this Court to read into Section 6254.9 an exemption for "records" but not for "information." But neither *Haynie* nor *Williams* support Orange County's interpretation of subd., (d) because Section 6254.9 is a records *exclusion*, not an *exemption*, and further subd. (d) lacks the specificity of Section 6254(f) and the express distinctions made therein. By enacting Section 6254(f), the Legislature took great pains to carve out a specific exception to the investigative records exemption, allowing disclosure of specified information contained in the investigative record.

If the Legislature had wanted to carve out "information"

exceptions to Section 6254.9's software exclusion, it would have made that intent clear just as it has done in other sections of the PRA. For example, Section 6254.3, which excludes from the definition of "public records" the home addresses and home telephone numbers of state employees and employees of a school district or county office, the Legislature provided certain exceptions where information contained in the records could be disclosed. (Section 6254.3(a)(1).) In contrast, the Legislature chose not to carve out exceptions to Section 6254.9's software exclusion, but to ensure that public records maintained in a computer retained their public records status subject to disclosure. (Section 6254.9(d).)

Because no distinction between "records" and "information" can be found in Section 6254.9(d), and because no categories of information are expressly stated for disclosure, there is no practical basis for Orange County's position that Section 6254.9(d) means something other than what it plainly states on its face: information stored in a computer retains its public record status and therefore shall be disclosed as required by the PRA. It follows, then, because

the PRA requires disclosure of electronic records in the electronic format requested, (Section 6253.9) computer mapping records such as the OC Landbase must be disclosed in GIS file format.

Orange County's interpretation of Section 6254.9(d) lacks credibility for another reason too: the Legislature would not have excluded "computer programs" from "public record" status only to then turn around and defeat the legislation's foremost purpose by deeming the *information* in the computer program (i.e., the computer program code) a "public record" subject to disclosure in an alternative format, such as paper or .pdf documents.

Said another way, if the information in the GIS database must be produced in paper or .pdf records, as is alleged by Orange County, then logistically so too must the information in the GIS software since, according to Orange County, the GIS database and the GIS software together constitute a "computer mapping system." (Answer Br., pp. 1; 19-20) Therefore, to accept Orange County's premise, is to revert back to the state of the law in 1988 before the passage of A.B. 3265, when agencies were required under the PRA's

terms to produce their software code on paper print outs. (See Opening Br., p. 47, citing 4 PA 1038, [A.B. Leg. Hist.].) For these reasons, Orange County's interpretation of Section 6254.9(d) is unreasonable, unsupported, and likely to result in absurdity; it should therefore be rejected.

IV. THE ATTORNEY GENERAL AND THE SIXTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT GIS PARCEL DATABASES ARE SUBJECT TO MANDATORY DISCLOSURE UNDER THE PRA AND THIS COURT SHOULD REFUSE ORANGE COUNTY'S URGING TO REJECT THOSE DECISIONS

As addressed in its Opening Brief, Sierra Club explains how the Attorney General Opinion upholds canons of statutory construction in finding that "software" does not mean GIS database. (Opening Br., p. 57) In response, Orange County argues that this Court should decline to adopt the Attorney General Opinion's reasoning because "none of the cases or dictionary references cited...specifically interpreted Section 6254.9." (Answer Br., p. 45.) However, use of dictionary references to determine the plain and common meaning of the terms of the statute is a common and proper tool of statutory interpretation. (88 Ops.Cal.Atty.Gen. 153, 157 (2005).)

Orange County inexplicably claims that the Attorney General Opinion "ignores the plain language of Section 6254.9" by employing the very tool with which to determine the plain meaning of "software" - the dictionary. (Answer Br., p. 45 [noting dictionary references and "external sources"]; Answer Br., p. 25, nt. 8 [Orange County cites to dictionary definitions]; 88 Ops.Cal.Atty.Gen. 153, 159 (2005).) In addition, Orange County claims that by attempting to determine the common meaning of a term in the statute, the Attorney General somehow created an "artificial distinction" between "software" and "data." (*Ibid.*) Yet, as addressed herein, this distinction is not "artificial" but derived from the intent of the Legislature.

Orange County provides no support for its perplexing argument that merely because the Attorney General Opinion relies upon case law that did not specifically interpret Section 6254.9, the Opinion is somehow invalid and should be dismissed. (Answer Br., p. 45.) On the contrary, the Attorney General Opinion follows the correct legal maxim that "words used in a statute...should be given the meaning they bear in ordinary use" and "so construed, they provide the best indication of the Legislature's intent." (88

Ops.Cal.Atty.Gen. 153, 157 (2005).) Employing these established principles, the Attorney General's Opinion concludes that the term "software" cannot be construed as including parcel map data by virtue of the term "computer mapping system" in Section 6254.9(b). (*Ibid.*)

Orange County further contends the Attorney General Opinion is undercut by its reference to the Elder Pipeline Safety Act of 1981 (Gov. Code Section 51010.5), which defined the term "GIS mapping system" as follows: "a geographical information system that will collect, store, retrieve, analyze, and display environmental geographical data in a data base that is accessible to the public." (Answer Br., p. 36.) Orange County does not explain why this definition undermines the Attorney General Opinion's conclusion that the term "computer mapping system" in Section 6254.9(b) cannot be construed to include computer mapping data. It appears to plainly support the Attorney General Opinion's view that the term "system" refers to software that acts to "collect, store, retrieve, analyze, and display" the data contained in a database. As such, it

is difficult to see how Orange County interprets this statute as somehow undermining Sierra Club's position.[3]

Similarly, Orange County's attempts to refute the applicability of *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, are unavailing. (Answer Br., pp. 46-48.) *Santa Clara* did not involve only "the Critical Infrastructure Information Act" and issues related to preventing "a terrorist attack," (Answer Br., pp. 46-47.) On the contrary, the *Santa Clara* case is an instructive Public Records Act case; the court expressly addressed whether Santa Clara County's GIS database must be disclosed pursuant to the PRA, and, addressing Section 6254.9 in the process, correctly held that the county was not authorized to withhold the GIS database from public

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[3] Perhaps recognizing this problem, Orange County in a footnote (Answer Br., p. 36-37, fn. 12) stakes out a contrary position to the one it takes in the main body of its argument, contending that that the Attorney General had ignored the fact that Gov. Code Section 51010.5 limited the definition of "GIS mapping system" to use in that Elder Pipeline Safety Act , and so the definition of "computer mapping system" in Section 51010.5 is irrelevant to the meaning of similar terms in other statutes. Orange County misses the point. The 2005 Attorney General Opinion reviewed a number of other sources defining terms similar to "computer mapping system", including three statutes and at least two dictionary sources, to show that the term's ordinary accepted meaning, in a number of different contexts, does not included data or databases. It is irrelevant that definitions were provided for particular sections of the code, what matters is that the definitions consistently treated the "data" as something separate and outside of the "system".

disclosure. (*Santa Clara County v. Superior Court, supra,* 170 Cal.App.4th at pp. 1330-1334.)

In sum, the 2005 Attorney General Opinion and the *Santa Clara* Opinion should be affirmed by this Court as reasonable interpretations of Section 6254.9 and Orange County's criticisms of these sound legal decisions should be disregarded.

V. ORANGE COUNTY FAILS TO OVERCOME LEGISLATIVE HISTORY EVIDENCING THE LEGISLATURE'S INTENT THAT "SOFTWARE" AS USED IN SECTION 6254.9 DOES NOT EXTEND TO COMPUTER "DATA"

In its Opening Brief, Sierra Club provided a detailed analysis of the legislative history of Section 6254.9 that provided a detailed chronology of how Assembly Bill 3265 was introduced by the City of San Jose, how the California Department of Finance (hereinafter "Finance Department") objected to the bill's inclusion of "databases" as subject to exclusion from the PRA, and how the bill that ultimately emerged was substantially different from what was introduced, in particular striking the word "databases." (Opening Br., pp. 32-39.) Orange County does not dispute that this chronology is correct. In fact, Orange County acknowledges that the Legislature specifically removed the term "computer readable databases" from the bill. (Answer Br., p. 32) Nonetheless, Orange

County asks this Court to read that precise term back into the statute, and hold that the OC Landbase is excluded from the PRA's reach. Because Orange County's request is contrary to the legislative intent behind Section 6254.9, it should be rejected. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 861 ["The effect on this court of the Legislature's decision to omit the prior language from the final version of the bill is plain. We cannot interpret the section to reinsert what the Legislature has deleted"].)

Orange County in essence re-writes the legislative history of A.B. 3265, focusing almost exclusively on what the bill's sponsor hoped to achieve through the legislation and omitting analysis of the portions of that history that evidence the sponsor was only partially successful, as aptly demonstrated in Sierra Club's Opening Brief. (Opening Br., pp. 32-39.)

Perhaps the most telling element of Orange County's Answer is its failure to address the most important aspects of the bill's chronology set forth in Sierra Club's Opening Brief. For example, the Answer Brief does not even mention the objections raised by the Finance Department to the inclusion of the term "computer readable databases" in the bill. That objection was pivotal, since it resulted in

the removal "computer readable databases" from the final bill.

The April 4, 1988 version of the bill contained the following language:

> The people of the State of California do enact as follows:
>
> ~~SECTION 1. Section 6257 of the Government Code is~~
>
> SECTION 1. Section 6254.9 is added to the Government Code, to read:
>
> *6254.9 (a) Computer software developed or maintained by state or local agency is not itself a public record under this chapter. The agency may sell, lease or license the software for commercial or noncommercial use.*
>
> *(b) Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer.*
>
> *(c) As used in this section, "computer software" includes computer readable data bases, computer programs, and computer graphics systems*

(4 PA 943-44.)

On April 28, the Finance Department submitted a Bill Analysis opposing A.B. 3265, in part because the bill would define "computer readable databases" as "software" exempted from disclosure under the PRA. In the Finance Department's view such databases were clearly within the scope of the PRA's disclosure provisions:

> The inclusion of data bases in paragraph (c) is

contradictory to the intent expressed in paragraph (b) since the records maintained in data bases are subject to public records laws.

* * *

The definition of computer software in (c) includes data bases. The inclusion of data bases in paragraph (c) is contradictory to the intent expressed in paragraph (b) *since data bases are organized files of record information subject to public record laws.* In addition, the inclusion of information data bases in the definition of computer software makes them subject to sale, licensing, or rental *which is contrary to the Section 6250 and 6252(d)(e) of the Government Code.*

(4 PA 1020-21 [emphasis added])

In response, the Legislature amended the bill to remove the term "computer readable databases", which is exceedingly compelling evidence that it was not the Legislature's intent to exclude computer readable databases of any kind from the PRA. (See *Gikas v. Zolin, supra,* 6 Cal.4th at p. 861; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 607 ["The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision"]; *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 230-231 ["[A] court should not grant through litigation what could not be achieved through legislation. Thus, courts must not interpret a

statute to include terms the Legislature deleted from earlier drafts"].)

Orange County does not address this issue at all, but rather focuses almost entirely on the contention that since the original intent of the bill's sponsor, City of San Jose, wanted to exclude from disclosure its mapping and other databases, the Legislature could not have actually intended to remove "databases" from the legislation. (Answer Br., pp. 32-37.) Orange County argues that when the term "computer readable databases" was removed and replaced with the term "computer mapping systems", what the Legislature actually intended to do was simply provide a slightly different definition of the type of "database" exempted from disclosure under the PRA. (Answer Br., pp. 33-38.) However, such an argument is nonsensical for a number of reasons.

Primarily, it ignores the reason *why* the term "computer readable database" was deleted. The Finance Department did not object that the term "computer readable databases" was not specific enough, or that some types of computer databases should be excluded from the PRA's reach while others should not. It objected to the inclusion of the term because databases are not "software",

and because they are clearly subject to disclosure under public records laws. (4 PA 1020-21.)

Additionally, if the Legislature intended to ignore the objections of the Finance Department, as Orange County's refashioned legislative history would require, there would have been no need for an amendment removing the term "database" at all. If the Legislature had for some reason decided to simply specify a type of database to be excluded, there would be no reason to remove the word "database" altogether. It simply would have specified the type of "database" at issue. Instead, the Legislature removed the word "database" entirely from the bill, and inserted the term "systems." (4 PA 946-47, see also Opening Br., pp. 34-39.) It is clear from even the portions of bill analysis cited by Orange County that "Systems" referred to "software," not "data".

For example, the Assembly Committee analysis cited by the Answer, page 31, states that the term "computer readable mapping system" refers to a computer program. The report's "Comments" section notes that San Jose "has developed computer readable mapping systems, graphics systems, *and other* computer programs for civic planning purposes," and the "city is concerned about

recouping the cost of developing the software." (4 PA 1028-29 [emphasis added].) Thus, "computer readable mapping systems" and "graphics systems" were both explicitly understood as types of "computer programs," not databases. Further, the "concern" was to recoup the cost of developing software, not databases. (4 PA 1029; Opn., pp. 9, 12.) Orange County does not address, analyze or rebut the foregoing.

Moreover, contrary to Orange County's assertion at page 36, Mr. Joffe's testimony about the meaning of computer mapping system cannot support Orange County's flawed interpretation of legislative history. (See *Burden v. Snowden, supra,* 2 Cal.4th 556, 564.) Mr. Joffe's testimony is used by Orange County as a distraction because the testimony related not to what the Legislature understood the term "computer mapping systems" to mean at the time A.B. 3265 was passed, but rather his present understanding of the term. In any event, Mr. Joffe testified that a computer mapping system manipulates data in a database, but neither the data nor the database are part of that system—the system is the software that acts upon and organizes the data. Mr. Joffe's testimony in this regard is not contradictory to Sierra Club's position, as Orange County

alleges. (Answer Br., p. 36) Rather, Mr. Joffe's conclusion is precisely what the Sierra Club contends—that the database is not part of a computer mapping system.

Orange County and the Fourth District rely on the Strategic Geographic Information Investment Act of 1997 (hereinafter "AB 1293") as evidence of legislative intent behind Section 6254.9. Both Orange County and the Fourth District claim AB 1293 supports the proposition that the Legislature intended databases, such as the OC Landbase here, be included in the definition of "geographic information system". (Opn., p. 19; Answer Br., pp. 39-41.) Both note that AB 1293 defined "geographic information system" as "an organized collection of computer hardware, software, geographic information, and personnel designed to efficiently capture, store, update, manipulate, analyze, and display all forms of geographically referenced information," and rely on this definition to support the contention that a geographic information system includes the data on which it acts. (Opn., at 19; Ans. at 39-41.)

However, the definition of GIS data is not at issue in this case -- only the definition of "computer software" in Section 6254.9. The OC Landbase (which is a GIS database) has been stipulated to

include only data. (5 PA 1083.) The term "geographic information systems" does not appear anywhere in Section 6254.9. Therefore, AB 1293 is not probative of legislative intent of Section 6254.9.

Nevertheless, the failed bill's language and history still support Sierra Club's position for the following reasons: First, *on its face*, the definition of "geographic information systems" in AB 1293 contemplates that the "system" consists of people, hardware, and software, and that "system" is designed to "capture, store, update, manipulate, analyze and display all forms of geographically referenced information." (*Id.*) Thus, the "geographically referenced information" is *not* part of the system.

Second, AB 1293 contains numerous provisions and definitions which rather straightforwardly identify the underlying geographic data as separate from the systems that process it. For example, § 1 subd., (c) reads:

> Crime prevention, property management, energy resources planning and service delivery, land planning, risk assessment, economic development, emergency response, pollution control, education, delivery of human and social services, transportation management, natural resources management, and environmental decision making are all functions of the public and private sectors that require large amounts of high quality and available information. This information can be indexed by its geographic location, and, *through the use of geographic information systems*, can be

retrieved rapidly and effectively."

(Assem. Bill No. 1293 (1997-1998 Reg. Sess.) § 1 subd., (c) [Emphasis added].)

Evidently, the "information" referred to in this quote is considered separate from the "geographic information systems" which manipulate and retrieve it. Also, AB 1293 separately defines "geographic information records" as "maps, documents, computer files, data bases, and other information storage media m which geographic information is recorded." (Proposed Section 8302(e), Orange County's Request for Judicial Notice Exhibit 1, p. 5.) Since none of these terms appear in the definition of "geographic information system", it is reasonable to conclude that the Legislature did not intend to include such records in its definition.

Finally, Orange County notably ignores the most pertinent fact relating to AB 1293—that the Governor vetoed the bill. (See Petitioner's Second Motion Requesting Judicial Notice, Exhibit A). A review of the purposes of the bill provides context and gives full meaning to the Governor's statement at the time of veto. For example the authors of AB 1293 considered the geographic data to be public data that deserved unfettered access:

(m) Because of the high cost of creating and maintaining

> geographic information data bases, many public agencies are *seeking greater authority to sell the data.* Public agency policies for pricing the data range from covering the cost of data duplication, to recouping the costs from compilation and maintenance of the data bases. These policies impede and discourage the sharing of data among public agencies with overlapping geographic jurisdictions and interests. *They also threaten to thwart the public's right to open and unfettered access to the government's decision making information.*
>
> (Assem. Bill No. 1293 (1997-1998 Reg. Sess.) § 1 subd., (m) [Emphasis added].)

Since the bill's purpose was to *stop the practice of selling mapping data* by providing grants to reduce the incentive, ("It is the intent of the Legislature in enacting this act to redress these problems..."), and in fact, the bill would have required that any grant recipient, including private, non-governmental entities, to "make data developed or maintained with grant funds available to disclosure under the California Public Records Act . . . and require that the electronic data shall be placed in the public domain free of any restriction on use or copy" (§ 1 subd. (n), at Orange County's Request for Judicial Notice, Exhibit 1, p. 4.) the Governor's veto message speaks volumes: "most of the goals of this program are achievable under existing law" and "this bill is unnecessary and creates an infrastructure to accomplish what can be done in its absence," precisely because state law already authorized unfettered

access to GIS data. (Orange County's Request for Judicial Notice, Exhibit 1, p. 4.)

VI. THE LEGISLATURE'S REFUSAL TO DISTURB THE ATTORNEY GENERAL'S 2005 OPINION ON THREE DIFFERENT OCCASIONS IS EVIDENCE THAT THE LEGISLATURE AGREES WITH THE ATTORNEY GENERAL'S INTERPRETATION OF SECTION 6254.9.

Sierra Club asserts that the Legislature's failure to amend the PRA in response to the Attorney General's 2005 Opinion concerning Section 6254.9 signals acquiescence. In response, Orange County cites *Prachasaisoradej v. Ralphs Grocery Company, Inc.* (2007) 42 Cal.4th 217 (Answer Br., pp. 39-40). Yet that case does not help Orange County because it is substantively distinguishable.

In *Prachasaisoradej,* this Court was asked to infer that the Legislature acquiesced to a court of appeal's interpretation of a statute *solely* because two subsequent bills intended to overturn the court of appeal's decision died without a floor vote. (*Prachasaisoradej v. Ralphs Grocery Company, Inc., supra,* 42 Cal.4th at pp. 243-244.) In contrast, the issue here is not whether legislative acquiescence can be inferred solely because the 2008 Orange County-sponsored bill, defining "computer mapping system" as including computer data, failed in Committee, but rather whether the Attorney General's

interpretation of Section 6254.9, subd., (b) has been ratified by the Legislature because the Attorney General's Opinion has not been disturbed despite the number of occasions in which the Legislature could have done so.

First, the Attorney General's Opinion was offered in response to Assembly member Nation's official written request. (88 Ops.Cal.Atty.Gen. 153, 153 (2005).) The fact the Legislature did not take steps to amend Section 6254.9 after having received the Attorney General Opinion in 2005 is evidence the Legislature agreed with the Attorney General's interpretation of the statute.

Three years later, the Attorney General's interpretation of Section 6254.9 was again placed squarely before the Legislature after the Santa Clara Superior Court ruled against Santa Clara County on the same "computer mapping system" interpretation theory advanced by Orange County in this case. (See, e.g., 1 PA 00229-232; Assembly Bill No. 1978 (2007-2008 Reg. Sess.) [attached as Exhibit 8 to Petitioner's Motion Requesting Judicial Notice].) AB 1978 was sponsored by Real Party Orange County who sought to define "computer mapping systems" as computer data, just as Orange County asks this Court to do now. The Legislature was thus

presented a second opportunity to address the Attorney General's interpretation of Section 6254.9 but again declined to do so.

Finally, the Legislature took no steps to amend the PRA in response to the Sixth District Court of Appeal's 2009 decision, which cited the Attorney General Opinion with favor, wherein the court held that GIS databases (such as the OC Landbase at issue in this case) are not Section 6254.9 "software" (*County of Santa Clara v. Superior Court, supra,* 170 Cal.App.4th at pp. 1332-1334).

Thus, because the Legislature declined to disturb the Attorney General's interpretation of Section 6254.9's software exclusion not once, not twice, but on three occasions, it is reasonable to conclude legislative ratification of the Attorney General's interpretation of Section 6254.9. (See *Cal. Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 16-17 [In agreeing with Attorney General's interpretation of statutory term, noting Legislature's failure to "modif[y]" that interpretation].)

VII. DESPITE ORANGE COUNTY'S CLAIMS TO THE CONTRARY, THE LEGISLATURE HAS NOT ACQUIESCED TO ORANGE COUNTY'S INTERPRETATION OF SECTION 6254.9 AS INCLUDING GIS DATA

Orange County argues that because during the seventeen years that passed between the adoption of Section 6254.9 and the issuance of the 2005 Attorney General Opinion, some counties charged fees for GIS data, it follows that the Legislature must have acquiesced to Orange County's proposed interpretation of Section 6254.9. (Answer Br., p. 39.) The implication is, of course, that because the Legislature did not affirmatively stop recalcitrant counties from violating the PRA in this way, the Legislature demonstrated its agreement with the interpretation now advocated here by Orange County.

Orange County's argument is untenable for three reasons. First, the fact that 19 counties charged licensing fees for their GIS data prior to the 2005 Attorney General Opinion (Answer Br., p. 39) suggests very little, since the state of California has 58 counties in total. Thus, while perhaps one-third of the state's counties chose to violate the PRA by charging licensing fees for GIS file formatted data, the majority of California's counties chose to comply.

Second, Orange County places great weight on Governor-vetoed A.B. 1293's requirement that recipients of grant money for new GIS data development projects make that data available to the

public free from any restriction on use or copy. (Answer Br., pp. 39-41.) This reliance is misguided because A.B. 1293 contemplated grant-making not just to public agencies, but also to private entities, and further expressly encouraged "public-private partnerships" in developing and sharing GIS data. (Proposed Gov. Code, Section 8306(3)-(4) at Orange County Request for Judicial Notice, Exhibit 1, pp. 9-10.) Because private entities are not subject to the PRA and therefore can, by law, restrict use and copy of data, A.B. 1293 understandably needed to condition grant monies on the grantees' agreement to make the GIS data available to the public under the PRA's terms.

Third, legislative history of Section 6253.1, the PRA statute that requires public agencies to assist the public with making an effective public records request, (discussed in Sierra Club's Opening Br., p. 54), suggests that agencies as a matter of course violate the PRA in one way or another over 70% of the time. Section 6253.1 was an apparent attempt by the Legislature to mitigate this chronic agency recalcitrance. (See Petitioner's Second Motion Requesting Judicial Notice, Exhibit B, pp. 1-2.) Thus, it would be a mistake to infer any acquiescence on the part of the Legislature when violation of the

PRA by government officials is evidently so commonplace and the Legislature has taken demonstrative steps to change the state of affairs.

VIII. PROVIDING THE GIS FILE FORMATTED DATA WILL FURTHER THE IMPORTANT PUBLIC POLICIES UNDERLYING THE PRA AND, ACCORDINGLY, ORANGE COUNTY'S ASSERTIONS REGARDING COSTS SHOULD BE DISREGARDED AS IRRELEVANT

While wholly ignoring Sierra Club's many public policy arguments in favor of disclosure (Opening Br., pp. 51-54), Orange County itself offers no discussion of public policy considerations supporting its interpretation of Section 6254.9. Rather, Orange County points out the cost of creating and maintaining the OC Landbase (Answer Br., pp. 5-6.) Orange County's dearth of public policy arguments, both in number and significance, either in favor or against, makes it simple to detect which side in this case carries the weight of public policy.

While it may be true that the OC Landbase is a costly endeavor, (Answer Br., pp. 5-6), this in and of itself does not tip the balance of the PRA's policies of disclosure and government accountability in favor of Orange County. (See *Dixon v. Superior Court, supra,* 170 Cal.App.4th at p. 1277.) Certainly the Legislature observed that data

maintained in a government's computers is ultimately created at taxpayer expense in the first place. (Petitioner's Request for Judicial Notice, Exhibit 1, RJN1-0013 [July 6, 2000 Legislative Analysis of A.B. 2799].)

The 2005 Attorney General Opinion observed, "the fact that a record is costly to produce in the first instance or that a copy thereof may be costly to reproduce for a member of the public does not cause a public record to become exempt from disclosure." (88 Ops. Cal. Atty. Gen. 153, 163.) Moreover, "[t]here is nothing in the Public Records Act to suggest that a records request must impose no burden on the government agency." (*State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177.) Indeed, if public agencies were justified in withholding GIS data from disclosure for the reason that government personnel must be paid to input or enter it on a computer, (see Answer Br., pp. 3, 5) the same could be said for practically any computer-held information since most government activity today involves a computer in one way or another.

It could also be surmised that because the data in GIS file format is more useful than alternative formats such as paper or PDF

documents, then Orange County's true objective is to assert a proprietary interest in the *usefulness* of the information, not the *information itself.* Indeed, the reason geographic information in GIS file format commands large fees from third parties, including other government agencies, is precisely because it is so useful. (2 PA 400-401; 3 PA 00673-00680.)

Thus, public policy considerations underlying the PRA weigh heavily in favor of Sierra Club and in favor of disclosure of GIS databases such as the OC Landbase at issue in this case.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests this Court reverse the Fourth District and put a definitive end to agencies' sale and licensing of public records such as GIS data.

Dated: February 3, 2012

Respectfully Submitted,
VENSKUS & ASSOCIATES

By: Sabrina Venskus

Attorney for Petitioner,
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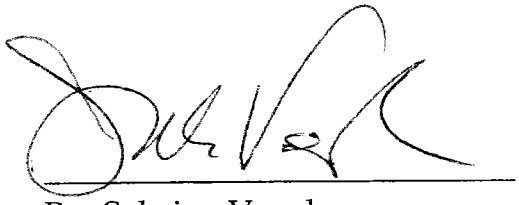
Certificate of Compliance

Counsel of record hereby certifies that pursuant to Rule of Court 8.520(c) (1) the attached Petitioner's Reply Brief on the Merits was produced on a computer and contains 8,035 words, not including this certificate or the tables of contents and authorities. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

Dated: February 3, 2012

Respectfully Submitted,
VENSKUS & ASSOCIATES



By: Sabrina Venskus

Attorney for Petitioner,
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Proof of Service

I, Sharon Emery declare:

I am over the age of 18 years and not a party to this action. My business address is 21 South California Street, Suite 204 Ventura, CA 93001:

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence so collected is deposited with the United States Postal Service the same day.

On February 3, 2012, at my place of business, I placed the following document: **PETITIONER'S REPLY BRIEF ON THE MERITS** and a copy of this declaration for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to the following persons, for collection and mailing on that date following ordinary business practices:

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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: February 3, 2012

Sharon Emery