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.

9 2012

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 SIERRA CLUB'S SECOND MOTION REQUESTING JUDICIAL NOTICE; DECLARATION OF SABRINA VENSKUS; EXHIBITS A-B

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Attorneys for Petitioner,

THE SIERRA CLUB

COPY

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Attorneys for Petitioner,

THE SIERRA CLUB

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner/Appellant The Sierra Club hereby motion and request this Court to take judicial notice of the documents listed below. This motion is brought on the grounds that Cal. Rule of Court 8.252 (a)(2), and Evidence Code §§ 450, 451, 452, and 459, confer upon this Court the authority to take judicial notice of the referenced documents for the purpose of assisting this Court in evaluating the issues presented in this matter. The Sierra Club requests judicial notice of the following documents:

Exhibit A: Governor Pete Wilson's Veto Message on California Assembly Bill 1293, (1997-1998 Reg. Sess.) dated October 10, 1997.

Exhibit B: Portions of the legislative history of California Assembly Bill 1014 (2001-2002 Reg. Sess.) related to the enactment of Section 6353.1.[1]

Relevancy of Exhibit A

The Governor's veto message is relevant to Sierra Club's rebuttal to Real Party in Interest Orange County's argument that A.B. 1293 is evidence of the Legislature's intent with respect to Section 6254.9, enacted 10 years earlier, to exclude GIS databases from PRA disclosure. (Answer Br., pp. 39-41.) Previously vetoed acts of the Legislature may contribute to the Court's interpretation of a statute. *(City of Richmond v. Comm'n on State Mandates,* 64 Cal. App. 4th 1190, 1199 (1998) [referring to various versions of a bill, including reference to the Governor having previously vetoed legislation].)

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[1] All statutory references are to the Government Code unless otherwise indicated.

Specifically, Sierra Club argues that A.B. 1293 was an attempt by the Legislature to stop agencies' practice of selling GIS data such as the database at issue in this case, but that the bill was vetoed by the Governor because "most of the goals of [A.B. 1293] are achievable under existing law" and that A.B. 1293 was, "unnecessary and creates an infrastructure to accomplish what can be done in its absence." Thus, this veto message indicates, contrary to Orange County's contention, (Answer Br., pp. 40-41) that the Legislature did believe that "public agencies were already required to produce data in a GIS file format in response to a PRA request." (see Answer Br., p. 41) at the time A.B. 1293 was passed.

Because it is relevant to the Sierra Club's rebuttal of Orange County's argument regarding the proper interpretation of section 6254.9, it is likely to aide in the Court's analysis and therefore the Court may properly take judicial notice of Exhibit A pursuant to Evidence Code section 452 (c).

Relevancy of Exhibit B

The selected portions of the legislative history of A.B. 1014 (now Section 6253.1) is relevant to Sierra Club's rebuttal to Real Party in Interest Orange County's argument that an agency's conduct is probative of whether the PRA requires disclosure of a public record in the first instance. (Answer Br., p. 39.) Specifically, Orange County states "at least 19 counties charged fees for the production of GIS data in a GIS file format" prior to the 2005 Attorney General Opinion interpreting Section 6254.9, and suggesting that therefore legislative acquiescence can be inferred that Section 6254.9 indeed excludes GIS databases from the PRA's reach. (Answer Br., p. 39.)

But the legislative history of Section 6253.1 (a statute referenced in Sierra Club's Opening Brief at p. 54), demonstrates that agencies as a matter of course violate the PRA on average approximately 70% of the time, and that by passing A.B. 1014 in 2001, the Legislature intended, in

part, to mitigate agencies' chronic violations of the PRA. Thus, the subject bill history demonstrates that agencies' PRA violations should not be interpreted as legislative acquiescence to an agency's or agencies' particular interpretation of a PRA statute (such as Orange County's here with respect to Section 6254.9.)

Pursuant to Cal. Rule of Court 8.252 (2)(B) and (C), the matters to be noticed were never presented to the trial court nor the appellate court. None of the documents herein related to proceedings occurring after the trial court's judgment.

This motion is also based upon the accompanying Memorandum of Points and Authorities, the Declaration of Sabrina Venskus, and the exhibits attached hereto.

Dated February 3, 2012

Respectfully Submitted,

VENSKUS & ASSOCIATES, P.C.

By:

Sabrina Venskus
Attorney for Petitioner,
The Sierra Club

Memorandum of Points and Authorities

Pursuant to Evidence Code § 459, this Court must take judicial notice of any matter specified in Evidence Code Section 451 and may take judicial notice of any matter specified in Evidence Code Section 452.

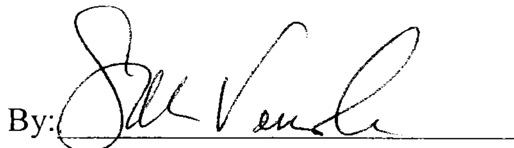
Evidence Code Section 452 (c), authorizes this Court to take judicial notice of Exhibits A and B because the former is an official act of the executive and the latter is an official act of the legislature.

Under Evidence Code Section 452 (c), a court may take judicial notice of the legislative history of a statute and vetoed legislation. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, (2005) 133 Cal. App. 4th 26, [discussing judicial notice of legislative history]; *City of Richmond v. Comm 'n on State Mandates,* (1998) 64 Cal. App. 4th 1190, 1199-1200, [referring to various versions of a bill, including previously vetoed legislation]; *St. John's Well Child & Family Center v. Schwarzenegger*, (2010) 50 Cal. 4th 960, 967, fn. 5, [Court took judicial notice of legislation approved by the Governor as well as the Governor's Message].)

Thus, Petitioner requests this Court take judicial notice of the Governor's veto message on A.B. 1293 (Exhibit A) and portions of the legislative history of A.B. 1014 (Exhibit B).

Dated February 3, 2012

Respectfully Submitted,
VENSKUS & ASSOCIATES, P.C.

By: 

Sabrina Venskus
Attorney for Petitioner,
The Sierra Club

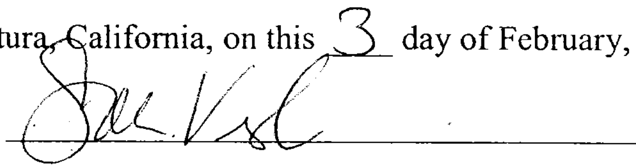
Declaration of Sabrina Venskus

I, Sabrina Venskus, declare and state as follows:

1. I am licensed to practice in the state of California and am lead counsel for Petitioner The Sierra Club in this matter. I have personal knowledge of all matters contained herein.
2. On January 23, 2012, I accessed the Official California Legislative website (http://www.leginfo.ca.gov/) and obtained Governor Pete Wilsons veto message on California Assembly Bill 1293, dated October 10, 1997. A true and correct copy is attached hereto as Exhibit A.
3. On January 21, 2012, I accessed the Official California Legislative website (http://www.leginfo.ca.gov/) and obtained portions of the legislative history for California Assembly Bill 1014. (2001-2002 Reg. Sess.) A true and correct copy of this legislative history is attached hereto as Exhibit B.

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

Executed at Ventura, California, on this 3 day of February, 2012.



Sabrina D. Venskus

Exhibit A

BILL NUMBER: AB 1293
VETOED DATE: 10/10/1997

To the Members of the California Assembly:

I am returning Assembly Bill No. 1293 without my signature.

This bill would create a panel appointed by the Secretary of the California Resources Agency. The purpose of this panel would be to create a single clearinghouse for all Geographic Information Services, and develop consistent parameters for information to be included in the Geographic Information Services database.

Among other concerns, it is counter-intuitive to create an advisory panel with seven or more members, pay their travel and per diem and call the action government efficiency. This is particularly true when most of the goals of this program are achievable under existing law.

In short, this bill is unnecessary and creates an infrastructure to accomplish what can be done in its absence.

Cordially,

PETE WILSON

Exhibit B

BILL ANALYSIS

SENATE JUDICIARY COMMITTEE
Martha M. Escutia, Chair
2001-2002 Regular Session

AB 1014
Assembly Member Papan
As Amended August 20, 2001
Hearing Date: August 21, 2001
Government Code
GMO:cjt

A
B

1
0
1
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SUBJECT

California Public Records Act:
Procedures for Disclosure of Public Records

DESCRIPTION

This bill would require a public agency, when it dispatches a determination that a public records request seeks disclosable public records, to notify the requestor of the estimated time and date when the records will be made available.

This bill also would require a public agency to assist a member of the public who requests to inspect or copy public records to make a focused and effective request, by doing the following actions "to the extent reasonable under the circumstances":
1) identify records and information that are responsive to the request or to the purpose of the request, if stated;
2) describe the information technology and physical location in which the records exist; and
3) provide suggestions for overcoming any practical basis for denying access to the records or information requested.

BACKGROUND

The California Newspaper Publishers Association, sponsor of AB 1014, was also the sponsor of two bills dealing with the

(more)

California Public Records Act (CPRA), SB 48 (Sher, 1999) and SB 2027 (Sher, 2000), both of which were vetoed by Governor Davis. SB 48 and SB 2027 were introduced, according to the CNPA, to provide an expedited and less expensive review of a denial of access to public records by a public agency, to be conducted by the Attorney General prior to court review. The bills also would have provided for a daily penalty for a wrongful denial of access to public records.

The Governor's veto message on SB 48 focused on the inherent conflict of interest arising from the Attorney General's review of an agency decision to deny access, when the Attorney General is charged with the responsibility of representing the public agency. The Governor's veto message on SB 2027, while contending that the review process involving the Attorney General would be too costly and yet not achieve the purpose of the bill, recognized the need for public agencies to be fully responsive to legitimate public record requests. The Governor directed the Secretary of State and Consumer Services Agency "to conduct a review of all state agencies' performance in responding to PRA requests and to make recommendations on appropriate procedures to ensure timely response."

In the fall of 2000, the California First Amendment Coalition and the Society of Professional Journalists performed an audit of local agency compliance with the CPRA. The audit, conducted by university journalism students (USC, UC Berkeley, CSU Fullerton, CSU Northridge, Chapman University) under the supervision of their respective professors, covered records at more than 130 local government agencies in the San Francisco Bay Area and in Los Angeles, Orange, and San Bernardino Counties. The findings, entitled "State of Denial, Roadblocks to Democracy" were published in the Stockton Record on December 17 and 18, 2000. The findings document that local agencies initially reject or ignore legitimate public record requests 77% of the time, on the average. Cities and police departments initially refused legitimate public records requests 79% of the time (declining to 60 to 64% when oral requests were followed by formal written requests citing state disclosure mandates), and schools initially failed to comply 72% of the time (similarly declining to 33%).

The results of the audit, the CNPA states, definitively document what has been fact for decades after the CPRA was first enacted: that public agencies routinely ignore the Act, or abuse their powers to the detriment of the free flow of information to the public that is the basis of this democracy.

This bill is intended to put some teeth into the CPRA, according to the author and the sponsor, by placing some burden on the public agency that denies a legitimate request to affirmatively assist the requester of information in making a focused and effective request. Compared to SB 48 and SB 2027, AB 1014 would seem to take a less aggressive, more positive approach in assisting the public gain access to disclosable public records.

CHANGES TO EXISTING LAW

Existing law, the California Public Records Act (CPRA), governs the procedure for members of the public to request, and public agencies to provide access to, disclosable public information. Specifically, the CPRA requires a public agency, upon a request for public records and within 10 days from the receipt of the request, to determine whether the public records requested are disclosable public records and to promptly notify the requestor of the determination and reasons for the decision. The time period in which the determination must be made may be extended for no more than 14 days in unusual circumstances, as specified in the statute, and upon written notice by the head of the agency or by a designee as to the reason for the extension and the date on which the determination is expected to be dispatched. (Section 6253 of the Government Code.)

This bill would require that when the determination is dispatched, and the agency has determined that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available.

This bill also would require a public agency, to the extent reasonable under the circumstances, to do all of the following in order to assist a member of the public make a focused and effective request that reasonably describes an identifiable public record or records:

1) assist the requestor in identifying the records and information responsive to the request or to the purpose of the request, if stated by the requestor;
2) describe the technology or physical location in which the records exist; and
3) provide suggestions for overcoming any practical basis for a denial of access to the records or information sought.

This bill would make this requirement inapplicable when the public agency either makes the records available as requested, or makes the determination that the records sought are exempt from disclosure under the CPRA.

COMMENT

1. Stated need for the bill

According to the sponsor, AB 1014 is intended "to fundamentally alter the relationship between public agencies and the citizens they serve." The bill contains a legislative declaration of intent that the CPRA specifically require public agencies to assist members of the public in a specified manner in making requests for public records.

The author cites both the referenced audit conducted by university students, and an investigation conducted by the Stockton Record that showed, in the latter case, public agencies delivered properly requested information 53% of the time, and rejected, partially answered, or left unanswered the rest. Additionally, the sponsor provided anecdotal evidence, reported in various newspapers, of frustrations experienced by citizens trying to get public information from public agencies (state and local). There is certainly a need, the author states, to give citizens a helping hand in obtaining

access to information to which they are entitled under the CPRA.

2. Public agency to provide estimated date and time when records will be available

The CPRA requires a pubic agency to respond, within 10 days of a request for a copy of records, with a determination of whether or not the request seeks disclosable records under the CPRA (current law provides a number of records which are exempt from disclosure to the public, such as personnel or medical records, which are confidential and would require a court order or a person entitled to the record making the request). When a determination is made, the agency is to notify the requestor promptly, including the reasons for the determination. In "unusual circumstances" the agency may extend this 10-day period for up to another 14 days, and is required to notify the requestor in writing of the date on which the determination is expected to be dispatched. "Unusual circumstances" is defined in the statute as the agency's need to search for and collect requested records from another location, or to examine voluminous records to separate those requested for copying, or to consult with another agency having substantial interest in the request, or to compile data, write a computer program or construct a computer report to extract data.

This bill would require that when the notice of determination is dispatched (whether within the 10-day period or the additional 14-day period), and the determination is that the records sought are disclosable, the notice shall state the date and time on which the records will be available.

This provision would remove any ambiguity in the statute about the agency's obligation to give a definite time and date for the release of the disclosable records so that the requestor may be prepared to copy or receive them.

3. New agency obligation: assist the requestor in accessing disclosable records

This bill would impose a new obligation on public

agencies to assist a member of the public who requests to inspect or copy public records to make that request focused and effective enough to identify the record or records sought. This, according to proponents, would improve the rate at which public records are accessed by citizens, as it so often happens that requests are summarily rejected because the requests do not clearly identify the records sought. Especially if the requestor states the purpose of the request, an agency employee may be able to help the requestor identify or describe the record or records and thus expedite access, if the record is disclosable, or the determination that the record is exempt from disclosure.

AB 1014 would require the public agency to do all of the following, when a member of the public requests to inspect or copy public records:

1) assist the requestor to identify records that are responsive to the request or to the purpose of the request, if the requestor states the purpose;
2) describe the information technology (e.g., electronic format) and physical location in which the records exist; and
3) provide suggestions for overcoming any practical basis for a denial of the request.

In order to avoid any undue burdens on the public agency, this bill would require that the agency perform these acts only "to the extent reasonable under the circumstances." What this phrase means exactly is to be determined by each agency on a case-by-case basis, according to proponents, thus giving the agency sufficient flexibility but also shifting the burden of alleging unreasonableness on the part of the agency to the requestor.

The bill however does not specify whether or not the request to inspect or copy records that would trigger this obligation of the public agency must be a formal, written request, or one made verbally or even over the phone. With the burden this would impose on a public agency, it would seem that a formal, written request (even a filled-out form, provided at the agency counter) should be required, so that the goal of properly

assisting the requestor may be met.

SHOULD THE REQUEST TRIGGERING THIS OBLIGATION TO ASSIST BE IN WRITING?

The third act required of a public agency, i.e., that the agency provide suggestions for overcoming any "practical basis" for the denial of access to the public records, was carefully crafted in order to avoid any assertion that the public agency's employee responding to the requestor would be dispensing legal advice, prohibited by the Business and Professions Code. Thus, "practical basis" would include, for example, that the records requested are buried in many boxes of records such that without a focused request, it would take the agency too long or too much personnel time to sort through and comply with the request.

As a whole, however, this new requirement on public agencies can be fairly labor-intensive. For example, if the requestor has a purpose, e.g., "to find corruption in the agency," but really does not know what to look for or where to begin, the amount of help the agency would be required to give may be too burdensome. How much help the requestor would be entitled to get, and what is reasonable in a case such as this could be the subject of litigation instead of whether or not the records sought were disclosable and therefore should have been disclosed.

It also should be noted that when the Governor vetoed SB 2027 last year, he instructed the Secretary of the State and Consumer Services Agency to review state agencies' performance in responding to public records requests and to make recommendations for effecting timely response. The Agency has finished its survey of state agencies and indicates that there does not seem to be any serious problems with compliance with the CPRA. The Agency has scheduled a meeting with proponents of this bill in late August to discuss the results of the survey and what might be done to improve state agency compliance, where problems are identified.

This bill would affect all public agencies, i.e., all state and local agencies. If there is little or no

problem associated with state agencies' compliance with the CPRA, perhaps this bill should focus on local agencies. One opponent of the bill has suggested that basic or better training of local agency employees about the CPRA and the process of obtaining disclosable public records may improve access to information more expeditiously and cost-efficiently than imposing this new requirement on all public agencies.

SHOULD THIS BILL PROVIDE FOR TRAINING OF PUBLIC AGENCY EMPLOYEES IN THE CPRA INSTEAD?

4. Requirement to assist inapplicable where the request is denied based on exemption or records are provided

The bill would make the requirement to assist the requestor in making a focused and effective request inapplicable where the records sought are made available, or where the request is denied based solely on the fact that the records sought are exempt under the CPRA [such as records pertaining to pending litigation involving the agency, medical or personnel records, records of investigation, intelligence information or security procedures of the Attorney General or any state or local law enforcement agency (with specified exceptions), etc.].

Thus, as long as the request for records is denied on grounds other than that the records are exempt under Section 6254 of the Government Code, the records would be disclosable and the public agency must assist the requestor in formulating a request that the agency can respond to positively by making records available for inspection and copying.

5. Continuing opposition to the bill

Early opposition to the bill posed by the League of California Cities, the California State Association of Counties and several smaller public agencies such as water districts was directed at the heavy burden this bill would impose on the public agency. It would especially affect the smaller agencies, they state, that cannot afford the costs and personnel required to be in total compliance. However, those concerns have been

addressed somewhat by the requirement that the actions required to be taken by the public agency be reasonable under the circumstances. Thus, if the bill would impose a significant cost on the agency that the agency can consider "unreasonable," the agency would be excused, and the requestor must rely on his or her own aptitude in forming an effective and focused request.

Another argument posed by the opponents is that under the bill, public agency staff would be required "to have an accurate understanding of the records being sought, which is not always clear and creates the opportunity for miscommunication and litigation." (City of Santa Barbara letter dated May 2, 2001.) Opponents have also stated that in small special districts where staff turnover is often and big, the bill would mandate them to "train new employees to be knowledgeable regarding ALL old business records and how to find them - a mostly unrealistic burden for any agency, particularly districts that receive no direct funding from state or local sources." [California Association of Resource Conservation Districts (CARCD) letter dated May 15, 2001.] The CARCD has suggested exempting from this bill all non-enterprise (or non-fee generating) special districts such as resource conservation districts.

Support: Consumer Attorneys of California

Opposition: City of National City; California Law Enforcement Association of Records supervisors; City of Santa Barbara; California Association of Resource Conservation Districts (CARCD); County Sanitation Districts of Los Angeles County; California Municipal Utilities Association; California Assessor's Association; Association of California Water Agencies (ACWA); California Association of Sanitation Agencies (CASA); California Peace Officers' Association; City of Palm Desert; California State Association of Counties; California Association of Clerks and Election Officials.

HISTORY

Source: California Newspaper Publishers Association

Related Pending Legislation: None Known

Prior Legislation: SB 48 (Sher, 1999) and SB 2027 (Sher, 2000) - both vetoed by Governor Davis. See Background for details.

Prior Vote: Asm. Com. Gov. Org. (Ayes 15, Noes 0)
Asm. Appr. (Ayes 21, Noes 0)
Asm. Flr. (Ayes 64, Noes 2)

****

PROOF OF SERVICE

I SHARON L. EMERY declare:

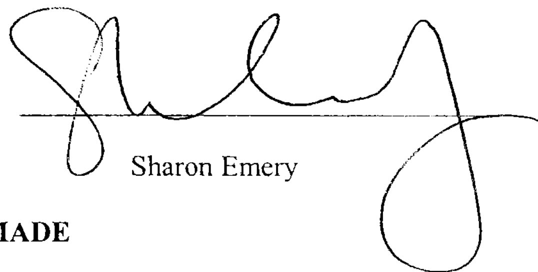
I am, and was at the time of the service hereinafter mentioned, over the age of eighteen and not a party to the above-entitled cause. My business address is 21 South California Street, Suite 204, Ventura, California 93001. On February __7__, 2012 I served the following documents described as:

PETITIONER SIERRA CLUB'S SECOND MOTION REQUESTING JUDICIAL NOTICE; DECLARATION OF SABRINA VENSKUS; EXHIBITS A-B; [PROPOSED] ORDER

___X__ Via U.S. Mail: by placing a copy of the said document/s in a sealed envelope to the addressees as indicated further below, with the postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing, in a U.S. Postal Service box at 21 South California Street Ventura, California 93001.

_______ Via Federal Express: by placing a copy of said document/s in a sealed package to the addressees as indicated further below, with all delivery charges thereof fully paid the same day on which the correspondence was placed for collection and delivered.

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 __7__, 2012 in Ventura, California.



Sharon Emery

NAMES AND ADDRESSES TO WHOM SERVICE WAS MADE

Nicholas S. Chrisos Mark D. Servino Rebecca Leeds Office of the County Counsel 333 W. Santa Ana Blvd., Suite 407 Santa Ana, CA 92701 **Real Party In Interest** **County of Orange**	The Superior Court of California County of Orange Department C-18 700 Civic Center Drive, West Santa Ana, CA 92701 **Respondent**	California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd. Santa Ana, CA 92701