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 OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

As stated in the Petition for Review, the Issues Presented are as follows:

1. Geographic Information Systems (GIS) data is computer data consisting primarily of information referenced to specific geographic locations, such as the legal boundaries of the land parcels in a county. Does the Public Records Act's computer-software exclusion in section 6254.9 exempt non-software computer data, such as GIS data, from mandatory disclosure?

2. Does the constitutional requirement that a "statute ... 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), par. (2)) require that section 6254.9's[1] computer-software exclusion be limited to software only, since it limits the rights of access?

The Issue for Review as articulated in the Answer of Real Party in Interest County of Orange to Petition for Review (the "Answer")

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[1] Section references are to the Government Code, unless otherwise specified.

is: "whether the California Public Records Act ("CPRA") requires a government agency to produce the database associated with a GIS in a GIS file format pursuant to Government Code section 6254.9 at the cost of duplication."

STANDARD OF REVIEW

Since the above are issues of statutory interpretation, the standard of review is de novo. (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 906 ["[T]he interpretation of the PRA and its application to undisputed facts, present questions of law subject to de novo appellate review."].)

PROCEEDINGS BELOW

This petition arises from an action in the Superior Court of California, County of Orange, *Sierra Club v. County of Orange*, filed April 21, 2009, Case No. 0-2009-00121878-CU-WM-CJC, heard in Dept. C-18 of the Santa Ana courthouse by the Honorable James J. Di Cesare. Sierra Club was the petitioner in the action. Real Party in Interest, County of Orange, was respondent in the action. On August 3, 2010 the trial court denied the Sierra Club's petition for a writ of mandate. (5-PA-1347-62, [Stmt. of Dec.,].)

The Sierra Club timely filed its appeal to the Court of Appeal, Fourth District on August 27, 2010. The appeal took the form of a Petition for Extraordinary Writ ("Writ Pet."), as required by section 6259, subd. (c). A total of six Amici Curiae briefs were filed: five in support of Sierra Club and one in support of Orange County. After full briefing on the merits, on May 31, 2011, the Court of Appeal denied Sierra Club's Petition and issued a 21- page published Opinion. On July 12, 2011, Sierra Club filed a Petition for Review in this Court, which was granted on September 14, 2011.

INTRODUCTION

This case involves the question of whether government agencies may use § 6254.9 of the California Public Records Act ("PRA") to convert an electronic public record into a revenue-generating device. More specifically, the issue is whether or not the Legislature intended to make GIS-file formatted land parcel data, held by the government in computer files, subject to the PRA so that government agencies are required to disclose their land parcel data in an electronic file format requested by a member of the public, without requiring a fee and licensing agreement. Orange County has one of the largest stakes in the answer to this question, as it has long charged among the highest fees in the state for such information.

Here, Sierra Club requested, pursuant to the PRA, the entire collection of Orange County's land parcel data in GIS file format (referred to as the "OC Landbase") so that it can view and analyze the data using Sierra Club's own GIS software (not Orange County's). But according to Orange County, GIS formatted data is not subject to the PRA at all. Citing Government Code section 6254.9 (sometimes referred to herein as the "Software Provision") as its basis, Orange County contends it may refuse Sierra Club's PRA request because the requested data is "software" excluded from disclosure under the PRA.

> The entire text of section 6254.9 is as follows:
>
> (a) Computer software developed by a 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) As used in this section, "computer software" includes computer mapping systems, computer programs, and computer graphics systems.
>
> (c) This section shall not be construed to create an implied warranty on the part of the State of California or any local agency for errors, omissions, or other defects in any computer software as provided pursuant to this section.
>
> (d) 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.
>
> (e) Nothing in this section is intended to limit any copyright protections.

Both parties agree the Software Provision expressly excludes computer software, as that term is commonly and ordinarily understood, from PRA disclosure requirements. Where the parties diverge is whether the Software Provision should be construed as also excluding from the PRA's reach a specific type of computer data, specifically GIS-file formatted data like the OC Landbase.

On this issue, the Court of Appeal (hereinafter referred to as "Fourth District") agrees with Orange County that GIS data is "software" as contemplated by the Software Provision and thus is not a "public record" and therefore need not be disclosed pursuant to the PRA's terms. The Fourth District concludes that GIS data is "part of" a "computer mapping system," as used in subd., (b), and therefore is, by extension, "computer software" in subd., (a), thus broadly construing "software" to mean both computer mapping "software," as well as any computer mapping "data" processed by the software. (*Sierra Club v. Superior Court of Orange County* (2011) previously published at 195 Cal.App.4th 1537 [125 Cal.Rptr.3d 913]; Slip Opinion, ("Opn.") attached to this brief as Exhibit A.)

Respectfully, the Fourth District, in denying Sierra Club's Petition, makes several errors in its analysis.

The Opinion turns away from the plain meaning of the term "software." In doing so, the Court gives a generous reading to a subset of software, "computer mapping systems," which the Court took to mean both "software" and "data." One unfortunate result of this reading of the statute is that it creates disharmony between section 6254.9 and another section of the PRA, section 6253.9. (*People v. Shirakow*, (1980) 26 Cal.3d 301, 307; *People v. Garcia*, (1999) 21 Cal. 4th 1,6.)

Further, instead of narrowly interpreting the Software Provision as the PRA and the California Constitution require, the Fourth Circuit does precisely the opposite, reading the public access-limiting statute expansively, thereby sweeping computer data into its exclusionary grasp. Instead of resolving any perceived ambiguity in the statute in favor of public's right to access government information, the Opinion accords excessive deference to the City of San Jose's subjective goals for the legislation, the sponsor of the bill that led to section 6254.9. At the same time, the Opinion discounts the bill's language as it evolved through legislative amendments, a review of which supports a finding that the Legislature in fact

intended what subdivision (d) of section 6254.9 makes perfectly clear- that computer software developed by a state or local agency would be exempted from the PRA, but that data related to the conduct of the public's business would remain a public record subject to disclosure in accordance with the PRA's terms.

Finally, the Fourth District's interpretation of the Software Provision conflicts with two published authorities supporting Sierra Club's position—a decision by the Sixth District Court of Appeal in 2009 and a 2005 Attorney General opinion, both of which support the contention that GIS data is subject to mandatory disclosure under the PRA. (*County of Santa Clara v. Superior Court of Santa Clara County* (2009) 170 Cal.App.4th 1301, 1334); *88 Ops. Cal. Atty. Gen. 153*, ["AG Opinion"].)

The Fourth District's Opinion, if left undisturbed, would allow state and local agencies to deny access to a large, and increasingly important, class of government held information. Neither the Legislature in enacting the PRA, nor the People of California in amending the California Constitution to elevate access to government information to civil right status, intended such a result.

STATEMENT OF THE FACTS AND OF THE CASE

GIS is an acronym for "geographic information systems." GIS has been described as providing "a framework for gathering and organizing spatial data and related information so that it can be displayed and analyzed." (5-PA-1307, [ESRI, A to Z GIS, An Illustrated Dictionary of Geographic Information Systems (2006), p. 90].) GIS software processes GIS data so that the data can be viewed, manipulated and analyzed. (3-PA-527:23-31, [Declaration of Bruce Joffe, ("Joffe Decl.")]; 3-PA-537:8-11 [Declaration of Amanda Recinos, ("Recinos Decl.")].)

Orange County currently distributes the OC Landbase in a GIS file format to members of the public, if they pay a licensing fee and agree to the license's restrictions on disclosure and distribution. (Opn. p. 4.) The OC Landbase in a GIS file format does not consist of, or contain computer software as defined by the American Heritage Dictionary. (5-PA-1083, [Stipulated Fact No. 20, ("The OC Landbase in the format the Sierra Club has requested, and in which it is currently distributed to OC Landbase licensees does not contain *programs, routines and symbolic languages that control the functioning of computer hardware and direct its operation.*")[emphasis added]; 5-PA-1315, [American Heritage Dict. (4th ed. 2004), p. 1652.] .)

The Sierra Club made several PRA requests for a copy of the OC Landbase. (1-PA-16-17; 36-37; 52; 69-70; 5-PA-1086; 1106; 1116; 1121, [Exhibits to Stipulated Facts].)[2] Orange County denied the requests, citing, among other sections, the PRA's Software Provision, section 6254.9, (1-PA-46-47; 54-55; 72-73), offering instead to produce the paper records from which the OC Landbase is compiled, or PDF electronic copies. (Opn. p. 4.) Neither the paper records nor the pdf files can be displayed or analyzed by the Sierra Club's GIS software. (*Ibid.*)

The OC Landbase is used every day by Orange County officials to make important policy decisions. (GIS Needs Assessment Study, attached to Petitioner's Request for Judicial Notice ("Pet.RJN") as Exhibit 2, at OC-1215.) A "GIS Needs Assessment Study," recently conducted by an external consulting firm at the behest of Orange County, concluded that the OC Landbase is "the most essential data set in the county." (*Id.* at OC 1455.) It contains the reference data consulted whenever an OC Public Works employee needs to know the boundaries, location, ownership or other characteristics of a parcel of land in the county. (*Id.* at OC-1463.) The GIS Needs

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[2] As noted in the Opinion, the parties stipulated to most of the relevant adjudicative facts. (Opn., p. 3.)

Assessment recommended rolling out the OC Landbase to be accessed "countywide." (*Ibid.*) Because of the OC Landbase's wide applicability and extensive use, it is one of the most important public records maintained by Orange County.

Despite the importance of the OC Landbase to government activity, Orange County restricts access to it unless members of the public are willing to pay hefty fees. For example, data for each parcel in GIS format sells for one dollar, although Orange County provides a discount to purchasers of more than 100,000 parcels. (2-PA-400, [Fee schedule for "Parcel Map Data" indicating 600,000 parcels for a fee of $375,000.00].) Further, Orange County requires a non-disclosure agreement as part of the data's sale, so that the data cannot be passed on to others. (2-PA-394-99).

In contrast, the vast majority of California counties provide their GIS parcel data to the public free of charge or for a small fee covering the cost of copying the GIS data to a CD or DVD, with no non-disclosure agreement required. (3-PA-533-34, [Joffe Decl. ¶¶ 35-37].) Even the largest county in the state, Los Angeles County, provides all of its parcel data in GIS file format to the public for a copying fee of only $6.00. (1-PA-110).

ARGUMENT

I. SECTION 6254.9 EXCLUDES COMPUTER SOFTWARE FROM PUBLIC RECORD STATUS, BUT DOES NOT EXCLUDE COMPUTER DATA, SUCH AS THE GIS FILE-FORMATTED OC LANDBASE.

A. The PRA's Broad Disclosure Policy Favors Disclosure of the OC Landbase.

The fundamental goal of statutory interpretation is to ascertain legislative intent so that the purpose of the law may be effectuated. (*People v. Cruz (1996)* 13 Cal.4th 764, 774-775; *Walnut Creek Manor v. Fair Employment & Housing Com. (1991)* 54 Cal.3d 245, 268; *Palos Verdes Faculty Ass'n. v. Palos Verdes Peninsula Unified School District (1978)* 21 Cal.3d 650, 658).

Any interpretation of section 6254.9 must be viewed through the lens of the Legislature's declared intent in enacting the PRA: "[A]ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state," (Section 6250). Courts have explained the import of this legislative declaration, "[b]y its own terms, the CPRA embodies a strong policy in favor of disclosure of public records," (*Lorig v. Medical Bd.* (2000) 78 Cal.App.4th 462, 467), and therefore "all public records are subject to disclosure unless the Legislature has expressly

provided to the contrary." (*Williams v. Superior Court* (1993), 5 Cal.4th 337, 346.)

The Legislature intended to bring almost all government held information into the purview of the PRA as evidenced by the expansive definition of "public records," which means "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency." (§ 6252, subd. (e).)[3] As this Court has observed, "This definition is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 288, fn. 3, internal quotations omitted.)

Thus, any government record, regardless of the manner in which the record has been stored, is a public record. Even

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[3] This is not to say that almost all government held information is required to be disclosed; indeed many categories of government held information are exempted from disclosure, but nonetheless maintain their "public records" status under the PRA.

information contained in a computer database qualifies as a writing under the PRA, and thus is a public record. (*Id.*)

The Legislature's adoption of such an expansive definition of "public record" has an important purpose: "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files." (*CBS v. Block* (1986) 42 Cal.3d 646, 651.) Thus broad disclosure of government information promotes participation in the democratic process and encourages citizens to make government accountable.

Therefore, the policy underlying the PRA favors a broad interpretation of the type of information that is subject to disclosure, and the default position is that nearly any information held by the government is a "public record" subject to disclosure. This policy favors disclosure of the OC Landbase.

B. "Computer Software" Is Clear And Unambiguous And Therefore The Court Should Give Effect To Its Usual And Customary Meaning

Courts are bound to give effect to statutes according to the "usual, ordinary import" of the language employed in framing them. (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268.) "[W]hen...the language of a statute is clear and

unambiguous, its meaning should generally be followed." (*Rhiner v. Workers' Comp. Appeals Bd.* (1993) 4 Cal. 4th 1213, 1226.) "Words used in a statute . . . should be given the meaning they bear in ordinary use [citations]." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, emphasis added.)

Moreover, "'[i]f the plain, commonsense meaning of a statute's words is unambiguous, *the plain meaning controls*.'" (*People v. King* (2006) 38 Cal.4th 617, 622, quoting *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818, emphasis added.)

Section 6254.9, subdivision (a) states: "Computer software developed by a 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." The operative term in section 6254.9 is computer "software." (§ 6254.9, subd. (a).) This is a term that is clear and generally understood by the public at large. (*See Lungren, supra*, 45 Cal.3d at p. 735.) Thus, the term "computer software" has a plain, commonsense meaning. (*See King, supra*, 38 Cal.4th at p. 622.) Most people have used computer software in their lives and equate computer "software" with computer "programs," such as Microsoft Word or iTunes.

To further illustrate the point, mainstream dictionary definitions define computer "software" and computer "programs" similarly.[4] (*See*, e.g., *Cory v. Board of Administration* (1997) 57 Cal.App.4th 1411, 1419-20 [using dictionary definition to determine plain meaning].) For example, the American Heritage Dictionary defines computer "software" as "the programs, routines, and symbolic languages that control the functioning of the hardware and direct its operation," and computer "programs" as "a set of coded instructions that enables a machine, especially a computer, to perform a desired sequence of operations." (5-PA-1315 and Exhibit 5 to Pet.RJN, respectively, [American Heritage Dict. (4th ed. 2006)].) Neither of these definitions so much as mention electronically formatted data, and for good reason, since data upon which software operates cannot simultaneously be software too. (See 88 Ops. Cal. Att'y Gen. 153, 159 [describing software and data].)

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[4] The Opinion suggests that Sierra Club "rel[ies] heavily" upon dictionary definitions, (Opn., p.7), but then uses a dictionary definition of "system" for the proposition that the term "computer mapping system" should include more than a computer program component. (Ibid., p.8.)

Thus, the plain meaning of the subject term "software" in subdivision (a) is commonly understood to be distinct from the data upon which the software operates. (*Reid v. Google, Inc.*, (2010) 50 Cal.4th 512, 527.) Subdivision, (d), which states, "nothing in this section" is intended to "affect the public record status of information merely because it is stored in a computer," recognizes this distinction. Plainly read, then, section 6254.9 unambiguously excepts computer software from public record status, but not computer data

This Court's decisions have held that dictionary definitions play an integral part in ascertaining the meaning of statutory language. (*See Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333-1334, citing *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word."].)

The Fourth District gives short shrift to the plain meaning of "software," (Op., at pp. 8-13), and instead resorts to legislative history to investigate the meaning of the term "computer mapping systems" contained in subd., (b). (Opn., p. 8 ["We turn first to section 6254.9's legislative history"]; Opn., p. 17 ["We have construed section 6254.9 as narrowly as is possible consistent with its legislative

history"]; Opn., p. 17 [distinguishing Attorney General Opinion for failing to examine legislative history.]) Its primary reliance on legislative history is misplaced because when statutory language is clear and unambiguous, resort to legislative history is neither appropriate nor justified. (*People v. Boyd* (1979) 24 Cal.3d 285, 295 [holding that even though the parties' differing interpretations of the legislative history were equally rational to give rise to conflicting inferences regarding statutory construction, departing from the plain language was not justified because of it].)

Ultimately, the language of the Software Provision speaks for itself. The term "software" is a term of "ordinary use" and therefore, its regular, ordinary meaning should be employed in construing the statute. (*Lungren, supra,* 45 Cal.3d at p. 735.) Thus, because the ordinary meaning of "software" does not mean computer-formatted data, the meaning of the Software Provision is unambiguous (*See* 88 Ops.Cal.Atty.Gen. 153, 159 (2005)), and should be held as such.

C. If Ambiguity Can Be Found In Section 6254.9, It Must Be Resolved In Favor Of Disclosure of Data Such as the OC Landbase.

Assuming *arguendo* that the Software Provision is ambiguous, it is appropriate to "look to 'extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative

history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [citations]. (*People v. Woodhead* (1987) 43 Cal. 3d 1002, 1008.)

Employing these interpretive tools of construction leads inescapably to the conclusion that the Software Provision does not include data such as the OC Landbase. First, as discussed further below in section IV of this brief, Article I, Section 3 (b) of the California Constitution requires a strict canon of narrow construction be applied to public records disclosure limitations. As such, the Software Provision must be read narrowly in favor of disclosing computer data, should any perceived ambiguity need resolving. Second, to read the Software Provision otherwise results in an unreasonable reading of subdivision (b), which contains three terms, "computer mapping systems," "computer programs," and "computer graphics systems,"counter to the full text of 6254.9. Third, construing the Software Provision as excluding certain types of computer data, such as GIS formatted data, results in disharmony within the statutory scheme. Fourth, a review of the legislative history demonstrates that the Legislature's intent in enacting the Software Provision was to protect software from the PRA's reach, not databases or data. Finally, public policy considerations are

instructive in PRA matters involving technological advances in record keeping and information gathering, such as here, so that the most judicious approach to statutory interpretation of the Software Provision is that advocated by Petitioner.

1. A clear, direct, and reasonable reading of section 6254.9 indicates that the Legislature did not intend the term "computer mapping system" to include data.

   a. *Section 6254.9 distinguishes between data and software, protecting only the latter from disclosure.*

Orange County's position, approved by the Fourth District, can be characterized as follows: because the OC Landbase is part of a computer mapping system, and because § 6254.9, subd., (b) specifies that the term "computer software" as used in that section "includes computer mapping systems," its GIS-formatted land parcel records are excluded from the PRA and can thus be licensed to the public for a fee. (Opn., pp. 13-14.)[5] To reach this conclusion, one must strain to

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[5] This formulation of the issue appears to be premised upon misconception of the nature of the data at issue in this case and the software that operates upon it. GIS software processes GIS data so that the data can be viewed, manipulated, and analyzed, (3-PA-527:23-31, [Declaration of Bruce Joffe, ("Joffe Decl.")]; 3-PA-537:8-11 [Declaration of Amanda Recinos, "Recinos Decl."].) implying that GIS data is "associated with" the system in which it was created, suggesting some sort of co-dependency between the mapping

define the term "computer mapping systems" as something other than software systems – it is not explicitly defined in the Software Provision or anywhere else in the PRA. But one need not go to such great lengths to make sense of the word "computer mapping systems," because the Software Provision itself recognizes a distinction between software and data stored in a computer. (§ 6254.9, subd., (d).) Thus, the logical interpretation of "computer mapping systems," is that it refers to a special type of software, and not the computer data upon which the software system operates. This is also the only interpretation that avoids conflict with the Software Provision's express guarantee that "Public records stored in a computer shall be disclosed as required by this chapter." (*Ibid.*; see, e.g., *Lungren, supra*, 45 Cal.3d at 735, ["The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject

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software and the data upon which the mapping software operates, such that it would not be possible to view, analyze or manipulate the data without the specific software that created it in the first place. Sierra Club does not need Orange County's GIS software to view, analyze and manipulate GIS data; it already possesses its own GIS software. Further, just as a document would not be considered part of the word processing program that created it, neither is GIS data part of the software that is used to display it.

matter must be harmonized to the extent possible"].)

b. The Legislature intended the terms "computer mapping systems," "computer programs," and "computer graphics systems" to have a parallel meaning.

Section 6254.9(b) states: "As used in this section, 'computer software' includes computer mapping systems, computer programs, and computer graphics systems." (§ 6254.9, subd. (b), emphasis added.) These three terms should be construed uniformly and in parallel because "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.] In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list. [Citations.]" (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011–1012.)

The expansive interpretation of "computer mapping systems" utilized by the Fourth District, makes the term "markedly dissimilar" to another listed item, "computer programs," since "computer programs" cannot possibly be interpreted as meaning anything more

than computer software in its ordinary and customary usage. (*Moore, supra,* 2 Cal.4th at p. 1012; § 6254.9, subd. (b).)

The treatment of each item as "similar in nature and scope" acknowledges the necessarily similar term "system" as used in "mapping systems" and "graphics systems" equating "system" with computer "programs." (See *Moore, supra,* 2 Cal.4th at p. 1012.)

Such a congruent reading of the listed items however, cannot be achieved if subdivision (b) is interpreted as the Opinion has done; if "computer mapping systems" is interpreted to mean both the mapping data and the software that processes it, (see Opn., p. 14), then it must also be true that "computer graphics systems" means both graphic data and the graphics software that preserves it.[6] But, construing "computer graphics systems" to include the data operated upon by the "system" would arguably exclude from the PRA all computer data operated upon by programs using a graphical interface such as those found on Microsoft Windows or Apple

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[6] The Fourth District declined to investigate or consider the meaning of the term "computer graphics systems." (Opn., p.13, fn10.)

Macintosh computers,[7] in other words, the vast majority of government-held information stored in a computer. Thus, if the Fourth District's premise is to be accepted, that the word "system" must mean something more than just a program computer component (Opn., p.8), the premise would violate the express admonition of the Section 6254.9, subdivision (d) that "nothing in this section is intended to affect the public record status of information

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[7] When section 6254.9 was enacted in 1988, most desktop,(i.e., personal) computers used text-based displays rather than graphical displays that are common now. (See *Ceruzzi, A History of Modern Computing* (1998) pp. 272-76, attached to Pet. RJN as Exhibit 6, RJN-2-4 ["no PC [in 1984, when the Apple Macintosh was introduced]. . . could offer the graphical interface of the Macintosh." (pp. 274-75); Microsoft Windows Version 3, the first popular version of the Windows system "was as not introduced until around 1990, so for the [seven years between 1984 and 1990], IBM PCs and their clones would be known by the primitive MS-DOS [text-based, non-graphical] interface inherited from the minicomputer world." (p. 276).] Thus, in 1988, most computers used text-based interfaces instead of the graphical interfaces we're accustomed to today. "Computer graphics systems" in 1988 were therefore specialized systems running on the Macintoshes and the small minority of other computers that had graphical display hardware. Today, virtually all personal computers run MS Windows or the Macintosh operating system. They, and the software programs running on them are "computer graphics systems."

merely because it is stored in a computer." The Fourth District's reading is therefore unreasonable because it would lead to an unreasonable result. (*Cory, supra,* 57 Cal.App.4th 1411, 1423-1424 [avoiding unreasonable reading of statutory language].)

The Fourth District justifies its interpretation and its failure to employ the plain meaning of Section 6254.9, subdivision (b) in its analysis by stating the following:

> Section 6254.9's language is susceptible to both parties' interpretations, i.e., a "computer mapping system" might or might not include data along with the associated computer program. We must focus on the ambiguous phrase "computer mapping system," not the standard dictionary meaning of "computer software," because section 6254.9 contains its own definition of computer software. "When a legislature defines the language it uses, its definition is binding upon the court even though the definition does not coincide with the ordinary meaning of the words. . . ." (*Cory v. Board of Administration* (1997) 57 Cal.App.4th 1411, 1423-1424.)

(Opn., at p. 8.)

The trouble with the Fourth District's analysis is that § 6254.9, subdivision (b) is not the sort of "definition" to which the *Cory* case and others like it applies. In *Cory* the term "legislator" was defined in the statute in a provision that started with: "'Legislator' means ..." (*Cory, supra,* 57 Cal.App.4th at 1420, emphasis added.) Thus, the

Legislature actually set out to propose a definition of the term, whereas here, the Legislature used the term "includes" to denote a list of illustrative examples. In addition, the *Cory* Court went on to say that: "If, however, the definitions are arbitrary, result in unreasonable classifications or are uncertain, then the court is not bound by the definition" and can reject the statutory definition in favor of the common and ordinary meaning. (*Id.* at p. 1424.) The Court found that the application of the statutory definition of "legislator" (provided in a different section) would lead to an unreasonable reading of the statute and rejected it in favor of a meaning that comported with legislative intent and the context of the statute. (*Id.* at pp. 1424-1425.) Thus, even if the list in subdivision (b) could be considered a "definition," in the *Cory* sense, to interpret it expansively to include data would run counter to the legislative intent to disclose information or data as public record. (See Section 4, *infra*; § 6254.9, subd. (d); § 6253.9.)

c. *The Rule Against Surplusage Is Not Applicable.*

The Fourth District fails to give "computer mapping system" a parallel meaning to "computer programs" and "computer graphics systems" claiming that to do so would somehow violate the rule against "surplusage." (Opn., at p. 14.) The Opinion contends that "if

'computer mapping systems' denotes only mapping computer *programs*, then the phrase is superfluous since section 6254.9's definition of computer software already includes computer programs." (Ibid., citing *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22, *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 234.)

But the Fourth District's construction does not resolve the purported surplusage because one could just as easily argue that "computer mapping systems" are also "computer graphics systems" a term that is also used in § 6254.9 (b). Thus, even if the term "computer mapping systems" in § 6254.9 (b) was construed to include the data such mapping systems operate upon, the term would remain surplusage.

Petitioner's reading of § 6254.9 (b), that the terms are meant to be overlapping, does not result in the conundrum identified above with respect to the Opinion's rationale. In sum, the rule against surplusage would not apply to an "includes" clause such as that in subdivision (b) of 6254.9, where the Legislature intends to provide illustrative examples, the meanings of which may overlap. "In both legal and common usage, the word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle." (*Arizona State Bd. for Charter Schools v. U.S. Dept. of Education* (9th Cir. 2006) 464 F.3d 1003, 1007; *Flanagan v.*

Flanagan (2002) 27 Cal. 4th 766, 774. ["includes" is "ordinarily a term of enlargement rather than limitation"]; *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101 [citations] [same]; Black's Law Dictionary (8th ed. 2004) p. 777-78 ["[t]he participle *including* typically indicates a partial list"].)

Here, the more reasonable interpretation and one that does not render 6254.9 subd., (d) itself superfluous, is that subd., (b) is comprised of a list of software *examples* and so the rule against surplusage is inapplicable. (*See Santa Clara County Local Transportation Authority v. Guardino*, (1995) 11 Cal.4th 220, 234-235 [the rule against surplusage will be applied only if it results in a reasonable reading of the legislation]; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 [the rule applies "[w]here reasonably possible"]; *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114 ["When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. [Citation.] In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences."]; (*People v. Ventura Refining Co.*, (1928), 204 Cal. 286, 290 ["When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy,

the former should be rejected and the latter adopted."]; see also *Cory v. Board of Administration* (1997) 57 Cal.App.4th 1411, 1423-1424; ("'[statutes] must be given a reasonable and common sense construction"].)

2. The Fourth District's reading of section 6254.9 cannot be reconciled with section 6253.9, but the two sections must be read in harmony because they are both part of the Public Records Act.

A statute must be construed "in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts." (*People* v. *Shirakow* (1980) 26 Cal.3d 301, 307.) Reading section 6254.9 in light of another section of the PRA, offers convincing evidence that the Software Provisions in section 6254.9 does not cover data or databases. Section 6253.9 of the PRA provides that when public records are maintained by an agency in "any electronic format," the agency "shall make that information available in an electronic format when requested by any person." (§ 6253.9(a).) This section confirms the Legislature's intent to subject data stored on government computers to public disclosure. When read together, §§ 6254.9(d) and 6253.9 require disclosure of data in the format requested by the Sierra Club. Here, Sierra Club requested the data in

GIS format. (5 PA 1083, ¶15.) Thus, Orange County cannot comply with the PRA by producing non-GIS formatted data.

The County contends, and the Fourth District implicitly agrees, that because Orange County provides map data in *some* format (i.e., a non-GIS format such as a pdf format), its PRA obligations have been met. (See Opn, p. 15, fn.12, ["the County offered Sierra Club the information in 'Adobe PDF electronic format'"].) This contention contradicts the Legislature's repeal (in 2000 with the adoption of section 6253.9) of the rule allowing records to be provided in any format in which the agency chose. (See Pet.RJN, Exhibit 1,[A.B. 2799, 1999-2000 Reg. Sess. (Cal. 2000) (enacted)].) Instead of allowing the agency to exercise its discretion as to what format to produce the records, section 6253.9 requires the agency to " make the information available in any electronic format in which it holds the information." (§ 6253.9(a)(l).) Alternatively, the agency "shall" make the information available "in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies." (§ 6253.9(a)(2).)

The Fourth District avoids addressing the conflict between § 6253.9 and its interpretation of § 6254.9 by relying on the rule of statutory construction that where a conflict arises between two

statutes, the more general of the two must give way to the more specific.[8] (Opn., p. 15.) But the rule "applies only when the two sections cannot be reconciled."[Citations.] (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478.) If two statutes can be harmonized "then [a court] must give 'concurrent effect' to both, 'even though one is specific and the other general.'" [Citations.] (*Ibid.*)

Here, §§ 6253.9 and 6254.9 can most certainly be harmonized if we construe computer mapping systems so that the underlying mapping data upon which the mapping software operates remains a public record. (See *People v. Garcia*, (1999) 21 Cal.4th 1, 6 [statutes must be harmonized].) The two sections conflict only when we accept the premise that "computer mapping systems" means software plus data.

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[8] The Opinion also explains the failure to harmonize section 6253.9 by implying that because the opposition to the bill requested that software be excluded from 6253.9's reach, somehow that meant that 6254.9 should be interpreted broadly to include data. (Opn, p. 15.) However, 6254.9 and 6253.9 read together means that only software was intended to be excluded from public record status. The amendment to the bill to include the exemption language was not intended to broaden the scope of 6254.9 but rather ensure that any exemptions such as 6254.9 would still apply.

Moreover, the Opinion does not consider the relationship between §§ 6253.9 and 6254.9 until long *after* it has reached its conclusions about what the legislative history shows, at which time § 6253.9's electronic format requirement was brushed aside on the grounds that it "applies to electronically formatted 'information that constitutes an identifiable public record *not exempt from disclosure*...'" (Opn., p.15, italics in original.)[9] But, ultimately, depending on how one reads § 6254.9, either the GIS data requested by Sierra Club is excluded from public record status or it is not. If excluded, *none* of the information need be provided at all, electronically or otherwise. (§ 6254.9 subds. (a) & (b).) If not excluded, then the GIS data is a public record, and, pursuant to § 6253.9, Orange County's offer of electronic records in pdf file-format does not suffice. There is no "walking the line" for Orange County.

Viewing section 6254.9 in its statutory context thus furnishes a clear and compelling indication that the Legislature intended the words "computer mapping systems" in section 6254.9(b) to refer

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[9] Elsewhere, the Opinion describes § 6254.9 as an exclusion, rather than an exemption, "since governmentally-developed 'computer software' within the meaning of that statute is not a public record." (Op., p. 6, fn4.)

exclusively to computer mapping *software*. Indeed, in view of the language of section 6253.9, no other conclusion is reasonable.

II. SECTION 6254.9's LEGISLATIVE HISTORY CONFIRMS THAT THE MEANING OF "COMPUTER SOFTWARE" IS INTENTIONALLY LIMITED.

Section 6254.9 was originally proposed by the City of San Jose who sought to recoup costs from its development of certain computer-stored information. (AB 3265 as introduced, in Legislative History (Leg. Hist., 4–PA-934-1078); 4-PA-943.) When the City of San Jose introduced AB 3265 on February 11, 1988, it apparently hoped to amend the PRA so that agencies could sell or lease "proprietary information," which was broadly defined as "computer readable data bases, computer programs, and computer graphics systems." (4-PA-941-42.) San Jose thus wanted to sell, lease or license the information "at a cost greater than the 'direct costs of duplication.'" San Jose's memorandum contained in the legislative file of the Senate Committee on Governmental Organization explained that it wanted to sell as "proprietary" not just computer programs and computer readable databases but "other computer stored information" that it had developed. (4-PA-986.)

As introduced, AB 3265 proposed adding the following language to § 6257:

> Nothing in this chapter prohibits an agency from selling *proprietary information* or requiring a licensing agreement for payment of royalties to the agency prior to any subsequent sale, distribution, or commercial use of the proprietary information by any person receiving the information. For purposes of this subdivision, *"proprietary information" includes computer readable data bases, computer programs, and computer graphics systems.* Any fee or royalty imposed for proprietary information shall be based on the cost of developing and maintaining the information and shall take into consideration whether the person requesting the information contributed to the development of the information.

(4-PA-942 (emphasis added).)

After the bill's introduction, the City of San Jose did not receive everything it wanted from the Legislature, as the bill was amended on April 4, 1988, to delete references to "proprietary information" and to replace the concept of selling or leasing "information" with selling or leasing software:

> AB 3265, as amended, ... Public records: ~~proprietary information~~ *computer software.*
>
> The existing California Public Records Act requires each state or local agency, upon receiving any request for a copy of records in its possession which are subject to public disclosure, to make the records promptly available upon payment of fees covering direct costs of duplication or any applicable statutory fee.

~~This bill would provide that the act does not prohibit an agency from selling proprietary information or requiring a licensing agreement for payment of royalties to the agency prior to any subsequent sale, distribution, or commercial use of the information.~~

This bill would provide that computer software developed or maintained by a state or local agency is not itself a public record under the act and would authorize the agency to sell, lease, or license the software for commercial or noncommercial use.

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 (the "April 4 Amendments.").)

However, the bill as amended contained contradictory

language; although its amendment distinguished "software" from proprietary "information," the term "computer readable *data bases,*" was left in the bill, which would exclude from the PRA not just software, but also the data upon which software operates or processes. As a result, on April 28, 1988, the California Department of Finance (hereinafter "Finance Department") submitted a Bill Analysis opposing AB 3265, in part because the bill still referred to databases:

> 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.)

The Finance Department's objections were insightful; due to the internal inconsistency between subsection (b) and (c), but also

because computer *data* was already subject to public record status, as evidenced in then-existing section 6256, which stated "[c]omputer data *shall be provided* in a form determined by the agency" (former § 6256 [emphasis added].)[10]

In response to the Finance Department's objections, the Legislature amended the bill again on June 9, 1988:

> 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.
>
> (~~c~~*b*) As used in this section, "computer software" includes ~~computer-readable databases~~ *computer mapping systems*, computer programs, and computer graphics systems.

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[10] Computer data was already deemed a public record at the time § 6254.9 was enacted in 1988 pursuant to § 6256, then in force which provided, "[a]ny person may receive a copy of any identifiable public record or copy thereof... Computer data shall be provided *in a form determined by the agency*." (Emphasis added.) This language was repealed in 2000 when the legislature amended the PRA to add § 6253.9, requiring computer data be disclosed in the electronic format requested if held by the agency in that format.

(c) This section shall not be construed to create an implied warranty on the part of the State of California or any local agency for errors, omissions, or other defects in any computer software as provided pursuant to this section.

(~~b~~*d*) Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer.

(e) Nothing in this section is intended to limit any copyright protections.

(4-PA-946-47 (the "June 9 Amendments.").)

The Legislature's removal of the final statutory references to computer data demonstrates legislative intent that computer databases are not "software" subject to § 6254.9. (*See Gikas v. Zolin* (1993) 6 Cal.4th 841861 ["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"].)

In fact, following the June 9th Amendments, the Finance Department released an amended report interpreting the term "computer mapping systems" as a form of "computer software," and concluded the change in language from "computer databases" to "computer mapping systems" was intended to eliminate "data" from the software exception. (4-PA-1017.) The report specified the change in the bill meant that "*any data* that may be stored on a computer *still*

retains its public record status." (*See* Opn., p. 11; 4-PA-1017 [emphasis added].) The Finance Department's interpretation was contemporaneous and thus reliable.

The deletion of the term "database" as the bill evolved evidences the Legislature's intention to exclude from the bill all "databases" including GIS-formatted databases like the OC Landbase at issue here (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 116 [previous failed attempts at passing a bill can be evidence of legislative intent that enacted language does not include prior failed definitions]; *see also 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"]; *accord Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 231.)

By inserting the term "system" in the place of "database," the Legislature intended to describe something other than a "database," and the legislative history surrounding the enactment indicates that the term "system" was meant to describe the software and other processes that *act* on the raw data to display, store, or analyze it. (4-PA-1028.) Instead of reaching this conclusion, the Opinion

essentially reads back into the statute the very term that had specifically been removed by the Legislature: "database." (*See Berry v. American Express Publishing, Inc., supra,* 147 Cal.App.4th 224: 230-31 ["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"].)

It might be tempting to interpret, as the Fourth District did, the exchange of the term "computer mapping system" for "computer readable database" to mean that the Legislature intended to provide a specific exclusion for one specific type of database, a computer mapping database. However, since the Legislature chose to remove all references in the statute to the word "database" specifically in response to the Finance Department's objection that "any data" should retain its public record status, and add the term computer mapping *"systems,"* (as opposed to computer mapping *data bases)* the only reasonable interpretation of "computer mapping systems" is that it refers not to data, but rather to a system of particular software components. Had the Legislature intended to exclude a particular type of database, it would have simply identified the type of "databases" that were to be excluded. It did not.

Moreover, an Assembly report[11] concurring in the Senate amendments to the final bill stated the amendments, "[s]pecifically reference computer mapping systems and make other technical revisions." (4-PA-1028; Opn., p. 12.) 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., p. 9, 12.)

Finally, that the Legislature intended to protect only computer software while subjecting computer data to disclosure was also made evident in the bill's final amendment of June 15, 1988, which further

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[11] Assembly reports are more dispositive than a proponent's "arguments in support in determining legislative intent." (*People v. Patterson*, 72 Cal.App.4th 438, 443-44 (1999).) Thus, the Fourth District's reliance on San Jose's self-serving arguments is misplaced, as is its failure to provide any analysis of the contradictory language contained in the Assembly report. (Opn., pp. 11-12.)

emphasized the public-records status of computer formatted information, as opposed to computer software, by adding to subsection (d) the following italicized sentence: "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.*" (4-PA-948-49 [emphasis in original].) The June 15th version of the bill passed both houses and was signed by the Governor. (4-PA-953.)

A. The Legislative History Contradicts the Opinion's Conclusion that the Legislature Intended "computer mapping systems" To Mean Both GIS Software and GIS-formatted Data.

As a starting point in its analysis of legislative history, the Fourth District sets out to discover whether the term "computer mapping system" as used in § 6254.9 "includes a computer mapping database," (Opn., p. 8 [emphasis in original]), and concluding it does, pronounces that the Legislature intended to "exclud[e] from public disclosure a narrow and specific type of database (i.e., a computer mapping database)." (Opn., p. 13 [emphasis added].) As outlined above, the Fourth District's conclusion is contradicted by the legislative history of § 6254.9. Moreover, the Opinion relies excessively on the opinions of the original bill's sponsors while

ignoring contrary evidence of legislative intent found in materials reflecting the Legislature's own opinions and objectives.

By relying heavily on the original intent of the bill's sponsor, City of San Jose, the Opinion loses sight of the significance of the Legislature's responsiveness to Department of Finance's objections. (Opn., pp. 8-13 [referring to early memorandums and other materials mentioning the word "database"].) Because the final bill passed by the Legislature was a far cry from the earlier version advanced by San Jose, the original intent of San Jose becomes much less relevant. (Quintano v. Mercury Casualty Co. (1995) 11 Cal.4th 1049, 1055 ["our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law"]); see also People v. Patterson (1999) 72 Cal.App.4th 438, 443-44 ["When construing a statute, our task is to ascertain the intent of the Legislature as a whole. Generally, the motive or understanding of an individual legislator is not properly received as evidence of that collective intent, even if that legislator was the author of the bill in question"].)

Moreover, relying on a sponsor's motivations to countervail the ultimate language enacted reads into the statute something the Legislature did not intend. (Berry v. American Express Publishing,

Inc., supra, 147 Cal.App.4th at 231, quoting California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 33 (dis. opn. of Kennard, J.).)

The Opinion also seizes upon a San Jose submitted memorandum describing its "Automated Mapping System." (Opn., pp. 9-10.) However, because there is no evidence this memorandum was even before the Legislature, (4-PA-986), it cannot rightly be regarded as legislative history. (See, e.g., Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26, 39 ["Because there is no showing that [a document found in a legislative committee file] was communicated to the Legislature as a whole, it does not constitute cognizable legislative history, and the request for judicial notice of this document is denied"].) The sponsor's wish is not evidence in its own right as to the intent of the Legislature in passing a bill into law. Here, San Jose was not granted every wish, and in any event, as the memorandum pre-dates the bill's amendments, it is not dispositive or instructive as to the Legislature's intent. (4-PA-986.)

When the Opinion does refer to legislative reports, the cited sections are merely further evidence of the sponsor's original intent in proposing the bill, as general background. For example, the

Opinion quotes a Senate staff analysis as purported evidence of legislative intent to include "databases" within the meaning of software, stating that the "report noted that San Jose 'has developed various computer readable data bases and other computer stored information for various civic planning purposes' and that a 'number of private parties have requested use of the city's software under the [Act] for profit-making purposes.'" (Opn., p. 11.) However, it fails to consider the context of this statement -- it is contained in the "Background" section and prefaced with the qualification "According to the author...." (4-PA-981.)

The Opinion also quotes a Senate Rules Committee report section titled "Arguments in Support" as follows: "the bill 'would permit the city of San Jose and other governmental agencies to recoup development costs of computer databases sold to the public.'" (Opn., p. 11; 4-PA-1013) This section supplies background for the legislators by recounting the bill's history. The Opinion failed to mention however that the paragraph is prefaced with "According to the author's office." (Ibid).

Turning to the Finance Department's reports and analyses, the Opinion notes the inclusion of the term "information data bases" in the "Fiscal analysis" section of the June 16, 1988 report which the

Department left unchanged from earlier reports, (Opn., p. 11), reads: "The potential revenue generated by the sale of computer programs, graphics, and information data bases could be substantial depending on the price of the information, program or graphics, and conditions of the sales or licensing agreement."

Focus on the Fiscal Analysis section's language as evidence that the Finance Department understood "computer mapping systems" to mean computer mapping data is misplaced. (5-PA-1357; see Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal.4th 995, 1003 [courts must select the construction that comports most closely with the apparent intent of the Legislature].)[12] First, the "Specific Findings" section of that same report reflects the Finance Department's position with respect to the amended bill as "neutral," because, as amended, it "specifically includes computer mapping systems as computer software" and as such, "specifies that any data that may be stored on a computer still retains its public record status." (4-PA-1077 [emphasis added].) Second, the reports, as discussed above, contain numerous references to "databases," and do

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[12] Arguably, because the "Fiscal" section of the report did not provide suggestions for changing the bill, there was no need for the Finance Department to revise it from previous drafts.

so in provisions of the reports designed to explain what, precisely, the legislation would accomplish.

Significantly, the "Fiscal Analysis" section remained static from one report to another as the bill evolved, while the "Specific Findings" of each report did not remain static and specifically dealt with the bill's impact on the public record status of data. Given the strength of the evidence to the contrary, it was in error for the Opinion to rely so heavily on the ambiguous language in the Fiscal Analysis section to conclude, that the rest of the report must have been in wrong somehow.

Moreover, the Opinion overlooks the fact that the Legislature in 1988 was well aware that computer data was, by law, a public record subject to the PRA's terms. Section 6256, in effect at the time AB 3265 was enacted, authorized agencies to provide information in either paper or electronic form, recognizing that data was public information ("[c]omputer data shall be provided in a form determined by the agency".) Prior to the enactment of § 6254.9, computer software developed by public agencies could be requested as public records by anyone, including commercial businesses wishing to appropriate new software for their own use. The Legislature was aware that § 6256 did not protect the agencies'

software because the computer program text could be read from paper print-outs of the software program and re-entered, resulting in a functioning piece of software. (See 4-PA-1038, [Letter from County of Santa Cruz, AB 3265 Leg. Hist.].) Moreover, when it set out to exempt from disclosure computer "software" in any format, the Legislature did not disturb § 6256, thus evidencing its intent that computer "data" as specified in § 6256 remain public records subject to disclosure in a form determined by the agency.

That the Legislature was aware of § 6256 import when it enacted § 6254.9, is evidenced by an Administrative Services Committee Report and a report of Assembly Committee on Government Organization. (See 4-PA-0984; Opn., p.9 [quoting, 4-PA-955-56].) A legislator reading these reports would undoubtedly conclude AB 3265 preserved the public information status of all computer data, not just certain types of data, while protecting software and software components from PRA disclosure:

> Status of Computer Data
>
> The bill draws a distinction between computer software and computer-stored information. The bill declares that information is not shielded from the California Public records Act "merely because it is stored on a computer".

> In addition, current law also provides that "computer data shall be provided in a form determined by the agency" (Government Code § 6256).

(Opn., 9 [quoting, 4-PA-0956 [emphasis added].)

When section 6254.9's legislative history is viewed as a whole, the Legislature's intent becomes clear: computer mapping data, such as the GIS formatted data at issue here, remains a public record subject to the PRA's terms, and software, including systems of software components, are protected from the PRA's reach.

B. Post-1988 Legislative Activity Contradicts The Fourth District's Assertion of Legislative Intent Regarding The Meaning of "Computer Mapping Systems."

The addition of § 6253.9 to the PRA in 2000, repealing § 6256 demonstrates by implication that § 6254.9's software exclusion was not understood as applying to a GIS-formatted database. Section 6253.9 effectively stripped agencies of the discretion to disclose public records in the format of their choosing, thus reaffirming the public record status of all non-software computer data.

Further, the Legislature left unchanged § 6254.9 and despite over 100 other amendments to the PRA since the enactment of § 6254.9. (Pet.RJN, Exhibit 7; See Olson v. Automobile Club of Southern California (2008) 42 Cal.4th 1142, 1155-56, ["because the

Legislature had declined to amend the statute to abrogate our prior decision despite making numerous other amendments in the intervening years" the Legislature had acquiesced in our initial interpretation].) ; and despite the Attorney General's 2005 Opinion that "the term 'computer mapping systems' in § 6254.9 does not refer to or include basic maps and boundary information per se (i.e., the basic data compiled, updated, and maintained by county assessors), but rather denotes unique computer programs to process such data using mapping functions – "original programs that have been designed and produced by a public agency" (88 Ops.Cal.Atty.Gen. 153, 159 (2005) (emphasis in original).) The Legislature has declined to disturb this interpretation. The fact that the Legislature "has never taken steps to reject [the Attorney General's] opinion" suggests it concurs with it. (See Wilkoff v. Superior Court (1985) 38 Cal.3d 345, 353 ["Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it."].)

That the Attorney General's interpretation has been ratified by the Legislature is also evidenced by the fact the 2005 opinion was placed squarely before the Legislature in 2008. Assembly Bill No.

1978 (2007-2008 Reg. Sess.), sponsored by Orange County and introduced to define "computer mapping systems" as: "assembled model data, metadata, and listings of metadata, regardless of medium, and tools by which computer mapping system records are created, stored and retrieved," (Opn., p. 20; Pet.RJN, Exhibit 8), was rejected by the Legislature, never even making it out of committee. (See Wilkoff v. Superior Court, supra, 38 Cal.3d at 353 [citations omitted]; accord California Assn. of Psychology Providers, supra, 51 Cal.3d at 16-17 [in agreeing with Attorney General's interpretation of statutory term, noting Legislature's failure to "modif[y]" that interpretation]; Ventura v. City of San Jose (1984) 151 Cal.App.3d 1076, 1079-1080 [calling a particular Attorney General opinion "[t]he most persuasive evidence of the Legislature's intent"].)

Therefore, the legislative actions and inaction subsequent to the enactment of § 6254.9 provides compelling evidence that the Legislature intended electronically formatted data, including GIS data like the OC Landbase, to remain subject to the PRA.

C. The Opinion Defeats The PRA's Goal of Maximizing Access To Government Information So That Citizens Can Monitor Government And Participate In The Democratic Process.

The public policy behind the statutory scheme is another tool to help decipher legislative intent. (Ohio Farmers Ins. Co. v. Quin (1988) 198 Cal.App.3d 1338, 1348 ["the favored construction of a statute is one which is consistent with established public policy"].) As outlined above, the Legislature intended to bring all government held information into the purview of the PRA as evidenced by the expansive definition of "public records," in order to promote broad disclosure of government information which in turn promotes participation in the democratic process and encourages citizens to make government accountable.

Compilations of data, such as the OC Landbase, are especially important public records, as evident by the Orange County's GIS Needs Assessment Study ("Assessment," a portion of which is attached as Exhibit 2 to Pet.RJN.) The Assessment claims the OC Landbase is "the most essential data set in the county." (Id., at OC 1455.) Its importance is underscored by the fact many County departments make use of it, including the board of supervisors; executive management; OC Parks; Public Works; Engineering and Planning and Development Services. (Id., at OC 1029.) This data set

is the primary data source used by county officials and employees to obtain information about land parcels within the county.

If it is the "most essential data set" for Orange County government, it is also arguably the "most essential data set" to the public and should therefore be accessible via the PRA.[13]

If provided with a copy of the OC Landbase in GIS file format, the Sierra Club, using its own GIS software, could display, analyze and query the data in many ways, some of which would be useful in monitoring the county government's activities. For example, Sierra Club could generate a map showing ranges of assessed value per square foot of land in different colors, to look for patterns of assessment favoring certain types of property owners. (5-PA-001310-13, [Images of use of GIS parcel data prepared by Amanda Recinos; see also Ms. Recinos' authentication of said images at RT-000141:13 through 000144:3]) Similarly, Sierra Club, using GIS formatted data obtained from the County of Los Angeles pursuant to the PRA, has produced a computer-generated map showing the parcels of land in Los Angeles County's Verdugo Mountains. Each parcel is

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[13] The County's original land records – records of survey, tract maps lot-line adjustments, deeds, and so forth – amount to approximately seven million pages. (3-PA-538, [Recinos Decl., at 4:9].)

color-coded on the map to indicate whether it is publicly or privately owned. The map has been used by the local city councilmember to prioritize open-space acquisitions in the Verdugo Mountains. (1-PA-106, ¶9; 1-PA-107, ¶¶13, 14, 17, [Declaration of Dean Wallraff]; 1-PA-113, [example of Verdugo Hills Open Space Map, Exhibit 1, attached to Declaration]). Compiling such a map from the original paper property records would be impractical and wasteful, (3-PA-529:36), for the same reason that compiling an agency department's income and expense statement for a given year from the original accounting transaction documents would be impractical and wasteful.

GIS land parcel data can serve as the base layer for other electronic data sets, enabling sophisticated computerized analysis of an almost limitless number of matters relating to real property. (3-PA-527:23-26, [Joffe Decl.].) The GIS-formatted OC Landbase enables the entirety of countywide land parcels to be queried, selectively extracted according to locational criteria, and displayed in a comprehensive map. (3-PA-527:29-31.) Conversely, when the records are provided only in paper or PDF form, as Orange County has offered, the same analysis is impossible. (3-PA-529:7-15, [Joffe Decl.].)

Finally, it makes sense that the Legislature would provide by

law that software, as the word is commonly understood, "is not itself a public record" because a computer program itself does not directly "relat[e] to the conduct of the public's business," (§ 6252(e)), and therefore is arguably appropriately excluded from the scope of the PRA. In contrast, however, electronic mapping data is critical to the conduct of the public's business, and stripping it of its public record status would detrimentally impact citizens' ability to monitor and participate in government business.

Section 6253.1(a)(2), requires public agencies to assist citizens with making a focused and effective request for public records by describing the information technology in which the records exist. Thus, this section demonstrates the Legislature's intent that government do all it can to facilitate access to government held information in electronic format. If the Fourth District's Opinion is allowed to stand, government agencies will be free to deny the public access to computer data held in only some computer technology formats but not others, frustrating the public policy principles underpinning the PRA as public records become increasingly computerized.

III. THIS COURT SHOULD ADOPT THE INTERPRETATION OF "SOFTWARE" ADOPTED BY THE SIXTH DISTRICT

COURT OF APPEAL AND THE CALIFORNIA ATTORNEY GENERAL.

Sierra Club's interpretation of "computer software" in section 6254.9 comports with the 2005 Attorney General opinion (88 Ops.Cal.Atty.Gen. 153 (2005), and the 2009 Sixth District Court of Appeal decision, *County of Santa Clara v. Superior Court of Santa Clara County* (2009) 170 Cal.App.4th 1301 ["*Santa Clara*"], both of which in turn follow the correct principles of statutory construction to discern legislative intent. Both opinions concluded that GIS databases consisting of land parcel data, such as the OC Landbase in the case at bar, are public records subject to mandatory disclosure. The Fourth District Opinion attempts to distinguish them.

The facts in *Santa Clara* are analogous to the facts in this case. In *Santa Clara*, petitioner First Amendment Coalition requested, and was refused, a copy of Santa Clara County's GIS "basemap," the equivalent of the Orange County's GIS "landbase" requested by Petitioner here. First Amendment Coalition filed suit under the Public Records Act. The trial court issued the requested writ of mandate, ordering Santa Clara County to provide the requested GIS data to petitioner with no licensing agreement requirement. The Sixth District Court of Appeal affirmed. (*Santa Clara*, at p. 1337.)

The Fourth District in reaching the opposite conclusion, attempts to distinguish *Santa Clara* on the basis that the *Santa Clara* Court did not interpret "computer mapping system" as that term is used in section 6254.9 (b). However, this is a distinction without a practical or legal difference because both Courts rely upon the term "computer software" as used in section 6254.9 (a) in some way or another. (*Santa Clara,* at p. 1332, fn. 9.) The *Santa Clara* Court determined – albeit in the context of subdivision (e) -- that the GIS database is not exempted from disclosure by virtue of § 6254.9 because GIS data is not "software" as used in subdivision (a) of 6254.9. (*Ibid.*) Thus, "software" means the same thing in *Santa Clara* as it does in this case because subdivision (e) of §6254.9 is governed by subdivision (a) 's "computer software" in the same way that subdivision (b) is governed by subdivision (a).

Furthermore, the only other published authority as to the issue of whether "computer software" applies to GIS data is the California Attorney General's 2005 Opinion. (*See* 88 Ops.Cal.Atty.Gen. 153 (2005) ["AG Opinion"].) The Attorney General concluded, "Parcel

boundary map data[14] maintained by a county assessor in an electronic format is subject to public inspection and copying under provisions of the California Public Records Act." (1 PA-173.) The Attorney General properly determined, using canons of statutory construction (including plain meaning), that the term "computer mapping systems" in § 6254.9 (b) refers to the software used to process boundary and similar mapping information, not the mapping information itself:

> [T]he term "computer mapping systems" in section 6254.9 does not refer to or include basic maps and boundary information per se (i.e., the basic data complied, updated, and maintained by county assessors), but rather denotes unique computer programs to process such data using mapping functions – original programs that have been designed and produced by a public agency. (See, e.g., §§ 6254.9, subd. (d), 6253.9, subd. (f) [distinguishing "record" from "software in which [record] is maintained"] 51010.5 subd. (i)[defining "GIS mapping system" as system "that will collect, store, retrieve, analyze, and display

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[14] "Parcel boundary map data," as the term is used in the Attorney General Opinion, means "detailed geographic information that is regularly prepared, maintained, and updated for use by California's county assessors to describe and define the precise geographic boundaries of 'assessor's parcels' – units of real property for which property taxes are assessed throughout the state." (- PA-173.)

> environmental geographic data..."(italics added)]. ... Computer Dict. (3d ed. 1997) p. 441 [defining "software" as "[c]omputer programs; instructions that make hardware work"]; Freedman, the Computer Glossary: The Complete Illustrated Dict. (8th ed. 1998) p. 388 ["A common misconception is that software is also data. It is not. Software tells the hardware how to process the data. Software is 'run.' Data is 'processed'"]. Accordingly, parcel map data maintained in an electronic format by a county assessor does not qualify as a "computer mapping system" under the exemption provisions of section 6254.9

(88 Ops.Cal.Atty.Gen. 153, 159 (2005); 1 PA 179).

The Fourth District dismisses this opinion in part because of its failure to review legislative history. (Opn., p. 17.) However, as addressed above, the use of plain meaning is entirely appropriate and in any event, the legislative history supports the Attorney General's construction.

This Court should adopt the Sixth District's and Attorney General's conclusion that a GIS database, such as the OC Landbase at issue in this case, must be disclosed pursuant to the PRA without a licensing agreement or licensing fee.

IV. THE CALIFORNIA CONSTITUTION REQUIRES THAT SECTION 6254.9'S COMPUTER-SOFTWARE EXCLUSION BE LIMITED TO SOFTWARE ONLY.

Now enshrined in the Declaration of Rights, Article I, section 3(b), provides,

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) 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.
>
> (3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

California voters, by passing Proposition 59 in 2004 which amended the California Constitution with this language, elevated to civil right status a citizen's right to access government information.

The Voter's Pamphlet demonstrates the People's intent in enacting this constitutional amendment,

> What will Proposition 59 do? It will create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how. It will ensure that public agencies, officials, and courts broadly apply laws that promote public knowledge. It will compel them to narrowly apply laws that limit openness in government—including discretionary privileges and exemptions that are routinely invoked even when there is no need for secrecy.

(Exhibit 3, Pet.RJN at 3-002.)(*See, e.g. Strauss v. Horton* (2009) 46 Cal.4th 364, 472 [the most potentially informative extrinsic source regarding voter intent on initiative is usually the material contained in the ballot pamphlet].) That the right of access to government information is now a civil right in California suggests a greater significance should be given to it when construing statutes related to information access such as the PRA, and that the judiciary should apply the constitutional requirement to interpret such statutes at the inception of the statutory interpretation exercise.

Some courts have given the constitutional mandate due consideration. For example, in *Sonoma County Employees' Retirement Assn. v. Superior Court* (2011) 198 Cal. App. 4th 986, ["*SCERA*"],

a newspaper requested payroll information including retirees' pensions pursuant to PRA. In accordance with Art I, Section 3 (b)(2), the court held that Gov. Code, § 31532 did not make confidential the names of, and amount of benefits received by, each retired county employee or beneficiary. The court having found statutory ambiguity, engaged in the process of statutory interpretation, following the constitutional mandate to construe provisions restricting access narrowly. (*Id.* at pp. 992-993.) The court stated, "In the particular context of the CPRA, if there is any ambiguity about the scope of an exemption from disclosure, we must construe it narrowly," (*Ibid.*), emphasizing that this narrow construction is a constitutional requirement. (*Id.* at p. 1000.)

In contrast, the Fourth District's statutory interpretation analysis violates this constitutional mandate by doing the opposite of what it requires. After declaring the Software Provision ambiguous and susceptible to both parties' interpretations, (Opn., p.8), the Opinion *broadly* interprets subd., (b) of § 6254.9 to arrive at the conclusion that the OC Landbase is not a public record because it is part of "computer mapping system." (Opn., pp. 16-17.) The constitutional mandate is treated almost as an afterthought; the entire extent of attention given to it by the Opinion is as follows:

> Sierra Club points out that the California Constitution mandates that a statute be "narrowly construed if it limits" the people's right of access to government information. (Cal. Const., art. I, § 3, subd. (b)(1) & (2).) We have construed section 6254.9 as narrowly as is possible consistent with its legislative history. Moreover, article 1, section 3, subdivision (b)(5) of the California Constitution specifies it "does not repeal or nullify, expressly or by implication, any . . . statutory exception to the right of access to public records . . . that is in effect on the effective date of this subdivision . . . ." Section 6254.9 was in effect on November 3, 2004, the subdivision's effective date.
>
> (Opn., pp. 16-17.)

Had the Opinion given due regard to the civil right status of a citizen's right to access government information, and the express language of Article I, Section 3 (b), it is quite possible the Fourth District would have drawn a different conclusion. For one, there is nothing on the face of subsection (b)(5) of Article I, Section 3, that suggests it is intended to equate a court's narrow reading of a previously-enacted statute limiting public access with nullification or repeal of that statute. On the contrary, subsection (b)(5) merely recognizes that while statutory exceptions to the right of access to public records (such as section 6254.9) will be read narrowly, they may still be given effect.

Here, the interpretation of "software" as limited to "software" and not "data", leaves section 6254.9 intact, yet satisfies subdivision (b)(2)'s constitutional requirement to read the Software Provision narrowly. The Opinion does not explain how Sierra Club's interpretation of the term "software" would somehow "nullify" section 6254.9. (See Opn., pp. 16-17.)

Thus, the interpretation of "software" and "computer mapping systems" must be governed by the narrow construction required by the California Constitution. Any ambiguity in the term "computer mapping systems" must be resolved in favor of disclosure and thus in favor of Petitioner in this case.

CONCLUSION

Sierra Club requests this Court reverse the Fourth District with instructions to direct Respondent to enter judgment in favor of Sierra Club, and to issue an extraordinary writ directing Orange County to provide Sierra Club a copy of the OC Landbase in GIS file format for the direct cost of duplicating the OC Landbase onto a suitable medium, such as a computer disk or solid-state USB drive ("thumb drive").

Sierra Club also respectfully requests this Court give priority to this case, since the Legislature contemplated judicial challenges under the PRA be decided at the earliest possible date. (*See* section 6258, the object of which is to secure a decision at the earliest possible time; and section 6259, providing for an expedited appeal procedure.)

Further, should Sierra Club prevail in this case, it is requested that this Court determine entitlement to attorney fees, pursuant to section 6259, subdivision (d), and to remand to the Court of Appeal with directions to order the trial court to determine the amount of the attorney fee award. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 427, [determining prevailing party entitled to attorney fees].)

Dated: November 14, 2011

Respectfully Submitted,
VENSKUS & ASSOCIATES, P.C.

By: _____

Sabrina Venskus

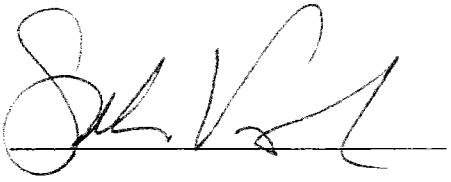
Attorney for Petitioner,
The Sierra Club

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule of Court 8.204(c)(1) the attached Petitioner's Opening Brief on the Merits was produced on a computer and contains 12,288 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: November 14, 2011

Respectfully Submitted,
VENSKUS & ASSOCIATES, P.C.

By: 

Sabrina Venskus

Attorney for Petitioner,
The Sierra Club

Filed 5/31/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SIERRA CLUB, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; COUNTY OF ORANGE, Real Party in Interest.	G044138 (Super. Ct. No. 30-2009-00121878-CU-WM-CJC) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, James J. Di Cesare, Judge. Petition denied.

Venskus & Associates, and Sabrina D. Venskus for Petitioner.

Michel & Associates and C.D. Michel for Members of the GIS Community as Amici Curiae on behalf of Petitioner.

Law Offices of Michael W. Stamp, Michael W. Stamp, and Molly Erickson for The Open Monterey Project as Amicus Curiae on behalf of Petitioner.

M. Rhead Enion for Academic Researchers in Public Health, Urban Planning and Environmental Justice as Amici Curiae on behalf of Petitioner.

Meyer, Klipper & Mohr, Christopher A. Mohr, Michael R. Klipper; Coblentz, Patch, Duffy & Bass, Jeffrey G. Knowles, and Julia D. Greer for Consumer Data Industry Association, Corelogic, LexisNexis, The National Association of Profession Background Screeners, and the Software & Information Industry Association as Amici Curiae on behalf of Petitioner.

Holme Roberts & Owen, Rachel Matteo-Boehm, Katherine Keating and Leila Knox for Media and Open Government, First Amendment Coalition, Freedom Communications, Inc., publisher of the Orange County Register, Los Angeles Times Communication LLC, doing business as Los Angeles Times, The Associated Press, Bay Area News Group, Bloomberg News, Courthouse News Service, Gannett Co., Inc., Hearst Corporation, Lee Enterprises, Incorporated, The McClatchy Company, Patch Media Corporation, The San Francisco Examiner, Wired, American Society of News Editors, Association of Capitol Reporters and Editors, California Newspaper Publishers Association, Citizen Media Law Project, Electronic Frontier Foundation, First Amendment Coalition of Arizona, National Freedom of Information Coalition, Openthegovernment.org, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel, Mark D. Servino, Rebecca S. Leeds, and Karen L. Christensen, Deputy County Counsel, for Real Party in Interest.

Best Best & Krieger and Shawn Hagerty for League of California Cities and California State Association of Counties as Amici Curiae on Behalf of Real Party in Interest.

* * *

The issue in this case is whether the California Public Records Act (the Act) (Gov. Code, § 6250 et seq.) requires a government agency to disclose to any requesting person (who pays the cost of duplication) the database associated with a geographic information system.[1] In a petition for writ of mandate, Sierra Club asserts such a right to a database developed by the County of Orange (the County).[2] The County argues that under section 6254.9 of the Act, the database is *not* a public record and therefore the County may charge a licensing fee for its disclosure. We conclude section 6254.9 excludes from the Act's disclosure requirements a geographic information system database like the one at issue here. Therefore, the County may properly charge a licensing fee for its geographic information system database.

FACTS

Stipulated Facts

The parties stipulated in writing to the following facts.

The database sought by Sierra Club is the "OC Landbase," i.e., "the County's parcel geographic data in a GIS file format." "GIS" stands for "geographic information system." "'GIS file format' means that the geographic data can be analyzed, viewed, and managed with GIS software." "The OC Landbase is a parcel-level digital basemap identifying over 640,000 parcels in Orange County with geographic boundaries

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1 All statutory references are to the Government Code unless otherwise stated.

2 The trial court's denial of Sierra Club's petition for writ of mandate is "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (§ 6259, subd. (c).)

of parcels, Assessor Parcel Numbers [and] street addresses, with links to text information such as the name and addresses of the owner(s) of the parcels."

"The County currently distributes the OC Landbase in a GIS file format" "to members of the public, if they pay a licensing fee and agree to the license's restrictions on disclosure and distribution." The OC Landbase in a GIS file format does not contain any computer programs.

The County agreed to provide Sierra Club with copies of the source documents containing the parcel related information (such as assessment rolls and transfer deeds)"in Adobe PDF electronic format or printed out as paper copies," rather than in a GIS file format. But "Sierra Club cannot use the analytical, display and manipulation functions of its GIS software on the OC Landbase if the County produces [the information] in Adobe PDF format or printed out on paper."[3]

The Proceedings Below

Sierra Club asked the superior court to issue a writ of mandate "compelling the County to provide the OC Landbase in a GIS file format to the Sierra Club for a fee consisting of only the direct costs of [duplication], and with no requirement that the Sierra Club execute a non-disclosure or other agreement with the County." Before

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[3] By order dated October 8, 2010, we granted Sierra Club's request for judicial notice of parts of the legislative history of section 6253.9 and official ballot information on Proposition 59 (adding article 1, section 3(b) to the state Constitution). We hereby grant the County's motion for judicial notice of Assembly Bill No. 1293 (1997-1998 Reg. Sess.), and a Sierra Club amici's request for judicial notice of its exhibits A through L, i.e., the court records from *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1326 (*Santa Clara*), the legislative history of section 6253.9, and Assembly Bill No. 1968 (2007-2008 Reg. Sess.). We hereby deny Sierra Club's request for judicial notice of the County's GIS needs assessment study and a Sierra Club amici's request for judicial notice of exhibits M through X, consisting of news articles and internet web pages.

ruling, the court heard oral argument, allowed extensive briefing, and conducted a two-day evidentiary hearing.

At the evidentiary hearing, Sierra Club's expert witness (Bruce Joffe) read aloud the following definition of "GIS" from a specialized technical dictionary on geographic information systems: "An integrated collection of computer software and data used to view and manage information about geographic places and [analyze] spatial relationships and model spatial processes." Joffe opined this definition was a "misstatement" because "GIS is software that integrate[s] data models and other spatial processes." But on cross examination, Joffe admitted that he "used" the following definition for "GIS" in a 2003 document: "Geographic Information System, the collection of computers, software, databases, and data that enable geospatial data to be received, manipulated, displayed, and distributed."

The court found that the "County offered persuasive testimony and evidence that the term 'GIS' refers to 'an integrated collection of computer software and data used to view and manage information about geographical places, analyze spatial relationships and model spatial processes.'" The court further found the County showed "that all of the revenue collected from licensing the OC Landbase in a GIS file format accounts for only 26% of the costs to keep the OC Landbase up to date." The court, identifying the issue as "whether the OC Landbase in a GIS file format falls within the scope of Section 6254.9's computer mapping system exception" from public disclosure, held that "Section 6254.9's legislative history indicates that it was designed to protect computer mapping systems from disclosure, including the data component of such systems, and to authorize public agencies to recoup the costs of developing and maintaining computer mapping systems by selling, leasing, or licensing the system."

DISCUSSION

The Act requires government agencies to make public records promptly available to any requesting person "upon payment of fees covering direct costs of duplication, or a statutory fee if applicable," unless the record is "exempt from disclosure by express provisions of law." (§ 6253, subd. (b).) "'Public records'" are defined to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (§ 6252, subd. (e).)

The "Act states a number of exemptions that permit government agencies to refuse to disclose certain public records." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282.) "A qualifying agency refusing to disclose a public record must 'justify' its decision 'by demonstrating that the record . . . is exempt under' one of the" Act's express exemption provisions. (*Ibid.*)

At issue in this case is the Act's exclusion from mandatory disclosure for "computer mapping systems" within the meaning of section 6254.9. Under section 6254.9, subdivision (a), "[c]omputer software developed by a state or local agency is *not* itself a public record" under the Act and therefore the agency may "sell, lease, or license" it.[4] (Italics added.) Subdivision (b) of section 6254.9 defines "'computer software'": "As used in this section, 'computer software' includes computer mapping systems, computer programs, and computer graphics systems." Section 6254.9 further provides: "(c) This section shall not be construed to create an implied warranty . . . for errors, omissions, or other defects in any computer software as provided pursuant to this section.

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[4] In this opinion, we refer to the exclusion from public disclosure established by section 6254.9 as an exclusion, rather than an exemption, since governmentally-developed "computer software" within the meaning of that statute is not a public record.

[¶] (d) 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. [¶] (e) Nothing in this section is intended to limit any copyright protections."

Both parties agree that the OC Landbase is a GIS database.[5] They disagree on whether a computer mapping system, within the meaning of section 6254.9, includes only the GIS computer program, or alternatively, the GIS computer program *and* database. Sierra Club argues "the correct interpretation of section 6254.9 is that computer databases containing GIS data are not considered software under the [Act]," relying heavily on standard dictionary definitions of "computer software" and "data." The County contends the "OC Landbase data, which is in a GIS file format, is part of a computer mapping system" and therefore excluded from disclosure under section 6254.9.

Section 6254.9 does not define the term "computer mapping systems." We must therefore interpret section 6254.9 in accordance with established principles of statutory construction. Our standard of review is de novo. (*An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal.App.4th 1418, 1424.) "Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's

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[5] We do not define what constitutes a "GIS database," since the only question before us is whether the OC Landbase (an undisputed GIS database) is excluded from public disclosure under section 6254.9.

purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Section 6254.9's language is susceptible to both parties' interpretations, i.e., a "computer mapping system" might or might not include data along with the associated computer program. We must focus on the ambiguous phrase "computer mapping system," not the standard dictionary meaning of "computer software," because section 6254.9 contains its own definition of computer software. "'When a legislature defines the language it uses, its definition is binding upon the court even though the definition does not coincide with the ordinary meaning of the words. . . .'" (*Cory v. Board of Administration* (1997) 57 Cal.App.4th 1411, 1423-1424.)

Moreover, if dictionary definitions controlled the outcome in this case, the word "system" is defined as a "complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." (Webster's 3d New Internat. Dict. (2002) p. 2322.) Thus, a computer mapping *system* should include more than solely a computer *program* component. (In addition to computer data and programs, a computer system could also include hardware or infrastructure, although these last two components cannot be physically copied and disclosed.)

We must thus interpret "computer mapping system," as used in section 6254.9, to determine whether the term includes a computer mapping *database*. We turn first to section 6254.9's legislative history.[6] As originally introduced in the Assembly on February 11, 1988, the statute allowed a government agency to sell "proprietary information" and defined that term to "include[] computer readable data bases, computer programs, and computer graphics systems." An Assembly amendment dated April 4,

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[6] The trial court granted Sierra Club's request for judicial notice of the legislative history of section 6254.9. Pursuant to Evidence Code section 459, subdivision (a), we take judicial notice of the same material in the record.

1988 (first amended bill) changed the term "proprietary information" to "computer software," but kept the same definition quoted above. The first amended bill also added a statement that nothing in the section was intended to affect the public record status of information "merely because it is stored in a computer." A Senate amendment dated June 9, 1988 (second amended bill) changed the term "computer readable data bases" in the definition of computer software to "computer mapping systems." A Senate amendment dated June 15, 1988 (final amended bill) added the sentence, "Public records stored in a computer shall be disclosed as required by this chapter."[7]

The City of San Jose sponsored the bill. A report of the Assembly Committee on Government Organization stated the first amended bill's purpose was to allow San Jose, which had "developed various computer readable mapping systems, graphics systems, and other computer programs," "to sell, lease, or license the software at a cost greater than the 'direct costs of duplication.'" (See *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465 [legislative committee reports are cognizable legislative history].) The report stated San Jose was "concerned about recouping the cost of developing the software." The report stated the "bill draws a distinction between computer software and computer-stored information" and "declares that information is not shielded from the [Act] 'merely because it is stored on a computer.'"

A San Jose memorandum (contained in the legislative file of the Senate Committee on Governmental Organization) stated: "The City of San Jose, like many other government agencies[,] has developed various computer readable data bases,

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[7] The bill originally proposed to amend section 6257 (repealed in 1998), as opposed to enacting a new section.

The first amended bill stated that computer software "developed or maintained by" a government agency is not a public record. The second amended bill deleted the phrase, "or maintained," due to the Finance Department's observation that if an agency did not develop the particular software, it did not own such software and could not legally lease or sell it without the owner's consent.

computer programs, computer graphics systems and other computer stored information at considerable research and development expense. For example, the City's Department of Public Works has recently completed development of a data base for a computer mapping system known as the Automated Mapping System (AMS). [¶] The AMS is the product of eight years of efforts on the part of Public Works to collect and store on computer magnetic tape, city wide information regarding the location of public improvements and natural features. This wide range of data can be arranged in various ways to produce many types of maps for specialized uses, such as fire response, sewer collection, or police beat maps. Public Works estimates that development costs to date have exceeded $2 million dollars." (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1373 ["[s]tatements by the sponsor of legislation may be instructive"].)

The Department of Finance opposed the first amended bill on April 28, 1988, noting that the inclusion of databases in the definition of "computer software" was contradictory to the statute's statement that nothing in the section was intended to affect the public record status of information merely because it is stored in a computer. The contradiction resulted because "data bases are organized files of record information subject to public records laws" and making them subject to sale or licensing was contrary to the people's right to access public information under section 6250.[8] The "Fiscal Analysis" section stated: "The potential revenue generated by the sale of computer programs, graphics, and information data bases could be substantial depending on the price of the information, program or graphics, and conditions of the sales or licensing agreement."

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[8] The Department of Finance also objected that the bill would permit the state to sell software or data bases which it maintained and did not own, and the bill did not protect the state from warranty liability. The second amended bill addressed both these concerns in subdivisions (a) and (c) of section 6254.9.

As noted above, the Senate amended the bill on June 9, 1988 to, inter alia, revise the statute's definition of computer software to include "computer mapping systems" instead of "computer readable data bases." The Department of Finance then dropped its opposition to the bill. The Finance Department's June 16, 1988 report identified its position on the second amended bill as "neutral," noting in the "Specific Findings" sections that the bill "specifically includes computer mapping systems as computer software, thereby permitting their sale" and that the bill "specifies that any data that may be stored on a computer still retains its public record status." The "Fiscal Analysis" section of the Finance Department's report continued to state: "The potential revenue generated by the sale of computer programs, graphics, and *information data bases* could be substantial depending on the price of the information, program or graphics, and conditions of the sales or licensing agreement." (Italics added.)

A Senate staff analysis of the second amended bill stated the bill's purpose was to "clarify that computer software is not itself a public record and to authorize a public agency to sell, lease, or license the software at a cost greater than [the cost of duplication]. The bill would permit the city of San Jose and other government agencies to recoup development costs of computer databases sold to the public." The report described the statute as specifying that "'computer software,' *as defined*" is not itself a public record. (Italics added.) The report noted that San Jose "has developed various computer readable data bases and other computer stored information for various civic planning purposes" and that a "number of private parties have requested use of the city's software under the [Act] for profit-making purposes."

A Senate Rules Committee report concerning the final amended bill stated in the section titled "Arguments in Support" that the bill "would permit the city of San Jose and other governmental agencies to recoup development costs of computer databases sold to the public."

An Assembly report concurring in the Senate amendments to the final amended bill stated that the Senate amendments "[s]pecifically reference computer mapping systems and make other technical revisions." The "Comments" section of the report states that San Jose "has developed computer readable mapping systems, graphics systems, and other computer programs for civic planning purposes" and that the "city is concerned about recouping the cost of developing the software."

The Department of Finance, in its June 20, 1988 report stating its neutral position on the final amended bill, reiterated its finding that the bill permitted the sale of computer mapping systems and that the potential revenue generated by the sale of "information data bases" could be substantial. The Director of the Department of Finance signed an identical report on August 9, 1988.[9]

A Republican analysis for the Assembly Governmental Organization Committee stated the final amended bill revised the Act "to allow agencies to recover development and maintenance costs of computer software by selling or licensing computer programs and data bases that have been developed sometimes at considerable public expense. Passing such costs along to those who will use them for business-oriented purposes is in the taxpayers' best interest. [¶] This does not affect the ability of the public to obtain information stored on computers." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1297 [Republican analysis of Assembly bill showed legislative history and intent].)

The bill passed unanimously through the Assembly and the Senate with support from many local governments and no known opposition. On August 22, 1988, the Governor signed the bill adding section 6254.9 to the Government Code.

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[9] Sierra Club postulates that the Department of Finance's references to information data bases "were unintentional and more likely a case of editing oversight." But we cannot presume that a passage in a government document is simply the product of an editing mistake, particularly a document which was signed and submitted on four separate dates by different individuals.

The legislative history of section 6254.9 reveals that the computer mapping systems developed by San Jose and other government entities consisted of databases. San Jose's description of its computer mapping system includes *no* references to any *mapping* computer programs developed by it.

The legislative history also reflects a concern that the original bill's definition of computer software to include all "computer readable data bases" was too broad, encompassing information potentially desired by credit bureaus, title companies, and newspapers. As noted by the Department of Finance, a database is simply an organized file of information. Thus, the expansive phrase "computer readable data bases" would have excluded from disclosure all organized information stored on a computer.

Balancing these considerations, and based on section 6254.9's legislative history, we interpret "computer mapping systems" to include a GIS database like the OC Landbase. This interpretation effectuates the bill's purpose of allowing San Jose to recoup the development costs of its database known as the Automated Mapping System. Significantly, San Jose also sought the ability to recoup the cost of developing its computer graphing systems, and as a result, "computer graphing systems" are also included in section 6254.9's definition of computer software.[10] The Legislature, by substituting "computer mapping systems" for "computer readable data bases" in the statutory definition of computer software, narrowed the definition sufficiently to preserve the public records status of most computer-stored information, while excluding from public disclosure a narrow and specific type of database (i.e., a computer mapping database). A computer mapping database is not excluded "merely" because it is stored on a computer, but because its development is time-consuming and costly and the

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[10] The definition of computer graphing systems is not before us.

Legislature has made a policy decision that local governments should be allowed to recoup some of their development costs.[11]

If "computer mapping systems" were interpreted to include only computer *programs*, it is unclear what purpose the inclusion of the phrase in section 6254.9 was intended to achieve, since the legislative history does *not* show that any local government or agency sought the ability to recoup the developmental costs of a proprietary computer *program* associated with a mapping system. Indeed, GIS software is sold by third party vendors, weakening any market a government might have for its proprietary computer program associated with a mapping system. Here, the County licenses mapping software from third parties; similarly, Sierra Club uses "a program called Arc Map."

Furthermore, if "computer mapping systems" denotes only mapping computer *programs*, then the phrase is superfluous since section 6254.9's definition of computer software already includes computer programs. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 [courts avoid "constru[ing] statutory provisions so as to render them superfluous"]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 234 [if two terms have same meaning, one is "mere surplusage"].) A court interpreting a statute should try to give "effect . . . , whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part or provision useless or deprived of meaning." (*Weber v. County of Santa Barbara* (1940) 15 Cal.2d 82, 86.)

Having reviewed the legislative history of section 6254.9, we turn to the statutory framework of which the section is a part. The Act's statutory scheme is consistent with our interpretation that computer mapping databases are excluded from public disclosure. The Act exempts many types of information from disclosure (§§ 6254 — 6254.29) without regard to whether the data is stored in a computer. Thus, section 6254.9, subdivision (d)'s statement that "[p]ublic records stored in a computer

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[11] Here, the County contends it has spent over $3.5 million during the last five years to maintain the OC Landbase.

shall be disclosed as required by this chapter" is not a mandate that all computer-stored information must be divulged under the Act.

Sierra Club argues that section 6253.9 of the Act requires the County to disclose the OC Landbase in the electronic format requested by Sierra Club. But section 6253.9 applies to electronically formatted "information that constitutes an identifiable public record *not exempt from disclosure pursuant to this chapter*" and requires such information to be made "available in an electronic format when requested by any person . . . ." (*Id.*, subd. (a), italics added.) The statute's legislative history reveals that an "earlier version" failed to specify its nonapplication to information exempted from disclosure under the Act; this earlier version drew opposition "related to the proprietary software and security exemption," which opposition was withdrawn after the bill was amended.[12] Furthermore, a specific provision (such as section 6254.9 regarding computer mapping systems) "'prevails over a general one relating to the same subject.'" (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 942.)

Looking outside the Act, other California statutes are consistent with our interpretation that a computer mapping system includes the integrally associated database. The Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Health & Saf. Code, § 25299.10 et seq.) concerns underground petroleum storage tanks. Article 12 thereof requires the State Water Resources Control Board to "upgrade the data base" to "*include* the establishment of a statewide GIS mapping system . . . ."[13] (Health & Saf. Code, § 25299.97, subd. (b), italics added.) The database is to be "*expand*[*ed*]" to

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[12] Sierra Club notes one purpose of section 6253.9 was to obviate the duplication cost of making paper copies. Here, the parties stipulated the County offered Sierra Club the information in "Adobe PDF electronic format or printed out as paper copies . . . ."

[13] The database covers "discharges of petroleum from underground storage tanks." (Health & Saf. Code, § 25296.35 [formerly § 25299.39.1].)

"*create* a cost-effective GIS mapping system that will provide the appropriate information to allow agencies to better protect public drinking water wells . . . ." (*Id.*, subd. (c)(1), italics added.) "GIS mapping system" is defined as "a geographic information system that collects, stores, retrieves, analyzes, and displays environmental geographic data in a data base that is accessible to the public." (*Id.*, subd. (a)(3).) Although the state has chosen to make this particular GIS database accessible to the public, thereby foregoing its rights under section 6254.9, what is pertinent to our inquiry here is that the database is an integral part of the GIS mapping system.

Similarly, the Elder California Pipeline Safety Act of 1981 (safety regulation of hazardous liquid pipelines) contains a virtually identical definition of "GIS mapping system." (§ 51010.5, subd. (i).) In addition, Health and Safety Code section 25395.117, subdivision (b) requires the Department of Toxic Substances Control to "revise and upgrade the department's database systems . . . to enable compatibility with *existing databases of the board, including the GIS mapping system* established pursuant to Section 25299.97." (Italics added, see Health & Saf. Code, § 25395.115, subd. (d).)[14]

Sierra Club points out that the California Constitution mandates that a statute be "narrowly construed if it limits" the people's right of access to government

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[14] Outside California, statutes of Illinois, Iowa, Maryland, Nevada, and North Carolina exempt GIS databases from public disclosure or allow government entities to charge fees for them. (5 Ill. Comp. Stat. 140/7, subd. (1)(i) [protecting "[v]aluable formulae, computer geographic systems, designs, drawings and research data obtained or produced by any public body"]; Iowa Code, § 22.2, subd. (3)(*b*) ["geographic computer database"]; Md. Code Ann., State Gov't. § 10-901 subd. (f)(2) ["'System' includes data that define physical and nonphysical elements of geographically referenced areas"]; Nev. Rev Stat. Ann., § 23.054 ["'geographic information system' means a system of hardware, software and data files on which spatially oriented geographical information is digitally collected, stored, managed, manipulated, analyzed and displayed"]; N.C. Gen. Stat., § 132-10 [reasonable fee may be charged for "Geographical information systems databases and data files"].)

information. (Cal. Const., art. I, § 3, subd. (b)(1) & (2).) We have construed section 6254.9 as narrowly as is possible consistent with its legislative history. Moreover, article 1, section 3, subdivision (b)(5) of the California Constitution specifies it "does not repeal or nullify, expressly or by implication, any . . . statutory exception to the right of access to public records . . . that is in effect on the effective date of this subdivision . . . ." Section 6254.9 was in effect on November 3, 2004, the subdivision's effective date.

We turn to Sierra Club's remaining counter arguments. Sierra Club relies heavily on an Attorney General opinion which concluded that a GIS database does not constitute a computer mapping system for purposes of section 6254.9. (88 Ops.Cal.Atty.Gen. 153 (2005).) But that opinion considered only the language of section 6254.9 and did not examine (or even mention) its legislative history. The opinion contains scant analysis of the issue: "[T]he term 'computer mapping systems' in section 6254.9 does not refer to or include basic maps and boundary information per se (i.e., the basic *data* compiled, updated, and maintained by county assessors), but rather denotes unique computer *programs* to process such data using mapping functions — original programs that have been designed and produced by a public agency. (See, e.g., §§ 6254.9, subd. (d), 6253.9, subd. (f) [distinguishing 'record' from 'software in which [record] is maintained'], 51010.5, subd. (i) [defining 'GIS mapping system' as *system* 'that will collect, store, retrieve, analyze, and display environmental geographic data . . . .' (italics added)]; see also *Cadence Design Systems, Inc. v. Avant! Corporation* (2002) 29 Cal.4th 215 [action between two 'software developers' who design 'place and route software']; *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 171 [delay in implementation of elections system because necessary 'software' not yet 'developed' and tested]; Computer Dict. (3d ed. 1997) p. 441 [defining 'software' as '[c]omputer programs; instructions that make hardware work']; Freedman, The Computer Glossary: The Complete Illustrated Dict. (8th ed. 1998) p. 388 ['A common misconception is that software is also data. It is not. Software tells the hardware how to

process the data. Software is "run." Data is "processed"'].)" We have already discussed most of the authorities on which the Attorney General relied, i.e., sections 6254.9, subdivision (d) (public record status of information stored in a computer), 6253.9 (requested electronic format), and 51010.5 (Elder California Pipeline Safety Act of 1981), and standard dictionary definitions of "software." The relevance of *Cadence Design Systems* to the issue before us is unclear. There, the parties designed "'place and route' software, which enables computer chip designers to place and connect tiny components on a computer chip," and the issue involved trade secret law. (*Cadence Design Systems*, at p. 218.) In any case, opinions of the Attorney General are "not binding on" the courts. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 952.)

Finally, Sierra Club relies on *Santa Clara*, *supra*, 170 Cal.App.4th 1301. But the appellate court there declined to consider whether Santa Clara County's GIS basemap was a computer mapping system excluded from disclosure under section 6254.9 because the issue was raised only by Santa Clara County's amici curiae. (*Santa Clara*, at p. 1322, fn. 7.) Instead, the case examined whether Santa Clara County's GIS basemap was exempt from public disclosure under (1) section 6255 of the Act (the "catchall exemption" allowing an agency to justify nondisclosure by showing the public interest is best served by nondisclosure) (*Santa Clara*, at p. 1321), (2) copyright law, or (3) "federal law promulgated under the Homeland Security Act" (*id.* at p. 1321). The Court of Appeal stated in dicta in a footnote that Santa Clara County had conceded in the trial court that its basemap was a public record and that this "concession appears well founded," based on the Attorney General's opinion discussed above. (*Id.* at p. 1332, fn. 9). The Court of Appeal stated it had taken judicial notice of, but did *not* rely on, the legislative history of section 6254.9 "in resolving this proceeding." (*Santa Clara*, at p. 1312 & fn. 4.) Indeed, the party requesting disclosure of the basemap had argued

against the court's taking judicial notice of section 6254.9's legislative history. (*Santa Clara*, at p. 1312, fn. 4.)

Based on our review of the legislative history and purpose of section 6254.9, the Act's statutory scheme, and other relevant statutes, we conclude the County has met its burden of proving that its OC Landbase is part of a computer mapping system and therefore excluded from public disclosure. (*Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, 896 [agency opposing disclosure bears burden of proving exemption applies].)

Relevant actions taken by the Legislature subsequent to the passage of section 6254.9 do not change our conclusion. Almost a decade after enacting section 6254.9, the Legislature passed Assembly Bill No. 1293, *supra*, adopting the Strategic Geographic Information Investment Act of 1997 (proposed § 8301 et seq.). But the Governor vetoed the bill. (*City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1199 [bill passed by Legislature but vetoed by Governor was cognizable and relevant history].) The legislation would have established state funding through grants "for the development of new, and maintenance of, framework data bases for geographic information systems." (Legis. Counsel's Dig. Assem. Bill No. 1293, *supra*, p. 2) The Legislature recognized "the high cost of creating and maintaining geographic information data bases," and stated, "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." (Assem. Bill. No. 1293, *supra*, § 1, subd. (m).) The Legislature expressly intended "to provide an alternative source of funds for public agencies to create and maintain geographic information data bases without having to sell the public data." (Assem. Bill No. 1293, *supra*, § 1, subd. (n).) Significantly, the proposed legislation 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." (Assem. Bill No. 1293, *supra*, § 2; Proposed Gov. Code, § 8302, subd. (f).) The proposed legislation would have required "any recipient of a grant [to] make data developed or maintained with grant funds available to disclosure under the [Act] and require that the electronic data . . . be placed in the public domain free of any restriction on use or copy." (Assem. Bill No. 1293, *supra*, § 2; Proposed Gov. Code, § 8306, subd. (a)(7).)

A decade later, Assembly Bill No. 1978 (2007-2008 Reg. Sess.) was introduced to amend section 6254.9 by defining computer mapping systems. Proposed section 6254.9, subdivision (b)(2) would have provided: "Computer mapping systems include, assembled model data, metadata, and listings of metadata, regardless of medium, and tools by which computer mapping system records are created, stored, and retrieved." The bill was referred to two committees, but they took no action on it. A Sierra Club amici argues that because the bill "did not make it out of committee," the Legislature effectively ratified the Attorney General's interpretation of "computer mapping systems" to exclude data. But "'failure of the bill to reach the [chamber] floor is [not] determinative of the intent of the [chamber] as a whole that the proposed legislation should fail.'" (*Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 243-244.) Moreover, legislative acquiescence may be inferred "when there exists both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision." (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1156.) Neither of those conditions is met here.

Sierra Club stresses the potential impact of our decision, warning that geographic data is increasingly used by government agencies and the public. We reiterate that the OC Landbase is excluded from disclosure because it is a basemap that constitutes an integral part of a computer mapping system, not simply because it contains some geographic data. Section 6254.9 must be interpreted narrowly to exclude from

disclosure only a GIS database such as the OC Landbase. (Cal. Const., art. 1, § 3, subd. (b)(2).) By enacting section 6254.9 in 1988, the Legislature encouraged and enabled local governments to develop and maintain computer mapping systems by allowing the agencies to recoup some of their costs.[15] Whether the increasing use of GIS data in our society requires reconsideration of section 6254.9's exclusion from disclosure is a matter of public policy for the Legislature to consider. (*In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 628 [the Legislature, not the judiciary, determines public policy].)

DISPOSITION

The petition for extraordinary writ is denied.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.

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[15] In the County's consolidated answer to Sierra Club's various amici, the County states such amici praise "the usefulness and functionality of computer mapping systems." The County argues it spends "millions of dollars to maintain and update the OC Landbase" precisely because of its "great utility," and that without licensing fees, the County would be forced to reduce services.

PROOF OF SERVICE

I SHARON L. EMERY declare:

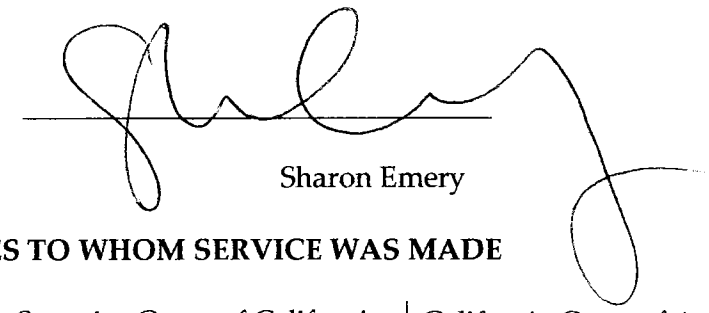
I am, and was at the time of the service hereinafter mentioned, over the age of eighteen and not a party to the above-entitled cause. My business address is 21 South California Street, Suite 204, Ventura, California 93001. On November 14, 2011 I served the following documents described as:

PETITIONER'S OPENING BRIEF ON THE MERITS

___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 November 14, 2011 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 (Over-night mail 5 copies)