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Court of Appeal No. G044138

(Orange County Superior Court Case No. 0-2009-00121878-CU-WM-CJC)

In the Supreme Court of the State of California

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

COUNTY OF ORANGE,
Real Party in Interest.

FROM THE SUPERIOR COURT FOR ORANGE COUNTY
The Honorable James J. Di Cesare, Judge
Department C-18 – (657) 622-5218

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SUPREME COURT
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PETITION FOR REVIEW

After a Decision by the Court of Appeal Fourth Appellate District, Division Three

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TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES:

The Sierra Club, Petitioner, respectfully petitions for review of the decision of the Court of Appeal, Fourth Appellate District, Division Three, in the matter captioned "Sierra Club v. Superior Court of Orange County," filed on May 31, 2011 (the "Opinion"), attached as Exhibit A.

I. Issues for Review

1. Geographic Information Systems (GIS) data[1] 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 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" to government information (Cal. Const., art. I, section 3, subd. (b), par. 2) mandate that section 6254.9's computer-software exclusion be interpreted to

[1] The GIS data at issue in this case, the "Orange County landbase," is organized in a database, but the difference between GIS data and GIS database is a distinction without a difference because a database is simply a set of data. Thus, the Opinion's reasoning applies to both.

apply to GIS software only, and not GIS data, since the exclusion limits the rights of access to government-held information?

II. Introduction

This case represents a challenge to Orange County's practice of selling public records held in a specified electronic format for the purpose of generating revenue. The Orange County Court of Appeal's decision to endorse Orange County's refusal to disclose its GIS data pursuant to the California Public Records Act[2] works a radical departure from existing open-records law, removing indisputably valuable public information from the public domain for the express purpose of creating a private market for the data.

Petitioner Sierra Club respectfully urges the Supreme Court to grant review of this case because the Orange County Opinion directly conflicts with the Sixth District Court of Appeal's decision in *County of Santa Clara v. Superior Court of Santa Clara County* (2009) 170 Cal.App.4th 1301 ("*Santa Clara*") and thus review is necessary to ensure uniformity of decision.

In addition, the case presents important issues of law including the proper interpretation of section 6254.9 and the proper weight a court must give Article 1, Section 3 of the California Constitution when interpreting the PRA's provisions.

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[2] Gov. Code sections 6250–6276.48, the "Public Records Act" or "PRA." Section references are to the Government Code, unless otherwise specified.

The Orange County Court held in this case that GIS data is not a public record because it is "computer software" as that term is used in section 6254.9.[3] This holding, which conflicts with all prior legal authority involving the Public Records Act's application to GIS data, has wide-ranging negative implications with respect to the public's right to access important electronic public records maintained and used by the government.

As demonstrated in the court record below, GIS land parcel data, the specific type of GIS data being sought under the PRA in the instant case, is, according to Orange County itself, the most

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[3] Section 6254.9 reads 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.

important data set the county possesses due to its wide applicability and extensive use.

GIS parcel data is utilized by public agencies of all sizes and jurisdictions, non-profit organizations, academic researchers and teachers, profit-oriented businesses, news media, and individuals for a wide range of purposes, such as:

- News media frequently use GIS data for news reporting purposes. For example, the Sacramento Bee combined foreclosure data with GIS data to map where the housing bust hit hardest in the Sacramento area. It also utilized GIS data to show where medical marijuana dispensaries could be located under a newly enacted city ordinance. The Miami Herald used GIS land parcel data in conjunction with government inspection reports of structures damaged from Hurricane Andrew to demonstrate that damage to structures was the worst not where the hurricane hit hardest, but rather in areas where development occurred after 1980, around the time building codes were relaxed. The Herald's award winning report helped instigate a reform effort to strengthen building codes in South Florida. This reporting would not have been possible without the newspaper having access to GIS land parcel data held by the government.
- Businesses aggregate GIS parcel data and integrate it with other computer data to provide value-added services. For

example, LexisNexis offers a means of tracking sexual predators that relies heavily on GIS data, and integrates it with other public record information. This service is provided only to law-enforcement agencies and enables law enforcement to generate and prioritize leads in time-sensitive, pressurized situations such as Amber Alerts, as just one example.

- Academic researchers use GIS parcel data to study urban planning and shifts in population density, and when used in combination with census data and pollution source databases, to study the impacts of urban development on public health. Orange County remains a blank spot in much of UCLA's academic research because it refuses to provide its GIS parcel data at a cost comparable to that of other counties.
- Non-profit organizations use GIS data to map open-space ownership for public land acquisition efforts, and to identify the most disadvantaged urban populations in terms of proximity to park space and recreational facilities.

Unlike Orange County, the vast majority of California counties presently provide their GIS parcel data under the PRA's terms, requiring no licensing agreement and charging a fee for the direct cost of copying the data onto a DVD – a few dollars; but this is likely to change if the Orange County Opinion stands. For purposes of

comparison, Los Angeles County, with the largest GIS land parcel database of any county in the state, charges a mere $6.00 for the full collection of its GIS land parcel data. On the other hand, Orange County **charges $375,000.00** for a copy of its entire collection of GIS land parcel data and restricts the purchaser's ability to distribute the data by requiring a licensing agreement. As a result of the Opinion in this case, many local agencies will likely follow the lead of Orange County and charge hefty licensing fees for GIS land parcel data, effectively placing these records out of the public's reach.

Because the Opinion holds that GIS data is not a public record because it is "computer software", public agencies can, at will, deny access to its GIS parcel data altogether. Further, and even more disturbing to the integrity of the Public Records Act, is the Opinion's reasoning arguably applies to all types of GIS data, not just GIS land parcel data, and therefore operates to remove increasingly more government-held information from the public domain because GIS data is being incorporated into an ever-expanding variety of electronic records held by the government.

The matter is one of statewide concern. For example, the State of California is aggregating GIS land parcel data to produce a state-wide GIS land parcel database. Many other states are embarking upon similar endeavors, and a federal effort is underway to aggregate all states' GIS land parcel data into a nationwide database.

The result of these efforts will provide important mapping datasets to not just Californians, but also the public nationwide.

To succeed, these GIS data-sharing efforts depend upon generally uniform application of public-records laws in California and across the country. The California statewide effort has been significantly hampered by Orange County's insistence to restrict the distribution of its GIS parcel data, which it provides to the State of California under a licensing agreement. Such restrictions will similarly hamper the federal effort. The Opinion in this case allows Orange County to continue restricting and selling its GIS data for significant licensing fees, and encourages other government agencies within California to impose similar restrictions and licensing fees.

As an increasingly large percentage of public records consist of computer data and especially GIS data, the issues in this case affect a larger spectrum of public records in California than one might imagine from reading the Opinion. Thus, the Orange County Court of Appeal's decision represents a regrettable setback to open government laws. The Supreme Court should grant review of this case and put a definitive end to government efforts such as Orange County's to license electronic records for the purpose of generating revenue.

III. Factual and Procedural Background

In 2007 and 2008 the Sierra Club requested in writing from Orange County an electronic copy of the Orange County landbase,

which is a collection of GIS data containing the location and configuration of each of the more than 640,000 legal parcels of land in Orange County. The landbase also contains related information for each parcel, including the Assessor Parcel Number, the parcel's street address, and the parcel owner's name and address. The landbase contains no software.

The Sierra Club has its own GIS software that it purchased from a third-party vendor, and is not requesting, nor has requested, Orange County provide its GIS software to Sierra Club.

GIS software can overlay the GIS landbase on other layers of GIS data concerning streets, lakes and rivers, aerial photographs, political boundaries, parks, and the like.

GIS land parcel data obtained from other counties is imported into the GIS software and the software is used to manipulate the data to make a variety of maps. Sierra Club uses these maps in furtherance of its environmental campaigns. One such campaign, called "Open Spaces, Wild Places," is aimed at preserving open space in Orange County. GIS land parcel data enables the Sierra Club to produce accurate maps, since the open-space area boundaries match up with legal boundaries of land parcels, but because Orange County refuses to disclose its landbase pursuant to the Public Records Act, Sierra Club is unable to produce accurate maps of Orange County's remaining open space threatened by development.

Another computer-generated map produced by the Sierra Club shows the parcels of land in Los Angeles County's Verdugo Mountains. Each parcel is 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.

GIS land parcel data like Orange County's landbase is used by a wide variety of public agencies and private businesses for an ever-expanding variety of purposes, including city planning, routing emergency vehicles, designing real-estate developments, tracking sexual predators, and many more.

After Orange County denied the Sierra Club's request for the landbase, the Sierra Club filed a petition for writ of mandate under the California Public Records Act requesting the Orange County Superior Court to direct Orange County to provide to Sierra Club the landbase in the electronic format requested for the direct cost of copying, and with no requirement for a license agreement. The case was assigned to the Honorable James G. Di Cesare in Dept. C-18. After two rounds of briefing, an evidentiary hearing, and oral arguments the Superior Court denied Sierra Club's petition.

The Sierra Club timely appealed. In addition to the parties' briefs, amicus curiae briefs were filed on behalf of the following organizations and persons:

- Consumer Data Industry Association, Corelogic, LexisNexis, and the National Association of Professional Background Screeners, in support of the Sierra Club;
- First Amendment Coalition, Freedom Communications, Inc., publisher of the Orange County Register, Los Angeles Times, the Associated Press, Bay Area News Group, Bloomberg News, Courthouse News Service, Gannett Co., Inc., Hearst Corporation, Lee Enterprises, Inc., the McClatchy Company, Patch Media Corp., the San Francisco Examiner, Wired, American Society of News Editors, Association of Capital Reporters and Editors, California Newspaper Publishers Assoc., 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 the Society of Professional Journalists, in support of the Sierra Club;
- The Open Monterey Project, in support of the Sierra Club;
- Academic Researchers in Public Health, Urban Planning and Environmental Justice, in support of the Sierra Club;
- the GIS Community (including 20 GIS professionals and organizations), in support of the Sierra Club;
- League of California Cities, and California State Association of Counties, in support of Orange County.

After full briefing, the Court of Appeal heard oral arguments on April 18, 2011, and filed its opinion in the case, denying the Sierra Club's petition, on May 31, 2011.

The Sierra Club has not filed a petition for rehearing; no essential facts are in dispute. The Opinion determined the proper standard of review is de novo (Opinion at p. 7) and the Sierra Club agrees.

IV. DISCUSSION

Under California Rules of Court, rule 8.500(b), Supreme Court review is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law." This case meets both criteria.

The primary issue in this case is whether government agencies must disclose GIS land parcel data pursuant to the Public Records Act. One Court of Appeal says yes, another Court of Appeal says no, thus creating disunity of decision.

The specific Public Records Act provision at issue is section 6254.9, which reads 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.

Subdivision (a) excludes[4] computer software from public record status. Subdivision (b) declares that "computer software" includes "computer mapping systems," "computer programs," and "computer graphics systems." These three terms are not separately defined in the Public Records Act anywhere.

The dispute in this case centers around the proper construing of "computer software" as used in subdivision (a), and whether subdivision (b) merely illustrates types of computer software or actually defines "computer software" to mean something other than its plain meaning. The Supreme Court should grant review of this case and resolve the issue to establish uniformity of decision and settle important questions of law.

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[4] Petitioner herein adopts the Opinion's terminology (Opinion at p. 6, fn. 4): section 6254.9 *excludes* computer software from public-record status altogether, in contrast to other provisions which *exempt* public records from disclosure.

A. *The Orange County and Santa Clara Opinions Directly Conflict.*

The Opinion in this case, by the Fourth District Court of Appeal, Division 3, which has been certified for publication, conflicts with the published opinion of the Sixth District Court of Appeal in *County of Santa Clara v. Superior Court of Santa Clara County* (2009) 170 Cal.App.4th 1301 ["*Santa Clara*"]. The facts in the *Santa Clara* case are analogous to the facts in this case. In *Santa Clara,* petitioner First Amendment Coalition requested a copy of Santa Clara County's GIS "basemap," the equivalent of the Orange County's GIS "landbase" requested by petitioners here, and was refused. 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).

While the *Santa Clara* Court held that the County's GIS "basemap" is a public record and therefore must be disclosed without requirement of a licensing agreement (*Santa Clara,* at p. 1336), the Orange County Court concluded the exact opposite: the County's GIS "landbase" is not a public record and therefore the County may charge whatever fee it wishes for distribution of its GIS land parcel data and subject to a licensing agreement. (Opinion at p. 3)

The Orange County Court of Appeal claims the *Santa Clara* Opinion is not applicable or controlling because, "the appellate court [in *Santa Clara*] 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," (Opinion at p. 18,) and further noting, "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." (*Ibid.*)

The Orange County Court of Appeal's determination that the *Santa Clara* court "declined to consider" whether Santa Clara County's GIS "basemap" was excluded from the PRA because it did not consider whether the basemap was a "computer mapping system" as that term is used in section 6254.9 (b), is a distinction without a practical or legal difference; both Courts were faced with construing the term "computer software" as used in section 6254.9 (a) to arrive at their respective, albeit contrary, holdings regarding whether the county's GIS land parcel database is a public record and therefore whether the county can subject the GIS data to a licensing agreement.

Here is the *Santa Clara* footnote that the Orange County Opinion characterizes as dicta:

> The County conceded below that the GIS basemap is a public record. The contrary arguments of its amici curiae

> notwithstanding, that concession appears well founded. (*Cf. 88 Ops.Cal.Atty.Gen. 153, 157 (2005)* ["parcel boundary map data maintained by a county assessor in an electronic format is subject to public inspection and copying . . ." under CPRA].) Since the GIS basemap is a public record, the County cannot claim the computer software exemption of 6254.9, subdivision (a).

(*Santa Clara, supra,* 170 Cal.App.4th 1301, 1332, n.9.) Without more, this footnote might only be dicta. However, the court makes use of this determination that the GIS basemap is not "computer software" in its holding section 6254.9, subd. (e)[5] does not apply to the GIS basemap. Specifically, the *Santa Clara* Court rejected the County's argument that since it had taken the liberty to copyright the GIS basemap, section 6254.9 (e) entitled the County to demand a licensing agreement. (*Id.* at p. 1331.) The *Santa Clara* Court expressly denied the County's copyright claim by concluding section 6254.9 does not apply to the GIS basemap because it is not "computer software" under section 6254.9:

> By the express terms of section 6254.9, the Legislature has demonstrated its intent to acknowledge copyright protection for software only. In sum, while section 6254.9 recognizes the availability of copyright protection for software in a proper case, it provides no statutory authority for asserting any other copyright interest.

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[5] "Nothing in this section is intended to limit any copyright protections."

(*Santa Clara, supra,* 170 Cal.App.4th 1301, 1334). This holding – that Santa Clara County cannot claim copyright protection of its GIS basemap under section 6254.9(e) because the GIS basemap is not software under 6254.9 (a) – is dependent on the Court's finding that the GIS basemap is not software. Because the result in the *Santa Clara* case depends upon the court's finding that the GIS basemap is not software, that finding is a holding and not dicta.

The Orange County Opinion errs in attempting 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). But the distinction is one without a practical difference: if the GIS data is not "computer software" as contemplated by section 6254.9, then the date is subject to the Public Records Act's disclosure requirements. Therefore, the two Court of Appeal Opinions are in conflict with each other. Supreme Court review of this case is necessary to establish uniformity of decision.

B. This Case Presents Important Questions of Law.

1. **Whether the section 6254.9 software exclusion applies to electronic data such as GIS data is an important question of law because the answer implicates a fast growing sector of public records held by government.**

The specific electronic data at issue in both this case and the *Santa Clara* case is GIS land parcel data. But the two conflicting case holdings could apply to other types of GIS data, and even non-GIS electronic records. For example, hundreds, if not thousands, of state

and local agencies maintain GIS data regarding the locations of storm drains, pipelines, electric poles, streets and highways, rivers and lakes, parks, publicly-owned buildings, water meters, airports, aqueducts, and street addresses. The Orange County Opinion raises the question of whether this type of GIS data is also subject to sale and licensing agreements in light of the Court's reasoning.

The worst-case scenario arising from the Orange County decision is that even non-GIS electronic records will be subject to hefty fees and end-user licensing agreements. This is because as GIS technology becomes more ubiquitous in government affairs, GIS data is making its way into a greater variety of electronic records, including computer graphics, conventional databases and non-GIS datasets.

Both Orange County and the State of California have adopted policies requiring new databases include "geocoding," in other words, GIS data. The increasing presence of GIS information in conventional databases (e.g., a voter registration database or a utility company's customer complaint database) blurs the line between GIS data and other types of data. As public agencies increasingly maintain their public records in the form computer data, and as computer data increasingly contains GIS information, the Orange County Opinion, if it stands, could serve to justify government's refusal to disclose, (or demand for licensing agreements and hefty

fees), vast numbers of public records by virtue of the fact the records contain GIS data.

The statewide and even nationwide significance of correctly interpreting section 6254.9's computer software exclusion is demonstrated by the number and variety of individuals and organizations for which amicus curiae briefs were filed in the Court of Appeal.

> ***a) Section 6254.9 should be interpreted so as to effectuate the express purpose and structure of the Public Records Act, that is, give the public access to as much government-held information as possible within the constraints of significant privacy and security interests, to enable citizens to effectively monitor their government and keep it accountable.***

In enacting the Public Records Act into law, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250.) Openness in government is essential to the functioning of a democracy, "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. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*Int'l Federation of Prof. and Technical Engineers, Local 21 v.*

Superior Court of Alameda County (2007) 42 Cal.4th 319, 328-29 (internal quotation marks and citations omitted).)

Citizens' inability to obtain GIS data under the Public Records Act will almost certainly diminish government transparency and accountability, thereby frustrating the Act's stated purpose.

For example, used in conjunction with an assessor's roll database, a GIS parcel database can be used by a property owner to locate comparable properties based on geographic criteria, and to evaluate whether assessed valuations and taxes are consistent and fairly applied to the owner's property. Similarly, the Sierra Club has utilized Los Angeles County land parcel GIS data, previously provided pursuant to a Public Records Act request, to determine that certain parcels of land slated for development but owned by the City of Santa Clarita are within the navigable floodplain of the Santa Clara River, and thus may be subject to the public trust doctrine. This information was provided by the Sierra Club to the lead agency responsible for conducting environmental review pursuant to the California Environmental Quality Act ("CEQA"). Had Los Angeles County refused to disclose its GIS database to Sierra Club and instead demanded hefty licensing fees like Orange County, the City's plans to develop public trust lands would have gone unchallenged.

The Opinion gives little weight to the legislature's express statutory purpose in enacting the Public Records Act and instead

implicitly and impermissibly recasts the statutory purpose as one that furthers the government's interest in generating revenue from the sale of government-held information.

b) The Orange County Opinion disturbs the Legislature's careful balancing of interests.

In adopting section 6253.9,[6] which requires public agencies to provide public records in an electronic format if available and requested in that format, and section 6254.9, which excludes computer software from Public Records Act disclosure, the Legislature sought to balance the government's interest in protecting proprietary computer programs written and developed at significant cost with the People's interest in broad access to government-held information. The intersection of the two provisions demonstrate the

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[6] Section 6253.9 reads in pertinent part,
(a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
(1) The agency shall make the information available in any electronic format in which it holds the information.
(2) Each agency shall provide a copy of an electronic record 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. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

legislature's intent to establish a policy balance that weighs clearly in favor of disclosure of all electronic data not related to software programming itself. Regrettably, that policy balance is significantly disturbed by the Opinion.

Orange County's annual revenue stream from licensing its GIS data appears to be a significant factor in the Orange County Court of Appeal's decision. (*See* Opinion at p. 5, [discussing Orange County revenue from licensing the OC Landbase], and at p. 13, [erroneously finding that the legislative history demonstrates the purpose of the bill enacting section 6254.9 was to "allow[] San Jose to recoup the development costs of its database known as the Automated Mapping System."].) The Opinion disturbs the Legislature's careful balancing of interests by elevating Orange County's desire to generate a steady stream of revenue over the People's interest in liberal access to government-held information and thus open and transparent government.

Simply stated, the Public Records Act was not designed to create a revenue center for selling public records. The Opinion might be the first California appellate decision creating a government right to sell public records for profit. The Orange County Court of Appeal's rebalancing of Orange County's desire for revenue as more important than the People's interests in open and transparent government presents an important question of law, which necessitates review by the Supreme Court.

2. **How much weight a court should give the California Constitution's mandate to narrowly interpret statutory provisions limiting access to government information is an important question of law best resolved by the Supreme Court.**

Under the California Constitution, "The people have the right of access to information concerning the conduct of the people's business. . . ." (Cal. Const., art. I, section 3, subd. (b).) This civil right was added to the California Constitution by Proposition 59 ("Prop. 59"), which was approved overwhelmingly by the electorate in 2004.

Prop. 59 also added requirements to the California Constitution that specifically apply to the statutory interpretation of the PRA:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

(Cal. Const., art. I, section 3, subd. (b), par. 2.) This constitutional provision controls the interpretation of the Public Records Act, including section 6254.9. (See *Commission on Peace Officer Standards and Training v. Superior Court,* (1997) 42 Cal.4th 278, 288). It is a constitutional mandate requiring courts to broadly interpret the definition of "public record, "and narrowly interpret any exceptions and exemptions, such as section 6254.9's computer software exclusion.

Given that the Opinion declares section 6254.9's statutory text is ambiguous and subject to both parties' interpretations (Opinion at p.

8), the Constitution compels the Court to choose the narrower of the two possible interpretations of the term "computer mapping system." Thus, the Court was compelled by the California Constitution to adopt the position advocated by Petitioner: "computer software" and "computer mapping systems," as those terms are used in section 6254.9, refer to computer programs only, and neither GIS parcel data nor any other non-computer programming electronic data is encompassed within the definition of "computer software" as that term is used in section 6254.9. The Orange County Court of Appeal erred by failing to follow the constitutional mandate of narrowly construing exclusions to the Public Records Act early in the statutory construction analysis.

The Opinion pays "lip service" to the constitutional mandate that limitations on public access be narrowly construed: "Section 6254.9 must be interpreted narrowly to exclude from disclosure only a GIS database such as the OC Landbase." (Opinion at p. 21.) This is not a narrow interpretation of the Public Records Act software exclusion at all. It actually demonstrates the Orange County Court treated the constitutional mandate as almost an afterthought, giving it very little weight.

The question of where in the statutory construction analysis a Court must seriously consider and apply the constitutional mandate to narrowly construe limits to access of government records is an

issue the Supreme Court has not yet squarely addressed in the context of the Public Records Act.

Whether the Orange County Opinion committed legal error in failing to give Article 1, Section 3 of the California Constitution more weight in its interpretation of "computer software" in section 6254.9 is an important legal question that should be resolved by the Supreme Court.

C. The Opinion Misapplies Tools of Statutory Construction.

The Opinion mistakenly found ambiguity in the computer-software exclusion's language and so resorted to legislative history to interpret it. (Opinion at p. 8). But as discussed further below, the Opinion's analysis of the legislative history is flawed in several respects, resulting in the erroneous conclusion that legislative history demonstrates the legislature intended "computer mapping systems," as used in section 6254.9 (b), to mean something more than computer software as typically defined.

1. The plain meaning of the statute is clear

In interpreting a statute, a court must look to the statute's words and give them their usual and ordinary meaning. (*Reid v. Google, Inc.*, (2010) 50 Cal. 4th 512). The plain-meaning interpretation of "computer software" possesses the same meaning when used in its lay and its technical senses. "Computer mapping systems," "computer programs," and "computer graphics systems," terms

used in section 6254.9(b) to describe "computer software" are merely illustrative examples of computer software. (*Arizona State Bd. for Charter Schools v. U.S. Dept. of Education* (9th Cir. 2006) 464 F.3d 1003, 1007 [emphasis added] ["the word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an *example* of the preceding principle."]; *Federal Land Bank v. Bismarck Lumber Co.* (1941) 314 U.S. 95, 100 ["The term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."].)

Section 6254.9 (b) does not enlarge the statutory definition of "computer software" to include the data operated upon by software, as was Orange County's argument below. Yet the Orange County Opinion gave credence to the agency's strained and unreasonable interpretation of "computer mapping systems" as consisting of both mapping software and the computer data upon which computer mapping software operates: "a 'computer mapping system' might or might not include data along with the associated computer program." (Opinion at p. 8).

Construing the term "computer mapping systems" in this manner is unreasonable in light of the plain meaning of "computer software." (*Goodman v. Lozano*, (2010) 47 Cal. 4th 1327, 1332, [court was "not free to 'give the words an effect different from the plain and direct import of the terms used.'"]; *People v. Tindall* (2000) 24 Cal.4th 767, 772,["Where the statute is clear, courts will not 'interpret

away clear language in favor of an ambiguity that does not exist.'].)

The Orange County's Opinion interpreting "computer mapping systems" as including computer data is also unreasonable given the statute's emphasis on treating electronic records, (such as computer data) and software differently from one another. (*See* section 6254.9, subd. (d), [expressly cautioning that 6254.9's computer software exception should not be read to "affect the public record status of information merely because it is stored in a computer."]; *Commission on Peace Officer Standards and Training v. Superior Court,* (1997) 42 Cal.4th 278, [When construing a statute, the court's task is to select the construction that promotes rather than defeats the statute's general purpose, and avoids a construction that would lead to unreasonable results.].)

Since the plain meaning of the statutory language is unambiguous, it was error for the Orange County Opinion to resort to legislative history in the first instance.

2. Even if the statutory text is ambiguous, the proper next step is to apply constitutional and statutory mandates requiring narrow interpretation of the software exclusion.

If the text of the statute were ambiguous as the Orange County Opinion claims, the proper next step in the statutory construction analysis would be to apply the constitutional mandate contained in Cal. Const., art. I, section 3, subd. (b), par. 2, which compels the narrower interpretation of the computer-software exclusion, and gives effect to the general statutory principle underlying the Public

Records Act that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Section 6250.) (*Commission on Peace Officer Standards and Training v. Superior Court,* (1997) 42 Cal.4th 278, 290, [Where more than one statutory construction is arguably possible, the court's task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose.]; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1043, [a court is not to pass upon the wisdom, expediency, or policy of voter enactments any more than it would enactments by the Legislature.].)

Application of the fundamental purpose of the Public Records Act and Article 1, Section 3 of the California Constitution resolves the purported statutory ambiguity in section 6254.9 without the need to resort to legislative history.

3. The Opinion contains three major errors with respect to the legislative history of section 6254.9.

In choosing between the two alternative interpretations of section 6254.9, the Opinion relies heavily on legislative history of section 6254.9, added to the Public Records Act in 1988 by AB 3265. The Opinion contains three major errors in its legislative history analysis.

First, the Opinion does not recognize, as it should, that the word "software," as used by both lay people and technical experts, **never** refers to data or databases. As just one example in the record below, the report of the Assembly Committee on Government Organization quoted by the Opinion at p. 9, contains the following summary of the bill enacting 6254.9: "Subject – Should computer software be exempt from the California Public Records Act?" There is no reason that a legislator reading this summary would expect this bill as described to apply to GIS data or any other type of data. This summary of the bill is only one of many indications that the legislature intended AB 3265 to exclude only software, not data, from public-record status. This is not an isolated example; similar descriptions of the purpose of AB 3265 abound in the legislative history.

Second, the Opinion takes notice of the fact that "San Jose's description of its computer mapping system includes *no* references to any *mapping* computer programs developed by it." (Opinion at 13, emphasis in original.) But it errs in concluding on this basis that San Jose, the bill's sponsor, had no interest in protecting its GIS software from disclosure under the PRA. The Opinion quotes a San Jose memorandum as follows: "The City of San Jose, like many other government agencies[,] has developed various computer readable data bases, *computer programs*, computer graphics systems and other computer stored information at considerable research and

development expense." (Opinion at pp. 9-10 (emphasis added).) Express mention of the term "computer programs" contradicts the Opinion's suggestion that San Jose had not developed computer programs (i.e. software), it wished to protect from Public Records Act disclosure.

Third, the Opinion fails to account for the fact computer data was *already protected* from disclosure under the Public Records Act at the time section 6254.9 was enacted in 1988. Section 6256, then in force but since repealed, provided that "[a]ny person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency."[7] Thus, at the time section 6254.9 was enacted, section 6256 provided the government the discretion and thus the means to exclude electronic data, including GIS data, from disclosure.

In spite of the fact the briefing below addressed this significant point, the Opinion surprisingly ignores it. That the PRA did not require the disclosure of electronic data, such as GIS data, at the time section 6254.9 was passed is further evidence the legislature intended to limit 6254.9's exclusion to computer software only -- not also computer data.

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[7] The provision quoted from section 6256 was repealed in 2000 when the legislature added section 6253.9 to the Public Records Act, which requires government to disclose computer data in the computer readable format requested if held by the agency in that format.

D. The Case is Ripe for Supreme Court Review

The Opinion in this case provides the proper context for the Supreme Court to resolve the issues presented above, and to resolve them now and not later.

While section 6254.9 was added to the PRA in 1988, it was not until 2005 the legal question of whether that section applied to GIS data was addressed when Attorney General issued an opinion on the subject (88 Ops.Cal.Atty.Gen. 153), at the request of a member of the State Legislature.

Now, the question of whether GIS data falls within the definition of "computer software," as that term is used in section 6254.9, has been litigated through the Court of Appeal in two separate cases in two different districts. A full record has been established in this case below, with testimony and declarations of expert witnesses on both sides, and substantial briefing – two rounds in the trial court, full briefing in the Court of Appeal, and six amicus curiae briefs from a wide range of constituencies.

After the Attorney General issued his opinion in 2005 declaring that GIS data is not "computer software" as defined in section 6254.9, many California counties changed their GIS data-distribution policies to conform, providing GIS parcel data for the direct cost of copying as mandated by the Public Records Act. Following the 2009 *Santa Clara* case, which treated the 2005 Attorney General opinion favorably, it was relatively well settled that GIS data must be

disclosed in the electronic format requested pursuant to the Public Records Act.

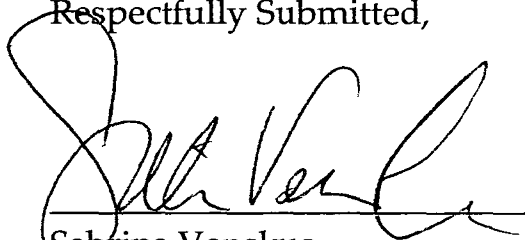
Thus, public agencies and consumers of data in both the public and private sectors have relied upon, and followed, the Attorney General's and *Santa Clara* Court's Opinions with respect to disclosure of GIS data. Should the Orange County Opinion stand, providers and users of GIS data will be left to grapple with conflicting guidance as to whether GIS data is subject to Public Records Act disclosure. The Supreme Court is the best venue to resolve this conflict now, before more litigation ensues.

V. Conclusion

For the foregoing reasons, Petitioner respectfully requests the Supreme Court grant its Petition for Review.

Dated: July 11, 2011

Respectfully Submitted,



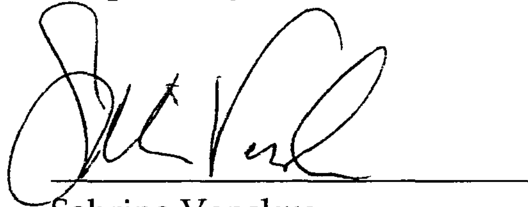
Sabrina Venskus
Attorney for Petitioner,
The Sierra Club

Certificate of Compliance

Counsel of record hereby certifies that pursuant to Rule of Court 8.204(c)(1) the attached Respondent's Brief was produced on a computer and contains 6,446 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: July 11, 2011

Respectfully Submitted,



Sabrina Venskus
Attorney for Petitioner,
The Sierra Club

Proof of Service

I, Sharon Emery declare:

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

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

On July 11, 2011, at my place of business, I placed the following document: **Petition for Review After a Decision by the Court of** Appeal and an unsigned copy of this declaration for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to the following persons, for collection and mailing on that date following ordinary business practices:

Nicholas S. Christos
Mark D. Servino
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Office of the County Counsel
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Attorneys for Orange County,
Real Party in Interest

The Superior Court of California
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Santa Ana, CA 92701

Respondent

Clerk of Court
California Court of Appeal
Fourth Appellate District
Division Three
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Santa Ana, CA 92701

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

Date: July 11, 2011

Sharon Emery

EXHIBIT A

COURT OF APPEAL 4TH DIST DIV 3
FILED
MAY 31 2011
Deputy Clerk

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

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.

G044138
Sierra Club v. The Superior Court of Orange County
Superior Court of Orange County

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