

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

Date: 05/21/2010

Time: 01:30:00 PM

Dept: C18

Judicial Officer Presiding: James J. Di Cesare
Clerk: Marycruz Leyva
Reporter/ERM: Randi Taylor-6208 CSR# 6208
Bailiff/Court Attendant: Debora Vandor

Case No: **30-2009-00121878-CU-WM-CJC** Case Init. Date: 04/21/2009
Case Title: **The Sierra Club VS County of Orange**

Case Category: Civil - Unlimited

Case Type: Writ of Mandate

EVENT ID/DOCUMENT ID: 70983188

EVENT TYPE: Motion - Other

APPEARANCES

Theresa A. Labirola and Dean Wallraff, specially appearing for LAW OFFICES OF SABRINA VENSUS, present for Plaintiff(s).

Mark D. Servino and Rebecca S. Leeds, Deputy County Counsel for The County of Orange present

Hearing re: Petition for Writ of Mandate Held.

The Court hears oral argument as to the Statement of Decision.

The Court announces its final ruling in open court as follows:

On 11/05/2009 the tentative ruling was posted on the Internet and in Department C18 as follows:

1. PLAINTIFF'S MOTION FOR WRIT OF MANDATE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DECLARATION OF DEAN WALLRAFF DECLARATION OF SABRINA VENSUS

Petitioner the Sierra Club requests this Court to issue a writ of mandate compelling Respondent County of Orange to provide geographic information systems (GIS) format copy of the OC Land base to the Sierra Club for a fee consisting of only the direct costs of making the physical electronic copy, and with no requirement to execute a non-disclosure or other agreement.

Neither party discusses whether the standard of review is trial de novo/independent judgment or arbitrary and capricious/abuse of discretion. However, because abuse of discretion is not asserted, the standard of review is trial de novo independent judgment.

Because the Sierra Club relies on GC 6253 the Public Records Act (PRA) as the basis for granting the writ, whether the OC Land base in GIS format is a public record or a public record exception must be determined.

In order to make this determination, it must be decided whether the OC Land base in GIS format is mere data or computer mapping system software under GC 6254.9.

GC 6254.9 states in part: Computer software; status as public record; sale, lease, or license authorized;

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limitations

(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.

(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.

GC 6254.9 plainly states that computer software is not a public record, that an agency may license the software and that computer software includes computer mapping systems. To that end, the computer mapping system that provides the OC Land base in GIS format is not a public record but rather an exception to the PRA rule of disclosure.

The Sierra Club contends that Santa Clara County conceded the issue that the trial court ruled GC 6254.9 did not exempt the Santa Clara GIS Base map from disclosure under the PRA by not raising it on appeal. (*County of Santa Clara v. Superior Court of Santa Clara County* (2009) 170 Cal.App.4th 1301.)

However, the County points out that unlike in Santa Clara, the County's arguments are not based on national security or the Critical Infrastructure Information Act of 2002, but on the computer mapping system exemption.

The argument in the Santa Clara case was based on security and yet the information sought had been provided to others which made the security argument unpersuasive. Here, no security interest is being advanced. As such, the Santa Clara decision is not controlling in this action.

The Sierra Club relies heavily on an Attorney General Opinion that processed data is a public record and that even if the data was processed from computer mapping system software that no 6254.9 exception to disclosure applies.

However, the County makes two valid points in response to the Attorney General Opinion. The County points out that the Attorney General Opinion relied on external definitions of "computer software" that do not purport to define this term as used in Section 6254.9. (88 Ops. Cal. Atty. Gen. 153 at p. 8.) The County further points out that although the opinions of the Attorney General are entitled to considerable weight, they are not binding upon the judiciary. (*City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal. 4th 942, 952.)

The County also points out that the GC 6254.9 computer mapping system exemption is far more specific regarding the subject of computer mapping systems, than the general language of GC 6253.9 and 6254.5. GC 6253.9(a) requires the disclosure of non-exempt public records in electronic format if the record is in an electronic format. GC 6254.5 states that disclosure of a public record that is otherwise exempt constitutes "a waiver of the exemptions specified in GC 6254, 6254.7, or other similar provisions of law." GC 6253.9 and 6254.5 do not address computer mapping systems. The specific provisions of GC 6254.9 regarding computer mapping systems prevail over the general terms of GC 6253.9 and 6254.5.

The OC Land base in GIS format contains public record information but is not merely comprised of public records information. It is also computer software that falls under the GC 6254.9 exception to disclosure under the PRA. The Sierra Club argues that because the County has provided the OC Land base in GIS format to others, it has waived all GC exemption arguments. However, the County maintains that it has not provided the OC Land base in GIS format to others under the PRA but rather has licensed it to others for a fee. As such, no waiver of PRA exceptions has occurred.

The fine distinction between the parties' positions is that the Sierra Club views its request as one for the public record extracted from the computer mapping system software while the County views the request as one for licensing of the software without paying the licensing fee.

However, the Sierra Club fails to recognize that its request for the OC Land base in GIS format cannot be accomplished without execution of the computer mapping system software which the County has a statutory right to license under GC 6254.9. The Sierra Club also fails to acknowledge that the County has agreed to make the information the Sierra Club seeks available in other format so as not to invoke the licensing of the computer mapping system as a means of extracting or compiling the information sought.

It seems undisputed that the Sierra Club can obtain a license from the County for use of the OC Land base in GIS format. It is apparent that issue comes down not to whether the OC Land base in GIS format will be made available but rather at what cost. While obtaining a license may be an expensive proposition, the County has shown that all of the revenue from its OC Land base in GIS format licensing accounts for only 26% of the costs to keep the OC Land base in GIS format up to date. Responding party objections are overruled. The requests judicial notice are granted but not as to the truth of all matters asserted in the documents.

The Petition is denied.

The Court heard oral argument regarding the tentative ruling and scheduled the matter for an evidentiary hearing regarding the writ of mandate.

Evidentiary hearing re: Writ of Mandate held on 04/12/2010 and 04/13/2010.

The parties have provided hundreds of pages of briefing and exhibits for the Court's review of this matter. Even this Motion for order that the Court request the parties to provide further briefing presented 15 additional pages of briefing as well as several declarations which fully went to the substance of this matter but essentially continued to discuss what was already set forth in the papers for the initial hearing. There was even a 6 page Reply that went to the merits of the Petition rather than a singular "request for a request for further briefing".

The original Tentative on the Petition is sufficient. However, because of oral testimony and additional briefing the following supplements the original tentative ruling. Further the parties spent most of their briefing discussing the merits of the Petition rather than the need for or absence of need for further briefing. The oral testimony presented by the County supports the County's position and is persuasive.

Moving party argues that 'the Country's interpretation would lead to exclusive of all computer data from public record status'. GC 6254.9(d) states that nothing in this section is intended to affect the public record status of information merely because it is stored in a computer. It does not state that a computer formatted version of a public record must be disclosed without payment of licensing fees.

Moving party argues that 'the Court should not consider the revenue that would be lost in deciding this case. The County indicated that the OC Fire Authority (OCFA) pays a \$75K licensing fee to use the OC Landbase to route its emergency vehicles. However, moving party believes that some of OCFA's revenue is from the County so the \$75K licensing fee may amount to an interdepartmental transfer. If OCFA were relieved from the \$75K fee, the County would not lose revenue. Per GC 6255, revenue loss should not be taken into account (Santa Clara (2009) 170 Cal.App.4th 1301, 1323-1330)." Moving party has not shown that if OCFA were relieved from the \$75K fee that the County would be relieved from providing OCFA revenue and moving party indicates it believes to be the case. Responding party has shown a GC 6254.9 legislative intent behind the exemption to be cost recoupment for the considerable expense invested in developing and maintaining the info in a computer formatted version.

Moving party contends that information in GIS format must be produced because it is kept in that format citing GC 6253.9. However, GC 6253.9 states that it only applies to information that constitutes a public record not exempt from disclosure. Per GC 6254.9, GIS formatted i.e. computer mapping formatted information is exempt from disclosure. Even so, no one is denying anyone access to GIS formatted

information.

It appears that this is not a dispute over production of public record but rather the form of the production and at what cost. The cost of production in GIS format includes a software licensing fee that moving party may pay like all other GIS formatted information requesters pay. That moving party has its own gratis software for using the GIS formatted data does not change what the cost of the County is to provide such information in requested format or that GC 6254.9 recognized this when it was enacted to provide an exemption for computer mapping systems.

As indicated in the original Tentative on the Petition for Writ of Mandate, moving party can have the information in GIS format but moving party will need to pay for it in that format as all other requester of GIS format do.

There is no reason for any further briefing or expense in regard to this issue considering the considerable briefing that has already been done. By diving right back into the merits of the Petition under the caption of a request that the Court request the parties to provide further briefing, moving party essentially mooted such a request. The motion is denied.

The Court orders counsel for Respondent to prepare and submit Statement of Decision within 10 days and give notice.