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

PETITION FOR REVIEW

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

Sabrina D. Venskus, SBN 219153
Dean Wallraff, SBN 275908
Venskus & Associates, P.C.
21 South California Street, Suite 204
Ventura, California 93001
Telephone: (805) 641-0247
Facsimile: (213) 482-4246

Attorneys for Petitioner and Appellant,
THE SIERRA CLUB

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

PETITION FOR REVIEW

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

Sabrina D. Venskus, SBN 219153
Dean Wallraff, SBN 275908
Venskus & Associates, P.C.
21 South California Street, Suite 204
Ventura, California 93001
Telephone: (805) 641-0247
Facsimile: (213) 482-4246

Attorneys for Petitioner and Appellant,
THE SIERRA CLUB

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Constitution

California Cases

California Statutes

California Rules of Court

Other Primary Sources

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.

---

[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

---

[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.

---

[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.

---

[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

---

[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.

---

[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.

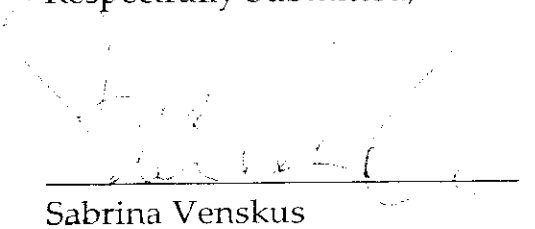
Thus, public agencies and consumers of data in both the public and private sectors have relied upon, and followed, the Attorney General's and *Santa Clara* Court's Opinions with respect to disclosure of GIS data. Should the Orange County Opinion stand, providers and users of GIS data will be left to 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,



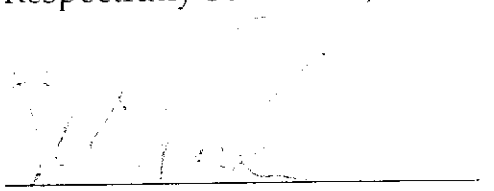
Sabrina Venskus
Attorney for Petitioner,
The Sierra Club

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
Rebecca Leeds
Office of the County Counsel
333 W. Santa Ana Blvd., Suite 407
Santa Ana, CA 92701

Attorneys for Orange County,
Real Party in Interest

The Superior Court of California
County of Orange
Department C-18
700 Civic Center Drive, West
Santa Ana, CA 92701

Respondent

Clerk of Court
California Court of Appeal
Fourth Appellate District
Division Three
601 W. Santa Ana Blvd.
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