NO. S194708

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SIERRA CLUB,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,

Respondent.

COUNTY OF ORANGE,

Real Party in Interest.

Appeal from the Superior Court of California, County of Orange
Case No. 30-2009-00121878-CU-WM-CJC
The Honorable James J. Di Cesare, Judge

On Review from the Court of Appeal of the State of California
Fourth Appellate District, Division 3
Case No. G044138

APPLICATION OF ADVOCATES FOR THE ENVIRONMENT FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT SIERRA CLUB AND PROPOSED AMICUS CURIAE BRIEF

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Pursuant to California Rules of Court, subdivision 8.520(f), Advocates for the Environment respectfully requests permission to file the attached Brief of Amicus Curiae in Support of Appellant Sierra Club. This application is timely made within 30 days of filing of Sierra Club's reply brief on the merits.

Interest of Potential Amicus

Advocates for the Environment is a 501(c)(3) organization dedicated to promoting environmental quality and government transparency in Orange County and other parts of southern California. Advocates for the Environment has a substantial interest in this case because it requires open and affordable access to public agencies' Geographic Information Systems (GIS) data, such as the OC Landbase at issue here, in order to carry out its mission.

Advocates for the Environment monitors the activities of state and local agencies in order to provide citizens with accurate, up-to-date information about the management of natural resources and the built environment. Agencies use GIS data for a wide range of activities—such as pollution monitoring and reporting, transportation planning, and disaster preparation—that implicate the welfare of nearly every citizen. Without access to agencies' GIS data, neither Advocates for the Environment nor the citizens it serves can understand how agencies conduct these activities

or ensure that agencies' decisions are based on accurate and credible information.

Advocates for the Environment also uses administrative and judicial forums to ensure that government agencies represent the public in good faith. Official government GIS data is necessary for this work because it is often the most authoritative information available. For instance, in a recent dispute, Advocates for the Environment used Los Angeles County's official GIS data to show that a city had attempted to sell public land to a private party in violation of Government Code. The County's GIS data allowed Advocates for the Environment to demonstrate unassailably the location and ownership of the relevant parcels. Had Advocates for the Environment not been able to obtain a copy of the County's GIS data for a nominal fee, it would not have been able to make the evidentiary showing necessary to bring its case and ensure that the city complied with the law.

Finally, Advocates for the Environment operates the California Public Records Access Project, an initiative to foster government transparency by promoting access to government records in all forms. Advocates for the Environment has observed that government agencies increasingly use computer databases to gather and store information without ever storing that information in individual paper or electronic records. To help provide a clear window into the conduct of government activity, Advocates for the Environment needs legal tools, such as the

California Public Records Act, that can keep pace with such evolving government practices. Its ability to do so is directly implicated here.

If this Court were to adopt Orange County's construction of the Public Records Act, Orange County and other state and local agencies would have free rein to secrete their GIS data—and indeed any other data that they gather and store in computer databases—from all but the wealthiest citizens and businesses. Advocates for the Environment's ability to carry out its mission would thus be severely frustrated, and the citizens it serves would be deprived of important information about government activities.

The Proposed Amicus Brief

Advocates for the Environment's proposed amicus brief brings an important perspective that is not represented by the present parties. The parties focus their attention on section 6254.9, the statutory provision at issue, in relative isolation from the rest of the statutory text. They also write extensively about the provision's legislative history. As an expert user of both GIS technology and the Public Records Act, Advocates for the Environment is uniquely able to explain the broader legal and factual context in which this dispute has arisen. Advocates for the Environment believes that its proposed brief on these issues will help this Court understand the flawed legal argument on which Orange County relies and illuminate the practical implications of embracing such an argument.

No Participation by Parties Other than the Potential Amicus

Neither the parties to this case, nor their counsel, nor any third party has participated in or contributed funds for the writing of this amicus brief, in whole or in part.

Accordingly, Advocates for the Environment respectfully requests that the Court accept the accompanying amicus curiae brief for filing in this case.

Dated: March 5, 2012

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

by _____
Matthew H. Armsby
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I. INTRODUCTION

The California Public Records Act recognizes the "fundamental and necessary right of every person in this state" to "information concerning the conduct of the people's business." Cal. Gov't Code § 6250. The statute protects this right by providing broad public access to government records of "every conceivable kind," subject only to certain narrow statutory exemptions unrelated to the people's business. Commission on Peace Officer Standards and Training ("POST") v. Superior Court, 42 Cal. 4th 278, 288 fn.3 (2007). In the absence of such access, the people of California cannot fully understand how government agencies use modern tools and forms of information to conduct public business or participate meaningfully in public decisionmaking processes.

Here, the Sierra Club seeks a copy of Orange County's land parcel data, which the County stores, maintains, and uses in the form of the Orange County Landbase ("OC Landbase"), a comprehensive computer database. The OC Landbase, which is compatible with geographic information system ("GIS") software, serves as the informational foundation for key decisions involving land use planning and regulation, social services, infrastructure management, taxation, voter registration, electoral redistricting, and emergency response. Affordable access to this digitized government information is thus vital to the public's understanding of virtually any significant agency planning process. Without it, there is no

way for the people to know what their government officials and public servants are up to.

The County's refusal to disclose the OC Landbase hinges on a misapplication of Government Code section 6254.9, which amended the Public Records Act in 1988 to exclude from the definition of a public record "computer software developed by a state or local agency." As the Sierra Club and other amici have explained, the OC Landbase is not "software"; it is a set of data files that can be read by software. The County's expansive interpretation of this exclusion – to cover a stand-alone database in addition to the software that displays it – does not serve the public interest in government transparency that lies at the heart of the Public Records Act. Instead, it serves the County's improperly asserted proprietary interest in extracting exorbitant licensing fees and end-user agreements for the disclosure of public data.

As a matter of simple statutory construction, the County's reading of section 6254.9 cannot be squared with the plain language of the Public Records Act or harmonized with either the statute's other provisions or its express legislative purpose. It is inconsistent, as well, with the California Constitution and decades of case law requiring a narrow construction of any limitation on the public's sacrosanct "right to access [government] information concerning the conduct of the people's business." Cal. Const., art. I, § 3(a).

Equally troubling, the County's expansive reading of the "computer software" exclusion threatens to undermine the core government transparency value enshrined in the Public Records Act. If adopted by this Court, the County's posited interpretation would carve an enormous loophole in the Public Records Act's presumptive disclosure mandate with respect to the large and growing body of government GIS data. Taken to its logical conclusion, a broadly construed "computer software" exclusion would effectively immunize from disclosure an increasingly wide range of electronic information – all currently subject to required disclosure – that happens to be contained in databases maintained by state and local agencies around California. The Public Records Act does not require or permit such a result.

II. BACKGROUND

A. GIS Software and GIS Data Are Critically Important Tools for Public Resource Management.

At the heart of this dispute is a fundamental misapprehension about the nature of "geographic information systems." GIS is a generic term describing computer technology that allows users to combine various pieces of information with geographic components – such as property parcel shapes, street addresses, assessment records, and titles – and then display the resulting relationships on a computer screen or printout, such as a paper map. M.F. Goodchild, Geographic Information Systems,

Encyclopedia of Computer Science 748 (4th ed. 2000); 3 Petitioner's Appendix ("PA") 527-29 (Joffe Decl.). Today, GIS software and GIS data are related but distinct tools that work together to allow spatial representation of geographic information. The Sierra Club in this case seeks disclosure only of GIS data, not the software used by the County to display and manipulate it.

GIS technology has fundamentally transformed the way citizens, businesses, and government agencies interact with the world:

> Geographic information describes the locations, characteristics, and shapes of features and phenomena on the surface of the earth. Traditionally, such information has been produced, disseminated, and used in the form of paper maps and atlases …
>
> Today, [however,] vast amounts of geographic information are available for use in digital form, and a system that handles, processes, edits, manipulates, analyzes, and displays such data is called a geographic information system (GIS).

M.F. Goodchild, supra, at 748.

GIS is now vital to the management of public resources and infrastructure systems. It offers users a digital "toolbox" for conducting spatial data analysis, a problem-solving approach that is critical for public resource management. GIS allows data of one type to be characterized with relation to data of another type and with relation to its geographic context. The geographic context allows analysts to see underlying relationships among data more accurately. State and local agencies use spatial data

analysis to conduct a wide range of public business: writing general plans and zoning ordinances, planning infrastructure projects, monitoring air and water pollution, preparing for emergencies, fighting crime, and managing public land.

GIS software emerged in the early 1980s and has continued to evolve with time. See M.F. Goodchild and R.P. Haining, GIS and Spatial Data Analysis: Converging Perspectives, 83 Papers in Regional Science 363 (2004). One major change – and the one relevant to this lawsuit – has been the increased portability of data on which GIS software can operate. By the late 1990s, computer software enabled users to manage and maintain GIS data "through a separate, generic database-management system" that is distinct from the software used to analyze the data. Id. The resulting self-contained database files, which are now widely used, allow geographic information to be shared easily and quickly over the Internet and on CDs or DVDs.

Thus, potential users can now customize a GIS "toolbox" with software and data from multiple sources.[1] Common standards allow different computer software programs to work together regardless of the

[1] See Arnulf Christl and Carl Reed, Open Source and Open Standards (Open Geospatial Consortium 2011) (explaining that "[s]oftware and applications can be built on a solid foundation of Open Standards, regardless of whether the software and applications are proprietary or Open Source"), available at http://portal.opengeospatial.org/files/?artifact_id=6200&version=1&format=pdf (last visited 2/29/2012).

origin of each piece.[2] Similarly, common data standards and formats enable any GIS software to access, view, and analyze GIS data; once the data is in a GIS format, anyone can use it.[3]

The use of GIS data is now a common part of both public and private life. Publicly accessible GIS software includes Internet applications like Google Earth and Google Maps, which tap into immense databases of parcel and transit information, topographic measurements, and other geospatial data. Anyone with a computer can use these applications to analyze travel routes, get directions, and share the results.

In the same way, GIS software and Internet applications provide citizens with access to information that government agencies maintain and use on the public's behalf. Public emergency-response agencies use GIS software to organize, view, and analyze up-to-date data about buildings, transportation networks, and infrastructure, and thereby improve their ability plan for and respond to disasters as well as assist in disseminating

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[2] Governmental and non-governmental bodies like the U.S. Federal Geographic Data Committee, the International Standards Organization, and the Open Geospatial Consortium establish interoperability standards for this purpose. See Open Geospatial Consortium, About OGC, at http://www.opengeospatial.org/ogc (last visited 2/24/2012).

[3] 3 PA 532 (Joffe Decl.); D. Schnell, Geodata Interoperability: A Key National Information Infrastructure Requirement (Open Geospatial Consortium 2000), available at http://portal.opengeospatial.org/files/?artifact_id=6200&version=1&format=pdf (last visited March 5, 2012).

that information to the public.[4] For example, "MyHazards" is a free online tool operated by the California Emergency Management Agency. State and local agencies, businesses, and citizens use MyHazards to determine whether property and infrastructure lie within earthquake, flood, fire, and tsunami hazard zones, and to find avoidance and preparation instructions for the potential damage.[5]

Another example is the City and County of San Francisco's Property Information Map, a free online tool that allows citizens to search for public records about homes, businesses, and public places.[6] By entering an address, a user can find accurate and authoritative city records such as a property's footprint, latitude, and longitude; its assessor parcel number; its most recent assessor's report and sale price; and its zoning designations. Id. The Property Information Map also links to permit applications, complaints, and decisions related to the property so that citizens can monitor nearby land use planning and regulatory activities. Finally, the data can be downloaded so users can examine it themselves. The Property Information Map thus allows the public to stay informed about the world

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[4] See, e.g., A.E. Gunes and Jacob P. Gavel, Using GIS in Emergency Management Operations, 126(3) Journal of Urban Planning and Development 136 (Sept. 2000).

[5] See http://myhazards.calema.ca.gov/ (last visited 2/24/2012).

[6] San Francisco Property Information Map, at http://propertymap.sfplanning.org/ (last visited 2/27/2012).

around them and participate more effectively in San Francisco's land-use decision-making processes.

In short, GIS data is an essential part of doing the public's business today, and access to such data is a critical component of participatory government and the public process. Moreover, relevant GIS information is now contained in stand-alone database files – separate from the computer software needed to display the data – that are easily shared and distributed in common, readily used electronic formats.

B. Orange County Refused to Disclose Its GIS Data to the Sierra Club In Its Native Electronic Format.

1. The Data Contained in the OC Landbase Is Critical to Orange County's Conduct of Public Business.

Orange County considers its GIS software, data, and information products to be "invaluable" tools. Petitioner's Request for Judicial Notice ("Pet. RJN"), Exhibit 2, at OC 1462 (Orange County, GIS Needs Assessment Study (2008)). The County's departments rely on these tools "to carry out their various missions for public safety, land planning, social services, infrastructure management, taxation, and stewardship of natural and man-made resources." Id. at 1030.

The public records at issue in this case are land parcel data that Orange County maintains in a computer database called the OC Landbase.[7] 5 PA 1348 (Trial Court's Statement of Decision at 2-3 [SOD]).[8] When used with separate GIS software, the OC Landbase depicts the boundaries and locations of more than 640,000 parcels of land in Orange County, along with each parcel's assessor parcel number, street address, and owner name. Trial Court Decision at 2; Stipulated Facts at 3, 5. The County and its former partner, the Southern California Gas Company ("Gas Company"), compiled the OC Landbase from official public records such as assessment rolls, parcel maps, tract maps, and transfer deeds. Trial Court Decision at 2; 4 PA 789 (Jelinek Decl.). The County updates the OC Landbase regularly to keep it accurate and current. Id.

Because the OC Landbase is so comprehensive, accurate, and current, it is Orange County's "most essential dataset." Pet. Request for Judicial Notice ("RJN"), Exhibit 2, at OC 1455 (Orange County, GIS Needs Assessment Study). "County departments rely on [geographic] information to carry out their various missions for public safety, land

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[7] "[E]xternal to the County, 'Landbase' is used *just* [to] refer to the data … in a GIS file format." Trial Court's Statement of Decision at 3 n.1 (emphasis added).

[8] The Trial Court's Statement of Decision can be found in Volume 5 of the Petitioner's Appendix at pages 1347-62. The Stipulated Facts can be found in Volume 5 of the Petitioner's Appendix at pages 1081-84. For simplicity, we hereinafter refer to these documents as "Trial Court Decision" and "Stipulated Facts" and cite their internal page numbers.

planning, social services, infrastructure management, taxation, and stewardship of natural and man-made resources." Id. at OC 1188. The OC Landbase is the "primary parcel-level digital basemap" that the County uses to draw the official boundaries of census tracts, water and school districts, and cities within its borders; engage in land use planning and zoning; conduct voter registration and electoral redistricting; and respond to emergencies. 2 PA 308 (Jelinek Decl.); Pet. RJN, Exhibit 2, at OC 1456.

Orange County uses several third-party computer software programs to maintain, analyze, and share the data contained within the OC Landbase. For example, the County uses GISNet, licensed from MRF Geosystems, to maintain the OC Landbase; GeoResearch, also licensed from MRF Geosystems, to display and share the OC Landbase over the internet; Oracle Spatial Relational Database Management System (RDBMS) software, licensed from Oracle, to input, extract, and share data from the OC Landbase; and ArcSDE and ArcGIS 9.3, licensed from Esri, to view and create maps from the OC Landbase. 3 PA 566-68 (Orange County's Response to Special Interrogatories).

The County stores and distributes the OC Landbase in Oracle Spatial, a standard database format, to facilitate easy access and transfer among users. 3 PA 530 (Joffe Decl.). From its current format, OC Landbase data can easily be translated into other GIS formats that both proprietary and open source GIS software can read. Trial Court Decision at

3; 3 PA 530 (Joffe Decl.). Thus, any person with a copy of the Oracle database management software can thus load a copy of the Landbase into his or her own database management software, and then translate it into a format that is compatible with his or her own spatial analysis software. 3 PA 530 (Joffe Decl).

2. The OC Landbase Was Created from Official Public Records, but Has Been Available Only at High Cost and with a Restrictive License.

While Orange County is the current owner and manager of the OC Landbase, it did not develop the database alone. In fact, the Gas Company performed almost all of the initial work pursuant to a "joint development agreement" that it signed with the County in 1990. 2 PA 354-60 (Agreement #D90-45). The Gas Company was already developing a comprehensive GIS basemap of Orange County for business purposes; the County was interested in developing a "Land Information System" for the land within its jurisdiction. 2 PA 356. The County agreed to provide the Gas Company with official public records such as parcel maps and assessor rolls; it also agreed to develop a network of survey control points at taxpayer expense. 2 PA 357. In return, the Gas Company agreed to input the most useful information from the maps and records into an electronically formatted basemap. 2 PA 358. The County could freely use the basemap for its own purposes, but the agreement provided that the County "shall not provide this data in digital form to any third party …

without [the Gas Company's] express prior written consent." 2 PA 358. Thus, by the 1990 agreement, the County and its collaborator attempted to convert public record information into a revenue-generating device that was not subject to public disclosure.[9]

The County's one-sided exchange with the Gas Company has colored the OC Landbase's use and legal status ever since. The Gas Company completed the creation of the digital basemap, by then deemed the "Landbase," in 1992-93. In a 1993 follow-up agreement, the County secured unlimited use of the Landbase for internal purposes, as well as the right to sub-license and redistribute the Landbase to third parties. 2 PA 364 (Agreement No. D93-147).

The County's rights, however, came at the price of government transparency and public resources. While County employees would continue to update the Landbase with official public record information, the agreement purported to secure for the Gas Company full and perpetual ownership of "that data that was the original Landbase." 2 PA 364. The County also agreed to require anyone seeking the database to purchase a

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[9] The Legislature prohibited such one-sided exchanges of public records in 1995. Assembly Bill 141, 1995 Cal. Stat., ch. 108, § 1. This prohibition is now codified at Government Code section 6270, which states:

> Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to law.

license. 2 PA 365; see example at 2 PA 393-98. Meanwhile, the Gas Company would receive a free copy of the updated Landbase each year, and half of the net revenue from the County's sales of licenses. 2 PA 365. Thus, not only did the County shield public record information from view, but it also charged for access and provided the Gas Company with substantial ongoing benefits.

Orange County secured full "ownership" of the OC Landbase in 2007, when it bought the Gas Company's stake for $300,000. 2 PA 374, 377 (Agreement No. D07-170 and accompanying staff memo). The contract purported to convey all of the Gas Company's rights, title, and interests in the Landbase, minus any confidential or proprietary information that might remain inside. 2 PA 377-78. Further, the contract provided that the Landbase would be "the confidential and proprietary property of [Orange] County." 2 PA 380. The Gas Company and its affiliates, of course, retained significant long-term rights to the OC Landbase and the data within it. For instance, if the County should ever fail to maintain or update the OC Landbase, the Gas Company will immediately accede to a fifty percent ownership stake and the unlimited right to license the Landbase to third parties. 2 PA 379. Again, the Gas Company would benefit from the expenditure of public labor and funds.

To ensure a sufficient stream of revenue for itself and the Gas Company, the County has charged excessive fees, further limiting public

access to public the data. Until 2003, a license for the OC Landbase cost more than $625,000.[10] See 2 PA 387-88 (Agenda Item Transmittal Memo and Minute Order, Sept. 9, 2003). This fee structure created a three-tier system of access to the County's data: (1) the Gas Company and its affiliates paid nothing for access and could do anything they wanted with the data; (2) large companies, municipalities, and consulting firms could afford the entire OC Landbase but were subject to the license terms; and (3) individuals, small municipalities, small businesses, and non-governmental organizations were effectively excluded from access by the large fees. 2 PA 387-88. The County also required – and continues to require – users of the OC Landbase to sign a restrictive license and non-disclosure agreement.[11] 2 PA 394-404.

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[10] The County revised its fee schedule in late 2003. However, a perpetual license still cost nearly $380,000, while each update cost $6,000. 2 PA 388, 391. The County also charged for the computer disk, "including procurement and delivery charges," as well as a "minimum transaction fee" of *two times* the hourly billing rate for staff to sit in front of a computer and copy the data. Id. The Sierra Club would have had to pay all of these fees when it first requested the OC Landbase. 1 PA 73. In late 2011, the Orange County Board of Supervisors reduced the cost of the OC Landbase to between $1,000 and $5,000 depending on the type of use. This price is much greater than the cost of duplication, and the County still imposes a restrictive license.

[11] The license requires users to "acknowledge that the Landbase contains an independent compilation of land records and other spatial data, and copyrighted matter proprietary to Licensors and, as such, constitutes valuable assets." 2 PA 395. It forbids users from disclosing, publishing, displaying, or otherwise making parcel data available "in any digital form," and further requires them to take "all reasonable precautions" to maintain the confidentiality of the Landbase. Id. In the event of breach, the

3. Orange County Refused to Provide the Sierra Club with a Copy of the OC Landbase.

Between June 2007 and February 2009, the Sierra Club made five requests for OC Landbase data in the GIS format used by the County. Stipulated Facts at 1. In its final request on February 9, 2009, the Sierra Club requested

> A complete copy of the County of Orange Landbase as described on your Web page . . . including a parcel level digital basemap identifying over 640,000 parcels in Orange County, with parcel boundaries, owner name and address, street address and assessor's parcel number for each parcel. Please provide the [L]andbase in the electronic [ ] format in which it is offered for sale on the above-cited Web page. The Sierra Club is willing to pay the actual cost of your copying the data to a medium such as a CD or DVD.

1 PA 69.

Orange County denied each request. Id. In its initial July 2, 2007 denial, the County wrote that:

> GIS information obtained by the Assessor is compiled through copyright-protected software and its distribution is restricted by licensing agreements, copyright protections, or trade secret laws. Further, there is no requirement that the Assessor keep or prepare GIS data or information. For these reasons, any GIS information obtained by the Assessor is not a public record. Additionally, any GIS software obtained by the Assessor that was developed by a government agency is not a public record (Cal. Gov't Code § 6254.9). . . . Thus, it appears the information is not subject to disclosure under the Public Records Act.

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agreement provides for liquidated damages equal to the initial cost of purchase, injunctive relief, and attorneys' fees, in addition to any other costs assessed by a court. Id.

1 PA 33-34 (additional quotations and citations omitted). In subsequent letters, the County offered to produce millions of pages of PDF or paper copies of individual "assessment rolls, assessor parcel maps, tract maps, records of survey, lot line adjustments, and various transfer deeds" or to sell the Sierra Club a license. 1-PA-54-55, 72-73. The County never provided a reasoned explanation why section 6254.9 prevented it from disclosing the OC Landbase in GIS format. To the contrary, it stated only that section 6254.9 prevented it from disclosing "any GIS software." 1 PA 33-34.

Had the County disclosed the OC Landbase as requested, the Sierra Club would have been able to use its own GIS software to access, display, and use the OC Landbase. Stipulated Facts at 3. The Sierra Club could not use its GIS software on the PDF and paper records offered by the County. Id. Nor could it afford several hundred thousand dollars for a license. The Sierra Club was thus functionally excluded from access to the County's parcel data. This lawsuit ensued.

C. The Public Records Act Guarantees Broad Access to Information Held by Government Agencies in the Electronic Formats Used by the Agency.

1. The Statute Establishes a Right to Government Information and a Strong Presumption in Favor of Disclosure.

The Public Records Act, enacted in 1968, codifies the principle that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov't

Code § 6250. Its purpose is to minimize government secrecy and "safeguard the accountability of government to the public." San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 771-72 (1983). The Act has "the explicit purpose of increasing freedom of information by giving the public access to information in the possession of public agencies. *Maximum disclosure of the conduct of governmental operations was to be promoted by the Act*." CBS, Inc. v. Block, 42 Cal. 3d 646, 651 (1986) (emphasis added).

To secure the public's right of access to government information, the Public Records Act establishes a general mandate for disclosure, with limited and specific exemptions which must be construed strictly and narrowly. See Williams v. Superior Court, 5 Cal. 4th 337, 346 (1993) (holding that "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary"); ACLU v. Deukmejian, 32 Cal. 3d 440, 447 (1982) (holding that "[s]upport for a refusal to disclose information must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act."); San Gabriel Tribune, 143 Cal. App. 3d at 771-72, 778 (holding that the PRA "reflects a general policy of disclosure that can only be accomplished by narrow construction of the statutory exemptions."). This general mandate is clear from three elements of the statute.

First, the Public Records Act presumptively requires the disclosure of "every conceivable kind of government record that is involved in the governmental process." Cal Gov't Code §§6252(e), (g); San Gabriel Tribune, 143 Cal. App. 3d at 774 (explaining provision). The statutory term "public records" encompasses "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." Gov't Code § 6252(e). The term "writing," moreover, means:

> any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Id. § (g). This definition excludes "only purely personal information unrelated to the conduct of the public's business." San Gabriel Tribune, 143 Cal. App. 3d at 744 (quoting Assembly Comm. on Statewide Info. Policy, Cal. Public Records Act of 1968, 1 App. to Journal of Assembly 7, Reg. Sess. (1970)). Any data or information that an agency or official keeps "as necessary or convenient to the discharge of his official duty is a public record." Id.

Second, agencies should facilitate access to public records and avoid creating obstructions to, or burdens on, that access. For instance, agencies

may charge requesters for the direct cost of duplication, but cannot impose extra fees for access to records. Cal. Gov't Code § 6253(b). The agency must identify the information technology and physical location in which it holds requested information "and provide suggestions for overcoming any practical basis for denying access to the records or information sought." Id. § 6253.1. Once it has located the requested information, the agency must provide an exact copy "unless impracticable to do so." Id. § 6253(b). If the information has been requested in an electronic format that the agency uses to conduct its business, the agency must disclose the information in that format. Id. § 6253.9(a).

Third, an agency may only refuse to disclose requested information on the basis of an express exemption. Cal. Gov't Code § 6255(a); Fairley v. Superior Court, 66 Cal App. 4th 1414, 1419 (1998) (explaining provision). An agency seeking to withhold information bears the burden of proving that an exemption applies. International Federation of Professional and Technical Engineers, Local 21, AFL-CIO ("International Federation") v. Superior Court, 42 Cal. 4th 319, 329 (2007). Moreover, if only part of a record is exempt from disclosure, an agency must produce the requested information if it can be separated or "segregated" from the exempt material. Cal. Gov't Code § 6253(a) ("Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after

deletion of the portions that are exempted by law."); POST v. Superior Court, 42 Cal. 4th at 301 ("segregation is required").[12]

Accordingly, any limitation on the Public Records Act's disclosure requirements must be narrowly construed and narrowly applied "in order to give effect to the legislative intent that favors disclosure over secrecy in government." San Gabriel Tribune, 143 Cal. App. 3d at 773. All terms and provisions of the statute are subject to this rule of construction. See id. (construing narrowly the term "license" in section 6254(n), which exempts financial data submitted to a licensing agency, so as to ensure access to financial data exchanged between a city and its contractor); Fairley, 66 Cal App. 4th at 1419 (construing narrowly section 6254(b), which exempts records pertaining to pending litigation, to ensure access to petitioner's arrest documents).

[12] Accordingly, "information stored in a computer database qualifies as a writing" and "must be disclosed unless one of the Act's exceptions applies." POST v. Superior Court, 42 Cal. 4th at 288 fn.3 (requiring disclosure of information from a database of police officer records); Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1001 (2011) (holding that whether an agency stores information in individual files or electronic databases "should have no bearing on the confidentiality or public character of [government] information"). Agencies' GIS data, like any other electronic information that may be stored in a database, is subject to disclosure. County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301 (2009) (requiring disclosure of a GIS database).

2. Section 6254.9, Enacted in 1988, Excludes from Disclosure Only "Computer Software Developed by a State or Local Agency."

In 1988, the Legislature amended the Public Records Act to carve out a narrow exclusion from the broad statutory definition of public records; while almost all information stored on a computer is a public record, "computer *software* developed by a state or local agency is not *itself* a public record." A.B. 3265, 1988 Cal. Stat. 1836, ch. 447, codified at Cal. Gov't Code § 6254.9 (emphasis added). As the Sierra Club and Orange County describe in their briefs, section 6254.9 was a compromise solution to what was, in 1988, a novel issue: the City of San Jose had created GIS software and databases and wanted to assert proprietary rights over its work. Opening Br. at 32; Answer Br. at 30. The Legislature did not want to jeopardize the public record status of electronic data merely because it could be read by new software in which a County might have a proprietary interest. Specifically, it did not want public records to become an income source for government agencies. Accordingly, the Legislature amended the initial version of the bill to clarify that section 6254.9 applies only to "computer software … itself." It also clarified that "computer readable databases" are not a protected form of information. Opening Br. at 32-37. Contemporaneous analyses from the Department of Finance explained that these changes ensured that "any data that may be stored on a computer still retains its public record status." Id. at 38. Section 6254.9 thus allowed the

City of San Jose and other state and local entities to recover some of the costs of their software development endeavors while maintaining public access to the data contained in their computer databases.

3. Section 6253.9, Enacted in 2000, Expressly Furthers Public Access to Agencies' Electronic Information.

In 2000, the Legislature amended the Public Records Act again to ensure public access to agencies' electronic data. 2000 Cal. Stat. 7140, c. 982, § 2, codified at Cal. Gov't Code § 6253.9. Prior to that amendment, agencies could disclose electronic data in any form or format they chose. Cal. Gov. Code § 6256 (1998) (renumbered as § 6253(b) by S.B. 143, 1998 Cal. Stat. 4117, ch. 620, §§ 5, 7) ("computer data shall be provided in a form determined by the agency").

The 2000 amendment rescinded that authority. Specifically, it eliminated the language permitting agencies to disclose computer data in the form of their choice. 2000 Cal. Stat. 7140, ch. 982, § 1. At the same time, it added section 6253.9, which requires agencies to disclose electronic data in the formats in which they use and share it. Id. § 2; Pet. RJN, Exhibit 1, at 5, 17 (Leg. Hist. of Cal. A.B. 2799). Section 6253.9 states in relevant part:

> 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. . . .

Cal. Gov't Code § 6253.9(a).

Section 6253.9 also clarifies that the Public Records Act's limitation of fees to the "direct cost of duplication" governs the disclosure of electronic information, just as it does for non-electronic information. Cal. Gov't Code § 6253.9(a)(2) ("The cost of duplication shall be limited to the direct cost of producing a copy of the record in an electronic format."). An agency may recover the costs of computer programming and services "necessary to produce a copy of the record" if programming and services are necessary to produce a copy. Id. at 6253.9(b)(2). An agency may not, however, recover "expenses associated with [its] initial gathering of the information, or with initial conversion of the information into an electronic format, or with maintaining the information." 88 Ops. Cal. Atty. Gen. 153, 163 (2005); see also County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301, 1337 (2009) (holding that section 6253.9 authorizes an agency to recover only the costs of duplicating a GIS basemap).

With these changes, the Legislature unambiguously removed agencies' discretion to disclose electronic information in the formats of their choice and strengthened the public's right of access to that

information. See Asdourian v. Araj, 38 Cal. 3d 276, 292 (1985) ("Where the Legislature undertakes to amend existing law by deleting an express provision of the previous statute, it is presumed the Legislature intended to change the law."); Arnall v. Superior Court, 190 Cal. App. 4th 360, 368 (2010) (citing Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified School Dist., 21 Cal. 3d 650, 659 (1978)) ("when substantial changes are made in the statutory language it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes.").

It is clear, moreover, that the purpose of section 6253.9 was to remedy statutory "deficiencies" by "substantially increas[ing] the availability of public records and reduce the cost and inconvenience associated with large volumes of paper records." Pet. RJN, Exhibit 1, at 5, 20. Even before 2000, agencies were using computers to conduct large amounts of public business. Id. at 5, 17. The Public Records Act's pre-2000 disclosure provision, however, allowed them to obscure their activities by providing their electronic data as truckloads of paper printouts. Id. These obstacles were particularly difficult to overcome when data requested by the public was voluminous in its paper form and thus required large amounts of time and money to duplicate and understand. Id. Indeed, agencies could purposefully "frustrate a [Public Records Act] request by providing a copy of the requested [electronic] record in a form different

from the request, which could sometimes render the information useless." Id. By enacting section 6253.9, the Legislature intended to prevent government data from becoming "practically inaccessible" to all but the wealthiest requesters. Id.

Taken together, sections 6254.9 and 6253.9 do not change the Public Records Act's strong policy in favor of disclosure. To the contrary, they ensure public access to all forms of electronic data, excluding only computer *software* developed by an agency.[13]

4. Enacted in 2004, Article I, Section 3(b) of the California Constitution Reaffirms a Narrow Construction of Limits on the Right of Access to Government Information.

In 2004, the people of California approved Proposition 59, which enshrined in the state Constitution the public's right of access to government information. POST v. Superior Court, 42 Cal. 4th at 329. Article I, section 3(b)(1) of the state Constitution now provides that:

> The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

Similarly, Article I, section 3(b)(2) clarifies and restates the longstanding rule that statutory exemptions must be construed narrowly:

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[13] Like section 6254.9, section 6253.9 carves out protections for agencies' proprietary computer software. Agencies may refuse to disclose electronic data *only* "if doing so would jeopardize or compromise the security or integrity of … any proprietary software in which it is maintained." Cal. Gov't Code § 6253.9(f).

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

Pursuant to this Constitutional provision, "if there is any ambiguity about the scope of an exemption from disclosure, [courts] must construe it narrowly." Sonoma County Emp. Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 993 (2011).

Together, the Constitution and the Public Records Act require courts, when interpreting the statutory text, to err always on the side of disclosure, and to resolve any ambiguity in favor of public access.

III. ARGUMENT

The OC Landbase is subject to disclosure as a public record, at the direct cost of copying it to a CD or DVD, free of the restrictions of a license or end-user agreement. Orange County argues that the OC Landbase is not a public record because is it used by computer software and, therefore, is part of a "computer mapping system." [14] But to reach that

[14] In support of its position, the County contends that the term "computer software," as used in section 6254.9, refers not only to computer software, but also to any data that the software can access, display, or manipulate. Answer Br. at 1, 3, 5, 11, 37. In the County's view, the OC Landbase is "part of a computer mapping system" merely because the County can read it with third-party GIS software. Therefore, it argues, the OC Landbase

conclusion, this Court would have to (i) strain against the plain meaning of the relevant Public Record Act provisions, (ii) ignore other provisions of the statute that require the disclosure of information that can be segregated from exempt information and the disclosure of electronic information in its native electronic format, (iii) disregard the statute's stated purpose of providing broad access to government information, and (iv) contravene the California Constitution's proscription against construing ambiguities to limit access to government data.

In contrast, the Sierra Club's interpretation of the statute is consistent with the plain meaning of its relevant terms, gives meaning to each provision of the statute, and is in harmony with the stated purpose of the Public Records Act and the California Constitution. Therefore, this court should reject the County's argument and direct it to disclose the OC Landbase as required by the PRA.[15]

"falls within the statutory definition of 'computer software'" and is excluded from disclosure. Answer Br. at 12.

[15] Because the meaning of Section 6254.9 is clear, especially when read with the rest of the statute, there is no need, and indeed no authority, to look to legislative history or other extrinsic sources to assist in construction. "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." In re C.H., 53 Cal. 4th 94, 100-01 (2011) (citing Murphy v. Kenneth Cole Productions, Inc., 40 Cal.4th 1094, 1103 (2007)).

A. Section 6254.9 Does Not Authorize Orange County to Withhold the OC Landbase, or Any Other GIS Data, from Disclosure.

Orange County relies on section 6254.9 of the Public Records Act to support its argument that the OC Landbase is not a public record. But section 6254.9 does not provide an express exemption for agencies' GIS data. Instead, it excludes a discrete category of information – computer software "itself" – from the definition of public records, with the functional result of removing that software from the statute's mandatory disclosure requirement. Cal. Gov't Code § 6254.9(a). Section 6254.9 also explains that "[a]s used in this section, 'computer software' includes computer mapping systems." Id. § 6254.9(b). But section 6254.9 does not say that "any file or database that a computer software or a computer mapping system" can read is also excluded from the definition of "public record." And therein lies the Achilles' Heel of the County's position.

Because the County's broad construction of section 6254.9 violates the rules of construction for the Public Records Act, its reliance on section 6254.9 is misplaced; therefore, the County must disclose the OC Landbase.

1. Because Section 6254.9 Does Not Expressly Exclude GIS Data from Disclosure, the OC Landbase Must Be Disclosed.

Exceptions from the Public Record Act's disclosure requirement must appear on the face of the statute. Cal. Gov't Code § 6255. The text of section 6254.9 does not expressly exclude GIS data from the definition of

public records or otherwise exempt it from disclosure.[16] Nor does section 6254.9, or any other section of the statute, define "computer software" or "computer mapping systems" to mean or include "GIS data."

Where the Public Records Act defines operative terms, it does so expressly and unambiguously. See, e.g., Cal. Gov't Code §§ 6252(f) (using the word "means" to define the term "state agency"); (g) (using the word "means" to define the term "writing"). No such language can be found to support the County's argument. To the contrary, section 6254.9 expressly draws a distinction between agencies' computer software "itself," which is excluded from the definition of public records, and all other information stored in a computer, which must be disclosed as required by the Public Records Act. Compare Gov't Code §§ 6254.9(a) and (d).

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[16] Section 6254.9 reads in full:

(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.

Where a statute makes express distinctions, courts must give them full effect. Jurcoane v. Superior Court, 93 Cal. App. 4th 886, 894 (2001). Applied to section 6254.9, this rule of construction requires the Court to distinguish between computer software "itself," such as the GIS software used by the County and the Sierra Club, and data "stored in a computer" which contains no software, like the OC Landbase. Trial Court Decision at 2-3; Stipulated Facts at 3-4; 3 PA 564-73 (OC's Response to Special Interrogatories). Because it does not fall within the express exclusion for computer software "itself," the OC Landbase must be disclosed. See County of Santa Clara, 170 Cal. App. 4th at 1332 (explaining that subsection (a) provides a "discrete exemption" for "computer software"); id. at fn.9 (explaining that "the computer software exemption of section 6254.9, sub[section] (a)," does not exempt GIS data); 88 Ops. Cal. Atty. Gen. 153, 159 (concluding that section 6254.9 does not exempt parcel map data from disclosure).

Furthermore, a statutory provision "shall be narrowly construed if it limits the right of access" to government information. Cal. Const., art. I, § 3(b)(2). "[I]f there is any ambiguity about the scope of an exemption from disclosure," a court "must construe it narrowly." Sonoma County, 198 Cal. App. 4th at 993. Even assuming that the absence of express language renders section 6254.9 ambiguous with respect to GIS data, that ambiguity

must be resolved so as not to limit public access to agencies' GIS data generally, and to the OC Landbase in particular.

2. The Usual and Ordinary Meaning of "Computer Software," as Used in Section 6254.9, Confirms that GIS Data such as the OC Landbase Is Not Exempt from Disclosure.

The County argues that the phrase "includes computer mapping systems" expands the meaning of "computer software" to include GIS data. Answer Br. at 11, 37. But that would give the term "computer software" a meaning that is not consistent with its ordinary meaning. In construing a statute, a court "may not broaden or narrow the scope of [a] provision by reading into it language that does not appear in it." Doe v. City of Los Angeles, 42 Cal. 4th 531, 545 (2007). That is, a court "may not rewrite the statute to conform to an assumed intention which does not appear from its language." Id. (citing Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 573 (1998); In re Hoddinott, 12 Cal. 4th 992, 1002 (1996)).

To determine the scope and meaning of section 6254.9, the Court must look first to the express language of the provision, e.g., Pineda v. Williams-Sonoma Stores, Inc., 51 Cal. 4th 524, 530 (2011) ("we look first to the words of a statute"), and must strictly and narrowly construe that language where it authorizes the withholding of government information. See Cal. Gov't Code § 6255 ("the agency shall justify withholding any record by demonstrating that the record in question is exempt under express

provisions of this chapter"); Sonoma County, 198 Cal. App. 4th at 992 (holding that article I, § 3 of California Constitution and Public Records Act case law require narrow construction of the statute where it limits the right of access to government information). Here, the usual and ordinary meaning of the term "computer software," as used in the context of section 6254.9 and the Public Records Act as a whole, confirms that this provision excludes only computer software "itself," as the statute expressly states.

The term "computer software" is usually and ordinarily understood to mean something distinct from the data, contained in compatible "files" that the software can read, analyze, view, or manage. For instance, computer software such as Microsoft Word or Corel WordPerfect can be used to view and manage textual and numerical data contained in a ".doc" or ".wpd" file. Similarly, Adobe Photoshop or Apple iPhoto can be used to analyze photographic data contained in a ".jpg" file. This usual and ordinary meaning of "computer software" is all that is needed to apply section 6254.9 to the facts here, where the County itself clearly distinguishes between its GIS software and OC Landbase, which is GIS data contained in an "Oracle Spatial" database file. No special meaning of "computer software" is needed to resolve this case.

Moreover, when the Legislature enacted section 6254.9, it knew that the term "computer software," as well as section 6254.9 as a whole, would be strictly and narrowly construed as a limit on the people's right of access

to information. See White v. Ultramar, Inc., 21 Cal. 4th at 572 (citing Palos Verdes Faculty Ass'n, 21 Cal. 3d at 659) (holding that when the Legislature amends a statute, it is presumed to be aware of existing language and prior judicial constructions). Section 6255, which requires an agency to justify any refusal to release information on an express provision of the statute, has been part of the Public Records Act since its enactment in 1968. See 1968 Cal. Stat. 2946, c. 1473, § 39. Moreover, courts had been long applying the rule of narrow construction to the statute's exemption provisions. See, e.g., State of Cal. ex rel. Div. of Indus. Safety v. Superior Court, 43 Cal. App. 3d 778, 783 (1974); San Gabriel Tribune, 143 Cal. App. 3d at 772. The Court must, therefore, presume that the Legislature was fully aware that agencies or courts would not be "filling gaps" with terms or meanings that are not apparent on the face of the provision. Where the Legislature said "computer software," it meant only that. See Allen v. Sully-Miller Contracting Co., 28 Cal. 4th 222, 227 (2002) (A court gives statutory language its "usual and ordinary meaning, and if there is no ambiguity, then we presume the lawmakers meant what they said.") (emphasis added).

3. The Subparts of Section 6254.9 Clarify that Only Computer Software Itself is Excluded from Disclosure.

The text and structure of section 6254.9 as a whole further confirm that the only thing excluded from disclosure is "computer software . . . itself" and not segregable files of GIS data. None of the subparts of section 6254.9 expand this software exemption to digitized data or suggest that GIS data is considered GIS software.

Subsection (a), which states the subject matter and legal effect of section 6254.9, expressly excludes only "computer software developed by a state or local agency." Cal. Gov't Code § 6254.9(a). This subsection is the only part of the provision that affects whether information is a public record and therefore disclosable. See County of Santa Clara, 170 Cal. App. 4th at 1332 (noting that subsection (a) provides a "discrete exemption" for "computer software"); id. at fn.9 (noting that "the computer software exemption of section 6254.9, sub[section] (a)," does not exempt GIS data).

Subsection (d) affirms the disclosure requirement for the broad realm of information "stored on a computer" that is not computer software. Subsection (c) clarifies that section 6254.9 does not create an implied warranty for "errors, omissions, or other defects in any computer software" that an agency may sell or license "as provided pursuant to this section." Subsection (c) refers only to computer software, and affirms that the scope

of section 6254.9 is limited to computer software itself, and does not encompass GIS data such as the OC Landbase.

Similarly, subsection (e) clarifies that section 6254.9 does not affect agencies' proper assertions of copyright for computer software. Specifically, it states that "nothing in this section is intended to limit any copyright protections." In County of Santa Clara, the court held that subsection (e) does not authorize a state or local agency to assert copyright over a GIS database because such a database is not computer software. 170 Cal. App. 4th at 1331-34. The court explained that "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.") (emphasis added). Thus, subsection (e) also affirms that the scope of section 6254.9 is limited to computer software itself.

Subsection (b) similarly refers only to computer software. It merely illustrates the kinds of computer software excluded from the definition of public records. It states: "As used in this section, 'computer software' includes computer mapping systems, computer programs, and computer graphic systems." Cal. Gov't Code § 6254.9(b). As with the term "computer software" itself, these terms refer to things with which a user can analyze, view, and manage data stored in compatible formats. Just as one can use Microsoft Word, a "computer program," to display and manipulate textual and numerical data in a ".doc" file, one can use GIS or "computer

mapping system" software to analyze, view, and manage GIS data. Trial Court Decision at 2-3; Stipulated Facts at 3; see also 88 Ops. Cal. Atty. Gen. 153, 159 (finding that "the term 'computer mapping systems' in section 6254.9 … denotes unique computer programs to process [geographic] data using mapping functions").

Orange County argues that subsection (b) expands the meaning of "computer software." While in some cases a statutory list beginning with "includes" can be read to expand the illustrated term, doing so would be inappropriate here. This Court has previously held that the use of "includes" does not conclusively demonstrate that the Legislature intended a category to be without limits. Dyna–Med, Inc. v. Fair Employment & Housing Comm'n, 43 Cal.3d 1379, 1389 (1987). In Dyna–Med, this Court held that, despite its use of the phrase "including, but not limited to," the California Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) does not authorize an award of punitive damages because such damages are "different in kind" from the relief authorized in the list: corrective and equitable remedies. 43 Cal.3d at 1387-89. Here, Orange County argues that the section 6254.9 (b) expands "computer software" to consume anything that could be a part of a computer mapping system, including easily segregable data – something quite different in kind from computer software. The County's argument makes no sense, particularly in

light of other provisions requiring the disclosure of segregable information and the general mandate to narrowly construe any limits on disclosability.

Moreover, as explained more fully below, Orange County's reading of section 6254.9(b) conflicts with other provisions of the Public Records Act, essentially repealing them with respect to electronic information used in mapping and possibly even word processing or photographic analysis. Had the Legislature intended to repeal those other provisions of the Public Records Act, it could have done so much more clearly than simply through the use of the word "includes." "The law shuns repeal by implication and, if possible, courts must maintain the integrity of both statutes." Schelb v. Stein, 190 Cal. App. 4th 1440, 1448 (2010), citing Hughes Electronics Corp. v. Citibank Delaware, 120 Cal.App.4th 251, 268 (2004).

Subsection (b) can be given a reasonable interpretation without creating a conflict with other provisions of the Public Resources Act or with the basic rules of statutory construction. The term "computer mapping systems" should be interpreted to mean a collection of interoperable GIS software such as that used by the County, including GISNet, GeoResearch, Oracle, ArcSDE, and ArcGIS. 5 PA 567-69 (OC's Response to Special Interrogatories). The better reading of Section 6254.9 as a whole is thus the Sierra Club's: "computer software" is just that, and "computer mapping systems" means a set of interconnected or interoperable software. Neither

term encompasses data or information stored in electronic databases that can be segregated and disclosed.

B. Section 6254.9 Can Only Be Harmonized With the Public Records Act as a Whole If It Is Construed to Exclude Only Computer Software, and Not Also GIS Data, from Disclosure.

Statutory language must be read "with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." Pineda, 51 Cal. 4th at 529. A statute's various parts must be harmonized "in the context of the statutory framework as a whole." Los Angeles County Metro. Transp. Auth. v. Alameda Produce Mkt., LLC., 52 Cal. 4th 1100, 1107 (2011). Courts harmonize statutory provisions by "giving each provision full effect" to the extent possible. In re C.H., 53 Cal. 4th at 103. "An interpretation that renders related provisions nugatory must be avoided." Lungren v. Deukmejian, 45 Cal. 3d 727, 735 (1988). Here, the County's proposed construction of section 6254.9 cannot be harmonized with the broad disclosure provisions of the Public Records Act, whereas the Sierra Club's reading gives effect to each and every one of these provisions.

1. The County's Reading of Section 6254.9 Conflicts with the Expansive Disclosure Requirements of Sections 6252, 6253, and 6255.

Orange County's interpretation of Section 6254.9 cannot be harmonized with the Public Records Act as a whole. The statute's definition of "public records" is expansive and inclusive. Cal. Gov't Code

§§ 6252(e) ("'public records' includes 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"), 6253, 6255. Electronically stored files, in particular, are public records and must be disclosed in the electronic formats in which they are used, making it easier and less costly for the public to obtain them. Id. § 6252(g) ("writings" are public records regardless of how they are stored); § 6253.9 (electronically stored public records must be produced in electronic format); see also POST, 42 Cal. 4th at 288 n.3, 289 ("information stored in a computer database qualifies as a writing," and thus is a public record and "must be disclosed unless one of the Act's exemptions applies."). Moreover, agencies must disclose all public records that are "reasonably segregable" from exempt material. Cal. Gov't Code § 6253(a). Section 6254.9 only makes sense, and gives meaning to each of these other provisions, if the scope of its exclusion from disclosure is limited just to software itself and not the database files that can be read by software.

2. The County's Construction of Section 6254.9 Would Exempt All Electronic Geospatial Information from Disclosure, Despite Specific Requirements that It Be Disclosed in Section 6254.

Orange County's argument would apply to all geospatial data once converted into GIS compatible format, despite section 6254.9(d)'s admonishment that "[n]othing 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." The County's construction of section 6254.9 cannot be squared with other provisions of the Act that clearly treat geospatial location information as a "public record." These provisions require disclosure of "records" containing geographically referenced data, such as air quality data associated with stationary sources at known locations, Cal. Gov't Code § 6254.7, and information regarding the location of crimes and arrests. Id. § 6254(f). These records should not be suddenly excluded from public record status merely because an agency has chosen to store them in GIS-compatible formats.

Orange County's position also is inconsistent with provisions of the Public Records Act which indicate that the Legislature knew how to be specific when exempting geospatial data, such as "sacred places and records of Native American places, features, and objects," and "archaeological site information." Cal. Gov't Code §§ 6254(r), 6254.10 (exempting these geospatial records, while acknowledging that such information would still be a "record," albeit one not subject to disclosure). The Sierra Club's interpretation is thus superior to the County's because it retains the meaning of section 6254's specific exemptions and section 6254.9(d).

3. The Sierra Club's Construction of Section 6254.9 Is Readily Harmonized with Section 6253.9, which Requires Disclosure of Public Record Information in the Electronic Format Used by the Agency.

The County contends that it complied with the Public Records Act by offering to provide copies of individual land records in non-GIS format (Adobe PDF) or in hard copy. Answer Br. at 4. But the Sierra Club requested the OC Landbase in the GIS format used by the County. Trial Court Decision at 3; Stipulated Facts at 3. Orange County's construction thus impermissibly ignores section 6253.9, which requires disclosure of electronic information in the format used by the agency at the direct cost of copying it to a CD or DVD. Here, Orange County has conceded that the OC Landbase is information, and thus it must be disclosed in the database format in which the county uses it.

By contrast, the Sierra Club's reading of section 6254.9 can easily be harmonized with section 6253.9. Upon a request for an agency's computer software, the agency can lawfully claim that the software is not a public record and is, therefore, nondisclosable under sections 6254.9 and 6253.9. If, as here, the agency receives a request for GIS data or information, the agency may then determine, on the basis of the content, whether it falls within the scope of an express exemption. Cal. Gov't Code § 6254.9(d) ("Public records stored in a computer shall be disclosed as required by this chapter."). Here, the County has not asserted that any express exemption

applies on the basis of the OC Landbase's content, so it must disclose the OC Landbase in GIS format at the direct cost of duplication.

4. The Sierra Club's Construction of Section 6254.9 Also Is Readily Harmonized with Section 6253(a), which Requires Disclosure of Information that is Reasonably Segregable from Expressly Exempt or Excluded Information.

Finally, while the Sierra Club's reading of section 6254.9 is consistent with section 6253(a), the County's construction cannot be harmonized with that section, which forbids the withholding of records like the OC Landbase as long as they can be "segregated" from any excluded computer software. Where exempt and non-exempt information are maintained in the same place, the non-exempt information must be separated, or "segregated," from the exempt information and then disclosed. Cal. Gov't Code § 6253(a) ("Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.").[17] This requirement is robust; even where exempt and non-exempt information are contained in the same document, the non-exempt information must be disclosed. See CBS, Inc. v. Block, 42 Cal. 3d at 653 ("The fact that parts of

[17] In Northern Cal. Police Practices Project v. Craig, 90 Cal.App.3d 116, 124 (1979), the court held that "if material that is exempt from disclosure reasonably can be segregated from material that is not exempt, segregation is required." The Legislature amended the Public Records Act in 1981 to codify this requirement. See Johnson v. Winter, 127 Cal. App. 3d 435, 440 (1982); originally section 6257 until recodified at section 6253(a) by S.B. 143, 1998 Cal. Stat., ch. 620, § 10.

a requested document fall within the terms of an exemption does not justify withholding the entire document.").

Courts apply section 6253(a) in cases like the one at bar, where an agency claims that an exemption allows it to withhold more information than is expressly exempted. As the court explained in State Bd. of Equalization v. Superior Court, 10 Cal. App. 4th 1177, 1187 (1992):

> where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the [Public Records Act] to make public records available for public inspection and copying unless a particular statute makes them exempt.

(quoting ACLU Found. v. Deukmejian, 32 Cal. 3d 440, 453 fn.13 (1982) and citing Northern Cal. Police Practices Project, 90 Cal. App. 3d at 124). Section 6253(a) forbids an agency from attempting to broaden the scope of an exemption in order to withhold non-exempt information that is merely associated or co-located with exempt information. Citizens for a Better Env't v. Dept. of Food & Agriculture (1985) 171 Cal. App. 3d 704, 715 (requiring disclosure where the requested information related to pesticide monitoring and regulation, "grave public matters in which the public has a substantial interest in disclosure"). Only where requested information is inextricably intertwined with the exempt information, such that the costs of segregation substantially outweigh the benefits of disclosure, can the agency withhold the non-exempt information. Northern Cal. Police

Practices, 90 Cal. App. 3d at 124 ("Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and the judiciary. Nothing less will suffice, however, if the underlying legislative policy of the [Public Records Act] favoring disclosure is to be implemented faithfully.").

The courts have been clear that agencies cannot avoid disclosure by mingling exempt and non-exempt material. In Sonoma County, the court held that an agency must disclose requested data despite its storage and use in a "composite" computer database alongside confidential information. 198 Cal. App. 4th. at 990, 998, 1001-02. Petitioner had urged that "it is the fact that the information is in the records of the system that makes it confidential." Id. at 998. The court disagreed, holding that "[t]he particular details of how [ ] public information is filed, organized, or maintained by a public agency cannot, without express legislative direction, diminish its public character." Id. at 1000 (citing POST, 42 Cal. 4th at 290-91).

Similarly, in POST, this Court required disclosure of information from a computer database because it was "not among the items specifically enumerated in section 832.8 [of the California Penal Code] as components of a peace officer's personnel record." POST, 42 Cal. 4th at 289.

Petitioner had argued that the terms of the exemption for such records should be construed broadly to mean that "any information maintained in a file that also contains any of the information enumerated in

[the exemption] becomes [an exempt] personnel record." Rejecting that argument, this Court held that broadening the scope of an exemption to encompass information not expressly enumerated in the statutory text, merely because it was located in the same place as exempt information, "would serve no legitimate purpose and would lead to arbitrary results." Id. at 293. If such constructions were allowed, agencies could rationalize behavior that was plainly contrary to the letter and intent of the Public Records Act:

> the circumstance that a document was placed into a file that also contained the type of personal or private information listed in the statute would render the document [exempt], regardless of whether the document at issue was of a personal or private nature, and regardless of whether it was related to personnel matters.…
> we do not believe that the legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file that contains [specifically exempt information].

Id. at 291. The Court explained that the proper test is whether the content of the information, rather than the location in which it is stored, renders it exempt under an express provision of the PRA or similar statute. Id.; see also International Federation, 42 Cal. 4th at 346 (holding that a broad reading of the term 'related to' "would make confidential not only the kinds of information specified by the Legislature, but also any information from *any* file containing *any* item relating to confidential information. We do not believe the

Legislature intended to paint with so broad a brush.") (emphasis added).

Sonoma County and POST conclusively foreclose the County's construction of section 6254.9. Like the agencies in those cases, the County can cite no express exemption to support its position. Rather, it attempts to construe ambiguous statutory language broadly to encompass all information (GIS data) that happens to be associated with exempt information (computer mapping software developed by a state or local agency). As those cases make clear, such broad constructions must be rejected because they would allow agencies to circumvent the Public Records Act's disclosure requirement merely by hiding non-exempt information in allegedly exempt databases. Here, the County's construction of section 6254.9 would allow it to circumvent the statute's disclosure requirement simply by storing public record data in formats and databases that make it accessible by GIS software. Indeed, by paying the Gas Company to input official public records into the OC Landbase, the County attempted to do exactly that.

By contrast, the Sierra Club's interpretation of section 6254.9 can easily be harmonized with section 6253(a); while it excludes computer software "itself" from disclosure, it does not expressly exempt GIS data or "parts of" computer mapping systems, as Orange County argues. Thus,

GIS data must be disclosed to the extent it can reasonably be segregated from any GIS software that an agency has developed.

C. The County's Construction of Section 6254.9 Would Lead to Perverse Results and Contravene the Purpose of the Public Records Act.

A court "may consider the likely effects of a proposed interpretation" of a statute. Klein v. United States, 50 Cal. 4th 68, 77 (2010). "Where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation." Id. Here, Orange County's construction of section 6254.9 would limit access to public record information, create conflicts among statutory provisions, and beget new opportunities for agencies to circumvent the disclosure requirements of the Public Records Act. A court "may refuse to enforce an interpretation of an enactment that would produce absurd or perverse results that are at odds with the purpose and intent of the statute." Honig. v. San Francisco Planning Dept., 127 Cal. App. 4th 520, 528 (2005).

The County's construction would contravene the purpose of the Public Records Act, which is to promote "maximum disclosure of the conduct of governmental operations" through application of the disclosure requirement to "every conceivable kind of record that is involved in the governmental process." CBS, Inc. v. Block, 42 Cal. 3d at 651; San Gabriel Tribune, 143 Cal. App. 3d at 774. By the County's reasoning, an agency could easily transform data from a public record into a government secret

merely by choosing, at any time and for any reason, to convert it to a GIS-compatible format. Indeed, because almost any kind of electronic data with location information – from election results data to natural resource monitoring data to agency staff reports – can be gathered, stored, and used in a GIS-compatible format, the realm of public records could become vanishingly small under the supervision of secretive government officials.

Taken further and applied to the other terms in section 6254.9(b), the County's construction could void the Public Records Act for virtually all electronic records. If data that can be read by a "computer mapping system" is never subject to disclosure, surely the same is true for data that can be read by a "computer program" or a "computer graphic system" such as Microsoft Word, Corel WordPerfect, or Adobe Photoshop.

Because the County's construction of section 6254.9 would lead to such absurd and counterproductive consequences, it must be rejected. The OC Landbase should be disclosed as required by the Public Records Act.

IV. CONCLUSION

For the foregoing reasons, Advocates for the Environment respectfully requests that this Court set aside the decisions below and hold

that the OC Landbase – an electronically stored file of public information – be provided to the Sierra Club pursuant to its Public Records Act requests.

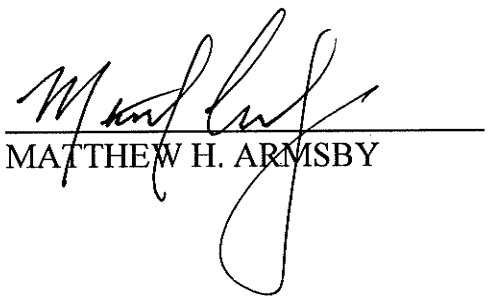
Dated: March 5, 2012

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

by _____
Matthew H. Armsby
Attorneys for Applicant-Intervenor Advocates for the Environment

CERTIFICATE OF COMPLIANCE

I certify that the text of this [Proposed] Brief of Amicus Curiae Advocates for the Environment in Support of Appellant Sierra Club is printed in 13-point Times New Roman font and contains 11,643 words, exclusive of tables and this certificate, as calculated by the word processing program used to generate it.



MATTHEW H. ARMSBY

PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, San Francisco, California 94305-8610.

On March 5, 2012, I served the foregoing **APPLICATION OF ADVOCATES FOR THE ENVIRONMENT FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AND [PROPOSED] AMICUS CURIAE BRIEF** on all persons and entities named below by placing true and correct copies thereof for Federal Express next-day delivery service, addressed as follows:

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named below by placing true and correct copies thereof in sealed envelopes, with postage thereon fully prepaid, in the United States Mail at Stanford, California , addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed March 5, 2012 at Stanford, California.

LYNDA F. JOHNSTON