No. S194708

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SIERRA CLUB,
Petitioner,

vs.

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

COUNTY OF ORANGE,
Real Party in Interest

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION 3, NO. G044138

ORANGE COUNTY SUPERIOR COURT
Honorable James J. Di Cesare
No. 30-2009-00121878-CU-WM-CJC

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF ACADEMIC RESEARCHERS IN PUBLIC HEALTH, URBAN PLANNING AND ENVIRONMENTAL JUSTICE AMICI CURIAE IN SUPPORT OF PETITIONER SIERRA CLUB

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APPLICATION AND STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae Professors Leah Brooks, J.R. DeShazo, Doug Houston, Paul Ong, Manuel Pastor, James L. Sadd, George Tita and Researchers Paul Bunje and Norman Wong make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.520, subd.(f). Some of the amicus represented here also filed an amicus brief to the proceeding below in the California Court of Appeal.

Amici are academic researchers who depend on continued access to public record data produced by the State of California and other public bodies in their research and advocacy efforts. Amici use geographic land parcel data in a format compatible with Geographic Information System software ("geographic parcel data" or "GIS parcel data") obtained from counties and the State of California for research and advocacy in public health, environmental justice and urban planning.

Geographic parcel data are particularly useful for urban planning because the data link specific attributes of the property—such as number of rooms in the house, age of the structure, and square footage—with geographic location and shape of the parcel. These historical data, which include changes in use and property value, are invaluable in identifying trends in economic development. Geographic parcel data, when combined

with other data sources, can be used to study gentrification, air pollution, environmental justice, epidemiology, criminology and land use.[1]

For example, in a study for the California Air Resources Board,[2] amici Manuel Pastor and James Sadd conducted a statewide analysis of the association between ambient pollution exposures and birth outcomes. They developed a screening method to identify areas of concern due to the cumulative impacts of hazard proximity, air pollution, exposure and estimated health risk, and social vulnerability. Their study used GIS parcel data in combination with census data and locations of potentially hazardous facilities in order to highlight neighborhoods that, due to cumulative impacts of hazardous land uses, may require enhanced regulatory attention. The California Air Resource Board's biorefinery guidance and proposed

[1] See, e.g., Boarnet et al., Fine Particulate Concentrations Near Arterial Streets: The Influence of Building Placement and Wind Flow (2010) [U. of Cal. Trans. Ctr. UCTC-FR-2010-24] [using Los Angeles County parcel data in a study of how fine particulates concentrate in dense urban environments]; Wu et al., *Spatial analysis of bioavailable soil lead concentrations in Los Angeles, California* (2010) 110 Envtl. Research 309 [correlating the distribution of lead concentrations with land-use data from the Southern California Association of Government and parcel data from Los Angeles County]; Wartell, *Residency Restrictions: What's Geography Got to Do with It?* (May 2009) 2 GEO. & PUBLIC SAFETY 1 [describing the use of land parcel data and GIS in San Diego's study the effects of sex offender residency restrictions].

[2] Pastor Jr. et al., Air Pollution and Environmental Justice: Integrating Indicators of Cumulative Impact and Socio-Economic Vulnerability into Regulatory Decision-Making (2010) [ARB Contract # 04-308] <http://www.arb.ca.gov/research/apr/past/04-308.pdf>.

cap-and-trade regulations discussed the study's ability to identify communities that may be disproportionately impacted by air pollution.[3]

Amicus Professor Leah Brooks taught at the University of Toronto and is currently working as an economist on the Board of Governors of the Federal Reserve System. She recently used geographic parcel data to analyze Los Angeles' Business Improvement Districts.[4] Professor Brooks is currently researching urban land markets by following sales, over an eleven-year period, of the 2.2 million land parcels in the Los Angeles County geographic land parcel data set.[5] She appears here in her own capacity and does not represent the views of the Board of Governors of the Federal Reserve.

Amicus Researcher Paul Bunje is the executive director of the UCLA Center for Climate Change Solutions and managing director of the Los Angeles Regional Collaborative for Climate Action and Sustainability. He uses GIS parcel data in his work to inform urban planners on necessary responses and adaptations to climate change challenges. He also uses GIS parcel data to assess patterns of energy production and use in relation to

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[3] Cal. Air Res. Board, Air Quality Guidance for Siting Biorefineries in California (Nov. 2011) § VII <http://www.arb.ca.gov/fuels/lcfs/bioguidance/biodocs/finalbiorefineryguidenov2011.pdf>; Cal. Air Res. Board, Proposed Regulation to Implement the California Cap-and-Trade Program, Staff Report: Initial Statement of Reasons (Oct. 2010) §§ VII-3 to VII-V <http://www.arb.ca.gov/regact/2010/capandtrade10/capisor.pdf>.

[4] Brooks & Strange, *The Micro-Empirics of Providing Collective Goods: The Case of Business Improvement Districts* (2011) 95 J. PUBLIC ECONOMICS 1358.

[5] Brooks & Lutz, *Do We Need Eminent Domain? An Empirical Investigation of Urban Land Assembly* (U. of Toronto Working Paper, July 2011).

land use patterns and economic activity. Access to various GIS data, including parcel data, is critical for his work in determining existing energy use patterns and for evaluating potential changes to the energy system that might impact greenhouse gas emissions.

Amicus Professor J.R. DeShazo is the director of the Luskin Center for Innovation and the Lewis Center for Regional Studies at UCLA. He is an associate professor and co-chair of the Department of Public Policy in the School of Public Affairs at UCLA. He uses geographic parcel data to study urban planning and development, mapping density shifts, identifying underserved communities for access to parks, transit, internet, hospitals and daycare, and locating gang territories in communities. Recently, he created a Los Angeles solar rooftop map that used geographic parcel data to identify properties with high solar energy potential.[6]

Amicus Professor Doug Houston teaches planning, policy and design at the School of Social Ecology at University of California, Irvine. His research focuses on the environmental and health implications of urban development and transportation systems. His studies, in collaboration with amicus Paul Ong, have used geographic traffic volume data along with census data to model toxic vehicle exhaust pollutants near child care

[6] DeShazo & Matulka, UCLA Luskin Ctr., Bringing Solar Energy to Los Angeles (2010) <http://www.labusinesscouncil.org/online_documents/2010/Consolidated-Document-070810.pdf>.

centers.[7] Recently, he has used geographic parcel data to model air pollution exposure along the ports of Los Angeles and Long Beach.[8]

Amicus Professor Paul Ong researches Urban Planning, Social Welfare and Asian American Studies at UCLA. He uses land parcel and other GIS data to study the effect of neighborhood economies on welfare and work, minority community economic development, and the healthcare worker labor market. Professor Ong has previously advised the U.S. Bureau of the Census and the South Coast Air Quality Management District.

Amicus Professor Manuel Pastor is the director of University of Southern California's Program for Environmental and Regional Equity (PERE) and director of USC's Center for the Study of Immigrant Integration (CSII). His research on economic, environmental and social conditions facing low-income communities in the United States requires

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[7] Houston et al., *Proximity of Licensed Child Care Facilities to Near-Roadway Vehicle Pollution* (2006) 96 AM. J. PUBLIC HEALTH 1611; Ong et al., *Policy and Programmatic Importance of Spatial Alignment of Data Sources* (2006) 96 AM. J. PUBLIC HEALTH 499; see also Houston et al., *Structural Disparities of Urban Traffic in Southern California: Implications for Vehicle-Related Air Pollution Exposure in Minority and High-Poverty Neighborhoods* (2004) 26 J. URBAN AFFAIRS 565 [incorporating spatial measures of land use, racial segregation, housing, land use, job distribution and transportation access into an analysis of uneven traffic distribution in Southern California].

[8] Wu et al., *Exposure of $PM_{2.5}$ and EC from diesel and gasoline vehicles in communities near the Ports of Los Angeles and Long Beach, California* (2009) 43 ATMOS. ENV'T 1962. Professor Houston's studies in progress include one that uses the same parcel data to consider environmental justice concerns with vehicle pollution near the ports and another that will look at the impact of traffic and pollution on home sales and foreclosures.

access to a wide variety of GIS data, particularly data at the regional and parcel level.

Amicus Professor James L. Sadd teaches physical geology at Occidental College. In his courses, students evaluate geologic and environmental data using computer modeling, GIS, GPS and other technologies. Professor Sadd evaluates patterns of human exposure to various urban environmental hazards, for which access to GIS parcel data is an invaluable resource.

Amicus Professor George Tita teaches courses in the Department of Criminology, Law and Society at the University of California, Irvine that pertain to communities and crime, urban violence, spatial analysis and geographic information systems. His research focuses on understanding the mechanisms responsible for crime "hot spot" formation; designing and evaluating crime reduction strategies; modeling diffusion of crime and mobility of offenders across communities; and exploring how crime impacts local housing prices as well as local business decisions.[9] In all of these instances, spatially-referenced data (such as crime, housing transactions and offender/victim place of residence) play a major role in

[9] See, e.g., Mohler et al., *Self-exciting point process modeling of crime* (2011) 106 J. AM. STAT. ASSOC. 100; Short et al., *Dissipation and displacement of crime in reaction-diffusion models of crime* (2010) 107 PROC. NAT'L ACAD. SCI. 3961; Griffiths & Tita, *Homicide in and Around Public Housing: Is Public Housing a Hotbed, a Magnet, or a Generator of Violence for the Surrounding Community?* (2009) 56 SOCIAL PROBLEMS 474.

informing both our understanding of where crime occurs as well as potential policing interventions.

Amicus Researcher Norman Wong is the IT/Data Manager and GIS Program Manager at the UCLA Lewis Center for Regional Policy Studies. He is directly involved in GIS research across various disciplines (including urban planning, policy, transportation and public health) and the design and development of publicly accessible internet-based mapping software. Recently, Mr. Wong has determined impediments to fair housing for areas in California (ongoing), conducted a "smart growth inventory" to determine the physical landscape of the areas around the City of Los Angeles' current and planned transit stations, and analyzed data to estimate the infill potential of industrial properties in Los Angeles County.[10] All of these projects would not be possible without the use of parcel-level data. Mr. Wong has contacted the Orange County Assessor's office in the past to obtain parcel shapefiles for use in various research activities. At $1 per parcel, the cost was above and beyond the budget of the entire project.

This amicus curiae brief will assist this Court's decision in several respects. First, amici have experience working with counties throughout California to obtain and work with geographic parcel data similar to that at issue in this case. Second, amici use such data to further academic research

[10] Richman et al., Los Angeles County Urban Infill Estimation Project Phase II (2009).

and advocacy efforts in a wide variety of public health and environmental health concerns, in policy areas beyond the purview of Petitioner Sierra Club. Third, this brief discusses aspects of the statutory exemption that the parties have overlooked.

Accordingly, amici respectfully ask this Court to grant their application for permission to file this brief.

Dated: March 2, 2012 By: _____

M. Rhead Enion

Counsel for Academic Researchers in Public Health, Urban Planning and Environmental Justice Amici

AMICI CURIAE BRIEF

I. INTRODUCTION

In 1990, Orange County provided the Gas Company with public parcel data so that the Southern California Gas Company (the "Gas Company") could build a "Digital Land Base Map of Orange County" (the "OC Landbase" or "Landbase"). (Agreement between the County of Orange and Southern California Gas Company dated June 26, 1990, 2 PA 356.) Despite not earning a profit from licensing the OC Landbase at least from FY2004-05 onwards (Spreadsheet prepared by Gordo Pardee, 2 PA 410), Orange County chose to purchase all rights to the Landbase from the Gas Company in 2007. (Agenda Staff Report, 2 PA 376). The Orange County Board of Supervisors believed that by purchasing the Landbase, it could "determine the cost and terms charged to other users . . . or provide the Landbase mapping system to users at no cost." (*Id.* at p. 374.)

In 2007, 2008 and 2009, the Sierra Club requested from Orange County an electronic copy of the geographic data used in the Landbase per the California Public Records Act. (June 21, 2007 letter from Sierra Club, 1 PA 16; Feb. 9, 2009 letter from Sierra Club's attorney, 1 PA 69.) When Orange County denied that request, Sierra Club sought a writ of mandate from the trial court. The Superior Court denied the Sierra Club's petition, based on the erroneous legal conclusion that the geographic data are exempt

from disclosure because they are part of a "computer mapping system." (*Sierra Club v. Super. Ct.* (Aug. 3, 2010, No. 30-2009-00121878) [Stmt. of Decision, 5 PA 1347 to 62].) The Court of Appeal affirmed. (*Sierra Club v. Super. Ct.* (2011) 195 Cal.App.4th 1537 [hereinafter "Court of Appeal Opinion"].)

The issue before this court is whether the California Public Records Act ("PRA") (Gov. Code §§ 6250–6276.48) exempts from disclosure geographic data associated with publicly available land parcel data that, when saved in a Geographic Information System ("GIS") compatible file format, can be opened and manipulated by GIS software.

This brief argues that geographic data stored on a computer must be disclosed in accordance with the PRA, regardless of the format of that data. Part II describes the geographic parcel data at issue in this case and explains its importance for research in public health and environmental justice. The rest of the brief is devoted to developing a consistent, logical interpretation of the section 6254.9 exemption.

Section 6254.9 of the PRA reads in its entirety:

> (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.

Applying the exemption to this case hinges on the interpretation of "computer mapping systems" in section 6254.9, subdivision (b) and the import of section 6254.9, subdivision (d). Computer software, as that term is commonly understood, is distinct from computer data. (See Part III.A.) Subdivision (b) lists "computer mapping systems" not as the definition of "computer software" as the Court of Appeal found, but rather as an illustrative example. As explained in Part III.B, a computer mapping system should be considered a set of computer software programs working together to analyze geographic data.

Subdivision (d), by protecting the public record status of computer-stored information, constrains the definitions of computer software and computer mapping systems to preclude data. (See Part III.C.) While a computer mapping system is exempt, the underlying geographic data that may be manipulated by that system is not exempt. This interpretation is consistent with *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, which held that the section 6254.9 exemption is meant to protect software copyright and cannot be used to assert a proprietary

interest in otherwise publicly available geographic land parcel data. (*Id.* at pp. 1335–36; see Part IV.) This interpretation also respects the constitutional mandate to favor public access to information. (See Part V.) It also respects the legislative purpose of the PRA and the legislative history of the exemption, in which the legislature removed the term "data bases" from the proposed exemption. (See Part VI.)

The Court of Appeal's interpretation of section 6254.9, on the other hand, cannot convincingly reconcile subdivision (d) with the rest of section 6254.9. If upheld, the Court of Appeal's Opinion would exempt a wide swath of computerized data based merely on the format of that data, in apparent disregard of subdivision (d)'s mandate to the contrary. In addition, the Court of Appeal made two reversible errors in its statutory analysis. The Court of Appeal misapplied the California Constitution's mandate favoring public access. (See Part V.) And the Court of Appeal failed to consider the purpose expressed by the Legislature in establishing the Public Records Act. Instead, it erroneously gave weight to the purpose of certain supporters of the bill that created the section 6254.9 exemption. (See Part VI.)

For these reasons, this Court should reverse the Court of Appeal opinion and hold that section 6254.9 does not apply to geographic data such as that contained in the OC Landbase.

II. GEOGRAPHIC PARCEL DATA ARE AN IMPORTANT PUBLIC RESOURCE

As described by Orange County, its OC Landbase is a tool by which it inputs and manipulates an underlying set of spatial data and associated land parcel information (together, the "geographic parcel data").[11] Sierra Club has requested access only to that underlying geographic parcel data. That geographic parcel data, along with similar data sets, are used by amici to further California's understanding of public health, urban planning and environmental justice phenomena. If not reversed, the Court of Appeal Opinion would place future research into these important public issues in California in serious jeopardy.

A. The geographic data requested by Sierra Club are distinct from the computer programs used to manipulate and analyze that data.

Terminology is particularly important in this case. Geographic data are "[i]nformation describing the location and attributes of things, including their shapes and representation." (ESRI, GIS Dictionary, *geographic data*.[12]) Computer programs that organize, display and allow the user to analyze geographic data are typically referred to as Geographic Information System ("GIS") software. (Declaration of Bruce Joffe, 3 PA 527:23–31; Declaration of Amanda Recinos, 3 PA 537:8–11; see also ESRI, GIS

[11] Part III.A explains in more detail how Orange County defines its Landbase.
[12] <http://support.esri.com/en/knowledgebase/GISDictionary/term/geographic%20data>

Dictionary, *GIS*.[13]) Geographic data that are saved in a GIS-compatible file format can be opened and manipulated by GIS software. Aligning geographic data to a specific map coordinate system is known as georeferencing. (See ESRI, GIS Dictionary, *georeferencing*.[14])

The GIS software used to manipulate geographic parcel data allows the user to manage and manipulate three types of data: (1) the geographic coordinates describing the land parcels; (2) the parcel number; and (3) the parcel information (occupant size, residence type, etc.) ("metadata"). The parcel number links the geographic coordinates to the parcel information, creating a set of "geographic parcel data." The parcel information, but not the geographic information, are available in paper parcel records.

[13] <http://support.esri.com/en/knowledgebase/GISDictionary/term/GIS>
[14]<http://support.esri.com/en/knowledgebase/GISDictionary/term/georeferencing>

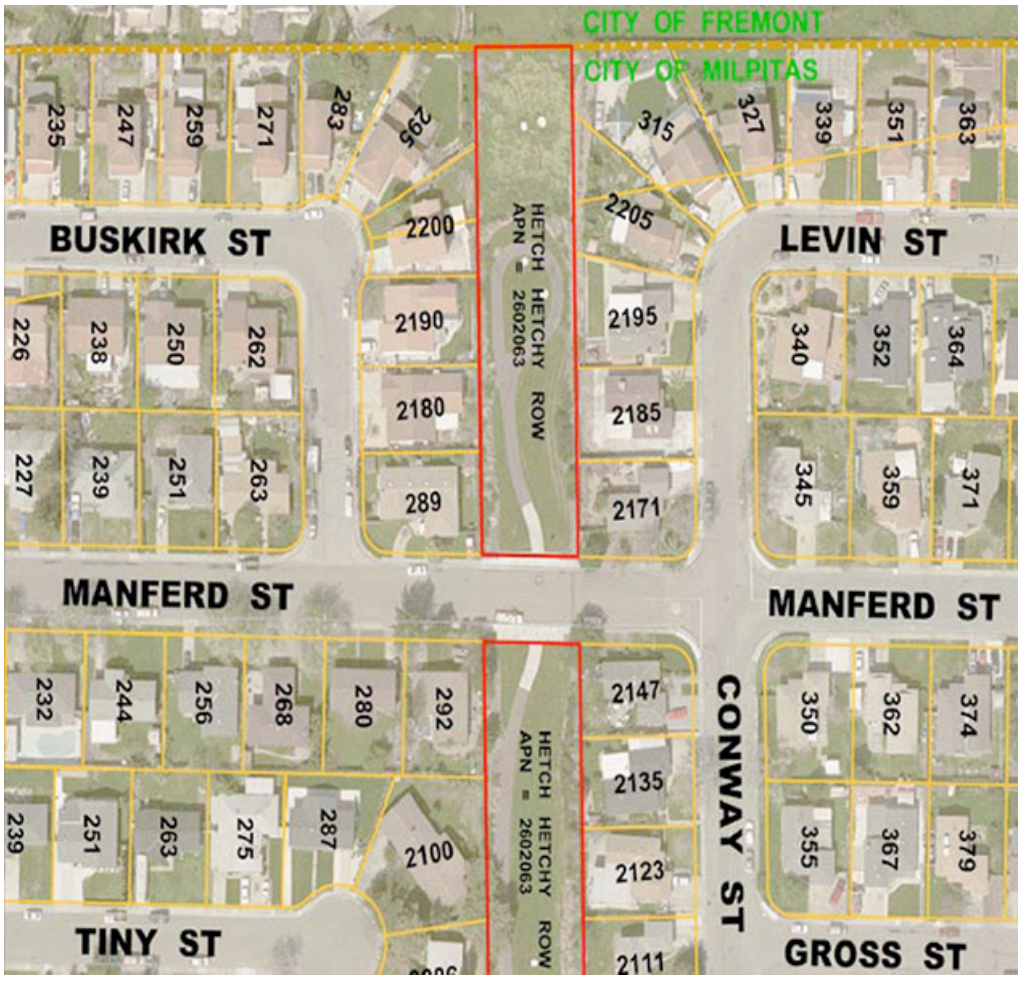
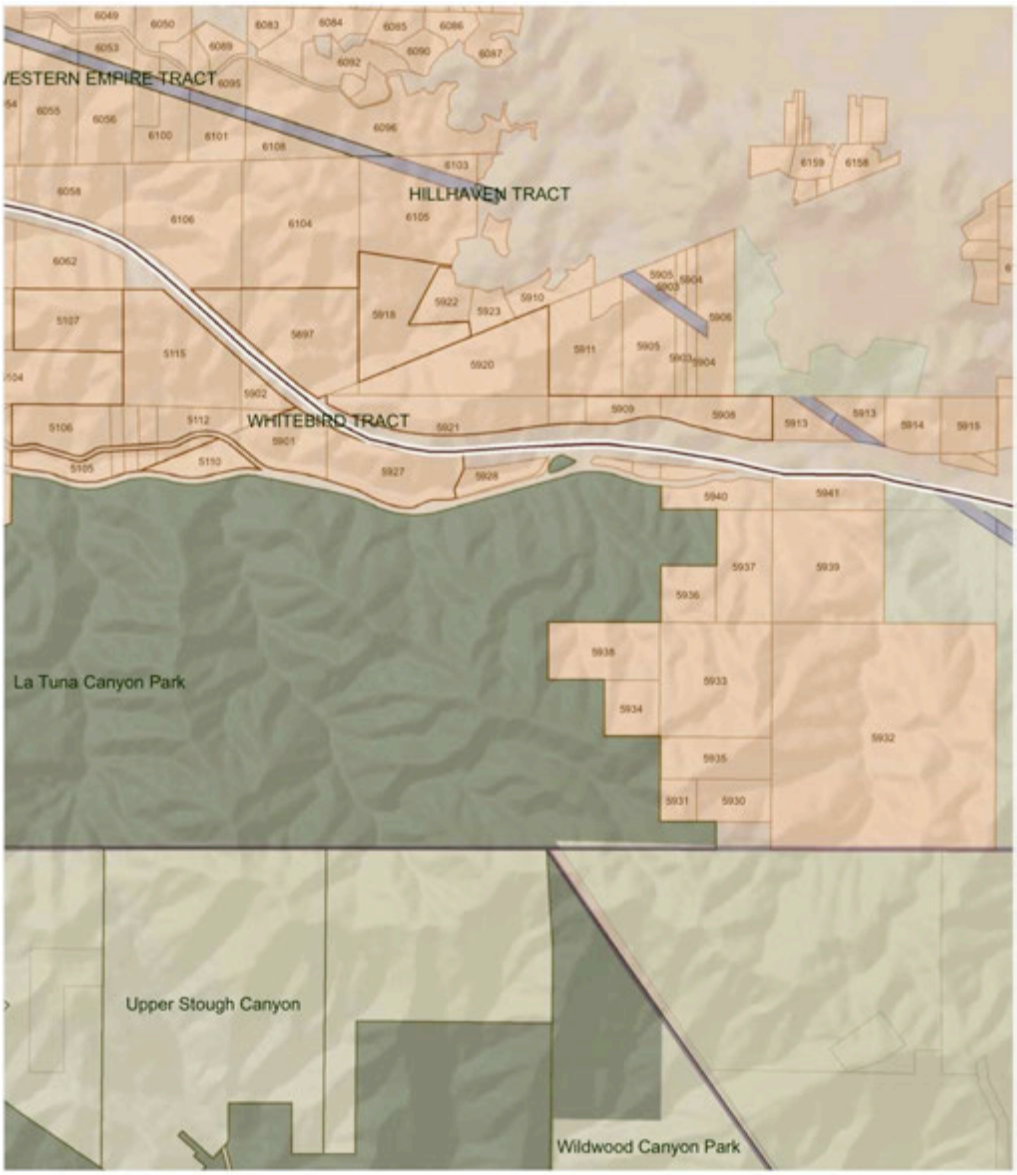


Figure 1: Land parcel boundaries in Santa Clara, California transposed on to an aerial photograph. (*From* Zetter, *Officials Hoard Valuable Databases Funded by Taxpayers* (Mar. 19, 2009) Wired <http://www.wired.com/politics/onlinerights/news/2009/03/sunshine>.)

Take, for example, the image in Figure 1, which displays land parcel boundaries in Santa Clara County, California, transposed onto an aerial photograph. The rectangles and other polygons are created from the geographic coordinates. The parcel number is also displayed, and would allow the user to relate this image to specific parcel information. To create this image, the user took these data and, using GIS software like ESRI's ArcGIS, overlaid the visual representation onto a photograph.



PA-000113

Figure 2: Example portion of the Verdugo Hills Open Space map, created using the Los Angeles County Parcel Map Data. (1 PA 113.)

A similar set of geographic parcel data, without the aerial photo, has been overlaid onto a basic topographical map in Figure 2. Another user could take the same data used in Figures 1 or 2 and overlay it using Google Earth, for example. A public health researcher could take the same data and produce an air pollution model by combining it with geographic information on regional air pollution, without using GIS software at all.

B. The geographic data in this case—and similar geographic data sets—are essential public resources

All the amici use geographic land parcel data and similar geographic data sets to make valuable contributions to California's public health, urban planning and environmental justice efforts. Amici to this brief use third-party software and their own, independently developed software, to analyze, manipulate and visualize geographic land parcel data in combination with other GIS layers.

For example, amicus J.R. DeShazo and the UCLA Luskin Center used the Los Angeles land parcel database in combination with data on tree shading and solar availability to estimate the feasibility of distributed solar energy installations in Los Angeles. (DeShazo & Matulka, Bringing Solar Energy to Los Angeles (2010) appx. 1, p. 38.6.) Amicus Manuel Pastor and James Sadd used GIS parcel data along with census and other data to identify neighborhoods at high risk of serious heath problems correlated with air pollution. (Pastor et al., Air Pollution and Environmental Justice: Integrating Indicators of Cumulative Impact and Socio-Economic Vulnerability into Regulatory Decision-Making (2010) [ARB Contract # 04-308].) Linking GIS-formatted land parcel data with data on pollution sources and census data is a common and valuable research tool in the environmental justice community.

A 2005 paper published in the *International Journal of Health Geographics* described the importance of geographic parcel data for assessing air pollution exposure. (Setton et al., *Opportunities for using spatial property assessment data in air pollution exposure assessments* (2005) 4 Int'l J. Health Geographics 26.[15]) The paper noted that individual parcels have a much finer spatial resolution than comparable spatially referenced data, such as census data. (*Id.* at p. 27.) This finer spatial resolution allows researchers to model air pollution exposure at neighborhood and city-block levels, instead of the more typical regional level. (*Id.* at p. 29.) Work by amici has taken advantage of this neighborhood scale in geographic parcel data to model the effects of transit pollution on schools, bring to light correlations between low-income areas and concentrated areas of air pollution, and model the potential of individual residences for distributed solar energy.

Parcel data are also critical for assessing climate change impacts that have a high spatial resolution, such as heat, precipitation, pollution and disease. Amicus Paul Bunje, for example, depends on high-resolution geographic data in his work to assess responses and adaptation to climate change in urban areas such as Los Angeles. Planning responses to climate

[15] <http://www.ij-healthgeographics.com/content/4/1/26>. See also Stroh et al., *A study of spatial resolution in pollution exposure modelling* (2007) 6 Int'l J. Health Geographics 19 [finding the need for a spatial resolution of 400 meters or better in urban areas in order to correctly estimate household exposure levels].

change and extreme events requires a clear understanding of existing land uses, infrastructure, and vulnerabilities in order to evaluate risk and response to differentially experience climate change impacts.

The Court of Appeal downplayed the impact of its decision, observing that while the section 6254.9 exemption would exclude a GIS database, it would not exclude just any object that "contains some geographic data." (Court of Appeal Opinion at p. 1554 [slip op. at p. 20].) As discussed in Part III below, nothing in the Opinion leads to such a fine distinction between a GIS database and geographic data. Furthermore, even the exclusion of only geographic land parcel data sets would be a serious blow to research in the environment and public health in California. The Appellate Opinion concedes as much when it concludes that "increasing use of GIS data in our society" may require the Legislature to eventually reconsider the section 6254.9 exemption. (*Id.* at pp. 925–26 [slip op. at p. 21].)

Practically every California county maintains a land parcel GIS data set. Local and state agencies use GIS software to analyze land parcel data and other geographic data to make decisions for land use planning, legislative redistricting and environmental assessments, to name just a few. (See generally O'Looney, Beyond Maps: GIS and Decision making in Local Government (2000).) The California Emergency Management Agency is working towards a common framework for geographic data that

would facilitate, among other things, sharing of land parcel data across the state. (Cal. Chief Info. Officer, Final Data Availability Document: California Minimum Essential Datasets (MED) (2009).[16]) California maintains a clearinghouse of geospatial data freely available for download. (Cal-Atlas Geospatial Clearinghouse[17]) and encourages regional sharing of geospatial data throughout the state (Cal. Geographic Information Association, Regional GIS Collaboratives[18]).

At present, forty-seven counties offer public access to their geographic land parcel data sets for less than $300 (basically, the administrative cost of duplication). (Declaration of Bruce Joffe, 3 PA 533:17–26.) The Court of Appeal Opinion allows every California county to revisit those access fees and charge as much as—or more than—the $375,000 access fee at issue here.[19] Such fees discourage research in public and environmental health in California, to the detriment of amici and the citizens of California.

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[16] <http://www.cio.ca.gov/wiki/GetFile.aspx?File GIS%2FMEDS%2FData_Availability_FINAL_Dec14_2009.pdf>

[17] <http://atlas.ca.gov>

[18] <http://cgia.org/regional-gis-collaboratives>

[19] Recently, Orange County decreased its fee for access to "the OC Landbase in a GIS file format," depending on use, to between $1,000 and $5,000. (Resolution of the Board of Supervisor of the County of Orange (Dec. 13, 2011) [Resolution No. 11-196, Item No. 37] <http://www.calpubrec.org/oclawsuit/OCResolution11-196.pdf>.) Orange County still requires an end-user license to restrict further distribution and use of the OC Landbase. (*Ibid.*) For purposes of the PRA, this fee still exceeds the fee for comparable land parcel databases from some other California counties and likely far exceeds the cost of duplication. (*Cf.* Declaration of Bruce Joffe, 3 PA 533:17–26 [describing typical county fees].)

III. THE INTERPRETATION PUT FORWARD BY ORANGE COUNTY AND THE COURT OF APPEAL IS INCONSISTENT WITH SUBDIVISION (d) AND WOULD EXEMPT AN OVERLY BROAD SET OF DIGITIZED INFORMATION

Orange County's argument in this litigation (and the Court of Appeal's interpretation) can be broken down into a series of conceptual steps:

> 1. The Orange County geographic parcel data can be analyzed, viewed, and managed with GIS software.
>
> 2. Because it can be analyzed, viewed, and managed with GIS software, the Orange County geographic parcel data must therefore be considered part of a Geographic Information System.
>
> 3. A Geographic Information System is exempted under section 6254.9 because it is a "computer mapping system."
>
> 4. Because the geographic parcel data is part of a computer mapping system, its exempt status under 6254.9 can only ever be determined with reference to the system as a whole.

The parties have stipulated step one. (Stipulated Facts Nos. 12 and 14, 5 PA 1083.) Orange County argues that steps two and three are "facts" resolved by the Superior Court. (Answer at 9.) Sierra Club disputes that interpretation. (Reply at pp. 1–5.) Sierra Club primarily objects to step two, arguing that GIS software is distinct from geographic parcel data and that section 6254.9 honors that distinction. (Opening Brief at p. 16.) The Court of Appeal held that a "computer mapping system" means both the GIS computer program and the underlying data, thus giving credence to

steps two and three. (Court of Appeal Opinion at pp. 1549, 1554 [slip op. at pp. 13, 20].)

Steps two and four are erroneous logical leaps unsupported by either the PRA or common sense. Defining data in a GIS-compatible file format to be part of a GIS (step two) leads to the unfortunate conclusion that all data files, be they Microsoft Word, Adobe PDF or ESRI GIS files, should be exempted as part of software programs under section 6254.9. Broadly defining computer mapping systems to include software-plus-data, as the Court of Appeal did, still exempts all data files that could be part of that system. And applying the section 6254.9 exemption as if Sierra Club requested the entire mapping system, instead of considering the data alone (step four) violates the requirement in subdivision (d) that the public status of information does not change when stored in a computer.

A. The fact that a type of computer file can be opened and manipulated by a computer program does not make that computer file a part of that computer program

This case centers on a conceptual problem: if a specific computer program (here, GIS software like ESRI, ArcMap or Google Earth) can open a type of data file, is that data file a part of that program? The answer is no. Section 6254.9 exempts computer software.[20] (Gov. Code § 6254.9, subd.

[20] Part III.B explains that the linguistic switch to "computer mapping system" does not affect this analysis because the same basic question remains: should data be considered part of a mapping system simply because it can be manipulated by that system?

(a).) Computer data, such as the geographic parcel data at issue here, cannot be lumped in with computer software simply because that software may be capable of manipulating that data.

In this litigation, the parties have not always clearly distinguished between the OC Landbase and the data. The data are digital information stored in a GIS software-compatible file format that can be manipulated and visualized using GIS software. It is the data that Sierra Club requests under the PRA. (June 21, 2007 letter form Sierra Club, 1 PA 16 [seeking "[p]arcel data"]; Feb. 9, 2009 letter from Sierra Club's attorney, 1 PA 69 [seeking a "copy of a specific computer data file"].)

As stipulated by the parties, "[t]he Orange County Landbase is a parcel-level digital basemap identifying over 640,000 parcels in Orange County with geographic boundaries of parcels, Assessor Parcel Numbers [and] street addresses, with links to text information such as the name and addresses of the owner(s) of the parcels." (Stipulated Facts No. 15, 5 PA 1083.) The OC Landbase also contains no computer software, as that term is commonly understood. (*Compare* Stipulated Facts No. 20, 5 PA 1083 ["The OC Landbase . . . does not contain programs, routines, and symbolic languages that control the functioning of computer hardware . . . ."] *with* Am. Heritage Dict. (4th ed. 2004), p. 1652 [defining software as "programs, routines and symbolic languages that control the functioning of hardware"].) One might assume, then, that the OC Landbase is simply

geographic parcel data that Orange County manipulates and analyzes using separately licensed GIS software. (See Court of Appeal Opinion at p. 1549 [slip op. at 14] [noting that Orange County licenses its mapping software from third parties]; Response to Special Interrogatories No. 3, 3 PA 563.)

Distinguishing between computer data files and computer programs is not without difficulty. At a high level, computer programs ("software") are just a series of computer files that contain instructions for running the program. Data files also contain "instructions" that a program interprets to display the data. A version of this brief is saved in a Microsoft Word data file. That data file contains information that allows Microsoft Word, a computer program, to display the words of the brief on the screen and along with bolded headings, for example. Microsoft Word understands how to display the brief because it references separate set of computer files containing the relevant computer code.

One distinction between data and programs is that computer programs contain "programs, routines and symbolic languages that control the functioning of computer hardware and direct its operations." (Stipulated Facts No. 20, 5 PA 1083.) Data files, such as the OC Landbase and the Microsoft Word data file containing this brief, contain no such programs or routines. (See *ibid*; cf. Declaration of Bruce Joffe, 3 PA 532:8–22 [describing the parallels between GIS software and word processing software].)

A more crucial distinction is what happens when one opens a data file versus opening a computer program on a computer. The data file does nothing standing alone; it must be associated with a computer program to be opened or "run." This brief, saved as a Microsoft Word data file, could be opened by Microsoft Word. It could also be opened by any number of programs, such as OpenOffice, that can understand Microsoft Word data files. The computer program, on the other hand, runs its associated code without being associated with another computer program. Opening Microsoft Word means you are now running Microsoft Word. There is no real sense in which other computer programs "open" Microsoft Word.

Orange County appears to construe its Landbase as part of a collective computer system, used to input and manipulate geographic and related data. That is, Orange County broadly defines its Landbase as if it contains computer programs, despite its stipulation to the contrary. At the same time, Orange County nevertheless distinguishes its Landbase from the underlying geographic parcel data.[21] According to the Deputy County Surveyor for Orange County, "[t]he Landbase is . . . used for capturing, sorting, checking, integrating, manipulating, analyzing and displaying *data* about land and its use, ownership, and development. The Landbase is a

[21] Orange County Board Resolution 11-196 similarly distinguishes between the Landbase and the geographic data: "the OC Landbase is maintained in a GIS file format, which allows the geographic data stored in the OC Landbase to be analyzed, viewed, and managed with GIS software." (Resolution of the Board of Supervisor of the County of Orange, *supra*.)

tool to incorporate, visualize, and analyze relationships between different types of *data* . . . ." (Declaration of Robert Jelinek, 2 PA 308 [emphasis added].) The agreement between Orange County and Southern California Gas Company similarly defines "Landbase" as a "computer mapping system" that can "receive, manipulate, analyze or display *Source Data* . . . ." (Agreement D07-170, Dec. 4, 2007, 1 PA 129 [emphasis added].) In other words, Orange County believes its Landbase is a tool by which it manipulates and analyzes a distinguishable set of geographic data.

Orange County and the Court of Appeal Opinion muddle the distinction between data and computer programs in order to reach their erroneous conclusion regarding the section 6254.9 exemption. Orange County exploits the very broad term, Geographic Information System, to try to inextricably link data with its desired definition of computer mapping system. Accordingly, Orange County defines GIS as "an integrated collection of both software and data used to view and manage information about geographic places, analyze spatial relationships and model spatial processes." (Answer at p. 22–23.) In other words, Orange County argues that GIS *is* data.

But the same definition that Orange County quotes above goes on to say that GIS "provides a framework for gathering and organizing spatial data and related information so that it can be displayed and analyzed." (A to Z GIS (Tasha Wade & Sheily Sommer, eds. 1996), 5 PA 1307; see also

GIS Needs Assessment Study, attached to Petitioner's Request for Judicial Notice as Exhibit 2 [describing GIS as "an organized collection of computer hardware, software, geographic data and personnel designed to efficiently capture, store, update, manipulate, analyze, and display all forms of geographically referenced information."].) In other words, GIS *operates on* geographic data. GIS definitions thus imprecisely distinguish between computer program and computer data. Interpreting section 6254.9 requires, however, a greater level of precision.

Orange County's definition of GIS is linguistically problematic. While computer programs can be used to view, manage, analyze and model, computer data cannot. Microsoft Word could be used to view and manage this brief, but the Microsoft Word data file for this brief is of little use standing alone. Data lack the ability to do actions; data cannot view, data cannot manage and data cannot model.

The Court of Appeal Opinion appears to miss this pertinent distinction altogether. The Court of Appeal looks to the definition of GIS mapping system in the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989: "a geographic information system that collects, stores, retrieves, analyzes, and displays environmental geographic data in a data base that is accessible to the public." (Court of Appeal Opinion at p. 1551 [slip op. at p. 16] [quoting Health & Safety Code § 25299.97, subd. (a)(3)].) The Court of Appeal quotes this definition as evidence that

the database is integral to the GIS mapping system. (*Ibid.*) But in fact this definition supports the alternative interpretation: the GIS as defined is operating on geographic data by collecting, analyzing and displaying that data.[22] The geographic data is integral only in the way that a Microsoft Word data file is integral to Microsoft Word: the software program is not particularly useful if it cannot open, manipulate, and save document data files.

By broadly defining GIS to include data that could be opened by a GIS software program, Orange County's interpretation strips the term "GIS" of interpretive power to make sense of the section 6254.9 exemption. According to Orange County, "[t]he OC Landbase data, which is in a GIS file format, is part of a computer mapping system." (Answer at p. 23.) The phrase "in a GIS file format" is doing all the work in Orange County's argument. Unfortunately, there is no one GIS file format. For example, ESRI's ArcGIS software can read, import and export dozens of file formats, including text files, Microsoft Excel files, Microsoft Access files, and Adobe Illustrator files.[23] According to Orange County's logic, files in all these formats could be exempt from public records requests as being

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[22] The Court of Appeal makes the same error in emphasizing the testimony of Bruce Joffe, who previously defined "GIS" as a "collection of computers, software, databases, and data that enable geospatial data to be received, manipulated, displayed, and distributed." (Court of Appeal at p. 1543 [slip op. at 5].)

[23] Full list available at <http://www.esri.com/library/fliers/pdfs/data-interop-formats.pdf>.

part of a Geographic Information System. And dozens of computer programs, including the freely available Google Earth, can open and manipulate data in a GIS file format. Holding computer data hostage based merely on the format in which Orange County chooses to save the data runs contrary to the purpose of the PRA: to provide access to information held by public agencies. (Gov. Code § 6250.)

B. The Court of Appeal erred in finding that data must be part of a computer mapping system

The Court of Appeal subverts the basic conceptual difference between a computer program and computer data when it jumps from its assertion that "a computer mapping *system* should include more than solely a computer *program* component" (Court of Appeal Opinion at p. 1546 [slip op. at p. 8]) to its conclusion that such a system should include *data*, (*Ibid.* ["In addition to *computer data* and programs, a computer system could also include hardware or infrastructure . . . ."]; see also *id.* at p. 1549 [slip op at p. 13] ["[W]e interpret 'computer mapping systems' to include a GIS database . . . ."]. The Court of Appeal's conclusion is unfounded for three reasons: it fails to account for the plain meaning of computer software; it fails to acknowledge that a system could be a set of computer software; and it fails to explain why data in only a certain format should be exempted from the PRA.

First, the Court of Appeal errs in finding that "section 6254.9 contains its own definition of software." (*Id.* at p. 1545 [slip op. at p. 8].) The only "definition" is found in section 6254.9, subdivision (b): "'computer software' includes computer mapping systems, computer programs, and computer graphics systems." Strangely, this "definition" comes after the first use of the phrase "computer software" and contains none of the verbs—such as "means" or "is defined as"—that legislators typically use to indicate a definition. (See, e.g., *Bernard v. Foley* (2006) 39 Cal.4th 794 [interpreting statutory definitions from Cal. Civ. Code § 1761].)

Instead, this "includes" phrase appears to be a list of examples of types of software.[24] Alternatively, the "includes" list could expand the definition of software in some respect. (See *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774 [noting that "includes" is typically used to enlarge, rather than limit, a statutory definition].) It does not follow, however, that such an expansion must incorporate *data* into the definition of software. Under either interpretation, the term computer software should be defined with reference to its standard dictionary meaning. (See, e.g., Am. Heritage Dict., *supra*, at p. 1652 [defining software].)

[24] Sierra Club devotes significant effort to explaining why section 6254.9, subdivision (b) should be interpreted as a list of items, which will not be repeated here. (Opening Brief at pp. 21–31; Reply Brief at pp. 13–17.)

Second, the Court of Appeal errs in not considering that "system" could refer to multiple software components working in unison. [Cf. Court of Appeal Opinion at 1545 [slip op. at p. 8].) As the Court of Appeal notes, a "system" is a "complex unity formed of many diverse parts subject to a common plan or purpose." (*Id.* at p. 4 [slip op. at p. 8] [quoting Webster's 3d New Int'l Dict. (2002) p. 2322].) A computer mapping system could simply be a set of computer programs working together to achieve a complicated goal: geographic data analysis. The Legislature then chose to include the term "computer mapping system" not simply as an example of computer software, but rather as an example of a set of related programs constructed to work as a functional set.[25] This interpretation would also explain why the Legislature chose to replace the phrase "computer readable data bases" from an earlier version of the proposed exemption with "computer mapping system": the former would have excluded data while the latter excludes only a set of mapping programs. (See Legislative History, 4 PA 1020 [Objection of the Office of Information Technology].) This interpretation also comports with the *Flanagan* interpretation of "includes" as a term of enlargement. (*Flanagan*, *supra*, 27 Cal.4th at 774.)

Third, the Court of Appeal's interpretation—requiring data to be a part of a larger computer mapping system for purposes of the exemption—

[25] The same argument could be applied to "computer graphics system." The third listed example, "computer program," may simply be listed because it is a common synonym for computer software. (See Gov. Code § 6254.9, subd. (b).)

still suffers from all the conceptual problems discussed in Part III.A above. The Court of Appeal has simply replaced "program" with the word "system." Following the Court of Appeal's logic, the only reason the geographic data should be exempt is because they are data in a particular format (GIS-compatible), such that the data can be manipulated and analyzed by the program component (GIS software) of the computer mapping system. The same digital data in an incompatible format—such as Adobe PDF format—would be disclosed. (Court of Appeal Opinion at p. 1542 [slip op. at p. 4].) And because GIS software can read multiple data formats, how does a court distinguish between exempt and non-exempt data without excluding most computer-stored information? The plain language of section 6254.9, subdivision (d), as explained below, rejects such a conclusion.

C. Interpreting the section 6254.9 exemption to encompass data in a specific format violates the plain language of subdivision (d)

Allowing the 6254.9 exemption to encompass data in a specific file format creates an irreconcilable clash with subdivision (d):

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

Geographic data contained on a computer are exempt, according to Orange County, if they are in a GIS-compatible file format. But that same data—

assuming data is a type of information[26]—should be disclosed as a public record according to section 6254.9, subdivision (d). The more linguistically consistent interpretation would be that subdivision (d) precludes an interpretation of "system" or "software" that includes computer data that happens to be stored in a particular format.

Consider a parallel to confidential files under the PRA. In *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, this Court rejected the Court of Appeal's finding that records containing hiring and termination information of California peace officers could not be disclosed simply because those records were obtained from the officers' personnel files. Although personnel files are protected from disclosure (Pen. Code §§ 832.7 & 832.8), this Court ruled that it was unreasonable to "render documents confidential based on their location, rather than their content." (*Comm'n on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 469.) Otherwise, the confidential nature of the information would depend on how each agency structured its personnel files. (*Ibid.*) Similarly, basing disclosure on the *format*, instead of the

[26] Neither Orange County nor the Court of Appeal attempts to distinguish between "data" and "information." Such a distinction is difficult to discern: Merriam-Webster defines data as "factual information." (Webster's 9th New Collegiate Dict. (1991), p. 325.) The Court of Appeal Opinion claims that section 6254.9, subdivision (d) "is not a mandate that all computer-stored information must be divulged." (Court of Appeal Opinion at p. 1550 [slip op. at pp. 14–15].) While likely true, the Court of Appeal's contention does not explain how certain factual information—namely geographic data in a computer data file—could be both exempt under section 6254.9, subdivision (b) but not exempt according to subdivision (d).

content of electronic data, leads to similar unreasonable, arbitrary and anomalous results. (Cf. *ibid.* ["Furthermore, if records are stored in a computer in electronic form, it would be difficult, if not impossible, to determine which records are contained in the same virtual 'file.'"].)

This interpretative problem led the Court of Appeal to assert that section 6254.9 excludes a GIS database such as the OC Landbase but does not exclude geographic data stored in a computer. (Court of Appeal Opinion at p. 1554 [slip op. at p. 20] ["[T]he OC Landbase is excluded from disclosure because it . . . constitutes an integral part of a computer mapping system, not simply because it contains some geographic data."].) This distinction between the OC Landbase and geographic data only makes sense if there is a meaningful legal distinction between the two. But the parties stipulated that the OC Landbase contains no software, only geographic data and related parcel data in a GIS file format. (Stipulated Facts No. 20, 5 PA 1083.) And Orange County argues that the PRA would require it to produce non-GIS formatted records containing the same information stored in the GIS-formatted data. (Answer at pp. 18, 20.) So then what is the distinction between geographic data and GIS file format data stored on a computer? It appears to be merely the *format* of the electronic data, which the PRA explicitly considers to be irrelevant to the question of disclosure: "Each agency shall provide a copy of an electronic record in the format requested . . . ." (Gov. Code § 6253.9, subd. (a)(2).)

Describing geographic data as *integral* to a computer mapping system merely because the data are formatted to be used by that system does not change the public record nature of that data. (*Id.*; Gov. Code § 6254.9, subd. (d).)

Therefore, geographic data that happen to be in a GIS-compatible file format should not be considered a part of a computer mapping system for purposes of section 6254.9. PRA section 6253.9 mandates that the format of electronic data is irrelevant to its public record status. And to consider data to be part of a computer software program whenever that data are in a compatible format invites the exclusion of most computer-stored information from disclosure under the PRA, in violation of section 6254.9, subdivision (d)'s mandate to the contrary.

Other parts of the PRA require disclosure of data even when that data is part of a broader, exempt category of public records. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727 ["The meaning of a statute . . . must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible."].) Section 6254.7, subdivision (e) requires disclosure of air pollution emission data, even if that data is considered a trade secret otherwise exempt per section 6254.7, subdivision (d). Section 6254.5 notes that disclosure of an otherwise exempt public record constitutes a waiver. In these two scenarios, the exemption must be

interpreted in reference to the specific public record and not the broader category of which the record may be a part.

The geographic data that, Orange County argues, constitute part of a computer mapping system, are public records in their own right. They are a digitized set of publicly available parcel data that Orange County is required to maintain. (Rev. & Tax. Code §§ 408 & 327, subd. (a); 88 Ops.Cal.Atty.Gen. 153 (2005), 1 PA 182; Declaration of Robert Jelinek, 2 PA 308:22 ["The information in the Landbase is compiled from official public records . . . ."].) If the geographic data described air pollution emissions, they would be disclosed even if they were otherwise a trade secret. (Gov. Code § 6254.7, subd. (e).) Similarly, the geographic data at issue in this case must be disclosed even though they may constitute part of a computer mapping system. (Gov. Code § 6254.9, subd. (d).)

Furthermore, Orange County has argued that it would (and must) disclose the exact same information at issue here as a series of PDF files. (Answer at p. 20 ["[N]on-GIS formatted records must still be produced under the PRA even though the same information contained therein is also stored in a computer mapping system in a GIS file format."].) If Orange County is correct, then PRA sections 6254.5 and 6253.9 require disclosure of the GIS file format data. The same information has already been disclosed by Orange County in PDF format, which constitutes a waiver from all exemptions under the PRA. (Gov. Code § 6254.5.) And public

records not exempt from disclosure must be produced in the requested electronic format if that format is used by the agency. (Gov. Code § 6253.9, subd. (a).) Because Orange County uses a GIS-compatible file format, it must therefore disclose the records in that format, as requested by Sierra Club, according to the waiver requirement in section 6254.5.

IV. THE *SANTA CLARA* OPINION PREVIOUSLY FOUND THAT THE SECTION 6254.9 EXEMPTION DOES NOT INCLUDE DATA BECAUSE THE LEGISLATURE INTENDED ONLY TO PROTECT COPYRIGHT IN SOFTWARE

Over the years, Orange County has asserted copyright control over its Landbase through licensing agreements with both the Gas Company and consumers of the Landbase. (Agreements between the County of Orange and Southern California Gas Company, 2 PA at pp. 358, 365, 377; License Agreement, 2 PA 395:21–22.) Orange County continues to assert licensing control over its Landbase today. (Answer at 5; Orange County Resolution No. 11-196, *supra*.) The Court of Appeal previously relied on copyright law to interpret the section 6254.9 exemption as applying only to computer software, and not computer data, in *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301. Neither party, however, addresses the importance of copyright to this case, and the Court of Appeal failed to reconcile its interpretation with the *Santa Clara* court's interpretation.

Section 6254.9 should be interpreted as the Legislature's attempt to make the PRA more compatible with federal copyright and licensing of

proprietary software. The *Santa Clara* court recognized that section 6254.9 exempts "software" because of specific copyright protection for that software. (*Id.* at p. 1334.) Yet the *Santa Clara* court went on to find that the Santa Clara County GIS basemap—almost identical in form and function to the OC Landbase—could not partake of that software exemption because the county could not assert copyright protection for its basemap to prevent disclosure under section 6254.9. (*Id.* at pp. 1335–36; see also *id.* at p. 1330 [noting that subdivision (d) requires disclosure of information stored in a computer].) Therefore, the *Santa Clara* court necessarily concluded that section 6254.9 distinguishes software from data by holding that the section exempts software but does not exempt collections of geographic data, such as the Santa Clara County GIS basemap or the OC Landbase.[27] (See *id.* at p. 1335.)

Because the parties stipulated that the OC Landbase contained no software (Stipulated Facts No. 20, 5 PA 1083), Orange County cannot assert a copyright interest in software. According to the *Santa Clara*

[27] In the record, Santa Clara County stated, as Orange County does here, that its 'GIS Basemap' is a "computer mapping system." (*Santa Clara*, *supra*, 170 Cal.App.4th at p. 1309 fn. 1.) However, the point was only raised by *amici* at the appellate level, and so the *Santa Clara* appellate court refused to consider it directly. (*Id.* at p. 1322 fn. 7.) Nevertheless, Santa Clara County's concession that its GIS Basemap was a public record was a legal conclusion that the appellate court chose not to overrule. In fact, the *Santa Clara* court noted that this "concession appears well-founded." (*Id.* at p. 1332 fn. 9.)

interpretation described in Part IV.A below, this stipulation would be sufficient to require disclosure of the underlying geographic data.

Presumably, however, Orange County may be asserting a copyright interest in its compilation of the geographic data. Again according to *Santa Clara*, section 6254.9 recognizes no such copyright interest and thus the underlying data must be disclosed.

Even if, however, *Santa Clara* were wrong, Orange County would still need to disclose the underlying public geographic data regardless of its potential copyright interest in the data compilation. (See Parts IV.C and IV.D below.) The Court of Appeal incorrectly dismissed the *Santa Clara* interpretation without properly addressing the importance of copyright to the Legislative scheme for section 6254.9. The Court of Appeal's resulting interpretation thus lacks consistency with both the plain language of the statue and the legislative history. (See *Lungren*, *supra*, 45 Cal.3d at p. 735 ["[E]ach sentence must be read not in isolation but in the light of the statutory scheme . . . ."].)

A. *Santa Clara* makes it clear that section 6254.9 protects only software copyright.

The appellate court in *Santa Clara* held that (1) copyright under the PRA is limited to computer software; and (2) the County could not impose

copyright or end-user licensing restrictions on its GIS basemap.[28] The court expressly rejected the idea that a public record GIS basemap could claim the computer software exemption of section 6254.9, subdivision (a). (*Santa Clara*, *supra*, 170 Cal.App.4th at p. 1332 n.9.) The *Santa Clara* opinion found that the express language of section 6254.9 both "strongly suggests that the referenced copyright protection is limited to computer software" and "cannot be read as an affirmative *grant of authority* to obtain and hold copyrights." (*Id.* at p. 1333.)

The legislative history supports the *Santa Clara* court's assertion that the Legislature sought to acknowledge only copyright protection for software in section 6254.9. (*Id.* at p. 1334.) The California Legislature noted the distinction between computer software and computer data. (Senate Digest: AB 3265, 4 PA 1029 ["The bill draws a distinction between computer software and computer-stored information."].) The Legislature stressed the importance of protecting copyright interests in the licensing of the software, but made no such claims regarding the underlying geographic data. (*Id.* at p. 1028 ["A public agency may sell, license or lease its software . . . ."].) And the Legislature removed the phrase

[28] The GIS basemap at issue in *Santa Clara* is nearly identical in form and function to that of the OC Landbase at issue here. (Compare, e.g., *Santa Clara*, *supra*, 170 Cal.App.4th at p. 1310 fn. 1 ["Among the essential elements of the GIS basemap are 'parcels, streets, assessor parcel information, jurisdictional boundaries, orthophotos [aerial photographs], and buildings."] with Stipulated Facts No. 15, 5 PA 1083 ["The OC Landbase at issue in this case is comprised of land records and spatial data, including over 640,000 parcels with boundaries, addresses and assessor's parcel numbers."].)

"computer readable data bases" after the Department of Finance objected that "data bases are organized files of record information subject to public record laws." (Legislative History, 4 PA 1020.) It would be therefore inappropriate to lump data with a software copyright exemption.

B. The OC Landbase is not software and thus does not fall within section 6254.9 exemption

Both parties stipulated that the OC Landbase contains no software. (Stipulated Facts No. 20, 5 PA 1083.) Instead, the OC Landbase is a geographic data set in a GIS-compatible format. (Stipulated Facts No. 13, 5 PA 1083.) Because section 6254.9 is written to protect copyright in software, it is simply nonsensical to apply it to the geographic data at issue here.

First, section 6254.9, subdivision (a) requires that the computer software be "developed by a state or local agency." If the OC Landbase contained proprietary software, it would make sense to consider whether Orange County *developed* that software. Here, however, to claim that paper format land records are transformed into "computer software developed by a state or local agency" when digitized is to claim that all paper records fall under the subdivision (a) exemption whenever they are scanned or otherwise input into a computer. While it is true that Orange County uses software to analyze, manipulate and display the geographic data contained in its Landbase, the County did not *develop* this software; it

merely *uses* third-party software licensed from Oracle Corporation and ESRI to analyze its geographic data. (Response to Special Interrogatory No. 3, 3 PA 568; Declaration of Bruce Joffe, 3 PA 528:16–18.)

Second, section 6254.9, subdivision (d) prevents the exemption from applying to "information merely because it is stored in a computer." Because the geographic *data* at issue here are facts (land parcel coordinates) stored in a computer file, it is difficult to see why subdivision (d) should not apply. (See Webster's 9th New Collegiate Dict. (1991) p. 325 [defining data as "factual information."].) Furthermore, subdivision (d) explicitly requires disclosure of "[p]ublic records stored in a computer" and the geographic data are a digitized collection of public land parcel information. (See Stipulated Facts Nos. 15 and 17, 5 PA 1083.)

C. Even if *Santa Clara* is wrong, Orange County lacks a copyright interest in the geographic data because the data are an unoriginal compilation of public records

Copyright for database structures, unlike software programs, is thin at best. (See, e.g., *Harper House, Inc. v. Thomas Nelson, Inc.* (9th Cir. 1989) 889 F.2d 197, 205; *Greenbie v. Noble* (S.D.N.Y. 1957) 151 F.Supp. 45, 66 ["There is no copyright of facts, news or history."].) It is particularly thin when the database is built from facts contained in public records.

The geographic data at issue in this case are comprised of land records and spatial data, including over 640,000 parcels with boundaries, addresses and assessor's parcel numbers. (Stipulated Facts No. 15, 5 PA 1083.) The Orange County assessor is required by law to prepare and maintain such parcel boundary maps and data. (Rev. & Tax. Code §§ 408 and 327, subd.(a); 88 Ops.Cal.Atty.Gen. 153 (2005), 1 PA 182; Declaration of Robert Jelinek, 2 PA 308:22 ["The information in the Landbase is compiled from official public records . . . ."].)

Digitizing publicly available parcel records by adding spatial coordinates from the addresses and parcel descriptions in those records is an admittedly time-consuming, "sweat-of-the-brow" exercise that lacks the necessary originality for copyright protection. (*Feist Publ'ns v. Rural Telephone Serv.* (1991) 499 U.S. 340 [holding that obvious orderings of data lack sufficient originality for copyright protection].) Identifying land parcels with reference to their geographic coordinates is obvious, albeit labor-intensive. Orange County acts as a mere "census-taker" of all parcels without choice as to selection or arrangement. (See *id.* at p. 347 ["Census data . . . do not trigger copyright because these data are not 'original' . . . ."].) Therefore, Orange County lacks a copyright interest in its compilation of geographic parcel data and cannot take advantage of the section 6254.9 exemption, which seeks only to protect copyright interests.

D. Any copyright in the compilation still does not protect disclosure of the underlying geographic data

Either Orange County holds no copyright interest in its OC Landbase because its compilation of publicly available geographic data lacks originality (*Feist*) or it holds a copyright interest in the compilation but not the underlying geographic data. Either way, Orange County should not be allowed to prevent access to the underlying geographic data through the section 6254.9 exemption.

A private corporation in the jurisdiction of the Seventh Circuit once tried to do almost precisely what Orange County is attempting here. Wisconsin municipalities held license agreements with a company called Assessment Data, whereby municipal tax assessors would input real estate data into Assessment Data's computer database. (*Assessment Techs. of Wisconsin, LLC v. WireData, Inc.* (7th Cir. 2003) 350 F.3d 640, 641.) WIREdata sought to obtain the compiled data using Wisconsin's open-records law, which contains a copyright exemption.

Judge Posner did not mince words:

> This case is about the attempt of a copyright owner to use copyright law to block access to data that not only are neither copyrightable nor copyrighted . . . . The owner is trying to secrete the data in its copyrighted program . . . . It would be appalling if such an attempt could succeed.

(*Id.* at 641–42.) Similarly, in the instant case Sierra Club wishes to access the electronic data—neither copyrightable nor copyrighted—of Orange County's assessor using the PRA. Disclosure of that geographic data

cannot be frustrated by an assertion of copyright protection in a GIS basemap. (*Santa Clara*, *supra*, 170 Cal.App.4th at p. 1335–36; cf. *Microdecisions, Inc. v. Skinner* (D. Fla. 2004) 889 So.2d 871, 875 [finding that a similar Florida public records law gives "no authority to assert copyright protection in the GIS maps, which are public records"].) By pretending that its GIS database is equivalent to a copyrighted software program, Orange County hides public domain information behind a veil of inappropriate public records exemption and unwarranted copyright licensing.

V. IN RESOLVING PERCEIVED AMBIGUITY IN THE LANGUAGE OF SECTION 6254.9, THE COURT OF APPEAL FAILED TO PROPERLY APPLY THE CALIFORNIA CONSTITUTION'S MANDATE FAVORING PUBLIC ACCESS TO GOVERNMENT INFORMATION

"A statute . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(1)(2).) This constitutional mandate requires the judiciary to narrowly construe exemptions to the PRA. (*Id.*; see, e.g., *Sonoma County Employees' Ret. Ass'n v. Super. Ct.* (2011) 198 Cal.App.4th 986, 992 ["Statutory exemptions from compelled disclosure under the CPRA are narrowly construed."].) The Court of Appeal found the legislative history of section 6254.9 ambiguous, but chose to give more

weight to an interpretation that limited access, in violation of the constitutional mandate to favor public access.

The Court of Appeal first found that the phrase "computer mapping system" in section 6254.9 to be ambiguous. (Court of Appeal Opinion at p. 1545 [slip op. at p. 8].) The Court of Appeal then devoted several pages to the legislative history of the section, discussing why the City of San Jose, the sponsor of the bill, wanted to protect its Automated Mapping System from public disclosure. (*Id.* at p. 1545–49 [slip op. at p. 8–12].) The Court of Appeal concluded that legislative history revealed that San Jose's computer mapping systems "consisted of databases" but that the original phrase, "computer readable data bases" was deleted after objections that it "would have excluded from disclosure all organized information stored on a computer." (*Id.* [slip op. at p. 13].)

Then the Court of Appeal misinterpreted the significance of the California Constitution's mandate in balancing that conflicting legislative history. The Court of Appeal's only discussion of the California Constitution is contained in one paragraph, in which the court rejected Sierra Club's contention that the California Constitution applied because section 6254.9 was already in effect at the time the constitutional provision went into effect. (*Id.* at p. 1551 [slip op. at p. 17].) The mandate, however, requires the court to narrowly construe *its interpretation* of any ambiguity in the statute in favor of public disclosure. (Cal. Const. art. 1, § 3, subd.

(b)(1)(2); see, e.g., *Sonoma County Employees' Retirement Assn.*, *supra*, 198 Cal.App.4th at p. 992.) The effective date of the statute is irrelevant to this analysis because the constitutional mandate in this case constrains judicial interpretation, not the statutory language.

The Court of Appeal Opinion also declared that it "construed section 6254.9 as narrowly as is possible consistent with its legislative history." (Court of Appeal Opinion at p. 1551 [slip op. at p. 16].) Respectfully, the Court of Appeal has its interpretative process exactly backward. This constitutional mandate cannot be trumped by an appeal to indeterminate legislative history.

In its examination of legislative history, the Court of Appeal emphasized evidence that San Jose's mapping system contained a database and discounted evidence that the Legislature deleted the phrase "computer readable data bases" from the bill because databases are subject to public record laws. (*Compare* Court of Appeal Opinion at pp. 1547–48 [slip op. at pp. 11–12] *with* Legislative History, 4 PA 1020 [Objection of the Office of Information Technology].) In addition, the Opinion admits to "[b]alancing" the conflict between the deletion of the phrase "computer readable data bases" and the intent of San Jose to obtain an exemption for its computer mapping system. (Court of Appeal Opinion at 1548–49 [slip op. at 12–13].)

In striking this balance and discounting certain discrepancies in the legislative history, the California Constitution required the Court of Appeal to favor public disclosure. (Cal. Const. art. 1, § 3, subd. (b)(1)(2).) Instead, the Court of Appeal Opinion took the opposite approach: using the legislative history to write off the constitutional mandate. To do so was clear error. The California Constitution confers and constrains the judicial power of statutory interpretation, not the other way round. (See *Bodinson Mfg. Co. v. Cal. Employment Comm'n* (1941) 17 Cal.2d 321, 326.)

VI. THE COURT OF APPEAL FAILED TO CONSIDER THE PURPOSE EXPRESSED WHEN THE LEGISLATURE ENACTED THE PUBLIC RECORDS ACT

The California Public Records Act "declares that access to information . . . is a fundamental and necessary right of every person in this state." (Gov. Code § 6250; see also *Filarsky v. Super. Ct.* (2002) 28 Cal.4th 419, 425 ["The CPRA . . . was enacted for the purpose of . . . giving members of the public access to information in the possession of public agencies."].) The Court of Appeal, however, gave no weight to the express statutory purpose of the PRA in its analysis. Interpreting a statutory exemption without reference to the context of the statute as a whole is error. (*Lungren*, *supra*, 45 Cal.3d at p. 735.)

The Court of Appeal did a further disservice to its interpretative task by relying not on the express purpose of AB 3265, which established the

section 6254.9 exemption, but rather on the stated and implied goals of the bill sponsor—the City of San Jose. This Court has previously stated, in interpreting legislative history, that the opinions of individual legislators or the bill author are not evidence of legislative intent. (*Id.* at p. 742.)

The Court of Appeal here gave weight to a report of the Assembly Committee on Governmental Organization that described the concerns of the City of San Jose. (Court of Appeal Opinion at p. 1546 [slip op. at p. 9].) The Opinion discussed a San Jose memorandum that explained why the City wanted an exemption. (*Id.* at p. 1546 [slip op. at pp. 9–10].) And to support its conclusion, the Court of Appeal noted that "San Jose also sought the ability to recoup the cost of developing its computer graphing systems." (*Id.* at p. 1549 [slip op. at p. 13].) According to the Court of Appeal, its "interpretation effectuates the bill's purpose of allowing San Jose to recoup the development costs of its database . . . ." (*Ibid.*)

None of this discussion concerning the purpose of AB 3265's sponsor is relevant to determining legislative intent. Instead, it biases the Court of Appeal's interpretation of the legislative history. The Court of Appeal spent much analytical effort trying to establish that the phrase "computer software" must include San Jose's desired exemption for "computer readable data bases and other computer stored information." (*Id.* at p. 1546 [slip op. at p. 11].)

There is, of course, no mention of a database or computer stored information in the statutory language. Rather, AB 3265 appears to allow state or local agencies to license computer software. Nor is computer software defined explicitly; section 6254.9, subdivision (b) merely states that "'computer software' includes computer mapping systems, computer programs, and computer graphics systems."

The Court of Appeal would throw out the plain meaning of "computer software" in favor of a definition created out of whole cloth by proponents of the bill, despite the fact that language favorable to the proponent's definition was explicitly deleted by amendment during the legislative process. Apparently, the Court of Appeal believes that when Governor Deukmejian signed AB 3265 into law, he relied not on the description or the plain meaning of the phrase "computer software" but rather on the hopes and dreams of the City of San Jose. And when California assemblymembers and senators voted for AB 3265, they did so by ignoring both the plain meaning and the amendment removing the troublesome phrase "computer readable data bases." The Court of Appeal is relying not on legislative purpose but rather on a legislative proponent's purpose. This is clear error. (*Lungren*, *supra*, 45 Cal.3d at p. 742.)

Furthermore, AB 3265 did not amend or repeal the legislative purpose behind the Public Records Act, which still controls for purposes of interpreting exemptions to that Act. As stated in its first section, the PRA's

purpose is to provide "access to information concerning the conduct of the people's business." (Gov. Code § 6250.) Yet there is no discussion of the legislative purpose of the PRA in the Court of Appeal Opinion or any attempt to reconcile the section 6254.9 exemption with the broader purpose of the PRA. Such a failure to construe an exemption to a statute in the context of the statutory scheme is reversible error. (*Lungren*, *supra*, 45 Cal.3d at p. 735.)

VII. CONCLUSION

The Court of Appeal has construed a statutory exemption to the Public Records Act broadly when the California Constitution and the statutory scheme of the PRA itself demands a cautionary, narrow approach. The resulting interpretation provides no logical distinction between the geographic parcel data at issue in this case and all other digitized geographic information held by public agencies in California. Orange County's digitized geographic parcel data have great value to California in furthering public and environmental health. Yet Orange County has been allowed to transform its statutory obligation to maintain publicly available, taxpayer-funded parcel data into commodities to be sold to the highest bidder. The Court of Appeal Opinion threatens strike a gaping hole in the PRA and make Orange County's obstinance the new norm for access to computerized data in California.

Dated: March 2, 2012

Respectfully Submitted,

By: _____

M. Rhead Enion

Counsel for Academic Researchers in Public Health, Urban Planning and Environmental Justice Amici

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule of Court 8.204(c)(1), the attached proposed amicus brief was produced on a computer and the total word count of this brief, including footnotes, is 9,921 words, as determined by the word count of the Microsoft Word program used to produce this brief, excluding this certificate and the tables of contents and authorities. The application and statement of interest of amici, including footnotes, is an additional 1,797 words.

I also certify that no counsel for a party participated in the drafting of this brief, and no person other than the amici curiae listed in the brief contributed monetarily or substantively to it.

Dated: March 2, 2012 By: _____

M. Rhead Enion

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DECLARATION OF SERVICE BY U.S. MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 405 Hilgard Avenue, Los Angeles, California 90095.

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Executed on March 2, 2012, at Los Angeles, California.

_____

Jeanne Fontenot