Supreme Court Case No. S194708

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SIERRA CLUB,
Petitioner and Appellant,

v.

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

COUNTY OF ORANGE.
Real Party in Interest.

After a Published Decision By The Court Of Appeal,
Fourth Appellate District, Division Three, Civil Case No. G044138

Appeal from Orange County Superior Court
Case No. 30-2009-00121878
Hon. James J. Di Cesare

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The issue in this case is the interpretation of the Public Record Act's ("PRA") computer-software exclusion contained in Government Code section 6254.9.[1] That section provides that computer software is not a public record, and states that "computer software" includes "computer mapping systems." The issue is whether GIS parcel data, which is computer mapping data describing the location and layout of legal land parcels in the county, is "computer software" under section 6254.9. The Court of Appeal held that it is.

In its Answer, Orange County tries to focus this Court on the included term, "computer mapping systems" instead of the overall and operative term, "computer software." The Answer refers to the "computer mapping systems" exemption (Answer at p. 1), citing to a page of the Opinion that does not use that terminology. (Slip Op. at p. 13.) But the express language of the Public Records Act excludes "computer software" from public-record status (section 6254.9(a)), so the Court must find that GIS parcel data is "computer software," as that term is used in section 6254.9 in order to find, as the Orange County Court of Appeal did, that it is not subject to disclosure under the PRA.

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[1] All statutory references are to the Government Code unless otherwise noted.

Orange County's Answer completely ignores the second issue raised in the Petition for Review: when interpreting the PRA, how much weight should be given to the constitutional mandate that statutory provisions restricting the public's access to government information are to be narrowly interpreted? (Cal. Const., art. I, section 3, subd. (b), par. 2.) Here, very little weight was given to that provision by either the trial court or the appeal court, and the published appellate decision demonstrates disregard for the constitutional mandate.

The Opinion in this case tries to distinguish the only other appellate-level case on point, *County of Santa Clara v. Superior Court of Santa Clara County* (2009), 170 Cal. App. 4th 1301 (hereinafter "*Santa Clara*"). The cases cannot be distinguished factually; no party or court has contended otherwise nor can the cases be reconciled. *Santa Clara* holds that GIS parcel data must be disclosed under the PRA, without requirement of a license agreement, while the present case holds that the PRA does not require disclosure of GIS parcel data; hence Orange County may require a license agreement and substantial licensing fees in exchange for providing the data.

The conflict between the *Santa Clara* and *Orange County* decisions is an important state-wide issue of law because thousands of state and local agencies in California have GIS data, the use of which is becoming more widespread. The conflict creates confusion for government agencies about whether the PRA applies to GIS data.

The Supreme Court should review this case to decide this issue before an anticipated flood of further litigation ensues.

II. ARGUMENT

A. ORANGE COUNTY'S CHARACTERIZATION OF SIERRA CLUB'S STATEMENT OF THE ISSUE IS MISLEADING.

Orange County claims "[t]he Sierra Club attempts to recast the issue as a question of whether an unspecified 'computer software exclusion' exempts 'non-software computer data' from disclosure." (Answer at p. 1). This is puzzling, since section 6254.9 is the *only* software exclusion in the Public Records Act and the Sierra Club repeatedly refers to section 6254.9 throughout its Petition for Review. Second, both parties agree that the computer data at issue in this case, GIS data, is not "software" as that term is commonly and ordinarily understood. (5 PA 1083, [Stipulated Fact 20 reiterating the American Heritage Dictionary definition].).

Orange County further claims that Sierra Club's framing of the issue on appeal in this way "mischaracterizes the plain language of the exclusion for computer mapping systems found in Section 6254.9." (Answer at p. 1) But Sierra Club uses the Court of Appeal's own terminology in referring to section 6254.9. (Slip. Op. at p. 6, fn 4, [citing "software" exclusion not "computer mapping system" exclusion]). The Court of Appeal held that "section 6254.9 excludes from the [Public Records] Act's disclosure requirements a [GIS] database like the one at issue here." (Slip Op. at p. 3). Since the

exclusion is one about "software," as that term is understood in the Public Records Act, Petitioner accurately characterized the issue for review.

B. ORANGE COUNTY FAILS TO REBUT SIERRA CLUB'S ARGUMENTS DEMONSTRATING THE *ORANGE COUNTY* AND *SANTA CLARA* CASES CONFLICT BECAUSE BOTH OPINIONS INTERPRET SECTION 6254.9, YET DRAW OPPOSITE CONCLUSIONS REGARDING MANDATORY DISCLOSURE OF GIS DATABASES.

While Orange County is technically correct that the *Santa Clara* Court did not directly consider an amicus curiae's argument that section 6254.9 exempts GIS data from disclosure because of subsection (b)'s "computer mapping system" language, Orange County is wrong to hang its hat on this distinction (Answer, p. 4). The exclusion at issue is not the "computer mapping system" exclusion, but rather the "software" exclusion. (*See* section 6254.9, subdivision (a), ["[c]omputer *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 non-commercial purposes."](italics added.).) Section 6254.9, subdivision (b) states that "'computer *software*' includes computer mapping systems, computer programs and computer graphics systems." (italics added.) Thus, the subject matter of section 6254.9 is computer software, not computer mapping systems.

Orange County fails to rebut Petitioner's arguments with respect to *Santa Clara's* treatment of section 6254.9. (Petition, at pp. 13-16).

Concluding Santa Clara County could not avail the Basemap of copyright protection in section 6254.9, subdivision (e) necessarily required the *Santa Clara* court to determine the Basemap is not subdivision (a) "computer software" in its plain meaning sense. Thus, even though the *Santa Clara* court did not specifically deal with subdivision (b) as did the *Orange County* court, an undeniable conflict has arisen between the two holdings with respect to disclosure of GIS databases. Orange County does not dispute this.

It is worth noting that Orange County's Answer does not explain how Sierra Club is wrong in contending 6254.9, subdivision (a)'s term "computer software" governs both subdivisions (b) and (e) so that "computer software" cannot mean something different in the context of subdivision (b) than that of subdivision (e). Orange County's Landbase is not computer software anymore than Santa Clara's Basemap was computer software.

C. ORANGE COUNTY DOES NOT DISPUTE THAT THE *SANTA CLARA* AND *ORANGE COUNTY* OPINIONS DIRECTLY CONFLICT WITH RESPECT TO THE ABILITY OF AN AGENCY TO REQUIRE A LICENSE AGREEMENT BEFORE DISCLOSING THE GIS DATABASE TO MEMBERS OF THE PUBLIC.

Despite the fact that the Petition for Review pointed out the *Santa Clara* and *Orange County* holdings directly conflict as to whether an agency can require a license agreement for disclosure of GIS parcel databases, Orange County's Answer does not address the point at

all. (Petition at p. 13.) As the Court notes and Orange County repeats (Answer at p. 2), "The County currently distributes the OC Landbase[2] in a GIS file format…to members of the public, if they pay a licensing fee and agree to the license's restrictions on disclosure and distribution." (Slip Op., p. 4). Similarly, in *Santa Clara*, the County "sells the GIS basemap to members of the public for a significant fee and requires all recipients to enter into a mutual non-disclosure agreement." (*Santa Clara*, at p. 1310)

In this case, Sierra Club challenged Orange County's conditioning the Landbase's disclosure on a license agreement. (Slip Op. at p. 4). Similarly, in *Santa Clara*, the County sought to demand a license agreement upon disclosure of the GIS Basemap (*Santa Clara*, at p. 1331). Yet while the Orange County Court of Appeal held the County may restrict disclosure of the Landbase to those who agree to a license agreement (Slip Op. at p. 3), the *Santa Clara* court held the opposite, "There is no statutory basis either for copyrighting the GIS basemap or for conditioning its release on a licensing agreement" (*Santa Clara*, at p. 1337.) Thus, there is now a split in authority as to whether government agencies can impose license agreements before disclosing their GIS data.

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[2] Orange County never has, and still does not, dispute that the Landbase is factually indistinguishable to that of the Basemap at issue in *Santa Clara*. (see e.g., Stipulated Fact 15, 5 PA 1083 and compare *Santa Clara*, 170 Cal.App.4th at p. 1310).

D. CONTRARY TO ORANGE COUNTY'S CLAIM, THE PAPER DOCUMENTS AND ELECTRONIC IMAGES OFFERED TO SIERRA CLUB DO NOT CONTAIN THE "SAME INFORMATION" AS THE GIS-FILE FORMATTED RECORDS.

Orange County claims this case is "not about the denial of access to information" (Answer at p. 1). Orange County presumably bases this claim on its contention that "[t]he county agreed to produce non-GIS formatted records to the Sierra Club without any license fee" and that "these records contained the same information stored in the OC Landbase…" (Answer at p. 2).

As a threshold matter, section 6253.9, requiring records held electronically to be produced in the same electronic format as maintained by the agency, undermines Orange County's position that non-GIS file formatted records were enough to satisfy the Public Records Act.

But Orange County's contention is false anyway, because the non-GIS formatted records – whether paper or electronic documents in document-image (i.e., "pdf") files – do not contain the "same information" as in the OC Landbase.[3]

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[3] To the extent Orange County relies on 5 PA 1350, the trial court's Statement of Decision ("SOD"), to support its proposition that the non-GIS file format records contain the "same information" as the GIS file format records, it is inapplicable because Sierra Club objected to the trial court's SOD with respect to this finding, (see 5 PA 1342), and the Court of Appeal did not adopt it. (Slip Op. at p. 4, [Court correctly stating fact that County agreed to provide copies of

For example, the non-GIS formatted records contain no inherent spatial reference; do not consistently contain owner name, number and street name; have distorted scales so accurate measurements of distance or area cannot be determined; and lack other important information otherwise available in GIS-formatted data. (3 PA 537).

Further, "Sierra Club cannot use the analytical, display and manipulation functions of its GIS software on the OC Landbase if the County produces [the information] in Adobe PDF format or printed out on paper." (Slip Op. at p. 4). Orange County does not dispute this fact and indeed repeats it at page 2 of its Answer. Thus, Orange County's offer to provide non-GIS file formatted records is not helpful, because only in GIS file format can the information be analyzed, displayed and manipulated in the manner the agency itself does with its own GIS software.

Thus, Orange County's position deprives the public of the necessary information to actively participate in governance issues because the public cannot analyze the information.[4]

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the source documents containing parcel related information (such as assessment rolls and transfer deeds).].)

[4]The complete set of paper or .pdf documents for the OC Landbase would consist of about 7,000,000 (7 million) pages. (3 PA at 538.)

E. THE PETITION FOR REVIEW DOES NOT MISREPRESENT FACTS AND ORANGE COUNTY DOES NOT EXPLAIN WHICH FACTS ARE MISREPRESENTED BY PETITIONER.

Orange County complains that Petitioner "misrepresents the facts as found by the trial court and accepted by the court of appeal." (Answer at p. 5) Orange County suggests the Court of Appeal explicitly affirmed all the trial court's findings of fact, but this is simply not the case. Nowhere in the opinion does the Court say it accepted the trial court's version of the facts.

Sierra Club does not dispute the facts contained in the Court of Appeal Opinion (see Petition at p. 11), and Orange County does not demonstrate how Sierra Club misrepresents any of the stated facts contained in the Opinion. (see Answer at p. 5). Instead, Orange County's complaint appears to be that Sierra Club included additional facts above and beyond those stated in the Opinion in its Petition for Review and for that reason is guilty of "misrepresenting" the facts. This argument makes no sense. There is no rule limiting Petitioner's universe of facts in a Petition for Review to only those cited in the Opinion below. To the extent Orange County alleges a violation of Cal. Rules of Court 8.500(c)(2), Sierra Club does not dispute any of the facts contained in the Court of Appeal Opinion, so there is no conflict with Rule 8.500(c)(2).

As to the Petition "introduce[ing] new allegations of fact and anecdotal references" (Answer at p. 5), all facts and references are contained either in the record or in amicus curiae briefs filed in

support of Sierra Club, most of which are offered to provide context or to support policy arguments.[5]

To the extent that Orange County is attempting to rehash its substantial evidence standard of review argument discussed in the briefing below, this effort should be rejected as it was by the Court of Appeal since the standard of review on appeal of a statutory interpretation case is *de novo*. (Slip Op. at p. 7).

F. ORANGE COUNTY'S ANSWER DOES NOT EVEN MENTION THE SECOND ISSUE FOR REVIEW, SO ORANGE COUNTY APPARENTLY CONCEDES PETITIONER IS CORRECT THAT THE ISSUE PRESENTS AN IMPORTANT QUESTION OF LAW.

Orange County's Answer completely ignores the second issue raised in the Petition for Review: when interpreting the PRA, how much weight should a court give to the constitutional mandate that statutory provisions restricting the public's access to government information are to be narrowly construed? (Cal. Const., art. I, section

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[5]Petition p. 3: *see* Appellant's RJN, Exhibit 2 at 1463; Petition p. 4: *see* Open Gov't amicus brief at p. 7; Petition p. 5: *see* LexisNexis amicus brief at p. 31; Academic Researchers amicus brief at p. vii; Open Gov't amicus brief at p. 6; 3 PA 533; Petition p. 6: *see* 1 PA 110; 3 PA 533; GIS Community amicus brief at pp. 24-25; Petition p. 7: *see* GIS Community amicus brief at pp. 3-4; 9-10; 24-25; Petition p. 9: *see* 1 PA 106-107 and above-cited references; Petition p. 17: *see* GIS Community amicus brief at pp. 3-4; 9-10; 24-25; Petition p. 19: *see* Open Gov't amicus brief at p. 5; 1 PA 106-107

3, subd. (b), par. 2.) As argued in the Petition at pages 22-24, the cited constitutional provision was considered by the Court at the tail end of its statutory interpretation exercise, and only to decide a relatively trivial question. The Opinion did not apply the constitutional requirement for narrow interpretation of access limitations to the perceived ambiguity the court found in the statute. (Opinion at p. 8.) The fact that Orange County ignored this issue in its entirety suggests it concedes the point.

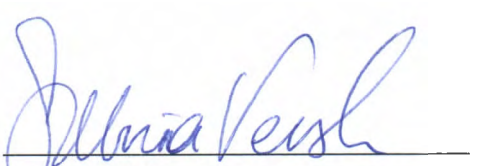
III. CONCLUSION

Orange County does not rebut Petitioner's demonstration that Supreme Court review is necessary to ensure uniformity of decision with respect to section 6254.9 software exclusion's applicability to GIS data, and that important questions of law are presented by this case. For the foregoing reasons, Sierra Club respectfully requests the Supreme Court grant its Petition for Review.

Dated: August 8, 2011

Respectfully Submitted,

VENSKUS & ASSOCIATES, P.C.



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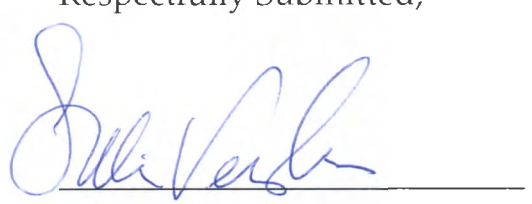
Certificate of Compliance

Counsel of record hereby certifies that pursuant to Rule of Court 8.204(c)(1) the attached Respondent's Brief was produced on a computer and contains 2,206 words, not including this certificate or the tables of contents and authorities. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

Dated: August 8, 2011

Respectfully Submitted,



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Proof of Service

I, Sharon Emery declare:

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

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

On August 8, 2011, at my place of business, I placed the following document: **Reply to Answer To Petition for Review After a Decision by the Court of Appeal** and an unsigned copy of this declaration for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to the following persons, for collection and mailing on that date following ordinary business practices:

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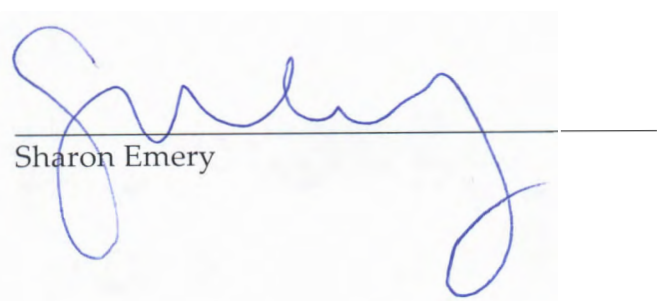
I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 8, 2011



Sharon Emery