Court of Appeal No. G044138
(Orange County Superior Court Case No. 30-2009-00121878-CU-WM-CJC)

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

SIERRA CLUB,
Petitioner

vs.

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

COUNTY OF ORANGE,
Real Party in Interest.

FROM THE SUPERIOR COURT FOR ORANGE COUNTY
The Honorable James J. Di Cesare, Judge
Department C-18 – (657) 622-5218

PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S RETURN TO PETITION FOR EXTRAORDINARY WRIT

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INTRODUCTION

Orange County opposed the 2000 enactment of section 6253.9 of the Public Records Act,[1] which requires a public agency possessing information in electronic format to make that information available in an electronic format upon request. (See Petitioner's RJN 1-0017, [only Orange County remained in opposition to final version of AB 2799].) Having failed at lobbying the Legislature, Orange County's Return attempts to persuade this Court to adopt its unsupportable reading of the §6254.9 software exemption in an effort to make an end-run around the PRA's requirement that GIS data be disclosed upon request. In furtherance of this effort, Real Party mischaracterizes Petitioner's arguments, fails to rebut vital statutory construction and legislative history supporting Petitioner's and the California Attorney General's interpretation of § 6254.9, and tries to impose upon this Court the erroneous definition of "computer software" adopted by the Respondent Superior Court.[2] Real Party's effort should be rejected by this Court.

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[1] The California Public Records Act shall hereinafter be referred to as "PRA." Unless otherwise indicated all statutory references shall refer to the California Government Code.

[2] Respondent Superior Court of the County of Orange shall hereinafter be referred to as, "Respondent Court" or "lower court."

Orange County wishes to circumvent the PRA's requirement that computer data be distributed in electronic format upon request for the cost of duplication, so it invokes the "computer software" exemption in 6254.9[3] to justify charging a $375,000.00 "licensing fee" to anyone who wishes to obtain the County's GIS data ("OC Landbase.) (2 PA 400.) Orange County is practically the only County in the state that wishes to fill its coffers for providing the government service of "maintaining" its GIS database. (Petition, at p. 58; 2 PA 400; Ret. at p 1.) Almost every other County in California provides the same service without attempting to pass the omnibus bureaucratic costs onto PRA requesters. (3 PA 533-34, [Most counties charge the direct cost of copying the data onto a disk].) For example, Los Angeles County makes a DVD of its GIS parcel data – the equivalent of the OC Landbase, but containing information on over three times as many parcels – available for six dollars plus the cost of shipping. (1 PA 110, lines 6-14.)

Respondent Court ruled at Orange County's insistence that "computer mapping systems" as used in §6254.9 includes mapping data as well as software. (5 PA 1331, lines 7-9; 1332, line 8.) This ruling is contrary to law because "computer mapping systems" as used in § 6254.9 refers only to the computer software used to process mapping data using

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[3] Section references in this brief are to the Government Code, unless otherwise specified.

mapping functions. (Attorney General Opinion, 88 Ops. Cal. Atty. Gen. 153, at 159 (2005) [hereinafter "AG Opinion"].) The legislative history and *Santa Clara, infra,* decision supports this interpretation. Moreover, the PRA distinguishes between software and data on its face. (§§6253.9(f); 6254.9(d).) The County stipulated that the OC Landbase contains no software. (5 PA 1083.) Therefore, this court should reverse the Respondent Superior Court and direct Real Party to provide Petitioner the OC Landbase in the electronic format requested for a fee consistent with the PRA.

DISCUSSION

I. THE STANDARD OF REVIEW IS *DE NOVO* BECAUSE THIS COURT IS REVIEWING RESPONDENT COURT'S STATUTORY INTERPRETATION OF SECTION 6254.9

When a Court of Appeal is called upon to construe a statutory scheme, the Court accords "no deference to the trial court's determination." (*An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal.App.4th 1418, at p. 1424.) Furthermore, "[s]tatutory interpretation presents a legal question" (*Santa Clara v. California First Amendment Coalition* (2009) 170 Cal.App.4th 1301, 1316-17 [*Santa Clara*], citing *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 767), so the Court applies de novo review to the issues posed by the action. (*An Independent Home Support Service, Inc*, supra, at p. 1424, citing *Radian Guaranty, Inc. v. Garamendi* (2005) 127

Cal.App.4th 1280, 1288.) Further, any factual issues upon which the interpretation is based, such as the meaning of words used in the statute, are also reviewed *de novo*. (Pet., at pp. 14-17.)

Faced with overwhelming authority supporting Petitioner's interpretation of the PRA software exemption and demonstrating the lower court's error of law, Real Party now seeks a much more deferential standard of review (substantial evidence). (Ret., at pp. 41-45.) Real Party is estopped from arguing there are factual issues to review under substantial evidence.

Real Party conceded in the court below that the central issue, perhaps the only one before Respondent Superior Court, is one of law. (3 PA 763 [Real Party's brief stating, "[T]he parties largely agree on the facts, but disagree on the legal interpretation of Section 6254.9 of the Government Code."]; RT at 326-27, [Real Party acknowledging, "[I]f we have an argument on the legal issues, the question of whether or not subdivision (b) of section 6254.9 is a statutory definition or not... if we're wrong, we don't even get to the facts."].) Ultimately Orange County stipulated to the central *adjudicative* fact relevant here: the OC Landbase contains no software. (5 PA 1083.)

Now hamstrung by its own stipulation, Real Party tries to limit this Court's review powers by suggesting Respondent Court's interpretation of "computer mapping systems" is binding on this Court as fact. (Ret., at pp.

21-23; §6254.9(b).) Real Party on appeal wishes to force this Court to accept an erroneous interpretation of §6254.9 (one that resists the PRA's plain language and established legal precedent), claiming that Respondent Court's decision should be upheld under the more deferential substantial evidence standard. (Return at pp. 21-23.) As Courts of Appeal obviously possess powers of statutory interpretation under a *de novo* standard of review, Real Party's approach should be summarily rejected. (*Santa Clara*, *supra*, at p. 1316-17.)

Nevertheless, Respondent Court's determination that the OC Landbase is "part of" a "computer mapping system," cannot be upheld under any standard of review. The court's "finding", whether characterized as factual or legal, is based on an incorrect interpretation of the law. The operative definition in §6254.9 is "computer software." (§6254.9, subd. (a), (b).) The lower court's purported "factual" determination concerning "computer mapping systems," a subset of computer "software" under section 6254.9(b), is an error of law.

Finally, Petitioner is not estopped from arguing the lower court erred as a matter of law. (Ret., at p. 50-51.) Real Party's fourth and fifth affirmative defenses asserting estoppel and waiver should be stricken. First, Real Party's Return misrepresents Petitioner's actions in the lower court. For example, Petitioner did not, as Orange County states, "insist" on

an evidentiary hearing.[4] (Ret., at p. 51.) However, once an evidentiary hearing was scheduled at the invitation of the court, Petitioner was entitled to present evidence in support of its position. (See *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555, ["[N]o estoppel results from acts of the appellant which are defensive or precautionary"; See also *Williamson v. Pacific Greyhound Lines* (1949) 93 Cal.App.2d 484, 488, [appellant's jury instructions did not constitute waiver on contributory negligence because they were purely defensive, tendered provisionally to be used only in case the court refused her withdrawal instruction.].)

Petitioner argued well before the hearing this case presented the legal question of statutory interpretation of the PRA. (See e.g., 2 PA 488-89; 3 PA 513-19; 4 PA 912). In addition, Petitioner made specific objections to the proposed Statement of Decision that the issue was not one of fact, but

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[4] The Respondent Court requested the evidentiary hearing, not Petitioner. Further, at the time of Respondent Court's request, the Sierra Club expected the evidentiary hearing to focus on whether the OC Landbase in the form requested by Sierra Club contained computer software. But this issue was laid to rest when, prior to the evidentiary hearing, Orange County stipulated that the OC Landbase contains no software. (5 PA 1083.) Therefore neither party offered testimony on this issue at the evidentiary hearing held on April 12-13, 2010. (RT at pp. 37-272.) Thus, because the parties stipulated the OC Landbase contains no software, the only remaining controversy was one of statutory interpretation.

legal interpretation of the PRA.[5] (5 PA 1340, lines 12-16.) To that end, the holding in *Estate of Armstrong* is inapposite. (Ret., at p. 50, citing *Estate of Armstrong* (1966) 241 Cal.App.2d 1.) Here, unlike in *Armstrong*, Petitioner's position on appeal is consistent with its position in the lower court. (*Estate of Armstrong, supra*, at p. 7.)

Furthermore, there can be no waiver[6] when the one asserting error asserted it in the trial court. (See *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685.) Here, Petitioner timely brought the statement of decision's deficiencies (legal conclusions were couched as "factual findings") to the court's attention in written objections. (5 PA 1339-40; *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.) Thus, Petitioner did not "invite error" on the part of the lower court. (Ret., at p. 50; See *Redevelopment Agency, supra,* 80 Cal.App.3d 158, at p. 166.)

II. THIS COURT SHOULD ADOPT THE CORRECT CONSTRUCTION OF §6254.9'S SOFTWARE EXEMPTION, ARTICULATED BY THE ATTORNEY GENERAL AND *SANTA CLARA* COURT, AND REJECT REAL PARTY'S ERRONEOUS INTERPRETATION

The right to access government-held information is a constitutional right in California (Cal. Const., art. I, § 3, subd.(b)(1); §6250.) Thus,

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[5] Real Party, not Petitioner, requested a Statement of Decision from the court. (2 PA 493)

[6] Because the substantial evidence standard does not apply, Real Party's argument that Petitioner waived its right to argue on substantial evidence is irrelevant. (Return, at pp. 44-45.)

exemptions to information disclosure are to be interpreted narrowly and a court is to err in favor of disclosure. (See *Lorig v. Medical Bldg* (2000) 78 Cal.App.4th 462, 467; *San Gabriel Tribune v. Superior Court*, (1983) 143 Cal.App.3d 762, 773.) The agency seeking to prevent disclosure bears the burden of demonstrating the records in question are exempt under law. (*Board of Trustees of California State University v. Superior Court,* (2005) 132 Cal.App. 4th 889, at p. 896; *Santa Clara, supra,* 170 Cal.App.4th 1301, at p.1321.).) The lower court did not follow the above-cited principles. Instead, the court erred in favor of **preventing** disclosure, adopting Real Party's strained interpretation which deviates from the plain language and intent of the PRA, as well as all previous authority interpreting the PRA. (See *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

Petitioner's interpretation of "computer software" in Section 6254.9 is the only reasonable interpretation under the PRA. It comports with the Attorney General opinion and *Santa Clara v. California First Amendment Coalition* (2009) 170 Cal.App.4th 1301, both of which in turn follow the correct principles of statutory construction and discerning legislative intent.

A. Real Party's Overly Broad Interpretation of § 6254.9's Computer Software Exemption Was Rejected By The On-Point Attorney General Opinion Issued in 2005

As already explained in the Petition, § 6254.9 does not exempt from disclosure the OC Landbase data any more than it exempts the equivalent

parcel map data at issue in the AG's opinion. (Pet, at pp. 22-23, 42-43; See 2 PA 400 [County invoice entitles the GIS data "Parcel Map Data."].) Because the term "computer mapping system" was not defined by the PRA, the Attorney General properly determined, using canons of statutory construction (including plain meaning), that the term "computer mapping systems" in § 6254.9 (b) refers to the software used to process boundary and similar mapping information, not the mapping information itself:

> [T]he term "computer mapping systems" in section 6254.9 does not refer to or include basic maps and boundary information per se (i.e., the basic data complied, updated, and maintained by county assessors), but rather denotes unique computer programs to process such data using mapping functions – original programs that have been designed and produced by a public agency. (See, e.g., §§ 6254.9, subd. (d), 6253.9, subd. (f) [distinguishing "record" from "software in which [record] is maintained"] 51010.5 subd. (i)[defining "GIS mapping system" as system "that will collect, store, retrieve, analyze, and display environmental geographic data..."(italics added)]. ... Computer Dict. (3d ed. 1997) p. 441 [defining "software" as "[c]omputer programs; instructions that make hardware work"]; Freedman, the Computer Glossary: The Complete Illustrated Dict. (8th ed. 1998) p. 388 ["A common misconception is that software is also data. It is not. Software tells the hardware how to process the data. Software is 'run.' Data is 'processed'"]. Accordingly, parcel map data maintained in an electronic format by a county assessor does not qualify as a "computer mapping system" under the exemption provisions of section 6254.9
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> (88 Ops. Cal. Atty Gen. 153, 159 (2005),1 PA 179).

Realizing that the lower court's decision directly conflicts with the Attorney General's reasonable interpretation of § 6254.9, Real Party struggles to discredit the AG Opinion. (Ret. at p. 36-37). But Real Party

cannot escape the fact that the Attorney General used proper canons of construction in interpreting § 6254.9. (See Pet., at p. 42; 1 PA 179.) Even worse, Real Party argues – albeit wrongly -- that resorting to dictionary terms renders the entire AG Opinion invalid.[7] (Return, at p. 36; See *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 231 [court turns first to the dictionary definition of "voluntary" to determine the meaning of that term in a workmen's compensation statute].)

Adopting Real Party's argument, the Respondent Court rejected the AG Opinion mainly because it used extrinsic aids to define "computer software" and "computer mapping systems." (5 PA 1354-55.) Yet the court's statement of decision suffers from the same purported defect: embracing extrinsic aids to define the statute's terms. (5 PA 1347, 1353; see, e.g., *Smith v. Superior Court* (2006) 39 Cal.4th at p. 83, ["If the statutory terms are ambiguous, we may examine extrinsic sources, including ... the legislative history."].) There is no justified reason why the plain meaning, dictionary definition of "software" utilized by the Attorney General should be outright rejected in favor of other extrinsic evidence utilized by the trial court. (See, e.g., *Moyer, supra* [turning first to the

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[7] Real Party similarly claims "The Sierra Club urges this Court to rely on extrinsic dictionary definitions of the word "software" and disregard the plain language of subdivision (b) as unimportant to the interpretation of Section 6254.9." Wrong; Sierra Club argues ***for*** a plain language interpretation, not against it. (Pet. at pp. 31-34.)

dictionary definition of "voluntary" to determine the meaning of that term in a workmen's compensation statute].)

Furthermore, the AG Opinion properly follows the constitutional mandate embodied in Cal. Const., art. I § 3(b)(2)[8] because it *narrowly* construes the § 6254.9 software exemption as applying to software only – not data that is processed by the software. The lower court's and Real Party's overly *broad* interpretation of this exemption *(as including data)* directly conflicts with this constitutional mandate.[9] This Court should side with the California Attorney General and reject Real Party's invitation to ignore California's constitutional mandate to narrowly construe the software exemption.

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[8] The constitutional provision that mandates Public Record Act disclosure exemptions be narrowly construed is clear:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal Const., art. I, section 3, subd. (b), par. 2.)

[9] Real Party sets up a straw man in an effort to rebut Petitioner's constitutional argument. Specifically, Real Party alleges that Petitioner argues Cal. Const., art. I § 3(b)(2) abrogates or implicitly repeals the computer-software exemption in § 6254.9. (Ret. at 38-39.) Of course this is not Petitioner's argument at all, but rather that a PRA exemption, such as § 6254.9, is to be interpreted narrowly in the manner required by Cal. Const., art. I § 3(b)(2), (Petition, at p. 29); a point Real Party refuses to address.

B. The Court of Appeal in *Santa Clara* Interpreted "Computer Software" As Used In §6254.9, Therefore the Opinion Is Directly Applicable To This Case

Real Party argues that *Santa Clara* does not apply because (1) the *Santa Clara* court did not rule specifically on the definition of "computer mapping system" (§6254.9(b); and (2) Petitioner's expert provided different testimony in *Santa Clara* than in this case. (Ret., at p. 47-48.) Both arguments fail.

Santa Clara's conclusion that GIS data does not fall under the §6254.9 software exemption is highly persuasive:

> A statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed. In short, while a court is free to disregard a dictum that it strongly disapproves, it is quite likely to rely on a dictum where no contrary precedent is controlling and where the view commends itself on principle.

(9 Witkin, Cal. Proc. 5th (2008) Appeal, § 511, p. 575.)

Largely ignoring Petitioner's explanation of *Santa Clara*'s applicability, (Pet. at pp. 24-25), Real Party argues *Santa Clara* is inapplicable to this case because the court "did not consider the computer mapping system exemption" in subsection (b) of § 6254.9. (Return at 48.) But as pointed out in the Petition, the *Santa Clara* Court specifically held – albeit in the context of subdivision (e) -- that § 6254.9 does not exempt GIS

data from disclosure because GIS data is not "software" as used in subdivision (a) of 6254.9. (Petition, at pp. 23-25.) This holding was premised on the meaning of "software" as used in § 6254.9(a) and thus this ruling was binding on Respondent Court and is instructive for this Court. (See 9 Witkin, Cal. Proc. 5th (2008) Appeal, § 511, p. 575.) "Software" means the same thing in *Santa Clara* as it does in this case because subdivision (e) of §6254.9 at issue in *Santa Clara* is governed by subdivision (a)'s "computer software" in the same way that subdivision (b) is governed by subdivision (a). (§6254.9, subds. (a), (b), (e); see also *People v. Roberge* (2003) 29 Cal.4th 979, 987 ["In construction of statutes, words should be given the same meaning throughout a code unless the Legislature has indicated otherwise."].)

Finally, Real Party argues that *Santa Clara* is distinguishable because Mr. Joffe's (Petitioner's expert) testimony in *Santa Clara* differed from his testimony in this case. (Return, at p. 49.) This argument hardly deserves a response. Mr. Joffe's testimony in *Santa Clara* is obviously not relevant to the question of whether the *Santa Clara* court's interpretation and application of the PRA are instructive here.

C. Real Party's Interpretation of § 6254.9, subdivision (d) Must Be Rejected As Incorrect Because It Does Not Square With § 6253.9

Section 6254.9(d) is an admonition against interpreting the software exemption in § 6254.9 too broadly. Subdivision (d) of 6254.9 reads:

> "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."

In an attempt to skirt the guarantee that "nothing in this section" should affect the disclosure of public records stored in a computer, Real Party claims that so long as the County provided the information in *some* format, it complied with the PRA. (Return, at p. 46 ["Section 6254.9 creates an exemption for GIS file formatted data... but it nevertheless guarantees the public access to non-GIS formatted records containing the information stored in a GIS, which the County has repeatedly agreed to produce."].) This argument is foreclosed by §6253.9, which makes clear an agency must provide information in the electronic format requested. (§6253.9(a)(1), (2).) Section 6253.9, provides:

> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which it holds the information.
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

When read together, §§ 6254.9(d) and 6253.9 require disclosure of data in the format requested by Petitioner. (See *In re Marriage of Williams* (1989) 213 Cal.App.3d 1239, 1245 [statutes are to be harmonized].) Here, Petitioner requested the data in GIS format. (5 PA 1083, ¶15.) Thus, Real Party cannot comply with the PRA by producing non-GIS formatted data.

Moreover, realizing subsection (d) of § 6254.9 eviscerates its interpretation of the computer software exemption, Real Party implies that subdivision (d)'s plain language should be ignored, relying on two inapplicable cases interpreting a more restrictive PRA exemption ("investigative records" exemption in §6254(f)). (Return, at p. 47, citing *Williams v. Superior Court* (1993) 5 Cal.4th 337 and *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072.) Real Party essentially argues *Williams* and *Haynie* require this Court to read into § 6254.9 an exemption for "records" but not for "information." (Return, at p. 46-7.) Real Party argues it complied with the PRA because it provided the "information" (i.e., non-GIS formatted data). (*Ibid.*)

But neither *Haynie* nor *Williams* support Real Party's position. Both cases reviewed the broad PRA exemption for investigative records under **Section 6254(f)**. (*Williams, supra*, 5 Cal.4th 337 at pp. 346-54; *Haynie, supra*, 26 Cal.4th at p. 1072.) By enacting § 6254(f), the legislature did something it did not do in any other section of the PRA—it took great pains to carve out a specific exception to the broad investigative records

exemption, allowing disclosure of certain types of information while exempting from public review the records themselves.

By contrast, the legislature made no distinction between "records" and "information" in 6254.9(d). On the contrary, Section 6254.9, subdivision (d), provides that "[n]othing in this section is intended to affect the public record status of *information* merely because it is stored in a computer. *Public records* stored in a computer shall be disclosed as required by this chapter." (Emphasis added.) This provision deems "information" stored in a computer to be "public records" subject to full disclosure under the PRA.

Ultimately, either the GIS data requested by Petitioner is exempt from disclosure or it is not. If it is exempt from disclosure, none of the information need be disclosed at all -- in any format. (§6254.9(a),(b).) If it is not exempt, § 6253.9 mandates the information be disclosed in whatever electronic format Real Party holds it, as requested. There is no "in between" as Real Party implicitly asserts.

Real Party's PRA compliance theory with respect to GIS data prohibits the harmonic reading of §§ 6254.9 and 6253.9; it is therefore unsound and should be rejected. (See *In re Marriage of Williams* (1989) 213 Cal.App.3d 1239, 1245.)

D. Real Party Fails To Rebut Petitioner's Argument That §6254.9(b) Provides Examples of Computer Software, And Does Not Enlarge the Common Meaning of "Computer Software"

Section 6254.9, subdivision (b) provides illustrative examples of "computer software," which includes "computer mapping systems." (*Arizona State Bd. for Charter Schools v. U.S. Dept. of Education* (9th Cir. 2006) 464 F.3d 1003, 1007 [emphasis added] ["the word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an *example* of the preceding principle."]; *Federal Land Bank v. Bismarck Lumber Co.* (1941) 314 U.S. 95, 100 ["The term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."].)

Real Party insists the word "includes" as used in § 6254.9(b) is a term of enlargement rather than limitation. (Return, at p. 26.) Petitioner's point is not that "computer mapping system" limits "computer software," but that "computer mapping system" is limited to the definitional bounds of "computer software." (§6254.9, subd. (a), (b).)

Real Party argues §6254.9(b) is a "statutory definition" requiring this Court to adopt Real Party's interpretation of "computer mapping systems." (Ret., at pp. 24-26.) The cases cited by Real Party actually stand for the proposition an unclear definition can be deduced by canons of construction, including extrinsic evidence such as dictionary references,

treatises or legislative history. (Ret., at p. 24, citing cases.) In addition, a statutory definition is not binding if the construction of it would thwart the statute's purpose. (*Chen v. Franchise Tax Bd.* (1988) 75 Cal.App.4th 1110, 1123.) Thus, as explained herein, the plain meaning of "computer software" governs the meaning of "computer mapping systems" to exclude mapping data from the disclosure exemption. (§6254.9; see, e.g., *Trabue Pittman Corp. v. County of Los Angeles* (1946) 29 Cal.2d 385, 393).

Moreover, Real Party's reliance on *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709 (Ret. at p. 26) actually supports **Petitioner's** position. Real Party ignores the doctrine of *esjudem generis* on which the court in *Hassan* relies (although not naming it as such). (*Id.* at pp. 716-17.) The doctrine provides that, "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" (*Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1011-1012, 9.) Here, "computer mapping systems" is a subset of "computer software" and must be interpreted under that framework. (*Ibid*; § 6254.9, subd. (b). Based on the correct interpretation of §6254.9 as addressed herein and the Petition, "computer software" does not include GIS data so "computer mapping systems" also cannot be read to include GIS data.

III. THE PRA'S LEGISLATIVE HISTORY CLEARLY DEMONSTRATES THE § 6254.9 SOFTWARE EXEMPTION DOES NOT ENCOMPASS GIS DATA LIKE THE OC LANDBASE

Respondent Court focused myopically on one cost-recovery comment in the legislative history of § 6254.9, wholly ignoring the most pertinent and significant legislative developments supporting Petitioner's interpretation of § 6254.9. (5 PA 1357; *see Torres, supra,* 26 Cal.4th 995, 1003 [courts must select the construction that comports most closely with the apparent intent of the legislature].) As the California Supreme Court recently reaffirmed, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court, supra,* 39 Cal.4th 77, at p. 83.)

To provide context, the following is a chronology of the PRA's evolution with respect to computer information held by an agency:

- In 1981, the Legislature amended § 6256 of the PRA to require disclosure of computer records in the format of the agency's choosing, whether in an electronic form or paper print-outs.
- In 1988, the Legislature exempted computer software from disclosure by adding § 6254.9. (Assembly Bill 3265 ["AB 3265"].)
- In 2000, the Legislature repealed § 6256[10] and added § 6253.9 requiring agencies to disclose computer records in the same electronic format maintained by the agency if requested. (Assembly Bill 2799 ["AB 2799"].)

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[10] To be precise, Senate Bill 143 in 1998 renumbered § 6256 as § 6253 (b), but the subject language remained the same until the legislature passed § 6253.9 in 2000.

Real Party reads into the legislative history of § 6254.9 its desired result – the permission to sell government information to fund its operations. But upon examination, Real Party's version of history is not borne out by the facts.

A. Real Party's Return Omits Crucial Legislative Developments Undermining Its Reading of §6254.9's Software Exemption

The real interpretive coup de grâce to the arguments of Orange County comes in the form of the legislative history Orange County ignores. In describing the legislative history of § 6254.9, Real Party omits important developments in the legislative evolution of AB 3265 (enacting §6254.9). While Real Party references the first section of the April 5, 1988 Assembly Committee Analysis, the "Purpose" section, (Ret., at. p. 30), it ignores the second, most telling section, "Status of Computer Data," which demonstrates the legislature clearly intended to exempt only software, not data, from disclosure:

> The bill draws a distinction between computer software and computer-stored information. The bill declares that information is not shielded from the California Public Records Act "merely because it is stored on a computer." In addition, current law also provides that "computer data shall be provided in a form determined by the agency" (Government Code section 6256).

(4 PA 956.) The section explicitly recognizes the same distinction between software and data recognized by the California Attorney General. (88 Ops. Cal. Atty. Gen. 153, 159 (2005).)

The second notable omission from Real Party's Return is the April 28, 1988 Department of Finance critique wherein the Department opposed AB 3265 in part because the bill exempted from disclosure "computer readable databases." (5 PA 1020 ["The inclusion of data bases in paragraph (c) is contradictory to the intent expressed in paragraph (b) since the records maintained in data bases are subject to public records laws."].) In response, the Legislature removed "computer readable databases" from the bill as amended on June 9, 1988. (4 PA 947.)

Later that month, on June 16th, and then again on June 20th, the Department of Finance issued the analysis relied upon by Real Party at page 32 of the Return. One portion of this analysis relied on by Real Party references "information databases." (4 PA 1017, 1018.) But, as noted above, the "databases" language had been removed as part of the June 9th amendment and remained as such in the June 15th amended and final bills. Thus, it appears the Department of Finance references were unintentional, and more likely a case of editing oversight.[11] In any event, Real Party

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[11] The reference to "information databases" appears under the heading "Fiscal Analysis" in each of the Department's analysis. In fact, every Fiscal Analysis section is identical, evidencing an oversight on the Department's part to revise this portion of its analysis as the bill evolved. (*See e.g.*, 4 PA 1021, [Fiscal Analysis dated 4/28/88 for April 4, 1988 bill amendment]; 4 PA 1018, [Fiscal Analysis dated 6/16/88 for June 9, 1988 bill amendment]; 4 PA 1017 [Fiscal Analysis dated 6/20/88 for June 15, 1988 bill amendment]; 4 PA 1077, [Fiscal Analysis dated 8/8/88 for Final Bill].)

omits a crucial finding: "[t]he bill specifies that any data that may be stored on a computer still retains its public record status." (*Ibid.*) This finding bolsters Petitioner's position and further illustrates the fallacy of Real Party's position with respect to the legislative history of § 6254.9.

B. Real Party's Reading Of § 6254.9's Legislative History Must Be Rejected Because It Is Contrary To The Legislature's Intent In Preserving The Computer Data Disclosure Requirement In Then- Existing § 6256

Section 6256, since repealed and replaced with section 6253.9, provided:

> Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. **Computer data shall be provided in a form determined by the agency."**

(Emphasis added.)

Under §6256, an agency could produce computer data in paper printed form if it so chose. At the time AB 3265 (§6254.9) was being considered, the Legislature was indeed aware agencies were not obligated to provide computer data in electronic format:

> Section 6256 provides in part that "Computer data shall be provided in a form determined by the agency." There is no case law interpreting this provision, nor is "computer data" defined in the Act. The provision does indicate a legislative recognition that information which is stored in a computer is capable of being reproduced in a variety of forms, including printed or "hard" copies, as well as computer readable tapes or discs. It is clear that the Public Records Act does not obligate

> government agencies to provide computer stored or generated information in computer readable form.

(4 PA 984 [Administrative Services Committee analysis of AB 3265, dated January 19, 1988], from legislative bill file of the Senate Committee on Governmental Organization on Assembly Bill 3265, *see* Item 9, 4 PA 940.)

Prior to the enactment of §6254.9, computer programs developed by public agencies could be requested as public records by anyone, including commercial businesses wishing to appropriate new software for its own use in its computers. The Legislature was aware that § 6256 did not protect the agencies' software because the computer program text could be read from paper print-outs of the software program and re-entered, resulting in a functioning piece of software. (*See* 4 PA 1038 [Letter from County of Santa Cruz, AB 3265 Leg. Hist.].) Moreover, when it set out to exempt from disclosure computer "software" in any format (§6254.9), the Legislature did not disturb § 6256, thus evidencing its intent that computer "*data*" as specified in § 6256 remain public records subject to disclosure in a form determined by the agency.

Real Party argues, "the Legislature recognized that section 6254.9 only operated to exempt the disclosure of data in a GIS [electronic] format, while still requiring disclosure of the information in other non-GIS file formats." (Ret. at p. 31.) But Real Party overlooks the fact that § 6256

already did precisely that. Real Party's strained reading of the legislative history of § 6254.9 cannot be reconciled with the Legislature's intent in preserving (in §6256) public access to computer "data."

In addition, Real Party's premise, if accepted, presumes the Legislature would enact a superfluous provision (§6254.9(b)), because § 6256 already operated to effectively exempt disclosure of data in electronic (GIS) format while still requiring disclosure of data in other formats of the agency's choosing. Such intent cannot be imputed to the Legislature, and Real Party's reading of the legislative history is barred by doctrines of statutory construction. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, [significance should be given to every part of an Act in pursuance of the legislative purpose]; *Watkins v. Real Estate Commissioner* (1960) 182 Cal.App.2d 397, 400 "a construction making some words surplusage is to be avoided"].)

C. Real Party's Refusal To Produce The OC Landbase In The Electronic Format Requested By Sierra Club Results In The Very Evils The Legislature Intended To Avoid By Enacting § 6253.9

Read together, §§ 6253.9 and 6254.9 make perfectly clear the PRA distinguishes between public records maintained in electronic form, on the one hand, and the computer software used to view, process, manipulate, and/or store those records, on the other. While the PRA authorizes a public

agency to deny a PRA request for software under section 6254.9, it expressly prohibits an agency from denying a request for public records in electronic form, including the OC Landbase data at issue in this case.

As discussed above, before the enactment of §6253.9, section 6256 gave discretion to public agencies to disclose computer data in whatever form they chose, including paper format. Recognizing that the PRA "worked so that the agency could effectively frustrate the request by providing a copy of the requested record in a form different from the request, which could sometimes render the information useless" (Pet. RJN 1-005, [legislative comment on AB 2779]) and seeking to reduce the public's expense of copying paper print-outs of voluminous computer records (*Ibid.*, at 1-007 through 008), the Legislature passed AB 2799, repealing § 6256[12] and adding § 6253.9.

The history of §6253.9 confirms the Legislature recognized the computer age it was in and wanted to make computer-held public records accessible to the public. "The expense of copying these records in paper format, especially when the records are voluminous, makes those public records practically inaccessible to the public." (Petitioner's RJN,1 at 0017).

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[12] Then-existing § 6253(b) allowed an agency to determine the form in which computer records could be disclosed.

Orange County is well aware of this change in the PRA, having been the lone hold-out opposing AB 2799.[13] Understanding §6253.9 enlarges, rather than reduces, the public's access to computer records, Real Party now presents the somewhat perplexing argument that §6253.9 is a more general statute that cannot control over §6254.9's specific statutory reference to "computer mapping systems." (Ret., at pp. 40-41.) Real Party cites to cases involving implied repeal, which stand for the proposition that when two provisions are inconsistent, the more specific statute controls over the general one. (Ret., at p. 40.) But then Real Party claims the two provisions (§§6254.9 and 6253.9) are in fact consistent, making implied repeal inapplicable. (*Ibid.*) Such incoherence speaks volumes about the indefensibility of Real Party's position that the OC Landbase need not be disclosed in the electronic format requested by Sierra Club.

Moreover, the evil to be prevented by a statute is to be given prime consideration in interpreting a statutory provision. (*People ex rel. S. F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 543-544.) The paper records offered by Orange County in lieu of the OC Landbase in GIS file format amount to nearly 7 million pages. (PA 538, line 9.) It would cost Petitioner over a million dollars to copy at 15 cents per page. In contrast, the OC Landbase in electronic format is delivered on a single

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[13] See Petitioner's RJN, 1-0017 (only Orange County remained in opposition to final version of AB 2799).

DVD (3 PA 577), which could be copied at a cost of a few dollars. This is similar to what most other counties charge, such as Los Angeles County. (1 PA 110, lines 6-14.)

Real Party seeks to present the public with two choices: either pay an exorbitant licensing fee to obtain electronic records, or pay huge copying fees for unmanageable volumes of paper documents. Both options are contrary to the legislative intent of the PRA and must be rejected. (*See Torres v. Parkhouse Tire Service, Inc.*, *supra*, 26 Cal.4th 995, at p. 1003 [courts must select the construction that comports most closely with the apparent intent of the Legislature]; *see also People ex rel. S. F. Bay etc. Com., supra,* 69 Cal.2d 533, at pp.543-544].)

IV. REAL PARTY'S OBSERVATION THAT COMPLYING WITH THE PRA COMES AT A COST IS UNREMARKABLE, IRRELEVANT, AND DOES NOT JUSTIFY AN UNDULY BROAD INTERPRETATION OF THE SECTION 6254.9 SOFTWARE EXEMPTION

Real Party complains that maintaining the OC Landbase is expensive. (Ret., at p. 33-34.) While it may be true that Orange County must pay County staff to input information such as mapping data into the Orange County's computer system, this does not justify an unduly and unconstitutionally overbroad interpretation of § 6254.9 such that mapping

data need not be produced in GIS format when requested.[14] Certainly the Legislature observed that data maintained in an agency's computers is ultimately created at taxpayer expense in the first place. (Petitioner's RJN 1-0015 [July 6, 2000 Legislative Analysis of A.B. 2799].)

As has been said: "There is nothing in the Public Records Act to suggest that a records request must impose *no* burden on the government agency." (*State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th at p. 1190, fn. 14.) Indeed, if public agencies were justified in withholding GIS data from disclosure for the reason government staff must be paid to input or enter it on a computer, then the same could be said for practically any computer-held information since most government staff activity involves a computer in one way or another.[15] Thus, when Real Party complains, "Public agencies are...faced with three alternatives: (1) fund GIS development and maintenance with taxes; (2) fund GIS with fees for the sale and usage of GIS data; or (3) do without accurate, current, reliable GIS data," Real Party is fundamentally saying: public agencies are

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[14] Further foreclosing Orange County's "cost to maintain" argument is the legislature's deletion of the term "maintained" from section 6254.9, subsection (a), while leaving the term "developed" in same undisturbed. (4 PA 947 [June 9, 1988 Amendment to AB 3265].)

[15] The 2005 Attorney General Opinion observed, "the fact that a record is costly to produce in the first instance or that a copy thereof may be costly to reproduce for a member of the public does not cause a public record to become exempt from disclosure." (1 PA 30, nt. 9.)

faced with three alternatives—(1) fund government with taxes, or (2) sell government to the highest bidders, or (3) do without government. (Ret., at p. 34.) Nevertheless, the point is irrelevant—the PRA does not provide for a "cost exemption."[16] Real Party is required by law to produce the information Petitioner requests, in the same electronic format Orange County possesses it. (§6253.9.)

CONCLUSION

The PRA ensures public records in computer readable form are accessible to all, rich or poor. While agencies can withhold computer software from disclosure, the same cannot be said for computer data or databases. In harmonizing sections 6254.9 and 6253.9, the only legally tenable conclusion is "software" means "software" to which the public has no right of access for a nominal fee, but computer "data" is different and must be made available to the public for the cost of a computer disk. Thus, Petitioner respectfully requests this Court direct Respondent Superior Court

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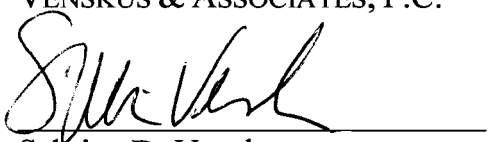
[16] It should be noted that Real Party's arguments regarding costs are akin to invoking § 6255's catch-all exemption, which provides a public agency may withhold public records upon a showing "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." No such weighing of interests is at issue here because §6253.9 does not allow for it, and Real Party has not asserted § 6255's exemption, failing to raise it in the lower court and on appeal.

to vacate its August 2010 Decision and Judgment and grant Petitioner's Motion for Writ of Mandate compelling Real Party to produce the OC Landbase in the GIS file format requested by Petitioner for the direct cost of copying the files onto a computer disk.

Dated: December 14, 2010

Respectfully Submitted,

VENSKUS & ASSOCIATES, P.C.



Sabrina D. Venskus

Attorney for Petitioner, The Sierra Club

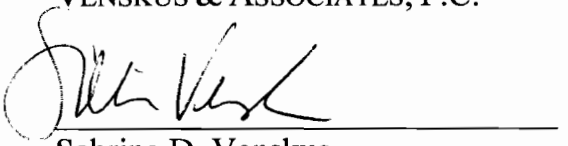
CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies, pursuant to Rule of Court 8.204(c)(1), the attached Petitioner's Reply brief contains 6,999 words, as counted by the Microsoft Word computer program used to produce the brief, not including this certificate or the tables of contents and authorities.

Dated: December 14, 2010

Respectfully Submitted,

VENSKUS & ASSOCIATES, P.C.



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Attorney for Petitioner, The Sierra Club

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