Court of Appeal No. G044138

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 of the State of California,
County of Orange; Case No. 30-2009-00121878-CU-WM-CJC
The Honorable James J. Di Cesare, Judge

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER SIERRA CLUB OF MEDIA AND OPEN GOVERNMENT AMICI FIRST AMENDMENT COALITION; FREEDOM COMMUNICATIONS, INC., PUBLISHER OF THE ORANGE COUNTY REGISTER; LOS ANGELES TIMES COMMUNICATIONS LLC, DBA LOS ANGELES TIMES; THE ASSOCIATED PRESS; BAY AREA NEWS GROUP; BLOOMBERG NEWS; COURTHOUSE NEWS SERVICE; GANNETT CO., INC.; HEARST CORPORATION; LEE ENTERPRISES, INCORPORATED; THE MCCLATCHY COMPANY; PATCH MEDIA CORPORATION; THE SAN FRANCISCO EXAMINER; WIRED; AMERICAN SOCIETY OF NEWS EDITORS; ASSOCIATION OF CAPITOL REPORTERS AND EDITORS; CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION; CITIZEN MEDIA LAW PROJECT; ELECTRONIC FRONTIER FOUNDATION; FIRST AMENDMENT COALITION OF ARIZONA; NATIONAL FREEDOM OF INFORMATION COALITION; OPENTHEGOVERNMENT.ORG; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND SOCIETY OF PROFESSIONAL JOURNALISTS

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INTRODUCTION

At its heart, this case represents an effort by Orange County to undo *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301 (2009), the Sixth District's recent landmark ruling that GIS-formatted electronic mapping records must be released to the public under the Public Records Act ("PRA"). That decision, which followed three years of exhaustive litigation, should have ended the practice by some government agencies, including Orange County, of charging exorbitant prices for electronic mapping records, and instead require public agencies to release those records for fees not exceeding those permitted by the PRA.

Unwilling to go along with that decision, Orange County, which has long charged among the highest fees in the state for such records, contends that it is justified in continuing this practice under the PRA's software exemption, Government Code § 6254.9. Although this exemption was not the focus of the Sixth District's decision, it nevertheless played a significant role in that case, and the Sixth District indicated that it found the § 6254.9 argument unpersuasive. Despite this, the respondent court, clearly sympathetic to Orange County's claims of financial hardship, determined that its electronic mapping records were exempt from disclosure under § 6254.9. If that decision is allowed to stand, it will effectively negate the result in the Santa Clara County decision and open the floodgates to government refusals to release not just electronic GIS-formatted mapping records, but a host of other public records maintained in electronic formats.

This Court should not permit such an outcome. Even setting aside the issue of whether Sixth District's earlier opinion controls in this case – a matter that petitioner addresses in detail in its briefs – it is clear that § 6254.9 does not exempt Orange County's GIS-formatted landbase, or any other electronic records, for that matter. Not only is the County's position directly contrary to a 2005 Attorney General opinion interpreting § 6254.9,

an interpretation that the trial court in the Santa Clara County case subsequently adopted, but it relies on the same flawed statutory interpretation and legislative history arguments that it advanced in an amicus brief it helped prepare in the Santa Clara County case – arguments that the Sixth District found unconvincing, *County of Santa Clara*, 170 Cal. App. 4th at 1332 n.9. In fact, the evolution of the bill that became § 6254.9 indicates an affirmative intent to distinguish data from software and to exempt only the latter from disclosure.

Moreover, noticeably absent from Orange County's papers is any mention of the most recent legislative history pertaining to § 6254.9. Orange County itself sponsored a bill in 2008 that would have amended § 6254.9 to define "computer mapping systems" as including data, but the bill died in committee. Its unsuccessful effort to amend the statute is compelling evidence that § 6254.9 as written does not include data.

Media and Open Government Amici have a unique and strong interest in the outcome of this case.[1] The First Amendment Coalition,

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[1] The Media and Open Government Amici group consists of 24 different media and public interest organizations: (1) the First Amendment Coalition; (2) Freedom Communications, Inc., publisher of The Orange County Register; (3) Los Angeles Times Communications LLC, dba Los Angeles Times; (4) The Associated Press; (5) Bay Area News Group, publisher of the San Jose Mercury News and other publications; (6) Bloomberg News; (7) Courthouse News Service; (8) Gannett Co., Inc.; (9) Hearst Corporation, publisher of the San Francisco Chronicle; (10) Lee Enterprises, Incorporated, publisher of North County Times and the Napa Valley Register; (11) The McClatchy Company, publisher of The Sacramento Bee and other newspapers; (12) Patch Media Corporation; (13) The San Francisco Examiner; (14) Wired; (15) American Society of News Editors; (16) Association of Capitol Reporters and Editors; (17) California Newspaper Publishers Association; (18) Citizen Media Law Project; (19) Electronic Frontier Foundation; (20) First Amendment Coalition of Arizona; (21) National Freedom of Information Coalition; (22) OpenTheGovernment.org; (23) The Reporters Committee for Freedom of the Press; and (24) the Society of Professional Journalists.

which until recently was known as the California First Amendment Coalition, was the petitioner in the Santa Clara County case, in which it was also represented by the undersigned counsel. Its considerable efforts in bringing that case to a favorable conclusion were supported by four different amici curiae briefs in the Sixth District, and several of its supporting amici in that case are co-amici on the instant brief. Having already devoted hundreds of hours to litigating this issue in the Santa Clara County case and now having devoted considerable additional time to the preparation of this brief, Media and Open Government Amici urge this Court to put a definitive end to these government efforts to charge huge fees for electronic mapping records and other electronic records that are essential to the public's ability to monitor their government.

I.

PUBLIC ACCESS TO ELECTRONIC GIS-FORMATTED MAPPING DATA IS CRITICAL TO THE PUBLIC'S ABILITY TO MONITOR GOVERNMENT DECISIONS AND ACTIONS AFFECTING REAL PROPERTY

In today's computerized world, geographic information systems (GIS) have become fundamental to the operation of government. GIS is layering technology. The foundational layer of any government's GIS program is a collection of GIS-formatted "landbase" data – boundary lines of individual parcels of property, together with other information such as the address of each parcel and the Assessor's Parcel Number. This foundational layer is referred to by different names depending on the jurisdiction. Orange County calls this collection of GIS-formatted records its "OC Landbase," while in the *County of Santa Clara* case, the County referred to essentially the same set of data as its "basemap."

There is no dispute that the information contained within a landbase is available from other sources in non-GIS formats. However, it is the GIS-formatted nature of this data that makes it so useful, not only to government

operations, but to those individuals and entities with an interest in the many government activities that relate to or affect real property. In its native electronic GIS-formatted state, landbase data can serve as the base layer for other electronic data sets, enabling sophisticated computerized analysis of an almost limitless number of matters relating to real property. The GIS-formatted landbase enables the entirety of countywide land parcels to be queried, selectively extracted according to locational criteria, and displayed in a comprehensive map. Conversely, when the records in a landbase are only provided in paper form, or in an electronic PDF, as the County has offered to do in this case, this same analysis is impossible.[2] In other words, the format in which these records are provided has a direct and critical bearing on the extent to which these records can be used to monitor the government. Indeed, the utility of this format is proven by the County's own use of the GIS database format rather than PDF or other formats.

In addition, the format in which landbase records are provided has a direct and critical bearing on their cost. Under § 6253.9 of the Government Code, which requires records in an electronic format to be provided in that format if so requested, the fees that may be charged for copies of electronic records are, with certain narrow exceptions, limited to the "direct cost of producing a copy of a record in an electronic format" – in other words, the cost of the CD or other storage medium used to make the copy, together with, conceivably, the staff time needed to push the necessary buttons on the computer keyboard to make the copy. Gov't Code § 6253.9(a)(2). Thus, at the conclusion of the litigation in the Santa Clara County case, the First Amendment Coalition ultimately paid $12.40 for its copy of Santa

[2] An electronic document in PDF format appears on a user's computer screen as a text file that looks and acts just like a piece of paper. In terms of usefulness, a record in PDF format is no more useful to the general public than a record in paper form.

Clara County's GIS-formatted electronic basemap – the cost of four CDs at $3.10 each. Media and Open Government Amici's Request for Judicial Notice ("Amici's RJN"), ¶ 2 & Exhs. B, C.

Conversely, when sophisticated electronic records such as the ones at issue in this case are provided in paper form, they are so voluminous as to be practically unaffordable, even when the charges for those paper records are limited to the direct cost of duplication as required under the PRA. Gov't Code § 6253. In the instant case, the paper records offered by Orange County in lieu of the GIS-formatted electronic records sought by petitioner would have amounted to nearly 7 million pages, which, at a cost of 15 cents per page, would have cost petitioners more than $1 million. 2 Petitioner's Appendix ("PA") 345, 3 PA 538.

In its affordable and useful GIS electronic format, landbase data can be used by property owners, non-profit and for-profit entities, and the news media to monitor the government in an almost endless number of ways:

Property owners – Used in conjunction with an assessor's roll database, an interested property owner can use GIS-formatted landbase data to locate other similar parcels (*e.g.*, same approximate size, same approximate distance to a park or school, same approximate distance from a freeway) and see whether their taxes are higher or lower than those being paid by others, or to determine whether zoning decisions made as to their property are in line with decisions made as to other comparable properties. To the extent disparities are discovered, they can be corrected, and the information can also be used to determine whether politically connected individuals are receiving favorable treatment.

Private sector – Knowing what the government is doing through access to GIS-formatted landbase data is also important to the efficient functioning of the private sector. Real estate developers use landbase data to ensure that property is developed appropriately. Cell phone companies

can use landbase data to improve their services. Water companies need the data, among other things, to comply with the directives of the Public Utilities Commission. Not only do these applications further public needs, but indirectly, their economic development activities generate tax revenue that enables government agencies to create GIS programs in the first place.

Non-profits – Public dissemination of GIS-formatted mapping data and other electronic mapping data is also critical to the non-profit sector's ability to monitor and respond to government action involving real property. In the instant case, the Sierra Club uses such data to produce detailed maps of proposed development and alternatives to proposed development as part of its efforts to protect open space. 1 PA 106-108. Similarly, The Trust for Public Land, a national, nonprofit land conservation organization that focuses on both urban and rural preservation of parks and open spaces, uses GIS mapping data for a wide variety of land preservation purposes. For example, its Greenprinting Los Angeles initiative uses GIS maps to identify open space needs and opportunities within the City of Los Angeles' borders, and helps tie park creation into other neighborhood revitalization opportunities, such as improved housing, education and transportation. Amici's RJN, ¶ 5 & Exh. M. The Trust for Public Land's GIS team also used GIS maps to develop easy-to-use interactive spreadsheets to help state legislators determine where voter-approved funds for new and revitalized parks should be spent. *Id.*, ¶ 6 & Exh. N.

Likewise, GreenInfo Network, a GIS consulting firm that specializes in assisting nonprofit environmental organizations, recently worked with an Orange County nonprofit, the Friends of Harbors, Beaches & Parks, to conduct a general planning study using GIS-compiled maps that show boundary location data for all public parks and protected open space in California. Amici's RJN, ¶ 7 & Exh. O. GreenInfo Network has also

created the California Protected Areas Database, which is a GIS inventory of all protected open space lands in the State of California. Amici's RJN, ¶ 8 & Exh. P. The California Invasive Plant Council, a small nonprofit that works to protect California wildlands from invasive plants, uses GIS mapping data for its statewide Map the Spread initiative, which endeavors to collect GIS datasets from collaborating organizations to create an online mapping tool to assist with plant restoration planning. Amici's RJN, ¶ 9 & Exh. Q. And in Minnesota, 1000 Friends of Minnesota, a nonprofit organization that supports communities and nonprofits, uses GIS mapping data to assist in land-use decisions at the local level, and provides many of these tools free of charge through its website. Amici's RJN, ¶ 10 & Exh. R.

News media – In addition, access to GIS-formatted mapping data and other electronic mapping data permits the news media to investigate and report on the activities of the government in ways that are simply not possible without access to that data. For example:

- In October 2010, *The Sacramento Bee* integrated foreclosure data into a GIS parcel map to show neighborhoods in the Sacramento region that were hardest hit by the housing bust. *Id.*, ¶ 11 & Exh. S.

- In November 2010, *The Sacramento Bee* also used GIS mapping data to show potentially acceptable locations within Sacramento where, under a new city ordinance, medical marijuana dispensaries could be permitted. *Id.*, ¶ 12 & Exh. T.

- In December 2010, following the release of census data by the U.S. Census Bureau, *The Philadelphia Inquirer* used electronic mapping data to track unemployment trends in certain areas of the greater Philadelphia metropolitan area, particularly in the region's wealthier ZIP codes. *Id.*, ¶¶ 13, 14 & Exhs. U, V. The reporter had originally set out to report on unemployment in a different section of the region, but once the unemployment data was integrated with the electronic map data, her story

focus changed, and she ultimately reported on increased unemployment centered around Philadelphia's Main Line, which is a regional rail line linking downtown Philadelphia with some its affluent suburbs. *Id.*

- In 2005, *The Press-Enterprise* published a series of articles that used electronic mapping data to show that Inland Empire communities in Southern California had handed out thousands of building permits in high-fire areas. *Id.*, ¶ 15 & Exh. W.

- Use of electronic mapping data is not only a recent phenomenon. Even as far back as 1992, media outlets were using GIS-formatted map data for news reporting purposes. In an award-winning special report, *The Miami Herald* used GIS basemap data to relate Hurricane Andrew's storm path and wind speeds across the Miami-Dade region to database information containing 60,000 damage inspection reports from structures harmed by the hurricane. The resulting map showed that the worst damage was not sustained where wind speeds were highest, but rather in areas where homes were built after 1980 – *i.e.*, after building codes and inspection processes had been relaxed during the 1980s construction boom in South Florida. The *Herald*'s reporting resulted in the reform and strengthening of building codes in South Florida. *Id.*, ¶ 16 & Exh. X.

II.

THE PUBLIC HAS A PRESUMPTIVE RIGHT OF ACCESS TO INFORMATION IN THE ELECTRONIC FORMAT IN WHICH IT IS MAINTAINED BY THE GOVERNMENT, AND THE PRA MUST BE INTERPRETED BROADLY IN FAVOR OF DISCLOSURE

In adopting the PRA, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't Code § 6250. As the California Supreme Court has observed: "Implicit in the democratic process is the notion that government should be accountable for

its actions. In order to verify accountability, individuals must have access to government files." *CBS, Inc. v. Block*, 42 Cal. 3d 646, 651 (1986).

In recent years, the PRA has been strengthened in two important ways. When Government Code § 6254.9, the PRA's software exemption, was enacted in 1988, the PRA allowed agencies to release information maintained on a computer in the format chosen by the agency. Gov't Code § 6256 (renumbered as § 6253(b) in 1998 and repealed in 2000). Thus, an agency could, if it wished, release electronic records in whatever form it chose, including paper or electronic PDF form. But that is no longer the law.

In 2000, our Legislature recognized that the format in which an electronic record is provided to the public – particularly those formats that allow for computer-assisted analysis of data – determines the extent to which that record can be fully analyzed and understood by the public. Mindful of this reality, in 2000 the Legislature amended Government Code § 6253(b) to delete the provision allowing agencies to release records in any form they chose, and added Government Code § 6253.9 to the PRA to require that, upon request, government agencies must make their electronic records available under the PRA in the same electronic formats in which those records are maintained by the government. Section 6253.9 provides, in relevant part:

> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in ***any electronic format in which it holds the information.***
>
> (2) Each agency shall provide a copy of an electronic

record ***in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies.*** The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

(b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

(2) The request would require data compilation, extraction, or programming to produce the record.

Gov't Code § 6253.9(a) & (b) (emphasis added).

More recently, in 2004, the California electorate overwhelming approved Proposition 59, which amended our state Constitution to include the right of public access to records created by government agencies. Article I, § 3(b) of the California Constitution now provides, in relevant part:

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

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

Cal. Const., art. I, § 3(b) (emphasis added).[3]

Thus, as a matter of California constitutional law, Government Code § 6253.9, which "furthers the people's right of access" to electronic records in the hands of public agencies, must be broadly construed in light of access. Conversely, the software exemption at § 6254.9, which the respondent court erroneously determined should be construed to "limit[] the right of access" to the GIS-formatted mapping records at issue in this case, must be narrowly construed. As explained in section III below, not only is the respondent court's broad interpretation of § 6254.9 and narrow interpretation of § 6253.9 inconsistent with the ordinary rules of statutory construction, but given the specific rules of statutory construction imposed under the PRA and the California Constitution, it is manifestly apparent that the respondent court's decision was in error and must be reversed.

III.

GOVERNMENT CODE § 6254.9 DOES NOT EXEMPT GIS-FORMATTED MAPPING DATA, OR ANY OTHER COMPUTERIZED DATA, FROM MANDATORY DISCLOSURE UNDER THE PUBLIC RECORDS ACT

Although the parties dispute whether the GIS-formatted data that is at issue in this case can properly be called part of a "computer mapping system," on one point there is no dispute: the records that the petitioner in this case seeks are ***not*** software. Yet the respondent court nevertheless

[3] Even prior to Proposition 59, it has long been the law in California that, consistent with the strong policies favoring the disclosure of public records, support for a refusal to disclose public records in accordance with the PRA "must be found, if at all, among the specific exceptions to the general policy that are enumerated in the [PRA]." *State of California ex rel. Division of Industrial Safety v. Superior Court*, 43 Cal. App. 3d 778, 783 (1974); *accord, e.g.*, Gov't Code § 6255(a). Those exemptions must be "strictly construed in favor of disclosure." 88 Ops. Cal. Atty Gen. 153, 159 (2005); *accord, e.g., Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1419 (1998); *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 772-73 (1983).

concluded that this data could be withheld under the PRA's exemption for software, Government Code § 6254.9, on the theory that (1) the County contends the data is part of a "computer mapping system," (2) Section 6254.9(b) specifies that, for the purposes of that section, software "includes computer mapping systems," and (3) therefore, the data at issue can be withheld under an exemption for software.

Respectfully, this logic is seriously flawed in numerous respects. Even assuming *arguendo* that the GIS-formatted mapping data at issue in this case should properly be characterized part of a "computer mapping system," the relevant inquiry for this Court is not so much resolution of that factual dispute, but rather what the Legislature meant by "computer mapping systems" for the purposes of § 6254.9.[4] As is demonstrated below, on its face and construed within the context of the entire PRA statutory scheme, as it must be, § 6254.9 makes a categorical distinction between the software elements of a mapping system (exempt) and the underlying mapping data requested by the petitioner in this action (not exempt) – a reading confirmed by the California Attorney General in a 2005 opinion, 88 Ops. Cal. Att'y Gen. 153, 158-59 (2005), in which the Sixth District appears to have concurred. *County of Santa Clara*, 170 Cal. App. 4th at 1332 n.9.

Nor does the legislative history support the interpretation given to § 6254.9 by the County and the respondent court. Both the County and the respondent court rely heavily on the City of San Jose's subjective intent in submitting the legislative bill that eventually became § 6254.9, contending that the City intended for the exemption to cover not only the software but

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[4] As petitioner discusses at length on pages 4-11 of its September 21, 2010 Reply to Preliminary Opposition of Real Party in Interest, and on pages 3-7 its December 14, 2010 Reply to Return of Real Party in Interest, this issue of statutory interpretation is a question of law subject to de novo review.

also the data elements of the mapping system it had created. But even if that is what the City wanted, its subjective hopes for that legislation did not carry the day. Indeed, as a chronological analysis of the legislative history makes clear – including the most recent legislative history, which Orange County has failed to mention in any of its briefs – the Legislature clearly rejected the attempt to use § 6254.9 to exempt any computer data, including the GIS-formatted mapping data at issue here.

A. Section 6254.9 On Its Face Recognizes A Distinction Between Software (Exempt) And Data Stored In A Computer (Not Exempt)

Since "[t]he words of the statute are the starting point" for any exercise in statutory construction, *Wilcox v. Birdwhistle*, 21 Cal. 4th 973, 977 (1999), it is necessary to begin with the text of the software exemption itself. Government Code § 6254.9 provides, in its entirety:

> **§ 6254.9. Computer software; status as a public record; sale, lease, or license authorized; limitations**
>
> (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.

On its face, the language of this provision signals a categorical

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distinction between software (exempt) and data stored in a computer (not exempt) in at least two ways. *First*, § 6254.9(d) expressly provides that "nothing in this section" is intended to "affect the public record status of information merely because it is stored in a computer," and that such information "shall be disclosed." *Second*, the plain language of this exemption makes clear that it applies to "computer software," which is commonly understood to be distinct from the data on which the software operates. *See Reid v. Google, Inc.*, 50 Cal. 4th 512, 527 (2010) ("We must look to the statute's words and give them 'their usual and ordinary meaning.'").

Both of these considerations, together with the rule that PRA exemptions be "strictly construed narrowly in favor of disclosure," led the Attorney General to conclude in its 2005 opinion construing § 6254.9 – which, other than the Sixth District's decision in the *County of Santa Clara* case, is the ***only*** published authority to address the software exemption – that electronic parcel map data could not be withheld under the software exemption. As explained in that opinion, which involved assessor's parcel map data maintained by a county assessor in electronic form, the term "computer mapping systems" in § 6254.9(b) refers to the software used to process boundary and similar mapping information, and not the electronic mapping data 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* compiled, 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.

88 Ops. Cal. Att'y Gen. 153, 159 (2005) (bold emphasis added; italics in orig.).[5] This reasoning was adopted by the Santa Clara Superior Court in 2007, when it ordered Santa Clara County to disclose GIS-formatted mapping data under the PRA. 1 PA 264-67; Amici's RJN, ¶ 2 & Exh. A.[6]

B. The Respondent Court's Contrary Conclusion That § 6254.9 Exempts Non-Software Data Is Not Justified By Any Of The Reasons Offered By The County Or The Respondent Court

Although the Attorney General's 2005 opinion is the only published

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[5] As this Court has observed, "opinions of the Attorney General are not binding on the courts, although they have been accorded 'great weight' ... where controlling authority construing the [statutory provision] is absent." *San Diego Union v. City Council of the City of San Diego*, 146 Cal. App. 3d 947, 954 (1983); *accord, e.g., Freedom Newspapers, Inc. v. Orange County Employees Retirement System*, 6 Cal. 4th 821, 829 (1983) ("While the Attorney General's views do not bind us, they are entitled to considerable weight."). As discussed in Section III(C)(2)(b), *infra*, this is especially true when an Attorney General's opinion reflects a position that the Legislature declines to contradict. *See, e.g., Fagan v. Superior Court*, 111 Cal. App. 4th 607, 617-18 & n.10 (2003) (Attorney General's interpretation of PRA and related confidentiality statute particularly persuasive where "notwithstanding the . . . opinion, the Legislature made no change to the language of that section concerning confidentiality of these records").

[6] As discussed in Footnote 12, *infra*, Amici do not rely on the Santa Clara trial court decision as legal authority but rather cite it for its factual significance vis-à-vis the Legislature's subsequent inaction, including Orange County's unsuccessful attempt to amend § 6254.9 in 2008.

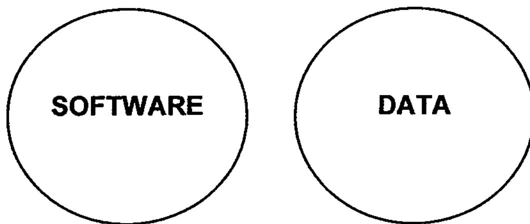
authority to directly address the § 6254.9 software exemption, as noted above, that exemption was also at issue during the course of the *County of Santa Clara* case, in which the undersigned counsel represented the prevailing petitioner, the First Amendment Coalition. In that case, Santa Clara County advanced (and lost) the software exemption argument in the trial court, but abandoned it for the purposes of appeal. However, an appellate amicus brief written in part by one of Orange County's own lawyers and filed on behalf of the Association of California Counties and the League of California cities attempted to revive that argument. 2 PA 321-22, 416-45. Although the Sixth District declined to directly address the software exemption on the ground that it had not been raised by Santa Clara County on appeal, *County of Santa Clara*, 170 Cal. App. at 1322 n.7, the court went on to suggest that had it done so, it would have found the counties and cities' arguments to be unpersuasive. *Id.* at 1332 n. 9 ("Section 6254.9, subdivision (a) provides: 'Computer software developed by a state or local agency is not itself a public record under this chapter.' The County conceded below that the GIS basemap is a public record. ***The contrary arguments of its amici curiae notwithstanding, that concession appears well founded.***") (emphasis added, citing 2005 Attorney General opinion).

Not surprisingly given that one of Orange County's attorneys assisted in the preparation and writing of the city and county amicus brief, most of the arguments that Orange County has made in this case to justify withholding its GIS-formatted mapping data were previously advanced in that amicus brief. But those arguments are as unpersuasive now as they were two years ago, and do not justify the respondent court's interpretation of § 6254.9 in a manner that is not only contrary to the Attorney General's earlier opinion, but also contrary to the statute's plain and logical meaning, achieving a result inconsistent with the PRA statutory scheme as a whole.

1. "Computer Mapping System" Is Not Defined In § 6254.9, And There Is Nothing To Suggest The Legislature <u>Intended This Term To Refer To Data</u>

The County's main argument, which it repeats like a mantra, is its contention that because its GIS-formatted records are part of a computer mapping system, and because § 6254.9(b) specifies that the term "computer software" as used in that section "includes computer mapping systems," its GIS-formatted mapping records are therefore exempt from disclosure under § 6254.9. But this assumes that the term "computer mapping systems," as used in § 6254.9(b), carries the particular meaning the County and the respondent court have chosen to attribute to it – *i.e.*, as something that includes both data and software elements. In fact, the term "computer mapping systems" is not defined in § 6254.9(b) or anywhere else in the PRA, except to the extent that it is said to be a subset of "computer software."

As even the County seems to acknowledge, software and data are two different things. The relationship between software, on the one hand, and data stored on a computer, on the other, can be visualized as follows:



Section 6254.9 acknowledges this relationship, stating that "[c]omputer ***software*** ... is not itself a public record" but that the statute is not "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." Gov't Code § 6254.9(d) (emphasis added). The statute then presents "computer mapping systems" as a subset of "computer software." Because software is distinct from data,

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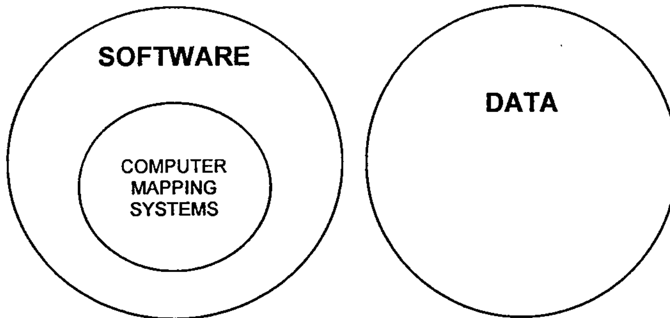
and a computer mapping system is a subset of software, the plain and direct import of this language is that computer mapping systems do not include data – *i.e.*, "records stored in a computer":



Thus, giving the terms "software" and "records" as used in § 6254.9 their plain and ordinary meaning, as the respondent court was obligated to do, the County's interpretation fails. *Reid*, 50 Cal. 4th at 527 (2010) ("We must look to the statute's words and give them 'their usual and ordinary meaning.'"); *Goodman v. Lozano*, 47 Cal. 4th 1327, 1332 (2010) (court was "not free to 'give the words an effect different from the plain and direct import of the terms used.'"); *Wilcox*, 21 Cal. 4th at 977 ("Words used in a statute . . . should be given the meaning they bear in ordinary use.").[7]

In addition, interpreting the term "computer mapping systems" to refer only to the computer programs used to process mapping records and not the records themselves is the only interpretation that does not contradict the express guarantee in § 6254.9(d) that "[n]othing in this section is

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[7] The respondent court's own Statement of Decision underscores how strained its interpretation of "computer mapping systems" is. It repeatedly characterizes the Sierra Club's request as one for records "in a GIS file format," which the court distinguishes from software. 5 PA 1349 ("'GIS file format' means that the geographic ***data*** can be analyzed, viewed, and managed ***with GIS software***. . . . The Sierra Club can then ***use its GIS software*** to read, analyze, display, and manipulate the OC Landbase.") (emphasis added). The respondent court then goes on to recognize that "[g]eographic data must be in a GIS file format ***in order for a computer mapping system to process the data.***" *Id.* (emphasis added). In other words, the respondent court acknowledges that data is a distinct thing on which a "computer mapping system" operates.

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." *See, e.g., Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988) ("The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible."); *Cory v. Board of Admin.*, 57 Cal. App. 4th 1411, 1424 (1997) (rejecting statutory definition of term in favor of its ordinary meaning where statutory definition would disrupt the statutory scheme).[8]

2. The County's Reading Of § 6254.9 Cannot Be Reconciled With § 6253.9, And The Two Sections Must Be Reconciled Where, As Here, They Are Both Part Of The Same Statutory Scheme – The Public Records Act

Realizing, as it must, that it has to explain away subdivision (d) of § 6254.9, the County contends that so long as it provides map data in some format (*i.e.*, a non-GIS format), it has satisfied its obligations under § 6254.9(d) because, the County argues, that subdivision only requires that an agency provide the underlying ***information*** in its electronic records. Under the County's theory, since it has offered to provide petitioner with records reflecting the information contained in the landbase – albeit in non-useful and expensive paper and PDF formats – it has complied with

[8] Moreover, providing by law that software, as the word is commonly understood, "is not itself a public record" makes intuitive sense, in that the computer program itself does not "relat[e] to the conduct of the public's business," Gov't Code § 6252(e), and therefore is appropriately excluded from the scope of the PRA. As discussed in section I, *supra*, however, electronic mapping data is critical to the conduct of the public's business and there is therefore no justification for stripping it of public record status. To analogize to less complicated technology, if an agency built an overhead projector, we would not expect the public to have access to it under a public records theory. But any transparencies the agency created for use on the overhead projector would be public records presumptively subject to disclosure.

§ 6254.9(d).

Not only is this strained interpretation of § 6254.9 at odds with the PRA's mandate that exemptions be construed narrowly, but it is foreclosed by the Legislature's repeal in 2000 of the rule allowing records to be provided in any format in which the agency chose and its adoption of § 6253.9. *See* Amici's RJN, ¶ 4 & Exhs. L (A.B. 2799, 1999-2000 Reg. Sess. (Cal. 2000) (enacted)). As noted, that section (which must be construed broadly) provides that where, as here, public records are maintained by an agency in "any electronic format," the agency "shall make that information available in an electronic format when requested by any person." Gov't Code § 6253.9(a). As this section goes on to specify, it is not up to the agency to decide the format in which it will provide the information. Rather, the agency "shall make the information available in any electronic format in which it holds the information." Gov't Code § 6253.9(a)(1). Alternatively, the agency "shall" make the information available "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." Gov't Code § 6253.9(a)(2).

Faced with this fact, the County attempts to brush aside § 6253.9 by relying on the statutory rule that where there is a conflict between two statutes, the more general of the two statutes must give way to the more specific. But "'[t]he principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled.' If we can reasonably harmonize '[t]wo statutes dealing with the same subject,' then we must give 'concurrent effect' to both, 'even though one is specific and the other general.'" *Garcia v. McCutchen*, 16 Cal. 4th 469, 478 (1997); *accord, e.g., People v. Garcia*, 21 Cal. 4th 1, 6 (1999) (noting the "fundamental" principle that "legislation should be construed so as to harmonize its various elements without doing violence to its language or

spirit"); *In re Marriage of Williams*, 213 Cal. App. 3d 1239, 1245 (1989) ("In construing a statute, all acts relating to the same subject matter should be read together as if one law and harmonized if possible, even though they may have been passed at different times, and regardless of the fact that one of them may deal specifically and in greater detail with a particular subject while the other may not.").

Sections 6254.9 and 6253.9 conflict only if we begin by accepting the badly strained interpretation of "computer mapping systems" as including data. This construction makes little sense on its own and is even harder to reach when one applies the special rules of construction applicable to the PRA, but it clearly cannot survive when read in conjunction with § 6253.9, which forecloses the very argument the County advances (and the respondent court accepted) – that is, that an agency may choose the format in which it provides public records. Conversely, it is quite easy to give concurrent effect to both §§ 6254.9 and 6253.9 by accepting that an agency that develops computer software, including a computer mapping system, need not treat that software itself as a public record, but the underlying data on which that software operates remains a public record that – since the 2000 enactment of § 6253.9 – must be provided in the same electronic format in which it is maintained.[9]

In a further attempt to salvage its argument that § 6254.9 only requires the County to provide the underlying ***information*** in its landbase,

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[9] Nor is it clear that § 6254.9 is the more specific statutory provision. Section 6253.9 expressly addresses agencies' obligations to provide public records in electronic format – and what they may charge for doing so – precisely what the respondent court said this case is about: "[T]his case is not a dispute over the production of information, but over the format of the records being produced and the cost of production." 5 PA 1349-50 (Statement of Decision). *See Garcia*, 16 Cal. 4th at 478 (questioning assumption as to which of two statutory provisions was specific and which was general).

and not the GIS-formatted ***records*** that petitioner has requested, the County points to Government Code § 6254(f), also part of the PRA statutory scheme. That section, which provides a broad PRA exemption for complaints to and investigations conducted by law enforcement agencies, nonetheless expressly requires that law enforcement agencies "make public" several enumerated categories of information ***derived from*** those records, including information relating to complaints, arrests, and requests for assistance. *See* Gov't Code § 6254(f)(1)-(3); *Williams v. Superior Court*, 5 Cal. 4th 337, 346-54 (1993).

By its explicit language, § 6254(f) reflects a legislative tradeoff – a broad exemption for the records themselves, but a requirement that specific information found within those records nevertheless be made public – that is not found anywhere else in the PRA. In contrast, § 6254.9(d) makes ***no*** distinction between records and information stored in those records, but in fact does just the opposite, stating that "information" stored in a computer has "public record status" and that such "public records" are themselves subject to disclosure, in their entirety, under the PRA. Now that the Legislature has mandated, through its enactment of § 6253.9, that the public is entitled to electronic records in whatever electronic format those records are maintained by the agency and/or in whatever format it has provided those records to other agencies, § 6253.9(a)(1) & (2), it is clear that the GIS-formatted landbase data must be provided in the electronic format requested by the petitioner.

3. The County's Reliance On Other States' Open Records Statutes Actually Confirms That § 6254.9 Was Intended To Exempt Only Software, Not Data

In another attempt to bolster its argument, the County points to several other states that it contends "have adopted statutes similar to Section 6254.9, which exempt computer mapping systems from state public

disclosure laws." Return, p. 28 n.3. But these statutes do not support the County's position. To the contrary, they undermine it since, unlike § 6254.9, by their plain language these statutes clearly apply to mapping data instead of, or in addition to, mapping software. *See* Iowa Code § 22.2(3) (providing an exemption for a "geographic computer ***database***") (emphasis added); 5 Ill. Comp. Stat. § 140/7(1)(i) (qualified exemption for "[v]aluable formulae, computer geographic systems, designs, drawings and research data"; exemption for "computer geographic systems" does not apply to requests by the news media "when the requested ***information*** is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public") (emphasis added); Md. St. Gov. Code §§ 10-901, 904 (authorizing governmental units to adopt fee structure for access to both GIS data and GIS software); Nev. Rev. Stat. Ann. § 239.054 (authorizing assessment of fee for "information from a geographic information system"); N.C. Gen. Stat. § 132-10 ("Geographical information systems ***databases*** and ***data files*** developed and operated by counties and cities are public records," but are subject to certain restrictions on resale and commercial use) (emphasis added).

In contrast, California Government Code § 6254.9 distinguishes on its face between software and electronically stored information, providing that the latter is a public record that must be disclosed pursuant to the PRA. Had the California Legislature intended to exempt or place limitations on the disclosure of GIS data, as opposed to software, it could have explicitly done so, as these other states have done.[10]

[10] In fact, as discussed in Section III(C)(2)(b), *infra*, the Legislature was given the opportunity to do precisely that in 2008, when a bill was introduced whose sole substantive effect would have been to amend § 6254.9 to define "computer mapping systems" as including data. Amici's

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4. The County's Surplusage Arguments Fail For At Least <u>Three Reasons</u>

Finally, the County argues that if the term "computer mapping system" in § 6254.9(b) refers only to mapping software programs, as the Attorney General concluded in its 2005 opinion, and not electronic mapping data such as the GIS-formatted landbase data petitioner seeks in this case, the term "computer mapping systems" would be superfluous and thus violate the rule against surplusage. But there are at least three problems with this argument.

First, the County's proposed construction would not fix the purported surplusage. The County contends that if the term "computer mapping system" as used in the definition of computer software in § 6254.9(b) denotes only the computer programs used to process mapping data, as the Attorney General concluded, it would render that term superfluous because the term "computer programs" is already included within the definition of computer software in § 6254.9(b). But one could just as easily argue that "computer mapping systems" are also "computer graphics systems," a term that is also included in § 6254.9(b). Thus, even if the term "computer mapping systems" in § 6254.9(b) was construed to include the data such systems operate on, as the respondent court found and the County urges this Court to do, that term would remain surplusage.

Second, the rule against surplusage is not absolute, and will be applied "only if it results in a ***reasonable*** reading of the legislation." *Santa Clara County Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 234 (1995) (emphasis in original); *see also People v. De Porceri*, 106 Cal. App. 4th 60, 69 (2003) (rule against surplusage "is merely a guide and should not be

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RJN, ¶ 3 & Exh. D (A.B. 1978, 2007-2008 Reg. Sess. (Cal. 2008)). Support for this definition was evidently lacking, however, as the bill never made it out of committee. *Id.* at ¶ 3 & Exh. E (complete bill history for A.B. 1978, 2007-2008 Reg. Sess. (Cal. 2008)).

employed to defeat legislative intent"). Here, the County contends that applying the rule of surplusage requires the Court to construe § 6254.9 in a way that allows agencies to withhold not only mapping software, but also map data like the GIS-formatted landbase data sought in this case. But as noted, such an interpretation would nullify subdivision (d) of § 6254.9, which states 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." Given this obvious contradiction, the County's reading is not "reasonable."

Third, in light of the above, the more reasonable conclusion is that by defining "computer software" in § 6254.9(b) to "***include[]*** computer mapping systems, computer programs, and computer graphics systems," the Legislature intended only to provide illustrative examples, not to delineate mutually exclusive categories. "In both legal and common usage, the word 'including' is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle." *Arizona State Bd. for Charter Schools v. U.S. Dep't of Education*, 464 F.3d 1003, 1007 (9th Cir. 2006). *Accord, e.g., Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). "A statute may clarify and emphasize a point notwithstanding the rule against surplusage." *Farmers Ins. Exchange v. Superior Court*, 137 Cal. App. 4th 842, 858 (2006); *see also De Porceri*, 106 Cal. App. 4th at 69, 72 (items on "serious felony list" were not mutually exclusive but rather were overlapping, cumulative, and "intentionally redundant"). It is therefore reasonable to assume that by including the term "computer mapping systems" within the definition of "computer software" in § 6254.9, the Legislature simply wanted to make clear that government-

created computer mapping programs were among the types of software that an agency could refuse to disclose under the PRA.

C. The Legislative History Of Government Code § 6254.9 Confirms The Legislature's Intent To Make A Distinction Between Software (Categorically Excluded From Public Records Status) And Data – Including GIS-Formatted Mapping Data – That Is Subject to the Public Records Act

Since the language of § 6254.9 clearly evidences the Legislature's intent to exempt computer software without affecting the public's right to the underlying data, this Court need not delve into the legislative history to affirm that intent. *Pacific Gas & Elec. Co. v. County of Stanislaus*, 16 Cal. 4th 1143, 1152 (1997); *Lungren*, 45 Cal. 3d at 735. If the Court chooses to do so, however, it will discover that both the evolution of the statute itself and subsequent legislative activity (and inactivity) confirms the Legislature's intent to exclude only computer software and not data – in this case, the GIS-formatted mapping records at issue – from public records status.

Although early versions of AB 3265, the bill that resulted in § 6254.9, would have made "proprietary information" and "computer readable data bases" exempt from disclosure, the Legislature amended the bill to recognize the distinction between software and data and to emphasize that the latter remains subject to disclosure as a public record even if the former is categorically excluded from disclosure under § 6254.9. *See* 4 PA 941-50 (text of AB 3265 from introduction through chaptering). At the urging of the County, the respondent court focused on the bill as it appeared in its early stages rather than the statute that the Legislature actually enacted. But "a court 'should not grant through litigation what could not be achieved through legislation.' Thus, courts must not interpret a statute to include terms the Legislature deleted from earlier drafts." *Berry v. American Express Publishing, Inc.*, 147 Cal. App. 4th 224, 231 (2007)

(quoting *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 33 (1990) (Kennard, J., dissenting)).

The Legislature's intent is further confirmed by both its subsequent action and inaction. In 2000, in response to concerns about the availability of public records in electronic form, it acted to prevent agencies from doing exactly what the County wants to do in this case – provide the public with virtually useless paper records while withholding the meaningful electronic data – by adding § 6253.9 to the PRA. *See* Petitioner's Request for Judicial Notice ("Petitioner's RJN") at 000001-20; Amici's RJN, ¶ 4 & Exh. F-L. Then, after the Attorney General concluded in 2005 that § 6254.9 did not exempt electronic mapping data from disclosure as a public record, 88 Ops. Cal. Att'y Gen. 153, 159-63, and the Santa Clara Superior Court ordered in 2007 that Santa Clara County disclose similar data under the PRA, 1 PA 217-43, the Legislature declined to disturb those interpretations, despite the introduction of a bill sponsored by Orange County that would have amended § 6254.9 to define "computer mapping systems" as including data. Amici's RJN, ¶ 3 & Exh. D-E.[11] That the Legislature "has never taken steps to reject [the Attorney General's] opinion" points to the conclusion that it concurs with that opinion. *Travis v. Board of Trustees of the Cal. St. Univ.*, 161 Cal. App. 4th 335, 345-46 (2008); *Orange County Employees Ass'n, Inc. v. County of Orange*, 14 Cal. App. 4th 575, 581 (1993).

Respectfully, the respondent court erred in giving Orange County through litigation the result it was unable to achieve through legislation, and its decision should be reversed.

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[11] The bill, AB 1978, never made it out of committee, and no similar amendment to § 6254.9 has been attempted since.

1. The Legislature Removed The Terms "Proprietary Information" And "Computer Readable Data Bases" From AB 3265, Distinguishing Software From Data

At the County's urging, the respondent court focused on what the City of San Jose hoped to accomplish when it introduced the bill that eventually evolved into Government Code § 6254.9 – the ability to profit from selling or licensing a database of geographic information it had compiled over the years. But the statute that the Legislature ultimately enacted bears little resemblance to the bill the city originally introduced. As the evolution of the bill's language demonstrates, the Legislature chose not to enact a law that would permit a government agency to sell or otherwise restrict the dissemination of public records. Instead, it permitted agencies only to restrict access to any software they might develop.

When the City of San Jose introduced AB 3265 on February 11, 1988, it evidently hoped to amend the PRA so that agencies could sell or lease "proprietary information," which was defined to include "computer readable data bases, computer programs, and computer graphics systems." 4 PA 941-42. As introduced, AB 3265 proposed adding the following language to Government Code § 6257:

> Nothing in this chapter prohibits an agency from selling ***proprietary information*** or requiring a licensing agreement for payment of royalties to the agency prior to any subsequent sale, distribution, or commercial use of the proprietary information by any person receiving the information. For purposes of this subdivision, ***"proprietary information" includes computer readable data bases, computer programs, and computer graphics systems***. Any fee or royalty imposed for proprietary information shall be based on the cost of developing and maintaining the information and shall take into consideration whether the person requesting the information contributed to the development of the information.

Id. (emphasis added).

The City of San Jose's hope was short lived, however, as the bill was amended on April 4, 1988, to delete references to "proprietary information" and to replace the concept of selling or leasing ***information*** with selling or leasing ***software***:

> AB 3265, as amended, ... Public records: ~~proprietary information~~ *computer software.*
>
> The existing California Public Records Act requires each state or local agency, upon receiving any request for a copy of records in its possession which are subject to public disclosure, to make the records promptly available upon payment of fees covering direct costs of duplication or any applicable statutory fee.
>
> ~~This bill would provide that the act does not prohibit an agency from selling proprietary information or requiring a licensing agreement for payment of royalties to the agency prior to any subsequent sale, distribution, or commercial use of the information.~~
>
> *This bill would provide that computer software developed or maintained by a state or local agency is not itself a public record under the act and would authorize the agency to sell, lease, or license the software for commercial or noncommercial use.*
>
> The people of the State of California do enact as follows:
>
> ~~SECTION 1. Section 6257 of the Government Code is~~
>
> *SECTION 1. Section 6254.9 is added to the Government Code, to read:*
>
> *6254.9 (a) Computer software developed or maintained by 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) Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer.*
>
> *(c) As used in this section, "computer software" includes computer readable data bases, computer programs, and computer graphics systems.*

4 PA 943-44 (the "April 4 Amendments").

There was a problem with the April 4 Amendments, however. Although the bill had been amended to distinguish software from information, the definition of "computer software" as including "computer readable data bases" continued to implicate information, arguably exempting such data from the PRA. The Department of Finance identified this issue and opposed the bill on this and other grounds, stating that:

> 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.
>
> * * *
>
> The definition of computer software in (c) includes data bases. The inclusion of data bases in paragraph (c) is contradictory to the intent expressed in paragraph (b) since data bases are organized files of record information subject to public record laws. In addition, the inclusion of information data bases in the definition of computer software makes them subject to sale, licensing, or rental which is contrary to the Section 6250 and 6252(d)(e) of the Government Code.

4 PA 1020-21.

The Legislature addressed this problem by amending the bill again on June 9, 1988:

> SECTION 1. Section 6254.9 is added to the Government Code, to read:
>
> 6254.9 (a) Computer software developed ~~or maintained~~ by 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.
>
> (~~c~~*b*) As used in this section, "computer software" includes ~~computer readable databases~~ *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.*

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

(e) Nothing in this section is intended to limit any copyright protections.

4 PA 946-47 (the "June 9 Amendments").

Since replacing "computer readable data bases" with "computer mapping systems" was meant to solve the problem caused by including data in the definition of "computer software," it is unreasonable to interpret the term "computer mapping systems" as itself including data. Accordingly, given the June 9 Amendments, the only reasonable interpretation of the term "computer mapping systems" is one that does not include any underlying data.

To make the Legislature's intent even clearer, AB 3265 was amended a final time on June 15 to further emphasize the public records status of information – versus software – by adding a sentence to subsection (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.*" 4 PA 948-49.

The evolution of AB 3264 speaks for itself. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." *Rich v. State Bd. of Optometry*, 235 Cal. App. 2d 591, 607 (1965); *accord Berry,* 147 Cal. App. 4th at 230-31; *People v. Goodloe*, 37 Cal. App. 4th 485, 491 (1995) ("The evolution of a proposed statute after its original introduction in the Senate or Assembly can offer considerable enlightenment as to legislative intent."). Here, the Legislature rejected versions of the bill that would have categorically stripped mapping data of its public record status and instead

enacted a statute providing only that software itself is not a public record and emphasizing that computerized data remains subject to the PRA.

The County, however, urges the Court to disregard the language of the enacted statute because of San Jose's purported motivation for introducing the bill in the first place.[12] In light of the amendments, which clearly transformed the original bill into one that protected software rather than information, the intent of San Jose in introducing AB 3256 is irrelevant. Instead, we must look to what the Legislature actually enacted. *See, e.g., People v. Patterson*, 72 Cal. App. 4th 438, 443-44 (1999) ("When construing a statute, our task is to ascertain the intent of the Legislature as a whole. Generally, the motive or understanding of an individual legislator is not properly received as evidence of that collective intent, even if that legislator was the author of the bill in question.").

Since the County cannot rely on the subjective intent of the bill's authors to support its reading of § 6254.9, it is left grasping at straws in the form of passing references to the phrase "computer software, as defined" or

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[12] The County bases its argument on a memorandum from San Jose to the Administrative Services Committee. 4 PA 986. Because there is no indication that this memorandum was communicated to the Legislature as a whole, it should not be considered as part of the statute's legislative history and should be disregarded by the Court. *See, e.g., Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 39 (2005) ("Because there is no showing that [a document found in a legislative committee file] was communicated to the Legislature as a whole, it does not constitute cognizable legislative history, and the request for judicial notice of this document is denied."). Notwithstanding this rule, the respondent court relied on this memorandum in reaching its decision, though it may have done so unwittingly. Pages 11 and 12 of the Statement of Decision contain a lengthy quotation regarding San Jose's intention in introducing AB 3265. The respondent court cites AB 3265 as the source for this quotation, but ***it actually comes from the memorandum***. 4 PA 986. To the extent the respondent court mistakenly believed that this language came from the bill itself, its analysis and decision may have been skewed accordingly.

"databases" in various committee reports. Return, pp. 30-33. But these scattered references do not "'shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms'" and are therefore not useful in interpreting the statute. *Martinez v. Regents of University of California*, 50 Cal. 4th 1277, 1293 (2010) (warning that "'judicial reliance on legislative materials like committee reports ... may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.'") (quoting *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005)); *accord J. A. Jones Construction Co. v. Superior Court*, 27 Cal. App. 4th 1568, 1578-79 (1994) ("Even assuming there is such a thing as meaningful collective intent, courts can get it wrong when what they have before them is a motley collection of authors' statements, committee reports, internal memoranda and lobbyist letters" and "the wisest course is to rely on legislative history only when that history itself is unambiguous.").

In any event, the significance of the language the County points to from these reports is ambiguous at best. For example, the County cites a committee report that uses the phrase "'computer software,' as defined" but that goes on to emphasize the distinction between software and data. 4 PA 955-56. Similarly, the County cites a few other reports that refer to "computer readable data bases," apparently overlooking the fact that the phrase had been replaced on June 9 with the phrase "computer mapping systems." Return, pp. 31-32 (citing 4 PA 981, 946-49, 979).

Because the evolution of AB 3265 clearly shows a transformation of the bill from one that would allow agencies to withhold "proprietary" information to one that provides only that "computer software" is not itself

a public record, the statute should be interpreted accordingly, with only computer software – and not underlying data – excluded.

2. Subsequent Legislative Activity (And Inactivity) Confirms That GIS-Formatted Mapping Data Is Not Exempt From Disclosure

If any question remained as to whether the Legislature intended computer software to encompass underlying mapping data, the actions (and inactions) of the Legislature in the years following the enactment of § 6254.9 in 1988 confirm that the underlying data is a public record that must be disclosed in electronic form.

Repeal of § 6256 and enactment of § 6253.9 – As noted, when § 6254.9 was enacted, a separate provision of the PRA directed that "[c]omputer data shall be provided in a form determined by the agency," which meant that agencies could provide computerized public records in paper form or in any other format they wished, regardless of the expense or loss of utility that paper or other form of production entailed. Gov't Code § 6256.

Reflecting the digital revolution then underway, § 6256 (renumbered as § 6253(b) in 1998) was repealed in 2000, and in its place the Legislature adopted § 6253.9. *See* Amici's RJN, ¶ 4 & Exh. F-L. That provision required that computer-stored information – already clearly a public record under § 6254.9 – must now be produced in the electronic format in which it is maintained, if so requested. The legislative history of § 6253.9 reflects that the problems meant to be solved through the enactment of that statute were precisely those at issue in this case. Namely, public records increasingly existed in electronic form, but because agencies were permitted to produce records in any form, a member of the public might "have to buy copies made out of the printouts from the [electronic] records. 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 000001-5 (S. Jud. Comm., Analysis of AB 2799 (1999-2000 Reg. Sess.)). In addition, agencies could "effectively frustrate [a] request by providing a copy of the requested record in a form different from the request, which could sometimes render the information useless." *Id.*

No amendment of § 6254.9 – Also telling is what the Legislature did – or, more specifically, did ***not*** do – after (1) the Attorney General concluded in 2005 that "the term 'computer mapping systems' in § 6254.9 does not refer to or include basic maps and boundary information per se (*i.e.*, the basic ***data*** compiled, 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," 88 Ops. Cal. Att'y Gen. 154, 159 (emphasis in original); and (2) the Santa Clara County Superior Court in 2007 agreed with this interpretation in rejecting arguments that § 6254.9 provided a basis for Santa Clara County to refuse to provide electronic GIS-formatted mapping data virtually identical to the records at issue here. 1 PA 217 (Decision and Order After Hearing, Case No. 1-06-CV-072630 (May 18, 2007)); Amici's RJN, ¶ 2 & Exh. A.[13]

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[13] Amici do not rely on the Santa Clara Superior Court decision as ***legal*** authority but rather offer it as evidence of the ***factual*** landscape that existed after May 2007, including when AB`1978 was introduced in 2008. The Court may consider the decision for its factual relevance to the subsequent actions (or inaction) of the Legislature, notwithstanding Rule of Court 8.1115's prohibition against relying on unpublished opinions. *See People ex rel. Gallegos v. Pac. Lumber Co.*, 158 Cal. App. 4th 950, 955 n.2 (2008) (taking judicial notice of unpublished opinion for certain relevant facts reflected therein but not relying on as legal precedent); *Conrad v. Ball Corp.*, 24 Cal. App. 4th 439, 443 (1994) ("unpublished opinions may be cited if they are not 'relied on'") (citation omitted).

In an apparent effort to force a different result than had been reached by both the Attorney General and the Santa Clara County Superior Court, Orange County sponsored a bill in 2008, AB 1978, that would have amended § 6254.9 to define "computer mapping systems" to include "assembled model data, metadata, and listings of metadata, regardless of medium, and tools by which computer mapping system records are created, stored, and retrieved." Amici's RJN, ¶ 3 & Exh. D. This definition is the only substantive change AB 1978 would have made to existing law, so the question of whether or not to define computer mapping systems as including data was squarely at issue. When the bill was introduced, the Legislature "presumably had before it the opinion[] ... of the Attorney General. If [that] opinion[] misconstrued the law, here was the opportunity to correct matters." *California Ass'n of Psych. Providers*, 51 Cal. 3d at 17.

But far from being seized upon by the Legislature, AB 1978 did not make it out of committee, *id.*, ¶ 3 & Exh. E (complete bill history), and § 6254.9 remained intact. Through its inaction in failing to take up AB 1978 or otherwise modify § 6254.9, the Legislature effectively ratified the Attorney General's and Santa Clara County's Superior Court's interpretation of the statute. *See Wilkoff v. Superior Court*, 38 Cal. 3d 345, 353 (1985) ("Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.") (citations omitted); *accord Cal. Ass'n of Psych. Providers*, 51 Cal. 3d at 16-17; *In re Gina S.*, 133 Cal. App. 4th 1074, 1083 (2005) (in agreeing with Attorney General's interpretation of statutory term, noting Legislature's failure to "modif[y]" that interpretation); *Ventura v. City of San Jose*, 151 Cal. App. 3d 1076, 1079-1080 (1984) (calling a particular Attorney General opinion "[t]he most persuasive evidence of the Legislature's intent" and stating that "[w]e can presume that this five-year-

old opinion has come to the attention of the Legislature, and that if it were a misstatement of the legislative intent, 'some corrective measure would have been adopted'").

Accordingly, every indicator of legislative intent confirms what the plain language of § 6254.9 says: that software is itself not a public record, but that mapping data and other information stored on computers retains its public record status. The respondent court's perplexing construction of "computer mapping systems" to include not just software but also underlying data is not tenable, and its order should be set aside.

IV.

IF THE RESPONDENT COURT'S DECISION IS ALLOWED TO STAND, PUBLIC ACCESS NOT JUST TO MAPPING RECORDS BUT OTHER ELECTRONIC RECORDS THAT "RELATE TO THE CONDUCT OF THE PUBLIC'S BUSINESS" WILL BE LIMITED TO THOSE WHO CAN AFFORD TO PAY FOR THAT ACCESS

Orange County makes no secret of the fact that its main objective in this litigation is not to prevent the release of GIS-formatted data to interested members of the public altogether, but rather to prevent its compelled release under the PRA so that it may preserve the unlawful revenue stream it has enjoyed for many years from the sales of its landbase to interested persons who are able and willing to pay Orange County's exorbitant asking prices and agree to its contractual restrictions on the use of the data. In the event the respondent court's decision is allowed to stand, revenue-challenged government agencies throughout California will no doubt follow suit, instituting hefty fees for copies of electronic records that have a direct bearing on "the conduct of the people's business" – *i.e.*, the business of a democratic government. Gov't Code § 6250.

Although the County attempts to downplay the extent of the fees it charges for copies of its GIS-formatted mapping records by referring to them as a "standard licensing fee," Return, p. 19, as evidenced by the

County's own records, fees in the tens of thousands of dollars are routine, and in some instances these fees have exceeded $100,000. 1 PA 145-55. These fees are similar to those that were being charged by Santa Clara County for sales of its basemap prior to the Sixth District's decision in the Santa Clara County case. *See Santa Clara County*, 170 Cal. App. 4th at 1310.

Nor will these high fees be limited only to the GIS-formatted mapping records at issue in this case. Although a fee-for-access system would be bad enough as to those records, government agencies looking to bolster their bottom line would almost certainly look to a broad interpretation of § 6254.9 given by the respondent court to support new fee structures for other types of electronic records as well. Under the respondent court's interpretation of § 6254.9 as including not just software but also the data elements of the items enumerated in § 6254.9(b), not only will other kinds of records that could even arguably constitute part of a "computer mapping system" suddenly be subject to a fee-for-access system, but under the same logic, any records that could arguably be part of a "computer graphics system" or a "computer program" could also be withheld under the PRA, and either not released to the public at all or released only to those who can pay. Given the inclusion of the phrase "computer graphics system" in § 6253.9, for example, it would hardly be surprising to see governments begin to charge fees for any number of records in an electronic format on the basis that those records contain photographs, charts, images, etc., and are thus part of a "computer graphics system" that, under the respondent court's deeply flawed logic, would be exempt from disclosure under § 6254.9. And because each government entity would charge its own set of fees for these records, those who seek records pertaining to multiple government agencies – something that is quite common for members of the public attempting to monitor matters

relating to real property that cross multiple government boundary lines – would find it particularly cost-prohibitive to do so.

In its Return, Orange County argues that the purpose of § 6254.9 "was to allow local agencies to recoup some of the costs of collecting and storing geographic data in a computer mapping system." Return, pp. 33-35. Not only is this assertion contradicted by the legislative history of the bill that led to § 6254.9, which reflects that the Legislature quickly eliminated the initially proposed language that would have allowed such fees,[14] but the PRA as a whole reflects a clear legislative mandate to limit the amount that a government agency may charge for copies of public records – including electronic records – created at taxpayer expense. Gov't Code § 6253.9 (limiting fees for copies of electronic records to "the direct cost of producing a copy of a records in an electronic format" except in certain specified instances, in which case the requester must bear "the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record.").

By specifically limiting the fees that an agency may recoup for copies of electronic public records, the Legislature has rejected a fee-for-access system whereby an agency could seek to recoup a portion of the costs of colleting and storing electronic data through fees charged to persons requesting copies of that data. *See* 88 Op. Cal Att'y Gen. 153, 164

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[14] As noted above, the version of AB 3265 initially introduced proposed adding language to the PRA that would have permitted agencies to "sell[] proprietary information or requir[e] a licensing agreement for payment of royalties to the agency prior to any subsequent sale, distribution, or commercial use of the proprietary information," further providing that "[a]ny fee or royalty imposed for proprietary information shall be based on the cost of developing and maintaining the information and shall take into consideration whether the person requesting the information contributed to the development of the information." 4 PA 941-42. When the bill was finally passed into law, none of this language had survived. 4 PA 950.

(2005) (addressing the fees that may be charged for electronic mapping records and concluding that per § 6253.9, "the fee may not include expenses associated with the county's initial gathering of the information, or with initial conversion of the information into an electronic format, or with maintaining the information"); *accord County of Santa Clara*, 170 Cal. App. 4th at 1326-27 (according "little weight" to the County's asserted financial concerns about releasing its basemap under the PRA and noting, "[t]here is nothing in the Public Records Act to suggest that a records request must impose *no* burden on the government agency.").

CONCLUSION

We live in an increasingly computerized age, in which electronic records are becoming the primary means by which the government runs its operations. Unless it is able to access mapping and other electronic records in the same electronic format in which they are maintained and used by their government, the public will increasingly lose ground in its ability to monitor that government. Recognizing this, the Sixth District found that GIS-formatted mapping records equivalent to those at issue here are public records that must be disclosed under the PRA.

At every turn, Orange County has tried to use § 6254.9 to avoid this result – first by advancing its § 6254.9 argument in an amicus brief in the Santa Clara County case that the Sixth District found unpersuasive, and then by introducing a failed legislative amendment to § 6254.9, and finally by arguing its case here – but in the end, it is clear that nothing in § 6254.9 affects the result reached by the Sixth District. Given the revenue potential from the sales of what are properly public records, Orange County's persistence in pursuing this issue is not surprising, but the controversy has gone on long enough. This Court should put a definitive end to it by issuing an opinion that makes it clear that government agencies may not use § 6254.9, or any other provision of the PRA, for that matter, to convert

electronic public records into a commodity reserved only for those willing and able to pay the government's asking price.

DATED: January 13, 2011

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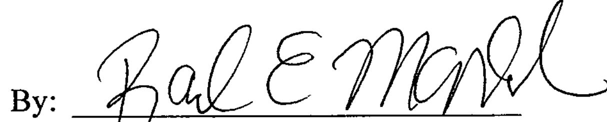
By: 

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Dated: January 13, 2011

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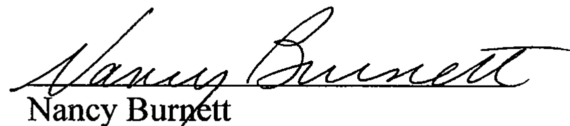

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