ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

August 12, 2011

Honorable Tani Cantil-Sakauye, Chief Justice
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Letter of Amicus Curiae in Support of Petition for Review: *Sierra Club v. Superior Court (County of Orange)*, (2011) 195 Cal.App.4th 1537; Supreme Court Case No. S194708

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

The Electronic Frontier Foundation ("EFF") submits this letter in support of the Petition for Review filed by the Sierra Club in the above-captioned case, *Sierra Club v. Superior Court (County of Orange)*. In accordance with the Rules of Court 8.500(g)(1), a copy of this letter was served on all parties to the case.

EFF strongly urges the Court to grant the Sierra Club's Petition for Review. The Court's review of this case is necessary, first, "to secure uniformity of decision" and, second, "to settle an important question of law." Rules of Court 8.500(b)(1). First, the Court of Appeal decision below ("the *Sierra Club* opinion") directly conflicts with *County of Santa Clara v. Superior Court*, (2009) 170 Cal.App.4th 1301, creating inconsistent California law governing the public record-status and copyrightability of GIS databases created and maintained by California state agencies. Second, this Court's review is necessary to address the important question of the proper deference Article I, § 3, subdiv. (b)(2) of California's Constitution should be afforded when construing an otherwise ambiguous statutory term under the California Public Records Act ("CPRA"). *See* Cal. Const. Art. I, § 3, subdiv. (b)(2);[1] Cal. Gov. Code § 6250 *et seq*.

Most importantly, however, this Court's intervention is necessary to quell the threat posed by the *Sierra Club* opinion to California's commitment to transparency and access to government information in the digital age. Increasingly, state agencies create, use, and store public information in an electronic format. If the *Sierra Club* opinion serves as precedent in future cases interpreting the "computer software exemption" of the CPRA, Cal. Gov. Code §

[1] In relevant part, Article I, § 3, subdiv. (b)(2) provides:

> 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, § 3(b)(2).

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6254.9,[2] state agencies may use the opinion as a vehicle to limit citizens' access to electronically stored, public information. For these reasons, more fully described below, this Court should grant the Sierra Club's petition for review.

Interest of *Amicus Curiae*

EFF is a San Francisco-based, donor-supported, nonprofit civil liberties organization working to protect and promote fundamental liberties in the digital world. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society.

As part of its FOIA Litigation for Accountable Government (FLAG) Project, EFF routinely files and litigates public records requests, at both the state and federal level, related to government use of technology. As part of its mission to foster openness and innovation, EFF also frequently serves as counsel or amicus in key cases addressing the scope and application of state and federal freedom of information laws. EFF also regularly litigates matters involving the use of intellectual property laws to stifle creativity, free speech, and innovation. Finally, as an organization devoted primarily to addressing novel legal questions arising from the use of technology, EFF is uniquely positioned to provide the Court with a comprehensive perspective on the confluence of the legal and technical issues at stake in this case. For these reasons, EFF has a particularly acute interest in the subject matter and resolution of the Sierra Club's Petition for Review.

Factual and Procedural Background

Orange County maintains public property information on 640,000 legal parcels of land in Orange County. *Sierra Club*, 195 Cal.App.4th at 1542 [slip op. at 3]. This property information includes, among other information, the geographic boundaries of parcels, Assessor Parcel Numbers, street addresses, and the names and addresses of the parcels' owners. *Id*. at 1541-42 [slip op. at 3-4]. The parties do not dispute that this information is public information. *See id*. at 1542 [slip op. at 4]. Orange County stores the information in two manners: first, the County

[2] In relevant part, § 6254.9 provides:

> (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.
>
> …
>
> (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.

Cal. Gov. Code § 6254.9(a),(b), (d).

maintains paper copies of assessor rolls, transfer deeds, and other property-related documents,[3] and, second, the County stores information from those documents in electronic form as the OC Landbase. *See* Petitioner's Appendix, Volume 1 at PA-000007. To create the OC Landbase, Orange County entered and stored the public information from assessor rolls and transfer deeds into proprietary Relational Database Management Software ("RDBMS"). *Id*. Orange County's current RDBMS was developed by Oracle, is licensed to Orange County by a third party vendor, and is indisputably "software." *See* Petitioner's Appendix, Volume 3 at PA-000568. Using a separate, GIS software program,[4] the public information stored within the RDBMS can be viewed as maps, which can be edited and manipulated in various ways. *Sierra Club*, 195 Cal.App.4th at 1542 [slip op. at 3]. A copy of the OC Landbase, then, is a copy of public information in a GIS-compatible file format stored, maintained, and distilled within the RDBMS. *See id*.

In 2007 and 2008, the Sierra Club filed a request under the CPRA for a copy of Orange County's OC Landbase. Petition for Review, *Sierra Club v. Superior Court (County of Orange)* at 7. The County refused the Sierra Club's request. *Id*. at 9. Instead, Orange County offered to provide the Landbase for a $375,000 fee and subject to a restrictive licensing agreement; or, alternatively, the County offered to provide the Sierra Club with access to the paper copies of assessor rolls, transfer deeds, and other property documents containing the public information stored within the OC Landbase. *Id*. at 6. The Sierra Club subsequently filed a petition for writ of mandate in the Orange County Superior Court in an attempt to compel disclosure of the OC Landbase in its GIS-compatible format. *Id*. at 9. After evidentiary hearings and trial, the Superior Court held that Orange County was not required to disclose the OC Landbase because the information was exempt as "computer software" under § 6254.9 of the CPRA. *Id*. The Sierra Club appealed. *Id*.

The Court of Appeal upheld the trial court's decision, determining that the OC Landbase was a "computer mapping system" within the meaning of the CPRA's computer software exemption. *Sierra Club*, 195 Cal.App.4th at 1542 [slip op. at 3]. Thus, because the OC Landbase was within the exemption, the court held that Orange County was not required to disclose the OC Landbase under the CPRA. *Id*.

In the proceedings below, the parties spent considerable time and effort attempting to draw a distinction between "software," which § 6254.9 exempts from disclosure, and "data," which, according to the Sierra Club, is not exempt. *See id*. at 1544 [slip op. at 7] ("Sierra Club [relies] heavily on standard dictionary definitions of 'computer software' and 'data.'") The relevant distinction, however, is not between "software" and "data," but between "software" (or, more specifically, "computer mapping systems") and public "*information*."[5]

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[3] The county also maintains electronic copies of the paper documents in PDF. *Sierra Club*, 195 Cal.App.4th at 1542 [slip op. at 4].

[4] Orange County, for example, uses ArcGIS. Petitioner's Appendix, Volume 3 at PA-000568. The GIS software is separate and distinct software from the RDBMS. *Id*.

[5] While the distinction between "data" and "information" may seem esoteric, the difference is important to a proper interpretation and construction of the statute. § 6254.9 exempts "computer software" from disclosure under the CPRA. While "software" is colloquially understood to be a "sequence of instructions" distinct from the "data"

The issue, then, is whether the public nature of the property information contained within the OC Landbase is altered when Orange County enters and stores it within its RDBMS.[6] Orange County maintains that, by virtue of the public information's storage in the RDBMS, the information *becomes* "*a part of* a computer mapping system." *Id*. at 1544 [slip op. at 7] (emphasis added). In contrast, Sierra Club maintains — consistent with statute, California's Constitution, and sound public policy — that the public information does not lose its public status, simply by virtue of the format of its storage. *See* Petition for Review at 16-22. The Court of Appeal concluded that Orange County's position was correct — that information may be stripped of its public nature simply by being entered into a computer and stored and manipulated by software. *See id*. at 3. For reasons more fully described below, that conclusion creates a fundamental conflict with existing California caselaw and raises important questions of law related to California's Constitution, the CPRA, and California's commitment to government accountability and transparency in the digital age.

Grounds Supporting Review

I. This Court's Review is Necessary to Settle the Important Question of Law Governing the People's Right to Access Public Information Stored in an Electronic Format

The *Sierra Club* opinion is fundamentally contrary California's robust dedication to transparency, access to government information, and accountability in the digital age. While the direct conflict between the *Sierra Club* and *Santa Clara* opinions and the important question of Article I, § 3, subdiv. (b)(2)'s proper application to statutory interpretation provide independent grounds for this Court to grant Sierra Club's Petition for Review,[7] in the view of amicus, the threat posed to transparency and accountability by the *Sierra Club* opinion predominates over other concerns. For this reason alone, the Court should grant Sierra Club's Petition for Review to settle the important question of whether the electronic storage of public information may change the public nature of that information.

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processed by those instructions, the instructions, themselves, *consist* of data. While distinctions may be drawn, at a given instance, between data that serves as instructions and data that is parsed or processed by those instructions, the nature of "software as software" and "software as data" can change depending on the context. Thus, attempting to distinguish the RDBMS and GIS software as "software" and the OC Landbase as "data," while entirely accurate, tends to obscure the issue in this case.

Instead, for purposes of clarity, "information" is a more appropriate term to describe the contents of the public property records at issue in this case — both in their paper form and as stored in electronic form within the OC Landbase. First, "information" does not implicate the technical distinction between "software" and "data" described above. Second, "information" better reflects the concern of the CPRA as a whole; the primary focus of the CPRA is not physical (or even electronic) "records," or "documents," but the "information" contained therein. *See* Cal. Gov. Code § 6250 ("[A]ccess to *information* concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."); *see also* Cal. Const. Art. I, sec 3, subdiv. b.

[6] Sierra Club does *not* seek production of the RDBMS itself, nor does it seek production of Orange County's propriety GIS software.

[7] *See* Sections II, III, *infra*.

Like all states, California's Public Record Act ensures citizens' access to information created and relied upon by state agencies. *See* Cal. Gov. Code § 6250 *et seq*. Unlike most states, however, California's commitment to transparency is so profound that this right of access is enshrined within California's Constitution. Cal. Const. Art. I, § 3, subdiv. (b). The primary concern of this right is access to government *information*. *Id*. ("The people have the right of access to *information* concerning the conduct of the people's business[.]") (emphasis added). The right to access this information exists regardless of the format in which the information is stored. *See* Cal. Gov. Code § 6252(g) (describing "writings" available under the CPRA "regardless of the manner in which the record has been stored"); Cal. Gov. Code § 6253.9(a) (state agencies must "make the information available in any electronic format in which it holds the information"). § 6254.9, too, reiterates the government's requirement to make public information available, regardless of format: "Nothing in [the computer software exemption] is intended to affect the public record status of *information* merely because it is stored in a computer." Cal. Gov. Code § 6254.9(d)(emphasis added).

There is no dispute that the information contained within the OC Landbase is public information. *See Sierra Club*, 195 Cal.App.4th at 1542 [slip op. at 4]. The issue is simply whether the information's storage in a particular format strips it of its "public" nature. A straightforward interpretation of § 6254.9(d) suggests that the software exemption does not change information's public status under the CPRA simply because the information is stored electronically. *See* Cal. Gov. Code § 6254.9(d). Thus, if information from a paper public record is scanned and stored electronically as a PDF, under § 6254.9(d), both the paper record and the PDF contain publicly accessible information under the CPRA. Applied to the circumstances of this case, the information taken from paper copies of public records and stored within the RDBMS — parcel record information, addresses, property owner names, property values — should not lose its public status simply because it is entered and stored within a computer database. The *Sierra Club* court, however, failed to even discuss § 6254.9(d)'s mandate that the software exemption not alter the public status of information. *See Sierra Club*, 195 Cal.App.4th at 1544, 1546 [slip op. at 7, 14].

This common sense interpretation is compatible with sound policy in light of § 6254.9's overarching purpose — to protect proprietary *software* developed by a state agency. The computer software exception to the CPRA reflects the legislature's rational, good faith decision to protect from disclosure computer software developed by a state agency.[8] The legislature did not seek to provide state agencies with a mechanism through which they could siphon otherwise publicly available information and, thereby, withhold it from citizens.[9] "Develop" in the language of § 6254.9(a), then, was likely meant to reflect a state agency's creation, editing, and

[8] As a matter of policy, EFF maintains that *software* developed by the government, at taxpayer expense, should be open-source and freely available to the public. That policy preference, however, is not implicated by this case.

[9] Withholding information under § 6254.9 could be accomplished in one of two ways. A state agency could flatly deny any request for access to the information; or, as Orange County has done, an agency could condition the information's release upon the payment of an exorbitant fee in conjunction with a restricted-use licensing agreement. Either result is unacceptable in light of the CPRA's broad commitment to the public's access to government information.

maintenance of software source code; it was not meant to encompass the translation — whether by scanning, as in the case of the creation of a PDF, or data entry, as in the case of the OC Landbase — of otherwise public information into an electronic format.

The logic undergirding the *Sierra Club* opinion threatens to undermine California's commitment to transparency and accountability in the digital age. At an abstract level, the *Sierra Club* opinion can be distilled to a distressing essence — by entering public information into software that may be used in conjunction with mapping software, a state agency has "developed" a "computer mapping system," thereby stripping any public information maintained within that software of its public nature and preventing its disclosure under the CPRA.

At a minimum, the *Sierra Club* opinion will dramatically reduce the public's ability to access GIS-formatted information from state agencies. Facing budget shortfalls, many state agencies would welcome the creation of additional revenue streams created through the licensing of GIS-formatted information, even if the agency did not previously charge for the information. Given the disparate uses to which researchers, companies, journalists, and nonprofits use this geographic information, the *Sierra Club* opinion will have a significant chilling effect on the analysis, innovation, and discourse stemming from geographically-tied public information in California.

A second concern is the likelihood that public geographic information — currently maintained by Orange County in both paper format and the County's OC Landbase — will eventually be created, stored, and maintained only in an electronic format. As society increasingly relies on electronic storage of information, an assessor's survey, for example, may be created and stored in a GIS-compatible format in the first instance — bypassing the "paper" stage entirely. Under the logic of the *Sierra Club* opinion, this GIS-compatible assessor's survey could be considered a part of a "computer mapping system," simply by virtue of the format of its storage, and thereby exempt from disclosure under the CPRA. The public would never have the opportunity to access this information and would lose a valuable check on state agency accountability. This was not the legislature's intent in passing § 6254.9.

When the logic of the *Sierra Club* opinion is applied to the other enumerated examples of exempt "software" described in § 6254.9(b), the unsoundness of the decision becomes even more apparent. For example, if a state agency implemented a procedure, using commercially available software, whereby arrest mug shots were taken with a digital camera, then stored and viewed electronically, those mug shots — a paradigmatic example of public information — could lose their public status, simply by virtue of their inclusion in a "computer graphics system." Like the public information entered into the RDBMS, the mug shot image data would be entered, stored, and maintained within government computers and software. And, like the OC Landbase, that mug shot image would be viewed using software specifically designed for viewing graphics and images. Like the entry of parcel information or street names, the entry of the mug shot into the state agency's electronic storage system would, according to the *Sierra Club* court's logic, satisfy the requirement that the "computer graphics system" be "developed" by the state agency. Thus, like the public information at issue in *Sierra Club*, mug shots could be withheld in their entirety, simply by their inclusion within such a "system." Again, undoubtedly, this is not the result the legislature intended in passing § 6254.9.

Along with "computer mapping systems" and "computer graphics systems," "computer programs" developed by a state agency are similarly exempt from disclosure under § 6254.9. When the logic of the *Sierra Club* opinion is applied to "computer programs," the possible results are even more extreme. For example, a public record that is scanned (with assistance from a computer program), translated into a PDF (using a computer program), stored (using a computer program), and viewed (using a computer program) could be withheld under the CPRA: at any step in the process, public information from the paper public record is transmitted, stored, or processed by one of many computer programs in a substantively identical manner to the inclusion of parcel records within Orange County's OC Landbase. According to the *Sierra Club* opinion, this transmission of data is sufficient to satisfy the requirement that the program, and associated public information, be "developed" by the agency. This PDF — or, for that matter, *any* public information entered into a computer program — could lose its public record status following the precedent of the *Sierra Club* opinion. The gradual evisceration of California's public record law in the digital age could not have been the policy impetus behind § 6254.9's passage.

Consequently, this Court should grant the Sierra Club's Petition for Review in order to protect Californians' right to access public government information, regardless of the electronic format in which it is stored.

II. This Court's Review is Necessary to Ensure Uniformity of Decision and to Settle the Direct Conflict Between the *Sierra Club* Opinion and *Santa Clara* Opinion

Beyond the threat to transparency in the digital age posed by the *Sierra Club* opinion, the decision also creates a precedential split in California courts. The *Sierra Club* opinion and *County of Santa Clara v. Superior Court*, (2009) 170 Cal.App.4th 1301,[10] conflict in two fundamental ways. First, the two cases conflict in their determination of whether a California state agency's GIS basemap is a public record. Second, the cases create a conflict as to a state agency's ability to license and copyright a GIS basemap. Consequently, this Court should grant the Sierra Club's Petition for Review to ensure "uniformity of decision" and to settle the two conflicting precedents. Rules of Court 8.500(b)(1).

The outcomes of the two cases conflict as to the public record status of state agencies' GIS basemaps in California. The *Sierra Club* opinion concluded that the "OC Landbase is part of a computer mapping system and, therefore, excluded from public disclosure" under the CPRA. *Sierra Club*, 195 Cal.App.4th at 1553 [slip op. at 19]. The *Santa Clara* opinion, on the other hand, held that "the law calls for unrestricted disclosure" of Santa Clara County's GIS basemap. *Santa Clara*, 170 Cal.App.4th at 1309. Given the myriad purposes to which researchers,

[10] *Santa Clara* is the functional analog to the present case. In *Santa Clara*, plaintiffs attempted to obtain, through the CPRA, Santa Clara County's GIS basemap — a compilation of public information nearly identical to the OC Landbase. Like the present case, Santa Clara refused to turn over the GIS basemap and plaintiffs, the California First Amendment Coalition, filed suit. While the question of whether the GIS basemap was part of a "computer mapping system" under § 6254.9 was conceded by Santa Clara at the trial court level, the *Santa Clara* decision and the *Sierra Club* decision still conflict in fundamental ways.

businesses, government, journalists, and nonprofits use GIS basemaps, the conflicting precedent will invite confusion among citizens requesting the basemaps, state agencies responding to those requests, and California courts charged with resolving the inevitable disputes arising from the conflict.

Sierra Club and *Santa Clara* create further conflicting precedent regarding a state agency's ability to license and copyright a GIS basemap. The underlying challenge in *Sierra Club* involved the petitioner's inability to obtain the OC Landbase without acquiescing to Orange County's licensing agreement and $375,000 fee; the *Sierra Club* decision sanctioned the County's costly licensing scheme. *Sierra Club*, 195 Cal.App.4th at 1541 [slip op. at 3] The *Santa Clara* court, however, unequivocally held that there is "no statutory basis. . . for conditioning [a GIS Landbase's] release on a licensing agreement." *Santa Clara*, 170 Cal.App.4th at 137.

Again, the explicit conflict between the *Santa Clara* decision and the *Sierra Club* decision requires this Court's intervention to ensure "uniformity of decision" with respect to the public record status of GIS databases and a state agency's ability to copyright its GIS database.

III. This Court's Review is Necessary to Address the Important Question of Law Governing the Appropriate Level of Deference to Afford Article I, § 3, subdiv. (b)(2) of California's Constitution When Interpreting Ambiguous Statutory Language Under the CPRA

Article I, § 3, subdiv. (b)(2) of the California Constitution requires that a "statute . . . be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const. Article I, § 3, subdiv. (b)(2) ("§ 3(b)(2)"). The Court of Appeal in *Sierra Club* construed the term "computer mapping system" broadly, and as a result, limited access to public information under § 6254.9 of the CPRA. Whether or not this construction was proper in light of § 3(b)(2)'s mandate is "an important question of law" requiring this Court's consideration. Rules of Court 8.500(b)(1).

In *Sierra Club*, the Court of Appeal determined that the term "computer mapping system" was ambiguous and could plausibly include or exclude the OC Landbase. *Sierra Club*, 195 Cal.App.4th at 1545 [slip op. at 8]. Yet, instead of first looking to § 3(b)(2) to determine the construction of the term that would best promote public access, the court looked to the legislative history of § 6254.9, the statutory framework of the CPRA, and even the statutes of other states. *See id*. at 1545-51 [slip op. 8-16] Only then, after reviewing those authorities, did the court finally address, and summarily dismiss, California's Constitutional mandate to narrowly construe the statute. *Id*. at 1551 [slip op. 16] ("Sierra Club points out . . . [§ 3(b)(2)'s] mandate[]. . .We have construed section 6254.9 as narrowly as is possible consistent with its legislative history."). While the appropriate level of deference is unclear, a Constitutional requirement to construe a statute in a particular manner should almost certainly figure more prominently in a court's analysis than the construction of statutes in other states.

The appropriate level of deference to afforded § 3(b)(2) of California's Constitution when interpreting the CPRA has divided this Court, as well. *See, e.g.*, *Int'l Federation of Prof. and Tech. Engineers, Local 21 v. Superior Court of Alameda*, (2007) 42 Cal. 4th 319, ("As I stated at

the outset, I have no quarrel with the majority's reasoning and its conclusion . . . [however, to interpret the statute] I would simply follow the mandate of the initiative the voters passed in 2004 amending the California Constitution to, among other things, direct courts to construe narrowly any statute *limiting* the people's right of access to public records.") (citing § 3(b)(2)) (emphasis in original) (Kennard, J. concurring and dissenting). As demonstrated by this Court's division in *Local 21*, the appropriate role of § 3(b)(2) when interpreting the CPRA remains uncertain and unsettled in California, and this Court's intervention is necessary to decide this important question of law.

Conclusion

While the intended scope of the CPRA's computer software exemption may be unclear, it is almost certain that the legislature did not intend to destroy the CPRA through subterfuge. The *Sierra Club* opinion's interpretation of an exception to the CPRA risks swallowing the rule, thus compromising California's fundamental commitment to transparency, accountability, and access to public records. This Court should grant the Sierra Club's Petition for Review to stem the threat to public access to government records in the digital age. For the reasons described above, EFF strongly urges this Court to grant the Sierra Club's Petition for Review.

Respectfully submitted,

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