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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

The CALIFORNIA FIRST AMENDMENT COALITION,

Petitioner,

v.

COUNTY OF SANTA CLARA and PETER KUTRAS, JR., as the County Executive of the County of Santa Clara,

Respondents.

CASE NO. 1-06-CV-072630

REPLY BRIEF OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION IN SUPPORT OF MOTION FOR JUDGMENT ON PETITION FOR WRIT OF MANDATE

Date: February 20, 2007
Time: 2:00 p.m.
Place: TBA
Judge: TBA

INTRODUCTION

Faced with the loss of revenue from the sales of its GIS basemap data if it is required to provide that data for the direct cost of duplication as required by the Public Records Act, the County has gone to great lengths to try to convince this Court that it should be allowed to continue its monopoly control over these public records created at taxpayer expense. In addition to the PRA exemptions the County originally cited, its opposition advances brand new exemptions and is accompanied by more than a dozen declarations by County officials. In an all-out effort to defeat CFAC's petition, the County even challenges CFAC's standing to bring this suit – an argument that flies in the face of the PRA's guarantee of the right of "any person" to bring an action for writ of mandate where an agency has refused to release public records. But despite asserting every possible argument against disclosure in the hopes that one will stick, none of the arguments advanced by the County makes the Basemap Data exempt from disclosure under the PRA.

In enacting the PRA, the Legislature recognized that public records are not something for the government to own and sell as a way to fund its operations, but are instead something to which the taxpaying public has a fundamental right to review, copy, and use as it sees fit. As information in the hands of governments becomes increasingly digitized and sophisticated, public agencies strapped for funding can be expected to behave much as the County is in this case, trying to sell, at monopoly prices, what are properly public records. This trend must be nipped in the bud. CFAC's petition should be granted, and the Court should make it clear that members of the public are entitled to the Basemap Data under the PRA, without being required to sign a license agreement or submit to other use restrictions, and without paying more than the direct cost of duplication.[1]

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[1] In its opposition, the County contends that the Revenue and Taxation Code authorizes it to charge more than the direct cost of duplication. As CFAC explained in its opening brief, because the Assessor's office does not control or provide the GIS basemap – a fact confirmed by the County's McKibbin Declaration -- Revenue and Taxation Code § 409(a) has no application here. Alternatively, the County maintains that it is entitled to charge "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," as permitted in certain instances specified by Govt. Code § 6253.9(b). However, the County does not provide any information as to the amount of that cost, nor does it indicate how it proposes to calculate that cost. In any event, 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." 88 Op. Cal. Atty. Gen. 153, 164 (2005).

I.

THERE IS NO MERIT TO THE COUNTY'S STANDING ARGUMENTS

As shown below, none of the County's standing arguments have any merit, and only serve to illustrate the lengths to which the County has gone to defeat the PRA request at issue here.

CFAC Is A Corporation In Good Standing. -- In January 2007, CFAC learned that it had been placed on suspended status by the California Secretary of State two months earlier as the result of an inadvertent failure to file an information statement mandated by the California Corporations Code. CFAC immediately filed the requisite statement, and has obtained a Notice of Revivor confirming CFAC's status as a corporation in good standing. Supp. Scheer Decl., ¶¶ 2-7 & Exh. A. The law is clear that such a temporary suspension does not bar CFAC's writ petition. The "revival of corporate powers has the effect of validating the earlier acts and permitting the corporation to proceed with the action." *Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*, 8 Cal. 3d 369, 373 (1972); *accord, e.g., Cadle Co. v. World Wide Hosp. Furn., Inc.*, 144 Cal. App. 4th 504, 513 (2006).

The County's Eleventh-Hour Settlement Offer Does Not Moot This Action. After the County refused not once, but ***twice***, to provide the Basemap Data, Scheer Decl., Exhs. A & B; Matteo-Boehm Decl., Exhs. B & D, CFAC filed the instant writ petition in October 2006. Three months later, only days before CFAC's opening brief was due and only after CFAC had already devoted considerable time and expense in litigating this action, the County offered to provide CFAC with a free copy of its GIS basemap, but only on two wholly unacceptable conditions. *First*, the County would have required that CFAC sign a release agreement that would preclude "reproducing, preparing derivative works, distributing, or displaying the GIS Basemap" -- restrictions that are not permitted under the PRA. *Second*, the County would have required CFAC to bear its own fees and costs -- which, by the time of the County's offer, had become significant -- even though the PRA guarantees an award of a fees and costs to a prevailing plaintiff.[2] In light of this, the County's mootness argument has no merit.

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[2] Without some mechanism for awarding fees and costs to prevailing plaintiffs, litigation to enforce the PRA would not, as a practical matter, be feasible for organizations with limited resources such as CFAC. Section 6259(d) of the PRA was "enacted to carry out the purposes of the Public Records Act. Through the device of awarding attorneys fees, citizens can enforce its salutary objectives." *Braun v. City of Taft*, 154 Cal. App. 3d 332, 349 (1984).

Even if the County had not imposed these conditions, where records are released by an agency ***after*** the filing of a PRA writ petition, the matters raised in the petition are not moot because "the question of petitioner's entitlement to the documents in the first place remains to be determined," and "[i]f the question is decided in petitioner's favor, he will be entitled to collect his attorneys fees and costs." *Fairley v. Sup. Ct.*, 66 Cal. App. 4th 1414, 1419 (1998). In addition, where, as here, the issues raised by a PRA writ petition are "a matter of public interest and continuing concern," it is appropriate for the Court to proceed to the merits. *Id.*

The County's Other Standing Arguments Have No Merit In A PRA Case. As the Court of Appeal observed in *Wilder v. Sup. Ct.*, 66 Cal. App. 4th 77, 82 (1998), "[t]he statutory provision for enforcing the [PRA] is not the equivalent of ordinary mandamus." As the Court noted:

> Under the CPRA, the Legislature created an avenue whereby "every person in this state" may obtain ready access to "public records." Where the documents are withheld "[a]ny person may institute proceedings for injunctive *or* declarative relief *or* writ of mandate ..." (§ 6258, italics added). The express "object" of the enforcement provision is to ensure that review of an agency decision to withhold documents from a "member of the public" be secured "at the earliest possible time."

Id. Thus, in the *Wilder* case, the court concluded that a litigant in one case who sought documents in a separate PRA writ of mandate proceeding was not barred by the rule that a writ mandate is not available where there is a "plain, speedy and adequate" remedy at law. The same reasoning holds true here with respect to the County's contentions that CFAC has not shown that it is "beneficially interested" and will suffer "irreparable injury" unless it obtains the relief requested in its petition. Any person is entitled to request public records under the PRA for any reason, and an agency may not limit access based on the purpose for which the record is requested. Govt. Code §§ 6253, 6257.5. If the agency withholds the records, that person is entitled by the PRA to bring a petition for writ of mandate in order obtain the release of the records "at the earliest possible time." Govt. Code §§ 6258, 6259. As such, the "beneficially interested" and "irreparable injury" requirements simply do not apply in a PRA action in the way that the County contends they apply here. If they did, only a select group of people would be able to seek writ relief to redress denials of access to public records, contrary to the express provisions of the PRA.

CFAC has demonstrated that it has submitted a PRA request to the County for the Basemap

Data that the County denied, and that that denial of access to this data under the PRA has deprived CFAC -- and anyone else who might request similar data from the County -- of a useful tool for evaluating and monitoring public agencies. For the purposes of a PRA action, this is more than enough to satisfy the irreparable injury and beneficial interest requirements.

II.

THE COUNTY HAS NOT MET ITS BURDEN TO SHOW THAT THE BASEMAP DATA FALLS WITHIN ONE OF THE PRA'S EXPRESS EXEMPTIONS TO DISCLOSURE

Since CFAC has standing to bring this action, its petition can only be denied if the Court determines that the County has satisfied its burden to show that the records are exempt from disclosure under one of the PRA's specific exemptions to the presumptive rule of disclosure. *E.g.*, *Braun v. City of Taft*, 154 Cal. App. 3d 332, 345 (1984). Despite advancing a multitude of exemptions, the County has not met this burden, and CFAC's petition must therefore be granted.

A. Copyright

The County repeatedly relied on copyright as one of its grounds for refusing CFAC's PRA request for the Basemap Data. Yet the County does not even attempt to rebut CFAC's explanation as to why copyright law does not allow it to refuse CFAC's request for the Basemap Data or impose restrictions on its use. Instead, the County points to the last clause of § 6254.9 which, contrary to the County's assertion, does ***not*** confer copyright protection on the information requested by CFAC. Government Code § 6254.9 provides, in its entirety:

> (a) Computer software developed by a state or local agency is not itself a public record under this chapter. The agency may sell, lease, or license the software for commercial or non-commercial 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 any 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.

Because the County fails to distinguish between the software and data portions of its GIS, as it is required to do by subsection (d) -- an issue that is further discussed in Section II(B) below -- it also misinterprets subsection (e). Subsections (d) and (e) are similarly phrased, and both modify sections (a)-(c) of § 6254.9. Thus, subsection (e) is intended to make clear that the authority conferred by § 6254.9 on public agencies to sell, lease or license software that it develops does not affect any copyright protections – whether held by the agency itself or another party – in the ***software***. Where, as here, CFAC has requested information, not software, subsection (e) does not apply. Indeed, because subsection (d) makes it clear that "nothing in this section is intended to affect the public record status of information merely because it is stored in a computer," and because the application of copyright law ***would*** limit the public record status of information stored in a computer, the interpretation advocated by the County makes no sense, and must be rejected.[3]

B. Government Code § 6254.9

The County's assertion that the Basemap Data requested by CFAC is exempt under § 6254.9 boils down to the following argument: (1) § 6254.9 provides an exemption for software; (2) software is defined by that section to include, among other things, a "computer mapping system;" (3) the GIS basemap is a computer mapping system; and therefore (4) the entire GIS basemap, including its data elements and descriptive attribute data, is exempt from disclosure under § 6254.9.

In its opposition, the County maintains that the GIS basemap includes both software and data. While GIS professionals normally consider the software portions of a GIS to be separate from the basemap, Supp. Joffe Decl., ¶ 2, the County's insistence that that the basemap portion of its GIS includes software is irrelevant for purposes of the § 6254.9 analysis in this case. Even assuming *arguendo* that the basemap includes both software and data, CFAC's June 12 PRA request clearly seeks certain data elements and descriptive attribute data in the basemap, and unless the data

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[3] In addition to its misplaced reliance on § 6254.9(e), the County points to a Model Data Distribution Policy that has been distributed by CFAC expert Bruce Joffe. Mr. Joffe is not a lawyer, is not an expert on copyright law, and the Policy does not change the fact that in enacting the PRA, the Legislature made a determination that public agencies may not rely on copyright as a basis for refusing requests for copies of public records by members of the public, nor may they rely on copyright to impose fees or restrictions not permitted by the PRA. In any event, the Policy does not reflect Mr. Joffe's current views on the ability of public agencies to use copyright to restrict the use of GIS. Supp. Joffe Decl., ¶ 17.

portions of the basemap are somehow exempt from disclosure, the County is obligated to provide that data to CFAC in the electronic formats CFAC has requested. Govt. Code §§ 6253; 6253.9.[4]

The County argues that because the basemap qualifies as a "mapping system," the County may withhold the data portions under § 6254.9. CFAC does not agree that the basemap constitutes a "mapping system" for the purposes of this section. Joffe Decl., ¶¶ 10, 11. But even if it did, the County's argument would still fail, since § 6254.9(d) expressly provides that nothing in § 6254.9 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." The County fails to even acknowledge subsection (d) in its opposition, and misses the point made by the Attorney General's observation, in the 2005 opinion on electronic parcel boundary maps, that there is a distinction in § 6254.9 between map data maintained in electronic form and the software – including mapping systems, computer programs, and computer graphics systems – used to ***process*** that data. 88 Op. Atty. Gen. Cal. 153, 159 (2005).

An analogy to a more familiar software application may be helpful here. Microsoft Word is a software program. Documents created and stored using Microsoft Word are not themselves software. They are information – data, to use computer nomenclature – for which the Microsoft Word program is needed to render the information accessible and understandable. CFAC is requesting the equivalent of Word files, but understands that it must purchase its own copy of the Microsoft Word program to read those files. Similarly, while the County need not provide CFAC with GIS software, it must disclose the ***data*** under the PRA. Any other interpretation would render § 6254.9(d) meaningless and would violate Article 2 § 3(b)(1) of the California Constitution, which requires that a PRA exemption "shall be ... narrowly construed if it limits the right of access."

C. Government Code § 6253.9(f)

In enacting § 6253.9, the Legislature guaranteed the public's right of access to information maintained by public agencies in electronic form, creating a narrow exception only in those cases where its release "would jeopardize or compromise the security or integrity of the original record or

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[4] Given that the County was able to provide representative samples of the basemap in both .shp and geodatabase format that contained both the data elements and descriptive attribute data sought by CFAC as part of the discovery process in this case, it cannot be heard to argue that it cannot provide the same information for the entire basemap under the PRA.

of any proprietary software in which it is maintained." Govt. Code § 6253.9(f). The County contends that because members of the public could theoretically reproduce, alter, and redistribute Basemap Data in harmful ways, § 6254(f) allows it to withhold the data from the general public under the PRA, while still continuing to sell the data to those able to pay its asking price.

Hypothetically, a member of the public who wished to do harm could alter and distribute ***any*** electronic document in a fraudulent or otherwise harmful manner. If an agency could avoid disclosing public records in electronic form simply by making self-serving claims that a person could alter the record and use it in harmful ways, § 6253.9's promise of public access to electronic records could be easily avoided. It is doubtful that the Legislature intended such a result.

It follows, then, that something more than unsupported assertions of possible harm are necessary to invoke § 6253.9(f). But this is all the County provides. Its argument is entirely speculative and is based entirely on conclusory assertions of its own GIS Manager that are outside the area of any arguable expertise he may have with respect to GIS operations. There is no reason why the County could not institute safeguards that deter fraudulent uses of the Basemap Data, and the County's assertions are also doubtful in light of the many other counties that provide their GIS basemap in electronic form either free of charge or for the cost of reproduction, thus allowing that data to be widely circulated. Supp. Joffe Decl., ¶¶ 6, 7. The Court should reject the County's attempt to use § 6253.9(f) as an excuse to continue to charge fees prohibited by the PRA.

D. Trade Secrets (Government Code § 6254(k) and Evidence Code § 1060)

California's Uniform Trade Secret Act does not in itself constitute a PRA exception. To the extent public records may be withheld under the PRA as a trade secret, it must be by virtue of Evidence Code § 1060, incorporated into the PRA through Government Code § 6254(k). *San Gabriel Tribune v. Sup. Ct.*, 143 Cal. App. 3d 762, 775-76 (1983); *Uribe v. Howie*, 19 Cal. App. 3d 194, 206-14 (1971). Evidence Code § 1060 only creates a qualified privilege for trade secrets, to the extent that "allowance of the privilege will not tend to ... otherwise work injustice." *Id.* In the context of a PRA case, the Court of Appeal has construed the "work injustice" language as essentially embodying a balancing test analogous to that set forth in the so-called "catch-all" exemption of § 6255(a). *Uribe*, 19 Cal. App. 3d at 206-14. Accordingly, even if the County's GIS

Data could be fairly characterized as a trade secret – and as shown below, it cannot – the question of whether trade secret status would work to exempt the Basemap Data in question would depend on the application of the § 6255 balancing test to the facts of this case, discussed in section II(E), below.

While the *San Gabriel* and *Uribe* courts acknowledged documents in the hands of public agencies reflecting the trade secrets of ***private parties*** (*e.g.*, documents submitted by such parties to the government) may be exempt under the PRA, CFAC is not aware of ***any*** reported case in which a California court has held that public records are exempt under the PRA because they would reveal the trade secret created by, and belonging to, a public agency. This is not surprising. Such an exemption would create a gaping hole in the PRA, allowing a public agency to withhold vast quantities of information concerning the public's business merely by making a superficially plausible claim that the information would lose its value to the agency if it were publicly available. In enacting the PRA, the Legislature determined that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Govt. Code § 6250. As such, permitting public agencies to withhold, under the PRA, information the ***agency*** has generated on trade secret grounds would "work an injustice," Evid. Code § 1060, and this Court should not allow it. Such an interpretation is consistent with the Federal Freedom of Information Act (FOIA), on which the PRA is modeled and that "illuminate[s] the interpretation of its California Counterpart." *ACLU v. Deukmejian*, 32 Cal. 3d 440, 447 (1982); *accord San Gabriel Tribune*, 143 Cal. App. 3d at 772-73. FOIA's exemption for trade secrets, which is intended to encourage people to contribute useful information to governments, only applies to information "obtained from a person" and does not extend to information generated by the government itself. 5 U.S.C. § 552(b)(4); *National Parks and Conserv. Ass'n v. Morton*, 498 F.2d 765, 767-69 (D.C. Cir. 1974); *Starkey v. United States Dept. of Interior*, 238 F. Supp. 2d 1188, 1194-95 (S.D. Cal. 2002).

Even if a public agency could theoretically withhold its own information as a trade secret, the Basemap Data at issue here would not constitute a trade secret for at least two reasons. *First*, trade secret protection is designed to prevent ***competitive harms*** – not to protect public agencies from a loss of revenue from the sale of otherwise public records where that sale is prohibited by the PRA in the first instance. *Second*, despite the County's best attempts to confuse the Court on this point,

CFAC is seeking information, not software, and the specific information it is seeking – parcel boundaries, addresses, and other similar information – is in the public domain. *See, e.g., DVD Copy Control Ass'n v. Bunner*, 31 Cal. 4th 864, 899 (2003) (Werdegar, J., concurring); *accord, e.g., Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. App. 4th 1135, 1172 (2006) (citing *Bunner*).

E. Government Code § 6255

The County raises two concerns in support of its argument that the Basemap Data is exempt from disclosure under § 6255. First, it raises the spectre that the loss of funding from the sales of the Basemap Data would endanger its basemap program. Second, it cites hypothetical security risks resulting from the disclosure of "sensitive information."

As a preliminary matter, the County's arguments rely solely on statements in the Colley and Wing declarations that are conclusory, speculative, lack foundation, and are based in inadmissible hearsay. As the Courts have made clear, such speculative concerns of harm are "inadequate to demonstrate any significant public interest in nondisclosure." *California State University, Fresno Ass'n v. Sup. Ct.*, 90 Cal. App. 4th 810, 834-35 (2001) (claims by university that disclosure of donors would "'likely' have a chilling effect on future donations, resulting in a 'potential' loss of donations, are inadequate to demonstrate any significant public interest in nondisclosure"); *accord CBS, Inc. v. Block*, 42 Cal. 3d 646, 652 (1986) ("A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records.").

The County's arguments are flawed for other reasons as well. Its assertion that the program will be lost if it is unable to continue selling the Basemap Data at monopoly prices is just not credible. Many other California counties maintain GIS operations and are still able to provide their GIS basemaps to the public without charging excessive fees. *See* Supp. Joffe Decl., ¶¶ 6, 7. Its assertion that the release of "sensitive information" would result in a security risk suffers from similar deficiencies. In support of this argument, the County maintains that the disclosure of the Basemap Data would also require the disclosure of Hetch Hetchy water lines, and that a person could use that information as part of a terrorist attack. If the County were truly concerned about the release of "sensitive information" in the basemap, it would not be selling that information to any buyer willing to pay its asking price. And realistically, if terrorists were determined to use the

location of the Hetch Hetchy water lines to carry out an attack, they could no doubt learn the location of those water lines from other sources,[5] regardless of their access to the Basemap Data.

Perhaps recognizing the weakness of its arguments purportedly supporting nondisclosure, the County also attacks the examples CFAC has offered of the ways in which the data could be used to monitor the government. Under § 6255, the focus is not how the requestor would use the information, but on whether ***public interest*** would be served by disclosure. *Connell v. Sup. Ct.*, 56 Cal. App. 4th 601, 616-17 (1997). The County acknowledges that "GIS mapping technology is on the verge of becoming as indispensable and transformative in the day-to-day operations of local government as personal computers and the Internet have been to information processing and communication through all levels of society," McKibbin Decl., ¶ 5, but ignores the public value that can be created by private sector investment in new applications of GIS data. And there are any number of examples of ways in which the Basemap Data can be used to serve the public interest. Supp. Joffe Decl., ¶¶ 10-16. In light of these significant interests favoring disclosure, together with the County's failure to establish a compelling interest for withholding the data, it is clear that the County has failed to meet its burden under § 6255 to show a "clear overbalance" on the side of confidentiality. *City of San Jose v. Sup. Ct.*, 74 Cal. App. 4th 1008, 1018 (1999).

CONCLUSION

For the foregoing reasons, CFAC requests that its writ petition be granted, and that the County be ordered to release the Basemap Data under the PRA for the direct cost of duplication and without restrictions on use.

Dated: February 5, 2007

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By: _____

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[5] Government Code §§ 6254(bb), referenced in the County's footnote 10, does not apply in this case. Section 6254(bb) was intended to encourage private entities to submit information to the California Office of Homeland Security and by its terms does "not affect the status of information in the possession of any other state or local government agency." § 6254(bb).