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11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SANTA CLARA**

14 The CALIFORNIA FIRST AMENDMENT
15 COALITION,

16 Petitioner,

17 v.

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

21 Respondents.

CASE NO. 1-06-CV-072630

**MEMORANDUM OF POINTS AND
AUTHORITIES OF PETITIONER
CALIFORNIA FIRST AMENDMENT
COALITION IN SUPPORT OF MOTION
FOR JUDGMENT ON PETITION FOR
WRIT OF MANDATE**

[Cal. Civ. Proc. Code § 1086, 1088.5]

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1 **INTRODUCTION**

2 Like many other counties, Santa Clara County (the “County”) has developed an electronic
3 geographic information system (“GIS”). At the core of the GIS is the so-called basemap, which
4 includes data reflecting boundary lines of individual parcels of property, together with other
5 information such as the address of each parcel and the Assessor’s Parcel Number. The basemap data
6 can be used to monitor local government officials on important matters such as property tax
7 assessments, the issuance of permits or variances, and real estate developments.

8 But while this data was developed at taxpayer expense, and clearly constitutes a public
9 record under California’s Public Records Act, Government Code §§ 6250 *et seq.* (“PRA”), the
10 County only makes electronic basemap data available to those willing to pay a hefty fee and sign a
11 non-disclosure agreement. The PRA does not permit such exorbitant fees, nor does it allow local
12 agencies to condition the release of public records on the recipient’s agreement that he or she will
13 keep records confidential. In an attempt to secure the County’s voluntary compliance with the PRA,
14 Petitioner California First Amendment Coalition (“CFAC”) submitted a PRA request for the
15 basemap data. The County denied that request, claiming that that PRA does not apply to its
16 “sophisticated, copyrighted” basemap, and citing the PRA’s exemptions and provisions relating to
17 computer software (§§ 6253.9 and 6254.9), the exemption for records made confidential by state or
18 federal law (§ 6254(k)), and the so-called “catch-all” exemption at § 6255.¹

19 Information in the hands of local and state governments is increasingly maintained in
20 electronic form, in increasingly sophisticated formats. If the County can refuse to provide copies of
21 its basemap on the basis of the exemptions it relies on in this case, there will be nothing to prevent it
22 and other governmental agencies from withholding and controlling the use of vast quantities of other
23 information in electronic form pertaining to the public’s business. The County’s denial of CFAC’s
24 request is contrary to recent decisions of the Florida Court of Appeals and the Connecticut Supreme
25 Court, both of which conclude that GIS data is a public record subject to mandatory disclosure under
26 the open records laws of those states, *Director, Department of Information Tech. of the Town of*

27
28 _____
¹ Unless otherwise indicated, all statutory citations are to the California Government Code.

1 *Greenwich v. Freedom of Information Commission*, 874 A.2d 785 (Conn. 2005); *Microdecisions v.*
2 *Skinner*, 889 So.2d 871 (Fla. Dist. Ct. App. 2004), as well as a recent opinion of the California
3 Attorney General concluding that electronic parcel map data must be disclosed under the PRA. 88
4 Op. Atty. Gen. Cal. 153 (October 3, 2005). CFAC thus brings this motion for judgment on its
5 petition for mandate under the PRA and Article 1, § 3, of the California Constitution, as amended by
6 passage of Proposition 59 in 2004, to obtain access to the GIS basemap data and to and make clear
7 that the public may obtain this data without being required to pay prohibitive fees or sign a non-
8 disclosure agreement.²

9 STATEMENT OF FACTS

10 The California First Amendment Coalition (“CFAC”) is a nonprofit public interest
11 organization dedicated to advancing free speech and open-government rights. Since its founding in
12 1988, CFAC has been a crucial counterweight to the tendency, at all levels of government, toward
13 greater secrecy and declining accountability.

14 Like many other counties, Santa Clara County possesses and maintains a geographic
15 information system, commonly referred to as GIS, which includes applications, software, hardware,
16 and data components. Declaration of Rachel Matteo-Boehm, Exh. A at 22-23. Included within GIS
17 is data providing information about real property, including data pertaining to such matters as
18 jurisdictional boundaries (*e.g.*, school district boundaries, open space districts, land use and zoning),
19 environmental features (*e.g.*, flood zones, vegetation), infrastructure (*e.g.*, water, sewer), and
20 transportation (*e.g.*, accident information, traffic data). *See id.*, Exh. A, at 47-55.

21 At the heart of the GIS is the so-called “basemap,” which, according the County’s GIS
22 Strategic Plan, contains “foundational data that supports most GIS application needs across most of
23 the GIS users.” *Id.*, Exh. A at 43. Included within the GIS basemap are data reflecting the
24 boundaries of individual parcels of property, the assessor’s parcel number (“APN”) for each parcel,

25 _____
26 ² In its October 11, 2006 writ petition, CFAC requested that the Court issue a peremptory writ directing the
27 County to provide CFAC with a CD copy of the GIS basemap, including the data elements requested in
28 CFAC’s June 12 letter, in the electronic format(s) requested in the letter. CFAC’s use of the term “data
elements” in this context was used in its broad sense and intended to include both the items listed as “data
elements” in CFAC’s June 12, 2006 PRA request and the “descriptive attribute data” requested for each data
element, all of which the County has refused to provide to CFAC in response to its PRA request.

1 the address of each parcel, and information about “air parcels” (multiple properties on a parcel of
2 land, such as condominiums). The basemap is aligned with other GIS maps and data, enabling
3 multiple types of data to be analyzed at the same time.

4 Like other California counties, the County makes the data within its GIS basemap available
5 to members of the public. Unlike other counties, it charges significant fees for the data. According
6 to the County’s rate sheet, the one-time fee to obtain County-wide parcel information alone (not
7 including any address or Assessor Parcel Number data) would be 56 cents per parcel; at
8 approximately 450,000 parcels the total cost would appear to be approximately \$250,000. Matteo-
9 Boehm Decl., ¶ 6 & Exh. D (letter and enclosed GIS Basemap Data Request form). In addition, the
10 County requires all parties to whom it provides GIS basemap data to sign a non-disclosure
11 agreement. *Id.*, ¶ 6 & Exh. D (letter and enclosed Non-Disclosure Agreement).

12 Under the PRA, all records -- including electronic records -- containing information relating
13 to the conduct of the public’s business that are prepared, owned, used, or retained by any state or
14 local agency must be made publicly available for inspection and copying upon request, for a fee that
15 ordinarily does not exceed the cost of duplication. Records maintained by an agency in electronic
16 form must be made available in an electronic format if the requestor seeks that format. §§ 6253,
17 6253.9. Concerned that the County’s policies with regard to its GIS data were in violation of the
18 PRA, on June 12, 2006, CFAC sent a letter to the County requesting an electronic copy of the
19 following identifiable electronic records pursuant to the PRA and Article 1, Section 3, of the
20 California Constitution, as amended by passage of Proposition 59 in 2004:

21 Specifically, we ask that you provide us with one copy of the most current version of
22 Santa Clara County’s Geographical Information System (GIS) basemap, including the
following:

23 ---Data elements: Closed parcel polygons, in .shp format, each tagged with Assessor
24 Parcel Number (APN), suitable for linking to corresponding Assessor parcel records.

25 ---Descriptive attribute data: For each closed parcel polygon, the APN, Situs
26 Address, Air Parcel status and address, and Annotation text illustrating the parcel’s
address (not linked to the parcel record).

27 We understand the county’s GIS basemap reflects integrated countywide coverage
28 and has been geographically registered with the county’s orthophotography. Please
provide the requested data, on CD disks, in both the .shp format and in the county’s
geodatabase format.

1 Declaration of Peter Scheer, ¶ 2 & Exh. A. The electronic records requested in CFAC’s June 12
2 PRA request and that are the subject of CFAC’s petition are collectively referred to throughout the
3 remainder of this memorandum as the “Basemap Data.”

4 Although CFAC employed technical terms in framing its PRA request, the particular
5 Basemap Data at issue is limited and straightforward. A “closed parcel polygon” is the term used to
6 describe the boundary of a parcel, as that information is maintained in electronic form. CFAC’s
7 request for information in “.shp format” is a reference to the standard electronic data transfer format
8 for GIS systems. The term “situs address” means the street address associated with each parcel.
9 “APN” is a reference to the Assessor’s Parcel Number, a unique identifier associated with each
10 parcel. The reference to “air parcel status and address” means address and ownership information
11 for individually owned properties occupying the same parcel of land. Finally, CFAC requested
12 “annotation text illustrating the parcel’s address,” a feature that places each parcel’s address numbers
13 on top of the appropriate parcel to which it is linked. Declaration of Bruce Joffe, ¶ 8.

14 By letter dated June 26, 2006, the County denied CFAC’s request for the Basemap Data,
15 citing Government Code §§ 6254(k), 6254.9, and 6255, and claiming the data was copyrighted.
16 Scheer Decl., ¶ 3 & Exh. B. On August 14, 2006, counsel for CFAC had a telephone conversation
17 with Susan Swain, Lead Deputy County Counsel for the County, in which Ms. Swain asserted that
18 the County owned the copyright to the requested data, and confirmed that the County was relying on
19 copyright as one basis for denial of CFAC’s PRA request. Matteo-Boehm Decl., ¶ 3.

20 On August 16, counsel for CFAC sent a follow-up letter to Ms. Swain, renewing CFAC’s
21 PRA request for the Basemap Data with the modification that CFAC no longer planned to make the
22 that data available free to the public on CDs (as it had so indicated in its June 12 PRA request) but
23 that CFAC expressly reserved the right to use and/or display the data for news reporting and other
24 similar purposes. CFAC requested that the County inform it as to whether it would reconsider its
25 denial of CFAC’s PRA request for the Basemap Data in light of this modification, and also
26 requested additional public records relating to the County’s GIS basemap, as well as the separate
27 parcel map referred to in the County’s June 26 letter to CFAC. *Id.*, ¶ 4 & Exh. B.

28

1 By letter dated August 28, 2006, the County notified CFAC that its position with regard to its
2 CFAC's June 12 PRA request was unchanged. Although the County released some of the additional
3 public records sought by CFAC in its August 15 letter, Matteo-Boehm Decl., ¶¶ 6-7 & Exhs. D-E, it
4 has refused to release the Basemap Data itself. *Id.*, Exh. D; Scheer Decl., Exh. B.³

5 **I.**

6 **THE BASEMAP DATA IS A PUBLIC RECORD THAT MUST BE MADE AVAILABLE TO**
7 **THE PUBLIC IN ACCORDANCE WITH THE REQUIREMENTS OF THE PRA**

8 The PRA requires that all “public records” collected or maintained by local agencies be
9 released upon request by a member of the public unless the local agency can demonstrate that the
10 record is exempt under one of the “express provisions” of the PRA or that “on the facts of the
11 particular case the public interest served by not disclosing the record clearly outweighs the public
12 interest served by disclosure of the record.” § 6255(a). A “public record is defined as “any writing
13 containing information relating to the conduct of the public’s business prepared, owned, used or
14 retained by any state or local agency.” § 6252(e), including information stored in electronic form.
15 §§ 6253.9, 6254.9. As the Attorney General has recognized, “[t]his definition is intended to cover
16 every conceivable kind of record that is involved in the government process. ... Only purely personal
17 information unrelated to “the conduct of the public’s business” could be considered exempt from this
18 definition.” 58 Ops. Cal. Atty Gen. 629, 633-34 (1975) (quoting Assembly Committee on
19 Statewide Information Policy California Public Records Act of 1968); *accord, e.g., Braun v. City of*
20 *Taft*, 154 Cal. App. 3d 332, 340 (1984) (“if a record is kept by an officer because it is necessary or
21 convenient to the discharge of his official duty, it is a public record”). For records in electronic
22 form, the agency must make the records available “in any electronic format in which it holds the
23 information.” § 6253.9.

24 The PRA “embodies a strong policy in favor of disclosure of public records,” *Lorig v. Med.*
25 *Bd.*, 78 Cal. App. 4th 462, 467 (2000); *accord Braun*, 154 Cal. App. 3d at 342, and consistent with
26 that policy, “support for a claim [of nondisclosure] must be found, if at all, among the specific
27 exceptions to the general policy that are enumerated in the Act.” *State of California ex rel. Division*

28 ³ The additional records requested in CFAC’s August 15 letter but not provided by the County are not part of
the instant PRA action.

1 of *Industrial Safety v. Superior Court*, 43 Cal. App. 3d 778, 783 (1974). Where, as here, a local
2 agency seeks to withhold a public record, “[t]he burden of demonstrating a need for nondisclosure is
3 upon the agency claiming the right to withhold the information.” *Braun*, 154 Cal. App. 3d at 345
4 (citing *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 780 (1983)).

5 In addition, in November 2004, Californians overwhelmingly approved Proposition 59,
6 which created a new constitutional right of public access to information “concerning the conduct of
7 the government’s business.” Cal. Const., Art. I, § 3(b)(1). Among other things, this new
8 constitutional provision requires that a “statute, court rule, or other authority, including those in
9 effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s
10 right of access, and narrowly construed if it limits the right of access.” *Id.* § 3(b)(2).

11 Among the data at issue in this case are parcel boundary lines maintained in electronic form,
12 as well as assessor parcel numbers and addresses. Although the information in dispute in this case is
13 maintained by the County’s Information Services Department, it includes some of the same elements
14 found in the assessor’s parcel records at issue in the Attorney General’s 2005 opinion. The Attorney
15 General described the “parcel boundary map data” at issue in that opinion as follows:

16 The questions presented for resolution concern ***detailed geographic information*** that
17 is regularly prepared, maintained, and updated for use by California’s county
18 assessors to describe and define the precise geographic boundaries of “assessor’s
19 parcels” -- units of real property for which property taxes are assessed throughout the
20 state. Most counties have converted much of this information, including parcel maps,
21 into an ***electronic format. Once converted, the information may be combined with
other kinds of information for use in “geographic information systems,” which
provide the ability to conduct complex comparisons and analyses useful to county
assessors, other public agencies, and private entities.***

22 88 Op. Atty Gen. Cal. 153, 153-54 (October 3, 2005) (emph. added). After analysis of certain PRA
23 exemptions -- including §§ 6254.9 and 6254(k), both of which the County has cited here -- the
24 Attorney General concluded that the data must be released electronically under the PRA for a fee
25 “generally limited to the amount that covers the direct cost of producing the copy,” except where
26 additional charges would be allowed under § 6253.9. *Id.* at 164. As the Attorney General explained:

27 To be sure, no provision of law dictates that a county assessor must keep this required
28 parcel boundary map data in an electronic format; rather, the choice to do so lies
within the discretion of each assessor. But once such a format has been selected, the

1 material must be made available for public inspection, and copies of the data in the
2 electronic format in which it is held, must be provided upon request.

3 *Id.* at 162-63. The opinion of the California Attorney General is entitled to considerable weight.
4 *Hunt v. Sup. Ct.*, 21 Cal. 4th 984, 1013 (1999); *accord Freedom Newspapers, Inc. v. Orange County*
5 *Employees Retirement Sys.*, 6 Cal. 4th 821, 829 (1993). Yet the County has never offered any
6 explanation for why the conclusion in that opinion -- that electronic parcel data are public records
7 that must be disclosed under the PRA -- would not also apply to the Basemap Data requested here.

8 Indeed, the only two reported cases to have considered the public's right of access to GIS
9 data under state open records laws are in accord with the Attorney General's conclusions. In *Town*
10 *of Greenwich*, the Connecticut Supreme Court concluded that computerized information from the
11 town's GIS database was a public record subject to that state's open record law and did not fall
12 under the exemptions for trade secrets and information posing a security risk. 874 A.2d at 795.
13 Similarly, in *Microdecisions*, the Florida District Court of Appeal concluded that Florida's public
14 records law prevented a county appraiser from conditioning the release of GIS maps on the signing
15 of an agreement requiring royalty payment if the maps were used commercially. 889 So.2d at 876.

16 II.

17 **NONE OF THE EXEMPTIONS CITED BY THE COUNTY OVERCOME THE PUBLIC'S** 18 **RIGHT UNDER THE PRA TO THE GIS BASEMAP DATA, AND THE DATA MUST BE** 19 **RELEASED WITHOUT ANY CONDITIONS ON DISCLOSURE AND FOR A FEE THAT** 20 **DOES NOT EXCEED THOSE ALLOWED BY GOVT. CODE §§ 6253 AND 6253.9**

21 Notwithstanding the California Attorney General's opinion, the County has asserted five
22 objections for its refusal to provide the records requested by CFAC. *First*, the county contends that
23 the Basemap Data is copyrighted. *Second*, the County claims the Basemap Data is exempt from
24 disclosure pursuant to the PRA's exemption for "[r]ecords, the disclosure of which is exempted or
25 prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence
26 Code relating to privilege." § 6254(k). *Third*, the County asserts that the Basemap Data is exempt
27 from disclosure pursuant to § 6254.9, which allows local agencies to withhold "computer software
28 developed by a state or local agency." *Fourth*, the county maintains the information is exempt under
§ 6253.9, which specifies the rules under which public agencies must release information maintained

1 in electronic form.⁴ *Fifth*, the County contends withholding the Basemap Data is justified pursuant
2 to § 6255, which allows public agencies to withhold records if they can demonstrate that “on the
3 facts of the particular case the public interest served by not disclosing the record clearly outweighs
4 the public interest served by disclosure of the record.”

5 None of these five objections allow the County to withhold the Basemap Data, and copies of
6 the requested records must be made available under the PRA in the electronic format requested.
7 Although the County may charge a fee for the copies of those records, that fee may not exceed the
8 nominal charges permitted by §§ 6253 and 6253.9. In addition, the PRA prohibits the County from
9 requiring CFAC to sign a nondisclosure agreement. *ACLU v. Deukmejian*, 32 Cal. 3d 440, 451
10 (1982); *Orange County Employees Ass’n v. Superior Court*, 120 Cal. App. 4th 287, 295 (2004).

11 **A. The County May Not Hide Behind Copyright As A Basis For Refusing To Disclose The**
12 **Requested Data, And Has Failed To Provide Any Other Basis For Withholding The**
13 **Data Under Government Code § 6254(k)**

14 The § 6254(k) exemption “is not an independent exemption at all; it simply incorporates
15 other exemptions or prohibitions provided by law.” *Cook v. Craig*, 55 Cal. App. 3d 773, 783 (1976);
16 *accord CBS, Inc. v. Block*, 42 Cal. 3d 646, 652-59 (1986)). Other than copyright, the County has not
17 cited any other state or federal law that could be incorporated into § 6254(k).⁵ Thus, the question of
18 whether the County may withhold the Basemap Data pursuant to § 6254(k) turns on whether it may
19 invoke copyright as a basis for refusing to provide a copy of those records and controlling use.

20 No reported California decision has ever concluded that a public agency may refuse to
21 release copies of public records to protect its own purported copyright. This is not surprising. By
22 enacting the PRA, the Legislature has made a policy decision that state and local agencies must not

23 ⁴ While the County did not originally assert § 6253.9 as a basis for refusing to disclose the Basemap Data, its
24 answer to CFAC’s writ petition indicates that the County is also relying on this section of the PRA as a basis
25 for its refusal to comply with CFAC’s PRA request.

26 ⁵ Although the 2005 Attorney General opinion discussed certain provisions of the Revenue and Taxation
27 Code as part of its § 6254(k) discussion -- ultimately concluding that they could not prevent disclosure of the
28 records at issue in that opinion -- the County has not cited any of them as a basis for withholding the records
requested by CFAC. Nor should it. Since the Basemap Data at issue in this action is maintained by the
County’s Information Services Department, *not* the Assessor, Matteo-Boehm Decl., Exh. D, the Revenue and
Taxation Code sections discussed in the 2005 opinion would not apply in this case.

1 only provide access to government records, but must provide copies of such records upon request,
2 and thus may not rely on copyright as a basis for denying such requests. In addition, allowing
3 agencies to rely on copyright as a basis for refusing to provide copies of public records under the
4 PRA, or limiting the use of such records through non-disclosure agreements or similar restrictions,
5 would lead to absurd results inconsistent with the legislative intent of the PRA and public policy.

6 While the Copyright Act does not permit the federal government to claim copyrights in its
7 works, “[w]orks of state governments are ... left available for copyright protection by the state or the
8 individual author, depending on state law and policy, and subject to exceptions dictated by public
9 policy.” *Building Officials & Code Adm'rs, Inc. v. Code Tech, Inc.*, 628 F.2d 730, 735-36 (1st Cir.
10 1980); *see also Microdecisions*, 889 So.2d at 875-76. Thus, California law determines whether the
11 County may claim a copyright in its Basemap Data. Under California law, the County cannot rely
12 on copyright to withhold public records because the PRA states that such records must be released.

13 Under the Copyright Act, protection subsists in any “original work” that is “fixed in any
14 tangible medium of expression.” 17 U.S.C. § 102. A copyright owner need not register his work,
15 nor is there any need to post any kind of notice to obtain copyright protection (labels such as “©
16 2006 Owner” are optional). And while copyright initially vests in the author of a work, 17 U.S.C. §
17 201(a), an employer is, in most cases, the copyright owner of works created by its employees. 17
18 U.S.C. § 201(b). In short, virtually any type of original work of authorship prepared by an employee
19 of a state or local agency, including letters, emails, memos, reports, charts, photographs, graphic
20 drawings, etc. -- could conceivably qualify for copyright protection.⁶

21 But as the Legislature has made clear, unless one of the PRA’s exemptions in §§ 6254 and
22 6255 applies, the very items that could qualify for copyright protection are also subject to mandatory
23 disclosure under the PRA, which applies to “any writing containing information relating to the
24 conduct of the public’s business prepared, owned, used, or retained by any state or local agency,
25 regardless of physical form or characteristics.” § 6252(e). While a copyright owner has the

27 ⁶ This said, CFAC does not concede that the GIS basemap data at issue here is capable of copyright protection
28 in the first instance. Among other things, there are significant questions as to whether the data at issue would
qualify as an “original work of authorship” pursuant to 17 U.S.C. § 102. However, resolution of this factual
issue is not necessary for a determination of the issues presented in CFAC’s writ petition.

1 exclusive right to reproduce and distribute a copyrighted work, and to authorize others to do so, 17
2 U.S.C. § 106, the PRA requires state and local agencies to make public records available for both
3 inspection and copying, for a fee that does not exceed the “direct costs of duplication, or a statutory
4 fee if applicable.” § 6253(b) (CFAC is not aware of any statutory fee that would apply in this case).
5 By making a policy decision that state and local agencies must not only provide access to
6 government records, but must provide *copies* upon request, the Legislature has eliminated the ability
7 of such agencies to rely on copyright as a basis for denying requests for copies of public records.

8 Similarly, while a copyright owner normally has the exclusive right to control the use of a
9 work and impose conditions on use through the use of non-disclosure or license agreements, as the
10 County has attempted to do here, 17 U.S.C. § 106, the PRA does not, in most cases, allow agencies
11 to exert control over the use of public records. There are only two categories of documents for
12 which the use of information is restricted by the PRA: the prohibition on the commercial use of
13 arrest records, and the prohibition against posting on the Internet certain address and telephone
14 numbers. §§ 6254(f)(3), 6254.21. In all other cases, the PRA “imposes no limits upon who may
15 seek information or what he may do with it. ... once information is held subject to disclosure under
16 the Act, the courts can exercise no restraint on the use to which it may be put.” *ACLU*, 32 Cal. 3d at
17 451; *accord, e.g., Orange County Employees Ass’n*, 120 Cal. App. 4th at 295 (quoting *ACLU*); *see*
18 *also* § 6257.5 (PRA prohibits “limitations on access to a public record based upon the purpose of
19 which the record is being requested, if the record is otherwise subject to public disclosure”). Under
20 the maxim of statutory construction, *expressio unius est exclusio alterius* (“the expression of some
21 things in a statute necessarily means the exclusion of other things not expressed”), where the
22 Legislature has affirmatively restricted the public’s use of one category of records while remaining
23 silent as to all other records subject to disclosure under the PRA, it must be concluded that the
24 Legislature did not intend to restrict the use of those records. *See, e.g., Rojas v. Superior Court*, 33
25 Cal. 4th 407, 424 (2004); *Dean v. Superior Court*, 62 Cal. App. 4th 638, 641-42 (1998).

26 As these authorities make clear, in enacting the PRA, the Legislature has waived the
27 exclusive rights granted to copyright holders under 17 U.S.C. § 106 with regard to those records
28 subject to the PRA. Indeed, if public officials were permitted to use copyright as a basis for denying

1 requests to access or copy public records, or to control the use of such records through non-
2 disclosure or licensing agreements, the PRA and its promise of greater openness in government
3 affairs would be virtually meaningless. It is therefore not surprising that although the PRA lists and
4 describes over 500 federal and state laws that provide disclosure exemptions under § 6254(k), there
5 is no mention of the United States Copyright Act. §§ 6275, 6276-6276.48.⁷

6 In addition, the County's refusal to provide copies of the Basemap Data under the PRA,
7 while at the same time making it available to those who are willing (and able) pay a hefty fee and
8 sign the non-disclosure agreement presented by the County (in other words, its attempt to exercise
9 the rights reserved for owners of copyrighted works) cannot be reconciled with the PRA's
10 prohibition against selective disclosure. The PRA provides that "whenever a state or local agency
11 discloses a public record which is otherwise exempt under this chapter, to any member of the public,
12 this disclosure shall constitute a waiver of the exemptions specified in 6254, 6254.7, or other similar
13 provisions of law." § 6254.7; *see also Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 656-57
14 (1974) ("public officials may not favor one citizen with disclosures denied to another.").

15 Given all of these considerations, it is clear that the Legislature did not intend public agencies
16 to be able to withhold copies of public records, or restrict their use, by invoking copyright. Because
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18

19 ⁷ Because the PRA is specific as to those circumstances in which the use of public records can be regulated,
20 the analysis in this case differs from that in *County of Suffolk v. First American Real Estate Solutions*, 261
21 F.3d 179 (2001), the only other reported case of which CFAC is aware to have considered the interaction
22 between copyright law and a state open records law. In that case, Suffolk County alleged that the defendants,
23 commercial entities, had infringed on the county's copyrights by distributing and marketing the county's tax
24 maps in both print and CD-ROM form without permission. In concluding that the New York Freedom of
25 Information Law ("FOIL") did not prevent the county from owning a copyright in the tax maps, the Second
26 Circuit observed that FOIL was "silent as to what may occur after a state agency discloses its records." 261
27 F.3d at 189; *see also id.* at 192 ("FOIL does not explicitly address what a recipient may or may not do once it
28 receives the agency records; it provides only that the state agency must make the records available for public
inspection and copying."). The Second Circuit thus concluded that while FOIL required a state agency to
make its records available for inspection and copying, and regulated the fee that could be charged for such
copies, the county could still attempt to restrict the subsequent redistribution of its copyrighted works --
subject to the limitations of copyright law, including fair use. *Id.* at 188-93. Even setting aside the
differences in California law discussed above, the County's non-disclosure agreement in this case is not
consistent with fair use. Among other things, since it does not allow the basemap data to be disclosed, it does
not allow for its use in news reporting, one of the uses the fair use doctrine is designed to protect.

1 the County may not rely on copyright as a basis for refusing CFAC’s PRA request, and its claim for
2 an exemption under § 6254(k) must also fail.

3 **B. The Basemap Data Requested By CFAC Is Not “Software,” And May Not Be Withheld**
4 **Under Government Code § 6253.9 Or § 6254.9**

5 The County also relies on the PRA’s exemption for computer software found at § 6254.9.
6 That section provides that “computer software developed by a state or local agency is not itself a
7 public record,” and that an agency may “sell, lease, or license the software for commercial or non-
8 commercial use.” § 6254.9(a). “Computer software” is defined to include “computer mapping
9 systems, computer programs, and computer graphics systems.” § 6254.9(b). However, the section
10 also provides that “[n]othing in this section is intended to affect the public record status of
11 *information* merely because it is stored in a computer. ***Public records stored in a computer shall be***
12 ***disclosed as required by this chapter.***” § 6254.9(d) (emph. added).

13 When § 6254.9 was enacted in 1988, the PRA allowed agencies to release information
14 maintained on a computer in a format chosen by the agency. *See* former § 6256 (repealed). Thus, an
15 agency could elect, if it wished, to release electronic records in paper form. That is no longer the
16 law. Section 6253.9 was added to the PRA in 2000 in recognition of the fact that information
17 maintained by governments is increasingly maintained in electronic form, and mandates that “any
18 agency that has information that constitutes an identifiable public record not exempt from disclosure
19 pursuant to this chapter that is in an electronic format shall make that information available in an
20 electronic format when requested by any person,” and “shall make the information available in any
21 electronic format in which it holds the information.” The ***only*** exception is where providing the
22 record in electronic form would “jeopardize or compromise the security or integrity” of either the
23 record or the ***software in which the record is maintained.***” § 6253.9(f) (emph added).

24 As both §§ 6253.9 and 6254.9 make clear, the PRA recognizes a distinction between
25 information maintained in electronic form, on the one hand, and the software that may be used to
26 view, process, manipulate, and/or store the information, on the other hand. Although a public
27 agency may deny a PRA request for software, it may not deny a request for information simply
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1 because that information may be maintained *in* a computer system that uses software, or because
2 software may be used to view or analyze that data.

3 Despite this clear legislative intent, the County appears to be taking the position that § 6254.9
4 does not mean what it says, and that the inclusion of the term “computer mapping system” within the
5 definition of “software” in § 6254.9(b) somehow allows it to withhold the data portions of its GIS.
6 Not only would this render the guarantee of access to information in § 6254.9 meaningless, but it has
7 been rejected by the Attorney General. As explained in the Attorney General’s 2005 opinion, the
8 term “computer mapping systems” in § 6254.9(b) refers to software used to *process* boundary and
9 similar information found in maps, not the information itself:

10 [T]he term “computer mapping systems” in section 6254.9 *does not refer to or*
11 *include basic maps and boundary information per se (i.e., the basic data compiled,*
12 *updated, and maintained by county assessors), but rather denotes unique computer*
13 *programs to process such data using mapping functions -- original programs that*
14 *have been designed and produced by a public agency. (See, e.g. ... Computer Dict.*
15 *(3d ed. 1997) p. 441 [defining “software” as “[c]omputer programs; instructions that*
16 *make hardware work”]; Freedman, the Computer Glossary: The Complete Illustrated*
17 *Dict. (8th ed. 1998) p. 388 [“A common misconception is that software is also data. It*
18 *is not. Software tells the hardware how to process the data. Software is ‘run.’ Data*
19 *is ‘processed’”]. Accordingly, parcel map data maintained in an electronic format by*
20 *a county assessor does not qualify as a “computer mapping system” under the*
21 *exemption provisions of section 6254.9.*

22 88 Op. Atty Gen. Cal. 153, 159 (2005) (emph. added).

23 In light of these authorities, the only remaining issue with respect to §§ 6253.9 and 6254.9 is
24 whether the particular records requested by CFAC consist of software or data. They are the latter.
25 CFAC has not demanded that the County provide it with GIS mapping software. CFAC has simply
26 requested that the county provide it with GIS *data*: information reflecting parcel boundary lines,
27 assessor parcel numbers, address of each parcel, and similar related information. Scheer Decl., ¶ 2
28 & Exh. A. Indeed, the County’s own GIS Strategic Plan recognizes a distinction between its
software and data elements. Matteo-Boehm Decl., Exh. A at *Id.* at 22-23. CFAC requested the
information in .shp (“shapefile”) format and the County’s geodatabase format, both of which are
formats designed to allow for the transfer of GIS data, Declaration of Clint Brown, at ¶¶ 6, 11; Joffe
Decl., ¶¶ 10,11, and are also formats in which the data is maintained by the County. Matteo-Boehm

1 Decl., Exh. D (Santa Clara County GIS Basemap Data Request). Although software is needed to
2 read and analyze the data in the formats requested by CFAC, that software is readily available from
3 parties such as ESRI. Brown Decl., ¶ 7; Joffe Decl., ¶ 10.

4 To eliminate any doubt as to this issue, CFAC requested and obtained through discovery in
5 this action a representative sample of the County’s GIS basemap that includes the data elements and
6 descriptive attribute data specified in CFAC’s June 12 PRA request. CFAC’s expert, Bruce Joffe,
7 has reviewed this sample, which was provided by the County in both .shp and geodatabase format,
8 and has confirmed that the sample consists of data, not software. Joffe Decl., ¶¶ 14, 15. Thus, the
9 Basemap Data must be released to CFAC in its entirety under the PRA.

10 **C. Section 6255 Does Not Justify The County’s Refusal To Release The Basemap Data**

11 The final PRA exemption on which the County relies is § 6255, which authorizes the
12 withholding of the requested public records if “on the facts of the particular case the public interest
13 served by not making the record public *clearly outweighs* the public interest served by disclosure of
14 the record.” § 6255. “The burden of proof is on the proponent of nondisclosure, who must
15 demonstrate a ‘clear overbalance’ on the side of confidentiality.” *City of San Jose v. Superior Court*,
16 74 Cal. App. 4th 1008, 1018 (1999); *accord* 68 Op. Atty Gen. Cal. 73, 77 (1985) (“A substantial
17 burden . . . is placed upon the public agency to demonstrate a need for nondisclosure”).

18 The County cannot assert any public interest significant enough to *clearly outweigh* the
19 benefits to the public of disclosure. The County is currently charging members of the public large
20 sums for *taxpayer* financed information that would put the public on a level playing field with the
21 County and its partners who have received the data, as well as the private entities who are able to
22 afford the County’s asking price. Allowing members of the public to access this data would allow
23 them to evaluate and monitor their local government officials on issues such as property tax
24 assessments, issuance of permits, treatment of tax delinquent properties, and issuance of zoning
25 variances. Such monitoring is possible with the data from the County’s GIS basemap, in
26 combination with other County government information, because members of the public can search
27 for information on parcels similar to their own and compare the tax assessments, issuance of permits,
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1 treatment of tax delinquent properties, and issuance of zoning variances. In this case, the benefit to
2 the public of releasing the data clearly outweighs any pretextual benefits the County may assert.

3 **CONCLUSION**

4 For the foregoing reasons, CFAC requests that this Court issue a writ of mandate compelling
5 respondents to (1) provide CFAC with a copy of its GIS basemap, including the data elements and
6 descriptive attribute data specified in CFAC's June 12, 2006 request, on a CD in both .shp format
7 and the County's geodatabase format, for a fee that does not exceed the direct cost of duplication and
8 without requiring CFAC to sign the County's non-disclosure agreement; and (2) awarding CFAC its
9 attorneys' fees and costs incurred in prosecuting this action in accordance with Government Code §
10 6259(d), in an amount to be determined upon CFAC's filing of a motion for attorneys' fees and
11 memorandum of costs.⁸

12 Dated: January 19, 2007

HOLME ROBERTS & OWEN LLP
ROGER R. MYERS
RACHEL E. MATTEO-BOEHM
KYLE L. SCHRINER

15 By: 
16 Rachel E. Matteo-Boehm
17 Attorneys for Petitioner
California First Amendment Coalition

26 _____
27 ⁸ The PRA provides that "the Court *shall* award court costs and reasonable attorney fees to the plaintiff
28 should the plaintiff prevail in litigation filed pursuant to" the PRA. Cal Gov't Code § 6259(d) (emphasis
added), and the Court of Appeal has further noted, "[i]t is abundantly clear that...section 6259, subdivision
(d), is *mandatory*." *Belth v. Garamendi*, 232 Cal. App. 3d 896, 900 (1991) (emphasis added).

PROOF OF SERVICE
CCP § 1010.6, CCP § 1013, CCP § 1013A

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 25th Floor, San Francisco, California 94105.

On January 19, 2007, I served the foregoing document(s) described as

1. **NOTICE OF MOTION AND MOTION BY CALIFORNIA FIRST AMENDMENT COALITION FOR JUDGMENT ON THE PEREMPTORY WRIT OF MANDATE;**
2. **MEMORANDUM OF POINTS AND AUTHORITIES OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION IN SUPPORT OF MOTION FOR JUDGMENT ON PETITION FOR WRIT OF MANDATE;**
3. **DECLARATION OF RACHEL MATTEO-BOEHM IN SUPPORT OF MOTION OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION FOR JUDGMENT ON PETITION FOR WRIT OF MANDATE;**
4. **DECLARATION OF CLINT BROWN IN SUPPORT OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION'S MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE;**
5. **DECLARATION OF PETER SCHEER IN SUPPORT OF MOTION OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION FOR JUDGMENT ON PETITION FOR WRIT OF MANDATE;**
6. **DECLARATION OF BRUCE A. JOFFE IN SUPPORT OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION'S VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND MOTION FOR JUDGMENT; and**
7. **APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND MOTION FOR JUDGMENT OF PETITIONER CALIFORNIA FIRST AMENDMENT COALITION**

on the interested party/parties in this action as follows:

1 Robert A. Nakamae, Esq.
2 Deputy County Counsel
3 Office of the Santa Clara County Counsel
4 70 West Hedding Street
5 9th Floor, East Wing
6 San Jose, CA 95110-1770
7 Tel: (408) 299-5900
8 Fax: (408) 292-7240
9 Email: robert.nakamae@cco.sccgov.org

*Attorneys for County of Santa Clara and Peter
Kutras, Jr.*

7 BY PERSONAL SERVICE: I caused the above-mentioned document(s) to be
8 personally served to the offices of the addressee as indicated above.

9 BY FACSIMILE: I communicated the above-mentioned document(s) via
10 facsimile transmittal to the addressee as indicated above. The transmission was reported complete
11 and without error by a transmission report issued by the facsimile transmission machine as defined
12 in California Rule of Court 2003 upon which the said transmission was made immediately following
13 the transmission. A true and correct copy of the transmittal report bearing the date, time and sending
14 facsimile machine telephone number shall be attached to the original proof of service.

15 BY ELECTRONIC MAIL (E-MAIL): I caused the above-mentioned
16 document(s) to be served via electronic mail from my electronic notification address to the electronic
17 notification address of the addressee as indicated above. The document was served electronically
18 and the transmission was reported complete without error.

19 BY FEDERAL EXPRESS: I caused the above-mentioned document(s) to be
20 sent via Federal Express overnight delivery. By placing a true and correct copy of such document(s)
21 enclosed in a sealed envelope or package designated by the express service carrier and deposited in a
22 facility regularly maintained by the express service carrier or delivered to a courier or driver
23 authorized to receive documents on its behalf, with delivery fees paid or provided for, addressed to
24 the address last shown by that person on any document filed in the action as indicated above.

25 BY MAIL: By placing a true and correct copy of such document(s) enclosed
26 in a sealed envelope addressed to the offices indicated above. I am "readily familiar" with the firm's
27 practice of collection and processing correspondence for mailing. Under that practice it would be
28 deposited with U.S. postal service on that same day with postage thereon fully prepaid at San

1 Francisco, California in the ordinary course of business. I am aware that on motion of the party
2 served, service is presumed invalid if postal cancellation date or postage meter date is more than one
3 day after date of deposit for mailing in affidavit.

4 Executed on January 19, 2007, at San Francisco, California.

5 I declare under penalty of perjury under the laws of the State of California that the
6 above is true and correct.

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Della Grant