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January 29, 2021

Michael Nearman
Deputy Executive Director
California Building Standards Commission
2525 Natomas Park Drive, Suite 130
West Sacramento, CA 95833
michael.Nearman@dgs.ca.gov

Re: California Public Records Act Request

Dear Mr. Nearman:

I write in response to your [January 7, 2021](#) letter in response to my California Public Records Act (“PRA”) request for electronic copies of Title 24 of the California Code of Regulations.

We understand from your response that you possess the documents and information that we’ve requested, but that you are refusing to produce them. In so doing, the PRA places the burden on you to prove that disclosure is not warranted – either through a statutory exemption, or based on the public interest. *Becerra v. Superior Court*, 44 Cal. App. 5th 897, 914 (2020), review denied (May 13, 2020); *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal.4th 59, 70 (2014); *County of Los Angeles v. Superior Court*, 211 Cal.App.4th 57, 63 (2012); § 6255. Your letter did neither. Nowhere in the PRA – or any other California law, for that matter – are private interests, such as those of publishers, favored over California’s constitutional right to publicly access the law of the land. Here, Title 24 of the California Code of Regulations is unambiguously a public record subject to disclosure, and no exemption or public interest applies. The justifications for withholding listed in your letter are insufficient, and inconsistent with both the text and spirit of the PRA and applicable law.

First, you state that print editions of Title 24 are available for inspection at certain locations, and can be purchased (in whole or part) from private organizations. This does not satisfy your duty to provide electronic copies upon request under the PRA. See Cal. Gov. Code § 6253.9(a) (“any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person”). Nowhere does the PRA say that making rival versions of the records available at select libraries and state buildings exempts the agency from complying with PRA requests. When a request is made, “the agency may charge the cost to construct a record,” but it must produce a compliant electronic copy to the requestor. *Cty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1336 (2009). Your letter identifies no authority to the contrary. And indeed, none exists.

Second, you state that Title 24 can be viewed on the Building Standards Commission (“BSC”) website. This does not satisfy your duty to provide electronic copies in every electronic format (1) in which you hold the information or (2) that you use to create copies for your own use or to provide to other agencies. *Id.* [§§ 6253.9\(a\)\(1\)](#) (“The agency shall make the information available in any electronic format in which it holds the information.”), (a)(2) (“Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies.”).

Moreover, the version of Title 24 on the BSC website is not “publicly available” within the meaning of the PRA. You provided a link to <https://www.dgs.ca.gov/BSC/Codes>, which directs visitors to view Title 24 on the proprietary website of International Code Council, Inc. at <https://codes.iccsafe.org/>. This version is not “publicly available” because it imposes severe “end user restrictions” that “are incompatible with the purposes and operation of the CPRA.” *Cty. of Santa Clara*, 170 Cal. App. 4th at 1334. For instance, the “Basic” access level only provides read-only

access in a proprietary format. For further access and functionality—such as the ability to copy, paste, print, and search—a reader must buy a subscription, priced between \$216 and \$865 per year. Such licensing schemes and end user agreements have been squarely rejected by the California Court of Appeal. *Id.* at 1334.


Third, you state that “CBSC does not have the publishing rights to Title 24 and therefore cannot provide free copies to the public” because “Title 24 is based on and includes model codes produced by the publishing entities, and they then publish California’s codes, retaining copyright protections.” This is not a valid basis to withhold materials in response to a PRA request. As noted above, an agency “shall make the information available in any electronic format in which it holds the information.” [Cal. Gov. Code § 6253.9\(a\)\(1\)](#). Any refusal to provide public records on the basis of copyright protection must be supported by express statutory authority. *Cty. of Santa Clara*, 170 Cal. App. 4th at 1333 (because no “express authorization to secure copyrights” existed for GIS data, the county could not assert copyright protection as a basis for nondisclosure); *City of Inglewood v. Teixeira*, No. CV-15-01815-MWF (MRWx), 2015 U.S. Dist. LEXIS 114539, at *8-9 (C.D. Cal. Aug. 20, 2015) (because the city could identify “no affirmative grant of authority that permits it to obtain and assert a copyright for the City Council Videos,” the court held that the city could not withhold the videos on copyright grounds).

Your letter points to no authority to support the notion that any alleged copyright interest in Title 24, even if valid, would prevent BSC from producing such records in response to the PRA request. This is because none exists. In fact, the California Court of Appeal has held that assertions of copyright protections over public records were inconsistent with the PRA: “The same persuasive reasoning applies to the interplay between copyright law and California’s public records law, with the result that unrestricted disclosure is required. Doing so effectuates the purpose of the statute, which is ‘increasing freedom of information by giving members of the public access to information in the possession of public agencies.’” *Cty. of Santa Clara*, 170 Cal. App. 4th at 1335 (citing *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 876 (Fla. Dist. Ct. App. 2004)).

Please provide copies of Title 24 in every electronic format in your possession—including (without limitation) structured, machine-readable formats, such as XML files—by February 12. If you withhold any materials, please identify them and state the basis for your decision to withhold them, as required by Government Code § 6253(c).

In the event we do not satisfactorily resolve this issue by February 26, I will authorize my attorneys to initiate writ proceedings to challenge the BSC’s refusal to provide me with these public records.

With best regards,

DocuSigned by:

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 Carl Malamud, President
 Public Resource



cc: Matthew Caplan, Cooley LLP
 Joseph D. Mornin, Cooley LLP
 Ryan T. O’Hollaren, Cooley LLP
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