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10 *Building Standards Commission*

FILED / ENDORSED

APR 11 2022

By N. Smith, Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SACRAMENTO
13 CIVIL DIVISION

14
15 PUBLIC.RESOURCE.ORG, INC.,

34-2021-80003612

Petitioner,

~~PROPOSED~~ JUDGMENT

16
17 v.

18
19 CALIFORNIA OFFICE OF
ADMINISTRATIVE LAW, and the
20 CALIFORNIA BUILDING STANDARDS
COMMISSION,

21 Respondents.
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23 Having reviewed the papers submitted by the parties, IT IS ORDERED, ADJUGED AND
24 DECREED that Petitioner Public.Resrouce.Org, Inc.'s Verified Petition for Writ of Mandate
25 regarding Respondent California Office of Administrative Law is denied and judgment is entered
26 in favor of Respondent California Office of Adminisitrative Law for the reasons set forth in the
27
28

1 the Court's Tentative Ruling attached and incorporated for reference hereto as Exhibit A.

2 Dated April 11, 2022



A handwritten signature in black ink, appearing to read "S. Gevercer".

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4 THE HONORABLE STEVEN M. GEVERCER
5 JUDGE OF THE SUPERIOR COURT
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EXHIBIT A

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME:	March 25, 2022 2:00 p.m.	DEP. NO.:	27
JUDGE:	HON. STEVEN M. GEVERCER	CLERK:	N. SMITH
Public.Resource.Org., Inc., Petitioner, v. California Office of Administrative Law, and the California Building Standards Commission, Respondents.		Case No. 34-2021-80003612	
Nature of Proceedings:		Petition for Writ of Mandate	

I. TENTATIVE RULING.

The following shall constitute the Court's tentative ruling on the above matter, set for hearing in Department 27, on Friday, March 25, 2022, at 2:00 p.m. The tentative ruling shall become the ruling of the Court, unless a party desiring to be heard so advises the Clerk of Department 27 no later than 4:00 p.m. on the Court day preceding the hearing, and further advises the Clerk that such party has notified the other side of its intention to appear.

The Court strongly encourages parties to appear remotely for the hearing on the tentative ruling through the Court's Zoom Application. But any party wishing to appear in person may do so, provided that party notifies the Court by 4:00 the Court day before the hearing.

The parties may join the Zoom session for hearing on the tentative ruling by audio and/or video through the following link/telephone number:

https://saccourt.zoom.us/my/dept27a	(888) 475-4499 ID: 553-829-7195
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Petitioner, Public.Resource.Org, Inc. has filed a petition for writ of mandate (Petition) against Respondents Office of Administrative Law (OAL) and the California Building Standards Commission (BSC), directing Respondents to comply with the Public Records Act (Gov. Code, §§ 6250 *et seq.*) (PRA). As to Respondent OAL, the Petition is denied. As to Respondent BSC, the Petition is stayed pending resolution of a final judgment from the District of Columbia District Court in *American Society for Testing and Materials, et al v. Public.Resource.Org* (D.C. Cir. 2018) 896 F.3d 437, 441.

1. Background.

On December 29, 2020, Petitioner¹ sent a PRA request to OAL for Titles 1-5, 7-23, and 25-28 of the California Code of Regulations (collectively, CCR).² (Petition, ¶13, Exh. C.) Petitioner requested that OAL provide the information "in all formats, in your possession, including (but not limited to) structured, machine-readable digital formats, such as XMF or PDF files," pursuant to Government Code section³ 6250, subdivision (a)(1). (Petition, Exh. C.) Petitioner also informed OAL that it must produce a copy of an electronic record in any format that has been used by it to create copies for its own use or for provision to other agencies, pursuant to Section 6250, subdivision (a)(2). (*Ibid.*)

OAL responded, stating that it could provide a paper copy of the CCR to Petitioner, and offered to scan each page of the print version, to serve as an "electronic" copy. (Petition, Exh. D.) OAL also directed Petitioner to a website that contained the most "up to date" version of the CCR. (*Ibid.*) OAL also offered to provide a CD-ROM with past versions of the CCR, but noted that the contents of the CD-ROM cannot be copied in whole or transferred to another storage device. (*Ibid.*) Petitioner and OAL corresponded further, and Petitioner contended that OAL's response was insufficient, and that the website to which it directed Petitioner was not "publicly available." (Petition, ¶¶14-19.)

Also on December 29, 2020, Petitioner also made a nearly identical, separate PRA request for Title 24 of the CCR (Title 24) to the Office of Public Affairs, which contains the Department of General Services, and BSC. (Petition, Exh. F.) Again, Petitioner requested an electronic copy of Title 24, and sought Title 24 in all formats in BSC's possession, including "structured, machine-readable formats." (*Ibid.*)

BSC also responded that it could not produce the records. BSC stated that a hard copy of Title 24 was available for inspection at BSC's office, and noted that hard copies of Title 24 were available for public viewing and copying at state document depository libraries or at city of county building or planning departments. (Petition, Exh. G.) BSC stated that Title 24 may be viewed online on the BSC's website, but because BSC did not have publishing rights, it could not provide copies to the public. (*Ibid.*) BSC explained that this is because Title 24 is based on and includes model codes produced by standards developing organizations (SDOs), Intervenor National Fire Protection Association (NFPA), International Codes Council (ICC), and the International Association of Plumbing and Mechanical Officials. (*Ibid.*) BSC also responded that

¹ Petitioner is a non-profit organization with the mission of providing public access to government records and legal materials. (Petition, ¶5.)

² Respondent OAL oversees the publication and distribution of Titles 1-5, 7-23, and 25-28 of the CCR. (Petition, ¶6.) Respondent BSC administers the adoption of, and codifies and publishes the California Building Standards Code as Title 24 of the CCR. (Petition, ¶7.)

³ Unless otherwise specified, all statutory references shall be to the Government Code.

individual parts or a full set of Title 24 may be purchased from these three publishing entities. (*ibid.*)

Petitioner then filed a petition for writ of mandate, alleging that OAL and BSC violated the PRA. On August, 27, 2021, the Court granted NFPA's and ICC's motion for leave to intervene in this proceeding.

2. Discussion.

a. Claims Against OAL.

Petitioner argues that OAL has violated the PRA by refusing to produce the records and insufficiently responding to its request, namely by failing to provide an "electronic" copy of the CCR in a "structured, machine-readable" format. (Opening Brief, 9:4.) Respondent OAL responds that the Legislature, in enacting the pertinent provisions of the Administrative Procedure Act (APA), dictated how the CCR should be made publicly available, and that in any event it, has complied with the PRA in responding to Petitioner.

i. PRA Statutes.

Under the PRA, a public agency must make public records promptly available to any person who submits a PRA request that "reasonably describes an identifiable record or records." (Gov. Code, § 6253, subd. (b).) The PRA enables persons to seek "injunctive or declarative relief or writ of mandate" to enforce that person's right to inspect or receive copies of public records. (Gov. Code, §§ 6258, 6259.)

The PRA is construed broadly in favor of access. (*Am. Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1040.) Exemptions from disclosure must be narrowly construed. (*Id.*) The agency withholding the records bears the burden of proving that an exception from disclosure applies. (*California First. Amend. Coal. v. Superior Court (California First)* (1998) 67 Cal.App.4th 159, 167.)

The PRA imposes on agencies an affirmative obligation to make available to the public any public records in their possession, unless the agency can demonstrate that a responsive record is otherwise exempt from disclosure. (Gov. Code, §§ 6253, 6254, 6255.) Public records may be exempted from disclosure if they fall within a particular specific statutory basis for exempting the records. (Gov. Code, § 6254.) Additionally, public records may also be exempt from disclosure if the agency can show that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Gov. Code, § 6255, subd. (a).) If "the requester has alternative, less intrusive means of obtaining the information sought" the public interest in disclosure is minimal, although the "existence of an alternative means does not wholly undermine the public interest in disclosure." (*County of Santa Clara v. Superior Court (Santa Clara)* (2009) 170 Cal.App.4th 1301,

1325 [citing *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1020, 1025].)

Section 6253.9 governs an agency's duty to produce electronic copies of records under the PRA. It provides:

- a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure...that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
 - (1) The agency shall make the information available in any electronic format in which it holds the information.
 - (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

- (b) ...the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:
 - (1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.
 - (2) The request would require data compilation, extraction, or programming to produce the record.

- (c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.

- (d) If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format.

- (e) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.

(f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

(g) Nothing in this section shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute.

(Gov. Code, § 6253.9.) Thus, a government agency is required by the PRA to produce non-exempt responsive computer records in the same manner as paper records, and can be required to compile, redact or omit information from an electronic record. (See *Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 669.) Section 6253.9 contemplates that public agencies can be required to gather and segregate disclosable electronic data from nondisclosable exempt information and perform data compilation, extraction or computer programming if "necessary to produce a copy of the record." (*Ibid.* [citing Gov. Code, § 6253.9, subdivision (b)].) However, the PRA does not require an agency to create a *new* record: an agency "cannot be required to create a new record by changing the substantive content of an existing record or replacing existing data with new data." (*Ibid.* [citing *Yeager v. Drug Enforcement Admin.* (D.C. Cir. 1982) 678 F.2d 315, 323 and noting that "Segregating and extracting data is a far cry from requiring public agencies to undertake the extensive 'manipulation or restructuring of the substantive content of a record.'"]) Additionally, agencies need not draft summary or explanatory material, perform calculations on data, or create inventories of data in response to a records request. (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 502; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075; see also *Sander v. Superior Court, supra*, 26 Cal.App.5th, at p. 669.)

ii. Pertinent Law Governing the Public Availability of CCR.

The Administrative Procedure Act (APA) (see Gov. Code §§ 11340, et. seq.) among other things, establishes the OAL and sets forth specific statutes governing rulemaking, or an agency's promulgation of regulations, which comprise the CCR. Section 11344, requires OAL to make the CCR available online. Section 11344 provides:

(OAL) shall do all of the following:

- (a) Provide for the official compilation, printing, and publication of adoption, amendment, or repeal of regulations, which shall be known as the [CCR]. On and after July 1, 1998, [OAL] shall make available on the Internet, free of charge, the full text of the [CCR], and may contract with another state agency or a private entity in order to provide this service.
- (b) Make available on its Internet Web site a list of, and a link to the full text of, each regulation filed with the Secretary of State that is pending effectiveness pursuant to Section 11343.4.

- (c) Provide for the compilation, printing, and publication of weekly updates of the California Code of Regulations....

....

(Gov. Code, § 11344.) OAL is also required to supply a complete set of the CCR and its Supplement to any county clerk. (*Id.*, at § 11344.2.) Additionally, the CCR "shall be sold at prices which will reimburse the state for all costs incurred for printing, publication, and distribution." (*Id.*, at § 11344.4.)

iii. The Petition is Denied as to OAL.

Petitioner argues that OAL violated the PRA by not providing the CCR to Petitioner in a "structured, machine-readable" format. Underpinning Petitioner's argument is its belief that OAL possesses a "Master Database" through its contract with Thomson Reuters/West Publishing, and has the ability to access the Master Database and provide Petitioner the CCR to Petitioner in a "structured, machine-readable" format.

OAL contends that Petitioner is demanding OAL provide the CCR in a format that it does not possess, and that it is really trying to compel OAL to create an entirely *new* record, which the PRA does not require.

Petitioner has not shown that OAL violated the PRA. OAL neither possesses the Master Database, nor do the PRA or pertinent statutes impose any duty upon OAL to provide the CCR in the "structured, machine-readable" format sought by Petitioner.

- **OAL Does Not Possess the Master Database.**

Petitioner argues that OAL constructively possesses the Master Database. OAL disagrees and claims that it does not possess the Master Database, or the data (the updated versions of regulations comprising the CCR) in it.

OAL has the better argument.

OAL declares that the Master Database exists in proprietary software of Thomson Reuters/West Publishing. (Declaration of Kevin Hull (Hull Decl.), ¶5; Declaration of Andrew Martens (Martens Decl.), ¶6.) The language of the contract with Thomson Reuters/West Publishing provides for a "useable electronic data base" in a "portable and easily processed or converted format" upon completion or termination of the contract. (Administrative Record⁴, Exh. B [000009] and Exh. J [000052-53].) The above contractual term ensures that OAL can obtain all the data (the regulations comprising the CCR) if needed to provide it to a new contractor. As the contract is not completed or terminated, OAL has not invoked this contractual term. Thus, Thomson Reuters/West Publishing has never given OAL the Master Database or the data in it.

⁴ Petitioner has furnished a collection of exhibits that it denotes as an "administrative record."

(Hull Decl., ¶13; Martens Decl., ¶15.) The data has never been extracted and formatted in the manner requested by Petitioner.

Petitioner argues that OAL, in fact, constructively possesses the Master Database because it has the right to control it. First, this is belied by the OAL's agreement with Thomson Reuters/West Publishing. Second, Petitioner's argument that it is entitled to data from this Master Database (the CCR) in a particular format conflates OAL's right to the data *within* the Master Database with the Master Database itself, which is not a "record," and which OAL does not possess.

Thus, OAL does not possess the data in a structured-machine readable format requested by Petitioner. OAL has not violated the PRA for this reason.

- **The PRA Imposes No Duty Upon OAL To Produce the CCR in the Format Requested by Petitioner.**

Additionally, the PRA itself imposes no duty upon OAL to produce "electronic" records in the "structured, machine-readable format" requested by Petitioner.

In determining whether OAL violated the PRA, the Court must harmonize two sets of pertinent statutes: the PRA, and the APA. (*City of Chula Vista v. Drager* (2020) 49 Cal.App.5th 539, 560 ["If, after an examination of the statutes in context, they 'conflict on a central element, we strive to harmonize them so as to give effect to each. The Court is guided by the following principles of statutory construction.'"].)

"A court's overriding purpose in construing a statute is to ascertain legislative intent. ... [Citation.] In interpreting a statute to determine legislative intent, a court looks first to the words of the statute and gives them their usual and ordinary meaning. [Citation.] Statutes must be given a fair and reasonable interpretation, with due regard to the language used and the purpose sought to be accomplished.' (*Sander v. Superior Court*, *supra*, 26 Cal.App.5th, at 653-654 [internal quotations and citations omitted].)

In PRA cases, the California Constitution requires that '[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.' (*Sander v. Superior Court*, *supra*, 26 Cal.App.5th, at 653-654. [citing Cal. Const., art I, § 3, subd. (b); *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617].)

Additionally, a specific statutory provision prevails over a general statute. (See *Rose v. State* (1942) 19 Cal.2d 713, 723-724.) If statutory provisions conflict, statutes that are passed later in time control. (*City of Chula Vista v. Drager*, *supra*, 49 Cal.App.5th, at p. 560 [citing *Collection Bureau of San Jose v. Rumsey* (200) 24 Cal.4th 301].)

The text of Section 6253.9 imposes no duty upon OAL to make records available in a particular format. It requires an agency to produce an "electronic" copy of records, and

contemplates that an agency may need to engage in "data compilation, extraction, or programming" to produce a record. Thus, the Court cannot find that OAL violated Section 6253.9 by failing to produce records in a "structured, machine-readable format."

The Court is mindful that the California Constitution requires that statutes, such as Section 6253.9 be "broadly construed" if it furthers the people's right of access. But the Court's inquiry does not stop here. It must also consider more specific, later-enacted statutes in the APA, and give those statutes a "fair and reasonable" interpretation.

As noted above, the Legislature has enacted more specific statutes, governing OAL's duty to make the CCR available. Pertinent here, Section 11344, provides that OAL must make the CCR publicly available on its website by posting a link to the full text of, each regulation. (Gov. Code, § 11344.) Notably, it imposes no duty upon OAL to make the CCR available in any electronic format requested by a member of the public. Thus, the Court finds that this specific statute directed only to OAL prevails over the more general PRA provisions governing all agencies.

Moreover, Section 11344, which was added in 1983, has been amended many times, most recently in 2012. (Stats. 2012, c. 295 (S.B. 1099), §3.) In contrast, Section 6253.9 was added in 2000, and has not been updated. (Gov. Code, § 6253.9 [Added by Stats. 2000, c. 982, (A.B. 2799) § 2.]) Thus, because Section 11344 is a later-amended statute, the Court presumes that the Legislature was aware of the PRA and Section 6253.9, when amending it.

Accordingly, the OAL has complied with Section 11344 and has not violated the PRA by failing to produce records in a "structured, machine-readable" format.

- **Petitioner's Other Arguments Show no Violation of the PRA.**

Petitioner claims that the website that OAL directed it to is not "publicly available" because it is subject to technological and legal restrictions to prevent users from text-searching, copying and pasting, or distributing portions of the CCR. (Opening Brief, p. 6.) Nothing in the PRA requires that discloseable records be searchable or adaptable for copying and pasting. Additionally, for the same reasons articulated above, OAL has not violated the PRA in this regard.

Petitioner also argues that OAL is trying to circumvent its duties to disclose records by outsourcing the publication of to a third party in violation of Section 6720. This statute, enacted in 1995, provides in pertinent part that "no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter." (Gov. Code, § 6270 [Added by Stats. 1995, c. 108 (A.B. 141), § 1.]

However, the Court must presume that the Legislature, in enacting and amending statutes regarding OAL's duty to publish the CCR, is aware of OAL's arrangement with

Thomson Reuters/West. Again, the Court notes that Section 11344, was amended several times after the enactment of Section 6270, and was most recently amended in 2012. Thus, OAL has not violated the PRA on this ground.

b. Claims Against Respondent BSC.

Petitioner argues that BSC has violated the PRA by not disclosing an electronic copy of Title 24. BSC responds that Section 6254, subdivision (k), exempts Title 24 from disclosure, as it contains model codes drafted by Intervenor NPFA and ICC, which are protected by federal copyright law. BSC alternatively argues that Section 6255, the "catch-all" exemption, exempts Title 24 from disclosure, as the public interest in nondisclosure clearly outweighs the public interest in disclosure. Intervenor NPFA and ICC, which are aligned with BSC, note the pendency of two federal actions in which the similar copyright issues are addressed. Intervenor argue that the records are exempt from disclosure, but also argue that this proceeding should be stayed, pending resolution of the federal cases.

i. Legal Standard.

The PRA contains a lengthy list of statutory exemptions from disclosure. (Gov. Code, § 6254.) Pertinent here, an item is statutorily exempt from disclosure if they are "exempted or prohibited pursuant to federal or state law." (*Id.*, § 6254, subd. (k).) BSC and Intervenor claim that Title 24 is protected by federal copyright law, as it incorporates by reference model codes drafted by Intervenor and other SDOs, and thus, Title 24 is statutorily exempt from disclosure.

"When an action is brought in a court of this state involving the same parties and the same subject matter as an action already pending in a court of another jurisdiction, a stay of the California proceedings is not a matter of right, but within the sound discretion of the trial court." (*Farmland Irrigation Co. v. Dopplmaier* (1957) 48 Cal. 2d 208, 215.)

"It is black letter law that, when a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action." (*Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co. (Caiafa)* (1993) 15 Cal.App.4th 800, 804.) *Caiafa* enumerated various factors that courts should apply when deciding whether to stay a matter pending in a California court because of pending federal litigation. It provided that courts "should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced." (*Id.*) Courts should also consider whether the federal action is pending in California. (*Id.*)

Of additional importance is the Court's inherent authority to control its docket. Courts routinely stay matters where circumstances warrant. (*Frieberg v City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489 ["Trial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency."].)

ii. The Petition is Stayed as to Claims against Respondent BSC.

Petitioner argues that BSC violated the PRA by not disclosing Title 24, because it actually possesses it; the online version cited by OAL and BSC is not "publicly available," as the user is subject to end-user restrictions; and no exemption from disclosure applies, particularly Section 6254, subdivision (k).

Petitioner contends that although Title 24 contains model codes drafted by Intervenor that are incorporated by reference, the model codes in Title 24 have now become "the law," and lost their copyright protection. Thus, Petitioner argues, Section 6254, subdivision (k), does not apply.

BSC responds that Title 24 is exempt under section 6254, subdivision (k), or alternatively, Section 6255, and that it complied with the PRA by making records available electronically.

Intervenor argues that a stay is appropriate in light of pending federal litigation.⁵ The Court agrees.

The issue of whether model codes that have been incorporated by reference into law is currently being litigated in federal court. In *American Society for Testing and Materials, et al v. Public.Resource.Org (ASTM)* (D.C. Cir. 2018) 896 F.3d 437, 441. Intervenor NFPA and two other SDOs sued Petitioner for copyright and trademark infringement, after Petitioner purchased copies of incorporated standards, scanned them into digital files, appended coversheets explaining Petitioner's mission and the source of the standards, and posted the documents to a public website. (*Id.*, at p. p. 444.) In some cases, Petitioner modified files so that the text of the standard could be more easily enlarged, searched, and read with text-to-speech software. (*Ibid.*)

In that case, Petitioner made, and is making, the same arguments raised here: that NFPA and the other SDOs lose the benefit of copyright protection for model standards they authored once those model standards are incorporated by reference. In *ASTME*, Petitioner and NFPA and the other plaintiffs filed competing motions for summary judgment. (*Ibid.*) The district court granted NFPA and the SDOs' motion, rejecting Petitioner's arguments. The district court found that NFPA and the SDOs held copyrights in the model standards incorporated by reference, and that Petitioner

⁵ Petitioner faults Intervenor for raising this issue in the briefs, rather than bringing a separate motion for a stay under Code of Civil Procedure, section 1005. This point is well-taken. However, because Petitioner has been afforded the opportunity to respond to Intervenor's request for a stay, the Court will consider it.

improperly reproduced them, and that Petitioner failed to create a triable issue of fact that its reproduction qualified as "fair use"---a defense to copyright infringement. (*Ibid.*)

PRO appealed that decision to the D.C. Circuit. The D.C. Circuit vacated the district court's decision. In doing so, it found that the district court should have considered Petitioner's affirmative defense of fair use. (*ASTM*, *supra*, 896 F.3d 437, 440-441.) Accordingly, the D.C. Circuit has remanded the matter to the district court to consider Petitioner's affirmative defense to the motion for summary judgment brought by NFPA and the other SDOs. (*Id.*, at p. 458.) In briefing related to that motion, Petitioner does not dispute that it advances the same argument that it advances here: that codes that governments have expressly incorporated into law, lose copyright protection and that standards incorporated by reference are "government edicts" under *Georgia v. Public Resource.Org, Inc.* (*Georgia*) (2020) 140 S. Ct 1498.

Additionally, Intervenor ICC is involved in pending litigation in the Southern District of New York, where the accused infringer (a company named UpCodes) has raised similar defenses based on incorporation by reference, that Petitioner raises in *ASTM* and this case. (*International Code Council, Inc. v. UpCodes, Inc.* (S.D.N.Y. May 27, 2020, No. 17-cv-6261.)

The Court exercises its discretion to stay the proceedings against BSC. At issue is whether the model codes drafted by intervenors and incorporated into Title 24 are protected by federal copyright law. The federal proceedings in *ASTM* are addressing this very issue, and as to the same parties: Intervenor NFPA and Petitioner. Additionally, another federal court is addressing these similar issues as to another organization and Intervenor ICC.

First, the nature of the subject matter—federal copyright law—is the exclusive province of federal court. (*Sears Roebuck & Co. v. Stieffel Co.* (1964) 376 U.S. 255, 231, fn.7; *Topolos v. Caldewey* (9th Cir. 1983) 698 F.2d 991, 993-994.) Petitioner cites to *Santa Clara*, *supra*, 170 Cal.App.4th 1301, for the proposition that "California law" addresses when the work of California agencies may be subject to copyright protection. This argument is unavailing. *Santa Clara* addressed copyright issues that arose after an agency claimed copyright protection in a work it authored. That is not the case here. The issue is whether copyright law protects *Intervenors'* works, which is currently under consideration in federal courts. The Court also rejects Petitioner's argument that the nature of the subject matter in this case differs, because the Court is concerned with the applicability of the PRA. This is true, but, if federal copyright law applies and protects model codes incorporated by reference into regulations, then this necessarily resolves whether BSC has violated the PRA. Thus, staying the proceedings also promotes judicial efficiency.

Second, a stay avoids the potential for "unseemly" conflicts with federal copyright issues raised by Petitioner, such as whether the "government edicts" doctrine, as articulated by the Supreme Court in *Georgia*, prevents Intervenor from asserting a copyright interest in the portions of Title 24 that incorporates their model codes by reference.

Third, the *ASTM* case is significantly advanced in the proceedings, weighing in favor of a stay. As noted above, the *ASTM* is on remand from the Court of Appeal where the district court will again consider the motions for summary judgment, including application of the government edicts' doctrine.

These factors all support the Court's decision to stay the proceedings as to BSC.

Petitioner argues upon reply, that BSC may not rely on *any* statutory exemption in Section 6254, because BSC has disclosed some copies of Title 24, and thus, waived its right to assert this exemption under Section 6254.5. Petitioner opposed BSC's nondisclosure based on Section 6254 on the merits, and did not at all raise this "waiver" argument in its Opening Brief. Thus, Intervenor and BSC had no opportunity to respond to it. Accordingly, the Court does not consider it.

3. Disposition.

The Petition is denied as to Respondent OAL. The Petition is stayed as to Respondent BSC in light of the *ASTM* matter.

Counsel for Respondent OAL shall prepare a formal order and a separate judgment, incorporating this ruling as an exhibit to each, submit them to opposing counsel for approval as to form, and thereafter submit them to the Court for signature and entry of judgment in accordance with California Rules of Court, rule 3.1312.

From: O'Hollaren, Ryan T.
To: Laura RandlesLittle; Caplan, Matt; Mornin, Joe
Cc: Keith Wurster
Subject: RE: Case No. 34-2021-80003612-CU-WM-GDS (Public.Resource.Org, Inc. v. OAL, et al)- Proposed order and judgment
Date: Monday, April 4, 2022 9:34:31 AM

EXTERNAL EMAIL: This message was sent from outside DOJ. Please do not click links or open attachments that appear suspicious.

Good morning – We propose adding a simple sentence capturing the point you just put your finger on: “This proposed Judgment does not apply to Respondent BSC.” Such a statement avoids confusion, since it accurately captures the posture of the case.

Ryan O'Hollaren
Cooley LLP
w 415.693.2288 • m 415.385.2879
rohollaren@cooley.com

From: Laura RandlesLittle <Laura.RandlesLittle@doj.ca.gov>
Sent: Monday, April 4, 2022 8:08 AM
To: O'Hollaren, Ryan T. <rohollaren@cooley.com>; Caplan, Matt <mcaplan@cooley.com>; Mornin, Joe <jmornin@cooley.com>
Cc: Keith Wurster <Keith.Wurster@doj.ca.gov>
Subject: RE: Case No. 34-2021-80003612-CU-WM-GDS (Public.Resource.Org, Inc. v. OAL, et al)- Proposed order and judgment

[External]

Good morning,
While we would be happy to consider alternate language you think might meet your objective, it is our position that additional language that goes beyond how the judgment applies to Respondent OAL will cause confusion. However, please let us know this morning if you have different language you would like us to consider. Please note, if we cannot agree that our draft is amenable, per the California Rules of Court, I will also transmit your concerns to the court when we submit the Proposed Judgment.
Thank you,
Laura

Laura Randles-Little
Deputy Attorney General
Government Law Section | California Department of Justice
1300 I Street, 17th Floor | Sacramento, CA 95814
tel. (916) 210-6504

From: O'Hollaren, Ryan T. <rohollaren@cooley.com>
Sent: Friday, April 1, 2022 4:31 PM
To: Laura RandlesLittle <Laura.RandlesLittle@doj.ca.gov>; Caplan, Matt <mcaplan@cooley.com>; Mornin, Joe <jmornin@cooley.com>
Cc: Keith Wurster <Keith.Wurster@doj.ca.gov>
Subject: RE: Case No. 34-2021-80003612-CU-WM-GDS (Public.Resource.Org, Inc. v. OAL, et al)- Proposed order and judgment

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Hi Laura,

We understand that the judgment only applies to OAL; we simply want to clarify that fact so as to avoid any potential confusion on the point. If our proposed language is not agreeable, we're happy to review an alternative approach.

We agree with the change to refer to the Tentative as an Exhibit. And as to the signature, we removed the line because we don't interpret the local rules to require our signature on the document.

Thanks,

Ryan O'Hollaren
Cooley LLP
w 415.693.2288 • m 415.385.2879
rohollaren@cooley.com

From: Laura RandlesLittle <Laura.RandlesLittle@doj.ca.gov>
Sent: Friday, April 1, 2022 3:50 PM
To: O'Hollaren, Ryan T. <rohollaren@cooley.com>; Caplan, Matt <mcaplan@cooley.com>; Mornin, Joe <jmornin@cooley.com>
Cc: Keith Wurster <Keith.Wurster@doj.ca.gov>
Subject: RE: Case No. 34-2021-80003612-CU-WM-GDS (Public.Resource.Org, Inc. v. OAL, et al)- Proposed order and judgment

[External]

Good afternoon,
Thank you for your comments. We believe the judgment only applies to Respondent OAL and do not agree it is appropriate to add language referencing a party to whom the judgment does not apply. Additionally, to avoid confusion now and in the future as to the judgement's potential application to Respondent BSC, the language should be limited to Respondent OAL. Thus, we have not

incorporated your recommended edit at this time. Please let us know if you continue to disagree with this approach. Pursuant to the Rule 3.1312 of the California Rules of Court we plan on filing the proposed Order and Judgment on Monday.

Also, please note, we made one minor edit to the Order to consistently reference the Tentative Ruling as an Exhibit. I understand from your email you do not have concerns with the Order. Can you clarify that this means you will not be signing the order as "Approved to Form"?

Thank you,
Laura

Laura Randles-Little
Deputy Attorney General
Government Law Section | California Department of Justice
1300 I Street, 17th Floor | Sacramento, CA 95814
tel. (916) 210-6504

From: O'Hollaren, Ryan T. <rohollaren@cooley.com>
Sent: Thursday, March 31, 2022 2:40 PM
To: Laura RandlesLittle <Laura.RandlesLittle@doj.ca.gov>; Caplan, Matt <mcaplan@cooley.com>; Mornin, Joe <jmornin@cooley.com>
Cc: Keith Wurster <Keith.Wurster@doj.ca.gov>
Subject: RE: Case No. 34-2021-80003612-CU-WM-GDS (Public.Resource.Org, Inc. v. OAL, et al)- Proposed order and judgment

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Good afternoon,

Attached is the proposed judgment with our edits. We have no edits on the proposed order.

Thanks,

Ryan O'Hollaren
Cooley LLP
w 415.693.2288 • m 415.385.2879
rohollaren@cooley.com

From: Laura RandlesLittle <Laura.RandlesLittle@doj.ca.gov>
Sent: Wednesday, March 30, 2022 10:57 AM
To: Caplan, Matt <mcaplan@cooley.com>; Mornin, Joe <jmornin@cooley.com>; O'Hollaren, Ryan T.

<rohollaren@cooley.com>

Cc: Keith Wurster <Keith.Wurster@doj.ca.gov>

Subject: Case No. 34-2021-80003612-CU-WM-GDS (Public.Resource.Org, Inc. v. OAL, et al)-
Proposed order and judgment

[External]

Good morning,

Attached please find a draft proposed judgment and a draft proposed order as directed by the Court. Please review this and let us know if you have any comments or concerns. If you do not have any concerns, we would appreciate it if you could please sign these as to form and return the signed documents to us.

Thank you,
Laura

Laura Randles-Little
Deputy Attorney General
Government Law Section | California Department of Justice
1300 I Street, 17th Floor | Sacramento, CA 95814
tel. (916) 210-6504

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