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By \_\_\_\_\_, Deputy  
Case Number:  
34-2021-80003612

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PUBLIC.RESOURCE.ORG, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SACRAMENTO

PUBLIC.RESOURCE.ORG, INC.,

Petitioners,

v.

CALIFORNIA OFFICE OF  
ADMINISTRATIVE LAW, and the  
CALIFORNIA BUILDING STANDARDS  
COMMISSION

Respondents.

Case No. 34-2021-80003612

**PUBLIC.RESOURCE.ORG, INC.'S OPENING  
BRIEF IN SUPPORT OF PETITION FOR WRIT  
OF MANDATE**

Date: December 17, 2021  
Time: 10:00 a.m.  
Dept: 27  
Hon. Steven M. Gevercer

BY FAX

1 **I. INTRODUCTION**

2 Petitioner Public.Resource.Org (“Public Resource”) submitted requests under the  
3 California Public Records Act (“CPRA”) to the California Office of Administrative Law  
4 (“OAL”) and Building Standards Commission (“BSC”) seeking disclosure of a complete  
5 electronic copy of the California Code of Regulations (“CCR”). OAL and BSC denied Public  
6 Resource’s request for multiple reasons, but they have not carried and cannot carry their burden  
7 of identifying a statutory exemption that justifies nondisclosure.

8 In addition, two private organizations—National Fire Protection Association, Inc.  
9 (“NFPA”) and International Code Council, Inc. (“ICC”)—have intervened in this case to block  
10 disclosure on the grounds that they own copyrights in parts of California’s laws. But no  
11 California law authorizes any entity to own the law by asserting copyright over it. Nor could it, as  
12 the government edicts doctrine holds that the law cannot be copyrighted, even when it  
13 incorporates portions of works authored or published by private parties.

14 Because OAL and BSC have failed to comply with their obligations under the CPRA,  
15 Public Resource filed this petition seeking a writ of mandate commanding them to disclose the  
16 CCR in response to Public Resource’s CPRA requests. *See Verified Pet’n for Writ of Mandate*,  
17 filed Mar. 17, 2021 (“Pet’n”), at 7–13. The Court should order them to produce electronic copies  
18 of the CCR in response to Public Resource’s CPRA requests.

19 **II. BACKGROUND**

20 **A. Parties**

21 Public Resource is a California nonprofit that aims to improve public access to  
22 government records and primary legal materials. *See generally* Pet’n at 7–13; *see also*  
23 <https://www.youtube.com/watch?v=2tOJdGaMvVw> (explaining Public Resource’s mission).

24 OAL oversees the publication and distribution of the CCR. *Id.* at 8–9. Its purpose is to  
25 “ensure that agency regulations are clear, necessary, legally valid, and available to the public.”<sup>1</sup>

26 BSC administers California’s building code, coordinates and manages the model code  
27 adoption process, reviews and approves building standards, and publishes the California Building

28 <sup>1</sup> <https://oal.ca.gov/about-the-office-of-administrative-law/>.

1 Standards Code as Title 24 of the CCR. *Id.* at 7, 11.

2 NFPA and ICC are private organizations that coordinate the development of technical  
3 standards, which they provide to government entities for incorporation into law. Pet'n at 11; *see*  
4 *also* Mot. to Intervene, filed August 27, 2021, at 4–5. Elements of some of the model codes they  
5 claim to own have been adopted as California law in Title 24 of the CCR. Pet'n at 11.

6 **B. Facts**

7 In December 2020, Public Resource submitted CPRA requests to OAL and BSC seeking  
8 complete electronic copies of the CCR in a structured, machine-readable format. *Id.* at 9–13. Both  
9 agencies refused on several grounds. OAL responded that it does not have a structured, machine  
10 readable version of the CCR, and that it has an outdated version on a CD-ROM, but each section  
11 would need to be individually extracted and copied. *Id.* at 10. BSC responded that print editions  
12 of Title 24 are available for inspection at certain public libraries; that it can be purchased in whole  
13 or part from certain private entities; and that BSC “does not have the publishing rights to Title 24  
14 and therefore cannot provide free copies to the public” because “Title 24 is based on and includes  
15 model codes produced by the publishing entities, and they then publish California’s codes,  
16 retaining copyright protections.” *Id.* at 12–13. Public Resource responded with letters explaining  
17 why OAL and BSC had not provided lawful reasons for refusing to disclose the CCR under the  
18 CPRA. *Id.* at 9–13. After OAL and BSC continued to refuse, Public Resource filed its petition  
19 with the Court seeking a writ commanding OAL and BSC to respond to its CPRA requests.

20 In May 2021, NFPA and ICC sought to intervene to prevent disclosure of the CCR based  
21 on the claim that they own copyrights in parts of California’s laws and that disclosure would  
22 infringe their exclusive rights. The Court granted their motion to intervene on August 27, 2021.

23 **III. ARGUMENT**

24 **A. The CPRA requires disclosure of public records.**

25 The California Constitution states that the “people have the right of access to information  
26 concerning the conduct of the people’s business, and, therefore, . . . the writings of public  
27 officials and agencies shall be open to public scrutiny.” Cal. Const. Art. I § 3(b)(1). The CPRA  
28 protects this “fundamental and necessary” right by giving the people a means of enforcing it. Cal.

1 Gov't Code § 6250; *see also* *Cty. of Santa Clara v. Super. Ct.*, 170 Cal. App. 4th 1301, 1335  
2 (2009) (the CPRA is designed to “increase[e] freedom of information by giving members of the  
3 public access to information in the possession of public agencies”); *CBS, Inc. v. Block*, 42 Cal. 3d  
4 646, 651–52 (1986) (“Implicit in the democratic process is the notion that government should be  
5 accountable for its actions. In order to verify accountability, individuals must have access to  
6 government files.”).

7 An agency must disclose records in response to a CPRA request if (1) the records “qualify  
8 as ‘public records’” within the meaning of § 6252(e); and (2) the records are “in the possession of  
9 the agency.” *Anderson-Barker v. Super. Ct.*, 31 Cal. App. 5th 528, 538 (2019). All public records  
10 are subject to disclosure unless the legislature has expressly provided to the contrary. Cal. Gov't  
11 Code § 6253(b). An agency must disclose public records unless the record falls under one of the  
12 exemptions listed in the statute. *Id.* Cal. Gov't Code § 6255; *Citizens for A Better Env't v. Dep't*  
13 *of Food & Agric.*, 171 Cal. App. 3d 704, 711 (1985) (“Grounds to deny disclosure of information  
14 ‘must be found, if at all, among the specific exceptions to the general policy that are enumerated  
15 in the Act.’” (quoting *State of Cal. v. Super. Ct.*, 43 Cal. App. 3d 778, 783 (1974))). The agency  
16 “opposing disclosure bears the burden of proving that an exemption applies.” *Cty. of Santa Clara*,  
17 170 Cal. App. 4th at 1321 (citing *Bd. of Trs. of Cal. State Univ. v Super. Ct.*, 132 Cal. App. 4th  
18 889, 896 (2005)); *see also* *L.A. Unified Sch. Dist. v. Super. Ct.*, 228 Cal. App. 4th 222, 239  
19 (2014).

20 Public records must be provided by the agency in “any electronic format in which it holds  
21 the information” and any format “used by the agency to create copies for its own use or for  
22 provision to other agencies.” Cal. Gov't Code § 6253.9(a)(1)–(2).

23 The California Constitution directs that any applicable statute or authority “shall be  
24 broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the  
25 right of access.” Cal. Const. Art. I § 3(b)(2); *L.A. Cty. Bd. Of Supervisors v. Super. Ct.*, 2 Cal. 5th  
26 282, 290–91 (2016). The general policy of disclosure “can only be accomplished by narrow  
27 construction of the statutory exemptions.” *Fairley v. Super. Ct.*, 66 Cal. App. 4th 1414, 1419–20  
28 (1998).

1           **B. The CCR is a public record.**

2           OAL and BSC have not disputed that the CCR is a “public record,” which the CPRA  
3 defines as “any writing containing information relating to the conduct of the public’s business  
4 prepared, owned, used, or retained by any state or local agency regardless of physical form or  
5 characteristics.” Cal. Gov’t Code § 6252(e). The CCR is a body of law regulating a vast range of  
6 public and private conduct in California, and accordingly, there is no doubt that it “relate[s] to the  
7 conduct of the public’s business.” See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498,  
8 1507 (2020) (“Every citizen is presumed to know the law, and it needs no argument to show . . .  
9 that all should have free access to its contents.” (internal quotations omitted)).

10           Additionally, California has mandated the creation and maintenance of the CCR. Cal.  
11 Gov’t Code § 11342.4 (“[OAL] shall adopt, amend, or repeal regulations for the purpose of  
12 carrying out the provisions of this chapter.”); Cal. Health & Safety Code § 18930(a) (“Any  
13 building standard adopted or proposed by state agencies shall be submitted to, and approved or  
14 adopted by, the California Building Standards Commission prior to codification.”). This fact  
15 independently qualifies the CCR as a public record. *League of Cal. Cities v. Super. Ct.*, 241 Cal.  
16 App. 4th 976, 987 (2015) (“Any record required by law to be kept by an officer, or which he  
17 keeps as necessary or convenient to the discharge of his official duty, is a public record.”).

18           **C. OAL and BSC possess the CCR.**

19           As Public Resource explained in its Petition, OAL and BSC possess the entirety of the  
20 CCR. Pet’n at 15–16. BSC has not denied possession, and OAL’s statement that it “does not have  
21 a copy of a CCR Master Database” (*id.* at 15 & Ex. D at 31) is contrary to California law.

22           OAL has contracted with West Publishing Corporation (“West”) to publish a copy of the  
23 CCR, but OAL maintains possession of its contents. Under that contract, West is tasked with  
24 maintaining “the Official California Code of Regulations (CCR) in an electronic database” called  
25 “the ‘Master Database.’” Pet’n at 8; Notice of Supplemental Auth. in Support of Petition for Writ  
26 of Mandate (“Notice”), Ex. J at 52. West must “update the Master Database as soon as feasible  
27 after OAL provides the contractor with regulations that have been endorsed by the Secretary of  
28 State, preferably within 15 days but in no event longer than 30 days after OAL delivers the

1 regulation text.” Pet’n at 15; Notice, Ex. J at 52. The contract says that West “shall not alter the  
2 text of regulations, notices of any other materials furnished by OAL for publication, except as  
3 expressly directed or authorized by OAL.” *Id.* at 59. OAL has the right to “inspect[], revis[e] and  
4 correct[]” the CCR Master Database and dictate revisions to West. *Id.* And the contract states that  
5 OAL maintains all rights to the Master Database, notwithstanding the fact that West publishes a  
6 copy of it. *Id.* at 65.

7 For purposes of the CPRA, California courts define “possession” to “mean both actual and  
8 constructive possession.” *Bd. of Pilot Comm’rs v. Super. Ct.*, 218 Cal. App. 4th 577, 598 (2013).  
9 Specifically, “an agency has constructive possession of records if it has the right to control the  
10 records, either directly or through another person.” *Consol. Irrigation Dist. v. Super. Ct.*, 205 Cal.  
11 App. 4th 697, 710 (2012).

12 OAL indisputably “has the right to control” the CCR Master Database. That right is  
13 explicitly spelled out in its contract with West. Not only does OAL claim to reserve all  
14 intellectual property rights in the CCR Master Database, but it has the exclusive contractual rights  
15 to inspect, amend, and revise its contents. Pet’n at 15–16; Notice, Ex. J at 52, 59, 65. OAL  
16 therefore has constructive possession of the CCR Master Database under California law.

17 Indeed, the California legislature has explicitly prohibited agencies from avoiding CPRA  
18 obligations by outsourcing publication to third parties. Cal. Gov’t Code § 6270(a) states:  
19 “Notwithstanding any other provision of law, no state or local agency shall sell, exchange,  
20 furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a  
21 private entity in a manner that prevents a state or local agency from providing the record directly  
22 pursuant to this chapter.” Thus, OAL cannot escape its CPRA obligations by asserting that the  
23 CCR is in the possession of a private party. *See City of San Jose v. Super. Ct.*, 2 Cal. 5th 608,  
24 623–24 (2017) (“The statute’s clear purpose is to prevent an agency from evading its disclosure  
25 duty by transferring custody of a record to a private holder and then arguing the record falls  
26 outside CPRA because it is no longer in the agency’s possession. . . . It simply prohibits agencies  
27 from attempting to evade CPRA by transferring public records to an intermediary not bound by  
28 the Act’s disclosure requirements.”).

1           **D.     OAL and BSC have not complied with the CPRA.**

2           OAL and BSC have provided no documents in response to Public Resource’s CPRA  
3 request. Pet’n at 9–13. Instead, they point to the availability of (1) hard copies at certain public  
4 libraries and (2) various online versions available from third parties that carry strict limits on their  
5 access and use. Pet’n Ex. D at 35 & Ex. G. As Public Resource explained in its Petition (*see* Pet’n  
6 at 18–20), neither response satisfies the agencies’ obligations under the CPRA.

7           First, paper copies are insufficient. The CPRA is clear that “any agency that has  
8 information that constitutes an identifiable public record not exempt from disclosure pursuant to  
9 this chapter that is in an electronic format shall make that information available in an electronic  
10 format when requested by any person.” Cal. Gov’t Code § 6253.9(a).

11           Second, the online versions cited by OAL and BSC are not “publicly available” under  
12 California law. These resources are subject to an array of technological and legal restrictions that  
13 prevent users from engaging in a variety of lawful activity, including text-searching, copying and  
14 pasting, or distributing any of those provisions of the CCR. Pet’n at 20. These “end user  
15 restrictions” “are incompatible with the purposes and operation of the CPRA.” *Cty. of Santa*  
16 *Clara*, 170 Cal. App. 4th at 1335. Public records must be provided by the agency in “any  
17 electronic format in which it holds the information” and any format “used by the agency to create  
18 copies for its own use or for provision to other agencies.” Cal. Gov’t Code § 6253.9(a)(1)–(2).  
19 BSC and OAL cannot avoid this obligation by pointing to highly restricted versions on third-party  
20 websites; they must comply with the statute and provide the records in the formats they  
21 themselves possess.

22           **E.     No statutory exemption permits OAL or BSC to withhold the CCR.**

23           As explained above, an agency must disclose public records unless the record falls under  
24 one of the exemptions listed in the CPRA. Cal. Gov’t Code § 6255; *CBS*, 42 Cal. 3d at 651–52.  
25 OAL and BSC have not cited a single exemption to justify withholding the CCR in response to  
26 Public Resource’s CPRA requests. Accordingly, they have failed to carry their burden, and the  
27 Court should compel them to disclose the CCR. *See Cty. of Santa Clara*, 170 Cal. App. 4th at  
28 1321 (the agency “opposing disclosure bears the burden of proving that an exemption applies”).

1 The intervenors, NFPA and ICC, cite two exemptions in their answer—Cal. Gov’t Code  
2 §§ 6254(k) and 6255(a)—but neither exemption justifies withholding the CCR. Section 6254(k)  
3 exempts records where disclosure is “exempted or prohibited pursuant to federal or state law,  
4 including, but not limited to, provisions of the Evidence Code relating to privilege.” And Section  
5 6255(a) provides a catch-all exemption that applies when “the public interest served by not  
6 disclosing the record clearly outweighs the public interest served by disclosure of the record.”

7 NFPA and ICC appear to argue that both exemptions apply because NFPA and ICC claim  
8 copyrights in certain model codes, and elements of those model codes have been incorporated  
9 into California law in Title 24 of the CCR. Answer at 11 (“Federal copyright law prohibits  
10 Respondents from disclosing Intervenors’ Copyrighted Works in the manner requested.”).  
11 Similarly, in its response to Public Resource’s CPRA request, BSC stated that it cannot disclose  
12 Title 24 because it contains copyrighted material (although BSC did not identify a statutory  
13 exemption that would justify nondisclosure). Pet’n Ex. G.

14 Copyright is not a basis for nondisclosure here. Under the government edicts doctrine, the  
15 CCR cannot be copyrighted at all, and therefore no entity owns copyrights in California’s laws.  
16 *Georgia*, 140 S. Ct. at 1508 (copyright does not vest in the law and legal materials issued in the  
17 name of the state). Title 1 of the CCR states that materials incorporated by reference carry the  
18 same weight as regulations in the code itself. Cal. Code. Regs Title 1 § 20(e) (“Where a  
19 regulation which incorporates a document by reference is approved by OAL and filed with the  
20 Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all  
21 provisions of the APA.”). Thus, materials incorporated by reference in the CCR *are* the law, and  
22 under the government edicts doctrine, “no one can own the law.” *Georgia*, 140 S. Ct. at 1507.

23 Numerous courts have held that codified laws are unambiguously in the public domain,  
24 even when they incorporate elements of model codes authored by private entities. *See, e.g., Am.*  
25 *Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 451 (D.C. Cir. 2018)  
26 (“the express text of the law falls plainly outside the realm of copyright protection”); *Veeck v. S.*  
27 *Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (when model codes  
28 have been “adopted by a legislative body and become ‘the law,’ . . . . the model codes enter the



1 public domain and are not subject to the copyright holder's exclusive prerogatives"); *Building*  
2 *Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) ("The citizens are  
3 the authors of the law, and therefore its owners, regardless of who actually drafts the provisions,  
4 because the law derives its authority from the consent of the public, expressed through the  
5 democratic process."); *Int'l Code Council, Inc. v. UpCodes, Inc.*, No. 17 Civ. 6261 (VM), 2020  
6 WL 2750636, at \*7 (S.D.N.Y. May 27, 2020) (explaining that "a private party cannot exercise its  
7 copyrights to restrict the public's access to the law" and concluding that a plaintiff "cannot claim  
8 actionable infringement based only on Defendants' accurate posting of the [plaintiff's codes] as  
9 [a]dopted, which are essentially enacted state and local laws").

10 Moreover, even if California's laws could be copyrighted (and they cannot), "[s]tate law  
11 determines whether [an agency] may claim copyright in [its] office's creations." *Cty. of Santa*  
12 *Clara*, 170 Cal. App. 4th at 1331; *see also City of Inglewood v. Teixeira*, No. CV-15-01815-  
13 MWF (MRWx), 2015 U.S. Dist. LEXIS 114539, at \*7-8 (C.D. Cal. Aug. 20, 2015) ("[W]hether  
14 state and local governments can claim copyright protection is governed by state law."). Thus,  
15 when an agency asserts copyright as the basis for refusing to disclose records in response to a  
16 CPRA request, courts assess whether California law explicitly allows the agency to obtain and  
17 assert copyrights in the records in question. *See, e.g., Cty. of Santa Clara*, 170 Cal. App. 4th at  
18 1333 (because no "express authorization to secure copyrights" existed for GIS data, the county  
19 could not assert copyright protection as a basis for nondisclosure); *City of Inglewood*, 2015 U.S.  
20 Dist. LEXIS 114539, at \*8-9 (because the city could identify "no affirmative grant of authority  
21 that permits it to obtain and assert a copyright for the City Council Videos," the court held that  
22 the city could not withhold the videos on copyright grounds); *Cty. of Santa Clara*, 170 Cal. App.  
23 4th at 1335 (holding that the CPRA's mandate to provide public records "overrides a government  
24 agency's ability to claim a copyright in its work unless the legislature has expressly authorized a  
25 public records exemption"). Here, the legislature has not permitted any entity to hold copyrights  
26 in the CCR.

27 Accordingly, BSC and OAL cannot assert copyright as a basis for nondisclosure. Because  
28 no statutory exemption permits OAL and BSC to withhold the CCR, the Court should compel

1 them to respond to Public Resource's CPRA request.

2 **IV. CONCLUSION**

3 Public Resource respectfully requests that the Court issue a writ of mandate commanding  
4 OAL and BSC to disclose a structured, machine-readable version of the CCR in response to  
5 Public Resource's CPRA requests.

6  
7 Dated: November 2, 2021

COOLEY LLP

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By: /s/ Matthew D. Caplan  
Matthew D. Caplan

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*Attorneys for Petitioner*  
Public.Resource.Org, Inc.

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