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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SACRAMENTO
11

12 PUBLIC.RESOURCE.ORG, INC.,

13 Petitioner,

14 v.

15 CALIFORNIA OFFICE OF
16 ADMINISTRATIVE LAW, and the
CALIFORNIA BUILDING STANDARDS
17 COMMISSION

18 Respondents.

Case No. 34-2021-80003612

**PETITIONER PUBLIC.RESOURCE.ORG,
INC.'S REPLY TO BUILDING STANDARD
COMMISSION'S OPPOSITION TO PETITION
FOR A WRIT OF MANDATE**

Date: March 25, 2022
Time: 1:30 p.m.
Dept: 27
Judge: Hon. Steven M. Gevercer

Action Filed: March 17, 2021

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1 **I. INTRODUCTION**

2 There is no dispute that Title 24 of the California Code of Regulations (“CCR”) is a public
3 record under the California Public Records Act (“CPRA”). Nor is there any dispute that Respondent
4 Building Standards Commission (“BSC”) possesses copies of Title 24 in a variety of electronic
5 formats. BSC’s opposition brief (“Opp’n”) makes it clear that no statutory exemption prevents
6 disclosure: the catchall exemption in § 6255(a) does not apply because the public interest favors
7 disclosure, and the exemption in § 6254(k) (allowing public records to be withheld where disclosure
8 is prohibited by law) does not apply because BSC cannot contract around its CPRA obligations and
9 because no entity can own copyright interests in California’s laws.

10 BSC fails to address Public Resource’s arguments and authority explaining why disclosure
11 is warranted. Instead, BSC contends that disclosure would “upend the current publication method
12 for model building codes” and make it harder to “recoup[] [the] costs associated with publishing.”
13 Opp’n at 6, 12. BSC and the intervenors in this case—private entities that sell access to the law—
14 have developed a publishing model under which “anyone can purchase Title 24” at purportedly
15 “reasonable price.” *Id.* at 7, 15. But the protection of this publishing model is not a valid basis to
16 withhold public records under the CPRA. BSC warns that Public Resource might redistribute copies
17 of Title 24 if disclosure were required (as if it were somehow harmful to make California’s laws
18 more accessible to the public), but that argument fails because the State may not withhold a public
19 record “based upon the purpose for which the record is being requested” or the motives of the party
20 making the request. Cal. Gov’t Code § 6257.5; *Connell v. Super. Ct.*, 56 Cal. App. 4th 601, 616
21 (1997).

22 The California Constitution states that “people have the right of access to information
23 concerning the conduct of the people’s business”—including, most fundamentally, the laws that
24 Californians must know and obey—and the CPRA protects this “fundamental and necessary” right
25 by providing a means of enforcing it. Cal. Const. Art. I § 3(b)(1); Cal. Gov’t Code § 6250.
26 Accordingly, the Court should require BSC to produce electronic copies of Title 24 in the formats
27 it possesses.

28

II. ARGUMENT

Under the CPRA, an agency must disclose public records if (1) the records “qualify as ‘public records’” and (2) the records are “in the possession of the agency.” *Anderson-Barker v. Super. Ct.*, 31 Cal. App. 5th 528, 538 (2019). Neither element is contested here—BSC does not dispute that Title 24 of the CCR is a public record in BSC’s possession. Thus, BSC must disclose Title 24 in “any electronic format in which it holds the information” and any format it uses “to create copies for its own use or for provision to other agencies.” Cal. Gov’t Code § 6253.9(a)(1)–(2). Disclosure is required unless BSC carries its burden of proving that Title 24 falls under one of the exemptions listed in the statute. *Id.* § 6255; *Cty. of Santa Clara v. Super. Ct.*, 170 Cal. App. 4th 1301, 1335 (2009). As explained below, BSC has failed to show that an exemption applies, and thus it must disclose Title 24 in the electronic formats it possesses.

A. The catchall exemption in § 6255(a) does not apply.

When no other exemption applies, an agency may withhold records under the catchall exemption in § 6255(a) if “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Cal. Gov’t Code § 6255(a). The catchall exemption “contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality.” *Michaelis, Montanari & Johnson v. Super. Ct.* 38 Cal. 4th 1065, 1071 (2006).

BSC fails to explain how withholding Title 24 would serve the public interest. California courts have recognized a variety of circumstances in which the public interest favors nondisclosure under § 6255(a), including to protect individuals’ privacy interests, to protect public safety, and to avoid the “expense and inconvenience involved in segregating nonexempt from exempt information.” *See Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 452–53 (1982) (expense of segregation); *Long Beach Police Officers Ass’n v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014) (public safety); *City of San Jose v. Super. Ct.*, 2 Cal. 5th 608, 626 (2017) (privacy). None of those circumstances are present here, and BSC does not cite a single case holding that the application of § 6255(a) is appropriate to prevent disclosure of Title 24.

BSC’s main argument is that the Building Standards Law establishes a framework directing

1 BSC to “publish, stockpile, and sell” Title 24. Opp’n at 11–12. This framework authorizes BSC to
2 “oversee[] the adoption and publication of California’s building codes,” including to “publish and
3 make available the records through a third-party contractor.” *Id.* It also directs BSC to distribute
4 hard copies of Title 24 to certain public locations, make it available for sale, and publish elements
5 of it on third-party websites with restrictions on its access and use. *Id.* But this framework is
6 irrelevant to BSC’s obligations under the CPRA. The Building Standards Law grants authority to
7 develop public records and distribute them in certain ways. However, it does not absolve BSC of
8 its obligation to disclose public records under the CPRA and the California constitution.

9 BSC cites no authority for this novel application of § 6255(a), and its arguments are
10 ultimately self-defeating. For example, BSC states that Title 24 “is already available” online “in
11 the format demanded by Petitioner” (Opp’n at 12), but then asserts that “any additional benefit in
12 requiring disclosure of Title 24 in the precise format that the Petitioner has requested is minimal at
13 best” (*id.* at 12, 14). Similarly, BSC “does not dispute that the public should have access to Title
14 24” (*id.* at 12), but then asserts that there is “immense public benefit in not disclosing Title 24”
15 (*id.*). These contradictory arguments belie BSC’s true motivation for withholding Title 24: under
16 the status quo, “Title 24 is sold at a reasonable price,” which allows “model code organizations [to]
17 recoup[] their costs by selling the codes.” *Id.* at 11, 15. But Title 24 is the law, even if it incorporates
18 elements of model codes. The private entities that develop model codes agreed to this arrangement
19 by allowing (indeed, encouraging) legislatures to adopt elements of these model codes as law. The
20 text of the law—including Title 24 and the elements of model codes it incorporates—is indisputably
21 a public record, and there is no basis to withhold it under § 6255(a). *See, e.g., League of Cal. Cities*
22 *v. Super. Ct.*, 241 Cal. App. 4th 976, 987 (2015) (“Any record required by law to be kept by an
23 officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public
24 record.”); *Cnty. Youth Athletic Ctr. v. City of Nat’l City*, 220 Cal. App. 4th 1385, 1418 (2013) (the
25 definition of “public record” is “broad” and “intended to cover every conceivable kind of record
26 that is involved in the governmental process” (quoting *Coronado Police Officers Ass’n v. Carroll*,
27 106 Cal. App. 4th 1001, 1006 (2003))); *see also Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct.
28 1498, 1507 (2020) (“Every citizen is presumed to know the law, and it needs no argument to show

1 . . . that all should have free access to its contents.” (internal quotations omitted)).

2 BSC argues that disclosure of Title 24 “would have three significant negative effects,” none
3 of which are persuasive. Opp’n at 13–14. First, BSC contends that disclosure would require BSC
4 to “create wholesale an extensive process to publish and continually update Title 24.” *Id.* at 13.
5 This is a strawman—BSC already publishes and continually updates Title 24 in accordance with
6 the Building Standards Law (*see* Opp’n at 11–13), and in any event, Public Resource is not asking
7 BSC to create any additional materials. Instead, as explained in section II.C below, Public Resource
8 seeks disclosure of existing copies of Title 24 that BSC currently possesses. Second, BSC contends
9 that if Title 24 were disclosed, “changes to [the] Building Standards Law would be necessary to
10 mandate a different process for use of the model codes.” *Id.* at 13–14. This is simply not the case—
11 again, BSC can disclose the copies it currently possesses without any modifications to the statutory
12 framework. Third, BSC contends that disclosure “would fundamentally change how California
13 obtains the model codes from the model code organizations and promulgates Title 24.” *Id.* at 14.
14 BSC provides no support for this sweeping assertion, nor does it explain how this concern justifies
15 nondisclosure under the CPRA.

16 BSC also fails to address the clear public benefits that would flow from disclosure of Title
17 24. First of all, the California constitution and the CPRA recognize that transparency around “the
18 conduct of the people’s business” is a “fundamental and necessary” right that serves the public
19 interest. Cal. Const. Art. I § 3(b)(1); Cal. Gov’t Code § 6250. Disclosure would have a variety of
20 practical benefits as well—for example, it would allow Californians to freely view the contents of
21 the law without restrictions on access or use, or the need to visit a physical location (in the midst
22 of a pandemic) to consult a paper copy; it would allow scholars, journalists, and others to examine,
23 analyze, and comment upon it; and it would allow innovators to make it accessible in new and
24 useful ways.

25 As explained above, the party invoking the catchall exemption in § 6255(a) must
26 “demonstrate a clear overbalance” of the public interest in favor of nondisclosure. *Michaelis*, 38
27 Cal. 4th at 1071. BSC fails to carry this burden and cannot show that § 6255(a) justifies
28 nondisclosure.

1 **B. BSC cannot withhold Title 24 based on third-party contracts or copyright**
2 **interests.**

3 Cal. Gov't Code § 6254(k) exempts records where disclosure is “exempted or prohibited
4 pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code
5 relating to privilege.” Cal. Gov't Code § 6254(k). BSC contends that this exemption applies
6 because disclosure would require it to violate its contracts with third parties and would infringe
7 third-party copyrights, but neither argument is availing—and again, BSC cites no case law
8 indicating that this exemption applies. Opp'n at 17–20.

9 First, BSC's contracts with model code organizations do not eliminate its duty to comply
10 with the CPRA. The California legislature anticipated that agencies might seek to escape their
11 CPRA obligations by asserting that disclosure is not permitted under an agency's contract with a
12 third party. To prevent this gambit, the legislature adopted Cal. Gov't Code § 6270(a), which states:
13 “Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish,
14 or otherwise provide a public record subject to disclosure pursuant to [the CPRA] to a private entity
15 in a manner that prevents a state or local agency from providing the record directly pursuant to this
16 chapter.”

17 That is precisely what BSC seeks to do here: it asserts that third parties “are the sole
18 copyright owners” of aspects of Title 24, and that their contracts with BSC give it a nonexclusive
19 license for limited purposes, but “do not transfer any ownership of any property licensed by the
20 various model code organizations at issue to BSC.” Opp'n at 18. In other words, BSC claims that
21 it cannot produce the public records at issue because it does not possess them, and that disclosure
22 “could put BSC in a position where BSC could be considered in breach of contract.” *Id.*

23 Cal. Gov't Code § 6270 forecloses this argument. As the California Supreme Court has
24 explained, the “clear purpose” of § 6270 is “to prevent an agency from evading its disclosure duty
25 by transferring custody of a record to a private holder and then arguing the record falls outside
26 CPRA because it is no longer in the agency's possession.” *City of San Jose*, 2 Cal. 5th at 623–24.
27 It “prohibits agencies from attempting to evade CPRA by transferring public records to an
28 intermediary not bound by the Act's disclosure requirements.” *Id.* at 624. There is no dispute that

1 BSC possesses copies of Title 24 (*see, e.g.*, Opp’n at 18:11–17), but it claims that it cannot produce
2 them because it has delegated ownership to third parties. Under § 6270, this is not a valid basis to
3 withhold public records.

4 Second, the CPRA provides that if an agency provides a record to any member of the public,
5 then exemptions like § 6254(k) are waived. Cal. Gov’t. Code § 6254.5 (“[I]f a state or local agency
6 discloses a public record that is otherwise exempt from this chapter, to a member of the public, this
7 disclosure shall constitute a waiver of the exemptions specified in Section 6254 or 6254.7, or other
8 similar provisions of law.”); *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 656-7 (1974)
9 (“When a record loses its exempt status and becomes available for public inspection, section 6253,
10 subdivision (a), endows Every citizen with a right to inspect it. By force of these provisions, records
11 are **completely public** or **completely confidential**. The Public Records Act denies public officials
12 any power to pick and choose the recipients of disclosure.”) (emphasis added). Here, BSC has
13 indisputably disclosed Title 24 to various members of the public. As such, § 6254(k) does not apply.

14 Finally, BSC cannot withhold Title 24 on the basis of copyright because no California law
15 authorizes any entity to own the law by asserting copyright over it. In addition, under the
16 government edicts doctrine, the law cannot be copyrighted, even when it incorporates elements of
17 works authored or published by third parties. Public Resource addresses these issues in its Reply
18 to Intervenor’s IFPA and ICC’s Opposition at pages 5-10, filed concurrently with this brief.

19 **C. BSC must disclose Title 24 in the formats it possesses.**

20 BSC argues that it has no obligation to produce Title 24 “in any format other than that
21 delineated by the Legislature” in the Building Standards Law. Opp’n at 12. That is plainly wrong—
22 the CPRA explicitly requires BSC to produce Title 24 in “any electronic format in which it holds
23 the information.” Cal. Gov’t Code § 6253.9(a)(1)-(2).

24 BSC concedes that it possesses Title 24 in a variety of electronic formats. For example, it
25 states that “[t]he various model code organizations provide the model codes in formats ranging
26 from PDF to Word documents for BSC to use for development of Title 24.” Opp’n at 18. It also
27 states that BSC “receives an electronic copy of the final text corresponding to the final versions of
28 the code that will be printed solely for code development purposes of the subsequent codes.” *Id.*

1 The fact that portions of Title 24 are available on third-party websites (with restrictions on access
2 and use) does not relieve BSC of its obligations under the CPRA. *See Cty. of Santa Clara*, 170 Cal.
3 App. 4th at 1335 (electronic versions subject to “end user restrictions” do not satisfy the CPRA’s
4 requirements). The CPRA’s mandate is clear: BSC must produce the electronic versions of Title
5 24 in its possession.

6 **III. CONCLUSION**

7 California law recognizes a strong presumption in favor of disclosing records under the
8 CPRA. *See, e.g.*, Cal. Const. Art. I § 3(b)(2) (a statute “shall be broadly construed if it furthers the
9 people’s right of access, and narrowly construed if it limits the right of access”); *see also Fairley*
10 *v. Super. Ct.*, 66 Cal. App. 4th 1414, 1419–20 (1998) (the general policy favoring disclosure under
11 the CPRA “can only be accomplished by narrow construction of the statutory exemptions”). Title
12 24 is indisputably a public record in BSC’s possession, and BSC has failed to carry its burden of
13 showing that a statutory exemption justifies nondisclosure. Accordingly, Public Resource
14 respectfully requests that the Court issue a writ of mandate commanding BSC to disclose a
15 structured, machine-readable version of Title 24 of the CCR in response to Public Resource’s
16 CPRA requests.

17
18 Dated: January 20, 2022

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19
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