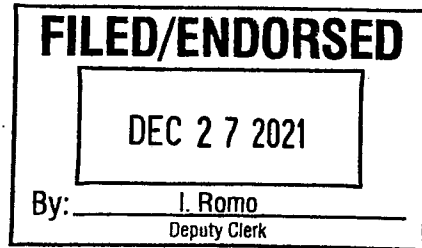


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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO
12 CIVIL DIVISION
13

14 **PUBLIC.RESOURCE.ORG, INC.,**
15
16 Petitioner,
17
18 v.
19 **CALIFORNIA OFFICE OF**
ADMINISTRATIVE LAW, and the
20 **CALIFORNIA BUILDING STANDARDS**
COMMISSION,
21 Respondents.

*Exempt from filing fees pursuant to
Government Code § 6103*

Case No. 34-2021-80003612

**CALIFORNIA BUILDING STANDARDS
COMMISSION'S OPPOSITION TO THE
VERIFIED PETITION FOR
PEREMPTORY WRIT OF MANDATE
ORDERING COMPLIANCE WITH THE
CALIFORNIA PUBLIC RECORDS ACT**

Date: January 21, 2022
Time: 1:30 p.m.
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Judge: Steven M. Gevercer
Trial Date:
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1 Respondent California Building Standards Commission ("BSC") submits this memorandum
2 of points and authorities in Opposition to the Verified Petition for Peremptory Writ of Mandate
3 ("Petition"). This Opposition is based on, and incorporates by reference, the declaration of Mia
4 Marvelli filed in support of this Opposition, Exhibits lodged as Petitioner's Exhibits F-I,
5 Respondent BSC's Exhibits L-N and BSC's Answer to the Complaint.

6 INTRODUCTION

7 BSC oversees the adoption and publication of California's building codes, which are
8 published as Title 24 of the California Code of Regulations ("Title 24.") In fulfilling these duties,
9 BSC contracts with model code organizations for their specialized publication services, and
10 through these contracts, makes Title 24 publicly available in hard copy at various locations
11 throughout the State and online for free. Despite the public accessibility of Title 24, Petitioner
12 insists that BSC provide it with a copy of Title 24 in a specific electronic format, contrary to the
13 Legislature's explicit methods of distribution of Title 24, which includes a single source of
14 publication and recoument of costs associated with publishing.

15 BSC has made Title 24 publicly available in accordance with the specific applicable
16 legislative framework. There is no statute, including the Public Records Act ("PRA"), that
17 requires BSC to produce records in every format requested by a member of the public that BSC
18 does not already possess. Petitioner's insistence on disclosure in a specific format is a misguided
19 attempt to use the PRA to infringe on copyright protections of third-party nonprofit organizations
20 that develop model code language for the benefit of the State of California and its citizens, as well
21 as for other states and their citizens.¹ For these reasons, and all those set forth below, Petitioner's
22 writ should be denied.

23 ///

24 ///

25 _____
26 ¹ To the extent Petitioner relies on arguments in its Petition relating to constructive
27 possession, these arguments were made in relation to the request before Respondent Office of
28 Administrative Law and Petitioner does not forward any arguments as to how or why they might
apply to BSC. Thus constructive possession is not relevant to the Petitioner's request to obtain a
copy of Title 24 from BSC and is not addressed in this opposition.

1

BACKGROUND

2 **I. TITLE 24: THE BUILDING STANDARDS LAW**

3 The Health and Safety Code governs the adoption of California's building codes via the
4 California Building Standards Law. (Health & Saf. Code, §§ 18901-18949.31.) The Building
5 Standards Law was first enacted in 1953 as a statutory framework to govern all aspects of Title
6 24. At that time, the Legislature established the State Building Standards Commission, whose
7 duty was to publish a single code of all building standards. (Stats. 1953. Ch 1500.) In 1979, the
8 Legislature reformed the framework relating to the adoption process of building regulations. As
9 part of this reform, the Legislature restructured BSC and imposed certain requirements for
10 submission of building regulations by state agencies for approval by BSC. (Senate Bill 331,
11 1979.) That legislation was intended to strengthen the powers of BSC to review, approve, codify,
12 and publish all public standards proposed by state agencies. (Legislative Analyst Analysis of
13 Senate Bill No. 331 as amended in Assembly July 17, 1979, dated August 27, 1979.) It also
14 established one centralized point of reference for state building standards by requiring all such
15 standards to be adopted in Title 24. (*Id.*)

16 As it exists today, the Building Standards Law specifically authorizes BSC to incorporate
17 model codes by reference into Title 24 and to contract with the model code organizations to fulfill
18 its obligation to publish Title 24. (See Health & Saf. Code, §§ 18928, 18928.1, 18930, and
19 18942.) It also authorizes BSC to add to or delete from model codes developed by the model code
20 organizations in approving or adopting standards for California. (Health & Saf. Code, § 18928.1.)
21 This statutory framework also specifically authorizes BSC to publish (or cause to be published),
22 stockpile, and sell at a reasonable price the code and materials incorporated by reference if the
23 materials incorporated by reference are insufficiently available or unavailable at a reasonable
24 price. (Health & Saf. Code, § 18942, subd. (d).) Pursuant to the contracts discussed below,
25 anyone can purchase Title 24 in individual parts or in its entirety in various formats, including
26 hard copies or PDFs from the model code publishers. (Exhibit K at 000076, Exhibit L at 000096,
27
28

1 Exhibit M at 000117, and Exhibit N at 000140.)² The Building Standards Law further requires all
2 state departments concerned with Title 24 and every city, county, or city and county to have an
3 up-to-date copy of the code available for public inspection. (*Id.*)

4 The publication of Title 24, in its entirety, is accomplished through four contracts with three
5 model code organizations. BSC also contracts with the model code organizations to incorporate
6 the model code language into building standards adopted or approved by BSC. The National Fire
7 Protection Association (the “NFPA”) publishes the California Electrical Code (Part 3 of Title 24).
8 The International Association of Plumbing and Mechanical Officials (IAPMO) publishes the
9 California Mechanical Code and also the California Plumbing Code (Parts 4 and 5 respectively).
10 The International Code Council (ICC) publishes the remaining parts of Title 24, which fall into
11 two categories. The first category consists of codes specific to California and *not* based on model
12 codes. (Parts 1, 6, 8, 11 and 12.) The second category consists of model codes that are augmented
13 with California amendments including the California Building Code, the California Residential
14 Code, the California Fire Code, and the California Existing Building Code. (Parts 2, 2.5, 9 and
15 10.) As part of these contracts, the model code organizations make Title 24 available in hard copy
16 at various locations throughout the state and online for free. NFPA and ICC have intervened in
17 this matter to protect their copyright interests in the records sought by Petitioner.

18 **II. PETITIONER’S PRA REQUEST**

19 On December 29, 2020, Petitioner submitted a PRA request to BSC requesting “a copy of
20 Title 24” of the CCR. The request further specified the records should be provided “in all formats
21 in [BSC’s] possession, including (but not limited to) structured, machine-readable digital formats,
22 such as XML, or PDF files.” On January 7, 2021, BSC directed the requestor to locations where
23 hard copies are publicly available, namely the BSC office, most state document depository
24 libraries, local city or county building or planning departments, and online through links on the
25 BSC website. BSC further stated that it does not “have the publishing rights to Title 24 and

26 ² Petitioner compiled communications and records relevant to this action, which it
27 inappropriately refers to as an administrative record in its “Notice of Lodging of Administrative
28 Record.” In order to avoid needless confusion, Respondent BSC will refer to these exhibits and
supplement the compilation with additional records but does not concede that their submission
transmits this action to an administrative appeal.

1 therefore cannot provide free copies to the public. This is because Title 24 is based on and
2 includes model codes produced by the publishing entities [that retain] copyright protections.”
3 (Exhibit G at 000042.) Petitioner objected to BSC’s response, claiming that: Title 24 is
4 unambiguously a public record; print editions do not satisfy the requirement to provide electronic
5 copies; the ability to view on the BSC website does not satisfy the duty to provide electronic
6 copies; the BSC website is not publicly available within the meaning of the PRA due to end user
7 restrictions; and, the Legislature must give express statutory authority to secure copyrights.
8 (Exhibit H at 000043-000044.)

9 On March 2, 2021, BSC confirmed that the particular record formats Petitioner sought
10 could not be provided in response to the request.

11 LEGAL STANDARD

12 Any person may institute proceedings for injunctive or declarative relief “to enforce his or
13 her right to inspect or to receive a copy of any public record or class of public records.” (Gov.
14 Code, § 6258.) A court may order disclosure of records when it finds that records are being
15 improperly withheld from a member of the public. (Gov. Code, § 6259, subd. (a); *County of Santa*
16 *Clara v. Super. Ct.* (2019) 171 Cal.App.4th 119, 130 [the PRA’s only remedy is an action to
17 determine “whether a particular record or class of records must be disclosed.”].) The PRA
18 embodies a strong public policy in favor of disclosure, yet the right to access public records is not
19 absolute. “The CPRA generally presumes that all documents maintained by a public entity are
20 subject to disclosure to any member of the public, *unless a statutory exemption applies or the*
21 *catchall exemption, section 6255, is satisfied* (when public interest served by nondisclosure of
22 records clearly outweighs the public interest in disclosure).” (*Fredericks v. Super. Ct.* (2015) 233
23 Cal.App.4th 209, 223, italics added; see §§ 6254 et seq. [exemptions to disclosure].) While the
24 2004 amendment to the California Constitution explicitly recognizes the right of access to
25 information regarding the government’s business, it specifically preserved existing statutory
26 exemptions and “other authorities” providing exemptions, such as case law relating to privacy
27 rights. (Cal. Const., art. I, § 3, subds. (3)-(5).) Every dispute regarding a PRA request is “unique
28

1 and fact-specific,” and courts develop the extent of the PRA’s coverage on a case-by-case basis.
2 (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 377.)

3 The Building Standards Law does not have any comparable provisions that authorize
4 proceedings to enforce disclosure in accordance with the legislative framework. However, as
5 judicial review pursuant to Government Code section 6258 is limited to whether a record must be
6 disclosed, the court may look to the statutory framework of the Building Standards Law to review
7 BSC’s compliance with the framework guiding content, publication, and distribution of Title 24,
8 as envisioned by the Legislature. (See Health & Saf. Code, §§ 18928, 18928.1, 18930 and
9 18942.)

10 ARGUMENT

11 BSC has fully complied with its legal obligations under the PRA. BSC responded to
12 Petitioner’s request for a copy of Title 24 by directing Petitioner to the various locations where
13 Title 24 can be viewed or copied. BSC additionally directed Petitioner to the website where Title
14 24 can be viewed for free. Finally, BSC provided direction as to how Petitioner could purchase
15 Title 24. As discussed below, BSC’s response goes beyond its obligations under the Building
16 Standards Law to make Title 24 available to the public. BSC does not dispute that the public
17 should have access to Title 24. Rather, BSC disputes that Title 24 must be produced in any format
18 that Petitioner requests. The Legislature set forth a detailed statutory framework that requires
19 Title 24 to be available to the public at various public sites. Notably, the Legislature directed that
20 Title 24 should be made available in hard copy—but it did not direct access be provided to Title
21 24 in whatever format may be most convenient to a requestor.

22 The intent of the PRA is to prevent secrecy in government and to hold the government
23 accountable for its actions. (*Fredericks v. Super. Ct.*, *supra*, 233 Cal.App.4th at p. 223.) This was
24 reinforced when voters adopted Proposition 59, which amended California’s Constitution to
25 include this right of access, among other things. (Cal. Const., art. I, § 3.) Supporters of
26 Proposition 59 explained that the intent was to address open and responsible government and
27 stated that “[a] government that can hide what it does will never be accountable to the public it is
28 supposed to serve.” (Ballot Pamp., Gen. Elec. (Nov. 4, 2004) argument in favor of Prop. 59.) BSC

1 satisfied the requirements of the Building Standards Law and the PRA when it made the entire
2 Title 24 available for free in hard copy and on the internet.

3 Additionally, the PRA recognizes that there are instances, like the present situation, where
4 disclosure in certain formats is not required. Disclosure of Title 24 in the manner sought by
5 Petitioner would upend the current publication method for model building codes and would
6 interfere with BSC's ability to promulgate their building standards laws. Additionally, granting
7 the relief Petitioner has sought could subject BSC to legal action for copyright infringement and
8 breach of contract. Although BSC has made Title 24 publicly available, Petitioner asks the Court
9 to read new requirements into the PRA that would require a state agency to produce records in a
10 format in which they are not maintained, when the Legislature has already directed the means by
11 which they should be made publicly available.

12 **I. THE CATCH-ALL EXEMPTION IN GOVERNMENT CODE SECTION 6255 APPLIES TO**
13 **TITLE 24 BECAUSE OF THE CRITICAL INTERESTS AT STAKE IN ITS PUBLICATION**
14 **AS SET FORTH IN HEALTH AND SAFETY CODE SECTION 18942**

15 The California Legislature thoughtfully crafted a statutory framework detailing how
16 building standards regulations (Title 24) in California are to be developed, adopted, and published
17 through enactment of the Building Standards Law. (Health & Saf. Code, §§ 18901- 18949.31.)
18 This specific framework not only directs how regulations should be developed and approved, but
19 also addresses disclosure by delineating the various ways Title 24 must be publicly available and
20 how Title 24 should be published and sold. This same framework also ensures Title 24 is
21 maintained and produced in a single source, affords the State of California the ability to leverage
22 private expertise in developing appropriate building standards, and ensures the State of California
23 is able to publish Title 24 cost-free, with model code organizations recouping their costs by
24 selling the codes. (Decl. of Mia Marvelli at ¶¶ 2, 3.)

25 Specifically, BSC oversees the adoption and publication of California's building codes. The
26 Building Standards Law gives BSC express authority to publish and to make available the records
27 through a third-party contractor. (Health & Saf. Code, §§ 18928.1, 18942.) Currently, Health and
28 Safety Code section 18942 requires BSC to publish or "cause to be published" Title 24. Thus, the
Legislature not only acknowledged, but specifically directed, BSC to make records available. By

1 giving BSC the responsibility to “publish, stockpile, and sell” Title 24, the Legislature also
2 recognized a need to provide the public a centralized source for any building requirements. (See
3 State Fire Marshal Enrolled Bill Report, Senate Bill 311, statutes of 1979, dated September 13,
4 1979.) The detailed framework discussed above is how the Legislature envisioned that Title 24
5 would be made available to the public. (Health & Saf. Code, § 18942, subd. (d).)

6 The Building Standards Law also dictates *how* Title 24 should be made available to the
7 public. Specifically, it requires each “state department concerned and each city, county, or city
8 and county” to have an up-to-date copy of the code available for public inspection. In fulfilling its
9 statutory obligations to make Title 24 available, BSC incorporated language in its contracts
10 requiring the publishers to make Title 24 available at various public libraries as well as specific
11 state agencies that are concerned with Title 24. BSC also requires the publishers to make Title 24
12 available for no charge over the Internet. (Exhibit K at 000076, Exhibit L at 000096 - 000097,
13 Exhibit M at 000122, Exhibit N at 000141.) The free online access is notably not required by
14 statute and goes beyond the various public formats required by the Legislature. Petitioner
15 concedes that access is available in these various formats, yet still seeks Title 24 in a different
16 format than that required under the statute. BSC does not dispute that the public should have
17 access to Title 24 and has ensured that it does. However, there is no requirement in the Building
18 Standards Law, or in the PRA, that the record must be produced in any format other than that
19 delineated by the Legislature.

20 The right to public records is not absolute. The PRA recognizes an exemption that permits
21 an agency to withhold a record when the public interest served by nondisclosure of the record
22 clearly outweighs the public interest in disclosure (Gov. Code, § 6255; *Fredericks v. Super. Ct.*,
23 *supra*, 233 Cal.App.4th at p. 223.) As applied to this case, there is an immense public interest in
24 not disclosing Title 24, which is already available in hard copy and online, in the format the
25 demanded by Petitioner. The Legislature recognized the significant public interest in using the
26 model codes as a foundation for Title 24 is to promote national uniformity in building standards
27 laws, and many states, cities, and counties contract with the model code organizations for this
28 reason. (Decl. of Mia Marvelli at ¶ 8.) Moreover, BSC has neither the expertise nor the capacity

1 to promulgate and periodically update the entire content of Title 24, a body of law that is critical
2 for ensuring safety in so many distinct areas of construction. Consequently, BSC relies on the
3 model codes to create a baseline from which to promulgate Title 24. (Decl. of Mia Marvelli at ¶
4 6.) These model codes enjoy copyright protection to ensure that the model code organizations can
5 fund their operations by selling the model codes. This symbiotic statutory structure enables the
6 model code organizations to continue to publish and update the codes, providing them to the
7 states—and the public—at no cost. (Decl. of Mia Marvelli at ¶ 9.)

8 Disclosure in the manner insisted upon by Petitioner would contravene all of these
9 legislative goals and jeopardizes BSC's very ability to publish Title 24. Significantly, the
10 requested disclosure would impact BSC's ability to maintain a cohesive, up-to-date version of
11 Title 24. (Decl. of Mia Marvelli at ¶ 2.) Dissemination of electronic copies by an entity other than
12 BSC also raises concerns about the public relying on outdated language, as BSC and its
13 contractor continually update Title 24 with errata pages, emergency regulations, and intervening
14 code cycle regulations. (*Id.*) This would pose significant problems for individuals in the building
15 industry who rely on up-to-date regulations applicable to their industry. BSC already has a
16 mechanism in place to ensure that the most current version of Title 24 is available online and in
17 hard copy, and there is a significant public policy interest furthered in preventing the confusion
18 that would be caused by publication of out-of-date or inaccurate regulations.

19 Further, if BSC were required to provide Title 24 in Petitioner's requested format, where it
20 could be readily republished without any copyright protection, the model code organizations
21 would need to make major changes to their relationships with California and other states to ensure
22 the financial viability of continuing to publish and update the model codes. This change would
23 have three significant negative effects, among other considerations. First, BSC would have to
24 create wholesale an extensive process to publish and continually update Title 24 online and in
25 print at significant cost increases to the state, the users of the code, and the public at large.
26 Second, changes to Building Standards Law would be necessary to mandate a different process
27 for use of the model codes, affecting not only BSC, but all other state agencies and local
28 jurisdictions throughout the state that rely on Building Standards Law to adopt the code for use in

1 their jurisdictions. Third, this would fundamentally change how California obtains the model
2 codes from the model code organizations and promulgates Title 24.

3 In contrast, any additional benefit in requiring disclosure of Title 24 in the precise format
4 that the Petitioner has requested is minimal at best. The only additional benefit to the public from
5 disclosure in the format requested by the Petitioner would be to potentially make it easier for
6 members of the public to reproduce and republish Title 24, the entire text of which is already
7 publicly available at no cost in multiple formats, including hard copies at various physical
8 locations in every city and county in the state as well as on BSC's internet website.

9 Finally, as discussed above, in enacting the Building Standards Law, the Legislature itself
10 weighed these interests and decided to set forth a specific, detailed statutory framework which
11 includes direction on how Title 24 is to be made available to the public. (Health & Saf. Code, §
12 18942.) This public access includes making Title 24 available in multiple free options. This
13 framework would be unnecessary if the public could obtain regulations through the means sought
14 by Petitioner. Accordingly, the public harm of disclosure of Title 24 in the format that Petitioner
15 has requested clearly outweighs the public interest in continuing to make Title 24 available as
16 outlined by the Legislature in the Building Standards Law.

17 **II. THE PUBLIC RECORDS ACT EXEMPTS RECORDS FROM DISCLOSURE FOR WHICH**
18 **THERE IS COPYRIGHT PROTECTION**

19 The PRA recognizes exemptions to disclosure for otherwise responsive records. Here, some
20 of the records are, in whole or in part, records for which a third-party maintains a copyright
21 interest that exempts Title 24 from disclosure under the PRA in the format requested.³ BSC is
22 aware of existing copyright interests and has agreed to use the copyrighted material in a manner
23 that respects those legal rights. Petitioner's efforts to compel disclosure constitutes an attempt to
24 circumvent federal copyright interests.

25 The intervenors in this action (NFPA and ICC) have stated that the disclosure sought by
26 Petitioner here, which disregards their longstanding copyright interests in model codes, would

27 ³ California-specific amendments to Title 24 are significantly reliant on the model code
28 language and cannot be reasonably segregated from the copyrighted materials. To the extent BSC
has been provided a copy of the California-specific parts of Title 24, the format in which those
parts exist is such that those parts also cannot be segregated from the copyrighted materials.

1 severely limit their ability and incentive to invest the technical expertise and time necessary to
2 develop and update their standards. This would ultimately impact BSC's ability to avail itself of
3 the expertise afforded by the intervenors and other nonprofit entities that develop the model codes
4 upon which Title 24 is based. (See Memorandum of Points and Authorities accompanying the
5 Motion to Intervene by National Fire Protection Association, Inc. and International Code Council,
6 Inc. at p. 5.) The disclosure contemplated by Petitioner would also require BSC to violate
7 contractual arrangements that were entered into at the direction of the Legislature and that
8 recognize federal copyright interests. In addition, disclosure of Title 24 in the manner requested
9 by Petitioner (a format not otherwise publicly available) not only prohibits BSC from ensuring
10 Title 24 is sold at a reasonable price as required by the Legislature, but also prevents these
11 nonprofit model code organizations from protecting their works from unauthorized disclosure.

12 **A. Section 6254, Subdivision (k) Exempts Records From Public Disclosure for**
13 **Which There is a Federally Recognized Copyright Interest**

14 The PRA codified the public's access to government records, providing that "access to
15 information concerning the conduct of the people's business is a fundamental and necessary right
16 of every person in this state." (Gov. Code, § 6250.) A government agency is required to provide
17 access to "any writing containing information relating to the conduct of the public's business
18 prepared, owned, used, or retained by any state or local agency regardless of physical form or
19 characteristics." (Gov. Code, § 6252, subd. (e).) As discussed above, however, the PRA preserves
20 existing statutory exemptions. (Cal. Const., art. I, § 3, *Fredericks v. Super. Ct.*, *supra*, 233
21 Cal.App.4th at p. 223; see Gov. Code, §§ 6254 et seq. [exemptions to disclosure].) Government
22 Code section 6254, subdivision (k), provides that disclosure is not required for:

23 Records, the disclosure of which is exempted or prohibited pursuant to
24 federal or state law, including, but not limited to, provisions of the
Evidence Code relating to privilege.

25 In evaluating Petitioner's request under the provisions of the PRA, it is clear that BSC cannot
26 produce materials that are subject to federal copyright protection, as those protections are
27 incorporated into the PRA exempting such records from disclosure.

28 The United States Constitution authorizes Congress "[t]o promote the Progress of Science

1 and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to
2 their respective Writings and Discoveries.” (U.S. Const., art. I, § 8, cl. 8.) Thus, the Copyright
3 Act was enacted at 17 United States Code (U.S.C.) § 101 *et seq.* to protect original works of
4 authorship and provide exclusive rights to display, distribute, and publish a copyrighted work.
5 (*Feist Publications, Inc. v. Rural Telephone Service Co.* (1991) 499 U.S. 340, 349-350; 17 U.S.C.
6 § 106.) Copyright owners may institute actions for infringement of their exclusive rights under
7 the Federal Copyright Law. (17 U.S.C. § 501.) In order to make a prima facie case of copyright
8 infringement, the owner must establish ownership of a valid copyright and actual copying. (*Feist*
9 *Publications, Inc. v. Rural Telephone Service Co, supra*, 499 U.S. 340.) Federal registration of a
10 copyright with the copyright office is prima facie evidence of a valid copyright. (*Monge v. Maya*
11 *Magazine* (9th Cir. 2012) 688 F.3d 1164.)

12 In enacting copyright laws, the federal government has expressly prohibited the release of
13 materials subject to those laws except for in specified circumstances. (17 U.S.C. § 501.) This
14 express prohibition is imported into the PRA via Government Code section 6254, subdivision (k).
15 Petitioners cite no case where any court has refused to apply the exemption of subdivision (k)
16 when a legislature or a court has expressly prohibited the disclosure of information. Additionally,
17 Petitioners have not cited any case that refused to recognize copyright law as one of the express
18 prohibitions on disclosure that is incorporated into subdivision (k). To the contrary, the California
19 Attorney General recognized that copyright infringement is incorporated into the PRA as an
20 exemption from disclosure, opining that a school could refuse to honor a PRA request when
21 reproduction of the requested material would constitute a copyright infringement. (See 64 Cal.
22 Op. Att’y Gen. 186 (1981) at 12 [“it is clear that the Legislature in enacting the California Public
23 Records Act did not intend it to be used in a manner which would constitute a copyright
24 infringement.”].)⁴ Federal law expressly prohibits copyright infringement. (17 U.S.C. § 101 *et*
25 *seq.*) As such, Government Code section 6254 subdivision (k) exempts such records from
26 disclosure.

27 _____
28 ⁴ The Legislature has also acknowledged copyright interests in the context of exempting
specific records under the PRA. (Gov. Code, § 6254.9, subd (e).)

1 **B. BSC Must Withhold Title 24 Due to Copyright and Contract Interests of**
2 **Third Parties**

3 BSC is not the holder of the copyright interests at issue – those are held by the publishers
4 (NFPA, IAPMO, and ICC), which include the intervenors in this action (NFPA and ICC), and it
5 is expected that they will submit arguments in support of their copyright claims. However, there
6 is sufficient evidence in BSC’s contracts with the publishers setting forth the publishers’
7 copyright interests, the state statute recognizing the copyright interests of these model code
8 organizations, and public information that the records at issue have been filed with the federal
9 copyright office⁵ as bases upon which to withhold the records at issue.

10 As detailed above, BSC contracts with three model code organizations that develop
11 standards governing highly technical issues such as building and electrical safety to publish Title
12 24. The Legislature enacted the Building Standards Law as a framework to ensure that California
13 can leverage this industry expertise. The model codes at issue are developed by organizations that
14 are comprised of technical experts, industry representatives, academics, and government
15 employees, and they focus on narrow issues to resolve technical problems, ensure compatibility
16 across products, and promote public safety. Use of model codes eliminates costs to government
17 agencies in developing their own standards and leverages private sector expertise. (*American*
18 *Society for Testing & Materials v. Public Resource Org. Inc.* (D.C. Cir. 2018) 896 F.3d 427.) The
19 federal government has recognized the benefit of using model codes through incorporation by
20 reference as they: (i) eliminate the cost to Government of developing standards on its own; (ii)
21 provide incentives to establish standards serving national needs; (iii) promote efficiency and
22 economic competition through harmonized standards; and (iv) further the policy of reliance upon
23 the private sector to meet government needs for goods and services. (Federal Office of
24 Management and Budget Circular No. A-119 Revised, February 10, 1998.) In order to leverage
25 this expertise, BSC has obtained limited rights to use the copyrighted material, but the holders of
26 the copyrights still maintain ownership over their interests.

27
28 ⁵ ICC, NFPA, and IAPMO are the duly registered owner of copyrights in various model
codes they publish that can be publicly viewed at www.copyright.gov/public-records/.

1 **1. Contractual Provisions Relating to Use**

2 The contracts with these model code organizations afford BSC a nonexclusive license to
3 use and copy the model code language for specific purposes. But, as is set forth in the contracts
4 that govern the publication of the various parts of Title 24 and incorporate the model codes, the
5 model code organizations that developed those standards still maintain and hold legitimate
6 copyright interests in the materials they developed. The contracts for the publication of the
7 California Mechanical Code; the California Plumbing Code, the California Electrical Code; and,
8 the California Building Code, California Residential Code, California Fire Code and the
9 California Existing Building Code, all contain copyright language that the nonprofit model code
10 organizations are the sole copyright owners of each respective model code. (See Exhibit L at
11 000094, Exhibit M at 000115, Exhibit N at 000138.) The various model code organizations
12 provide the model codes in formats ranging from PDF to Word documents for BSC to use for
13 development of Title 24. (Exhibit L at 000096 – 000098, Exhibit M at 000117 – 000119, Exhibit
14 N at 000139 – 000142.) BSC also receives an electronic copy of the final text corresponding to
15 the final versions of the code that will be printed solely for code development purposes of the
16 subsequent codes. (Exhibit K at 000076, Exhibit L at 000096 – 000097, Exhibit M at 000118,
17 Exhibit N at 000141.) Each contract additionally authorizes BSC the nonexclusive license to use
18 and copy all or any portion of the model codes at issue solely to create and prepare Title 24 as
19 well as any Title 24 supplements, which includes emergencies and related errata sheets. (See
20 Exhibit L at 000095, Exhibit M at 000116, Exhibit N at 000139.) However, the contracts do not
21 transfer any ownership of any property licensed by the various model code organizations at issue
22 to BSC. (Exhibit L at 000095.) Thus, in addition to potential copyright violations, a finding that
23 requires BSC to produce records which contain model code language that was obtained through
24 those contractual provisions could put BSC in a position where BSC could be considered in
25 breach of contract.

26 In addition to the contractual provisions, California law recognizes that BSC cannot adopt
27 the text of the model codes except through incorporation by reference or by negotiating with
28 model code organizations to publish the text of the model codes. (Health & Saf. Code, §

1 18928.1.) This is a recognition that the model code organizations have a copyright interest in this
2 language. Finally, IAPMO, ICC and NFPA are the duly registered owner of copyrights in various
3 model codes they publish. Copyright owners may institute actions for infringement of their
4 exclusive rights under the Federal Copyright Law. (See 17 U.S.C. § 501.) In order to make a
5 prima facie case of copyright infringement, the owner must establish ownership of a valid
6 copyright and actual copying. Federal registration of a copyright with the copyright office is
7 prima facie evidence of a valid copyright. (See *Monge v. Maya Magazine* (9th Cir. 2012) 688
8 F.3d 1164.) Because there is prima facie evidence of copyright, BSC could subject itself to civil
9 liability for copyright infringement by copying and distributing model code language to Petitioner
10 regardless of how Petitioner intends to further use the records. (*Feist Publications, Inc. v. Rural*
11 *Telephone Service Co, supra*, 499 U.S. 340.)

12 **2. The Legislature Intended for Title 24 to be Made Public Consistent**
13 **with Health and Safety Code Section 18942**

14 Petitioner cites Government Code section 6270 (“Section 6270”) because it prohibits the
15 disclosure of “a public record subject to disclosure pursuant to this chapter to a private entity in a
16 manner that prevents a state or local agency from providing the record directly pursuant to this
17 chapter.” Although Petitioner’s arguments are specifically directed towards Respondent Office of
18 Administrative Law and their purported possession of the records at issue, it is notable here that
19 this section is not at issue with respect to BSC because the records are already publicly available
20 in hard copy and online. Petitioner points to no authority that suggests that the Legislature
21 intended to prohibit BSC from continuing to contract with a third-party for the publication of
22 Title 24 by enacting Section 6270. And, there is no basis for implying the Legislature intended
23 Section 6270 to repeal the publishing scheme of the Building Standards Law. Repeals by
24 implication are generally disfavored. (See *Center for Biological Diversity v. Department of Fish*
25 *and Wildlife* (2016) 1 Cal.App.5th 452, 466.) This is not a case where repeal by implication is
26 proper because the entire framework of the Building Standards Law would need to be revised and
27 Section 6270 does not address the “entire field” covered by the Building Standards Law. (See
28 *Professional Engineers in California Government* (2007) 40 Cal.4th 1016, 1038.) Further, Health

1 and Safety Code section 18942 was amended after the passage of Government Code section 6270,
2 thus the Legislature had the opportunity to amend the statutory framework to prohibit the practice
3 of only making records available in select public venues and through the publisher. Yet the
4 Legislature did not do so. By not amending the Building Standards Law in a manner that would
5 clearly fit Title 24 within Government Code section 6270, the Legislature made clear its intention
6 to preserve the contracting provisions to function as they always had. In so doing, the Legislature
7 recognized the unique role that the model code organizations play in California's efforts to keep
8 standards current, and thereby continued to specify Title 24's disclosure requirements under the
9 Health and Safety Code.

10 **C. Materials Do Not Lose Copyright Protections When They Are**
11 **Incorporated by Reference into the Law**

12 The cases cited by Petitioner do not compel a finding that materials incorporated into the
13 law by reference lose their copyright protections. For example, in *Veeck v. Southern Building*
14 *Code Congress International, Inc.*, the Fifth Circuit Court of Appeals held that model codes that
15 are adopted as law are part of the law and cannot be copyrighted. However, in doing so, the court
16 distinguished standards that are incorporated by reference (like those at issue in this case) from
17 those standards that are in fact adopted into the law. ((5th Cir. 2002) 293 F.3d 791.) Thus, the
18 Petitioner's reliance on *Veeck* is misplaced. Also, the Petitioner's reliance on *American Society*
19 *for Testing & Materials v. Public.Resource.Org, Inc.*, *supra*, 896 F.3d 427, is flawed because the
20 court remanded with instruction for the parties to assess the Fair Use exception and expressly did
21 not make any finding as to whether the "Constitution permits copyright to persist in works
22 incorporated by reference into the law." (*Id.* at 447.) In contrast to the cases upon which
23 Petitioner incorrectly relies, one court directly addressed this issue. Specifically, the Ninth Circuit
24 Court of Appeals held that standards incorporated into the law were still subject to copyright.
25 (*Practice Management Information Corporation v. the American Medical Association.* (9th Cir.
26 1997) 121 F.3d 516, 518-520.)

27 Additionally, insofar as the copyright of the model code language is an issue, the instant
28 case is distinguishable from both *County of Santa Clara v. Super. Ct.* (2009) 170 Cal.App.4th

1 1301 and *Georgia v. Public.Resource.Org, Inc.* (2019) 140 S.Ct. 1498, which Petitioner claims
2 preclude copyright arguments. In *County of Santa Clara*, the county argued that there was a need
3 to protect its own copyrightable intellectual property. The focus in that case was on whether a
4 public official may claim a copyright in its own office's creations. The court found that the
5 mandate of state access laws overrides a governmental agency's ability to claim "copyright in its
6 work unless the legislature has expressly authorized a public records exemption." (*Id.* at 1335,
7 citing *Microdecisions, Inc. v. Skinner* (Fla. Dist. Ct. of Appeals 2004) 889 So.3d 871.) The
8 court's holding does not implicate a situation whereby a state agency may possess and use records
9 that are subject to the copyright interests of a *third party*.

10 Notably, this is not a case where a government agency is attempting to secure a copyright in
11 its own works. Here, BSC cannot provide the records in the format requested because a separate,
12 third-party entity has a viable copyright interest in the records. BSC does not have any right to
13 obtain damages or enjoin a third party from infringement of any copyright. This right remains
14 with the model code organizations that hold the copyright to the model codes and is even
15 specifically delineated in one of the contracts. (See Exhibit N at 000145.) This is not a case of a
16 government entity attempting to secure a copyright in its own works, but a state agency adhering
17 to the terms upon which it was authorized to use a nonprofit third party's copyrighted work.
18 Consequently, *County of Santa Clara* is inapposite.

19 In *Georgia v. Public.Resource.Org, Inc.*, *supra*, 140 S.Ct. 1498, the U.S. Supreme Court
20 addressed a case that similarly involved materials developed by a contractor. In that case,
21 however, the materials were developed at the behest of a public entity, a legislatively created
22 commission. At issue were annotations created by the contractor *as part of the legislative duties*
23 *of Georgia*. The Court found there was no legitimate copyright interest in those works. The Court
24 based its decision on the government edicts doctrine that prevents an official empowered with the
25 force of law from authoring (and therefore obtaining a copyright in) the works they create. In the
26 present case, however, the model codes incorporated by reference by BSC are not created at the
27 behest of BSC nor for the specific and exclusive benefit of BSC. The model codes at issue are
28 developed by "nonprofit organizations that have developed hundreds of standards governing

1 highly technical issues such as building and electrical safety.” (See Notice of Motion and Motion
2 to Intervene by National Fire Protection Association, Inc. and International Code Council Inc.;
3 Memorandum of Points and Authorities at p. 4.) They are not used exclusively by California but
4 are also used by federal, state, and local jurisdictions across the United States due to the expertise
5 and high standards the organizations follow in developing the model codes. (*Id.*) There is no basis
6 to extend the government edicts doctrine that prohibits law-making officials from copyrighting
7 their own materials to the language developed by third party, nonprofit model code organizations.
8 *Georgia v. Public.Resource.Org, Inc.*, therefore, is inapt to the facts before this court as well.

9 Petitioner’s reliance on title 1 of the CCR to support a finding that the model codes cannot
10 maintain a recognizable copyright interest is also misplaced because Title 24 of the CCR is not
11 subject to the part of the APA that authorizes this section. As detailed above, the Health and
12 Safety Code governs the promulgation of Title 24 regulations. Health and Safety Code section
13 18930, subd. (a) requires that building standards be approved by BSC. Additionally, it requires
14 that the building standards be adopted in compliance with specific sections of the APA, namely,
15 Article 5, Government Code sections 11346-11348. These specific sections of the Government
16 Code set forth the procedural requirements for adoption, amendment, or repeal of administrative
17 regulations, including notice requirements (what must be included and timeframes for noticing);
18 what must be included in a regulatory package; requirements for economic impact analyses; and,
19 requirements for public hearings, among others. In addition, the Legislature directed that BSC
20 meet the intent of specific sections of APA in implementing an 18-month adoption cycle. (Health
21 & Saf. Code, § 18929.1.)

22 Had the Legislature intended the Building Standards Law to comply with all aspects of the
23 APA, it would have so specified instead of selecting only certain sections, as here. Yet Petitioner
24 relies on sections of the APA that are not applicable to Title 24. As Title 24 is only subject to
25 limited parts of the APA (Article 5), it is not subject to the other sections of the APA.⁶ Title 24 is
26 not subject to Government Code section 11342.4, which is the underlying authority for CCR, title

27 _____
28 ⁶ For example, Title 24 is not subject to the section of the APA that dictates that the CCR
must be made available for free online because that is in Article 4.

1 1, section 20, cited by Petitioner to preclude copyright interests, as that section is in Article 1 of
2 the APA. Thus, insofar as The Building Standards Law is not subject to Government Code
3 section 11342.4, it is also not subject to CCR, title 1, section 20.

4 **III. BSC COMPLIED WITH THE PUBLIC RECORDS ACT BY MAKING RECORDS**
5 **AVAILABLE ELECTRONICALLY**

6 BSC complied with the PRA when it required the third-party non-profit publishers to make
7 Title 24 available online. The PRA requires that records be open to inspection at all times during
8 office hours and that copies shall be made promptly upon payment of required fees. (Gov. Code,
9 § 6253, subs. (a) and (b).) Pursuant to Government Code section 6253.9, the PRA also requires
10 that a public record be made available in any electronic format possessed by an agency. However,
11 as discussed above, government entities can meet this requirement by directing a requestor to its
12 website when it has posted those materials online. (Gov. Code, § 6253, subd. (f).) In 2016, the
13 Legislature recognized the efficiency, for both the requestor and the agency at issue, to post
14 records that have already been deemed disclosable online and to refer any requests to those online
15 records. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2853 (2015-2016 Reg.
16 Sess.) as amended March 18, 2016.) Thus, BSC's direction to the website where the records are
17 publicly available satisfies the PRA requirements.⁷ Notably, the link that BSC provided to the
18 requestor is also the same link that BSC provides any other requestor, including other state
19 agencies, when it receives a request to view Title 24. (Decl. of Mia Marvelli at ¶ 5.) Additionally,
20 this public availability also meets the intent of the PRA to prevent secrecy in government and to
21 hold the government accountable for its actions. (*Fredericks v. Super. Ct.*, *supra*, 233 Cal.App.4th
22 at p. 223.)

23 ///

24 ///

26 ⁷ Although Petitioner initially requested Title 24 in any "electronic format," BSC is aware
27 that Petitioner does not appear to be interested in PDFs that are not machine readable because
28 Petitioner declined this format when offered to Petitioner by Respondent Office of Administrative
Law. BSC therefore understands Petitioner to be interested instead in a machine-readable format.
BSC does not possess Title 24 in this format. (Decl. of Mia Marvelli at ¶ 4.)

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CONCLUSION

For the foregoing reasons, BSC respectfully requests that the Court deny the writ petition.

Dated: December 27, 2021

Respectfully submitted,

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