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Via Email and U.S. Mail

David Hicks
Senior Public Information Officer
SANDAG
401 B Street, Suite 800
San Diego, CA 92101
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Re: California Public Records Act Request

Dear Mr. Hicks:

On behalf of the Cleveland National Forest Foundation and pursuant to the California Public Records Act ("Act") and the Sustainable Communities and Climate Protection Act ("SB 375"), we request that the San Diego Association of Governments ("SANDAG") make available for review any and all modeling files from the adopted 2007 Regional Transportation Plan ("RTP") for the current 2006 and reasonably expected 2030 scenarios. Pursuant to the Act, you are required to respond to this request within ten (10) days. Gov't Code § 6256.

This request includes, but is not limited to, the following documents:

- 1) All TransCAD script files prepared for the purpose of generating model outputs for the adopted 2007 RTP for the current 2006 and reasonably expected 2030 scenarios.
- 2) All compiled non-TransCAD executable files called by TransCAD to generate model outputs for the adopted 2007 RTP for the current 2006 and Reasonably Expected 2030 scenarios.

The requested files are referred to hereinafter collectively as "script files."

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We understand that the Endangered Habitats League and Move San Diego submitted a prior Public Records Act request for the script files. We have been informed that SANDAG denied the request for these files, citing Government Code section 6254.9's exemption for computer software.

SANDAG's decision not to release the script files violates California law. SANDAG must make these files available for public review because they are a "writing" containing information concerning the agency's regional transportation planning process, and thus constitute an identifiable public record under the Act. Pursuant to Government Code section 6252(g), "[w]riting" includes information recorded electronically, and any record "upon any tangible thing [of] any form of communication," including electronic files containing data and assumptions used in modeling a region's transportation network. *See also* Gov't Code § 6253.9. Government Code section 6254.9's exemption does not apply to the requested script files because these files are not computer software. In fact, the files contain data and information used by SANDAG as the agency's own input to the transportation modeling software. As such, these files are subject to disclosure as electronically stored public records under Government Code section 6253.9. The script files also must be released pursuant to SB 375. *See* Gov't Code § 14522.2(a).

I. Government Code Section 6254.9's Exemption for Computer Software is Inapplicable.

Government Code section 6254.9 provides that "computer software developed by a state or local agency is not itself a public record." The statute defines "computer software" to include "computer mapping systems, computer programs, and computer graphics systems." It states further that "nothing in this section is intended to affect the public record status of information merely because it is stored in a computer." Moreover, according to the California Constitution, SANDAG must construe its exemption narrowly. Cal. Const. art. I, § 3(b)(2).

Even though SANDAG wrote script files in standard programming languages and even though the scripts run on standard desktop computers, these files do not constitute "programs" for purposes of the computer software exemption. As the California Attorney General ("AG") explains, the central inquiry is whether the scripts contain "basic data" or are a "unique computer program to process such data." 88 Op. Cal. Atty. Gen. 153 (2005). According to the AG, while computer software tells hardware how to process data, the data themselves are inputs on which the software acts. *Id.* The scripts at issue here do not enable hardware to process data, as computer software does. Instead, the scripts serve as SANDAG's informational input to the

agency's TransCAD software, injecting the agency's own assumptions and data into the model.

The AG identified this distinction as critical in determining whether electronic parcel map data qualified as "computer software" under the "computer mapping systems" element of the exemption to the Act. *Id.* The AG concluded that parcel map boundary data were *not* computer mapping systems, but rather the basic data on which the mapping software systems relied to create the model of the area. SANDAG's script files here are similar to the parcel map data because the scripts serve as the agency's input and assumptions into the TransCAD modeling software. The scripts are not a "unique computer program" used to *process* the data and assumptions, but rather *are* the data and assumptions themselves. *See id.*

According to the reasoning of AG Opinion, for Section 6254.9's exemption to apply, the script files would have to constitute stand-alone "computer software" files. This is not the case. SANDAG's scripts are operable only when used as an input into a TransCAD model; they will not run on their own and thus are not computer programs. In this regard, the scripts are similar to formulas used in the Microsoft Excel software: such formulas embody the user's instructions and assumptions to create charts and graphs; the formulas themselves are not the program. Just as a public agency could not withhold Excel formulas used to create public documents, so SANDAG here cannot withhold its script files, which contain the agency's unique input to the TransCAD program.

Since the scripting files provide fundamental inputs to the transportation models, including the agency's assumptions regarding certain future events and decisions, SANDAG must make them available publicly. Even SANDAG acknowledges that it created the scripts to provide agency input into the model, not to serve as the model itself. *See* Email from Julia Coleman to Norm Marshall, October 23, 2009 ("The scripting files . . . are created by SANDAG . . . to . . . produce specialized output, [and] prepare input for model procedures.") Given the broad purpose and scope of the Public Records Act, it cannot seriously be argued that the Legislature, in enacting Section 6254.9, intended to prevent an agency's disclosure of such fundamental data and assumptions. Instead, the purpose of the exemption was to allow public agencies to protect stand-alone, agency-created computer software, so that agencies could sell or lease those programs. 1988 Cal. Legis. Serv. 447 § 1 (West) (Legislative Counsel's Digest: "This bill would provide that computer software developed by a state or local agency is not itself a public record under the act and would authorize the agency to sell, lease, or license the software for commercial or noncommercial use"). Even SANDAG does not claim that the script files are software commodities that it would sell or lease.

For all these reasons, the “computer software” exemption to the Public Records Act is inapplicable here.

II. The Sustainable Communities and Climate Protection Act, SB 375, Requires Disclosure of All Transportation Modeling Files, Including the Script Files.

SB 375 provides separate authority requiring SANDAG to release the script files for public review. This recent legislation, which calls for comprehensive regional transportation planning, includes a provision expressly requiring metropolitan planning organizations, such as SANDAG, to disclose their transportation models and the underlying data, assumptions and results. Government Code section 14522.2(a) provides:

A metropolitan planning organization shall disseminate the methodology, results, and key assumptions of whichever travel demand models it uses in a way that would be useable and understandable to the public.

Under any plain reading of Section 14522.2(a), SANDAG is required to disclose the script files. In fact, these files exactly embody the “methodology” and “key assumptions” of the agency as it models and plans transportation infrastructure for the region.

Significantly, Section 14522.2 specifies that SANDAG must disseminate the information in a “useable” manner. This means that the agency must provide all the information used to complete the transportation modeling, excepting the TransCAD program itself. Refusing to release the script files, which embody the agency’s fundamental modeling assumptions contravenes SB 375’s mandate to make modeling information available and useable.

The legislative history of SB 375 emphasizes the importance of ensuring that regional transportation agencies provide their modeling information directly to the public. Originally, this section only required the Department of Transportation to develop *guidelines* for agencies to use in disseminating their methodology and results. SB 375 as amended April 17, 2007.¹ The Senate Appropriations Committee then

¹ SB 375 text as of April 17, 2007, *available at* http://leginfo.public.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20070417_amended_sen_v98.html.

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amended this section to *require* agencies to disseminate their methods and results. SB 375 as amended May 2, 2007.² Only full public access to agency transportation models complies with this mandate and fulfills the statute's goal of improving regional transportation modeling.

III. Conclusion

For the foregoing reasons, we request that SANDAG release the script files for public review. The agency cannot rely upon the Public Record Act's narrow "computer software" exemption to withhold scripts used as inputs to its modeling software; these files are not stand-alone software, but rather data and assumptions critical to the agency's transportation planning decisions. SB 375 also expressly requires release of SANDAG's script files, which embody the "methodology" and "key assumptions" that the agency used in its transportation modeling.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Rachel B. Hooper

RBH:JHM

cc: Julia Coleman, Associate Legal Counsel, SANDAG (jco@sandag.org)
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² SB 375 text as of May 2, 2007, available at http://leginfo.public.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20070502_amended_sen_v97.html.