

American Civil Liberties Union Foundation
of Southern California, et al. v. County of
Los Angeles, et al.
BS 143004

Decision on Petition for Writ of Habeas Corpus:
denied
ORIGINAL FILED
Superior Court of California
County of Los Angeles

AUG 27 2014

Sherri R. Carter, Executive Officer/Clerk
By Annette Fajardo, Deputy

Petitioners American Civil Liberties Union Foundation of Southern California (“ACLU”) and Electronic Frontier Foundation (“EFF”) seek a writ of mandate to enforce the California Public Records Act (“CPRA”) against Respondents County of Los Angeles (“County”), its Sheriff’s Department (“LASD”), the City of Los Angeles (“City”) and the Los Angeles Police Department (“LAPD”).

The court has read the moving papers, oppositions, and reply, heard oral argument, and renders the following decision.

A. Statement of the Case

Petitioners commenced this proceeding on May 6, 2013. The Petition alleges in pertinent part as follows.

Petitioner ACLU-SC is a non-profit organization under the laws of the state of California, and is an affiliate of the American Civil Liberties Union (“ACLU”), a national organization of 500,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and the nation’s civil rights law.

Petitioner EFF is a not-for-profit corporation established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco, California and Washington, D.C. EFF has worked for more than 20 years to inform policymakers and the general public about civil liberties issues related to technology and to protect civil liberties, privacy, consumer interests, and innovation in new technologies.

Respondent County is a local public agency within the meaning of Government Code section 6252(d). LASD is a department of the County.

Respondent City is a local public agency within the meaning of Government Code section 6252(d). LAPD is a department of the City.

In August through October 2012, Petitioners submitted requests for records concerning the use by LASD and LAPD of Automated License Plate Recognition (“ALPR”) tools. Respondents released some records to Petitioners but those releases were inconsistent and did not include the full scope of records requested by Petitioners. Respondents refused to release several categories of requested records. By providing inconsistent releases and refusing to release other records, Respondents have violated their legal duties.

B. Governing Law

The CPRA was enacted in 1968 to safeguard the accountability of government to the public. San Gabriel Tribune v. Superior Court, (1983) 143 Cal.App. 762, 771-72. Govt. Code¹

¹All further statutory references are to the Government Code unless expressly stated otherwise.

section 6250 declares that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” The CPRA’s purpose is to increase freedom of information by giving the public access to information in possession of public agencies. CBS, Inc. v. Block, (1986) 42 Cal. 3d 646, 651. The CPRA was intended to safeguard the accountability of government to the public, and it makes public access to governmental records a fundamental right of citizenship. Wilson v. Superior Court, (1996) 51 Cal.App.4th 1136, 1141. This requires maximum disclosure of the conduct of government operations. California State University Fresno Assn., Inc. v. Superior Court, (2001) 90 Cal.App.4th 810, 823.

The CPRA makes clear that “every person” has a right to inspect any public record. §6253(a). The term “public record” is broadly defined to include “any writing containing information relating to the conduct of the people’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. §6252(e). The inspection may be for any purpose; the requester’s motivation is irrelevant. §6257.5.

The right to inspect is subject to certain exemptions, which are narrowly construed. California State University, 90 Cal.App.4th at 831. The exemptions are found in sections 6254 and 6255. In pertinent part, public records exempt from disclosure include (1) personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy [Section 6254(c)], and (2) records subject to a “catch-all” exemption where the facts of the particular case demonstrate that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. §6255. The burden of demonstrating that exemptions apply lies with the governmental entity. §6255.

A petition for traditional mandamus is appropriate in actions “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station....” CCP § 1085. This includes actions to compel compliance with CPRA. § 6258, 6259. No administrative record is required for traditional mandamus. The court must uphold the agency’s action unless it is “arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner’s rights.” Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

C. Statement of Facts

1. EFF’s Requests to LAPD

On August 30, 2012, Petitioner EFF sent a CPRA request to the LAPD, seeking records related to LAPD’s use of Automated License Plate Recognition (“ALPR”) tools, including, specifically:

- a. all ALPR data collected or generated between 12:01 AM on August 12, 2012 and 11:59 PM on August 19, 2012, including, at a minimum, the license plate number, date, time, and location information for each license plate recorded;
- b. any policies, guidelines, training manuals and/or instructions on the use of ALPR technology and the use and retention of ALPR data, including records on where the data is stored, how long it is stored, who has access to the data, and how they access the data.

EFF stated that its request applied to all documents in LAPD's possession, including electronic records. It also included documents that were created by a member of another government agency or a member of the public, including ALPR software and device manufacturers or vendors. EFF asked that if LAPD contended that specific portions of any documents were exempt from disclosure, then LAPD provide the non-exempt portions.²

On September 14, 2012, LAPD responded to the request. LAPD agreed to produce, upon payment of a fee,³ the "PIPS Technology Automatic License Plate Recognition Vehicle User Guide," the "PIPS Technology Quick Start Guide," and copies of the City's records retention policies. LAPD refused to produce ALPR data generated between August 12 and August 19, 2012, stating that the "database and the data contained therein are exempt from disclosure because it contains official information" and relying on sections 6254(k), 6255, and 6254(f).

On October 16, 2012, LAPD produced the agreed upon records, but did not provide ALPR data generated between August 12 and August 19, 2012.⁴

2. ACLU's Request to LAPD

On September 18, 2012, ACLU sent a request to LAPD for records concerning policies, procedures, training, and practices related to its use of ALPR and GPS devices, including how that information is shared with other agencies.

On October 31, 2012, LAPD responded to ACLU's request. LAPD agreed to produce a variety of records, but did not produce requested records related to sharing of ALPR data.

ACLU contends that LAPD possesses records related to the sharing of ALPR data with other law enforcement agencies, as evidenced by a PowerPoint presentation produced by LASD to EFF suggesting that ALPR data gathered by other agencies, including LAPD can be searched by LASD personnel.

3. EFF's Request to Los Angeles Sheriff's Department

On September 4, 2012, Petitioner EFF sent a CPRA request to LASD, seeking (1) all ALPR data collected between 12:01 a.m. on August 12, 2012 and 11:59 p.m. on August 19, 2012, and (2) any policies, guidelines, training manuals and/or instructions on the use and retention of ALPR, including records on how it is stored, where it is stored, who has access, and

²The records requested are public records as defined in the CPRA. See §6252(e).

³On October 10, 2012, EFF sent a check to LAPD for \$2.40 to cover processing costs related to its CPRA request.

⁴Petitioners rely on a June 1, 2012, *LA Weekly* report that the LAPD and LASD "are two of the biggest gatherers of automatic license plate recognition information [and] have logged more than 160 million data points — a massive database of the movements of millions of drivers in Southern California." The *Weekly* article noted that ALPR "units continuously scan and photograph every license plate within view, logging the time and location of each, and that "Police have already conducted, on average, some 22 scans for every one of the 7,014,131 vehicles registered in L.A. County."

how they access the data.⁵

On September 5, 2012, LASD refused to produce the ALPR data generated between August 12 and August 19, 2012, asserting the records were exempt pursuant to sections 6254(f), (k) and 6255(a). LASD agreed to produce records responsive to the second part of EFF's request upon payment of a fee.⁶

On October 15, 2012, LASD produced the following records: (1) "Field Operations Directive 09-04 — Automated License Plate Recognition System" (Directive 09-04"), and "Department Policies and Guidelines." LASD also produced a CD that contained a PowerPoint presentation titled "ASAP: Advanced Surveillance and Protection" that discussed LASD's ALPR program (the "Powerpoint").

LASD has not provided Petitioner with ALPR data generated between August 12 and August 19, 2012.

4. ACLU-SC's Requests to Los Angeles Sheriff's Department

On August 10, 2011, ACLU sent a CPRA request to LASD seeking records related to LASD's use of ALPR tools, in addition to records related to a variety of other surveillance technologies. Among the requested records were (1) "All policies, procedures, and practices governing use by the department of GPS Tracking Devices and/or ALPRs", (2) "All policies, procedures, training, and practices governing and/or limiting the purposes for which information obtained through use of GPS Tracking Devices and/or ALPRs may be used by the department or shared with other (federal, state or local) government agencies or non-governmental agencies." and (3) "data policies relating to the maintenance and retention of information obtained through GPS Tracking Devices and/or ALPRs, including but not limited to policies detailing how records of such information are kept, databases in which they are placed, limitations on who may access the records and for what purposes, and circumstances under which they are deleted."

On September 2, 2011, LASD relied on the investigatory file exemption in section 6254(f) and declined to produce the requested records.

On September 18, 2012, ACLU renewed the three requests concerning policies and procedures, arguing that they would not be exempt as investigatory files.

On October 15, 2012, LASD produced three documents: (1) Directive 09-04, (2) Memorandum on Automated License Plate Recognition System dated September 5, 2012 ("September 5, 2012 Memo"), and (3) "Century Station Order #72 — Advanced Surveillance

⁵According to the June 1, 2012 *LA Weekly* article, by June 2012 LASD had "77 [ALPR] devices and another 200 in procurement."

A March 2008 Police Chief magazine article by LASD Lieutenant Scott Edson noted: "ALPR systems can scan up to 8,000 license plates during the course of a single shift." The article stated that, as of March 2008, LASD had 17 mobile ALPR units deployed across several patrol stations, six fixed ALPR cameras in the City of Compton, four fixed cameras in La Habra Heights, and more mobile and fixed units in the procurement process.

⁶On October 10, 2012, EFF sent a check to LASD for \$6.11 to cover processing costs related to its request.

and Protection" ("Century Order #72").

Directive 09-04 states that LASD's ALPR system uses "hot lists" which are "comprised of user defined data that is manually input into the informational data file so that ALPR users will be alerted whenever a 'vehicle of interest' is located." The policy directive explained that "[c]urrent use of hot lists include AMBER alerts and vehicles associated with 290 sex registrants." The document notes: "Often times, these hotlists will identify a 'vehicle of interest' which is not necessarily wanted for a crime (ex: sex registrants vehicle). Personnel must use discretion and in some cases have independent information justifying a traffic stop."

To learn more about the hot list system, ACLU sent LASD a followup request on October 22, 2012, asking for several different categories of records related to the hot list system.

In a letter dated December 5, 2012, LASD declined to provide records for two of the requests, indicating that "[t]he number and nature of currently existing 'hot lists'" and "[t]he number of vehicles and/or persons currently placed on all existing 'hot lists,' cumulatively and per 'hot list'" were investigatory files exempt pursuant to section 6254(f).

LASD has not produced any training documents responsive to ACLU's first request, and has not produced the same documents produced to EFF's similar requests. LASD has not produced records responsive to ACLU's second request concerning its hot lists, and has not produced records related to the sharing of ALPR data with other law enforcement agencies.

5. John Gaw Declaration

John Gaw ("Gaw") is employed by LASD as a Sergeant assigned to the Technical Services Division, Communications and Fleet Management Bureau, Advanced Surveillance and Protection Unit ("ASAP"). He is responsible for the development and implementation of LASD policies, procedures, and practices regarding the use of ALPR technology. Gaw Decl., ¶¶1-2.

ALPR technology is a computer-based system that utilizes special cameras to capture a color image as well as an infrared image of a license plate. The infrared image is converted into a text file using Optical Character Recognition ("OCR") technology. The text file is automatically compared against an "informational data file" or "hot list." If a match is found, the user is notified of the "hit" by an audible alert and an associated notation on the user's computer screen. Gaw Decl., ¶3. LASD uses ALPR technology to investigate specific crimes that involve motor vehicles, including but not limited to stolen motor vehicles, Amber alerts that identify a specific motor vehicle, warrants that relate to the owner of a specific motor vehicle, and license plates of interest that relate to a specific investigation being conducted by LASD investigatory personnel. Gaw Decl., ¶4.

The investigatory records generated by ALPR units are referred to as plate scan data. Plate scan data collected from ALPR units is transmitted to an ALPR server, which resides within LASD's confidential Sheriff's Data Network ("SDN"). Plate scan information is retained for a minimum period of two years. LASD would prefer to retain plate scan information indefinitely but is limited by storage considerations. The ALPR server houses both the informational data files and ALPR plate scans. Gaw Decl., ¶5.

Plate scan data may be queried for use in subsequent law enforcement investigations. Access to plate scan data is restricted to approved law enforcement personnel within LASD and within other law enforcement jurisdictions with which LASD shares data. Access to plate scan data is for law enforcement purposes only. Any other use of plate scan data is strictly forbidden.

The use of plate scan data by law enforcement personnel is governed by Manual of Policies and Procedures sections 3-07/210.00, 3-07/220.00, and 3-07/220.20, which outlines permissible and prohibited uses of LASD computer resources, and penalties for violation of these policies. All LASD personnel with access to the SDN are required to execute a User Acknowledgment of Electronic Communications Policy confirming their knowledge of and agreement to abide by LASD policies and procedures related to the use of the SDN. Gaw Decl., ¶6,

LASD maintains the following policies, procedures and practices regarding the use of ALPR technology: (1) Century Station Order #72, (2) the September 5, 2012 Memo, (3) Directive 09-04, and (4) the Powerpoint. The Department does not maintain user manuals for the use of ALPR technology because the ALPR interfaces are intuitive and do not require extensive training. Gaw Decl., ¶7.

Individual stations and units deploy ALPR technology subject to these policies, procedures and practices. Gaw Decl., ¶8.

6. Daniel Gomez Declaration

Daniel Gomez is a Sergeant II with the LAPD, currently assigned as the Assistant Officer in Charge, Tactical Technology Section (“TTS”), Information Technology Bureau. He supervises all TTS activities, which includes testing, procuring, managing, and deploying license plate recognition technology.⁷ Gomez Decl., ¶1.

Gomez reviewed the records produced by LAPD in response to the public records Act requests of ACLU and EFF. These records include numerous documents which reflect how the technology works and LAPD’s procurement of ALPR technology, and policies governing retention. Gomez Decl., ¶3.

The LAPD first started testing ALPR technology in 2004. LAPD has 242 ALPR-equipped vehicles distributed throughout its police stations and in several specialized sections. There are also 32 fixed position ALPR cameras in Southeast Area and Hollenbeck Area. Gomez Decl., ¶4.

LPR is an extremely valuable investigative tool. It has been instrumental in detecting and solving numerous crimes and for critical infrastructure protection. For instance, the data captured by the LAPD mobile ALPR system was used in identifying a vehicle that was present at the scene of a robbery where a gun was used. This data allowed investigators to use other departmental resources and investigative techniques to ascertain that the vehicle license plate was directly involved with the robbery. In another case, a fixed camera in Southeast Area captured a vehicle license plate that was later determined by the investigation was directly involved in a homicide. ALPR’s immediate investigative use is its ability to almost immediately identify vehicles that are stolen, wanted, or associated with an AMBER Alert. Gomez Decl, ¶5.

Without the aid of ALPR, an officer must observe a license plate and either manually enter the number into a mobile data computer inside the patrol car or use the radio system to communicate to LAPD dispatch to determine whether the vehicle may be stolen or otherwise associated with a crime. With ALPR, this determination is made almost instantly for all vehicles in the immediate vicinity of the patrol car. Further, the ALPR system is designed with a fixed

⁷Although Gomez uses the acronym LPR, the court will refer to APLR.

focal length and reads only numbers. This is especially significant as it relates to vehicles equipped with the mobile ALPR since the system does not use any other criteria -- only the presence of numbers. Gomez Decl., ¶6.

LAPD queries the stored ALPR data based for the specific purpose of furthering an investigation. If LAPD were required to turn over raw ALPR data, its value as an investigative tool would be severely compromised. For instance, a criminal would be able to request all ALPR data associated with the license plate of his or her vehicle, thereby learning whether LAPD has evidence regarding his or her whereabouts on a particular date and time or near a particular location. This could result in the potential destruction of evidence. The requesting individual could use the data to try and identify patterns of a particular vehicle. Unlike law enforcement, which uses additional resources to validate captured ALPR information, a private person could base assumptions about the vehicle driver's conduct solely on the ALPR data. Gomez Decl., ¶7.

Segregating data associated with active criminal investigations is not feasible. The system utilized by the LAPD does not have the capability as a native function to segregate data based on specific parameters. Gomez Decl., ¶8.

D. Analysis

This case primarily concerns ALPR data generated by LAPD and LASO during the period between August 12 and August 19, 2012. It is undisputed that the records in question (1) qualify as public records, and (2) are in Respondents' possession. See Consolidated Irrigation District v. Superior Court, (2012) 205 Cal.App.4th 697, 709. Therefore, Petitioners have met their burden of proof; the burden shifts to Respondents to demonstrate that the records are exempt.

1. Section 6254(k)

Section 6254(k) exempts records if state or federal law exempts or prohibits disclosure, including "provisions of the Evidence Code relating to privilege."

a. Official Information

The County, but not the City, claims that the official information privilege (Ev. Code §1040), which provides that official information acquired by a public employee in confidence is privileged if (1) disclosure is forbidden by federal or state law or (2) the need for nondisclosure outweighs the interest in disclosure in the interest of justice. Official information is protected from disclosure where the public interest in maintaining confidentiality clearly outweighs the public interest in disclosure. Black Panther Party v. John Kehoe, (1974) 42 Cal.App.3d 645, 657. To make this determination, courts evaluate whether disclosure would serve the CPRA's legislative purpose of shedding light on an agency's performance of its statutory duties. City of San Jose v. Superior Court, supra, 74 Cal.App.4th at 1019. This in turn must be compared to the public interest in confidentiality of the records in question. Id. at 1018.

The County contends that ALPR data is "official information" because it is part of the investigation files that LASD compiles regarding its investigation of crimes involving motor vehicles. The County notes that the contents of police investigation files are confidential: "Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential." County of Orange v. Superior Court, (2000) 79 Cal.App.4th 759, 764. "It is not only where a witness requests that his statement be kept in confidence, but in all cases of crime

investigation that the record and reports are privileged.” *People v. Otte*, (1989) 214 Cal.App.3d 1522, 1532 (citation omitted). The Information Practices Act (Civ. Code §1798 *et seq.*), specifically protects information that is “compiled for the purpose of a criminal investigation of suspected criminal activities, including reports of informants and investigators, and associated with an identifiable individual.” Civ. Code §1798.40(b). *See* Penal Code §11107 (requiring law enforcement agencies to submit crime data reports to the Attorney General which may be submitted confidentially due to criminal investigations). County Opp. at 8.

The County notes that case law confirms that the public interest in disclosure of investigatory materials is clearly outweighed by the public interest in investigation of crime. *County of Orange v. Superior Court*, *supra*, 79 Cal.App.4th 759, 767. ALPR data is official information generated to investigate crimes involving motor vehicles, child abduction and murder. Gaw Decl., ¶4. The County argues that the public interest in the investigation and prosecution of these crimes clearly outweighs the public interest in the disclosure of ALPR data. Therefore, the official information privilege protects ALPR data, which is exempt under section 6254(k). County Opp. at 8-9.

The problem, as noted by Petitioners (Op. Br. at 7-8) and never addressed by the County, the official information privilege only protects records “acquired in confidence” or provided by a confidential source. *Id.* at §1040(a); *see also, e.g., Ochoa v. Superior Court*, (2011) 199 Cal.App.4th 1274, 1283 (information provided by prison informants). ALPR data is collected from vehicle license plates displayed to the public. A license plate displayed to the public cannot be deemed to have been submitted by the licensee, or received by LASD, in confidence. LASD admits it collects data that is publicly available, including where a vehicle is at any given time when on public property or publicly viewable.

Given that ALPR data is not acquired in confidence, the official information privilege does not apply and the court need not conduct the balancing test of Ev. Code section 1040.⁸

b. The Right of Privacy

The City, but not the County, argues Respondents argue that ALPR data is exempt from disclosure under section 6254(k) because it is prohibited by the protection of privacy as an inalienable right under article 1, section 1 of the California Constitution (“article 1, section 1”). Petitioners acknowledge that members of the public have a strong privacy interest in the location information contained in ALPR data protected by article 1, section 1.

Article 1, section 1 does not on its face create a privilege exempt under section 6254(k). Even where there is a constitutionally protected privacy interest in a public record, the CPRA requires disclosure of the public record unless an exemption applies. Where the CPRA requires a

⁸The County also argues that the production of ALPR data is likely to lead to the disclosure of personal identifying information that is protected by statute, such as the home address of a vehicle owner, which is kept confidential by the DMV. *See* Veh. Code §1808.21. While ALPR data does not itself contain the home address of a vehicle owner, license plate numbers may lead to this information through the use of databases containing reverse lookup capabilities, such as LexisNexis and Westlaw. County Opp. at 9. This potential use of ALPR data simply does not bear on whether the official information exemption applies.

balancing of the interest in disclosure against a privacy interest, it says so. For example, section 6254(c) exempts disclosure of personnel, medical, or similar files where it would constitute an unwarranted invasion of privacy. This exemption requires a balancing of the public's interest in disclosure against the individual's interest in personal privacy. International Federation of Professional & Technical Engineers v. Superior Court, (“IFPTE”) (2007) 42 Cal. 4th 319, 329-30 (balancing of public interest in disclosure of public employee salary information against employee's privacy interest required disclosure). A privacy interest in a public record does not by itself exempt the record from disclosure under the CPRA.⁹

2. Section 6254(f)

Section 6254(f) exempts from disclosure the “investigatory files” and “records of investigation” of a local police agency. Both the City and County rely on these provisions to conclude that APRL data is exempt.¹⁰

a. Investigatory Files

Section 6254(f) exempts “investigatory...files compiled by any...local agency for correctional, law enforcement, or licensing purposes...”

The exemption for investigatory files is broad in nature. Williams v. Superior Court, (“Williams”) (1993) 5 Cal.4th 337, 349. Instead of adopting FOIA's case-by-case approach with specific criteria to determine the exemption, the Legislature provided for the complete exemption of such files, with disclosure of information derived from the records. Id. at 350, 353 (criminal investigation file of two deputy sheriffs).¹¹

⁹The invasion of the constitutional right of privacy is a separate cause of action which could result in injunctive relief. The elements of a claim for invasion of privacy under article 1, section 1 are: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) a serious invasion of the privacy interest. Hill v. National Collegiate Athletic Assn., (1994) 7 Cal.4th at 39-40. This showing requires evidence of harm from the privacy invasion, as well as a balancing of the competing privacy and nonprivacy interests. IFPTE, supra, 42 Cal.4th at 338. Respondents have not shown any actual harm from disclosure of ALPR data. In any event, the balancing of interests is considered in connection with section 6255(a)'s catch-all *post*.

¹⁰Although Petitioners address the prospect (Op. Br. at 10-11), neither Respondent contends that ALPR data is exempt under section 6254(k) because it is intelligence information that (1) identifies individuals that police suspect of criminal activity, (2) identifies confidential sources, or (3) contains information supplied in confidence by its original source, or constitutes law enforcement records of security procedures.

¹¹The derivative records required to be disclosed are information about arrests and arrestees (§6254(f)(1)) and complaints and requests for assistance (§6254(f)(2)). The required disclosure does not apply if it would endanger an investigation, related investigation, or personal safety of an involved person. Id. at 349. ALPR data consists of four fields of information: license plates, dates, time, and locations. The parties agreed at hearing that ALPR data is not derivative

Not every file is an investigatory file for purposes of section 6254(k). The law does not provide[] that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labeled ‘investigatory.’ Uribe v. Howie, 19 Cal.App.3d 194, 212-13 (routine farmer reports of pesticide spraying were not investigatory files for licensing purposes). Information in a file is investigatory material only when the prospect of enforcement proceedings becomes concrete and definite. Williams, supra, 5 Cal.4th at 355 (citing Uribe).

ALPR data cannot be considered an “investigatory file” because it is collected and retained indiscriminately of whether “enforcement proceedings [are] concrete and definite.” Id. at 355. ALPR cameras automatically record all plates within view without the driver’s knowledge and without any level of suspicion or relationship to an ongoing criminal investigation. At hearing, Respondents did not dispute the conclusion that ALPR data is not an investigatory file.

b. Records of Investigations

Section 6254(f) exempts ‘[r]ecords of ...investigations conducted by...[a] local police agency’.

In Haynie v. Superior Court, (“Haynie”) (2001) 26 Cal.4th at 1068-75, the California Supreme Court held that the Court of Appeal erred in directing LASD to disclose records, pursuant to a CPRA request, concerning Haynie’s traffic stop and detention. The Court concluded that LASD had properly asserted section 6254(f) in refusing to turn over records related to the incident, which did not result in criminal charges, and further held that the CPRA did not require the agency to prepare an inventory of potentially responsive documents.

The Court expressly rejected Haynie’s argument that investigatory records may be withheld “under section 6254(f) only when the prospect of enforcement proceedings is ‘concrete and definite...’” 26 Cal.4th at 1068. The concrete and definite requirement for an investigatory file is necessary to prevent an agency from attempting to “shield a record from public disclosure, regardless of its nature, simply by placing it in a file labeled “investigatory.” Id. (citing Williams, supra, 5 Cal.4th at 355). But no court has extended this qualification to section 6254(f)’s exemption for “[r]ecords of. . . investigations. . . .” Id. at 1069. Limiting records of investigations only to those where the likelihood of enforcement has ripened would expose the public to “the very sensitive investigative stages of determining whether a crime has been committed or who has committed it.” Id. at 1070.

Haynie clarified that the “concrete and definite” prospect of enforcement standard only applies to section 6254(f)’s exemption for investigatory files, not its exemption for “records of investigations” which are exempt in their own right, regardless of whether they are contained in an agency file. Id. at 1069-70. The Court noted that otherwise routine record could become exempt by the use to which they were put in part of an investigatory file. Id. at 1069. But documents independently exempt -- Black Panther Party v. Kehoe, (1974) 42 Cal.App.3d 645, 654 (records of complaints) American Civil Liberties Union v. Deukmejian, (1982) 32 Cal.3d 440, 449 (intelligence information) -- are not part of the concrete and definite investigatory file requirement. Id.

The Haynie Court included routine and everyday records of investigation in the section

information required for disclosure under section 6254(f)(1) or (2). *See also* City Opp. at 6-7.

6254(f) exemption. It hastened to add, however, that not everything law enforcement does is shielded from disclosure. Peace officers often have citizen contacts related to crime prevention and public safety unrelated to crime investigations. The records of investigation exempted under section 6254(f) only include those undertaken to determine whether there has been a violation of law and, if a violation is detected, the pursuit of that violation. *Id.* at 1071.

The ALPR data sought by Petitioners consists of electronic records of vehicle license plates, and the date, time and location those license plates were captured by ALPR cameras.¹² ALPR is an “extremely valuable investigative tool” that has been instrumental in solving numerous crimes, including whether the vehicle was stolen, is being operated by a person with an outstanding warrant, or is the subject of an “Amber Alert.” Gomez Dec. ¶5. Although Petitioners contend that Respondents can use ALPR data for crime prevention and public safety (Mot. at 9), the evidence shows that ALPR data is used exclusively for criminal investigations. The data is used to identify vehicles that are stolen, involved in crimes, or associated with an unsolved crime. *See* Gaw Decl., ¶’s 3-4; Gomez Decl., ¶5. The ALPR server contains the ALPR plate scans, and the informational data file or hot list. At the hearing, Sgt. Gomez was present and he indicated that the server also contains the results of the hot list comparisons to the plate scans.¹³

The City contends that ALPR data constitute records of investigations which fall squarely under this statutory exemption. The City relies on a plain reading dictionary definition of the term “investigation” as meaning “the action of investigating something or someone; formal or systematic examination or research” and the broad scope of the exemption afforded to investigatory records under section 6254(f). City Opp. at 3, n.1.

According to the City, all ALPR data is investigatory —regardless of whether a license plate scan results in an immediate hit. ALPR data also has investigative use in crime solving long after the initial scanning process. *See* Gomez Decl., ¶5. The very process of checking license plates against various law enforcement lists, whether done manually by the officer or automatically through ALPR technology, is intrinsically investigatory to determine whether a crime may have been committed. The mere fact that ALPR data is routinely gathered and may not ever be associated with a specific crime is not determinative of its investigative nature. *Haynie* states that section 6254(f) does not distinguish between investigations to determine if a crime has been or is about to be committed and those that are undertaken once criminal conduct is apparent. 26 Cal.4th at 1070, n.6. Releasing the ALPR data would “expose to the public the very sensitive investigative stages of determining whether a crime has been committed.” City Opp. at 4-5.

Petitioners disagree, contending that automated scans of license plates are not investigations within the meaning of *Haynie*. ALPR cameras automatically photograph all

¹²At the hearing, the City stated that in a randomly selected week LAPD recorded 1,170,000 vehicle plates. Similarly, the County’s counsel represented that LASD records 1.7-1.8 million plates a week.

¹³At the hearing, Petitioners’ counsel conceded that these hot list comparison results would be records of investigation and argued that the results could be redacted.

license plates within view, without the driver's knowledge and without the officer targeting a particular car or with any particular suspicion. The system immediately extracts the key data from the image (plate number and time, date, and location of its capture) and runs that against the hot lists. This non-targeted collection of license plate data does not comport with an ordinary, common sense understanding of the word "investigation." Reply at 5. It is not triggered by any suspicion of wrongdoing and indiscriminately takes pictures of all plates around the camera. Reply at 1. This is no different than any other surveillance technology, including red light cameras. Reply at 3-4. ALPRs do not involve a decision to stop and investigate; they do not involve any specific allegations of wrongdoing or any particular crime. ALPR scans are automated, mass surveillance undertaken without suspicion that the target is involved in any criminal activity, without a specific crime in mind, and without the specific knowledge of or effort by any human police officer.¹⁴ *Id.*

Petitioners argue that the cases relied upon by Respondents are distinguishable because each case involved requests for records concerning law enforcement's targeted investigation into specific criminal acts -- a newspaper's request for records of disciplinary proceedings against two deputies involved in a brutal beating of a drug (*Williams, supra*, 5 Cal.4th 337), a former police officer's request for records relating to the "investigation of a local official for failing to account properly for public funds" (*Rivero v. Superior Court*, (1997) 54 Cal.App.4th 1048, 1051, and a newspaper's request for records concerning the investigation of "two separate incidents of alleged police misconduct involving" a specific officer, (*Rackauckas v. Superior Court*, (2002) 104 Cal.App.4th 169, 171). The request in *Haynie* itself was for documents related to "the decision to stop Haynie and the stop itself," which were "for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission." *Haynie, supra*, 26 Cal.4th at 1071. *See* Reply at 4-5.

The problem with Respondents' analysis is that if ALPR data is an investigative tool, one would not expect it to be protected by section 6254(f)'s exemption for investigatory records. Generally, a tool is used in an investigation, but is not a record of it. Sherlock Holmes' magnifying glass was an investigative tool which clearly would not be protected even if it were a "public record." Similarly, a database of information is no more a protected record of investigation than any other database.

The court raised this issue of ALPR as an investigatory tool at the hearing. In response, Respondents compared ALPR data to a police officer's surveillance video conducted during an investigation. The videotape is a record of the police surveillance and so is ALPR data. The ALPR system consists of fixed cameras and mobile cameras on police cars. The ALPR data is generated solely for criminal investigation, and the records exist solely because Respondents are investigating. The database was created for the purpose of finding suspects, and Respondents use it to locate specific people. The driving officer makes the decision where he will go and what vehicle plates will be photographed. The photographs of those plates, converted to digital

¹⁴Petitioners add that the vast majority of ALPR data is collected not for immediate comparison, but for future use by law enforcement, which can query the database to address crimes not identified or even committed at the time the plate was scanned. The accumulation of data for future use is not an investigation. *Id.*

form, and the investigatory records. Therefore, the ALPR data is a record of investigation.

Petitioners' counsel replied that the use of ALPR is not targeted surveillance. The cameras are attached to vehicles and indiscriminately record vehicle plates. Consequently, there is no investigation, and no record of investigation under section 6254(f).

Petitioners' argument proves too much. The principal reason why Petitioners are interested in ALPR data is because they are concerned about law enforcement targeting. That is, Petitioners are not concerned about indiscriminate plate recording, but rather targeted recording in particular neighborhoods and locations. Petitioners want to know where the mobile cameras were, what path they took, and what neighborhood the officer was in so they (Petitioners) can draw conclusions about law enforcement conduct. Their concern is that law enforcement may have conducted the targeted surveillance of automobiles in particular locations or neighborhoods which potentially is an abuse.¹⁵

This concern demonstrates Respondents' point: ALPR data generated by mobile cameras -- LAPD has 242 patrol car cameras (Gomez Decl., ¶4) -- is not the indiscriminate recording of license plates. If it were, ALPR data might not constitute a record of investigation. Instead, the data is the collection of plate information gathered in specific areas and locations as conducted by the mobile officer as directed by his or her superiors.

Viewed this way, the recorded ALPR data is no different than the videotape of an undercover officer who watches a particular street corner looking for drug sales. The videotape from the street corner surveillance is clearly a record of investigation exempt under section 6254(f) even though the undercover officer may have no particular individual in mind as a suspect and is merely looking for illicit sales. In the same sense, the mobile ALPR officer directed to drive through particular paths or locations with a mobile camera looking for stolen vehicle plates is conducting a criminal investigation and the ALPR data is the record of that investigation exempt under section 6254(f).

Some ALPR data is gathered less discriminately. There are fixed point cameras -- LAPD has 32 fixed cameras in Southeast Area and Hollenbeck Area (Gomez Decl., ¶4) -- which by definition capture all license plates at that location. There may be an unknown number of mobile cameras which randomly drive in a station area to capture plate images. The quantity of indiscriminate license plate capture versus targeted capture is unknown, but it is also true that Petitioners are not interested in random plate information.

In sum, the ALPR server contains data that falls into the following categories (1) clearly a record of investigation (hot list comparisons), (2) a record of a targeted pattern of inquiry through mobile car patrols, (3) a record of a site-specific inquiry through fixed point cameras, and (4) a record of a random inquiry through mobile car patrols. Haynie referred to records of investigation exempt under section 6254(f) as "only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." 26 Cal.4th at 1071. The hot list comparisons and targeted mobile car patrol inquiries are just such records of investigation. Law enforcement is conducting these investigations looking for stolen cars and other evidence of crime. While it is less clear that ALPR data from fixed point and random

¹⁵For this reason, Petitioners' counsel were not particularly concerned about data from the fixed position ALPR cameras; they know the street corner locations of such cameras.

mobile car patrol cameras are records of investigation, the broad nature of the exemption for law enforcement investigatory records requires their inclusion. See Williams, supra, 5 Cal.4th at 349.¹⁶

3. Section 6255

Public records are exempt if “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.” §6255(a). Respondents must demonstrate a clear overbalance on the side of confidentiality. California State University, Fresno Assn., Inc. v. Superior Court, (2001) 90 Cal.App.4th 810, 831.

The CPRA does not define the term “public interest.” In considering this term, the analogous purpose of FOIA may be considered. Los Angeles Unified School District v. Superior Court, (“LA Times”) (July 23, 2014) __ Cal.App.4th __, 2014 DJDAR 9657, 9661. Under FOIA, the only relevant public interest is the extent to which disclosure of the information sought would “‘she[d] light on an agency’s performance of its statutory duties’” or otherwise let citizens know what their government is up to.” Id. (Citation omitted). The countervailing public interest is society’s interest in protecting private citizens (including public servants) from unwarranted invasions of privacy. Id. at 9661-62.

One way to resolve the tension is try to determine the extent to which disclosure will shed light on the agency’s performance of its duties. Id. at 9662. The weight of the public interest in disclosure stems from the gravity of the governmental tasks to be illuminated and the directness with which disclosure will serve to illuminate it. Id. A minimal interest in disclosure will not be compelled. City of San Jose v. Superior Court, (1999) 74 Cal.App.4th 1008, 1020. The public interest is minimal where the requester “has alternative, less intrusive means of obtaining the information sought.” Id. at 1020.

a. The Public Interest in Non-Disclosure

There is a public interest in maintaining the confidentiality of criminal investigations. ALPR data can be used to follow the deployment and patrol patterns of law enforcement. The data contains GPS readings which can be used to locate the patrol cars carrying cameras at any time. The patrol car’s actual daily path can be monitored. Indeed, identifying the patrol patterns of LASD and LAPD is the very reason why Petitioners want the ALPR data. A criminal obtaining this data could literally monitor the police to see if he is under investigation and, if so, the nature and timing of its surveillance. See Gomez Decl., ¶7. A criminal also would be able to determine whether the police have evidence regarding the location of his or her vehicle relative to the time and location of the crime.¹⁷

¹⁶Even if the fixed point and random patrol data were not records of investigation, as a practical matter it may not be possible to separate targeted mobile patrol data from random patrol data.

¹⁷If the court determines that ALPR data is not exempt and must be disclosed to Petitioners, the determination would require the release of ALPR data to other members of the public whose requests may be focused on a particular vehicle or location. Disclosure to one

There also is a public interest in maintaining the privacy of vehicle drivers and owners. Disclosure of ALPR data would release records detailing the precise locations of vehicles bearing particular license plate numbers on specified dates and times. The privacy implications of disclosure for individual drivers and car owners are substantial. Members of the public would be justifiably concerned about LAPD or LASD releasing information regarding the specific locations of their vehicles on specific dates and times to anyone.

This information can be used to draw inferences about an individual's driving patterns and whereabouts at a particular date and time. Specifically, a member of the public could seek all ALPR data concerning a particular license plate, a request with which Respondents would be able to comply. Such a request could be made by a person seeking information concerning the whereabouts or driving patterns of his ex-spouse, a stalker looking for a victim, or a criminal defendant looking for the detective, prosecutor, or judge who convicted him. City Opp. at 9-10.

The privacy interest of such persons was noted Westbrook v. County of Los Angeles, (“Westbrook”) (1994) 27 Cal.App.4th 157, a case concerning public access to law enforcement records: a database of records in the municipal court containing identifying information for persons with criminal charges and their criminal case history and disposition. In denying access, the Westbrook court stated: “The United States Supreme Court has concluded that a third party’s request for law enforcement records of a private citizen ‘can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’” *Id.* at 166 (citing US. Dept. of Justice v. Reporters Committee, (1989) 489 U.S. 749, 780). The Westbrook court further noted: “One of the motivations for the amendment to the state Constitution adding privacy to the list of inalienable rights was concern over ‘the ability to control circulation of personal information.’” 27 Cal.App.4th at 166, n.8.¹⁸

b. The Public Interest in Disclosure

There is a public interest in disclosure of records relating to law enforcement because of the power the police wield. Commission on Peace Officer Standards & Training v. Superior Court, (2007) 42 Cal.4th 278, 300 (“The public has a legitimate interest not only in the conduct of individual police officers, but also in how the Commission and local law enforcement agencies conduct the public’s business.”). *See* Reply at 7.

The misuse of ALPR technology can harm individual privacy and civil liberties. ALPR data can be used to record vehicles at a lawful protest or house of worship, track all movement in and out of an area, specifically target certain neighborhoods or organizations, or place political

member of the public constitutes a waiver of the exemption, and any person who requests a copy would be entitled to it. County of Santa Clara v. Superior Court, (2009) 170 Cal.App.4th 1301, 1321-22. Respondents would be powerless to refuse subsequent requests based on concerns about who is seeking the data and why.

¹⁸As Petitioners argue, Westbrook is distinguishable because it was neither a CPRA nor an article 1, section 1 case; the court’s holding relied on the specific statutory protections for criminal information in Penal Code section 13300 *et seq.* 27 Cal. App. 4th at 164.

activists on hot lists so that their movements trigger alerts. Taken in the aggregate, ALPR data can create a revealing history of a person's movements, associations, and habits.

The intrusive nature of ALPRs and the potential for abuse of ALPR data creates a public interest in disclosure of the data to shed light on how police are actually using the technology. The ALPR data would show whether police agencies are spreading ALPRs throughout their jurisdictions or targeting the collection of millions of data points on a few locations or communities. The data will reveal whether police are targeting political demonstrations to help identify protestors, or other locations such as mosques, doctors' offices or gay bars that might yield highly personal information. To debate whether police should have ALPR technology and what limitations, if any, should be placed on their use, the public must understand how police actually use the technology, which the underlying data can show. *See Reply at 8.*¹⁹

The public interest in disclosure of ALPR data not only concerns potential abuse, but also lies in understanding what picture of citizen movement law enforcement actually is receiving from ALPR data. Are there residents whose plates are scanned dozens of times in a single week? Hundreds of times? This information helps the public evaluate the threat to privacy posed by ALPR. *See Reply at 8.*

c. The Balancing of Public interests

The City argues that the potential for abuse of ALPR data is highly speculative and such speculation does not constitute a strong public interest in disclosure of raw ALPR data. *City Opp. at 12.*

Petitioners correctly argue that this argument undercuts the CPRA's purpose, which is to provide the public with access to documents necessary to determine whether abuses are taking place. *See Reply at 7.* The court held ALPR data to be a record of investigation based in part on the non-random nature with which it is collected. The mobile patrol pattern is subject to abuse, and Petitioners should not have to prove actual abuse in order to raise this public interest.

The City also contends that the disclosure of millions of ALPR scans would reveal little about such potential abuse since ALPR devices automatically and indiscriminately scan the license plates of all vehicles within range; they do not selectively scan only plates affixed to vehicles driven by Muslims, gays, or those on their way to political demonstrations. Detecting abuse in these automated and indiscriminate scans would be "like searching for a needle in a haystack." *City Opp. at 12.*

Petitioners describe the City's position as misleading. While the ALPR camera does not distinguish between vehicle plates, police can easily use ALPRs to target certain groups by their patrol pattern. The public can only debate whether police should have ALPRs and what limitations might be necessary if they understand how police actually use the technology, which only the underlying data can show. *Reply at 8.*

Petitioners have the better argument. ALPR data would enable the discerning reader to

¹⁹Neither side presented evidence or argument on whether the public interest in disclosure of ALPR data is minimal because there are alternative, less intrusive means to find out whether Respondents are abusing the ALPR system. *See City of San Jose v. Superior Court, supra*, 74 Cal.App.4th at 1020.

track vehicles scanned by the system and ascertain when and where a particular vehicle was scanned. (It would also enable a reader to track the mobile patrol unit taking the photos.) From this, an evaluation potentially can be made of whether individuals have been targeted by law enforcement. There may be better and easier ways to ascertain whether a person has been targeted if a criminal case or civil lawsuit results in which a person can find out that they were personally targeted. But there may always be persons targeted for surveillance who never know that they were the subject of surveillance. Disclosure of ALPR data could aid in that ascertainment.

The public interest in knowing whether there has been or is a potential for abuse, and the public's general interest in understanding how ALPR works in providing a picture of individual movements, must be balanced against the public interest in the confidentiality of criminal investigations and the privacy of those scanned. The weight of the public interest in disclosure stems from the gravity of the governmental tasks to be illuminated and the directness with which disclosure will illuminate. *LA Times, supra*, 2014 DJDAR at 9662.

The governmental tasks to be illuminated are Respondents' investigation of stolen cars and criminal suspect location through ALPR technology, and the potential abuse of that technology. Petitioners have provided no expert evidence on how well ALPR data can be used to illuminate Respondents' performance of that task, or what is likely to be shown. They have only shown that ALPR data can be used to attempt to ascertain whether a person has been targeted for surveillance, without demonstrating how successful that attempt would be.

In contrast, the City presents expert evidence that disclosure of ALPR data would compromise it as an investigative tool by allowing criminals to find out whether police have been following him or her, or locate a third person they were trying to harm. Gomez Decl., ¶7. The City's evidence is uncontradicted.

A balancing of the public interests works in favor of non-disclosure. The ALPR data contains hot list comparisons the disclosure of which could greatly harm a criminal investigation. It also would reveal patrol patterns which could compromise ongoing investigations, and even fixed point data could undermine investigations. Disclosure could also be used by a criminal to find and harm a third party. Balanced against these harms is the interest in ascertaining law enforcement abuse of the ALPR system and a general understanding of the picture law enforcement receives of an individual from the system, unsupported by any evidence as to how well the ALPR data will show this information. The balancing works in favor of non-disclosure.

At hearing, Petitioners acknowledged that hot list comparisons would be protected, and suggested it could easily be redacted. They also acknowledged the privacy concerns of individual plate holders, and their counsel argued at hearing that real plate numbers can be substituted for random numbers -- for example plate "G5123AP" could have a random number "111111" assigned to it. Counsel further contended that this randomizing process would not be expensive and individual privacy concerns would be addressed.

Although there is no evidence that Petitioners' suggestion is both workable and inexpensive, the court accepts it for purposes of analysis. Petitioners' argument would address the individual privacy concerns, but it would not address the impact on law enforcement investigation. A criminal could still use ALPR data to follow law enforcement patrol patterns and still could locate a particular randomized plate at a particular location on specific days and times.

Moreover, the ALPR system is fluid. As the City points out (City Opp. at 13), an officer may make a hot list inquiry into the ALPR system and receive a hit at any time, thereby converting a non-specific scan to evidence in an individualized investigation. Segregation of records in a fluid computerized environment is virtually impossible. Gomez Decl., ¶8. This burden of segregating exempt from non-exempt materials is a consideration in determining whether the public interest favors disclosure under section 6255. American Civil Liberties Union Foundation v. Deukmejian, (1982)32 Cal.3d 440, 453, n.13.

As a result, the public interest clearly weighs against disclosure and in favor of non-disclosure under the catchall exemption of section 6255.

E. Adequacy of the Search

Petitioners contend that Respondents' declarations do not clearly describe the searches conducted to show they discharged their duties. Petitioners question the production based on the failure to provide each Petitioner with exactly the same production despite their same requests, the City's reference in a document created after the CPRA request which refers to a federal grant for ALPR which was in place earlier, and LASD's failure to categorically state that all documents have been produced.

At hearing, the parties agreed to meet and confer, Petitioners would explain more clearly what they are looking for (deployment and training documents), Respondents would make their experts available for informal cross-examination on the nature and extent of their search, and Respondents either would renew their search or provide a declaration demonstrating the adequacy of the search for any issues on which Petitioners remain unsatisfied. This agreement moots the need for further order unless Petitioners still are unsatisfied after any final search and/or declaration.

E. Conclusion

The court assumes that the issue of search compliance will be resolved. If not, Petitioners may demonstrate their dissatisfaction at the order to show cause re: judgment. Apart from the search issue, ALPR data is exempt and the Petition is denied.

Respondents' counsel are ordered to prepare a proposed judgment, serve it on Petitioners' counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for September 25, 2014 at 9:30 a.m.

Dated: August __, 2014

 **JAMES C. CHALFANT**

Superior Court Judge

JAMES C. CHALFANT