

FIRST AMENDMENT PROJECT

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July 1, 2015

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Amicus* Letter of the Northern California Chapter of the Society of Professional Journalists in Support of Petition for Review of *American Civil Liberties Union Foundation of Southern California v. Superior Court for the State of California (County of Los Angeles), Court of Appeal, Second Appellate District, Case No. B259392, Supreme Court of the State of California, Case No. S227106*

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, the Northern California Chapter of the Society of Professional Journalists (“Nor. Cal. SPJ”) submits this *amicus* letter urging the Court to grant review of the above-entitled case.

Nor Cal. SPJ has an acute interest in the Court of Appeal’s decision and the issues raised here by Petitioners. The Society of Professional Journalists (“SPJ”) is a not-for-profit, national journalism organization dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. SPJ was founded in 1909 as Sigma Delta Chi, a journalistic fraternity. It works to inspire and educate current and future journalists through professional development.

SPJ also specifically works to protect First Amendment guarantees of freedom of speech and press through its advocacy efforts. Among other things, SPJ actively follows administrative, legislative, and judicial developments, and makes its voice heard through court filings and petitions on behalf of journalists who have been shut-out of hearings, denied access to information, or compelled to turn over notes and research. SPJ has nearly 9,000 members nation-wide, including broadcast, print, and online journalists, journalism educators and students, and other non-journalist members who support SPJ’s mission. SPJ is the oldest, largest, and most representative organization serving journalists in the United States. The Northern California Chapter was founded in 1931 and has approximately 200 members. Nor. Cal. SPJ has an active Freedom of Information Committee that has recommended that the Chapter be involved in this matter.

Nor. Cal. SPJ agrees with Petitioners that the Court of Appeal’s holding significantly expands the exemption for “Records of ... Investigations” under the Public

Records Act (Gov. Code § 6254, subd. (f))¹ beyond prior case law. Nor. Cal. SPJ also agrees with Petitioners that the Court of Appeal improperly ignored the Constitutional mandate to construe the exemptions to disclosure narrowly. (See Cal. Const. art. I, § 3, subd. (b), 2d par.) Nor. Cal. SPJ further agrees that the Court of Appeal failed to acknowledge the fundamental difference between Automated License Plate Reader (“ALPR”) technology and traditional policing, and the impact of that difference on public records law.

As an association of professional journalists, First Amendment lawyers, and activists, Nor. Cal. SPJ is particularly concerned with the impact of the Court of Appeal’s decision on the public’s right of access and the free flow of information that is vital to a well-informed citizenry and a free press. The disclosure of the records at issue is necessary to inform the public about Real Parties’ law enforcement activities and crucial to a meaningful public discussion on the use and retention of ALPR data. Moreover, the restriction of access to public records is, in and of itself, of serious interest to Nor. Cal. SPJ, whose members routinely rely on the Public Records Act to investigate and report on the activities of government.

Nor. Cal. SPJ is equally troubled by the impact that the Court of Appeal’s decision will have on the ability of journalists to gather and report on the news. Real Parties’ indiscriminate county-wide collection of license plate data places unique burdens and risks on the media, and those who work with the media. Specifically, the ability to track and piece together, through ALPR data, where a journalist was and who she was meeting with, and where she may be next, undermines the legal safeguards enacted to guarantee that the media act as the unfettered eyes and ears of the public, and to protect confidential and anonymous sources who are the foundation of investigative journalism. The extent of Real Parties’ secret surveillance is so far-reaching, and the potential for abuse so great, that the chilling effect on the rights to free speech, a free press, the right to association, and the attendant right to anonymity is enormous. It is only through the release of these records that the public can be fully informed and debate the virtues, values, flaws, and dangers of the collection and retention of ALPR data.

Nor. Cal. SPJ urges the Court to grant review of this important case.

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

I. The Court of Appeal's Holding Improperly Expands the Exemption for "Records of Investigations"

"[A]ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250; see also Cal. Const., art. I, § 3, subd. (b), 1st par.) The presumption is that this information is open and accessible. (See, e.g., *Sander v. State Bar of Cal.*, (2013) 58 Cal.4th 300, 318; *Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 166-67; *Cty of Los Angeles v. Super. Ct.* (2012) 211 Cal.App.4th 57, 60.) The purpose of the Public Records Act is to "increas[e] freedom of information by giving members of the public access to information in the possession of public agencies." (*Filarisky v. Super. Ct.* (2002) 28 Cal.4th 419, 425.)

The Public Records Act broadly defines "'[p]ublic records'" as including "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency...." (§ 6252, subd. (e); *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67.) A public agency claiming an exemption must show that the requested information falls within an enumerated statutory exemption. (§ 6255, subd. (a).) Significantly, since 2004, the Constitution requires that these limited exemptions be narrowly construed. (*Id.*; Cal. Const., art. I, § 3, subd. (b), 2d par.; *Long Beach Police Officers Assn. v. City of Long Beach*, *supra*, 59 Cal.4th at p.68.)

The Court of Appeal held that the records generated from the automatic and indiscriminate scanning of license plates belonging to every vehicle in Los Angeles constitutes "records of ... investigations" exempt from disclosure under section 6254(f). This was error.

The Court of Appeal's conclusion that ALPRs simply automate what an officer could otherwise do, and that technology is irrelevant to the question of what constitutes an "investigation", is deeply problematic. A police officer walking down the street cannot "investigate" every person or vehicle that passes by, run their information and plate numbers against police databases, and permanently catalog that information for potential future use. Yet, the ALPR system does just that. Consequently, the Court of Appeal's holding that it falls under the exemption in 6254(f) is a significant departure from the ordinary and common-sense understanding of police "investigations." It is also in conflict with this Court's definition of the exemption as encompassing "*only* those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1071 [emphasis added].) Prior to the Court of Appeal's decision in this case, "records of ... investigations" was properly understood to mean targeted inquiries into specific crimes, persons, or circumstances; a focused examination not an omnipresent and indiscriminate data collection. (See *ibid.* (applying exemption to traffic stop).)

The application of this definition to suspicionless mass surveillance renders the exemption limitless.² This could not have been the intent of Legislature or the voters, and this Court should grant review to resolve these issues.³

II. The Impact of the Court of Appeal’s Decision Places Unique Burdens on the Press

The right to publish the news, and the right to gather it, is protected by the First Amendment. (See *Branzburg v. Hayes* (1972) 408 U.S. 665, 681; *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 576 (plur. opn.) (recognizing that the First amendment incorporates a right “to gather information”); *Globe Newspaper Co. v. Super. Ct.* (1982) 457 U.S. 596, 604 (gathering information is among the freedoms that are “necessary to the enjoyment of other First Amendment rights.”); see also *United States v. Sherman* (9th Cir. 1978) 581 F.2d 1358, 1361 (“The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.”). Vital to newsgathering, especially in investigative journalism, are confidential and anonymous sources. Indeed, some of the most important stories of our time, particularly those involving government corruption and abuse, were only possible because of such sources.

Thus, California has enacted specific safeguards to protect the press, its information, and its sources. For example, Article I, section 2, subd. (b) of the California Constitution protects the forced disclosure of a newsgatherer’s “*source of information*” and “*any unpublished information* obtained or prepared in the gathering, receiving or processing of information for communication to the public.”⁴ (*Delaney v. Super. Ct.*

² Nor. Cal. SPJ is also concerned about the impact of the Court of Appeal’s ruling on access to other public records in light of law enforcement’s utilization of newer and more sophisticated surveillance technology. For example, the Court of Appeal’s decision, if it stands, will undoubtedly have an impact on access to footage from dashboard and body cameras under the PRA – technology that is increasingly being used for the express purpose of enhancing transparency and accountability in law enforcement.

³ Not insignificantly, the City of Oakland *is releasing* ALPR data requested through the Public Records Act. For example, the City recently released 4.6 million reads of over 1.1 million unique plates between December 23, 2010 and May 31, 2014. (Cyrus Farivar, *We know where you’ve been: Ars acquires 4.6M license plate scans from the cops* (March 24, 2015) <http://arstechnica.com/tech-policy/2015/03/we-know-where-youve-been-ars-acquires-4-6m-license-plate-scans-from-the-cops/1/> [as of June 26, 2015].)

⁴ Article 1, section 2, subd. (b), provides, in full:
A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press

(1990) 50 Cal.3d 785, 796-97 (quoting Cal. Const. Art. 1, sec. 2, subd. (b) [*Italics added*]).) This Constitutional provision, as well as the corresponding and identical rule found in Evidence Code section 1070, shields *all* unpublished information, whether confidential or non-confidential, and *all* sources for such information. Unpublished information includes “a newsmen’s unpublished, non-confidential eyewitness observations of an occurrence *in a public place*.”⁵ (*Id.* at 797 [*emphasis added*].) The shield law provides “virtually absolute immunity for refusing to testify or otherwise surrender unpublished information.” (*Miller v. Super. Ct.* (1999) 21 Cal.4th 883, 899.)

Additionally, the right to privacy found in article 1, section 1 of the California Constitution, and the First Amendment to the federal constitution, provide additional

association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. [¶] Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. [¶] As used in this subdivision, ‘unpublished information’ includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Evidence Code section 1070 is the statutory counterpart to article I, section 2, subd. (b), and contains nearly identical wording.

⁵ To qualify for shield law protection, the newsmen must show “that he is one of the types of persons enumerated in the law, that the information was ‘obtained or prepared in gathering, receiving or processing of information for communication to the public,’ and that the information has not been ‘disseminated to the public by the person from whom disclosure is sought.’” (*People v. Vasco* (2005) 131 Cal.App.4th 137, 151.)

protections for journalists and their sources, because they “protect[] the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret.” (*Rancho Publications v. Super. Ct.* (1999) 68 Cal.App.4th 1538, 1547.)

The mass collection and retention of ALPR data, which can track where a person has been and where they might be next, possess a significant risk to these established protections for journalists and their confidential and anonymous sources.⁶ The right to speak or associate anonymously, whether to a journalist or otherwise, is deeply rooted in both the First Amendment and the state right to privacy. The secret, indiscriminate collection of everyone’s movements undoubtedly undermines those rights. “Anonymity, once lost, cannot be regained.” (*Rancho Publ. v. Super. Ct., supra*, 68 Cal.App.4th at p.1541.)

This problem is particularly acute where the source is in law enforcement, or providing information about law enforcement activities. Such a source knows that ALPR cameras are indiscriminately recording movements of every vehicle in Los Angeles. Naturally, the source may avoid travelling to a place where a journalist’s movement might also be captured, or allowing the journalist to come to their home or workplace.

The United States Supreme Court has explained that the press fulfills its essential role in our democracy by baring the secrets of government and informing the people. (*New York Times Co. v. United States* (1971) 403 U.S. 713, 717 (conc. opn. of Black, J.)) These essential functions cannot be fulfilled if the exercise of these rights are chilled by the mass surveillance and indiscriminate secret stockpiling of information.⁷ Nor can the press function if it fears the misuse of this information against it, or other reprisals from knowledge gleaned from ALPR data.⁸

⁶ For example, the famous source of Watergate reporters Woodward and Bernstein, known as “Deep Throat”, insisted on meeting in a parking garage. Such garages are no longer reliably anonymous if the identity of every car going in and out can be recorded.

⁷ According to a recent East Bay Express Article: “In 2014, the PEN American Center surveyed writers in fifty nations, finding that many writers living in so-called free countries say they sometimes avoid controversial topics out of fear of government surveillance, and are self-censoring at levels near those in repressed nations.” Brian Hofer and the Oakland Privacy Working Group, *Oakland Poised to Lead in Protecting Privacy* (Feb. 4, 2015) East Bay Express <<http://www.eastbayexpress.com/oakland/oakland-poised-to-lead-in-protecting-privacy/Content?oid=4185374>> [as of June 26, 2015]

⁸ It was reported by the Boston Globe that, in 2004, police tracked Canadian reporter Kerry Diotte using automated license scans after he wrote articles critical of the local traffic division. “A senior officer admitted to inappropriately searching for the reporter’s vehicle in a license scan database in an attempt to catch Diotte driving drunk.”

While Nor. Cal. SPJ acknowledges that disclosure of ALPR records under the Public Records Act would threaten the confidentiality and anonymity just described, it is only through the release of these public documents that the public can be informed and discuss Real Parties' collection and retention of ALPR data, whether such a program should continue, and what, if any, level of transparency should be required.

In conclusion, the Court should grant review and resolve the issues raised by Petitioners to ensure that access to public records and governmental transparency remains the rule.



Cherokee D.M. Melton (SBN 243265)
FIRST AMENDMENT PROJECT

*Attorneys for Northern California Society of
Professional Journalists*

(Shawn Musgrave, *License Plate-Reading Devices Fuel Privacy Debate* (Apr. 9, 2013) Boston Globe <<http://www.bostonglobe.com/metro/2013/04/08/big-brother-better-police-work-new-technology-automatically-runs-license-plates-everyone/1qoAoFfgp31UnXZT2CsFSK/story.html>> [as of June 26, 2015])

PROOF OF SERVICE

I, Nicole Feliciano, hereby declare:

I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is First Amendment Project, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On July 1, 2015, I caused to be served the attached:

Amicus Letter of the Northern California Chapter of the Society of Professional Journalists in Support of Petition for Review of American Civil Liberties Union Foundation of Southern California v. Superior Court for the State of California (County of Los Angeles)

 X **BY MAIL.** I caused the above identified document(s) addressed to the party(ies) listed below to be deposited for collection at the Public Interest Law Offices or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service on this day.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Oakland, California on July 1, 2015.



Nicole Feliciano
DECLARANT

Chief Justice Cantil-Sakauye and Associate Justices of the Court
July 1, 2015
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