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March 28, 2017

VIA FEDERAL EXPRESS

Chief Justice and Associate Justices of
the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *American Civil Liberties Union Foundation of Southern California,
et. al. v. Superior Court of Los Angeles County, et al. (S227106) –
Amicus Supplemental Letter Brief*

Honorable Justices:

INTRODUCTION

We write as the Court's March 6, 2017 order invites, to develop an argument made briefly at pages 38 – 40 of our principal amicus brief that this Court may affirm Judge Chalfant's conclusion to deny the writ the ACLU seeks because automatic license plate reader ("ALPR") data is properly withheld under the "catchall exemption" of Government Code section 6255, subdivision (a).¹ On the facts here, the public interests in privacy, efficacious law enforcement and

¹ Unspecified references to "sections" in this letter are to the Government Code.

public safety clearly outweigh the ACLU's interest in a bit more governmental transparency and accountability.

DISCUSSION

THE CATCHALL EXEMPTION OF SECTION 6255. Two provisions of the Public Records Act ("Act") exempt public records from the Act's general duty to disclose public records: sections 6254 and 6255. Section 6254 enumerates categories of records exempt from disclosure. Section 6255 provides a final "catchall" exemption. It is a balancing exemption, with a bias toward disclosure:

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

The purpose of the catchall exemption is plain: to allow those who manage public records and courts to protect important public interests in circumstances the Legislature could not foresee. The Legislature chose not to define "public interest" to give the Act appropriate flexibility to balance competing public interests in changing and unforeseen circumstances.

For example, counties properly withheld absentee ballot applications in the past, when one must have been absent from home to apply, to avoid giving burglars a list of targets. Now that more than half the electorate votes absentee,

the balance is struck differently and this information is routinely distributed to assist candidates and campaigns in communicating with likely voters.

JUDGE CHALFANT’S RELIANCE ON SECTION 6255. Judge Chalfant articulated three public interests militating against disclosure of raw ALPR data: (1) personal privacy, (2) efficacious law enforcement, and (3) public safety. He noted that identifying information — like license plate data — is susceptible to abuse, as 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 a detective, prosecutor, or judge who convicted him.” (*American Civil Liberties Union Foundation of Southern California v. Superior Court of Los Angeles County* (Super. Ct. Los Angeles County, 2014, No. BS143004) at p. 15.) Judge Chalfant weighed these interests against those the ACLU articulated, namely, “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.” (*Id.* at p. 17.) Judge Chalfant found the scales tipped toward nondisclosure (*Ibid.*)

Personal privacy, of course, is at the heart of section 6255 balancing. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018 (*City of San Jose*) [“Disclosure of public records thus involves two fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy].) In adopting the Act, the Legislature was “mindful of the

right of individuals to privacy” — an inalienable right under our Constitution. (Gov. Code, § 6250; Cal. Const., art. I, § 1.) The Constitution also recognizes the right to access government information, but subordinates that right to individuals’ privacy interests. (Cal. Const., art. I, § 3, subds. (b)(1), (b)(3).)

The public interests in efficacious law enforcement and public safety are no less important. As Judge Chalfant noted, if the raw ALPR data is made disclosable, anyone will have access to the information, from the ACLU’s counsel to those with malicious intent. (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1324 [“The Public Records Act does not differentiate among those who seek access to public information”] (*County of Santa Clara*).) If a criminal obtained the data, (1) police investigations may be undermined as he “could literally monitor the police to see if he is under investigation and, if so, the nature and timing of its surveillance” (*American Civil Liberties Union Foundation of Southern California v. Superior Court of Los Angeles County, supra*, (Super. Ct. Los Angeles County, 2014, No. BS143004) at p. 15) or (2) public safety may be compromised as “[d]isclosure could also be used by a criminal to find and harm a third party.” (*Id.* at p. 17.)

SECTION 6255 BALANCING LOOKS TO INTERESTS THE ACT ASSERTS. In applying section 6255, precedent looks to policies reflected elsewhere in the Act — like section 6254, subdivision (f)’s concern for effective police investigations — and to the federal Freedom of Information Act (“FOIA”), upon which the Act

was modeled. (*City of San Jose, supra*, 74 Cal.App.4th at p. 1016 [FOIA's legislative history and judicial construction may be used to construe the Act].)

The interests in non-disclosure under section 6255 are analogous to those under section 6254, subdivision (f). (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338–1339 [“The provisions of section 6254 will provide appropriate indicia as to the nature of public interest in nondisclosure and will thus aid the courts in determining the disclosability of a document under section 6255.”]) Other cases are in accord. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071 [bids to public agencies not disclosed because disclosure would undermine purpose of bidding to allow government to get competitive terms]; *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222 [transparency outweighed by loss of personal privacy and frustration of government interests in evaluating and assigning teachers].) Section 6254, subdivision (f) protects records of investigations from disclosure to preserve the integrity of those investigations. Raw ALPR data is entitled to similar protection under section 6255 to avoid frustrating governmental efforts to track and apprehend criminals.

FOIA IS SIMILARLY CONSTRUED. FOIA includes a balancing provision like section 6255. Under FOIA, a “court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect.” (*U.S. Dept. of Justice v. Reporters Committee for Freedom of Press* (1989) 489 U.S. 749, 765 (U.S. Dept. of Justice).) Application of section 6255 must balance the public interest in

disclosure against the interests comparable to those expressly protected by other provisions of the Act. Given section 6254, subdivision (f)'s protection for police investigatory data to ensure efficacious law enforcement, analysis under section 6255 may properly consider that and related public interests.

JUDGE CHALFANT STRUCK THE PROPER BALANCE HERE. In assigning weight to the public interest in disclosure under section 6255, courts consider the nature of the information and how “disclosure would contribute significantly to public understanding of government activities.” (*County of Santa Clara, supra*, 170 Cal.App.4th at p. 1324.) Here, the information is raw, unredacted data in the form of license plate numbers, locations, dates, and times. The data affects personal privacy because it can be used to identify and track individuals. (See *U.S. Dept. of Justice, supra*, 489 U.S. at p. 765 [“disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind”].)

In addition, release of ALPR data makes no significant contribution to public understanding of government. Raw data cannot show how that data is used. LAPD and LASD disclosed their policies governing use of the ALPR data. Disclosure of those policies provides a less intrusive means by which the ACLU can more effectively achieve its goals here. The ACLU can use those records to hold both agencies accountable for the policies they adopt and how they use ALPR data. A week’s data adds little — but comes at great cost to privacy, law enforcement efficacy, and to public safety. (*Humane Society of the United States v.*

Superior Court (2013) 214 Cal.App.4th 1233 [weighing contribution of disclosure to transparency in light of other means to achieve transparency].)

SECTION 6255 CAN BE INFORMED BY INTERESTS IDENTIFIED IN OTHER STATUTES, TOO. Moreover, application of section 6255 may be informed by public interests identified in not only the Act, but other statutes, too. Civil Code sections 1798.90.5, subdivision (b), and 1798.90.55, subdivision (b), enacted by 2015's Senate Bill 34, reflect a legislative balance of police accountability and efficacy. (Cf. *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1421 [request for report of internal police investigation determined under more specific Evidence Code provisions].)

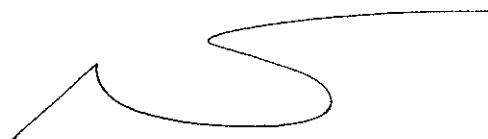
Here, SB 34 provides public agencies may not "share or transfer" "data collected through the use of an ALPR system." (Civ. Code, §§ 1798.90.5, subd. (b) and 1798.90.55, subd. (b).) SB 34 specifically exempts ALPR data from disclosure, as the Evidence Code does peace officer personnel records (Evid. Code, §1043, 1045 et seq.) By contrast, section 6255 provides a general exemption upon a balancing of countervailing interests recognized by the Act. Just as the specific exemption under the Evidence Code informed the determination to withhold an internal police investigation report in *Hemet*; so, too, must the specific exemption in SB 34 inform a determination not to disclose ALPR data here.

CONCLUSION

Section 6255's "catchall" exemption provides a persuasive basis to affirm here. The public interests in personal privacy, efficacious law enforcement, and

public safety clearly outweigh the marginal benefit to government transparency and accountability that might be achieved by ordering release of the data the ACLU seeks in addition to the policies it has already obtained. That data would have to be released to all others, too — no matter how motivated — under section 6254.5. Moreover, doing so would add but little to the ACLU's and the public's understanding of the use of ALPR technology in light of the policies Real Parties have already disclosed — at very great cost to the privacy of thousands of people whose cars were observed during the week in question by the two largest police forces in our State. At bottom, the ACLU's position is ironic — if it is the victor here, the very values of privacy and personal dignity it claims to pursue will be compromised by that success. It ought not to succeed.

Respectfully,



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MGC:arg

Enclosure: Proof of Service

PROOF OF SERVICE

ACLU Fnd. of So. California, et al. v. Superior Court of California, et al.

Supreme Court Case No. S227106

Court of Appeal 2nd DCA Case No. B259392

Los Angeles County Superior Court Case No. BS143004

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On March 28, 2017, I served the document(s) described as **AMICUS SUPPLEMENTAL LETTER BRIEF** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

 K **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 28, 2017, at Grass Valley, California.



Ashley A. Lloyd

SERVICE LIST

ACLU Fnd. of So. California, et al. v. Superior Court of California, et al.

Supreme Court Case No. S227106

Court of Appeal 2nd DCA Case No. B259392

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