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VIA OVERNIGHT DELIVERY

April 3, 2017

Chief Justice and Associate Justices of the
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*, Case No. S227106
Our File Number: 18623

Honorable Justices of the Supreme Court of California:

Real Party in Interest County of Los Angeles submits the following supplemental brief in response to the Court's request that the parties address the application of the catchall exemption under Government Code section 6255.

Introduction

The catchall exemption requires courts to weigh the benefits and burdens of disclosure in each particular case they address, in order to determine whether the public interest is best served by disclosure. The catchall balancing test thusmirrors the public policy concerns that underlie the Public Records Act and, for that reason, it provides an

apt framework for addressing the far-reaching implications of government handling of ALPR data.Balancing these factors confirms that, even if the Court decides that plate scans are not records of investigations, disclosure of plate scan data would be contrary to the express legislative intent of the CPRA, because it would require citizens to abandon the benefits of ALPR technologieswithout a corresponding benefit from disclosure of that information.

Legal Framework

Section 6255(a) requires agencies to "justify withholding any record by demonstrating that the record 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." Section 6255 has no counterpart in the federal Freedom of Information Act, and requires California courts to "weigh the benefits and costs of disclosure in each particular case." (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452.) This includes consideration of the impact of selective redaction of materials that contain both confidential and non-confidential information, both on the agencies responsible for redaction and the requesting parties seeking disclosure. (*Id.* at 452-453.)The balancing required under section 6255(a) mirrors the goals and public policies behind the CPRA itself: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and 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." (Govt. §6250.) These are "two fundamental and frequently competing societal concerns that result from the commingling of public and personal information." (*CBS, Inc. v. Block* (1982) 42 Cal.3d 646, 651.)

The significance of section 6255 lies in the fact that it provides a means by which an agency may withhold a public record not otherwise exempt under the CPRA. While the Act itself specifically identifies the competing interests for and against disclosure, it does not define those interests. Colloquially speaking, the public interest in disclosure is most easily understood as the public's "need to know" about the activities of its governing bodies. The public interest against disclosure, however, is not so simply defined, and in fact may be best determined by review of the specific exemptions from disclosure identified by the legislature set forth in section 6254.

Broadly speaking, section 6254 protects from disclosure two types of records: those records which would expose individuals' personal or financial information (subsections (c), (i) and (n)), and those records which compromise agency integrity (subsections (a), (b), (f), (h), (k)). Section 6254's enumeration of specific records exempt from disclosure thus presents the legislature's determination that, *as a general rule*, these types of records are exempt from disclosure because the weight of the public interest against disclosure necessarily trumps the interest in favor of disclosure. This is in contrast to the catchall exemption under section 6255, which requires a case-by-case

determination for those individual records similar in nature to the categories of records exempted by section 6254, but which the legislature has determined would not justify nondisclosure *as a general rule.*

As is so often the case with the legislation of widely recognized public policy considerations, Section 6255 embodies principles well established at common law which recognize that public records should not be open to indiscriminate public inspection, even if they are in the custody of a public official and even if they contain material of a public nature. (See *City and County of San Francisco v. Superior Court* (1951) 38 Cal.2d 156.) "In this regard the term 'public policy' means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen out to feel has a tendency to be injurious to the public or the public good." (*Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 222.)

It is beyond dispute that the Legislature has recognized that the disclosure of ALPR data implicates similar concerns for private citizens, and that ALPR data constitute confidential information in the view of the citizenry. (See Civil Code §§ 1798.90.5 et seq.)Within that framework, any arguments in favor of disclosure of ALPR data must overcome the presumption that, on balance, requests for disclosure of this information threaten the privacy of individual citizens.

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Balancing of the Public and Private Interests Forecloses Disclosure

Concern for the lives of private citizens whose information is contained in ALPR data should trump the public right to disclosure in this case. (Civil Code § 1798.90.51; *American Civil Liberties Union Foundation v. Deukmejian, supra*, 32 Cal.3d at 449-450.) It is well recognized that location data contains "a wealth of detail about familial, political, professional, religious, and sexual associations." (*United States v. Jones* (2012) 132 S.Ct. 945, 955.)On balance, these sensitive private concerns outweigh any potential benefit resulting from disclosure of ALPR data, particularly in view of the existing publicly available information about the County's policies, procedures and uses of ALPR technology.

The County already has disclosed all policies, procedures, and practices governing the Los Angeles County Sheriff's Department's use of ALPR technology, including: policies regarding retention of ALPR data; authorized dissemination to law enforcement agencies; access records;administrative and criminal penalties applicable for unauthorized use, access, or dissemination; and the quantity and rate of acquisition of ALPR data. (Opn., p. 5.) These disclosures confirm that the County's use of ALPR is consistent with the legislative goals of Senate Bill 34, Civil Code sections 1798.90.5 et seq., which requires ALPR operators to maintain reasonable security procedures and practices to protect ALPR information and implement a usage and privacy policy with respect to that information, and to maintain reasonable security procedures and practices

to protect ALPR information and implement a usage and privacy policy with respect to that information. (Civil Code §§ 1798.90.51, 1798.90.53.) Most significantly, County policy prohibits the unauthorized dissemination of ALPR data, which is consistent with SB 34's mandate that a public agency "shall not sell, share, or transfer ALPR information, except to another public agency, and only as otherwise permitted by law."(Civil Code § 1798.90.55(b).)

Weighed against the information already disclosed by the County, the additional benefit to be gained by the public from disclosure of the data itself, if any, is slight at best. ALPR data consists of three data points: photographs of the license plate in question, geographic coordinates where the plate was scanned, and the time and date of the scan. (Opn., p. 3.) Consideration of these three data points – license plate numbers, location information, and time/date stamps – confirms that the public interest in nondisclosure outweighs the public interest in disclosure.

License plate data without question constitutes "information which might lead the knowledgeable or inquisitive to infer the identity of the individual in question." (*American Civil Liberties Union Foundation v. Superior Court, supra,* 32 Cal.3d at 450.) The ubiquitous availability of both free and paid-for online databases with reverse lookup capabilities refutes any suggestion that license plate numbers do not implicate personal privacy interests, particularly where they are produced in conjunction with location information. (See Chris Francescani, *License to Spy*, Medium (Dec. 1, 2014).) The issue

becomes more concerning still when disclosure of the actual photographs is contemplated, which may contain pictures of the vehicle itself, the driver or other occupants, and the surrounding circumstances. There appears to be no serious argument that any portion of the public policies underlying the Act are served by disclosure of the license plate information or source photographs.

Similar concerns preclude disclosure of the location information itself. In conjunction with license plate information, the location information presents the greatest possible threat to the privacy interests of private citizens, unless its use and access remain a confidential matter restricted for law enforcement only. However, there is another concern, above and beyond the privacy concerns. Data that tracks the movement of law enforcement personnel as they investigate crimes without question constitutes a record of investigation because it documents the "very sensitive investigative stages of determining whether a crime has been committed or who has committed it." (*Hayniev. Superior Court* (2001) 26 Cal.4th 1061, 1070.) Viewed in this context, requiring disclosure of the location information also would compromise law enforcement's ability to investigate vehicle-related crimes, by effectively making patrol patterns, force strength and disposition, and the gaps in these resources, a matter of public record.

The same holds true for disclosure of time/date stamps. In conjunction with license plate numbers and location, time/date stamps present a significant potential intrusion into private lives when misused. However, even considered by themselves,

time/date stamps have the potential, equal to that of location information by itself, to inform criminals of law enforcement efforts and ability to investigate crime. These serious concerns confirm that policies regulating the use of ALPR technology pose unique challenges for law enforcement and the citizenry which are best left to the legislature.

In contrast, once any one of these data points are redacted, the utility of requiring disclosure is so drastically reduced as to no longer justify disclosure in view of the concerns for privacy. Redaction of the license plate numbers, which is legislatively mandated by Civil Code section 1798.90.55(b), prevents use of the data to determine whether particular individuals or groups are being inappropriately targeted by ALPR technology. Redaction of the location information and time/date stamps, which is necessary to preserve the integrity of law enforcement investigations, prevents use of the data to assess deployment of ALPR technologies, which in any event has been disclosed through production of the policies, procedures and practices. This is not a case where redaction can resolve the concerns presented by disclosure.

Conclusion

From the perspective of common sense, there are no arguments that explain why millions of Californians would benefit from having their driving patterns made a matter of public record. The legislature has considered the issue and made the same conclusion, which now provides Californians with a private right of action against any person who

violates the confidential nature of ALPR data.If this court reaches the opposite conclusion, then the resulting conflict between what the legislature has chosen, and what the courts have said, threatens to undermine public confidence in government. That cannot have been the intention of the legislature, either when it enacted the CPRA or when it passed SB 34.

The County respectfully submits that California courts, and the legislature, have "gotten it right" in California's existing jurisprudence and laws. The necessary tension between the competing interests of the CPRA, along with the availability of private enforcement under SB 34, ensure that public entities like the County can zealously guard private citizens' information while aggressively enforcing the law in order to protect the citizens they are duty-bound to serve. The decision below should be affirmed.

Very truly yours,

COLLINS COLLINS MUIR + STEWART LLP

JAMES C. JARDIN

JCJ:pxp

PROOF OF SERVICE
(CCP §§ 1013(a) and 2015.5; FRCP 5)

State of California,)
) ss.
County of Los Angeles.)

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