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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA and ELECTRONIC FRONTIER FOUNDATION,

Petitioners,

v.

COUNTY OF LOS ANGELES, and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, and the CITY OF LOS ANGELES, and the LOS ANGELES POLICE DEPARTMENT,

Respondents.

Case No.: BS143004

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

[Gov. Code §§ 6250, *et seq.*;
Civ. Proc. Code §§ 1085, *et seq.*]

Hearing Date: March 21, 2014
Hearing Time: 9:30 a.m.
Place: Department 86
Honorable Joanne O'Donnell

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I. INTRODUCTION

Respondents' oppositions confirm both Respondent City of Los Angeles and Respondent County of Los Angeles use ALPRs to amass an enormous database of the movements of vehicles across Los Angeles, the overwhelming majority of which are associated with no crime, registration violation or even suspicion of wrongdoing. But when faced with a public records request for a narrow slice of this data that would illuminate the privacy concerns and determine whether the technology is being used to target vulnerable groups, Respondent have refused to comply. The California Public Records Act (PRA) mandates that "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary." *Williams v. Superior Court*, 5 Cal. 4th 337, 346 (1993). The records at issue in this case, including a week's worth of license plate data, are not covered by any exemption expressly provided by the Legislature. As such they must be released.

Respondents' arguments fail to show otherwise. Respondents have claimed that the records can be withheld under the investigatory records exemption in § 6254(f);[1] the general public interest exemption in § 6255;[2] as information protected in § 6254(k) and the California Constituional right to privacy; and as information protected by the "official information" privilege in Evidence Code § 1040. First, the records may not be withheld under § 6254(f). License plate cameras are not triggered by any suspicion of criminal wrongdoing and thus take pictures indiscriminately of all plates around them. Therefore, the vast majority of the data cannot be considered "investigative" under either any resonable definition of the word or the case law interpreting this section of the statute. As such, the data are neither "records of investigations" or "investigative files." Second, the exemptions in both § 6255 and the protections for privacy though the California Constitution (through § 6254(k)) do not apply because the public interest served by disclosure of the narrow slive of ALPR data Petitioners seek outweighs any interest in nondisclosure. Finally, the requested ALPR data also do not qualify as official information under Evidence Code § 1040 because the data was not obtained in confidence and is not confidential.

Because Respondents have failed to meet their burden of proving the records are exempt under at

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[1] Respondents have failed to argue in their briefs—and thus have waived any claim—that the information at issue should be withheld as either intelligence information or security procedures records pursuant to § 6254(f).

[2] Only Respondent LAPD argues § 6255 applies.

least one of the claimed exemptions, this Court should grant Petitioners' Writ and order the records to be released.

Further, given the broad scope of the agencies' ALPR programs, the number of years those programs have been in operation, the small quantity of documents released, and the failure of either agency's declarant to address the records production, the Court should order Respondents to produce declarations describing their searches and indices of documents withheld.

II. ARGUMENT

The government bears the burden of demonstrating that the records at issue are exempt. *Comm'n on Peace Officer Standards & Training v. Super. Ct.*, 42 Cal. 4th 278, 299 (2007) (herein after "*Comm'n on POST*"). Respondents continue to claim that these records can be withheld under various exemptions; however, none of the claimed exemptions apply. And even if a small portion of the requested records that have been incorporated into the files of a criminal investigation could be considered exempt, Respondents are obligated to segregate and produce the parts of the records that do not fall under this exemption.

A. The ALPR Data are Not Exempt from Disclosure Under § 6254(f) Because They are Neither Records of Investigations nor Investigatory Files

Respondents acknowledge they collect data on Los Angeles drivers *en masse*, without targeting particular individuals who are suspected of criminal activity. Respondents nonetheless argue that ALPR data are "investigatory . . . files" or "records of . . . investigations" of a local police agency that would be exempt under § 6254(f).

The California Supreme Court in *Haynie v. Superior Court*, 26 Cal. 4th 1061 (2001), distinguished between "investigatory . . . files" and "records of . . . investigations," and the standards for disclosure for each. In *Haynie*, a man detained and then released by LASD deputies while driving a van that ostensibly matched the description of a civilian tip sought records related to the basis for his detention, including "crime reports, arrest reports, evidence reports, use-of-force reports, canine reports, officer-involved-shooting reports, follow-up reports, handwritten notes, supervisors' reports, notes or reports of interviews of witnesses, and tape recordings." *Id.* at 1065. The court reaffirmed its prior holdings that "the exemption for [investigative] files applies only when the prospect of enforcement

proceedings is concrete and definite." *Id.* at 1068 (citing *Williams v. Super. Ct.*, 5 Cal. 4th 337, 355 (1993), and *Uribe v. Howie*, 19 Cal. App. 3d 194, 212-13 (1971) (internal quotation marks omitted)). But the court indicated that the exemption applied "only to information which is not itself exempt from compelled disclosure, but claims exemption only as part of an investigatory file." *Id.* at 1069 (citation omitted). "[R]ecords of . . . investigations," the court held, are independently exempt under the text of § 6254(f), and do not require any showing that "the prospect of enforcement is 'concrete and definite.'" *Id.*

Haynie defined such "records of investigation exempted under section 6254(f)" as "only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred." *Id.* at 1071. Because Haynie had requested documents related to his detention and the bases for it, and "the investigation that included *the decision to stop Haynie and the stop itself* was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission[,] [r]ecords relating to that investigation are exempt from disclosure by section 6254(f)," *Id.* (emphasis added). However, as shown below, the facts in *Haynie* are very different from the facts in this case, and *Haynie's* conclusion that the requested material was properly withheld as an investigatory "record" is inapplicable here.

1. *The ALPR Data are Not "Records" of Investigations*

Respondents argue that "*all* APLR data is investigatory" and thus absolutely exempt under the "records of investigations" clause of Section 6254(f). LAPD Br. at 4 (emphasis in original); LASD Br. at 4. However, because ALPRs scan surrounding vehicles indiscriminately without any criminal suspicion and without reference to any particular criminal investigation, and because the overwhelming majority of plate scans are simply used to accumulate a database of location information for future use, ALPRs scans are not "investigations" within any dictionary or common-sense definition of the word, nor within the scope of the case law interpreting this section of the statute.

As Petitioners noted in their opening brief and Respondents do not dispute, LPR cameras automatically photograph all plates within view, without the driver's knowledge, without the officer targeting any particular car, and without any level of suspicion. The system immediately extracts the key data from the image—the plate number and time, data and location where it was captured—and runs that

data against "hot lists" of stolen vehicles, Amber alerts, wanted lists, etc. *See* Gaw Decl. ¶ 4; Gomez Decl. ¶ 5. At the instant a plate is scanned by an ALPR camera, not even the computer system itself—let alone the officer in the squad car—knows whether the license plate is linked to criminal activity. This is unlike any other surveillance technology in use by law enforcement today; even red-light cameras, which also capture an image of a vehicle's license plate, are only triggered to save a picture of the plate when the vehicle has violated the law by entering an intersection after the light has turned red.[3] LPR systems collect millions of data-points weekly or perhaps even daily.[4]

All of the cases to which Respondents cite, and indeed all of the very small number of other cases holding documents exempt from disclosure under the "records of . . . investigations" clause of § 6254(f), are distinguishable because they involve requests for documents related to targeted investigations into specific criminal acts — for example, a newspaper's request for records of disciplinary proceedings against two deputies involved in a brutal beating of a drug suspect, *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*, 54 Cal. App. 4th 1048, 1051 (1997); 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*, 104 Cal. App. 4th 169, 171 (2002). Even the request in *Haynie* was for documents related to "the

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[3] *See* LAPD, *Photo Red Light FAQs*, http://www.lapdonline.org/get_informed/content_basic_view/1026 (last visited March 3, 2014) ("The third video captures images of the front and rear of the vehicle, including the driver's face and the license plate. . . . The red light camera enforcement system only captures vehicles that run the red light.").

[4] LAPD Sgt. Gomez states in his declaration: "LAPD has 242 LPR equipped vehicles distributed throughout all LAPD police stations and in several specialized sections . . . [and] 32 fixed position LPR cameras in Southeast Area and Hollenbeck Area." Gomez Decl. at ¶ 4. From an ALPR presentation produced by LASD, we know that "ALPR has the 'ability' to read more than 14,000 license plates during the course of a shift." LASD Training, Bibring Decl., Exh. B at 32. By multiplying the number of LAPD vehicles equipped with LPR by the number of plates LASD says ALPR cameras can collect, we learn that, in a single shift, LAPD's cameras can collect as many as 3.4 *million* plates. And yet, as Petitioners noted in their opening brief, the typical percentage of license plate scans that become connected to any kind of suspected crime or vehicle registration issue is only about 0.2 percent. ACLU, *You Are Being Tracked: How License Plate Readers Are Being Used to Record Americans' Movements*, 13-15 (July 2013) https://www.aclu.org/technology-and-liberty/you-are-being-tracked-how-license-plate-readers-are-being-used-record. This means license plate data is regularly collected from thousands, if not millions of innocent people all over Los Angeles every day without their knowledge or consent and stored in a database for years.

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,* 26 Cal. 4th at 1071.[5]

The automated scans of license plates are not "investigations" within the meaning of *Haynie* or any of the cases to apply its rule. 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 indeed without the specific knowledge of or effort by any human police officer. Interpreting use of ALPRs as an "investigation" does not comport with an ordinary, common-sense understanding of the word — that when a law enforcement officer conducts an "investigation," he or she is looking into specific criminal activity by a particular suspect, not indiscriminately gathering information on everyone in a community, whether or not that information will lead to evidence of criminal activity.[6] Collecting the license plate data for every vehicle that comes into view of a camera does not entail such targeted inquiry. As such, ALPR data cannot be considered records of investigations.

Moreover, because so few ALPR scans result in an immediate hit, the predominant effect of ALPR use is to create a database of plate scans for future use by law enforcement, who can query the database to address crimes that were not identified or perhaps not even committed at the time the plate was scanned. The accumulation of information because it might be useful in future in some unspecified case certainly is not an investigation within any reasonable meaning of the word.

2. *The Data are Not Investigative "Files"*

Section 6254(f) also shields from disclosure the contents of "investigatory . . . files." A public agency may not "shield a record from public disclosure, regardless of its nature, simply by placing it in a

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[5] Respondents also cite to *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645 (1974). This case addressed records of "complaints" sent to state agencies rather than records of "investigations" conducted by law enforcement. Nevertheless, even the records sought in this case were tied to specific, individual citizen complaints "charging unethical or abusive practices by licensed collection agencies." *Id.* at 648.

[6] Indeed, the Fourth Amendment was added to the United States Constitution to prevent "general warrants " that

file labeled 'investigatory.'" *Williams*, 5 Cal. 4th at 355. Courts have also rejected the argument that § 6254(f) "appli[es] to any document which a public agency might, under any circumstances, use in the course of [an investigation]" because that would "create a virtual *carte blanche* for the denial of public access to public records." *Id.* at 356 (citing *Uribe*, 19 Cal. App. 3d at 212-13). Rather, a file is exempt as investigatory "only when the prospect of enforcement proceedings [becomes] concrete and definite." *Id.* at 355 (quoting *Uribe*, 19 Cal. App. 3d at 212).

Respondents' declarations show that ALPR data are exactly what *Williams* teaches that investigatory files are not: vast stores of information that Respondents are holding because they "might, under [some] circumstances, use [them] in the course of an investigation." *Id.* at 356. Respondents declarations' show that officers query their accumulated ALPR data to see if any might be relevant to an investigation. But while Respondents are collecting data on as many as several million license plates every day, data suggest that only about 1 in 500 scans (or 0.2 percent) becomes connected to "any kind of crime, wrongdoing, minor registration problem, or even suspicion of a problem."[7] Respondents therefore have not shown and cannot show that the data have been incorporated into investigatory files where the prospect of enforcement is "concrete and definite." *Uribe*, 19 Cal. App. 3d at 212.[8] As such, these data are not investigatory files and must be released.

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[7] ACLU, *You Are Being Tracked*, *supra* note 5 at 13-15.

[8] The City suggests that ALPR data that might actually be used in an investigation cannot be released, and that the data is not segregable because it might become useful in a criminal investigation. Gomez Decl. ¶ 8. This fails for several reasons. First, if the raw ALPR data does not indicate which of the millions of plate scans are vehicles that are not targets of an investigation, then it does not represent "investigatory . . . files." Public records do not constitute "investigatory . . . files" just because the contents might be germane to an investigation — for example, just because a criminal investigation may involve writing down the phone numbers of targets does not mean that the entire phone book is an investigatory record because the numbers are also listed there.

Second, even if the court were to find that the tiny fraction of plates that might be separately relevant to investigations did constitute "investigatory . . . files," then those plates could be redacted — even if the "system" cannot segregate data that is germane to investigations, it can be redacted manually as any other record subject to disclosure under the CPRA. Finally, the fact that data that is not associated with a crime might one day become associated with a crime, Gomez Decl. ¶ 8, is exactly the kind of speculative concern that the Supreme Court rejected when it limited the exception to investigations where the prospect of enforcement is "concrete and definite." *Williams*, 5 Cal. 4th at 355-56 (quotation omitted).

B. The Catch-All Exemption in § 6255 Does Not Justify Withholding ALPR Data

Respondent City argues that ALPR data should be withheld under the catch-all exemption in § 6255 that applies when "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." Gov't Code § 6255(a); *see also Cal. State Univ., Fresno Assn., Inc. v. Super. Ct.*, 90 Cal. App. 4th 810, 831 (2001) (noting that the "burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality"). Respondent City argues that there is a clear overbalance in favor of nondisclosure based on their description of the public interest in disclosure as "weak and largely speculative." City Br. at 11-12. This characterization ignores both facts and law.

First, Respondent City derides the "potential for abuse" from ALPRs as "speculative," arguing that such speculation or "suspicions about improper motives or actions by police officers … does not constitute a strong public interest in disclosure." City Br. at 12. But this logic undercuts the very purpose of the CPRA, which is to provide the public with access to documents necessary to determine whether or not abuses are taking place and, therefore, to allow the public to provide a check on government: "In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." *Int'l Fed'n of Prof'l and Technical Engineers, Local 21, AFL-CIO v. Super. Ct.*, 42 Cal. 4th 319, 328-329 (2007) (hereinafter "*IFPTE*"). It would stand the CPRA on its head to require a requestor to show some factual basis to believe abuse has actually occurred in order to obtain public records, as the City seems to suggest, rather than recognizing the public interest in disclosure of documents that would illuminate whether or not abuse has occurred. And even beyond the ordinary presumption of disclosure, *see* Cal. Const., art. I, § 3 (b)(1), there is a strong public interest in disclosure of records related to police because of the power police wield. *Comm'n on POST*, 42 Cal. 4th at 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 also N.Y. Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 104-05 (1997) ("To maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers."). Respondents admit they maintain a program of collecting ALPR data and thus are broadly gathering data on the public's movements. The fact that such

a program implicates privacy rights so strongly and holds the potential for abuse if monitoring is directed at certain communities creates a strong public interest in access to information about how the program actually operates.

Second, the City suggests there is no potential for abuse because ALPRs scan license plates "automatically" and "indiscriminately," and cannot "selectively scan only plates affixed to vehicles driven by Muslims, gays, those on their way to political demonstrations, or others whom... [police] seek to target." City Br. at 12. This simplistic account is utterly misleading. While the computerized ALPR device does not distinguish between vehicles buts scans all plates within its viewing range, police can easily use ALPRs to target certain groups by deciding where to use them. Police could target Muslims by driving an ALPR car around the parking lot of a mosque during Ramadan prayers. They could circle parking lots or streets around a gay bar or political meeting to collect plates of likely patrons or attendees, or sweep the streets around a political protest to capture the plates of likely protestors. And although one declaration describes ALPRs as being distributed across the jurisdiction, the raw data will show if ALPRs are deployed primarily in particular communities of color, creating a disproportional impact on those residents' privacy. 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. *Cf. In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 886 (S.D. Tex. 2008) ("Cumulatively considered, these secret orders, issued by the thousands year after year . . . may conceal from the public the actual degree of government intrusion that current legislation authorizes. It may very well be that, given full disclosure of the frequency and extent of these orders, the people and their elected representatives would heartily approve without a second thought. But then again, they might not.").

Third, the public interest arises not only from concerns about targeting but in understanding how complete a picture of movements ALPRs are currently providing to police. 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 ALPRs.

Fourth, Respondent City argues that the public "has strong interest in ensuring that police investigations are not compromised by the public release of investigatory information." City Br. at 11.

Of course, if the ALPR were actual investigatory information, it would be exempt under § 6254(f). If it is not investigatory information but merely information that might one day be used for an investigation, then this argument ignores the balance struck by § 6254(f) and should be rejected. Moreover, as this argument suggests that a person should not even have access to ALPR data gathered about his or her own movements, the balance swings significantly in favor of disclosure because no privacy interest is at stake.

On balance, the public interest in nondisclosure of such a limited request for ALPR data falls far short of "clearly outweigh[ing]" the interests in disclosure. Gov't Code § 6255(a). But even if the court were to find the balance favored nondisclosure, all Respondents' arguments concern the interests in nondisclosure of information that identifies particular vehicles. These interests could be addressed by redacting the license plate information from the data — for example, by assigning a unique but anonymous numerical ID for each license plate— to protect individual privacy interests (or prevent criminals from knowing if where their cars have been scanned) while still providing the public with enough data to partially assess Respondents' practices. *See, e.g., CBS, Inc. v. Block*, 42 Cal. 3d 646, 655 (1986) (recognizing that where public interest favoring disclosure conflicts with information about individuals that "entail[s] a substantial privacy interest . . . In such special cases, the confidential information [about that individual] may be deleted.").

C. No Other Provision of Law Bars Disclosure of ALPR Data

Respondents argue that ALPR data is exempt from disclosure under the CRPA pursuant to § 6254(k), because its disclosure would be prohibited by other provisions of state law, although they differ on which other provisions they invoke. The City argues that protection for privacy as an "inalienable right" in Article I, section 1 of the California Constitution precludes disclosure, while the County argues that the information is protected pursuant to the "official information" privilege in Evidence Code § 1040. Neither argument has merit.

1. *The Privacy Protections in the California Constitution Do Not Bar Disclosure of the Requested ALPR Data*

Petitioners do not dispute that members of the public have a strong privacy interest in the location information contained in ALPR data, nor that such a privacy interest is protected by Article 1, section 1 of the California constitution, which provides that privacy is an "inalienable right." But unlike

other provisions commonly incorporated by § 6254(k) — such as the "official information" privilege of Evidence Code § 1040 for documents reflecting information acquired in confidence, or the exemption for peace officers personnel records in § 832.7, for example — Article 1, section 1 does not on its face create a privilege or bar disclosure of any particular class of documents.

The City assumes, without citation or support, that just because there is a privacy interest in a public record — even a constitutionally protected one —that disclosure of that public record under the CPRA is categorically prohibited, without consideration of other factors such as the strength of the interest or the public interest in disclosure. But such a conclusion runs contrary to the CPRA's explicit handling of privacy concerns in § 6254(c), which bars disclosure of "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." That exemption "requires [courts] to balance two competing interests… — the public's interest in disclosure and the individual's interest in personal privacy." *IFPTE*, 42 Cal. 4th at 329-30 (quoting § 6254(c)). In *IFPTE*, petitioners sought disclosure of public salary information. The California Supreme Court and all parties agreed that government employees had a privacy interest (indeed a constitutionally protected one) in their financial information. *Id.* at 330. Nonetheless, the Court evaluated the strength of that interest and balanced it against "the strong public interest in knowing how the government spends its money." *Id.* at 333. If invocation of privacy interests under § 6254(c) requires balancing private interests with public interest in disclosure, it would be anomalous to bypass such balancing simply because the government instead invoked § 6254(k) and the constitutional right of privacy.

Therefore, under the California Constitution, as under § 6254(c), this court must balance the privacy interests against the interests in disclosure, just as under § 6255. For the same reasons articulated in the analysis under § 6255, *supra*, withholding of ALPR data is not justified.

a. Respondents Offer No Support for their Proposed Rule that Any Data Collected By the Government on Members of the Public is Exempt under the CPRA

In its argument under the privacy protections of the California Constitution, the City contends that data about members of the public for which the government is just the custodian should generally be exempt under the CPRA. *See* City Br. at 8-9. In support of this point, Respondents cite two cases: *U.S. Dep't of Justice v. Reporters' Comm. for Freedom of Press*, 489 U.S. 749 (1989), and *Westerbrook v.*

County of Los Angeles, 27 Cal. App. 4th 157 (1994), which conclude that that criminal history information (or "rap sheets") are protected against disclosure under federal law and California law, respectively. But neither case justifies the broad, categorical rule the City advocates. In *Reporters' Committee*, the Supreme Court held that rap sheets for of suspected members of the mafia were exempt from disclosure under the federal Freedom of Information Act ("FOIA") based on its interpretation of FOIA's exemption for information gathered for law enforcement purposes where there is an "unwarranted invasion of personal privacy." 489 U.S. 749 at 751 (quoting 5 U.S.C. § 552(b)(7)(C)). But that case is notably distinguishable for two reasons: First, in finding computerized rap sheets exempt from disclosure, the Court relied heavily on the federal Privacy Act's protections against disclosure of "compiled computerized information." *Id.* at 766 (citing H. R. Rep. No. 93-1416, p. 7 (1974) (noting Privacy Act reflected legislative concern with "the impact of computer data banks on individual privacy"); 5 U.S.C. § 552a(b) (barring disclosure of records except pursuant to request by, or with consent of, person to whom record pertains)). Respondents cite no analogous provision of California law that would specifically bar disclosure of ALPR data. Second, *Reporters' Committee* involved requests for criminal history of suspected mafia members, which is significantly more embarrassing and invasive than a request for a single week of ALPR data. Indeed, the *Westerbrook* court noted that *Reporters Committee* was "distinguishable . . . in several respects, including the fact that the information sought in that case was the rap sheets of four persons believed to be connected with organized crime, and the case was decided under the federal Privacy Act of 1974 (5 U.S.C. § 552a) rather than a specifically controlling statute." *Westbrook*, 27 Cal. App. 4th at 166.

Similarly, the issues arising here under the Article 1, section 1 are entirely distinguishable from the grounds for decision in *Westerbrook*. There, the court held that under California law, municipal courts have no duty to disclose criminal "rap sheets" from the municipal court information system, which contain not just the pending criminal charges but a significant amount of other information including physical identifiers, social security number, drivers license number, police disposition, and offenses charged.[9] But *Westerbrook* relied on neither § 6254(f) nor the California Constitution's

[9] The records sought in *Westerbrook* revealed "name, aliases, monikers, address, race, sex, date of birth, place of birth, height, weight, hair color, eye color, CII number, FBI number, social security number, (cont'd)

protection for privacy, and included no discussion of CPRA exemptions or the balancing at issue here. Instead, the court relied on specific statutory provisions regulating the information available from master criminal calendars in Penal Code 13300, which limits information available from master criminal records, as evincing Legislative intent that "nondisclosure of criminal offender record information [is] the general rule." *Westbrook*, 27 Cal. App. 4th at 164.[10] The court also reasoned that making the requested criminal records public would interfere with courts' ability to seal or destroy records if a criminal defendant were found factually innocent or completed a diversion program, thus subverting provisions of the Penal Code allowing such sealing or destruction of records. Here, there are no specific statutory protections for ALPR data that would be analogous to Penal Code 13300. Nor are there any legal provisions for purging or deleting ALPR data that would be circumvented by public release. Both *Westerbrook* and *Reporters' Committee* are therefore inapposite.

2. *ALPR Data Does Not Fall Within the "Official Information" Privilege*

Respondent County of Los Angeles argues that records of scanned license plates are exempt from disclosure under § 6254(k) because they fall within the privilege for "official information acquired in confidence by a public employee" set forth in Evidence Code §1040(a). County Br. 7:23. As Petitioners point out in their opening brief, Pet. Br. at 7-8, the "official information" privilege on its face protects only records "acquired in confidence" or provided by a confidential source. Evid. Code §1040(a); *see also, e.g.*, *Ochoa v. Superior Court*, 199 Cal. App. 4th 1274, 1283 (2011) (protecting information provided by prison informants because it was necessarily "clothed with the indicia of confidentiality and therefore conditionally privileged"). The records at issue here were scanned from

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California operating license number, arresting agency, booking number, date of arrest, offenses charged, police disposition, county and court name, date complaint filed, original charges and disposition." *Westbrook*, 27 Cal. App. 4th at 161.

[10] The court in *Westerbrook* mentioned the constitutional protection for privacy in passing, noting that because "[t]he state constitutional right of privacy extends to protect defendants from unauthorized disclosure of criminal history records" and "appellants, as custodians of the records, have a duty to 'resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.'" 27 Cal. App. 4th 165-66 (citing *Craig v. Municipal Court*, 100 Cal. App. 3d 69, 77 (1979)). But as *Craig* makes clear, that "duty" merely justifies the government's standing to assert the privacy interests of the individuals whose records it holds. *See Craig*, 100 Cal. App. 3d at 76 ("dispos[ing] of defendant's contention that … [Respondents] [have] no standing to assert an individual's constitutional right to privacy").

publicly displayed license plates. They were neither "acquired in confidence" nor provided to Respondents by a confidential source. Although Petitioners raise this point in their opening brief, the County simply ignores that requirement in its opposition, relying on arguments relating to the confidentiality of investigatory files.[11]

The County also argues that the ALPR data is exempt because it "is likely to lead to the disclosure of personal identifying information," such as home addresses, if people look use commercial databases to look up that personal identifying information associated with a particular license plate that may be specifically protected against disclosure by statute. *See* County Br. at 9. But the County does not suggest that ALPR data itself is specifically protected by statute, as would be required for it to be exempt from disclosure under § 6254(k). The fact that the results of a CPRA request *might* spur the requestor to take the further step of lawfully looking up in a commercial database information that a government would be prohibited from disclosing is irrelevant to whether the results of the original CPRA request are exempt.

D. The Court Should Order Respondents to Produce Declarations Describing Their Searches and Indices of Documents Withheld

In their oppositions, Respondents assert that they have not withheld any documents beyond the ALPR data. But neither of the declarations submitted by Respondents clearly describes the searches conducted for documents in a manner that indicates Respondents discharged their duties under the CPRA. Nor does either declaration clearly say that the City and County produced all responsive documents. Accordingly, in order to facilitate its own review of Respondents' actions, this Court should correct the imbalance of knowledge by ordering Respondents to produce an index of any documents withheld on the basis of exemptions, as well as affidavits describing the searches they conducted for responsive materials.

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[11] Even if ALPR data were "acquired in confidence" such that the "official information" privilege might apply, courts deciding whether the privilege protects information must undertake the same balancing of public interest in disclosure versus nondisclosure under Evidence Code § 1040 as is required by the CPRA catchall in Gov't Code § 6255, and, as Respondents acknowledge, may withhold information only "where the public interest in maintaining confidentiality *clearly outweighs* the public interest in disclosure." County Br. at 8:20-21 (citing *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 657 (1974)). For the same reasons the documents are not exempt under § 6255, their disclosure is not "against the public interest" under Evid. Code § 1040 (b)(2) and withholding is not justified.

The County asserts that it has produced all responsive documents, but the declaration of Sgt. John Gaw notably omits any clear assertion that no other responsive documents exist, and certainly fails to describe the search that identified those documents and how it was reasonably calculated to yield all responsive documents.

The City argues that no evidence suggests that they have withheld documents, pointing out that a document Petitioners submitted as responsive was created after Petitioners request. But ample evidence exists to question the scope of their production: the City provides a declaration from Sgt. Daniel Gomez indicating that LAPD has been using ALPRs since 2004, that it has nearly 300 ALPRs in operation across the City. Gomez Decl. ¶ 4. The scope and duration of its use make it implausible that the City has so few responsive documents, and in fact lacks a single document to train officers on the use of the ALPR data. While the City points out that the document submitted by Petitioners relating to a new appropriation for ALPRs was created after Petitioners' CPRA request, that document described the ongoing use of Palantir Law Enforcement, a platform for integrating databases "used by [LAPD] Newton Division's Crime Intelligence Detail . . . to track vehicles using data from the Automated License Plate Reader," and requested an extension to allow training of additional officers through June 2013.[12] If LAPD requested an extension of time for training on the use of ALPR databases in February 2013, it is entirely reasonable for the Court to require the City to explain why no training materials were turned over in October and November 2013, barely three months earlier.

Moreover, LAPD Sgt. Gomez's declaration is also notable for what it does not say: it does not say that the City has provided all responsive documents, nor does he explain how the City might provide training without any documents, nor does he explain how the City searched for responsive documents, and why.

No affirmative showing of a failure to respond is required before a court can order either an index or a declaration. Respondents note that an index is not required by the CPRA, but ignore that courts have clearly held that they may order an index, or that an index is one of the most effective ways

[12] *See* Transmittal of the Extension for the 2009 Los Angeles Smart Policing Project, Bibring Dec. Ex. D at 160, 161 (letters dated March 1, 2013 and Feb. 20, 2013). Palantir has posted information about its work on LAPD's ALPR database. Palantir, Responding to Crime in Real Time at the LAPD, *avl. at* http://www.palantir.com/_ptwp_live_ect0/wp-content/uploads/2012/06/ImpactStudy_LAPD.pdf.

a trial court can ensure the reasonableness of an agency's claim that a document is exempt from disclosure or non-responsive to the request. *See American Civil Liberties Union of N. Cal. v. Super. Ct.*, 202 Cal. App. 4th 55, 82-86 (2011); *State Bd. of Equalization v. Super. Ct.*, 10 Cal. App. 4th1177, 1191-93 (providing index upholds the pro-disclosure spirit of PRA); *Haynie*, 26 Cal. 4th at 1072-75, or that a statement describing the search conducted is standard procedure for cases under FOIA, on which the PRA was explicitly modeled. *Lawyers' Comm. for Civ. Rights of San Francisco Bay Areav. U.S Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1130-31 (N.D. Cal. 2008) (to prevail on summary adjudication of FOIA claim, agency must "describe what records were searched, by whom, and through what processes" and show "that the search was reasonably calculated to uncover all relevant documents and conducted in good faith") (quotations omitted); *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal. 3d 440, 447 (1982) (noting PRA was explicitly modeled on the federal FOIA, and "the judicial construction and legislative history of the federal act serve to illuminate the interpretation of its California counterpart").

Here, the Court should require Respondents to create an index for any documents withheld other than the requested week's worth of ALPR data to allow both Petitioners and the Court to fully understand and respond to any other exemptions asserted, and a declaration describing their search process.

E. Respondent County Fails to Address Their Refusal to Respond to Requests Regarding "Hotlists"

Petitioners argued in their Opening Brief that the County neglected its obligations under the CPRA when it responded to the ACLU's request for documents related to use of "hot lists" by stating that it was "unable to assist . . . with your request" because "[t]he request does not ask for 'identifiable' public records, but specific 'information' in the form of interrogatories." *See* Pet. Br. at 15; Pet., Ex. K at 78. The County fails to respond to this argument and ignores the request for documents related to hotlists in its account of their responses. *See* County Br. at 9-10. For the reasons set forth in Petitioners' Opening Brief, the County's refusal to respond to the requests related to "hotlists" is unjustifiable, nor has the County even attempted to justify it here. The Court should order the County to respond by producing responsive documents, providing an index of documents withheld, and providing a

declaration regarding the scope of its search.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court grant the Petition.

Dated: March 7, 2014

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

ELECTRONIC FRONTIER FOUNDATION

By: _____

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Attorneys for Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1313 West Eighth Street, Los Angeles, California 90017. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On March 7, 2014, I served the foregoing document: PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

Tomas A. Guterres
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I caused such envelope(s) fully prepaid with U.S. Postage to be placed in the United States Mail at Los Angeles, California. 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 Los Angeles, California in the ordinary course of business.

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

Executed on March 7, 2014, at Los Angeles, California.

Geneva Tien