S259392

IN THE SUPREME COURT OF CALIFORNIA

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

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,

COUNTY OF LOS ANGELES, and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, and the CITY OF LOS ANGELES, and the LOS ANGELES POLICE DEPARTMENT,
Real Parties in Interest.

After A Decision In The Court Of Appeal, Second Appellate District, Division Three (No. B259392)

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INTRODUCTION

Local police agencies use special cameras to read license plates and check whether a passing vehicle is stolen or of interest to a criminal investigation. This technology is known as ALPR, for "automatic license plate reader." The American Civil Liberties Union and the Electronic Frontier Foundation sought disclosure of ALPR data from the County of Los Angeles Sheriff's Department and the City of Los Angeles Police Department. Both agencies opposed on grounds that the records are exempt from disclosure as records of investigation.

The trial court and Court of Appeal agreed with the agencies. The definition of "investigation," California precedent, and the factual findings rendered by the trial court establish that the County and City's ALPR data constitutes a "record of investigation" under the California Public Records Act, for the simple reason that it is a record generated solely during the course of an investigation to locate specific criminal suspects. That makes the data exempt from public disclosure, as this court has repeatedly recognized in controlling precedent.

Balancing of the public interests for and against disclosure confirms that the current state of the law compels the correct decision for Californians. ALPR data are generated to investigate crimes involving motor vehicles, child abduction and murder. The public interest in the investigation and prosecution of these crimes clearly outweighs the public

interest in the disclosure of ALPR data, because the County and City have fully disclosed the extent of their use of ALPR technology, as well as their policies, procedures and safeguards regarding its use. Furthermore, the production of ALPR data is likely to lead to the violation of the public's privacy interests by making records of their movements a public record that is available to anyone, for any purpose. This likelihood confirms that the County and City's refusal to produce ALPR data is consistent with the public policies underlying the PRA. There is no need for review.

BACKGROUND

A. ALPR Technology.

ALPR technology is a computer-based system that utilizes special cameras to capture a license plate scan, which is a color image and an infrared image of a license plate. The infrared image is translated into the characters of the license plate through character recognition technology. This "plate scan" is then compared against a "hot list" of stolen vehicles or vehicles wanted in a criminal investigation. The law enforcement agent is notified of a "hit" by an audible alert and a notification on their computer screen. Opn., 3.

The County and City use ALPR technology to investigate specific crimes that involve motor vehicles. This includes 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 the agencies. *Id.* ALPR data can be and is used to find vehicles that might not have been of interest in an investigation at the time scanned, but which later were involved in an investigation. An example is the case of Lamondre Miles, who was found at Lake Castaic, murdered, on September 4, 2013. Through the use of ALPR plate scans, law enforcement agents were able to determine that the murder actually occurred the day before, 50 miles away. The suspects were caught. *Id.* at 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 within the County and City's confidential computer systems. Plate scan information is retained for two years by the County and five years by the City. *Id.* Access to plate scan data is restricted to approved law enforcement personnel within the agencies and within other law enforcement agencies with which the agencies share data. Access to plate scan data is for law enforcement purposes only. Any other use of plate scan data is strictly forbidden and subject to criminal penalties. *Id.*

B. The Underlying Action.

The ACLU and EFF brought suit to compel disclosure of one week's worth of ALPR data generated by the County and City. *Id.* The agencies opposed, citing the exemption for record of law enforcement investigations

under Government Code section 6254, subdivision (f), as well as the catchall exemption under section 6255. *Id.* at 5. They also filed supporting declarations accompanied by policy documentation establishing applicable procedures for use of ALPR technology and maintenance of ALPR plate scan data, which are maintained on confidential, secure networks with restricted access and applicable criminal penalties for unauthorized use. *Id.* The trial court found that ALPR data are subject to the exemption for "records of investigations" under section 6254, subdivision (f) as well as the catchall exemption under section 6255.

C. The Court of Appeal Opinion.

The Court of Appeal affirmed, relying on authority which defines an investigation as an attempt to "uncover[ ] information surrounding the commission of [a] violation of law and its agency." *Id.* at 10. Consequently, the ALPR data maintained by the City and County are "records of investigation" because the agencies generate ALPR data in an attempt to locate vehicles suspected of being involved in a crime. *Id.* at 10. The exemption applies to plate scans that fail to identify a criminal suspect, as well as all ALPR data that are retained , because there is no requirement that the prospect of enforcement be definite and concrete, and there is no time limit on the exemption. *Id.* at 11-12, 13. The Court of Appeal did not reach the merits of the catchall exemption under section 6255 because it concluded the exemption under section 6254, subdivision (f) supported

Real Parties' decision to withhold the ALPR data.

STANDARD OF REVIEW

The ACLU frames the standard of review as *de novo*, however "factual findings made by the trial court will be upheld if based on substantial evidence." *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1336 (1991). Review under the substantial evidence standard involves an undertaking to "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." *Jessup Farms v. Baldwin*, 33 Cal.3d 639, 660 (1983) (citations omitted). This standard of review is "deferential" to the factual findings of the trial court. *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1053 (1997).

Where the trial court is called on to make credibility judgments, its decisions will stand so long as they are not arbitrary. See *Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 890 (1971). Where different inferences may reasonably be drawn from the undisputed evidence, the "fact that it is possible to draw some inference other than that drawn by the trier of fact is of no consequence." *Jessup Farms v. Baldwin*, 33 Cal. 3d at 660. Deference to the trial court embraces both express and implied factual findings. *People ex rel. Dept. of Corrections v. Speedee Oil Change*

Systems, Inc., 20 Cal.4th 1135, 1143 (1999).

DISCUSSION

I.

THERE IS NO NEED FOR REVIEW BECAUSE THE DECISION BELOW IS CONSISTENT WITH CONTROLLING AUTHORITY

This court's role is to "secure harmony and uniformity in the decisions [of the appellate courts], their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law." *People v. Davis*, 147 Cal. 346, 348 (1905); Cal. Rules of Court, rule 8.500(b).

This Petition does not satisfy any of these bases for Supreme Court review or any of the grounds for review in California Rule of Court, rule 8.500(b). There is no split of authority, appellate or otherwise, regarding the meaning of the term "record of investigation," nor is it an important matter of law that is "unsettled." A "record of investigation" is a record generated "for the purpose of determining whether a violation of law may occur or has occurred." *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1071 (2001). That is what ALPR technology does. It generates a record (the

plate scan) which is then compared to a hotlist of specific crimes involving specific motor vehicles. Opn., 3. There is no evidence to the contrary, which means that the trial court's factual findings and inferences in this regard are supported by substantial evidence. On the facts before this court, there is no compelling reason for review.

The ACLU's primary arguments – that ALPR data are not records of investigation because they include plate scans of vehicles that do not appear on hot lists and are retained after the investigation is complete – have no basis in this court's decisional authority. An investigation qualifies as such regardless of the prospect of enforcement, and the records generated to perform it are likewise exempt from disclosure as records of investigation. *Haynie, supra*, 26 Cal.4th at 1070. There is no reported decision to the contrary. Similarly, the fact that an investigation has concluded has no bearing on the exemption. *Williams v. Superior Court*, 5 Cal.4th 337, 361-362 (1993). The fact that ALPR data include plate scans of non-suspect vehicles, and the fact that the County and City retain ALPR data after the investigations are concluded, does not change the fact that ALPR data are records of investigations.

There is similarly no factual support for the ACLU's argument that ALPR data are not records of investigation because ALPR technology does not target specific suspects. ALPR technology includes hotlists of specific suspect vehicles that the County and City are looking for. Opn., 3. The

fact that ALPR data also include plate scans of non-suspect vehicles is no different from the fact that surveillance video obtained during an investigation may well record innocent passersby as well as the sought-after suspect. That does not affect its status as a record of investigation.

Neither the facts nor the law support the ACLU's position, and thus this Petition in effect seeks a change in well-settled statutory law that has been consistently applied by this court and the appellate courts. That is not a basis for review by this court, because the plain language of section 6254(f) requires this result. See *Stephens v. County of Tulare*, 38 Cal.4th 793, 801-802 (2006). The law is clear and the Court of Appeal correctly applied it to the trial court's factual findings. Review by this court would serve no purpose and is not warranted.

II.

ARTICLE I, SECTION 3(b)(2) DOES NOT CHANGE THE CONFIDENTIAL STATUS OF RECORDS OF INVESTIGATION

While this court has discretion to consider issues not raised below, "as a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." Cal. Rules of Court, rule 8.500(b); *Jimenez v. Superior Court*, 29 Cal.4th 473, 481 (2002). The ACLU takes the Court of Appeal to task for

its failure to address the implications of Article I, section 3(b)(2) of the California Constitution, but the ACLU failed to raise the issue below. As a result it was neither briefed by the parties nor addressed by the Court of Appeal. However, even if the ACLU had raised the issue below, it does not affect the outcome.

Article I, section 3(b)(5) of the California Constitution expressly provides that Article I, section 3(b) does not "repeal or nullify, either expressly or by implication, any constitutional or statutory exception to the right of access to public records... including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records." This court has held that this language means that courts "may not countermand the Legislature's intent to exclude or exempt information from the PRA's disclosure requirements where that intent is clear." *Sierra Club v. Superior Court*, 57 Cal.4th 157, 166-167 (2013). There is a clear, express statutory intent to exempt records of investigation from the disclosure requirements of the PRA. Govt. Code §6254(f). It is reinforced by section 3(b)(5)'s specific reference to "any statute protecting the confidentiality of law enforcement and prosecution records." Records of investigation are confidential law enforcement records, and section 3(b)(2) was not intended to change their status under the law.

Review of the authorities applying section 3(b)(2) confirms that no case has held that section 6254(f) must be construed narrowly in derogation

of its plain language exempting all records of investigation from disclosure. This is in contrast to the *Pitchess* statutes, which protect only specific types of peace officer personnel information and thus were impacted by section 3(b)(2). *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal.4th 59, 72 (2014) [specific enumeration of exemptions from disclosure supported narrow construction disallowing unspecified exemptions]; *Commission on Peace Officer Standards and Training v. Superior Court*, 42 Cal.4th 278, 294 (2006) [specific exemptions from disclosure demonstrated legislative intent to limit exemptions to confidential information supplied by employee].) Section 6254(f)'s expressly broad exemption of records of investigation, which contains no language limiting its application to certain types of records of investigation, confirms the legislative intent that the exemption apply to all records of investigation. For that reason, section 3(b)(2) does not impact section 6254(f)'s exemption of all records of investigation from disclosure.

III.

GOVERNMENT CODE SECTION 6255's CATCHALL EXEMPTION CONFIRMS THAT THE PUBLIC INTEREST IS BEST SERVED BY CONFIDENTIALITY

The test for withholding a record under the PRA's catch-all exemption is whether "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." Govt. Code § 6255(a). No facts presented in this case show how the public would have an interest in its driving patterns being made public. Right now, only law enforcement can access the information, only for a legitimate law enforcement purpose, and automatic notifications of the specific location of a particular vehicle only occur if that vehicle is wanted in a crime. Opn., 3. If this court decides that ALPR data are public records, then that information will be available to anyone for any purpose, even nefarious ones.

Balanced against that possibility is the interest the public has in not disclosing the information. The privacy concerns noted above are one weight on that scale. Another is the public interest in the efficient and effective investigation and prosecution of crimes involving motor vehicles, child abduction and murder. Opn., 3; see, e.g., *County of Orange v. Superior Court,* 79 Cal.App.4th 759, 767 (2000) [public interest in apprehension of child's murderer]; *In re David W.* 62 Cal.App.3d 840, 847 (1976) [public interest in prevention of vehicle theft].) California law recognizes the importance of the public interest in law enforcement with safeguards designed to promote the effective, efficient administration of justice. See, e.g., Govt. Code §821.6 [prosecutorial immunity]. The same considerations confirm that the current state of the law achieves the right result here.

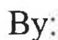
The ACLU claims that it needs the data so that "the legal and policy implications of the government conduct at issue may be fully and fairly debated." However, the ACLU's motivation in seeking disclosure is irrelevant, because the public interest controls. *Times Mirror Company, supra,* 53 Cal.3d at 1345-1346. More importantly, the County and City's use of ALPR technology is not being hidden. The policies have been produced, and the capabilities of ALPR technology have been disclosed. Opn., 4. The City disclosed that in a one-week period it reviewed as a sample, its ALPR cameras generated over 1.2 million plate scans. *Id* The County similarly disclosed that it generated between 1.7 and 1.8 million plate scans in a week. *Id.* A person's license plate likely is being read by ALPR devices, many times. That knowledge is more of a given than goal. Where the information sought is not likely to disclose something about the workings of government (because it is already known), the public interest in disclosure is not a strong one. See, e.g., *Los Angeles Unified School District*, 228 Cal. App. 4th 222, 242 (2014). There is no dispute that the County and City are generating plate scans, nor is there any dispute regarding how plate scans are being used.

CONCLUSION

The evidence shows that ALPR data is used by the County and the City to investigate crime. There are standards for its use, consequences for its misuse, and potentially devastating consequences to both law enforcement efforts and the privacy of the driving public if the data is disclosed. The current state of the law recognizes ALPR data is a record of investigation, balances the interest in disclosure against the interest in nondisclosure, and properly determines that the records should not be disclosed. There is no reason for this court to grant review.

Dated: July 10, 2015

COLLINS COLLINS MUIR + STEWART LLP

By: 

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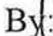
By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief, excluding this Certificate and the Certificate of Interested Parties, consists of 2,808 words as counted by the Microsoft Word version 2010 word-processing program used to generate the brief.

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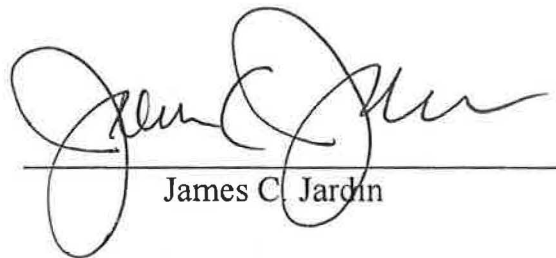

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PROOF OF SERVICE
(CCP §§ 1013(a) and 2015.5; FRCP 5)

State of California,)
) ss.
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 1100 El Centro Street, South Pasadena, California 91030.

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☐ **(FEDERAL)** - I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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