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JONES & MAYER

Attorneys at Law

3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police
From: Martin J. Mayer, Esq.

ALPR DATA EXEMPT FROM CPRA DISCLOSURE

On May 6, 2015, the Second District Court of Appeal ruled, unanimously, in *ACLU et al. v. Superior Court of Los Angeles County (County of Los Angeles, et al.*) that "the California Public Records Act (CPRA) exemption for law enforcement records of investigations [Gov. Code, § 6254, subd. (f)] applies to records generated by a system of high-speed cameras that automatically scan and catalogue license plate images to aid law enforcement in locating vehicles associated with a suspected crime."

Facts

"For more than a decade, the Los Angeles Police Department (LAPD) and the Los Angeles Sheriff's Department (LASD), agencies of Real Parties in Interest the City and County of Los Angeles (collectively, Real Parties), have used Automatic License Plate Reader (ALPR) technology to automate a process that officers ordinarily perform manually - checking license plates to determine whether a vehicle is stolen or otherwise wanted in connection with a crime."

The American Civil Liberties Union Foundation (ACLU) and the Electronic Frontier Foundation (EFF) "sent Real Parties a CPRA request for their policies and guidelines concerning use of ALPR technology, as well as all ALPR plate scan data Real Parties collected during a single week in August 2012. Real Parties agreed to produce the policies and guidelines, but refused to disclose the week's worth of ALPR data, citing the law enforcement investigative records exemption and privacy concerns. Petitioners filed a petition for writ of mandate seeking to compel production of the ALPR data under the CPRA. The trial court denied the petition, concluding the records are exempt as records of law

enforcement investigations under section 6254, subdivision (f)." Petitioners' then appealed to the California Court of Appeal.

At the request of the Real Parties, the firm of JONES & MAYER (J&M), as counsel to the California Police Chiefs' Association (CPCA), the California State Sheriffs' Association (CSSA), and the California Peace Officers' Association (CPOA) prepared and filed an amicus curiae brief supporting, in part, the argument that the data collected was exempt from disclosure.

Oral argument was heard by the Court of Appeal on March 11, 2015 and, again at the request of the Real Parties. Martin Mayer of J&M presented the argument on behalf of amici.

Court Discussion

The CPRA 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. The statute's explicit purpose is to increase freedom of information by giving the public access to information in the public agencies' possession."

As such, "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary. Consistent with the CPRA's purpose, '[s]tatutory exemptions from compelled disclosure are narrowly construed.'"

However, as the Court states in a footnote: "Notwithstanding the general directive to narrowly construe such exemptions, our Supreme Court has explained that section 6254, subdivision (f) 'articulates a *broad exemption* from disclosure for law enforcement investigatory records,' which is limited only by requirements in subdivisions (f)(1) and (f)(2) to 'provide *certain information derived from the records* about the incidents under investigation.'" (Emphasis in original.)

"The parties agree that the derivative categories of information to be disclosed under these Subsections - information about arrests and arrestees . . . and complaints and requests for assistance . . . are not at issue in this case. What is at issue is the meaning of the term 'investigations' in section 6254, subdivision (f), and whether the functions performed by the ALPR system can properly be characterized as investigations under the statute."

Previously, the California Supreme Court explained, in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, that "in exempting '[r]ecords of complaints to, or investigations conducted by law enforcement agencies, section 6254(f) *does not distinguish between investigations to determine if a crime has been or is about to be committed and those that are undertaken once criminal conduct is apparent*." (Emphasis in original.)

Furthermore, "while routine investigations are within the exemption's ambit, not everything that law enforcement does is shielded from disclosure. As the court explained in *Haynie*, '[o]ften, officers make inquiries of citizens for purposes related to crime prevention and public safety that are *unrelated* to either civil or criminal investigations.'"

Importantly, the Court notes that, "the exemption shielding records of investigations from disclosure does not lapse when the investigation that prompted the records' creation ends."

The Court also states that "if the Legislature had wished to limit the exemption to files that were 'related to pending investigations,' words to achieve that result were available. Additionally, "the same is true for records of investigations - they continue to be '[r]ecords of . . . investigations conducted by . . . any state or local police agency' even after the investigation that prompted their creation ends."

"Real Parties stress that the ALPR system uses 'character recognition software' to read license plate numbers and 'almost instantly' checks those numbers against a list of 'known license plate[s]' associated with suspected crimes to 'determine whether a vehicle may be stolen or otherwise associated with a crime.'"

"Petitioners argue the plate scans conducted by ALPR systems 'are not precipitated by any specific criminal investigation.' Rather, Petitioners assert, ALPR systems 'photograph every license plate that comes into view . . . regardless of whether the car or its driver is linked to criminal activity.' They contend, ALPR systems 'do not conduct investigations; they collect data.' We disagree. Contrary to Petitioners' premise, the plate scans performed by the ALPR system are precipitated by specific criminal investigations - namely, the investigations that produced the 'hot list' of license plate numbers associated with suspected crimes."

"(T)he ALPR system replicates, albeit on a vastly larger scale, a type of investigation that officers routinely perform manually by visually reading a license plate and entering the plate number into a computer to determine whether a subject's vehicle might be stolen or otherwise associated with a crime. The fact that the ALPR system automates this process does not make it any less an investigation to locate automobiles associated with specific suspected crimes."

"To be sure, the automated nature of the ALPR system, with its capacity to capture and record millions of plate scans throughout Los Angeles City and County, sets it apart from the traditional investigatory techniques that courts have considered in earlier cases addressing the scope of the investigative records exemption. But that distinction is irrelevant to the question of whether the ALPR system's core function is to 'uncover[ ] information surrounding the commission of the violation [of law] and its agency' - i.e., to investigate suspected crimes."

HOW THIS AFFECTS YOUR AGENCY

Use of ALPR technology is a significant tool for law enforcement to seek out and find vehicles which have been identified as stolen or otherwise involved in criminal activity. If that information would be subject to public disclosure it would, for all intents and purposes, render the tool useless.

Not only would it publicly identify those vehicles which are on a "hot list", it would

also invade the privacy rights of individuals whose plate numbers were captured but who were not involved in any nefarious activity.

As the Court of Appeal noted, "under section 6255, a public agency may justify withholding records otherwise subject to CPRA disclosure requirements by demonstrating 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.'" It was argued to the Court that protecting the privacy of those innocent persons fell directly under section 6255.

As a result of this decision, law enforcement can continue to seek out those who have violated the law without that information being publicly disseminated.

It is important to secure guidance and advice from your agency's designated attorney when applying the law to operations.

As always, if you wish to discuss this case in greater detail, please don't hesitate to contact me at (714) 446-1400 or via email at mjm@jones-mayer.com.

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