Law Enforcement Use Of Cameras And Other Technology – Usage And Data Retention Policies; Disclosure And Privacy Issues

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I. Introduction

Many practitioners find the provisions of the California Public Records Act ("CPRA") dealing with law enforcement records to be the most complex part of the statute. In addition, many law enforcement records, such as records related to pending investigations and records that impact individual privacy interests, are among the most sensitive and important records that local governments maintain. Effective handling of law enforcement records is a challenging task for local agencies, with significant risks. Law enforcement records that are improperly disclosed can undermine agencies’ efforts to solve crimes and protect the public, create civil and even criminal liability for local agencies and their officials, and invite litigation. Improper withholding of law enforcement records can also create agency liability and invite litigation, as well as undermine public trust in law enforcement and local governments generally.

Recent incidents involving police use of force in a number of U.S. communities have raised questions regarding appropriate and measured use of force, as well as regarding police departments’ and cities’ commitment to providing members of the public sufficient information to monitor how effectively local law enforcement is protecting the public. At the same time, law enforcement agencies across the U.S are embracing new technologies. Certain new technologies, such as

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1 Govt C §6250 et seq.
2 See, e.g., the prohibition against disclosing child abuse and neglect information in Pen C §11167.5; the prohibition against disclosing confidential mental health detention information in W&I C §5330; Marken v Santa Monica – Malibu Unified School Dist. (2012) 202 CA4th 1250, and the discussion in III(b).
3 Govt C §6258.
body-worn video cameras, are viewed by some as a harbinger of more transparent and accountable law enforcement. However, others view the same technology, and others like automatic license plate reader systems, as Orwellian encroachments of big data on personal privacy.

In this paper we provide a framework for understanding and applying the complex provisions in the CPRA that address law enforcement records. We discuss these provisions in the context of seminal cases and recent case law developments addressing the disclosability of law enforcement records. We also consider the statutes and case law in relation to emerging new law enforcement technologies. Finally, we discuss records retention requirements that local law enforcement agencies must ensure are satisfied concerning the records that result from their new policing technologies.

II. Public Records Act Overview

The CPRA is codified in section 6250 and following of the Government Code. The purpose of the CPRA is to give members of the public access to information that enables them to monitor the functioning of their government.4 The CPRA applies to California state and local government agencies, and gives members of the public both the right to inspect and to obtain copies of government records.5 The CPRA applies to all state and local government records, regardless of the form or medium in which they are kept.6 The CPRA is intended to apply to every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed.7 The right of access to government information that the CPRA gives is not absolute. It is qualified by some 76 different exemptions contained in the act.8 In addition, the CPRA lists many other statutes that affect disclosure of government records.9

When a requester reasonably describes identifiable government records, the CPRA requires disclosure of the records, and reasonably segregable portions of

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5 Govt C §§6252(a), (f); 6253(a), (b).
6 Govt C §6252(e), (g).
8 Govt C §§6253.2 - 6268.
9 Govt C §6275 *et seq.*
records, that are not exempt from disclosure by express provisions of law. Agencies subject to the CPRA generally must provide exact copies of public records that are subject disclosure unless it is impracticable to do so. Records requesters are entitled to responses as specified in the CPRA.

The CPRA, and the case law interpreting it, reflect the balance that the Legislature has struck between government transparency, privacy rights, and government effectiveness. In enacting the CPRA and declaring that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in the state, the Legislature noted its “mindful[ness] of the right of individuals to privacy.” Of the approximately 76 exemptions from disclosure contained in the CPRA, 37 or about half appear intended primarily to protect privacy interests. Another 36 or about the remaining half of the exemptions in the CPRA appear intended primarily to support effective governmental operation in the public’s interest. A few of the exemptions appear to be equally focused on protecting privacy rights and effective government. These include: an exemption for law enforcement records; an exemption that incorporates into the CPRA exemptions in other state and federal laws, including privileges contained in the Evidence Code; and an exemption referred to as the “public interest” or “catch-all” exemption that exempts from disclosure government records regarding which the public interest served by not disclosing the records clearly outweighs the public interest in disclosing the records, based on the facts of the particular case.

The balance that the CPRA strikes between the often-competing interests of government transparency and accountability, privacy rights and government effectiveness favors transparency and accountability. The CPRA is intended to reserve “islands of privacy upon the broad seas of enforced disclosure.” The case law interpreting the CPRA has consistently construed exemptions from disclosure narrowly and agencies’ disclosure obligations broadly. The CPRA policy prioritizing government transparency and accountability was incorporated into the California Constitution, along with the people’s right to access information

10 Govt C §6253(a), (b).
11 Govt C §6253(b).
12 Govt C §6253(c).
13 Govt C §6250.
14 Govt C §§6254(f), (k), 6255.
concerning the conduct of their business, when the voters approved Proposition 59 in November, 2004. Proposition 42, which the voters approved in June, 2014, amended the California Constitution to require state and local agencies to comply with the requirements of the CPRA, and any amendments and successor statutes. The transparency of government records enforced under the CPRA is a floor, not a ceiling. The exemptions from disclosure contained in the CPRA are permissive, not mandatory. Except as otherwise prohibited, state and local agencies are free to adopt requirements that allow for faster, more efficient or greater access to records than the minimum standards established in the CPRA.

The CPRA affords the same right of access to government information to all types of requesters. Every person has a right to inspect any public record, except as otherwise provided in the CPRA. The persons authorized under the CPRA to access government information include those that are not California residents, as well as those that are not U.S. citizens, and corporations. Elected officials of state and local agencies are entitled to access the public records of the agency they serve on the same basis as any other person. Members of the press and those that are the subject of government records generally have no greater right of access to public records than anyone else. The CPRA also provides that, subject to certain exceptions, whenever an agency discloses an otherwise exempt record to any member of the public, the exemption(s) otherwise applicable to the record are waived. As a result, the CPRA prohibits covered agencies from releasing otherwise exempt records to some requesters but not to others.

17 Cal Const, Art 1, §3(b)(1).
18 Cal Const, Art 1, §3(b)(7).
20 Govt C §6253(e).
21 Govt C §6253(a).
22 Govt C §6252(c); Connell v Superior Court (1997) 56 CA4th 601.
23 Govt C §6252.5.
24 Marylander v Superior Court (2002) 81 CA4th 1119; Los Angeles Police Dept. v Superior Court (1977) 65 CA3d 661. However, the courts have recognized a right of persons who believe their rights may be infringed by an agency decision to disclose records to bring a “reverse CPRA action” opposing disclosure. Marken v Santa Monica – Malibu Unified School Dist. (2012) 202 CA4th 1250.
25 Govt C §6254.5. A recent reported case held that §6254.5 does not to apply to an inadvertent release of privileged documents. Newark Unified School Dist. v Superior Court (2015) ___ CA4th ___. The question of whether a public agency’s inadvertent or unauthorized disclosure of exempt information subject to the attorney-client privilege waives the privilege has been granted review by the California Supreme Court.

Treatment of Law Enforcement Information
Such As Automatic License Plate Reader Information,
In-car and Body-worn Video, and Cell Site Simulators
under the California Public Records Act
III. Law Enforcement Records under the CPRA

a. CPRA section 6254(f)

The treatment of law enforcement information under the CPRA must be understood not only in the context of the larger CPRA framework, but also by careful review of the primary CPRA provision expressly directed at law enforcement records: section 6254, subdivision (f), “a complicated provision that has undergone many revisions since its enactment in 1968.”26 Section 6254(f) begins by providing in pertinent part as follows:

. . . this chapter does not require the disclosure of any of the following records: . . . [r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.27

Section 6254(f) thus begins with a broad exemption. It provides that complaint, investigation, intelligence, and security procedure records, and investigatory and security files compiled for correctional, law enforcement or licensing purposes of specified law enforcement agencies, including state and local police agencies, are exempt from disclosure. Next, section 6254(f) establishes an exception to the exemption, one which requires disclosure of specified incident information, other than information from confidential informants, to victims of specified crimes and their authorized representatives.

However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the

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27 Govt C §6254(f).
victims of an incident, or an authorized representative thereof, an
insurance carrier against which a claim has been or might be made,
and any person suffering bodily injury or property damage or loss, as
the result of the incident caused by arson, burglary, fire, explosion,
larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as
defined by subdivision (b) of Section 13951 . . .

Section 6254(f) then qualifies the required disclosure for crime victims and their
representatives with an exception to the exception requiring disclosure. Such
disclosure is not required if

the disclosure would endanger the safety of a witness or other person
involved in the investigation, or . . . [if] disclosure would endanger the
successful completion of the investigation or a related investigation.29

A further exception to the exception requiring disclosure of specified information to
crime victims and their representatives provides that

nothing in this division shall require the disclosure of that portion of
those investigative files that reflects the analysis or conclusions of the
investigating officer.30

Accordingly, section 6254(f) provides that certain specified information must be
disclosed in response to requests from victims of specified crimes and their
representatives for otherwise exempt complaint, investigation, intelligence and
security procedure information and investigatory and security files of state and local
police agencies. However, such disclosure is not required if it would endanger the
safety of a witness or other person involved in the investigation, or endanger the
successful completion of the investigation or a related investigation. In addition,
investigating officers’ analyses and conclusions are exempt.31 As the California
Supreme Court observed in the Williams case:

In summary, subdivision (f), up to this point, (1) articulates a broad
exemption from disclosure for law enforcement investigatory records,
(2) requires law enforcement agencies to provide certain information
derived from the records about the incidents under investigation, and

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28 Govt C §6254(f).
29 Govt C §6254(f).
30 Govt C §6254(f).
31 See Williams v Superior Court (1993) 5 C4th 337, 349.
(3) permits the withholding of information that (a) would endanger the safety of a witness or other person, (b) would endanger the successful completion of an investigation, or (c) reflects the analysis or conclusions of investigating officers.32

Section 6254(f) treats requests from members of the public for arrestee, complaint and request for assistance information essentially the same as victim information, except that such requesters are not entitled to the names, addresses and statements of witnesses to the incident.33 Similar to the treatment of crime victim requests, section 6254(f) requires that state and local law enforcement agencies make public specified arrestee and complaint and request for assistance information. However, if disclosure of a particular item of information would endanger the safety of a person involved in an investigation, or endanger the successful completion of the investigation or a related investigation, disclosure is not required.34 Required disclosure of complaint and request for assistance information is further qualified by identity privacy rights of victims of specified crimes.35 Analyses and conclusions of investigating officers are exempt in response to requests for arrestee, complaint and request for assistance information just as they are in response to requests of victims of specified crimes and their representatives.36 As summarized in Williams:

Subdivision (f) concludes with two subparts that require law enforcement agencies to disclose information about arrests and arrestees (§ 6254, subd. (f)(1)) and about complaints and requests for assistance (id., subd. (f)(2)). As before, however, these additional disclosure requirements do not apply "to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation."37

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33 Govt C §6254(f)(1), (2).
34 Govt C §6254(f)(1), (2); Williams v Superior Court (1993) 5 C4th 337, 348.
35 Govt C §6254(f)(2).
36 Govt C §6254(f).
b. Section 6254(f) in the overall context of the CPRA

Careful review of section 6254(f) and its treatment of law enforcement records shows that it applies in a different and almost opposite way compared with the predominate structure of the CPRA. The CPRA general rule is that public records are subject to disclosure unless exempt by express provisions of law.\(^\text{38}\) However, law enforcement complaint, investigation, intelligence and security procedure information and investigatory and security files are exempt. Notwithstanding the broad exemption for complaint, investigation, intelligence and security procedure information and investigatory and security files, specified crime victim, arrestee and complaint and request for assistance information must be disclosed. However, the law enforcement information otherwise required to be disclosed is exempt if disclosure would endanger the safety of a person involved in an investigation, or endanger the successful completion of the investigation or a related investigation.\(^\text{39}\) Also, analyses and conclusions of investigating officers are exempt without qualification.\(^\text{40}\) In other words, for broad categories of law enforcement records, so broad that they likely encompass the majority of information gathered and retained by law enforcement agencies, exemption is more the rule than the exception.

It is perhaps not too great a stretch to observe that unlike the rest of the CPRA, section 6254(f) appears intended to reserve islands of enforced disclosure of law enforcement information surrounded by a broader sea of privacy.\(^\text{41}\) At the same time, the different way section 6254(f) operates compared with the rest of the CPRA should be considered in the context of the CPRA as a whole. The requirement to construe exemptions from disclosure narrowly, and disclosure obligations broadly, applies to law enforcement records as it does to all other public records subject to the CPRA.\(^\text{42}\) However, that policy does not alter the qualified exemption in section 6254(f) extending to all complaint, investigation, intelligence, and security procedure records, and investigatory and security files compiled for correctional, law enforcement or licensing purposes. Also, agencies are not required to provide exact copies of law enforcement records as they are for other records. Section

\(^{38}\) Govt C §6253(b).
\(^{39}\) Govt C §6254(f).
\(^{40}\) Govt C §6254(f).
\(^{41}\) See and contrast the citation on page 2, above, to *Black Panther Party v Kehoe* (1974) 42 CA3d 645, 653 in footnote 12.
\(^{42}\) Cal Const Art 1, §3(b)(1).
6254(f) only requires that they provide specified information contained in law enforcement records.\textsuperscript{43}

Agencies are free to provide greater public access to law enforcement records than the CPRA requires, as they are for other public records.\textsuperscript{44} Many agencies do so by disclosing otherwise exempt law enforcement information, such as booking photos or excerpts from 911 tapes, when such disclosure will advance their law enforcement and public safety missions and help keep the public informed regarding their operations. However, agencies should use care in providing expanded public access to law enforcement information. Unauthorized disclosure of some law enforcement information is prohibited and subject to criminal penalties.\textsuperscript{45} Agency decisions to disclose some exempt law enforcement information may also invite “reverse CPRA actions” opposing disclosure.\textsuperscript{46} Disclosure of some exempt law enforcement information may also result in civil liability.\textsuperscript{47} Agencies should also note that as with any other public records, disclosure of exempt law enforcement records to members of the public waives the exemption(s) otherwise applicable to the particular records disclosed.\textsuperscript{48}

As is true regarding all other types of public records, the CPRA is intended to apply to every conceivable kind of record involved in the law enforcement process as well as to any new form of law enforcement record keeping instrument (or technology).\textsuperscript{49} Recent developments in law enforcement technology subject to the CPRA include automatic license plate readers, in car and body-worn video recorders, and cell site simulators, among others. State and local agencies are required to apply the requirements of section 6254(f) and the CPRA as a whole to the records created by current and future law enforcement technology.

\textsuperscript{43} \textit{Williams v Superior Court} (1993) 5 C4th 337, 348. Contrast the general requirement to provide exact copies of public records in §6253(c). See page 2, above.
\textsuperscript{44} Govt C §6253(e).
\textsuperscript{45} See, e.g., the prohibition against disclosing child abuse and neglect information in Pen C §11167.5.
\textsuperscript{46} \textit{Marken v Santa Monica – Malibu Unified School Dist.} (2012) 202 CA4th 1250.
\textsuperscript{47} See, e.g., the prohibition against disclosing confidential mental health detention information in W&I C §5330.
\textsuperscript{48} Govt C §6254.5.
\textsuperscript{49} \textit{Braun v City of Taft} (1984) 154 CA3d 332, 340.
c. Leading Law Enforcement Records Cases

The two leading cases interpreting section 6254(f) are Williams v. Superior Court from 1993 and Haynie v. Superior Court from 2001.50

1. Williams v. Superior Court

In 1990, San Bernardino sheriff’s deputies executed a search warrant for illegal drugs at a residence. The resident did not possess the drugs, but the deputies severely beat and injured him. An administrative investigation resulted in disciplinary action against the involved deputies. As a result of a separate criminal investigation, the district attorney filed charges against one officer, who was tried and acquitted. Real party in interest, the Daily Press newspaper, sought information about the disciplinary proceedings under the CPRA.

The Sheriff originally opposed disclosure arguing that the records were peace officer personnel records. Subsequently, the Sheriff asserted the records were investigatory records exempt under section 6254(f). Following an in camera review pursuant to section 6259 of the CPRA, the trial court ordered partial disclosure of the records. The Court of Appeal vacated the trial court’s order, ordered partial disclosure of the records and directed the trial court to conduct further review of the records based on standards articulated in the opinion.

The California Supreme Court reversed the Court of Appeal’s disclosure order and rejected two non-statutory limitations the Court of Appeal had applied to the law enforcement records exemption in section 6254(f). The Court of Appeal had applied criteria from the federal Freedom of Information Act ("FOIA") that limit the FOIA law enforcement records exemption to instances when production of the records could: interfere with enforcement proceedings; deprive a person of a right to a fair trial; constitute an unwarranted invasion of privacy; disclose the identity of a confidential source; disclose law enforcement investigation techniques and procedures; or endanger an individual’s safety. The Court of Appeal had also held that the exemption for records that are not exempt on their face but become exempt because they are included in an investigatory file only applies so long as the records are related to a pending investigation. Following a thorough discussion of the structure and legislative history of section 6254(f), the Supreme Court held:

• The CPRA’s exemption for law enforcement investigatory records does not incorporate Freedom of Information Act (5 U.S.C. § 552(b)(7)) criteria. “In view of the Legislature’s painstaking efforts to articulate appropriate limitations on the mandatory disclosure of public records, the argument in favor of incorporating the FOIA criteria into the CPRA is extremely weak.” 51

• The CPRA’s exemption for investigatory files does not terminate when the investigation terminates. “...[W]e shall enforce subdivision (f) according to its terms by holding the exemption for investigatory files does not terminate with the conclusion of the investigation. Once an investigation, as defined in Uribe (supra, 19 Cal.App.3d at pp. 212-213), has come into being because there is a concrete and definite prospect of enforcement proceedings at that time, materials that relate to the investigation and, thus, properly belong in the file, remain exempt subject to the terms of the statute.” 52

Thus the Supreme Court in Williams held that section 6254(f) should be applied according to the exemptions from disclosure and the qualifications of those exemptions (and the qualifications of the qualifications) contained in the statute, and not according to FOIA criteria. Williams also held that once it applies, the exemption for investigatory files applies indefinitely.

2. Haynie v. Superior Court

Haynie involved a request for records of a traffic stop on July 1, 1999. A Los Angeles County sheriff’s deputy had stopped a vehicle matching the description of one reportedly entered by males carrying guns. The deputy contacted the driver and passengers. The driver, Mr. Haynie, became argumentative and was handcuffed. The deputy determined Haynie and the passengers were not related to the report and released them. When the deputy returned to the location a short time later he saw Haynie attempting to injure his wrists on the pavement. Shortly after the incident Haynie filed a tort claim and a request for any records concerning the incident. In response to the records request the Sheriff’s Department refused to provide the requested records, citing section 6254(f), and provided a summary of the event. Haynie filed a writ. The trial court upheld the Sheriff Department’s production of the summary information in lieu of the requested records. Haynie

52 Williams v Superior Court (1993) 5 C4th 337, 361.
applied and the Court of Appeal ordered some of the requested records disclosed, holding that the exemption for investigation records applies only when the prospect of enforcement proceedings is concrete and definite.

The Supreme Court expressly rejected the argument that investigatory records may be withheld “under section 6254(f) only when the prospect of enforcement proceedings is ‘concrete and definite...’”\(^53\) The Court clarified that the “concrete and definite” prospect of enforcement standard, initially articulated in *Uribe v. Howie* (1971) 19 Cal.App. 3d 194, only applies to subdivision (f)’s exemption for “investigatory...files” – not to its exemption for “records of...investigations,” which are exempt in their own right, regardless of whether they are contained in an agency file.\(^54\) “Limiting the section 6254(f) exemption only to records of investigations where the likelihood of enforcement has ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it.”

The court in *Haynie* declined petitioner’s invitation to graft limitations on the law enforcement exemption in section 6254(f), just as it had done in *Williams*.\(^55\) The Court noted that unlike information contained in investigatory files, investigatory records, like records of complaints and intelligence information, are exempt on their face, whether or not they are ever included in an investigatory file.\(^56\) The Court in *Haynie* also helpfully clarified that the investigation exemption in section 6254(f) covers only records of investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred, and if a violation or potential violation is detected, records of investigations conducted to uncover information surrounding the commission of the violation and its agency.\(^57\) (This critical aspect of *Haynie* was central to the Court of Appeal’s decision in *ACLU v. Superior Court*, as discussed below.) The court also noted that because section 6254(f) requires disclosure of specified information contained in law enforcement records, rather than the records themselves, the tape recordings Haynie sought were not subject to disclosure.\(^58\)


\(^{54}\) *Haynie v Superior Court* (2001) 26 C4th 1061, 1069-1070.

\(^{55}\) *Haynie v Superior Court* (2001) 26 C4th 1061, 1069-1070.


\(^{57}\) *Haynie v Superior Court* (2001) 26 C4th 1061, 1071.

\(^{58}\) *Haynie v Superior Court* (2001) 26 C4th 1061, 1072.
IV. *ACLU v. Superior Court*: Records of Investigation under Government Code Section 6254(f)

In one of the most recent cases to examine the CPRA exemption for law enforcement records of investigations under Section 6254, subdivision (f), the Court of Appeal, Second Appellate District, held the exemption applies to Automatic License Plate Reader (ALPR) data maintained by the City of Los Angeles Police Department (LAPD) and the County of Los Angeles Sheriff’s Department (LASD).

Important Note: The California Supreme Court granted review of the Court of Appeal decision on July 29, 2015. Briefing is expected to be complete by the end of 2015 with oral argument expected in the first half of 2016. Therefore, there is presently no citable appellate decision regarding whether ALPR data must be disclosed under the CPRA. While not citable, due to the grant of review, *ACLU v. Superior Court* can at least provide an analytical framework for considering CPRA requests for ALPR data until the Supreme Court issues its decision. The following discussion is provided with that significant caveat in mind.

a. Background

ALPR data is generated when high-speed cameras mounted on patrol cars and in fixed positions automatically scan all license plates within range of the cameras and compare the plate numbers against law enforcement “hot lists” to determine whether the associated vehicles may be stolen or otherwise wanted in connection with a crime. In addition to the license plate number, the captured data also typically includes the date, time and location of the scan, as well the source of the capture.

Through CPRA requests to Real Parties LAPD and LASD, Petitioners American Civil Liberties Union Foundation of Southern California and Electronic Frontier Foundation (hereinafter “ACLU,” “EFF,” or “Petitioners”) sought various records related to the agencies’ ALPR programs, including all raw data generated during a specified one week period. Policies and procedures were disclosed, but the agencies refused to produce the requested data, primarily based on the exemption for “records of…investigations conducted by…any state or local police agency, or any investigatory or security files compiled by any other state or local police agency...”

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under Section 6254(f). ACLU and EFF filed a writ petition to compel disclosure of the ALPR data under the CPRA. The trial court denied the petition, finding the exemption for records of investigation applied as well as the “catch all” exemption of Section 6255 because the public interest in non-disclosure of the data “greatly outweighs” the public interest in disclosure, due in large part to privacy and safety concerns.

In a case of first impression, the Court of Appeal affirmed the trial court’s denial of the writ petition, holding the exemption for records of investigations under Section 6254(f), applies to ALPR data. Because the term “investigation” is not defined in Section 6254 or elsewhere in the CPRA, the court was guided in its analysis by California Supreme Court precedent in two leading cases that examined the exemption: As discussed below, the principles articulated in Williams and Haynie are “transferable” to the manner in which ALPR operates as a law enforcement tool to conduct and further criminal investigations. These same principles, moreover, can reasonably be applied to records generated by other forms of technology increasingly used by law enforcement, such as in-car and body cameras, when agencies seek to protect such records from public disclosure.

b. **ACLU affirms that Section 6254(f) is a broad exemption.**

The Court of Appeal began its analysis of Section 6254(f) by summarizing the familiar premises underlying the CPRA as a whole: the fundamental right to access information concerning “the people’s business;” its purpose of promoting “maximum disclosure,” such that “all public records are subject to disclosure unless the Legislature has expressly provided to the contrary;” and “exemptions from compelled disclosure are narrowly construed.”

The court pointedly noted, however, that in Williams the Supreme Court “explained that section 6254, subdivision (f), ‘articulates a broad exemption from disclosure for law enforcement investigatory records, which is limited only by requirements in subdivision (f)(1) and (2) to ‘provide certain information derived from the records about the incidents under investigation.’” Thus,

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60 Govt C §6250.
notwithstanding the general rule that CPRA exemptions are to be narrowly construed, the scope of records encompassed by this particular exemption is broad, although qualified by the specifically delineated categories of information which generally must be disclosed.

c. What is an “investigation” within the meaning of Section 6254(f)?

What, exactly, does the “broad” exemption afforded by Section 6254(f) encompass? In ACLU, the Court of Appeal explained what constitutes an “investigation,” applied that definition to ALPR technology, and definitively concluded that data generated by ALPR systems satisfies the standard for records of investigation.

Drawing guidance from Haynie, the court held: “[T]he exemption for records of investigation encompasses routine investigations undertaken to determine if a violation of law has, or may have, occurred.”65 “If a violation or potential violation is detected, the exemption also extends to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency.”66 While Haynie involved a traffic stop, rather than a license plate check, the Supreme Court’s common sense interpretation of the term is instructive and still good law.

Importantly, however, “not everything law enforcement does is shielded from disclosure.”67 The exemption does not include “inquiries of citizens for purposes related to crime prevention and public safety that are unrelated to either civil or criminal investigations.”68

d. ALPR data satisfies the “investigation” definition.

The City and County argued that ALPR data squarely falls within the exemption for records of investigation because the system’s automated process of scanning license plates and checking them against law enforcement-generated “hot lists” is inherently investigatory. Through ALPR, officers are attempting to locate vehicles and individuals associated with the crimes contained in those “hot lists;”

67 ACLU v Superior Court (2014) 236 CA 4th 673, 681.
68 ACLU v Superior Court (2014) 236 CA 4th 673, 681, italics in original.
therefore, the data captured and stored as a result of this process constitute records of those investigations. The Court of Appeal agreed.

Rejecting Petitioners’ assertion that ALPR plate scans are not within the exemption’s purview because they merely “collect data” in an untargeted fashion, the court noted that Real Parties’ evidence demonstrated to the contrary. Specifically, the evidence showed the system’s “principal purpose” is to locate vehicles connected to specific suspected crimes under investigation.69 “The collection of plate data and hot list check are part and parcel of the same investigative process—without the plate scan there can be no investigation.”70

Moreover, the fact that all plates within range of an ALPR camera are scanned “regardless of whether the car or its driver is linked to criminal activity” (a point emphasized by petitioners) “does not mean the system is not performing an investigation. As explained in Haynie, ‘[i]n exempting records of...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.’”71 Of course, not all license plate scans will result in a “hit,” indicating the vehicle may be associated with a crime, but this fact does not change the investigative nature of the scan and resulting data. Investigations that do not detect criminal activity do not as a result cease to be investigations.

e. There is no requirement that the prospect of enforcement be “concrete and definite” for records of investigation to be exempt.

Unlike the exemption for records contained in investigatory files, which are protected from disclosure “only when the prospect of enforcement proceedings [becomes] concrete and definite,” records of investigation (and intelligence information) are independently exempt by their very nature under section 6254(f).72 The “concrete and definite” requirement, with respect to investigatory files, is “necessary to prevent an agency from attempting to ‘shield a record from

69 ACLU v Superior Court (2014) 236 CA 4th 673, 683-684.
70 ACLU v Superior Court (2014) 236 CA 4th 673, 684, fn. 5.
71 Haynie v Superior Court (2001) 26 C4th 1061, 1070, fn. 6, italics added; ACLU v Superior Court (2014) 236 CA 4th 673, 684.
72 ACLU v Superior Court (2014) 236 CA 4th 673, fn. 4.
disclosure, regardless of its nature, simply by placing it a file labeled ‘investigatory.’”\textsuperscript{73}

The Court of Appeal declined petitioners’ invitation to graft this inapplicable standard onto records of investigation. “Contrary to petitioners’ implicit contention, our Supreme Court has repeatedly rejected the notion that a ‘concrete and definite’ prospect of enforcement must be shown to exempt records of investigations from disclosure.”\textsuperscript{74}

\textbf{f. Neither the vast amount nor the retention of ALPR data renders it non-investigatory.}

The court also rejected ACLU’s attempt to characterize ALPR data as non-investigative in nature based on the sheer volume of data collected and the fact that it is retained for years by LAPD and LASD. “The fact that ALPR technology generates substantially more records than an officer could generate in manually performing the same task does not mean the ALPR plate scans are not records of investigations.”\textsuperscript{75} The automation of the process, and resulting increase in records of license plate checks, “has no bearing on whether those plate scans and associated data are records of investigation under section 6254, subdivision (f).”\textsuperscript{76}

Likewise, the retention of the data does not remove it from the ambit of section 6254(f) because the exemption does not expire when an investigation concludes. The Supreme Court made this clear in \textit{Williams}, with respect to investigatory files, and the Court of Appeal applied the same analysis in \textit{ACLU}:

\begin{quote}
[T]he exemption shielding records of investigations from disclosure does not lapse when the investigation that prompted the records’ creation ends. As the high court stated in \textit{Williams} with respect to the exemption for investigatory files, "It is noteworthy that nothing [in the statute’s language] purports to place a time limit on the exemption for investigatory files. Indeed, a file ‘compiled by … [a] police agency’ or a file ‘compiled by any other state or local agency for
\end{quote}

\textsuperscript{73} \textit{Haynie v Superior Court} (2001) 26 C4\textsuperscript{th} 1061, 1069, quoting \textit{Williams} at p. 355; \textit{ACLU v Superior Court} (2014) 236 CA 4th 673, fn. 4.

\textsuperscript{74} \textit{Haynie v Superior Court} (2001) 26 C4\textsuperscript{th} 1061, 1069–1071; see \textit{Williams v Superior Court} (1993) 5 C4\textsuperscript{th} 337, 354–356.

\textsuperscript{75} \textit{ACLU v Superior Court} (2014) 236 CA 4th 673,685.

\textsuperscript{76} \textit{ACLU v Superior Court} (2014) 236 CA 4th 673, 685, fn. 6.
... law enforcement ... purposes’ continues to meet that definition after the investigation has concluded. If the Legislature had wished to limit the exemption to files that were ‘related to pending investigations,’ words to achieve that result were available. It is not the province of courts ‘to insert what has been omitted.’”77 “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.78

g. Section 6255: The Public Interest in Non-Disclosure.

“[T]he Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to section 6254; and (2) the ‘catchall exception’ of section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. [Citation.]”79

Because the Court of Appeal held ALPR data is exempt from disclosure under section 6254, subdivision (f), it did not have to reach the issue of whether the “catch all” provision of section 6255 also applied.80 The trial court however, based its decision on both statutes. With respect to section 6255, the trial court found that the public interest in maintaining the confidentiality of criminal investigations and the privacy of vehicle owners whose plates were scanned clearly outweighs the public interest in disclosure of ALPR data.

The public interest in maintaining the confidentiality of criminal investigations is implicitly recognized in the express exemption of section 6254(f). Nonetheless, to underscore the importance of preserving this confidentiality, the City presented evidence that the release of ALPR data would compromise the value

77 Williams v Superior Court (1993) 5 C4th 337, 357.
78 Govt C §6254(f); ACLU v Superior Court (2014) 236 CA 4th 673, 681-682.
79 City of San Jose v Superior Court (1999) 74 CA4th 1008, 1017.
80 “Because we conclude the exemption under section 6254, subdivision (f) supports Real Parties’ decision to withhold the ALPR plate scan data, we do not address whether Real Parties also met their burden under section 6255’s catchall exemption.” ACLU v Superior Court (2014) 236 CA 4th 673, 685.
of ALPR as an investigative tool and jeopardize criminal investigations themselves. For instance, a criminal or potential criminal could request all ALPR data associated with his or her vehicle and thereby learn whether the police have incriminating evidence regarding his or her whereabouts on a particular date and time or at a particular location. This was cited by the trial court as a compelling factor in favor of non-disclosure. *Amici Curiae* California State Sheriffs’ Association, California Police Chiefs’ Association and the California Peace Officers’ Association also emphasized the threat to law enforcement agencies throughout California should law enforcement agencies be forced to release raw ALPR data.

**h. Privacy interests and public safety also militate against disclosure of ALPR data.**

The City also presented evidence, through LAPD’s subject matter expert on ALPR technology, that an individual could use the data to try to locate a particular vehicle. Noting this evidence, the trial court recognized the significant threat to privacy and public safety this would pose.

The privacy implications of releasing records that disclose the "precise locations of vehicles bearing particular license plate numbers on specified dates and times" would be "substantial." Such information could be used to "draw inferences about an individual’s driving patterns and whereabouts on a particular date and time." For instance, a "stalker looking for a victim, or a criminal defendant looking for the detective, prosecutor or judge who convicted him" could request and use ALPR data to aid in efforts to locate and harm such individuals. Balancing these interests against the public interest in publicly exposing ALPR data to determine if LAPD and LASD are abusing the technology--particularly when, the trial court noted, petitioners failed to show how the data could reveal such "abuse"--the trial court concluded non-disclosure better served the public interest.

In finding that the public interest served by non-disclosure of ALPR data clearly outweighs the interest served by disclosure, the trial court cited a familiar principle underlying the release of records under the CPRA: "Disclosure to one member of the public would constitute a waiver of the exemption [citation], requiring disclosure to any other person who requests a copy." Moreover, the

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81 Trial court order, p.15.
82 Trial court order, pp. 15, 17.
83 86 Ops Cal Atty Gen 132, 137 (2003), citing Govt C §6254.5; see *City of San Jose v Superior Court* (1999) 74 CA4th 1008, 1018.
motive of the particular requester cannot be considered because it is "irrelevant; the question instead is whether disclosure serves the public interest."\textsuperscript{84}

In other words, a public agency cannot "pick and choose" to whom it releases records. A CPRA requester such as a media outlet may have no interest whatsoever in invading the privacy interests of an individual member of the public, but another requester may have downright nefarious motives in seeking location data regarding a specific vehicle. In any event, media organizations are not entitled to special access to public records under the CPRA: “It is irrelevant that the party requesting the public records is a newspaper or other form of media, because it is well established that the media has no greater right of access to public records than the general public.\textsuperscript{85}

This potential for enabling serious misuse of ALPR data by other requesters was a substantial factor in the trial court’s balancing of interests under section 6255. In short, the City and County demonstrated, to the trial court’s satisfaction, that the public interest served by not disclosing ALPR data "clearly outweighs the public interest served by disclosure of the record[s].”

\section*{V. Other Technologies}

In \textit{ACLU}, the Court of Appeal did not discuss other forms of technology-based investigative techniques and records as it was confronted only with the applicability of 6254(f) to ALPR data. Nonetheless, the court’s analysis and holdings provide a helpful framework for considering whether records generated by these relatively new technologies are also exempt from disclosure under the CPRA.

The Court of Appeal made it clear that the form of law enforcement records, or the means of creating them, is not determinative of whether they qualify as records of investigation. Be they “high tech” or “low tech,” the question is whether the records satisfy the definition of investigation records established in \textit{Haynie}, again summarized below.

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\textsuperscript{84} \textit{City of San Jose v Superior Court} (1999) 74 CA4th 1008, 1324.
\textsuperscript{85} \textit{City of San Jose v Superior Court} (1999) 74 CA4th 1008, 1018; \textit{California State University, Fresno Assn., Inc. v Superior Court} (2010) 90 CA4th 810, 831; \textit{Freedom Newspapers, Inc. v Superior Court} (1986) 186 CA3d 1102, 1109–1110; \textit{Dixon v Superior Court} (2009) 170 CA4th 1271, 1279.
\end{flushright}
a. In-car video and body-worn cameras

Law enforcement agencies throughout the country are increasingly utilizing cameras affixed to patrol vehicles’ dashboards ("dash-cams") and/or other parts of the vehicle ("in-car video") as well as to police officers themselves ("body-worn cameras") to record interactions with the public. The captured footage, which typically includes simultaneously recorded audio, is stored and retrievable for later use as evidence and for other purposes, such as review of use-of-force incidents.

Under the Supreme Court’s interpretation of records of investigation in Haynie, there is a strong argument that this captured video and audio data is exempt under most circumstances. Specifically, if the data constitutes a recording of one or more police officers’ actions in the following scenarios, the decision to withhold the records appears justified under Section 6254(f):

- “...investigations to determine if a crime has been or is about to committed and those that are undertaken once criminal conduct is apparent;”86
- “[i]f a violation or potential violation is detected...investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency.”87

If, on the other hand, the recording captures an officer’s non-investigatory interaction with a citizen, it would be subject to disclosure unless it qualifies as complaint or intelligence information or is included in an investigation or security file. As noted above, the exemption for investigation records does not include “inquiries of citizens for purposes related to crime prevention and public safety that are unrelated to either civil or criminal investigations.”88 While the line may not always be bright—for instance, an encounter that began with a non-investigatory inquiry could develop into an investigation—it is important to be mindful of the distinction articulated by the Supreme Court in Haynie and followed by the Second District Court of Appeal in ACLU.

Even when there is intense public and media pressure to release police video footage in a high-profile matter, an agency may properly assert the exemption afforded by Section 6254(f) when appropriate. This is the case even when the

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investigation is no longer “on-going” and the criminal and/or civil matter to which the video relates has been resolved. As held in Williams and followed by ACLU, the exemption for law enforcement investigatory records is broad and survives the duration of the investigation itself. In other words, public interest in video footage, no matter how strong, does not change the data’s character as an investigatory record, assuming the recording satisfies Section 6254(f) as interpreted by the Supreme Court in Williams and Haynie.

b. Cell Site Simulators

Cell site simulators, also known as “IMSI [International Mobile Subscriber Identity]-catchers,” are devices used by law enforcement agencies to locate wanted suspects through their cell phones. The technology works by monitoring cell phones on a particular network in the target area. If the signal associated with the suspect’s handset is located, the device simulates a cell tower in order to cause the phone to connect to the device and reveal its location.

From a CPRA standpoint, the data captured by IMSI catchers, to the extent it is retained, seems to fall squarely within the exemption for investigatory records under Section 6254(f). The technology is used not only in terrorism investigations, but also to aid in the apprehension of suspects wanted in connection with crimes such as homicide, kidnapping, and robbery. To the extent that the data is generated and used in the course of criminal investigations, the analysis employed in ACLU seems equally applicable. ALPR systems assist in investigations “to locate automobiles associated with specific suspected crimes.”

IMSI catchers assist in investigations to locate suspects, through their cell phones, wanted in connection with specific crimes. The nature of the technology and amount of records it generates “has no bearing on whether those plate scans and associated data are records of investigation under section 6254, subdivision (f).” Likewise, the advanced and “non-traditional” nature of IMSI catchers should have no bearing on whether the records they produce are exempt from disclosure. If the data was collected in the course of a criminal investigation and/or is contained in an investigatory file connected to a criminal case, it should be protected from compelled disclosure under Section 6254(f).

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89 For an in-depth discussion of technology and analysis of legal issues surrounding the technology, see: Hardman, Heath, The Brave New World of Cell-Site Simulators (May 22, 2014).
90 ACLU v Superior Court (2014) 236 CA 4th 673, 684.
91 ACLU v Superior Court (2014) 236 CA 4th 673, 685, fn. 6.
VI. Retention of Law Enforcement Records

The CPRA is not a records retention statute; it is a records disclosure statute. Other laws govern state and local government records retention. Local agencies generally must retain public records for a minimum of two years, although some records may be destroyed sooner, and the lack of a definition of “public records” subject to the records retention statute may leave agencies some flexibility in determining what records qualify as “public records” subject to statutory retention.

Certain types of records have their own statutory retention requirements. Peace officer complaint records must be retained for five years. Recordings of telephone and radio communications, defined as the routine daily recording of telephone communications to and from a city, city and county, or department, and all radio communications relating to the operations of the departments, may be destroyed after 100 days. Routine video monitoring, defined as video recording by a video or electronic imaging system designed to record the regular and ongoing operations of a city, including mobile in-car video systems, jail observation and monitoring systems, and building security recording systems, must be retained for one year, and may be destroyed or erased after 90 days if another record, such as written minutes, is kept of the recorded event.

In preparing to implement new electronic law enforcement technologies, such as license plate readers, body-worn and in-car video, and cell tower simulators, local agencies should review applicable retention requirements and prepare to retain the resulting records for at least the time required by law, and ideally as long as necessary or convenient for the discharge of the agencies’ duties concerning the information. In some cases, ongoing investigations, pending litigation and other considerations may warrant retaining law enforcement records longer than the applicable retention period.

VII. Conclusion

In sum, regardless of the type of technology involved, the applicability of the exemption for law enforcement records of investigation should be analyzed based

\[92 \text{ Los Angeles Police Dept. v Superior Court (1977) 65 CA3d 661.} \]
\[93 \text{ Govt C §34090(d); 60 Ops Cal Atty Gen 317 (1981).} \]
\[94 \text{ Pen C §832.5.} \]
\[95 \text{ Govt C §34090.6.} \]
\[96 \text{ Govt C §§34090.6, 34090.7.} \]

Treatment of Law Enforcement Information
Such As Automatic License Plate Reader Information,
In-car and Body-worn Video, and Cell Site Simulators
under the California Public Records Act

23
on the framework summarized above. While some agencies may choose, as a policy matter, to comply with CPRA requests for such records, other agencies may seek to protect such records from disclosure to ensure investigations are not compromised. As stated by the Court of Appeal, Third Appellate District: “The reasons for this law enforcement investigation exemption are obvious. The exemption protects witnesses, victims, and investigators, secures evidence and investigative techniques, encourages candor, recognizes the rawness and sensitivity of information in criminal investigations, and in effect makes such investigations possible.”\textsuperscript{97}

\textsuperscript{97} Dixon v. Superior Court (2009) 170 CA 4th 1271, 1276.