Case No. F082845

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

ALISHA KINNEY,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF KERN,
Respondent,

KERN COUNTY SHERIFF'S DEPARTMENT,
Real Party in Interest.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF REAL PARTY IN INTEREST KERN COUNTY SHERIFF'S DEPARTMENT

On Appeal from the Kern County Superior Court
Case No. BCV-21-100450
The Honorable Stephen D. Schuett

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I. INTRODUCTION

When a person is arrested, two things become apparent about the arrest record containing their identifying information. First, it is important that the information concerning the individual's arrest be made available to the public to allow loved ones and the press to know where the person is being held, bail information, possible release information, and the circumstances of the arrest to guard against clandestine seizures and detention. Second, however, is that after some initial period of time those interests have been met. At this point, the arrest record, which may very well concern an arrest for a crime for which there was ultimately no charges brought against the individual or for which the individual was found not guilty, can become a liability against the individual's privacy. The individual identifying information (name, etc.) in the record is no longer needed to serve as a check against government, nor to assist those who are seeking the arrestee and need information about location, bail and release. Rather, public release of the information invades the privacy of the individual without the corresponding public benefit.

This is the heart of the issue of this case. This Court asks, among other things, how Government Code section 6254, subdivision (f)(1) – the provision requiring release of certain arrest records – can be harmonized with Penal Code section 13300 – the provision prohibiting release of

certain arrest records. In considering the statutory language and legislative intent and the various constitutional principles at stake, the answer is clearly the one put forth by Real Party in Interest in this case: the two provisions are harmonized by a temporal element. In other words, contemporaneous arrest records must be disclosed as a check on government action and to serve the immediate need of members of the public to know where an individual is being held, but identifying records that are no longer contemporaneous, such as the ones sought by Petitioner here, are exempt from disclosure under the Public Records Act. (See *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 298 [temporal element applied to attorney billings, which are confidential when the legal matter is pending and active, but may not be protected if the matter was concluded long ago].)

II. ARGUMENT

A. The Public Records Act requirement to disclose arrest records under Government Code section 6254(f) includes a contemporaneous requirement, which reconciles with statutory provisions preventing disclosure of the records.

Government Code section 6254, subdivision (f)(1) requires state and local law enforcement agencies to disclose the following information pertaining to arrests, unless disclosure would endanger the safety of a person involved in an investigation or the successful completion of an investigation:

> The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

In *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588, the court addressed a request for all available information under Government Code section 6254 (f)(1) and (f)(2), as they were then worded, regarding arrests completed by two deputy sheriffs for a ten-year period. (*Kusar, supra,* 18 Cal.App.4th at p. 591.) The county argued that it was only required to disclose information contemporaneous with the arrests. The court found these subsections ambiguous, reviewed their legislative history, and agreed with the county, concluding that subsections (f)(1) and (f)(2) require only disclosure of information contemporaneous to an incident. (*Id.* at p. 599.) The court based its rationale, in part, on language in subsection (f)(1) that required disclosure of the "current" address of the arrest. (*Id.* at p. 595.) But it also relied on legislative history indicating the Legislature's intent "to continue the common law tradition of contemporaneous disclosure of individualized information in order to prevent secret arrests and to mandate the

continued disclosure of customary and basic law enforcement information to the press." (*Id.* at p. 598.)

While *Kusar* involved a request for arrest information under subsection (f)(1), in *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, the requester sought information under subsection (f)(2) regarding "complaints and/or requests for assistance" for a six-month period. (*Id.* at pp. 215-16.) Following the court's decision in *Kusar*, the Legislature had amended section 6254(f) to remove the term "current address" from subsections (f)(1) and (f)(2). The purpose of those amendments was to ease the burden on law enforcement agencies that were receiving an increasing number of requests for address information from marketing organizations. (*Id.* at p. 232.) The court in *Fredericks* examined the amended language of subsection (f)(2), which no longer included the word "current," and distinguished the request at issue from *Kusar*, which dealt primarily with a request for information under (f)(1). (*Id.* at pp. 233-34.) The court concluded that for purposes of the amended subsection (f)(2), there was "no basis in the plain language of the statute to read into it any 60-day limitation on access to disclosable information." (*Id.* at p. 234.)

Notwithstanding the decision in *Fredericks*, there continues to be a "contemporaneous" element to the subsection (f)(1)

exception involving arrest information for several reasons.

First, as noted above, the court in *Fredericks* based its holding regarding subsection (f)(2) on the Legislature's removal of the word "current" before "address" in a post-*Kusar* amendment of both subsections. But even with removal of the word "current" from subsection (f)(1), there continues to be language in that subsection indicating that there must be a temporal connection between the arrest and the request for information. (Gov. Code, § 6254, subd. (f)(1) ["the location where the individual *is currently* being held, and all charges the individual *is being held* upon"](emphasis added).) To read (f)(1) as requiring release of records of an arrest that occurred nearly one year prior would be to ignore the plain language of the statute and its focus on current or present information.

Second, as noted in *Kusar*, the legislative history of subsection (f)(1) indicates an intent to formalize a common law tradition of police departments providing arrest information regarding recent arrests to the press, in part to prevent the police from making secret arrests. The legislative history for the amendments to subsection (f)(1) to remove the word "current" indicates only that the Legislature wanted to ease the burden on law enforcement agencies that were being inundated with requests from marketing companies for address information. If the current address

of arrestees was no longer available, it stands to reason that the barrage of records requests that were being made to advance such marketing schemes would cease. Petitioner has not provided this Court with any legislative history, and amici is similarly not aware of any such history, indicating that the Legislature intended to overrule *Kusar* or to have any other effect other than reducing the number of information requests to departments. Thus, the Legislature's original intent in enacting the subsection (f)(1) exception – to provide a check against policy making arrests – persists, and it supports the conclusion that the arrest information sought by a requestor must be close in time to the arrest.

Finally, the disclosure requirement of subsection (f)(1) serves a different purpose and raises different concerns than the disclosure requirement of subsection (f)(2). Subsection (f)(1) calls for the disclosure of identifying information for the arrests of specific individuals, raising significant privacy concerns and implicating other statutory protections for criminal offender records, as will be discussed more fully below. Subsection (f)(2), on the other hand, involved more general information about calls for service and complaints that may not disclose personal information about arrestees and thus raises less of a concern for the privacy of arrestees.

Taken together, the plain language of the statute, the applicable case law, and the legislative history all point toward limiting subsection (f)(1) to contemporaneous records. When so interpreted, the answer to whether Government Code section 6254, subdivision (f)(1) can be harmonized with Penal Code section 13300 is clear. Contemporaneous arrest records are to be released, but thereafter the records may not be generally released to the public under the applicable Penal Code provisions.[1]

B. Local law enforcement agencies commonly limit disclosure of arrest records to contemporaneous information in order to comply with statutory requirements protecting the privacy of arrestees.

It is important to note that the Kern County Sheriff's Department is not an outlier in providing Petitioner with the requested information, but redacting personal identifiers (such as an arrestee's name) for requests for information that are no longer contemporaneous with the arrest. Local law enforcement agencies may differ in what constitutes a contemporaneous record, with

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[1] The prohibition against disclosure of records in the Penal Code is incorporated into the Public Records Act. "Government Code section 6254, subdivision (k) provides one of the more open-ended exemptions in CPRA. Under that provision, disclosure is not required of 'Records the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.'" (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1422.)

common policies and practices ranging from 30 days to 60 days to 90 days, though the precise definition of "contemporaneous" for these purposes is not at issue in this case. However, Petitioner's request here for records of arrests that occurred nearly one year prior, are not contemporaneous by any measure.

It should not be surprising that the Kern County Sheriff's Department, like so many other local law enforcement agencies, limits disclosure to contemporaneous records. As noted above, the statute itself contains temporal limitations, and the guidance provided by case law and the Attorney General. (89 Ops.Cal.Atty.Gen. 204 (2006)[addressing how to apply subsection 6254(f)(1) and Penal Code sections 13300-13305, and concluding that only contemporaneous records should be disclosed].)

C. An arrestee's constitutional right to privacy supports limiting subsection 6254(f)(1) to contemporaneous records.

This Court has requested briefing on whether arrestees have a constitutional right to privacy in their arrest records, and how that right might apply to this case. This question is unquestionably relevant to the issues in this case because contrary to Petitioner's assertion that the case involves only a straightforward requirement to produce records under the Public Records Act, the records request here implicates consideration of two important constitutional

principles—the public's right to access public records (Cal. Const., art. 1, § 3), and the individual's right to privacy (Cal. Const., art. 1, § 1). Under Government Code section 6255, these two rights must be analyzed to determine whether the public interest in nondisclosure clearly outweighs the public interest in disclosure. In *Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, the court concluded that the "state constitutional right of privacy extends to protect defendants from unauthorized disclosure of criminal history records." (*Westbrook*, supra, 27 Cal.App.4th at pp. 165–166, citing *Craig v. Municipal Court* (1979) 100 Cal. App. 3d 69, 76–77.)

> In support of this conclusion, *Westbrook* cited *U.S. Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749, which held that the FOIA did not require the disclosure of an individual citizen's rap sheet compiled by the Department of Justice. The high court in that case concluded that such disclosure "can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" (*Id.* at p. 780.) The decisions in *Westbrook* and *Reporters Committee* protect sensitive information contained in governmental records that does not, when separated from those records and compiled, contribute to the public's understanding of government operations.

(*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 340.)

In other words, there may be an overriding public interest accessing records that include personal information when such

records serve as a check on government activity. But when the records are just being stored by the government and revealing personal information to the public would not aide in the public's understanding of government operations, the individual privacy rights should prevail. (See *Voice of San Diego v. Superior Ct. of San Diego County* (2021) 66 Cal.App.5th 669, 926, as modified (July 27, 2021), review denied (Oct. 27, 2021) [County not required to disclosure the locations of private entities with confirmed COVID-19 outbreaks when disclosure would create a chilling effect on reporting infections and would not significantly contribute to the public's understanding of government activities].) That would certainly be the case with the records requested here. Initially (i.e., contemporaneously) upon arrest, information on the details of the arrest is critical for ensuring residents are not arrested in secrecy and to allow for their whereabouts and release plans to be known. In contrast, historical records do not provide such benefits, but do reveal private information and lead to unfair inferences about individuals who were arrested, even if they were never charged or convicted of a crime.

It is difficult to understand, and indeed Petitioner does not attempt to explain, the public benefit achieved by including personal identifiers in historical arrest records released to the public. Indeed,

under the Petitioner's theory, she could demand the arrestees' names and corresponding weights going back one year, and the agencies would be powerless to prevent disclosure. Petitioner was provided with redacted information, which allows the public to understand the volume of incidents and other information that may be relevant to monitoring government activity. But salacious curiosity over who the individuals are who were arrested nearly a year after the arrest took place does not serve a similar public. (See *Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 240 [records can be withheld to preserve privacy rights where interest in the records is private rather than public, and noting that "a public interest is not the same as a private interest. Otherwise, the adjectives 'public' and 'private' would be unnecessary. It follows, therefore, that just because a member of the public has an interest in something does not necessarily make that interest one of public concern."].)

The public purpose of historical arrest records is even more diminished after the recent amendments to Penal Code section 832.7, which permit the disclosure of certain police officer personnel records. Penal Code section 832.7 is a far better avenue to illuminate police activity than Government Code section 6254, subdivision (f), which notably does not require the disclosure of the names of the

officers involved. In contrast, Penal Code section 832.7, broadly requires the disclosure of "all investigative reports" related to certain incidents involving the discharge of firearm, use of force resulting in death or great bodily injury, a sustained finding of sexual assault, and a sustained finding of dishonesty. Moreover, Penal Code section 832.7 requires the redaction of information, including the names of complainants and witnesses, which very well could be the names of the arrestee. (See Pen. Code, § 832.7, subd. (b)(5).)

The Public Records Act was never intended to govern the disclosure of all government records in every circumstance. The Legislature wisely included Government Code section 6254, subdivision (k) to account for other statutory schemes that address concerns not otherwise covered in the Public Records Act. Government Code section 6254, subdivision (k) is the gateway to the protections in Penal Code section 13300 and Penal Code section 832.7. (*City of Hemet, supra,* 37 Cal.App.4th at p. 1430 ["[T]he protection of section 832.7 is illusory unless that statute is incorporated into CPRA through Government Code section 6254, subdivision (k). Logic does not permit the conclusion that information may be 'confidential' for one purpose, yet freely disclosable for another. In the court's apparent concern for allowing the city in that case to disseminate information as a matter of

legitimate public interest, the court put a gloss on the word 'confidential' which we cannot accept."].)

Concerns over privacy rights are exacerbated in the digital age where records are so easily maintained and searchable versus their old paper counterparts. In some European countries, there has developed a "right to be forgotten" in order to address this issue. It is premised on that fact that while a document or news story may be relevant to the public at or near the time of its occurrence, the privacy of the individual outweighs the public interest as time passes, notwithstanding that the electronic record is still readily available. Simply put, in a "newly forming information society one should hold the right to have personal information migrate from a public or disclosed sphere to a private or limited access sphere after a period of time." (Ambrose, *It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten*, (2013) 6 Stan. Tech. L.Rev. 369, 375.) The notion is that there is an individual "right to silence on past events in life that are no longer occurring." (*Id.* at p. 371.)

Concluding that subsection 6254(f)(1) includes a temporal or contemporaneous requirement furthers both the constitutional right to public records and the constitutional right to privacy, striking a balance that is contemplated by Government Code section 6255.

Releasing contemporaneous arrest records gives the press and members of the public the opportunity to monitor government operations and protects against secretive arrests and Penal Code section 832.7 provides additional checks on officer conduct. Furthermore, applying Penal Code section 13300 and the constitutional right to privacy to generally prohibit disclosure of personal information in historical arrest records protects the arrestee's individual rights, particularly where the interest in having such personal information is more of a private interest than a public one.

III. CONCLUSION

For all of these reasons, Amici request that this court deny the pending writ petition and uphold the trial court's decision to sustain Real Party in Interest's demurrer without leave to amend.

Dated: December 3, 2021

Respectfully submitted,

/s/
By _____
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California State Association of Counties
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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,467 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of December, 2021 in Sacramento, California.

Respectfully submitted,

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