



Exploring the California Public Records Act's Investigatory Privilege

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Exploring the Investigatory Privilege

- A PRA Refresher
- The “Investigatory Privilege”
- Exemptions and Exceptions under Section 6254(f)
 - Victims
 - Officer Involved Shootings
 - Audio & Video Footage & AB 748
- Recent Case Law

A PRA Refresher

- Every person, as defined, has a right to inspect public records of any state or local agency's custody or control.
 - This includes records maintained by Police Departments.
- Unless there is an exemption recognized under state and/or federal law, the public's right to disclosure shall be "broadly construed."
 - This right was enshrined in the California Constitution (Cal. Const., art. I, sec. 3(b)).
- The most common exemption from disclosure for PD records is Government Code Section 6254(f), known as the "Investigatory Privilege."

The “Investigatory Privilege”

- Big picture: Certain information contained within complaints to, or investigations conducted by state or local law enforcement and prosecutors in California must be disclosed, but otherwise the records are exempt from disclosure as part of the investigatory file.
 - Section 6254(f) is codified in a written style that makes it difficult to discern what information must be withheld (“exempt” material) and the certain information contained within these exempt records that must be disclosed (“exceptions” to that exempt material).
- In order for the “Investigatory Privilege” to apply, there must be a “concrete and definite prospect” of criminal enforcement. (*Haynie v. Superior Court* (2001) 31 P.3d 760).
- The “Investigatory Privilege” generally does not terminate with the completion of the investigation (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 355).

The “Investigatory Privilege”

Haynie v. Superior Court (2001) 26 Cal.4th 1061, 1071

Yet, by including “routine” and “everyday” within the ambit of “investigations” in section 6254(f), we do not mean to shield everything law enforcement officers do from disclosure. (Cf. *ACLU, supra*, 32 Cal.3d at p. 449.) Often, officers make inquiries of citizens for purposes related to crime prevention and public safety that are unrelated to either civil or criminal investigations. The records of investigation exempted under section 6254(f) encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred. 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. Here, the investigation that included the decision to stop Haynie and the stop itself was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission. Records relating to that investigation are exempt from disclosure by section 6254(f). The Court of Appeal erred in ordering them to be disclosed.

“Concrete and definite prospect of criminal enforcement”

- Public agencies often rely on administrative, civil and criminal enforcement in seeking to gain compliance re: violations of their Municipal Code, or adopted ordinances.
- **Administrative code enforcement records do not fall under the “Investigatory Privilege” [Gov. Code 6254.7(c)]**
 - Unless another exemption from disclosure applies under the PRA, a local agency would disclose: Notices of Violation, Administrative Citations, Routine administrative inspections, follow-up, etc.
 - However, a local agency may still rely on the “catch-all” exemption (Gov. Code 6255) to protect information that includes personal identifiable information (“PII”) and “Reporting Party” information.

Exemptions and Exceptions under Section 6254(f)

- Different disclosure requirements based on the specific type of police record in question.
 - (see Slides on Incident Reports; Arrest Records as examples)
- General exemption applicable to material otherwise disclosable under Section 6254(f):
 1. Material that if disclosed, would endanger the safety of a person involved in an investigation; or
 2. Material that would endanger the successful completion of an investigation or a related investigation.
 3. Also, no requirement to disclose analysis or conclusions of an investigating officer

Exemptions and Exceptions under Section 6254(f)

- Crime/Incident Reports
 - Information that must be made available to the public (*exception to exemption*)
 - Time/substance/location of complaints/requests for assistance; time and nature of response; time/date/location of occurrence; time/date of report; factual circumstances surrounding crime/incident; general description of injuries/property/weapons involved; and name/age of victim (unless name to be withheld per 6254(f)(2) or Penal Code provision)
 - Information that must be made available only to victims or their authorized representative (e.g. parents, attorneys, insurance companies)
 - Names & addresses of involved persons and witnesses (not confidential informants); description of property involved; date, time, location of incident; diagrams; statements of involved parties; statements of witnesses (not confidential informants)
 - Arrest and booking information always disclosable to District Attorney

Exemptions and Exceptions under Section 6254(f)

- Arrest Records:
 - Information that must be made available to the public (*exception to exemption*)
 - Full name and occupation of arrestee; physical description including date of birth, color of eyes and hair, sex, height, and weight; time and date of arrest, booking; location; factual circumstances surrounding arrest; amount of bail; time and manner of release or location where arrestee held; all charges, including outstanding warrants, parole or probation holds
 - Information that is generally exempt–
 - Personal Identifying Information (SSN, driver's license's number, phone number); criminal history; current address
 - Current address may be disclosed to a Requester who declares under penalty of perjury that the request is made for a scholarly, journalistic, political or governmental purpose and Requester provides a signed declaration the address will not be used directly or indirectly to sell a product or service

A Note on Victims' information under Section 6254(f)

- Victims' name, for particular crimes [violent sex crimes; domestic violence; crimes against minors; prostitution; stalking etc.] may be withheld at victim's request (or victim's parent or guardian if victim is a minor).
 - **DO NOT RELEASE** a victim's address or telephone number to anyone arrested for the alleged offense, or to any person who may be a defendant in a criminal action. (Penal Code 841.5)
- Juvenile Records: generally, confidential and not subject to disclosure. If juvenile records have been sealed pursuant to Welfare & Institutions Code §§ 389, 781, 786 or Penal Code §1203.45, the Requester must comply with the procedures set out by Statute for record release.
 - To the extent a minor is a victim or a witness to a crime, that information is protected from disclosure by 6254(f), *and* Penal Code 841.5(a) and 11167.

Officer Involved Shootings under Section 6254(f)

- Common for PDs to field many PRA requests after an OIS event.
- In 2014, the California Supreme Court held that the names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer's safety. (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59).
 - In ordering disclosure, court looked at Gov. Code 6254(f), and the requirement that when an officer's name is recorded as part of the "factual circumstances" of the incident, disclosure is required.
 - Public's interest outweighed privacy/safety interest of officers, but still case-by-case under "catch-all" exemption.

Audio & Video Footage & AB 748

- Assembly Bill 748 took effect July 1, 2019.
- Amended Section 6254(f) to allow greater access to police body camera and other audio and video recording footage
- Audio and visual recordings of “critical incidents,” as defined, must be made publicly available within 45 days of that incident with some limited exceptions.
 - Critical Incidents: resulting in either the discharge of a firearm by law enforcement or in death or great bodily injury to a person from the use of force by law enforcement.
 - A public agency may delay disclosure of the recording for between 45 days and one year during an active criminal or administrative investigation, but only if disclosure would “substantially interfere” with that ongoing investigation.
 - Examples of such interference include endangering the safety of a witness or confidential source.

Audio & Video Footage & AB 748

- Law enforcement agencies must be prepared to produce audio or visual recordings, while maintaining “the reasonable expectation of privacy of a subject depicted in the recording”
- Law enforcement agencies should be prepared to use “redaction technology” that includes “blurring or distorting images or audio” to protect that privacy interest.
- Exception if the agency demonstrates that the reasonable expectation of privacy cannot be adequately protected by redaction, then the agency may withhold the entire recording. However, a redacted or unredacted copy of that recording must be made promptly available to any person (or designated representative of that person) whose privacy interest is protected by the public nondisclosure.
 - For example, a copy must be provided to the parent or legal guardian of a minor subject whose privacy is being protected by the withholding.

Recent Case Law Impacting Section 6254(f)

- ***Goodin v. City of Glendora* (2019) 380 F. Supp. 3d 970:**
 - Officers accused of constitutional and civil rights violations stemming from a warrantless entry. A request was made under the PRA 2 years after the incident for related police reports, denied by the PD under Section 6254(f), arguing the investigation was still open.
 - Judge looked at evidence that case would not be filed and determined the PRA required PD to release “the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved” (public information described in previous slides).
 - A reminder to remain diligent about the information that must be disclosed within exempt information (“exceptions”) under Section 6254(f).

Recent Case Law Impacting Section 6254(f)

- **ACLU Foundation v. Superior Court (2017) 400 P.3d 432:**
 - LAPD, LASD (“law enforcement”) employed Automated License Plate Reader (“ALPR”) technology, popular among PDs to help apprehend or inform on vehicles via digital license plate capture that may pass through the jurisdiction.
 - ACLU and the Electronic Frontier Foundation (“petitioners”) sought all ALPR data collected during a 1-week period. Law enforcement refused to produce, citing Section 6254(f) and the “catch-all” exemption.
 - “Our case law recognizes that the CPRA should be interpreted in light of modern technological realities ... It is hard to imagine that the Legislature intended for the records of investigations exemption to reach the large volume of data that plate scanners and other similar technologies now enable agencies to collect indiscriminately.” (*Id.* at 437-38.)
 - California Supreme Court reiterated the need to view PRA exemptions, including the investigatory privilege, narrowly.



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