

# *Memorandum*

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**TO:** Sunshine Reform Task Force

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** Response to District  
Attorney's Position Paper

**DATE:** January 31, 2008

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## **EXECUTIVE SUMMARY**

We agree with the District Attorney that the Sunshine Reform Task Force's recommendations about law enforcement records raises important policy concerns about the possibility that increased access to police reports will result in decreased cooperation from victims and witnesses in reporting crime, and, consequently, decreased prosecution of persons who commit crimes. The Task Force should consider carefully these concerns as it finalizes its recommendations on law enforcement records.

The District Attorney, however, has not identified a California statute that would preempt the Sunshine Reform Task Force's recommendations about law enforcement records. In fact, the California Public Records Act specifically permits a public agency to open its administrative records and allow for faster, more efficient or greater access to records unless disclosure is otherwise prohibited by law.

The District Attorney also raised legal concerns about the privacy rights of victims, witnesses, arrestees, defendants pending trial, convicted defendants and acquitted defendants under Article 1, Section 1 of the California Constitution and under various California statutes that the Legislature passed in order to protect the privacy rights of those individuals. The privacy rights of these persons will have to be considered by the Task Force in its final recommendations. In this regard, we agree with the District Attorney's analysis. In addition, we believe that California law prohibits the City of San Jose from providing access to source records or other information that may be used to compile criminal history information. In other words, the City may only provide contemporaneous disclosure of individualized arrest information in order to protect legitimate rights of privacy.

Finally, we are concerned that a few of the Sunshine Reform Task Force's recommendations about redaction may actually result in less information than required by the California Public Records Act.

## **SOURCES**

To prepare this response, we reviewed the District Attorney's Position Paper dated December 4, 2007, James Chadwick's Comments on the Position of the Santa Clara District Attorney dated December 10, 2007, the letter dated January 25, 2008, from Mark Schlosberg, Police Practices Policy Director, ACLU of Northern California and conducted our own extensive research as cited below.

## **LEGAL ANALYSIS**

### **A. BACKGROUND**

#### **1. Constitutional Provision About Local Self-Governance**

The City of San Jose is a charter city and, accordingly, has broad regulatory powers with respect to municipal affairs. The California Constitution sets forth the grant of powers to charter cities as follows:

[Charter cities] may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City Charters adopted pursuant to this Constitution shall supersede any existing Charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

California Constitution, Article XI, Section 5.

#### **2. San Jose City Charter Establishes A Police Department**

The San Jose City Charter, Article VIII, Section 800 provides: "Subject to the limitations hereinafter specified in this section, the Council shall have the following powers and duties: (a) The Council, in its discretion, may at any time establish such City offices, departments and agencies, in addition to those established by this Charter, as it may desire; and shall prescribe the respective functions, powers and duties of those departments which are established by Section 807 of this Charter. . . ."

Section 802 of the San Jose City Charter provides that "By action not inconsistent with other provisions of this Charter, the Council shall provide for the organization, conduct and operation of the several offices, departments and agencies of the City." Section 807 of the San Jose City Charter establishes the Police Department.

#### **3. Preemption Principles**

The California Supreme Court in *O'Connell v. City of Stockton* (2007) 41 Cal.4<sup>th</sup> 1061, recently restated the correct analysis for determining whether State law preempts a charter city ordinance. The first step in determining whether a local ordinance is

preempted by State law is to determine whether there is, in fact, any conflict between the State law and the local provision. *O'Connell*, 41 Cal.4<sup>th</sup> at 1067. This is so because Article XI, Section 7 of the California Constitution states that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general [state] laws." *Id.* Consequently, if local legislation conflicts with state law, it is preempted and void. *Id.* It should be kept in mind, however, that with respect to "municipal affairs," laws enacted by charter cities prevail over all state laws, including conflicting state laws. *Comm. of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505. The only exception to this general rule is when State law addresses matters of statewide concern. *Id.*

A conflict exists if the local legislation "*duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.*" *O'Connell*, 41 Cal.4<sup>th</sup> at 1067 (citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4<sup>th</sup> 893, 897, and *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4<sup>th</sup> 1239, 1251)(italics in the original). The *O'Connell* court explained that a local ordinance duplicates State law when it is "coextensive" with it, contradicts State law when it is "inimical to or cannot be reconciled" with it or enters a field fully occupied by State law when the Legislature either "expressly or by implication manifest[s]" its intent to occupy the legal area. *Id.* at 1067-68.

The Legislature occupies an area of law by implication when:

"(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the" locality.

*Id.* at 1068.

It should also be noted that when a local government regulates in an area over which it traditionally has exercised control, California courts presume that such regulation is not preempted by State statute, unless there is a clear indication to the contrary. *Id.* at 1068.

In *Johnson v. Bradley* (1992) 4 Cal.4th 389, the California Supreme Court stated:

To the extent difficult choices between competing claims of municipal and state governments can be forestalled in the sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices

by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.

*Id.* at 399.

Next, in case of an actual conflict, and where the matter implicates a municipal affair, the court's inquiry under the California Constitution focuses on whether the conflicting State law qualifies as a matter of statewide concern. *Id.* If the State statute does not qualify as a matter of statewide concern, the inquiry ends and the city regulation is not preempted. *Id.* If the State statute qualifies as a statewide concern, the court then must consider whether the State statute is both reasonably related to the resolution of that concern, and narrowly tailored to limit incursion into legitimate municipal interests. *Id.* If it is not, then the local law is not preempted. *Id.*

In *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4<sup>th</sup> 1139, the Supreme Court explained that in certain circumstances, there is a presumption against preemption:

We have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.' 'The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.'

*Id.* at 1149 (citations omitted).

#### **4. The California Public Records Act – Generally**

The right to inspect public records is regulated by the California Public Records Act (CPRA), enacted as Government Code Sections 6250 through 6278.48.

The Sixth District Court of Appeals explained the purpose of CPRA as follows: "The CPRA 'was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public entities.' 'The CPRA embodies a strong policy in favor of disclosure of public records . . . .' Public records are broadly defined." *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4<sup>th</sup> 1356, 1407-1408 (citations omitted).

Despite the strong legislative policy favoring access, "the public's right to disclosure of public records is not absolute. In California, the 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 exceptions' 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." But "unless exempted, all public records may be examined by any member of the public, often the press, but conceivably any person with no greater interest than idle curiosity."

*Id.* at 1408.

To the many statutory exceptions the courts have added other exceptions that certain communications and documents must be treated as confidential, such as "the files in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, and punishment of criminals." 55 Cal.Jur.3d, Records and Recording Laws, sec. 17 (2008).<sup>1</sup>

### **5. The CPRA on Law Enforcement Records**

Generally, "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, . . . any local police agency. . ." are exempt from disclosure. Government Code Section 6254(f). But "[n]otwithstanding any other provision, state and local law enforcement agencies must make public certain statutorily enumerated information, except 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." Government Code Section 6254(f).

Moreover, the provisions of the CPRA authorize disclosure only of contemporaneous information relating to persons currently within the criminal justice system. According to the court in *County of Los Angeles v. Sup. Ct. (Kusar)* (1993) 18 Cal.App.4<sup>th</sup> 588, section 6254(f) describes certain information that must be released:

This information is described in terms which strongly suggest that contemporaneous information is intended. The disclosed information must include (1) the "*current address*" of an arrestee, (2) the time and date of booking, (3) the location where the arrestee is then *currently* being held, or, if not in custody, the time and manner of release, (4) the amount of bail set, (5) all charges on which the arrestee is *being held* and (6) any *outstanding warrants* or parole violations. This information is patently the type of information which would be relevant to current and contemporaneous police activity.

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<sup>1</sup> Exemptions created by case law or Attorney General opinions include: (1) records of the state court system, including records of the jury commissioner, (2) information communicated to public officers in confidence, on the theory that precluding officers from disclosing such information protects public interests that may be otherwise injured, (3) copies of an arrest or complaint report requested by one who has provided information contained in the report, although certain information contained in the report must be made public. Laurie L. Levenson, California Criminal Procedure, Ch. 17:6 (2008).

*Id.* at 595 (italics in original).

In addition to reviewing the actual language of section 6254(f) in effect at that time, the *County of Los Angeles* court reviewed its legislative history. Assembly Bill No. 909 of the 1981-1982 Regular Session sought to amend section 6254(f). The history of AB 909 “reflects that its purpose was to modify the then-existing statutory limitations on the disclosure of specified information in criminal complaints or law enforcement investigations. Up until that time such disclosure was restricted to the parties involved, insurance carriers or any person harmed during a particular incident.” *Id.* at 596. In explaining the bill, the report of the Senate Committee on the Judiciary explained that “[t]his bill would make express what proponents [the California Newspaper Publishers Association] maintain is implied by common law tradition and the scope of the Public Records Act – that incident logs and booking sheets recording the daily investigatory and arrest activity of local police departments should be open in public inspection.” *Id.* at 598.

As it turns out, “the Governor vetoed AB 909 as too broad. He invited both the press and law enforcement officials to work together on mutually acceptable legislation that serves both the public safety and right to know. Assembly Bill No. 277 (AB 277), introduced in 1982 was the result and it was ultimately passed. . . .” *Id.*

The *County of Los Angeles* court concluded:

It seems obvious that the legislative history of AB 909 is directly relevant to our examination of [section 6254(f)] since AB 277 was the same bill except for modifications requested by the Governor’s veto message on AB 909. Indeed, the legislative history of AB 277 itself is fairly modest, reflecting as it does that it is the compromise response to the veto of AB 909.

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We believe that this 1982 legislation demonstrated a legislative intent only to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information to the press.

*Id.*

## **6. The CPRA on Providing Greater Access to Public Records**

As discussed above, “[a] local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature “expressly manifest[s]” its intent to occupy the legal area or when the Legislature “impliedly” occupies the field. *Sherwin-Williams, supra*, 4 Cal.4<sup>th</sup> at p. 898.

The Legislature has not impliedly fully occupied the field of access to public records because it has expressly allowed local agencies to provide greater disclosure to the public than CPRA: "Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." Government Code Section 6254. The CPRA also provides that "[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter." Government Code Section 6253(e).

In *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4<sup>th</sup> 1139, the Supreme Court stated that "[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." *Id.* at 1157 (citation omitted).

## **B. THE DISTRICT ATTORNEY'S CONCLUSION ABOUT PREEMPTION IS INCORRECT**

The District Attorney concludes that the Sunshine Reform Task Force's (SRTF) recommendation violates the preemption and home rule doctrines. The discussion relies on an appellate court case, *Rivero v. Superior Court* (1997) 54 Cal.App.4<sup>th</sup> 1048.

First, the District Attorney states mistakenly that the California Constitution permits charter cities to regulate only matters of local concern. The *Rivero* case states the well-established principle that "local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature . . . ." *Rivero v. Sup. Ct.* (1997) 54 Cal.App.4<sup>th</sup> 1048, 1054.

Second, the District Attorney does not identify which State statute preempts the SRTF's recommendations. Preemption requires a conflict with a State statute and none is indicated in the District Attorney's analysis.

Finally, the finding of preemption in the *Rivero* case relied upon by the District Attorney does not apply here because the State statute discussed in *Rivero* only pertains to the authority of counties' boards of supervisors. The State statute has no relevance to a Charter city.

The First District Court of Appeals in *Rivero v. Superior Court* (1997) 54 Cal.App.4<sup>th</sup> 1048, considered a provision of the San Francisco Sunshine Ordinance that required disclosure of certain criminal investigation records of the San Francisco District Attorney's Office after the court or the prosecution ended "the prospect of any enforcement action." *Id.* at 1053. The California Public Records Act (CPRA), however, exempts those records from the normal disclosure requirements. And the CPRA exemption has no temporal limit (even though it mandates disclosure of certain information from the investigation files to certain specific persons). *Id.* at 1052. In *Rivero*, a citizen requested a complete investigation file from the San Francisco

District Attorney's Office based on the CPRA and the San Francisco Sunshine Ordinance. Even though the investigation had been closed, the San Francisco District Attorney's Office denied the request, invoking a non-disclosure exemption and asserting that the exemption continued after conclusion of the investigation. *Id.* at 1051. The citizen sued in State court and the court issued summary judgment in favor of the San Francisco District Attorney. The *Rivero* court held that neither the CPRA nor the San Francisco Sunshine Ordinance compels the San Francisco District Attorney to disclose the closed criminal investigation records. *Id.* at 1050.

First, the *Rivero* court determined that the ordinance applies to departments of the City and County of San Francisco. *Id.* at 1055. The *Rivero* court found that the Office of the San Francisco District Attorney is a "department" of the City and County of San Francisco and, as a result, the San Francisco Sunshine Ordinance by its terms applies to the District Attorney's Office. *Id.* at 1055-56.

It should be noted that for this analysis, the relevant provisions of the SRTF's recommendations do not contain terms that purport to apply to the Santa Clara County District Attorney's Office. Unlike the *Rivero* case, the Office of the Santa Clara County District Attorney is not a department of the City of San Jose.

Next, the *Rivero* court considered whether the ordinance applied to records of criminal investigations in the District Attorney's Office. The court determined that the key question was: "[d]oes compelled disclosure of closed criminal investigation files obstruct the investigatory function of the district attorney's office, thus contravening [Government Code] section 25303?" *Id.* at 1058. Government Code Section 25303 prohibits a County Board of Supervisors from interfering with the investigative or prosecutorial functions of a district attorney. The *Rivero* court thus considered whether there is a conflict between the Sunshine Ordinance of the City and County of San Francisco and a State statute that regulates the government of counties.

This is significant because neither the *Rivero* opinion nor the District Attorney's December 4, 2007 memorandum identifies a State statute which pertains to cities. Consequently, the finding of preemption in the *Rivero* case has no relevance to the preemption discussion of the SRTF's recommendations on law enforcement reports.

Although the District Attorney argues that investigations by police departments are a statewide concern just like investigations by district attorneys, the memorandum skips the key step in preemption analysis – there needs to be a conflict between a local ordinance and a State statute. Here, there is no conflicting State statute. Moreover, the District Attorney's argument disregards the constitutional right of a Charter city to establish rules that govern its police department.

The *Rivero* court stated that Government Code Section 25303 "affirms prosecutorial independence and states that the [county] board [of supervisors] shall not 'obstruct the investigative and prosecutorial function of the district attorney of a county.'" *Rivero*, 54 Cal.App.4<sup>th</sup> at 1056-57 (citing Government Code Section 25303). The *Rivero* court

found that Section 25303 prohibits the San Francisco's Board of Supervisors from interfering with the San Francisco District Attorney's investigative function. The court also found that the ordinance that the Board enacted in fact interferes with the San Francisco District Attorney's functions because it compels disclosure of closed investigation files. *Id.* at 1058. The *Rivero* court reasoned that such compelled disclosure would potentially impede evidence gathering because witnesses, including anonymous sources, would be deterred from coming forward if there is no assurance of confidentiality. *Id.* at 1058-59.

After an abbreviated preemption analysis, the *Rivero* court concluded that the San Francisco ordinance conflicts with Government Code Section 25303. *Rivero*, 54 Cal.App.4<sup>th</sup> at 1059-60. The *Rivero* court held that even though the California Public Records Act allows local entities to enact legislation to provide greater access to their records, and even though the CPRA allows a district attorney to voluntarily disclose the requested investigation records, the San Francisco Board of Supervisors may not compel such disclosure by its Sunshine Ordinance because another State statute, Government Code Section 25303, prohibits interference with the investigative function of district attorneys. *Rivero*, 54 Cal.App.4<sup>th</sup> at 1059-60.

This is not the case here. San Francisco's situation is different from the City of San Jose because San Francisco is both a city and county and is subject to state laws regulating county government. Not so with regard to the City of San Jose.

In sum, the District Attorney's memorandum does not identify any State statute that preempts the SRTF's recommendations on law enforcement records.

**C. THE SRTF'S RECOMMENDATIONS THAT REQUIRE RELEASE OF SOURCE REPORTS OR OTHER INFORMATION THAT MAY BE USED TO COMPILE CRIMINAL HISTORY INFORMATION ARE PRECLUDED BY THE CALIFORNIA CONSTITUTION AND OTHER CALIFORNIA LAWS THAT PROTECT AN INDIVIDUAL'S RIGHT OF PRIVACY**

Article 1, Section 1 of the California Constitution and various California statutes protect the privacy rights of victims, witnesses, arrestees, defendants pending trial, convicted defendants and acquitted defendants. The District Attorney's memorandum discusses some of the cases interpreting the California laws that protect privacy, and we agree with that analysis. For purposes of this memo, however, we focus only on the legislative scheme that protects disclosure of local summary criminal history information. Thus, our analysis below on the right of privacy is not exhaustive.

Penal Code Sections 13300 – 13305 identify those agencies and persons to whom "local summary criminal history information" may be released. Generally, courts, peace officers and other designated persons and agencies are entitled to the information when needed in the course of their duties. Other specified agencies or officers may receive local summary criminal history information on a showing of a compelling need.

The purpose of Sections 13300 – 13305 “is to avoid unwarranted public intrusion into matters personal and sensitive in nature, thereby protecting and promoting the right of privacy guaranteed in the California Constitution.” 89 Ops. Cal. Atty. Gen. 204, 205 (2006) (citations omitted). Section 13302 provides that “[a]ny employee of the local criminal justice agency who knowingly furnishes a record or information obtained from a record to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor.” But Sections 13300(h) and 13305 do permit dissemination of “statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed.”

The California Attorney General carefully analyzed and compared the requirements of the CPRA and Penal Code Sections 13300 – 13305 in light of the voters' approval of Proposition 59. The Attorney General concluded that:

. . . nothing in subdivision (f) of section 6254 requires that the records themselves be disclosed, and nothing suggests a duty to reveal information contained in historical compilations, such as summary criminal history information, or to make such historical records available for inspection.

Even as to current criminal information that may otherwise be found in public records, local agencies may not make general or comprehensive compilations available to members of the public, whether or not the records are susceptible of “specialized indexing” or electronic search functions.

...

Such disclosure of extensive data. . . regardless of the source of the data, would have the potential of undermining the privacy protections of Penal Code sections 13300 – 13305.

89 Ops. Cal. Atty. Gen. 204, 212-213 (2006).

In sum, Penal Code Sections 13300 – 13305 protect privacy interests by limiting disclosure of source records or information from which one could derive summary criminal history information.

**D. SOME OF THE SRTF'S RECOMMENDATIONS ARE CONTRADICTORY TO THE CPRA**

As to the names of witnesses, Section 5.1.1.030.H of the SRTF's recommendation prohibits disclosure (“the following information must be removed”) to anyone (it permits disclosure only if the witness agrees). This contradicts the State statute in that Section 6254(f) of the CPRA requires disclosure (“local law enforcement agencies shall disclose”) of the names of witnesses (other than confidential informants) to certain specified persons, such as the victims or their representatives, insurance carriers and

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persons suffering bodily injury or property damage as a result of certain incidents. It does not appear that these two provisions can be reconciled.

As to the addresses of witnesses, Section 5.1.1.030.C prohibits disclosure to anyone. On the other hand, Section 6254(f) requires disclosure to the same specified persons listed above. This is another clear contradiction; the above are just examples and this list is not exhaustive. The Task Force should consider the minimum requirements of the CPRA, which, in the above examples require broader disclosure than the current SRTF recommendations, as it finalizes its recommendations on law enforcement records.

### **CONCLUSION**

The District Attorney has not identified a California statute that preempts the Sunshine Reform Task Force's recommendations about law enforcement reports. But we do believe that the California Constitution and other California laws protect individual rights of privacy and thus prohibit the City of San Jose from providing access to law enforcement reports from which criminal history information can be derived. Finally, the Task Force should review the minimum requirements of the CPRA and ensure that its recommendations do not restrict access to contemporaneous individualized arrest information.

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