

MEMORANDUM OF LAW

DATE: December 19, 1986

TO: Commander L. K. Gore, San Diego Police
Department
FROM: City Attorney
SUBJECT: Release of Information to Public on Reported
and Located Missing Persons

In a memorandum of July 23, 1986 from Detective F. H. Driess of the Missing Persons Unit, clarification was sought on what and when information in police files regarding reported and located missing persons could be released to certain members of the public.

Information in missing persons files may generally be released to any member of the public under the guidelines set forth below; court orders are not required.

Neither the federal nor state privacy act is relevant to this issue. The Privacy Act of 1974, 5 U.S.C. section 552, applies only to federal agencies. The Information Practices Act of 1977, California Civil Code section 1798, applies only to state agencies and, in fact, specifically excludes local agencies. Civil Code section 1798.3(b)(4). Therefore there can be no civil or criminal liability under either Act for release of information to the public by the San Diego Police Department.

The controlling authority for the release of information by the San Diego Police Department is the Public Records Act of California (hereinafter PRA), found at Government Code section 6250 et seq. The PRA applies to local agencies under Government Code section 6252(b) and (d) and defines public records as "any writing containing information relating to the conduct of the public's business prepared . . . by any . . . local agency regardless of physical form or characteristic." Government Code section 6252(d). This definition would encompass any file, memo or other information on missing persons, including investigative reports.

The general policy of the PRA favors disclosure, as noted by its purpose set forth in section 6250: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The PRA generally requires that records of government agencies be made available to the public upon request. A refusal to disclose

information must either be based upon a specific exemption enumerated in section 6254, or be justified by demonstrating that on the facts of the particular case the public interest served by not making the record public outweighs the public interest served by disclosure. Government Code section 6255.

The most pertinent provision of section 6254 is subparagraph (f), which exempts from disclosure "records of complaints to, or investigations conducted by . . . any state or local police agency . . . compiled . . . for correctional, law enforcement, or licensing purposes" Investigating the whereabouts of missing persons is not done for correctional or licensing purposes. And unless foul play is suspected, there would be no law enforcement purpose. The adjective "law enforcement" as used in the subdivision refers to law enforcement in the traditional sense, that is, to the enforcement of penal statutes, etc. *State of California ex rel. Division of Industrial Safety v. Superior Court*, 43 Cal.App.3d 778, 784 (1974). Since it is not a crime to be a missing person, the investigation of such is not done for law enforcement purposes, and the exemption from disclosure would not apply.

There are certain situations that section 6254(f) authorizes the San Diego Police Department not to disclose information about missing persons. Of course, where foul play is suspected in the disappearance of the missing person, any investigation would be conducted for law enforcement purposes and the investigatory file would be exempt from disclosure. But even where no law enforcement purpose is evident and disclosure is the general rule, certain situations may arise that warrant nondisclosure. In *South Coast Newspapers, Inc. v. City of Oceanside*, 160 Cal.App.3d 261, 266 (1984) the court held disclosure is not required if:

- 1) Confidential sources would be revealed as a result of the disclosure; and
- 2) disclosure would interfere with enforcement proceedings; and
- 3) a person would be thereby deprived of a fair trial; and
- 4) disclosure constitutes an unwarranted invasion of privacy; and
- 5) secret police investigative techniques or procedures would be revealed; or
- 6) the life or physical safety of law enforcement personnel would be endangered.

None of these situations, aside from number four which is dealt with elsewhere is likely to arise where information about a missing person is released. Moreover, these situations involve

concerns the San Diego Police Department is well aware of. Nevertheless, they should be kept in mind when analyzing any particular fact situation involving a missing person. Also, note that where matters subject to disclosure are interwoven with nondisclosable matters, courts require editing, where feasible, to allow disclosure of those items not prohibited. *South Coast Newspaper*, 160 Cal.App.3d 261 (1984).

Section 6254(f) also would exempt otherwise disclosable material where disclosure would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation.

The only other relevant provision of section 6254 is subparagraph (c) which exempts from disclosure the following: "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." The purpose of this provision is to protect information of a highly personal nature that is typically found in personnel folders or sensitive personal information which individuals must submit to government. *Register Division of Freedom Newspapers Inc., v. County of Orange*, 158 Cal.App.3d 893, 902 (1984). Along the same line, the "similar files" provision of 6254(c) has been interpreted to protect only the most intimate details of personal and family life. *Braun v. City of Taft*, 154 Cal.App.3d 332, 344 (1984).

Courts, in assessing whether there has been an unwarranted invasion of personal privacy under section 6254(c), typically use a balancing test to weigh the interest of the individual in privacy against the interest of the public in disclosure. *City & County of San Francisco v. Superior Court*, 125 Cal.App.3d 879, 882 (1981). There is clearly a great interest, especially of family members, in locating a missing person. The privacy

interest of the "missing person" can only be based on the information sought to be disclosed, most likely an address or phone number. In *Braun* the court held that telephone numbers and addresses were neither embarrassing nor secret, and the disclosure thereof was not an unwarranted invasion of privacy, at least absent a showing of unavailability from local directories to which the public has access.

The court in *Freedom Newspapers* implied that there is less risk of an invasion of privacy where the disclosure was not in furtherance of a governmental purpose or objective. Disclosure of information about missing persons does not accomplish any governmental purpose, but rather allows a private, interested party to verify the whereabouts or safety of a missing person.

Section 6255, paraphrased *supra*, also weighs the competing

interests of privacy and disclosure. The balancing test used by the courts requires consideration of the same factors as the courts utilize in the balancing test under section 6254(c). Baun, 154 Cal.App.3d 332, 345 (1984). The court in Braun held that if the balancing test under section 6254(c) does not show an unwarranted invasion of privacy, it follows that the public interest in withholding records under section 6255 would not clearly outweigh the public interest served by disclosure. Thus, section 6255 would not preclude disclosure of an address or telephone number of a missing person.

Even if one of the section 6254 exemptions were to apply, the last sentence of that section allows any agency to override the exemption and disclose its records, if not otherwise prohibited by law. The exemptions are permissive, not mandatory; they permit nondisclosure but do not prohibit disclosure. Black Panther Party v. Kehoe, 42 Cal.App.3d 645, 656 (1974). Therefore, if disclosure is not prohibited by another law, state or federal, the San Diego Police Department has discretion to disclose any information from its file on missing persons, 62 Op. Att'y Gen. 402, 405 (1979).

If the missing person wishes to assert a claim alleging a violation of his constitutional right to privacy (Cal.Const. Art. 1, section 1), this privacy interest would be balanced against the public interest in disclosure. The court in Braun at page 347 stated that the balancing test employed to weigh the respective interests under section 6154(c) is the same test which should be utilized to assess the constitutional right to privacy. Thus, even under a constitutional analysis, disclosure of information on missing persons is permissible.

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By

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ML-86-144