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9
10 IN THE SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF ALAMEDA

12
13 SECURE JUSTICE, INC., a California
14 non-profit organization, and BRIAN
15 HOFER, a California citizen

16 Petitioners,

17 vs

18 THE OAKLAND POLICE
19 DEPARTMENT, and THE OAKLAND
20 CITY ATTORNEY'S OFFICE,

21 Respondents.

Case No.

**PETITION FOR WRIT OF
MANDATE OR PROHIBITION**

1 INTRODUCTION

2 *Quis custodiet ipsos custodes?*

3 (Who watches the watchers?)

4 1. “Police today increasingly rely on technologies of surveillance, data
5 collection, inference, and prediction. These technologies include tools like body
6 cameras, license plate readers, data analytics, and predictive crime software. All of
7 them have in common a reliance on artificial intelligence and enormous amounts of
8 digitized data. We can refer to these tools broadly as “police surveillance
9 technologies.” Elizabeth E. Joh, Thomas Wuil Joo, *The Harms of Policy Surveillance*
10 *Technology Monopolies*, (April 26, 2021) (to be published in the *Denver Law Review*;
11 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834777.)

12 2. Police surveillance technologies may help reduce crime. But they also
13 pose a clear and present threat to the civil liberties of the citizens of Oakland. The
14 “inquiry in any given case depends ultimately on the judgment ‘whether, if the
15 particular form of surveillance practiced by the police is permitted to go unregulated
16 by constitutional restraints, the amount of privacy and freedom remaining to
17 citizens would be diminished to a compass inconsistent with the aims of a free and
18 open society.’ Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev.
19 349, 403 (1974); see also 1 W. LaFave, *Search and Seizure* § 2.1(d), pp. 310-314 (2d
20 ed. 1987).” *Florida v. Riley*, 488 U.S. 445, 700 (1989) (J. Brennan, dissenting)

21 3. Recognizing that a balance must be struck, on January 19, 2016, the
22 City of Oakland (“City”) enacted Ordinance No. 13349, which created a first-of-its-
23 kind civilian oversight body of subject-matter experts—the Privacy Advisory
24 Commission (“PAC—to advise the City Council about how best to balance the
25 potentially harmful effects of police surveillance technology, data mining practices,
26 and public safety. The Ordinance states:

27 PAC must “Provide advice and technical assistance to the City of Oakland on
28 best practices to protect citizen privacy rights in connection with the City’s
29 purchase and use of surveillance equipment and other technology that
30 collects and stores citizen data.

1 4. On May 15, 2018, the City enacted Ordinance No. 13489 (Oakland
2 Municipal Code § 9.64 *et seq.*), commonly referred to as the Surveillance Technology
3 Ordinance (“Surveillance Ordinance,” Exhibit A).¹ The preamble to this ordinance
4 outlines its purpose:

5 WHEREAS, the City Council finds it is essential to have an informed public
6 debate as early as possible about decisions related to the City of Oakland’s
7 (“City”) acquisition and use of surveillance technology; and

8 WHEREAS, the City Council finds that, while the use of surveillance
9 technology may threaten the privacy of all citizens, throughout history,
10 surveillance efforts have been used to intimidate and oppress certain
11 communities and groups more than others, including those that are defined
12 by a common race, ethnicity, religion, national origin, income level, sexual
13 orientation, or political perspective; and

14 WHEREAS, while acknowledging the significance of protecting the privacy of
15 citizens, the City Council finds that surveillance technology may also be a
16 valuable tool to bolster community safety and aid in the investigation and
17 prosecution of crimes; and

18 WHEREAS, the City Council finds that surveillance technology includes not
19 just technology capable of accessing non-public places or information (such as
20 wiretaps) but also may include technology which aggregates publicly
21 available information, because such information, in the aggregate or when
22 pieced together with other information, has the potential to reveal a wealth of
23 detail about a person’s familial, political, professional, religious, or sexual
24 associations; and

25 WHEREAS, the City Council finds that no decisions relating to the City’s use
26 of surveillance technology should occur without strong consideration being
27 given to the impact such technologies may have on civil rights and civil
28 liberties including those rights guaranteed by the California and United
29 States Constitutions; and

30 WHEREAS, the City Council finds that legally enforceable safeguards,
31 including robust transparency, oversight, and accountability measures, must
32 be in place to protect civil rights and civil liberties before any City
surveillance technology is deployed;

¹ Amended on January 12, 2021 (Exhibit B).

1 19. Most ALPR use amounts to nothing more than mass surveillance—an
2 indiscriminate collection of data about people not suspected of wrongdoing.

3 20. OPD has not offered to the PAC or any public any legal authority
4 allowing it to conduct mass surveillance. OPD attempts to justify such practices by
5 claiming that once it identifies a suspect it can use the ALPR data to investigate
6 where the suspect has been.

7 21. One of PAC's functions is to address the disparate impact of the use of
8 police surveillance technologies. The concern is that such technologies may be used
9 against certain communities more than others. The concern is well-founded. A 2015
10 Electronic Frontier Foundation analysis of OPD's raw ALPR data showed that
11 certain populations are targeted by OPD's ALPR use more than others for no
12 obvious law enforcement purpose. A study by Stanford University's Dr. Eberhart
13 showed OPD's vehicle-stop data demonstrated racial profiling by OPD.² And OPD is
14 in its 18th year of federal monitoring due to a lengthy and horrible history of racial
15 profiling.

16 22. In early 2021, PAC's review of OPD's 2016 ALPR Use Policy uncovered
17 many deficiencies and misrepresentations. Notably, each version of the 2016 ALPR
18 Use Policy includes a representation that OPD would perform audits of its
19 surveillance technology use.

20 23. However, no such audits were produced in 2016, 2017, or 2018. When
21 this was brought to OPD's attention during a PAC meeting on February 4, 2021,
22 OPD admitted no such audits had been undertaken.

23 24. OPD then represented at that very same meeting that such audits
24 *would* be performed going forward.

25 _____
26 ² The study showed 61% of all individuals stopped were African American, despite
27 making up less than 25% of Oaklanders and despite similar rates of contraband
28 being found as other races; 77% of OPD officers never discretionarily searched a
29 white person, but 65% did so with an African American. Furthermore, 74% of OPD
30 officers did not handcuff a white person that was ultimately not arrested, yet 72% of
31 OPD officers did with an African American that was ultimately not arrested.

1 25. As of this date, no audits have been produced to the PAC.

2 26. The 2016 ALPR Use Policy and Civil Code section 1798.90.52 (Senate
3 Bill 34) require that OPD maintain a record of access to the ALPR data—that is, a
4 record of who used the database and for what purpose.

5 27. The OPD 2016 ALPR Use Policy requires that OPD destroy the APLR
6 data it collects six months after it is accumulated.

7 28. At the August 5, 2021, PAC meeting, OPD admitted in writing that
8 “based upon legal counsel...” OPD unilaterally decided to disregard the six-month
9 retention period in its own policy and that, beginning in 2019, they had begun
10 retaining data for two years. OPD’s unilateral adoption of an extended retention
11 policy violated the Surveillance Ordinance provision requiring City Council
12 approval (after vetting by the PAC) for any new use (purpose, manner, location) of
13 police surveillance technology acquired before enactment of the Surveillance
14 Ordinance.

15 29. At the August 5, 2021, PAC meeting OPD also confirmed that it was
16 allowing the Federal Bureau of Investigation unfettered data access to the ALPR
17 data without “following the standard data access request protocols outlined in the”
18 ALPR policy. And OPD admitted that “current data-sharing practice does not align
19 with limits set forth in” the ALPR policy.

20 30. OPD has, in effect, arrogated to itself the determination of who can
21 access the APLR data and for how long without seeking the input or advice of PAC
22 or the City Council.

23 31. In light of OPD’s refusal to provide advance notice about how it is
24 using APLR to PAC, on March 18, 2019, Mr. Hofer submitted a public record
25 request under the Public Records Act, Govt. Code section 6250 *et seq.* (PRA) for the
26 “record of access” documents.

27 32. OPD failed to respond in compliance with PRA’s section 6253(c).³

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29 _____
30 ³ <https://oaklandca.nextrequest.com/requests/19-1382> (contains both the request
and response)

1 33. In April 2019, OPD represented to PAC⁴ that 147 emails showed
2 successful historical searches (or requests for such searches), attempting to justify
3 OPD’s mass surveillance practices by demonstrating the need to retain data for a
4 lengthy period. However, OPD refused to produce the emails to PAC and told Mr.
5 Hofer to submit a PRA request.

6 34. On April 16, 2019, Mr. Hofer submitted the suggested PRA request for
7 the 147 emails.⁵

8 35. OPD declined to respond, violating PRA’s section 6253(c).

9 36. In July 2021, after repeated threats of litigation, OPD attempted to
10 partially cure its violation of the PRA by providing a limited set of emails (i.e., less
11 than the 147 referred to) to Mr. Hofer. These emails were mostly non-responsive.
12 They showed that most APLR database search queries were initiated within 48
13 hours or less of an incident (thus contradicting OPD’s claim that it needed a two-
14 year retention period). Only one email demonstrated that ALPR data had
15 successfully assisted in the investigation of a crime.

16 37. In the absence of any data from OPD, and in light of OPD’s resistance,
17 misrepresentations, and misuse, PAC recommended to the City Council that OPD’s
18 use of ALPR be prohibited for two years.

19 38. On May 11, 2021, PAC’s recommendation was heard by Oakland’s
20 Public Safety Committee. In the staff report to the Committee, OPD offered that
21 (a) that they had always maintained the record of access and (b) that they were
22 (only) now considering whether it was an undue burden to produce the 147 emails.
23 OPD misstated the state laws as to record retention and record disclosure and
24 misled the City Council about its past actions concerning ALPR.

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28 ⁴ Orally and in writing. See Surveillance Ordinance’s “impact statement” for the
ALPR technology.

29 ⁵ <https://oaklandca.nextrequest.com/requests/19-1897> (contains both the request
30 and response)

1 39. After listening to public comments, and presentations from OPD and
2 PAC, the Public Safety Committee voted unanimously to remand the issue to the
3 PAC and directed OPD to provide “the requested information to allow for data
4 analysis and evaluation.”

5 40. OPD has not provided the information requested.

6 41. On May 12, 2021, Mr. Hofer met with almost the entire command staff
7 of OPD, including newly appointed Chief LeRonne Armstrong and Deputy Chief
8 Drennon Lindsey. Each OPD representative that spoke to Mr. Hofer, including
9 Chief Armstrong and Deputy Chief Lindsey, promised that all of the missing
10 information referenced in the PAC’s recommendation to limit the use of APLR
11 would be supplied to the PAC and that OPD desired to “reset the clock” with the
12 PAC.

13 42. The missing information was *not* provided.

14 43. On May 23, 2021, Mr. Hofer submitted a PRA request for all writings
15 pertaining to the May 11th OPD ALPR staff report, and further provided the names
16 of all OPD agents identified on the written documents to aid in the search of
17 records.

18 44. On May 28, 2021, OPD responded by closing the request and stating
19 that no responsive documents had been found—which is obviously untrue since the
20 staff report itself, which was provided to the PAC, would have been within the scope
21 of the PRA request.⁶

22 45. On July 31, 2021, Mr. Hofer submitted a PRA request asking for the
23 “guidelines and procedures to comply with the requirements of Civil Code section
24 1798.90.5 et seq.” per the OPD 2016 ALPR use policy. Per OPD’s policy, the Bureau
25 of Services Deputy Chief was to develop such guidelines.

26 46. OPD did not respond to this request.

27 47. On July 31, 2021, Mr. Hofer submitted a PRA request for the annual
28 reports required under Government Code section 12525.5 *et seq.* (AB 953, the Racial
29

30 ⁶ <https://oaklandca.nextrequest.com/requests/21-4581>

1 and Identity Profiling Act”). Annual reports for 2020 and 2021 were due under this
2 law.

3 48. OPD has not provided the annual report for 2021 and has stated in
4 writing that they did not create it as required by law.

5 49. OPD is making it impossible for PAC, and, by extension, the City
6 Council, to perform its oversight function to protect the citizens of Oakland from
7 undue violation of their right to privacy. The records of how OPD uses the APLR,
8 what its policies are toward the use of APLR, and who has access to APLR data are
9 essential to PAC’s oversight framework and important to the public’s concerns for
10 privacy. OPD’s actions violate the Surveillance Ordinance and the corresponding
11 use policies.

12 WHEREFORE Petitioners request the Court issue a writ of mandate as
13 follows:

- 14 a. Compel OPD to provide the requested public records per
15 Request Nos. 19-1382, 19-1897, and 21-4581; or in the
16 alternative if such records were never created, compel OPD to
17 create the required records and disclose them to Petitioners as
18 requested.
- 19 b. Compel OPD to destroy APLR data older than six months, or to
20 submit for public comment a request to change the 2016 ALPR
21 Use policy and abide by the City Council’s decision on that issue.
- 22 c. Compel OPD to maintain a record of access to the APLR
23 database.
- 24 d. Compel OPD to maintain a record of access to all future police
25 surveillance technology databases.
- 26 e. Compel OPD to provide the record of access to PAC upon
27 request.
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- 1 a. Compelling OPD to refrain from using the exigent circumstances
2 exception without actual exigent circumstances,
3 b. Compelling OPD to report within 24 hours to PAC about any use
4 of police surveillance technology used under the exigent
5 circumstances exception.
6 c. Forbidding OPD from allowing ATF or any other state or federal
7 agency or organization from using OPD's police surveillance
8 technology without first obtaining the approval of the City
9 Council.
10 d. Compelling OPD to submit for approval to PAC and the City
11 Council the new police surveillance technologies it has under
12 consideration before the technologies are implemented.

13 **THIRD CAUSE OF ACTION**

14 **OPD's Violation of the Racial and Identity Profiling Act (A.B. 953)**

15 68. Petitioner incorporates by reference the allegations of the above
16 paragraphs as though fully set forth herein.

17 69. Pursuant to Government Code section 12525.5 *et seq.*, the City and
18 OPD are required to provide annual reports to the California Attorney General
19 specifying all stops made, certain demographic information about the people
20 stopped, and the results of such stops.

21 70. These reports are critical for PAC, Secure Justice and Oaklanders in
22 general to ascertain whether its police department is behaving appropriately.

23 71. Neither the City nor OPD has produced the required report for 2021.

24 72. Mr. Hofer requested such information in his PRA requests, but OPD
25 refused to respond to the requests.

26 WHEREFORE, Petitioner requests the Court issue a writ of mandate

- 27 a. Respond to Mr. Hofer's PRA request in full, and
28 b. Require that OPD provide the annual reports as required by
29 law.
30

1 **FOURTH CAUSE OF ACTION**
2 **OCA's Refusal to Advise PAC**

3 73. Petitioner incorporates by reference the allegations of the above
4 paragraphs as though fully set forth herein.

5 74. Section 401(6) of Oakland's city charter states that the "City
6 Attorney...shall advise all...commissions...on legal matters referred to him or her
7 and shall render written legal opinions when the same are requested in writing
8 by...any...commission of the City. He or she shall draft such ordinances...as
9 directed by the Council or requested by the Mayor or City Administrator or any
10 official board or commission of the City."

11 75. In March 2017, Deputy Attorney Sotelo told PAC that the Office of
12 City Attorney (OCA) would not advise PAC on any legal issues. PAC asked OCA to
13 confirm this in writing, but OCA simply refused to respond.

14 76. From late 2018 through the spring of 2019, Mr. Sotelo occasionally
15 attended PAC meetings. His legal advice was requested on at least five occasions, as
16 reflected by the March 7, 2019, and April 4, 2019, minutes. The OCA never
17 responded to these requests.

18 77. On March 27, 2019, Mr. Hofer inquired about the outstanding requests
19 for advice to OPD. OPD replied that it was not OPD's responsibility and copied Mr.
20 Sotelo on his email reply.

21 78. The OCA never responded.

22 79. On March 11, 2020, PAC submitted a request to OCA for a written
23 legal opinion as to the legality of OPD's participation in the FBI's Joint Terrorism
24 Task Force.

25 80. The OCA never responded.

26 81. On March 16, 2021, PAC submitted a request for a written legal
27 opinion as to whether the Surveillance Ordinance enforcement and oversight
28 mechanisms were incorporated into a grant application known as the "Chinatown
29 Camera" proposal.

30 82. The OCA never responded.

1 VERIFICATION

2 I, Brian Hofer, am one of the Petitioners in this action and I am the CEO of
3 Secure Justice, Inc. and am authorized to execute this verification on its behalf. I
4 have read the foregoing Petition for Writ of Mandate and I hereby verify that based
5 on my personal knowledge the facts alleged are true.

6 Executed this 1st day of September 2021 in Oakland, California, I declare
7 under penalty of perjury that the foregoing is true.

8
9 

10
11 _____
12 Brian Hofer,
13 on behalf of Secure Justice

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