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July 9, 2020

Kevin Webb  
kevin@transportpartnership.org

**RE: LEGISLATIVE OPEN RECORDS ACT REQUEST**

Dear Mr. Webb:

This letter is in response to your email received by the California Senate Committees on Judiciary and Transportation on February 26, 2020, requesting information pursuant to the Legislative Open Records Act. (Gov. Code, § 9070 et seq.)

The Committee on Rules of each house of the Legislature is considered to have custody of all legislative records of that house and has sole responsibility for making those records available for inspection. (Gov. Code, § 9074.) This letter responds to your request on behalf of the Senate Committee on Rules.

Specifically, you request a copy of a letter submitted to members of the California Senate Committees on Judiciary and Transportation by "a group of city lawyers . . . which contained a response to the Legislative Counsel opinion on CalECPA applicability to city-mandated mobility data exchange." We construe your request as seeking a letter that was submitted by the Offices of the Los Angeles, Santa Monica, and San Jose City Attorneys during a joint informational hearing of the aforementioned committees held on February 25, 2020.

The record you request is exempt from mandatory disclosure under the Legislative Open Records Act's exemption for "[c]orrespondence of and to individual Members of the Legislature and their staff." (Gov. Code, § 9075(h).) However, as a courtesy, we are enclosing a copy of the responsive record.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erika Contreras", is written over the typed name and title.

ERIKA CONTRERAS  
Secretary of the Senate

Enclosures

February 24, 2020

Diane F. Boyer-Vine  
Legislative Counsel  
Office of Legislative Counsel  
925 L Street  
Sacramento, CA 95814

Dear Ms. Boyer-Vine,

We are responding to the letter dated August 1, 2019, issued by the California Office of Legislative Counsel relating to request #1916004, which opined that the California Electronic Communications Privacy Act (“CalECPA”) restricts a local transportation regulatory agency from requiring a “business that rents dockless bikes, scooters, or other shared mobility devices to the public” to provide the regulatory agency with “real-time location data from its dockless shared mobility devices” as “a condition of granting a permit to operate” in the regulatory agency’s jurisdiction.

Respectfully, it is our collective opinion that the legal conclusions drawn in your August 1, 2019 letter are mistaken for the following reasons: 1) the plain language of the Penal Code limits CalECPA’s application to criminal actions and proceedings; 2) CALECPA’s legislative history clearly shows an intent to limit the act’s application to criminal actions and proceedings; and 3) the letter is based on a factual predicate (namely, “real-time” data sharing) that is not in use by local transportation departments who follow the City of Los Angeles’s Mobility Data Specification (MDS).

1. The Penal Code’s Plain Language Limits CalECPA’s Application to Criminal Actions and Proceedings

CalECPA is codified at Sections 1546 to 1546.4, within Title 12 (“Special Proceedings of a Criminal Nature”) of Part 2 (“Of Criminal Procedure”) of the Penal Code. Your August 1 letter fails to acknowledge the textual limitations placed on all statutes contained in that Part by Penal Code Section 690, which provides:

*The provisions of Part 2 (commencing with Section 681) shall apply to all criminal actions and proceedings in all courts, except where jurisdictional limitations or the nature of specific provisions prevent, or special provision is made for particular courts or proceedings.*

On its face, the plain language of Penal Code Section 690 makes clear that CalECPA, as a provision within Part 2 of the Penal Code, is limited in its application to “criminal actions and proceedings” in “all courts.” *See People v. Smith* (1955) 133 Cal. App. 2d Supp. 777, 779 (Penal Code Section 1004, specifying grounds for demurrer in criminal action, “is made applicable to municipal courts by section 690, Penal Code”); *Ex Parte Shaw* (1953) 115 Cal. App. 753, 756-57 (Section 690 does not confer jurisdiction on municipal court to conduct civil sanity proceeding because it is “not a part of the criminal prosecution” for which Section 690 “provides for uniformity of procedure in the several courts”). A dockless mobility regulatory program with no criminal enforcement mechanism is not such an action or proceeding to which CalECPA can apply, and this should end the inquiry.

Reading Penal Code Section 690 to limit CalECPA’s application to criminal actions and proceedings also allows CalECPA to coexist harmoniously with longstanding regulatory programs around the state that involve the collection of electronic device information. On the other hand, the August 1 letter’s contrary conclusion would call into question some of the State’s own longstanding regulatory activities, for example, the California Public Utilities Commission’s collection of electronic device information from Transportation Network Companies like Uber and Lyft. The Legislature has not taken any action to explicitly prohibit these regulatory activities. Courts presume that the Legislature is aware of regulatory activity and, when the Legislature takes no action to correct regulatory activity, courts take that silence as legislative acquiescence to the regulatory action. *See United States v. Rutherford*, 442 U.S. 544, 554 (1979) (“Unless and until Congress [takes action], we are reluctant to disturb a longstanding administrative policy that comports with the plain language, history, and prophylactic purpose of the Act.”).

Looking to CalECPA itself provides further support for limiting its application to criminal actions and proceedings. Penal Code Section 1546.4 is clear that the primary remedies provided by the Legislature for agency violations of the Act are: 1) a motion “to suppress any electronic information obtained or retained in violation of the Fourth Amendment to the United States Constitution or of this chapter,” made in accordance with Section 1538.5, which applies only in criminal proceedings; and 2) authorization for an “individual whose information is targeted by a warrant, order, or other legal process that is inconsistent with this chapter,” to “petition the issuing court to void or modify the warrant, order, or process, or to order the destruction of any information obtained in violation of [CalECPA] . . . .” These remedial provisions are clearly geared toward protecting defendants in criminal prosecutions, and are entirely inapplicable to regulatory processes. Thus, it is clear from the Penal Code’s plain language that CalECPA’s application is limited to law enforcement access to electronic information in the course and scope of criminal actions and proceedings, and does not extend to regulatory actions of a non-criminal nature.

2. Legislative Intent Was to Limit CalECPA's Application to Law Enforcement Agencies in Relation to Criminal Actions and Proceedings

Turning the focus to the legislature's intent, CalECPA's history shows that it is clearly targeted at the actions of law enforcement agencies, not regulatory bodies. The committee analyses of the bill cited in your August 1 letter make clear that both the author and the legislature as a whole intended to restrict the ability of California law enforcement to access electronic communications information when conducting criminal investigations and intelligence gathering, not to restrict a local department of transportation's ability to regulate dockless mobility devices in the public right-of-way.

For example, as noted in the June 19, 2015 analysis of the Assembly Committee on Privacy and Consumer Protection, the author stated that the Act "[institutes] a clear, **uniform warrant rule for California law enforcement** access to electronic information, including data from personal electronic devices, emails, digital documents, text messages, metadata, and location information" (emphasis added).

Similarly, the first sentence of the September 9, 2015 Senate floor analysis states, "This bill creates the California Electronic Communications Privacy Act, which **generally requires law enforcement entities to obtain a search warrant** before accessing data on an electronic device or from an online service provider" (emphasis added).

There is no mention anywhere in the statutory text or in the legislative history of any intent by the Legislature to limit or restrict a government regulator from obtaining and using electronic data within the ordinary course and scope of its regulatory authority to regulate dockless mobility devices freely parked in the public right-of-way and offered for short-term rental to the public.

Finally, the current pendency of AB 1112 suggests the Legislature's own recognition that CalECPA does not extend to regulation of dockless mobility devices. As currently drafted, AB 1112, which explicitly addresses regulation of dockless mobility devices, contains a provision stating that "individual trip data" is "electronic device information" as defined in CalECPA. This would be unnecessary surplusage if the August 1 letter were accurate in concluding that CalECPA already extends to individual trip data.<sup>1</sup>

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<sup>1</sup> The Legislative Counsel's digest for the current version of AB 1112 states: "Existing law generally regulates the operation of bicycles, electric bicycles, motorized scooters, and electrically motorized boards. Existing law allows local authorities to regulate the registration, parking, and operation of bicycles and motorized scooters in a manner that does not conflict with state law. ... The bill would prohibit the sharing of individual trip data, except as provided by the Electronic Communications Privacy Act."

3. The Factual Predicate for the Letter is Incorrect as MDS Does Not Require the Provision of Real Time Trip Data

The question presented was “whether CalECPA restricts a department of a city or county from requiring a business that rents dockless bikes, scooters, or other shared mobility devices to the public ... to provide the department with **real-time location** data from its dockless shared mobility devices ... as a condition of granting a permit to operate in the department’s jurisdiction” (emphasis added).

The City of Los Angeles’s MDS does not require “real-time” location data as a condition of permit compliance. Real-time data is better described as a “live” in-trip data feed of all devices as they travel along their respective routes. To our knowledge, no California regulatory agency collects such “real-time” data. Under the current MDS, the system requires a single ping notification within 5 seconds of any dockless trip start and a second ping notification within 5 seconds of any dockless trip end. The rest of the trip’s telemetry (i.e. turn-by-turn data) does not have to be delivered until nearly 24 hours later.<sup>2</sup> This is not “real-time” location data. Such historical location data, reflecting past operation of a shared mobility device in the public right of way, does not implicate the privacy interests that CalECPA’s warrant requirement is intended to protect. This is reflected in CalECPA itself. Once a user’s trip is over, the sole authorized possessor of a dockless mobility device is the business that owns it and temporarily rented it to the user. See Section 1546(b) (defining “authorized possessor” as “the possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device”). As the authorized possessor, the dockless mobility provider can consent (as a condition of a permit or otherwise) to provide historical data regarding that device’s movements in the public right of way. Thus, even if CalECPA applied to the provision of data to regulators (which it does not for the reasons discussed in sections 1 and 2 above), it would not prohibit local regulators from conditioning permits on dockless mobility providers’ consent to providing non-real-time location data as required by the current MDS.<sup>3</sup>

Conclusion

Consistent with the Legislature’s goals in passing the Act, local transportation agencies, as regulators, have a responsibility to safely and efficiently manage the public rights-of-way while protecting individual privacy, and to promote a

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<sup>2</sup> The City of Santa Monica currently collects all of its data from dockless mobility providers, including trip start and end and trip telemetry, on a 24-hour delay.

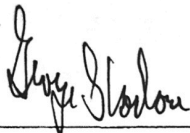
<sup>3</sup> Of course, for the same reasons, even if provided in real time, trip start location and end location would not implicate CalECPA because they reflect information relating to times when the dockless mobility provider is the sole authorized possessor of a device (immediately before and immediately after a user is temporarily authorized to ride the device) and so can consent to their provision.

transportation system free from discrimination. Of course, if the Legislature desires to make dockless scooter data subject to CalECPA, as currently suggested in AB 1112, it could do so, but that would require passage of new legislation. To that end, local transportation agencies have been working with the author's office to include language in AB 1112 that would prevent transportation regulators from sharing data with law enforcement officials absent a warrant. Nevertheless, it is our collective opinion that nothing in state law prohibits or restrictions local transportation agencies from maintaining their current permit requirements.



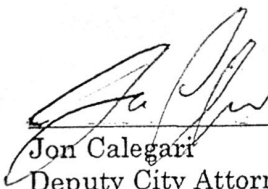
David Michaelson  
Chief Assistant City Attorney  
Office of the Los Angeles City Attorney

02/24/2020  
Date



George Cardona  
Chief of Staff  
Santa Monica City Attorney's Office

2/25/2020  
Date



Jon Calegari  
Deputy City Attorney  
Office of the San Jose City Attorney

2/27/2020  
Date