VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HARRISON NEAL, Plaintiff,	:	
v.	:	
	:	Case No. CL-2015-5902
FAIRFAX COUNTY POLICE DEPARTMENT, et al., Defendants.	:	

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants, Fairfax County Police Department (FCPD) and Colonel Edwin C. Roessler Jr. (Colonel Roessler), collectively referred to herein as "the Defendants," file this Opposition to the Plaintiff's Motion for Summary Judgment (Motion) filed on August 4, 2016, and assert that the Plaintiff, Harrison Neal (Neal), has failed to establish that the FCPD License Plate Reader (ALPR) program violates the Data Collection and Dissemination Practices Act (Act).

In support of his Motion, Neal alleges that the FCPD ALPR program violates the Act because a license plate number fits within the statutory definition of "personal information," and because his license plate number is indexed in an "information system," as defined by the Act. *See* Va. Code Ann. § 2.2-3801. Neal supports his assertions through principles of statutory interpretation, and through the invocation of various other authorities, including United States Supreme Court (Supreme Court) caselaw deciding general privacy issues, such as *U.S. v. Jones*, 132 S. Ct. 945 (2012). These outside authorities are inapplicable to this litigation; however, to the extent that they are instructive to the Court, when considered in the context of the ALPR database, they bolster the FCPD's position that the ALPR program is not violative of the Act.

Neal's Motion also inaccurately states the parties' agreement as to the scope of the issues to be decided by the Court at summary judgment. Neal asserts that the parties have agreed that the court will determine "a single question of law: whether or not the information collected, stored, and archived with respect to Neal's personal automobile constitutes 'personal information' as defined in the Data Act...." The parties' actual agreement was memorialized in an e-mail from Neal's counsel, which is attached hereto as Exhibit 1. Before this Court is the more broad issue of whether the Act applies to FCPD's ALPR program.[1]

[1] This agreement allows the Court to decide both legal issues presented in the Defendants' Summary Judgment papers: whether Neal is a data subject whose personal information is stored in an information system, and whether the FCPD ALPR database falls within the Act's exemption for investigations and intelligence gathering related to criminal activity.

I. NEAL'S INTERPRETATION OF THE DEFINITIONS OF "PERSONAL INFORMATION" AND "INFORMATION SYSTEM" STRAINS THE MEANING OF THE TERMS.

"The primary objective of statutory construction is to ascertain and give effect to legislative intent." *Hines v. Commonwealth,* 721 S.E.2d 792, 795 (2012). When the language of a statute is unambiguous, the court is bound by the plain meaning of that language. Furthermore, the court "must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity... [T]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Id.* at 795 (quoting *Kozmina v. Commonwealth,* 706 S.E.2d 860, 862 (2011)). In interpreting the meaning of a statute, the question for the court "is not what the legislature intended to enact, but what is the meaning of that which it did enact." *Carter v. Nelms*, 131 S.E. 2d 401, 406-07 (1963) ("We must determine the legislative intent by what the statute says and not by what we think it should have said").

In this case, the plain meaning of the terms contained within the Act; "personal information," "data subject," and "information system," is clear and unambiguous, as outlined in the Defendants' Memorandum in Support of Summary Judgment, filed previously with the Court. Even if the court engages in the additional step of giving effect to the legislative intent behind the language of the statute, Neal's argument that a license plate number was meant to be included within the definition of personal information, and that he was meant to be a data subject protected by the Act, strains the rational meaning of the Act's provisions, and would produce an absurd result.

Neal asserts that the legislature intended to include a vehicle's license plate number within the definition of personal information because (1) a license plate number is an agency

issued identification number, synonymous with a social security number, which has been assigned by the Department of Motor Vehicles (DMV) "to Neal and his automobile," and (2) because the image of Neal's license plate "creates a record of his presence," as contemplated by Va. Code Ann. § 2.2-3801.[2] Neal argues that the FCPD ALPR database constitutes an information system because the database indexes a license plate number with the time and location that the image was captured, and because vehicle license plate numbers are indexed in separate, non-FCPD databases, such as the Virginia DMV database, with the name of the vehicle's registered owner.

A license plate number is not assigned to an individual, and it provides absolutely no opportunity for the FCPD to create a record of an individual's presence at a particular location, nor does it permit the tracking of an individual. Neal's argument ignores that the DMV issues license plates to *vehicles*, and not to *individuals*. *See* Va. Code Ann. § 46.2-711. Indeed, Neal ignores that vehicles may be owned by multiple individuals at once, or by a private company or a governmental entity, while the vehicle itself is always assigned only one license plate number. *Id.* (requiring DMV to issue license plates to passenger-carrying vehicles for rent or hire; taxicabs; passenger-carrying vehicles operated by common carriers; property-carrying motor vehicles; emergency medical services vehicles; vehicles operated by nonemergency medical transportation carriers as defined in § 46.2-2000; trailers and semitrailers; and motor vehicles

[2] In his Motion, Neal highlights portions of the definition of "personal information" without providing the entire relevant portion of the definition. For example, Neal argues that the ADDCAR license plate number is maintained in the ALPR database in violation of the Act because the picture is maintained with the GPS location of the photo, which "creates a record of his presence." Neal fails to provide the context of that portion of the definition, however, which clarifies that it applies to information that "creates a record of his presence, registration, or membership in an organization or activity." Thus, the legislature clearly related the term "presence" to presence in an organization or activity, not simply presence at a location, as Neal asserts.

held for rental). Because a license plate number is issued to a vehicle, which may be owned by multiple individuals, corporations, or government entities, it defies logic that the number could be an identification number synonymous with a social security number.

Neal's argument that the legislature intended for a license plate number to be the personal information of an individual also flies in the face of additional statutes enacted by the legislature specifically to establish government ownership of license plates, and the requirement for public display of plates on vehicles. *See* Va. Code Ann. § 46.2-711 (stating that no vehicle shall be operated on the highway without displaying license plates); Va. Code Ann. § 46.2-713 (establishing that license plates are the property of the DMV); Va. Code Ann. § 46.2-716 (requiring all license plates to be securely fastened to the vehicle in a manner that makes them clearly visible); Va. Code Ann. § 46.2-720 (establishing the circumstances under which a license plate on a "motor vehicle *to which license plates have been assigned*" may be attached to a different motor vehicle). Read in conjunction with the Act, it is clear that the legislature did not intend for license plate numbers to be personal information.

Finally, Neal's argument ignores that the FCPD ALPR system does not capture or index the state that issued the license plate number to a particular vehicle, meaning that one license plate number could conceivably be assigned to 50 different vehicles in the United States. This is particularly relevant in the DC metro area, with multiple out-of-state jurisdictions being within miles of FCPD jurisdiction, and with the rate of travel in which people engage surrounding the District of Columbia. Neal's interpretation of the legislative intent behind the Act as it relates to whether license plate numbers are included in the statutory definition of personal information, is therefore patently incorrect and should not sway the Court.

Neal's interpretation of the definition of an information system" is also fatally flawed because it requires that databases beyond the ALPR database to be brought into the equation. Neal concedes in his Motion that the ALPR database does not itself capture "personal information and the name, personal number, or other identifying particulars of a data subject," as required by Va. Code Ann. § 2.2-3801. Neal argues that this is irrelevant, however, because the separate, state-maintained DMV database, does capture that information. According to Neal, the legislature intended to include all databases to which law enforcement officers have access in determining whether an in-house database constitutes an information system. A reading of the actual language of the statute clearly indicates otherwise. In defining the term "information system" the legislature obviously intended for the Act to govern how an agency could maintain its own information system without regard to information that might exist in a separate system not maintained by the agency. This is evidenced by the legislature's repeated references to an agency information system in the singular, and not the plural. Va. Code Ann. § 2.2-3801. Neal asserts that this is irrelevant because the statutory definition of information system "contains no requirement that the system be confined to one specific database or agency." In addition to ignoring the obvious meaning of the singular form of these words, Neal's argument ignores that it is not the FCPD's obligation to show that the Act requires confinement to one database; it is Neal's obligation at summary judgment to prove that the plain language of the statute contemplates otherwise, and Neal has failed to meet that burden.

Carrying Neal's assertions to their logical conclusion, a finding by this Court that a license plate number constitutes personal information also has the potential to affect other areas of well-settled law, and would produce an absurd result. For example, law enforcement officers who receive information of illegal activity by a vehicle owner are prohibited from effecting a

traffic stop of that individual's vehicle without first establishing that the driver of the vehicle matches the description of the suspect vehicle owner. *Worley v. Commonwealth,* 1996 WL 31949 (1996). Pursuant to Neal's reading of the Act, officers would simply presume that the driver of the vehicle was the individual whose information was associated with the license plate number, and take action accordingly.

Requiring Virginia drivers to display what is deemed to be "personal information" on the front and rear of their vehicles could also expose the DMV to civil liability pursuant to federal statutes that prohibit a state department of motor vehicles from knowingly disclosing the personal information of a licensed driver to any person or entity. *See* 18 USCA §2721, 2724. This is obviously not the intent of the legislature.

II. CONSTITUTIONAL PRIVACY CASELAW IS INAPPLICABLE TO THIS CASE.

Neal relies on Constitutional privacy principles to support his contention that the legislature intended to include license plate numbers within the statutory definition of "personal information" contained in Va. Code Ann. § 2.2-3801. These principles are inapplicable to the argument of whether a license plate number constitutes personal information, however, to the extent that they could assist the Court in determining the statutory definition of personal information, they weigh heavily in favor of the Defendants' position.

The United States Supreme Court has repeatedly held that citizens do not have a reasonable expectation of privacy in their license plate or vehicle identification numbers, or in the public movements of their vehicles. *See, e.g., SD v. Opperman,* 428 U.S. 364, 368 (1976) (decreased expectation of privacy in a vehicle); *NY v. Class,* 475 U.S. 106, 114 (1986) (Vehicle Identification Number (VIN), located inside a vehicle but visible from the exterior, is not personal information); *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (license plate number is

not personal information). Courts across the country have repeatedly held that license plate numbers are not personal information because they are owned and regulated by the government, and the government requires citizens to publicly display them in order to operate a motor vehicle. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *U.S. v. Diaz-Castaneda*, 494 F.3d 1146 (9th Cir. 2007). Indeed, courts recognize that the purpose for requiring the display of a license plate on a vehicle is specifically to "convey information about a vehicle to law enforcement authorities." *Diaz-Castaneda*, 494 F.3d at 1151.

Neal points to the United States Supreme Court decision in *U.S. v. Jones*, 132 S. Ct. 945 (2012) as providing a parallel privacy argument in the context of the FCPD ALPR program, however, a reading of *Jones* quickly dispels this argument. At issue in *Jones* was whether a government agent's placement of a Global Positioning System (GPS) tracking device on a vehicle to continually track the movements of a suspect known to drive the vehicle implicated the Fourth Amendment. *Id.* at 949. In answering the question in the affirmative, the Court found that the act of attaching the GPS device was a Fourth Amendment search based upon a common law property-based approach, as opposed to a reasonable expectation of privacy approach. *Id.* at 950. According to the Court, when government agents physically intruded upon the vehicle to attach the GPS device, and then utilized that device to continually track the movements of the vehicle, they triggered the Fourth Amendment, and where required to establish that the search was reasonable. *Id.* at 949.

Unlike the government action at issue in *Jones*, the FCPD ALPR program involves neither the physical attachment of an electronic device to a vehicle, nor the continuous monitoring of the vehicle's movements; the two key facts to the *Jones* ruling. In fact, the Court itself recognized the limited nature of its holding by drawing a clear distinction between the facts

presented in *Jones* and general Constitutional privacy principles. For example, the Court pointed out that its prior ruling in *Class*, that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search,'" was inapplicable to its *Jones* analysis because in *Jones,* "[b]y attaching the [GPS] device to the [vehicle], officers encroached on a protected area." *Jones,* 132 S. Ct. at 952. Therefore, there is no parallel between the Supreme Court's *Jones* decision and the FCPD ALPR database that could assist in this Court's analysis.

III. THE ATTORNEY GENERAL OPINION AND SUBSEQUENT LEGISLATIVE ACTION DO NOT SUPPORT NEAL'S ARGUMENTS.

The Defendants' Summary Judgment Memorandum delineates the Defendants' argument as to why the Attorney General opinion is not supportive of Neal's allegations, and why it is not relevant to these proceedings, and the Defendants rely on that argument herein. Neal alleges in his Motion that the Virginia General Assembly's attempts to amend the Act in the aftermath of the Attorney General opinion sheds light on his statutory construction argument, however, this reliance is misplaced. Neal is correct that the legislature has repeatedly attempted to enact legislation that would add license plate numbers to the strictures of the Act, and that would set a time limit on the retention of images that is less than the 364 day retention limit found in the FCPD policy, none of which have been successful. The General Assembly proposed several pieces of legislation during the 2015 legislative session, including Senate Bill No. 965, which passed both the House and Senate but was vetoed by the Governor over concerns that "defining vehicle license plate numbers as 'personal information' could dramatically impact state and local agency operations and create public confusion."[3] According to the Governor, this confusion would come from defining a license plate number as personal information, while the

[3] The Governor's position on the efficacy of making a vehicle license plate number the personal information of an individual was captured in his veto, which is attached hereto as Exhibit 2.

government simultaneously requires that this personal information be "attached to the front and rear of every vehicle." (Ex. 2.) Both the House and Senate again considered bills in the 2016 legislative session that would have added license plate numbers to the definition of personal information, HB 141 and SB 236. Both were referred to committee, and HB 141 did not pass committee. (Ex. 3.) The Senate version, SB 236, was continued to the 2017 legislative session for further debate and consideration. (Ex. 3.)

The implication that Neal draws from this failed legislative action is that it is indicative that the legislature must have intended all along to include license plate numbers within the Act. This conclusion ignores well-settled caselaw on legislative process and statutory construction. To the extent that the Court can draw any conclusions from the actions of the legislature subsequent to the Attorney General opinion, the only conclusion that may be properly drawn is that the legislature has repeatedly attempted since the Attorney General opinion issued to enact substantive change to the Act by adding license plate numbers to the definition of personal information, and setting time limits upon which law enforcement agencies may retain images of such numbers. *See Britt Constr., Inc. v. Magazzine Clean, LLC*, 623 S.E. 2d 886, 888 (2006) ("when a statute has been amended, there is a presumption that the General Assembly intended to effect a substantive change in the law").

The fact that the legislative and executive branches of government have repeatedly tried, and failed, to enact legislation that would create a cause of action for an individual in Neal's circumstances, does not support Neal's argument that the legislature intended with the 2001 enactment of the Act to make a vehicle's license plate number the personal information of an individual. Quite to the contrary, it supports the Defendants' argument that the legislature is attempting to enact substantive changes to the Act by adding for the first time license plate

numbers within its purview, but those efforts have failed due to disagreement within both the legislative and executive branches.

This conclusion highlights yet another flaw with Neal's reasoning: Neal is attempting to circumvent the legislative process by asking this Court to legislate on his behalf, which is clearly improper. *See Volkswagen of Am., Inc. v. Smit*, 587 S.E. 2d 526, 531 (2003) ("Amendments of statutes can only be made by the legislature and not by the courts or administrative officers charged with their enforcement.") quoting *Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake*, 240 S.E. 2d 819, 823 (1978). If license plate numbers are to be added to the definition of personal information in the Act, or otherwise regulated by statute, this is a function of the legislature, not of the judiciary, as Neal asserts.

IV. NEAL'S STATEMENT OF UNDISPUTED FACTS AND EXHIBITS INCLUDE FACTS THAT ARE NOT MATERIAL TO THE ISSUES BEFORE THE COURT, AND ARE IRRELEVANT AT SUMMARY JUDGMENT.

Neal also attempts to support his Motion through the inclusion of facts and exhibits that are not properly before the Court, or that are irrelevant to the legal issues presented at summary judgment. Neal's Statement of Undisputed Facts, attached to his Memorandum in Support of Summary Judgment (Memorandum) as Appendix A, is almost entirely cited to his Complaint, or not cited to the record at all. Neal provides supposed evidentiary support for his Motion through the inclusion of exhibits, which with the exception of Exhibit 10, the order and transcript from the Defendants' Demurrer, are documents and discovery responses provided by the Defendants in discovery. While the Defendants do not contest the authenticity of the exhibits, for the reasons set out below, many of the facts contained therein are immaterial to this Court's determination of this case.

For example, Neal relies on a Memorandum of Understanding (MOU) that he claims is evidence of a data sharing agreement among the law enforcement jurisdictions of the National Capital Region (NCR), with the result of the agreement being that NCR agencies will be permitted access to each other's ALPR databases. (Neal SJ Ex. 1.)[4] The MOU is unsigned, and contains a notation at the top of each page denoting the document as a draft document. *Id.* Neal asserts that this MOU establishes that the FCPD permits these NCR jurisdictions to access its ALPR data. Neal cannot properly rely on this exhibit in support of his Motion because it is an unsigned draft of an MOU, which does nothing to prove that the FCPD is a party to an MOU that permits data sharing among NCR jurisdictions, which it has not.[5] Regardless of whether Neal has properly established the existence of a data sharing MOU, whether the FCPD is a party to such a MOU is immaterial to the issues before the Court.

Similarly, Neal relies on an email from a representative of the Drug Enforcement Agency (DEA) notifying multiple email recipients, including an FCPD recipient, of a national ALPR program. (Neal SJ Ex. 6.) The email concludes with the statement "[i]f your agency has an existing LPR program and is interested in being part of DICE, please feel free to contact me." Neal asserts that this email provides an example of how government agencies can use ALPR data, however, he provides no link between the DEA program and the FCPD ALPR program. There is no evidence in the record that establishes that the FCPD even responded to the email,

[4] References to exhibits attached to Neal's Memorandum are cited as "Neal SJ Ex." Followed by the Exhibit number.

[5] This allegation is also refuted by the Defendants' SJ Ex. 7, which documents numerous instances wherein NCR jurisdictions request that the FCPD run a particular license plate number through its ALPR database. Had the FCPD entered into the MOU as Neal asserts, these jurisdictions would have simply accessed the FCPD database directly instead of relying on certified FCPD users to do so.

much less that it participates in the program, and in fact, it does not. As such, this exhibit is immaterial to the parties' summary judgment motions.

Finally, Neal relies on an email from Lexis Nexus, offering to assist the FCPD in a serial burglary investigation by running the FCPD ALPR database through the Lexis Nexus ALPR database. (Neal SJ Ex. 9.) Again, without asserting that the FCPD even responded to this email, which it did not, Neal relies on it to establish facts in this case. This email does nothing to establish facts material to the issue of whether the Act applies to the FCPD ALPR program. In sum, even if the FCPD had entered into a data sharing MOU with the other NCR jurisdictions, or responded positively to the emails from the DEA and Lexis Nexus, that evidence would have absolutely nothing to do with the legal issues that are before this Court at summary judgment, and they cannot be relied upon to support Neal's arguments.

V. NEAL CANNOT RELY ON JUDICIAL NOTICE TO SUPPORT HIS MOTION.

Neal asks this Court to take judicial notice of "the ease with which a license plate number alone can be used to unlock intimate personal information about the owner . . . with just a few clicks of the mouse via readily accessible internet resources . . ." arguing that this is somehow relevant to the issues before the Court. Even assuming that this alleged fact is material to whether the Act is applicable to the FCPD's ALPR program, it is not a proper fact for judicial notice. "Judicial notice permits a court to determine the existence of a fact without formal evidence tending to support that fact." *Taylor v. Commonwealth,* 502 S.E.2d 113, 116 (1998) (citation omitted). Generally, "[a] trial court may take judicial notice of those facts that are either (1) so 'generally known' within the jurisdiction or (2) so 'easily ascertainable' by reference to reliable sources that reasonably informed people in the community would not regard

them as reasonably subject to dispute." *Id.* (quoting *Ryan v. Commonwealth,* 247 S.E.2d 698, 703 (1978)); *see also* Rule 2:201 (judicial notice of adjudicative facts).

It is difficult to ascertain how the argument that the FCPD is prohibited by the Act from maintaining license plate numbers to support criminal investigations is bolstered by an allegation that members of the general public can access a treasure trove of information by simply plugging a license plate number into a public Internet database. Regardless, the argument is not properly before the Court and cannot be relied upon by Neal to support his summary judgment claims.

VI. THE COURT'S DEMURRER RULING IS NOT CONTROLLING ON THE PARTIES AT SUMMARY JUDGMENT.

Neal asserts that this Court has already conclusively ruled in his favor as to the issue of whether a license plate number constitutes personal information as defined by the Act. The basis for this assertion is this Court's denial of the Defendants' Demurrer, in which the Defendants argued before The Honorable Grace Burke Carroll (Judge Carroll) that Neal's Complaint failed to allege sufficient facts to establish that he was entitled to recovery. Neal contends that Judge Carroll's ruling in his favor establishes the law of the case.

"Pursuant to the "law of the case" doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the 'same litigation.'" *See Kondaurov v. Kerdasha,* 629 S.E.2d 181, 188 (2006). Generally, the doctrine applies to litigation that has proceeded "in a 'linear' sequence to trial, appeal, trial on remand, and second appeal, all under the same set of pleadings." *See, e.g., Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.,* 524 S.E.2d 420, 429 (2000); *Kemp v. Miller,* 168 S.E. 430, 431 (1933). The doctrine has also been applied to "future stages of the same litigation" on appeal. *Kondaurov*, 629 S.E.2d at 188. In this context, the Supreme Court of Virginia has held that "when two cases involve identical parties and issues,

and one case has been resolved finally on appeal, [it] will not re-examine the merits of issues necessarily involved in the first appeal, because those issues have been resolved as part of the 'same litigation' and have become the 'law of the case.'" *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 826 (2008).

Neal cites to no authority to support the proposition that, because the Defendants' Demurrer was overruled as to the issue of whether Neal's Complaint sufficiently alleged that a license plate number constitutes personal information, this Court may not revisit that issue at summary judgment. Indeed, when viewed in the context of the differing legal standards for demurrer when compared to summary judgment, it is obvious that the law of the case doctrine is inapplicable here. At summary judgment, Neal can no longer rely on the bare assertions made in his Complaint; he is now under the affirmative obligation to point to evidence developed in discovery that proves those assertions. *Compare Abi-Njam v. Concord Condo. LLC,* 699 S.E. 2d 483, 486 (2010) ("A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof") *with McCabe v. Reed*, 55 Va. Cir. 67, *3, *citing Stevens v. Howard D. Johnson Co.*, 181 F.2d 396 (4th Cir. 1950) ("A party is entitled to summary judgment only where the record, taken as a whole, could lead a rational trier of fact to only one conclusion").

Inexplicably, Neal attempts to bolster his argument by intentionally misrepresenting Judge Carroll's ruling by inserting favorable portions of the hearing transcript, without providing the entire quote. According to Neal, Judge Carroll stated the following in denying the Defendants' Demurrer: "this Court finds that that information is personal information . . . Otherwise what would be the point of holding that information?" (Neal SJ Memorandum, p. 11.) When considered in its entirety, it is abundantly clear that Judge Carroll based her demurrer

ruling on the sufficiency of the factual allegations contained in the Complaint, as required. What Judge Carroll actually said was:

> "this Court finds that that information is personal information, *that it's pled, the facts are pled sufficiently enough to keep it within 2.2-3801 and that the information system as defined under that statute, that it is an information system as well with the data points and components and operations of a record keeping process.* Otherwise what would be the point of holding that information?"

(Emphasis added.) (Neal SJ Ex. 10, pp. 31-32.) Neal should not be permitted support his claims by intentionally misquoting Judge Carroll, who clearly recognized that the proper standard to apply at demurrer was whether Neal had sufficiently asserted, on the face of his Complaint, and assuming the veracity of all of the allegations therein, that a license plate number was personal information.

The Defendants were bound at demurrer to assume the truthfulness of Neal's assertions, including, for example, the assertion that a license plate number is connected to an individual, that maintenance of that number permits the tracking of a particular individual, or that the FCPD ALPR database indexes the personal information of an individual. They are no longer required to make such unsupported assumptions, nor is the Court. To the contrary, Neal is now under an obligation to support his claims with evidence developed during discovery, which he has failed to accomplish. The law of the case doctrine is therefore clearly inapplicable here, and the Defendants' summary judgment argument related to whether a license plate number is personal information is properly before the Court.

CONCLUSION

Neal is not entitled to summary judgment in this matter because he has failed to establish that the FCPD ALPR database is governed by the Act. Therefore, Neal is not entitled to the relief that he seeks from this Court.

Respectfully submitted,

FAIRFAX COUNTY POLICE DEPARTMENT
COLONEL EDWIN C. ROESSLER, JR.
By Counsel

ELIZABETH D. TEARE
COUNTY ATTORNEY

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2016, a true copy of the foregoing document was sent via electronic mail and mailed, first-class mail, postage prepaid, to:

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American Civil Liberties Union Foundation of Virginia, Inc.
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Edward S. Rosenthal, Esquire
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_____
Kimberly P. Baucom

Baucom, Kimberly

From: Christina M. Brown <cmbrown@rrbmdk.com>
Sent: Friday, July 15, 2016 5:12 PM
To: Baucom, Kimberly
Cc: Edward S. Rosenthal; Leslie Mehta; Hope Amezquita
Subject: Neal v. FCPD, et al.

Hi Kim,

Thank you for the call today. Per our conversation, we have agreed to limit the motion for summary judgment to whether the Data Collection Practices Act applies to FCPD's LPR program. This is based on our understanding that if a judge rules that the Act applies to FCPD's LPR policy, you will concede that the policy does not comply with the Act. In light of this agreement, we will not use expert testimony in connection with the motion.

I hope you have a nice weekend.

Sincerely,
Christina

RICH
ROSENTHAL
BRINCEFIELD
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EXHIBIT 1

2015 SESSION
(SB965)

GOVERNOR'S VETO

Pursuant to Article V, Section 6, of the Constitution of Virginia, I veto Senate Bill 965, which would significantly restrict the use of License Place Readers (LPRs) and lead to many unintended consequences affecting public safety, transportation and the efficient conduct of business in the Commonwealth.

Despite their proven success in locating stolen vehicles, identifying drivers involved in hit-and-run accidents, locating missing children and enhancing overall public safety, this bill would drastically limit the use of LPRs by law enforcement agencies. In order to use a LPR without a warrant under this legislation, agencies must prove the LPR is being used for a "known relevance" data collected that is intended for prompt evaluation and there is suspected criminal or terrorist activity. This provision is extremely narrow and could impede day-to-day operations.

This bill also sets a strict, seven day retention period for all data collected by LPRs. Many localities in Virginia retain this data for 60 days to two years. Seven days is a substantial reduction. Additionally, law enforcement agencies demonstrate that crimes are often not reported until several weeks later. Under this bill, essential data would not be available at the time of those reports. This is particularly concerning when considering implications for the National Capitol Region, where cross-state collaboration and information-sharing are essential to responding to potential criminal or terrorist activity occurring near Virginia's borders.

Furthermore, defining vehicle license plate numbers as "personal information" could dramatically impact state and local agency operations and create public confusion. State law requires that license plates be attached to the front and rear of every vehicle, and license plates must be clearly visible and legible.

This new definition of personal information would likely prevent the live Internet transmission of video from VDOT's traffic cameras as a violation of the state's Government Data Collection and Dissemination Act.

The bill could potentially cripple the use of innovative, electronically-managed tolling lanes that improve the quality of life for Virginians by reducing commute times and expediting the tolling process. These projects use cameras that record license plate numbers for billing purposes, saving travelers the time they would spend waiting in line at a toll booth. The billing mechanism could be in violation of this legislation, eliminating the use of these time-saving travel options.

It would be unwise for me to sign legislation that could limit the tools available for legitimate law enforcement purposes and negatively impact public safety, or derail major transportation projects and jeopardize time-saving technologies that are essential to our economy, our citizens, tourism and the efficient conduct of business.

Accordingly, I veto this bill.

EXHIBIT 2

GOVERNOR'S RECOMMENDATION

1. Line 41, enrolled, after *use*

strike

any surveillance technology

insert

license plate readers

2. After line 64, enrolled

insert

"License plate reader" means a law-enforcement system that optically scans vehicle license plates.

3. Line 66, enrolled, after license number,

strike

the remainder of line 66 and through *number,* on line 67

4. At the beginning of line 72, enrolled

strike

presence at any place,

5. Line 77, enrolled

strike

all of lines 77 and 78

6. Line 81, enrolled, after *than*

strike

seven

insert

60

7. Line 83, enrolled, after *After*

strike

seven

insert

60

8. Line 85, enrolled

strike

all of lines 85 and 86

2016 SESSION

HB 141 Government Data Collection and Dissemination Practices Act; license plate readers.

Introduced by: **Robert G. Marshall | all patrons ... notes | add to my profiles**

SUMMARY AS INTRODUCED:

Government Data Collection and Dissemination Practices Act; license plate readers. Codifies an opinion of the Attorney General regarding the Government Data Collection and Dissemination Practices Act by limiting the ability of law-enforcement and regulatory agencies to use license plate readers to collect and maintain personal information on individuals where a warrant has not been issued and there is no reasonable suspicion of criminal activity by the individuals. The bill provides that information collected by a license plate reader without a warrant shall only be retained for seven days and shall only be used for the investigation of a crime or a report of a missing person. The bill also prohibits an agency from acquiring personal information collected from license plate readers from a third-party private vendor if the agency would not have been permitted to collect or retain the information on its own.

FULL TEXT

12/21/15 House: Prefiled and ordered printed; offered 01/13/16 16100776D pdf

HISTORY

12/21/15 House: Prefiled and ordered printed; offered 01/13/16 16100776D

12/21/15 House: Referred to Committee on Militia, Police and Public Safety

02/16/16 House: Left in Militia, Police and Public Safety

EXHIBIT 3

2017 SESSION

SB 236 Government Data Collection & Dissemination Practices Act; collection & use of personal information.

Introduced by: **J. Chapman Petersen | all patrons ... notes | add to my profiles**

SUMMARY AS INTRODUCED:

Government Data Collection and Dissemination Practices Act; collection and use of personal information by law-enforcement agencies. Provides that, unless a criminal or administrative warrant has been issued, law-enforcement and regulatory agencies shall not use surveillance technology to collect or maintain personal information where such data is of unknown relevance and is not intended for prompt evaluation and potential use regarding suspected criminal activity or terrorism by any individual or organization. The bill authorizes law-enforcement agencies to collect information from license plate readers, provided that such information is held for no more than seven days and is not subject to any outside inquiries or internal usage, except in the investigation of a crime or a missing persons report. After seven days, such collected information must be purged from the system unless it is being utilized in an ongoing investigation. The bill also adds to the definition of "personal information," for the purposes of government data collection and dissemination practices, vehicle license plate numbers and information that affords a basis for inferring an individual's presence at any place.

FULL TEXT

01/06/16 Senate: Prefiled and ordered printed; offered 01/13/16 16102870D pdf

HISTORY

01/06/16 Senate: Prefiled and ordered printed; offered 01/13/16 16102870D

01/06/16 Senate: Referred to Committee on General Laws and Technology

01/28/16 Senate: Assigned GL&T sub: #2

02/08/16 Senate: Continued to 2017 in General Laws and Technology (15-Y 0-N)