

April 8, 2015

BY EMAIL:

Members of the Senate of Virginia

Members of the Virginia House of Delegates

Dear Members of the Senate of Virginia and House of Delegates:

I write on behalf of the American Civil Liberties Union of Virginia and our 10,000 members and supporters across Virginia. I apologize in advance for the length of this missive, but Virginians' privacy is an important value that deserves full consideration before it is compromised.

We urge you to say NO to the Governor's amendments to HB 1673 (Anderson R Prince William) and SB 965 (Petersen D Fairfax) regarding use by law enforcement of surveillance technology. This legislation, which passed the legislature with only two dissenting votes, was intended to clarify privacy protections currently assured by Virginia's Government Data Collection and Dissemination Practices Act (the Data Act). With the Governor's amendments, however, the legislation would actually authorize mass surveillance by government that is now prohibited. **Bottom line, the amendments turn pro-privacy legislation into a pro-surveillance law.**

A vote against the Governor's Amendments is a vote to reaffirm current protections against government collection of private data. As passed, HB 1673 and SB 965 would establish once and for all that police cannot use any surveillance technologies to collect personal information about Virginians **unless** there is a need established in advance for the information, i.e., that the information is relevant to and intended to be promptly evaluated for use in an investigation. At the same time, however, the bills also **provide a safe harbor** for the unlimited use of license plate readers (LPRs) provided that the data collected is purged after seven days **or** after it is no longer needed in an investigation. Under current law, as interpreted by Attorney General Opinion [12-073](#) (February 2013), law enforcement does not have the authority to use license plate readers this freely.

To make the case for the Governor's amendments, law enforcement advocates are using the same hyperbole and unsubstantiated claims that failed to persuade you all (in committee or on the floor) during the Session. Don't let law enforcement lobbyists use fear to convince you that the reasonable limits on the use of surveillance technologies already in place under the Data Act should be repealed by the Governor's amendments.

Law enforcement lobbyists discount the real adverse impact on privacy that LPR data collection can have. As our Policy Director, Frank Knaack, detailed in [a blog](#) on this issue, if LPR location data is assembled into a data base, it can be used to track our movements, paint a picture of where we go and how often, and, with

enough data points, to predict where we'll be in the future. If LPRS are used as a kind of "digital fence" around events or places, they can produce a kind of "attendance" list that allows the police to get around constitutional limits on their ability to request such a list directly.

The Virginia State Police used this very technique when it set up LPRs to record the license plate of every vehicle that crossed the Potomac River bridges into DC on the day of President Obama's first inauguration, as well as cars parked near campaign rallies for Obama and then vice presidential candidate Sarah Palin. And, if this kind of mass surveillance is done over a longer term period, collection of this data can be used by law enforcement to measure the level of commitment of individual group members.

The Governor's amendments would grant Virginia law enforcement agencies free license (like that now employed by federal agencies like the NSA and the DEA) to gather personal information on innocent Virginians, maintain it for a minimum of 60 days (in the case of LPRs), and disseminate it to other agencies without limit. Virginians deserve better than to have a privacy bill turned into a surveillance bill without their participation or consent.

We urge you to reject all of the Governor's amendments to HB 1673 and SB 965 and vote to pass the bills notwithstanding the Governor's veto.

Following is a more detailed analysis of each of the amendments the Governor has offered:

Amendment Nos. 1 and 5

Amendment No.1 would strike the words "any surveillance technology" from the bill and replace it with "license plate readers." Amendment No. 5 strikes the definition of "surveillance technology."

Vote to reject Amendment Nos. 1 and 5.

The stated reason for these amendments is to limit the bills' application to license plate readers. Law enforcement lobbyists argue that the broader language would "seriously affect the ability to utilize courthouse security, jail security, body-worn or in-car police cameras, as well as many other types of technology that protect Virginians every day." This is a gross overstatement and a clear misreading of the law.

The Data Act (enacted at a time when Virginia Beach was contemplating using cameras with facial recognition software technology on the boardwalk 24x7) currently says that government cannot collect personal information about Virginians unless "the need for it has been clearly established in advance" and the "information shall be appropriate and relevant to the purpose for which it has been collected." Former Attorney General Ken Cuccinelli's 2013 opinion said that this language means that law enforcement cannot use license plate readers (and, by extension, any other technology) to collect personal information about Virginians without a warrant or without establishing in advance the law enforcement need for

the information and its relevance to a criminal investigation or other law enforcement purpose.

In the case of in-car and body-worn cameras, cameras used in courthouse or jail security and other technology, including technology used to gather information on prisoners being released related to notification of domestic violence victims as required by law, law enforcement agencies are free to use any of these technologies with a warrant. They can also establish the legal use of such technology under the Data Act merely by showing that there is a law enforcement need for the information (as there would clearly be in each of these cases) and that the information gathered will be evaluated promptly and purged if not needed for a law enforcement purpose. **Virginians want policies that assure that technology is used by law enforcement within these reasonable limits. The Governor's amendments would remove these reasonable limits and allow Virginia law enforcement to do the kind of unlimited and unjustified mass surveillance that have been done by the federal NSA and DEA.**

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The actual effect of Amendment Nos. 1 and 5 is to reverse the 2013 Attorney General's opinion and to narrow the current law limiting data gathering activities by law enforcement only to limits on the collection of "personal information" by license plate readers. This is a **major revision of the existing law**, and one on which the public has had no opportunity to comment. **The change would open up innocent Virginians to unlimited surveillance by law enforcement using any other kind of technology (drones, hand held radar, stingrays, thermal imaging) subject only to the minimum restraints now offered by antiquated Fourth Amendment jurisprudence.**

Amendment Nos. 2 and 8

These amendments are technical in nature.

These amendments, which are not necessary and are not harmful, move the definition of "license plate reader" from one section to another.

Amendment 3

This amendment removes "vehicle license plate number" from the definition of personal information.

Vote to reject Amendment No. 3.

Law enforcement representatives have consistently argued that "LPRs do not collect personally identifiable information." They argue that when "an LPR scans, collects and stores license plate information, it cannot be de-coded until it is run separately against a DMV database." This argument defies common sense. The fact is that the information is personally identifiable in the same way that your driver's license or social security number is identified only to you. The number identifies the car's owner. If it didn't provide a way to identify the person owning the vehicle, it would be useless to police.

The purpose of including vehicle license plate number in the definition of personal information in the bill was to settle this definitional debate once and for all. The

deletion of this language from the bill, however, does more than leave the debate open.

Look at this language on lines 40-43 of the bills:

11. Unless a criminal or administrative warrant has been issued, law-enforcement and regulatory 41 agencies shall not use any surveillance technology to collect or maintain personal information where 42 such data is of unknown relevance and is not intended for prompt evaluation and potential use respecting suspected criminal activity or terrorism by any individual or organization.

As you can see, this provision only applies to the collection and maintenance of “personal information” as defined in the law. If Amendment No. 1 is accepted and “license plate readers” is substituted for “any surveillance technology,” the deletion of “vehicle license plate number” from the definition of “personal information” by **Amendment No. 5 would make the language on lines 40-43 and the entire bill a nullity if law enforcement is correct and vehicle license plate numbers are not “personal information.”**

Amendment No. 4

This amendment seeks to strike “presence at any place” from the definition of “personal information.”

Vote to reject Amendment No. 4

Whether you are at church, at a shopping mall, at a political event, or at an abortion clinic, your “presence at any place” is a bit of information about you individually and personally. Including the language in the definition under the Data Act, means that government cannot acquire information about places you visit, compile it in a data base and use it to make decisions about you. Because many of us are creatures of habit, acquiring knowledge of a person’s movements over time is the first step toward being able to predict their future whereabouts. For example, LPR data can “map” a person’s friends, politics and medical conditions because LPRs can and are being used to scan the license plates of cars at church, in doctor’s office parking lots or at the site of political events. As the Data Act requires, it is reasonable to ask that government establish a “need for this information” before it is collected and apply the other privacy protections in the Act to its collection, maintenance and dissemination.

No argument for this amendment has been presented by the Governor or law enforcement advocates for the Governor’s changes.

Amendment Nos. 6 and 7

These amendments extend from 7 days to 60 days the number of days before passively collected license plate reader data must be purged.

Vote to reject Amendment Nos. 6 and 7

Throughout consideration of this legislation, law enforcement lobbyists consistently argued unsuccessfully for extensions of the time for maintaining location data collected by license plate readers to 60 days or 6 months. After hearing the

extensive arguments for such an extension in committee and, again, on the floor of the House, the legislature as a body rejected these amendments and passed these bills with the 7 day limit with only two dissenting votes. Law enforcement has made no new arguments in favor of extending the limit beyond 7 days except "other states," like New York, California, and Maryland, have longer data maintenance periods. Virginians level of privacy should not depend on how other states view this fundamental right.

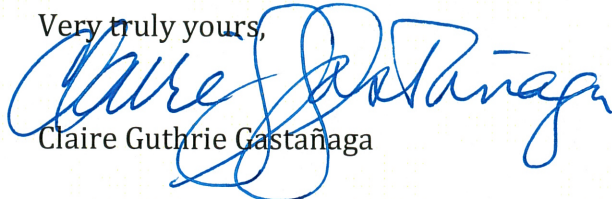
The "safe harbor" for LPR use included in the legislation as it passed both bodies is extensive and already represents a significant compromise to Virginians privacy. The "safe harbor" allows license plate readers to be used without the limits normally imposed on government data collection by the Data Act and allows LPR data to be collected for no reason or for any reason. Once collected, however, the data cannot be kept for more than 7 days unless it is determined to be relevant to an investigation.

Given the authorization for unlimited use of LPRs pursuant to the "safe harbor," the 7 day limit on the data retention is more than reasonable. State Police have been dumping their data within 24 hours since the AG's opinion was issued in February 2013, and only one case has been cited where having the data longer might have assisted in the quicker resolution of a case which involved an out of state abduction and a driver passing through Virginia. Some localities using LPRs dump their data at the end of each shift, and their citizens are no less safe. This legislation establishes a single statewide standard that protects both citizen privacy and legitimate law enforcement needs.

The bottom line is that the policy decisions made in the legislation that 138 of you voted for are the right ones for Virginians – they protect our privacy and allow law enforcement to do their jobs within reasonable and responsible limits.

Virginians do not want our local and State Police, Sheriffs and prosecutors to model their policies and conduct after the NSA or the DEA or simply to mimic what other states do. It's time to say no to policies that are driven more by fear than common sense. It's time to reject the Governor's amendments to HB 1673 and SB 965 and pass the bills notwithstanding the Governor's veto.

Very truly yours,



Claire Guthrie Gastanaga