

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

HARRISON NEAL,
Plaintiff,

v.

Civil No. 2015-05902

FAIRFAX COUNTY POLICE
DEPARTMENT and COLONEL EDWIN C.
ROESSLER, JR., Chief of Police, Fairfax
County Police Department.
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEMURRER

INTRODUCTION

In 2013, then-Attorney General of Virginia Kenneth Cuccinelli, II, determined that the Government Data Collection and Dissemination Act, Va. Code §§ 2.2-3800 et seq. (Data Act), governs law enforcement agencies' collection and storage of information using automatic license plate readers (ALPRs). (2013 Op. Va. Att'y Gen. 7, Compl. Ex. C, the "Attorney General opinion"). An ALPR is a device that captures every license plate number that comes within its field of vision and, after converting the image to a searchable, alphanumeric format, stores the number with the date, time and location at which it was recorded. ALPRs are typically mounted on police vehicles or on stationary objections, where they may record thousands of license plate numbers a day. (Compl. ¶ 6).

The Attorney General's opinion found that the information collected with ALPRs constitutes "personal information" as defined in the Data Act. Va. Code § 2.2-3801. The Data Act therefore prohibits law enforcement from using the technology to collect and

store such data when no need for such data has been “clearly established in advance” and it is “not properly classified as criminal intelligence information or otherwise related directly to law enforcement investigations and intelligence gathering respecting criminal activity.” Va. Code §§ 2.2-3800 (C) (2); § 52-48. The Attorney General found that law enforcement agencies violate these requirements when they engage in the “passive” use ALPRs, that is, the continuous collection of raw, unanalyzed data “for potential future use if a need for the collected data arises respecting criminal or terroristic arises.” (Compl. Ex. C at 4.) The thousands of records that are collected passively every day are not relevant to any current investigation, but are stored in databases in case they may be useful later.¹

Notwithstanding the Attorney General opinion that passively collecting and storing information using ALPRs violates the Data Act, FCPD has continued to do precisely that. Pursuant to FCPD’s standard operating procedure, each record captured by ALPRs is stored in a database for up to one year (Compl. Ex. A at 5), providing FCPD with historical location data for thousands of people who live and work in Fairfax County. Compounding this invasion of privacy, FCPD is party to a Memorandum of Understanding that allows law enforcement agencies in Maryland, Washington, D.C., and Northern Virginia to access information in the FCPD database. (Compl. ¶ 12.)

FCPD’s argument that information collected with ALPRs is not “personal information” and therefore not subject to the Data Act has no merit. The Attorney

¹ By contrast, “active” use of ALPR technology is the collection, evaluation, and analysis of ALPR data by law enforcement “in real time to determine the relevance to an ongoing case or emergency.” (Compl. Ex. C at 1). Typically, agencies maintain a “hot list” of vehicles relevant to current investigations, and the ALPR checks each license plate it records against the list. Records that do not match any on the hot list are discarded. The Attorney General opinion found that the “active” use of ALPRs does not violate the Data Act, and plaintiff does not challenge such use of the technology in this suit.

General's reasonable interpretation of the statute has significant weight and is bolstered by the legislative activity in the 2015 General Assembly Session.² Moreover, the FCPD's interpretation of the Data Act contradicts the statute's plain language and undermines its purpose.

For these reasons, the Court should overrule FCPD's demurrer and order it to answer the complaint.

ARGUMENT

I. STANDARD OF REVIEW

In considering a demurrer, Virginia courts apply the following standard:

A demurrer tests the legal sufficiency of a [complaint] and admits the truth of all material facts that are properly pleaded. The facts admitted are those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged. The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [complaint], but only may determine whether the factual allegations of the [complaint] are sufficient to state a cause of action.

Bd. of Supervisors v. Davenport & Co. LLC, 285 Va. 580, 585 (2013) (quoting *Harris v. Kreutzer*, 271 Va. 188, 195-96 (2006)).

II. LICENSE PLATE DATA IS "PERSONAL INFORMATION" AS DEFINED BY THE DATA ACT.

"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Conger v. Barrett*, 280 Va. 627, 630 (2010) (alteration in original)

(quoting *Turner v. Commonwealth*, 226 Va. 456, 459 (1983)). "When the language of a

² An opinion of the Attorney General is "entitled to due consideration." *Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998). "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." *Beck v. Shelton*, 267 Va. 482, 492 (2004) quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62 (1983).

statute is unambiguous, we are bound by the plain meaning of that language."

Commonwealth v. Morris, 281 Va. 70, 76 (2011) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, (2007)). And "[i]f a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute." *Id.* (quoting *Conyers*, 273 Va. at 104). *Commonwealth v. Amerson*, 281 Va. 414, 418-19 (2011).

In this case, both the plain language and the purpose of the Data Act establish that license plate records are personal information.

The Data Act broadly defines "personal information" to ensure that individuals are protected from government abuse regardless of the type of information or technology or method employed to gather such information. Personal information is:

"all information that (i) describes, locates or indexes anything about an individual including, but not limited to his social security number, driver's license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record; or (ii) affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution."

Va. Code§ 2.2-3801 (emphasis added).

The statute is deliberately comprehensive, encompassing "all information" that describes, locates, or indexes "*anything* about an individual" or allows *any* inference about an individual's "personal characteristics," activities, or associations. Va. Code§ 2.2-3801. The list of examples of personal information in the definition is expressly non-exclusive. ("Use of those words [but not limited to] manifests a legislative intent that the

statute not be given an 'expressio unius' construction."). *Surles v. Mayer*, 48 Va. App. 146, 164, (2006) quoting *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 528 (1979).

FCPD asserts, without analysis or explanation, that "a license plate number is not any of the specific terms contained in the definition of 'personal information.'" (Defs.' Mem. Supp.at 7.) However, as highlighted above, among the specific examples of what constitutes "personal information," the legislature included the category "agency-issued identification number." It is difficult to understand how the tag number assigned by the DMV, a state agency, in connection with Mr. Neal's auto registration, is anything other than an "agency-issued identification number." Like a driver's license number or a social security number, Mr. Neal's tag number, which FCPD admits it stores in its ALPR database (along with the vehicle's location information), is a unique "identification number" which has been "assigned" by a state agency (the DMV) to Mr. Neal and his automobile.

Even if license plate numbers were not an "agency-issued identification number," ALPR data would still be personal information because, as the Attorney General opinion explained, "it may assist in locating an individual data subject, documenting his movements, or determining his personal property holdings . . . The collection of such information may adversely affect an individual who, at some point in time, may be suspected of and or charged with a criminal violation." (Compl. Ex. C at 3.) As the Attorney General recognized, passive use of ALPRs to collect, maintain, and disseminate data can reveal an alarming amount of personal information about drivers. A license plate record contains a photograph of the license plate in searchable, alphanumeric form,

the date, time, and location that the photo was taken, and is maintained in the database for a year. (Compl. ¶ 6.) If a particular vehicle repeatedly appears at a certain location over the course of a year, inferences may be drawn about the driver's physician, place of worship, or organizational memberships.

In the related context of GPS monitoring, the U.S. Supreme Court has noted that location data is sensitive because it can reveal “a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.” *See United States v. Jones*, 132 S. Ct. 945, 955 (2012). “The Government can store such records and efficiently mine them for information years into the future.” *Id.* at 955-56. The Court explained that GPS monitoring “is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: “limited police resources and community hostility.” *Id.* at 956 quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004). The same observations apply to the passive use of ALPRs, with this significant difference: GPS devices collect location information from persons suspected of criminal activity, while ALPRs collect location information from every vehicle that drives within their range, the vast majority of which have no relevance to any criminal investigation.

License plate numbers are also “personal information” for the independent reason that they “index” personal information that is readily accessible to FCPD, specifically in databases operated by the Virginia Department of Motor Vehicles (DMV). (Compl. ¶ 19.) Armed with nothing more than a person's license plate number, FCPD may obtain from

DMV specific types of personal information explicitly listed in the Data Act, such as social security number, date of birth, and address. Va. Code § 2.2-3801.

FCPD misses the point when it contends that the “license plate number of a vehicle says absolutely nothing about an individual, his personal characteristics such as his fingerprints, or his membership in an organization.” (Defs.’ Mem. at 7.) First, many of the types of personal information listed in the statute are essentially random strings of characters that are not inherently descriptive of a person’s appearance or activities. *See* Va. Code § 2.2-3801 (including “social security number, driver’s license number, [and] agency-issued identification number” among types of “personal information.”) The power of these numbers, and their danger when misused, is that they convey information about an individual in and of themselves, but that they easily lead to other information that is profoundly private. Second, ALPR records do not consist only of license plate numbers; they include the date, time, and location at which the license plate was observed. As explained above, such information may be deeply revealing of a person’s activities and associations, and are decidedly within the category of “all information that . . . affords a basis for inferring . . . things done by or to such individual . . . and the record of his presence . . . in an . . . activity.” Va. Code § 2.2-3801.

FCPD concedes that license plate numbers obtained with ALPRs may be used to obtain other personal information from the Department of Motor Vehicles database, but claims that this does not trigger the requirements of the Data Act because the definition of “information system” does not include databases maintained by separate entities. (Defs.’ Mem at 8.) This is wrong on several counts.

First, FCPD erroneously assumes that the Data Act does not regulate collection of personal information unless that information is part of an “information system.”

Although the Data Act does regulate information systems, it also constrains the mere collection and use of personal information, regardless of whether it is stored in an information system. Indeed, of the ten information practice requirements of Section 2.2-3800(C), only the first is exclusive to “information systems.” The rest limit the circumstances under which personal information may be collected and used. *See, e.g.*, § 2.2-3800(B)(2) (“Information shall not be collected unless the need for it has been clearly established in advance”); § 2.2-3800(B)(5) (“Information shall not be used unless it is accurate and current.”). Thus, if ALPR records are “personal information,” they are subject to the Data Act even if they are not stored in an “information system.”

Second, the plain language of the definition of “information system” includes the ALPR database maintained by FCPD. An “information system” is:

the total components and operations of a record-keeping process, including information collected or managed by means of computer networks and the Internet, whether automated or manual, containing personal information and the name, personal number, or other identifying particulars of a data subject.

Va. Code §2.2-3801. The ALPR database is an information system because it contains identifying particulars (license plate numbers) and other personal information (location and time).

Third, even if the ALPR database is not an “information system,” that database combined with the DMV database certainly is. The definition of “information system” contains no requirement that the system be confined to one specific database or agency. In fact, the definition encompasses “the *total* components and operations of a record-

keeping process,” regardless of where or by whom the records are stored. Interpreting the statute to exclude systems that cross agency lines would require reading words into the statute that simply are not there.

Indeed, the ALPR database would be of little use as an “an investigative tool to aid in the detection or investigation of terrorism or a series of related crimes” (FCPD SOP 11-039, Compl. Ex. A at 5), if FCPD could not use it to access, in a matter of seconds, the information available in the DMV database. The ALPR database and the DMV database represent two integral “components” and “operations” of an integrated “record-keeping process,” which FCPD can manage by “automated or manual” means through “computer networks” and the Internet.” They are two inextricably complementary parts of “the total components and operations of a record-keeping process” that FCPD’s ALPR surveillance system is designed to encompass.

FCPD’s interpretation of “information system” would frustrate the purpose of the Data Act. The statute is meant to constrain the information available to government agencies that could intrude on personal privacy. Under FCPD’s argument, an agency may avoid this purpose merely by making use of another agency’s database to obtain information. But a person’s privacy is not any less compromised when FCPD uses information its ALPR database to access information in the DMV database than it would be if FCPD stored all of this information itself.

Finally, the FCPD misreads the General Assembly’s recent attempt to amend the Data Act to add an explicit mention of license plate numbers.³ FCPD claims that the

³ Virginia General Assembly, 2015 session, HB 1673 (House 94-Y, 2-N; Senate 37-Y, 0-N) and SB 965 (Senate 38-Y, 0-N; House 97-Y, 0-N) passed by overwhelming majorities to protect license plate numbers as personal information, limit passive collection of ALPR data by law enforcement agencies to seven days, and to prohibit unauthorized use of the data. The Governor of Virginia amended the legislation to expand

legislature would not have sought such an amendment if the existing Data Act already covered license plate numbers. In fact, the General Assembly agreed with the Attorney General that the definition of personal information already encompasses ALPR data, but was well aware that some localities thought otherwise, and continued to collect and store vast numbers of ALPR records.⁴ The General Assembly simply wanted to leave no room for those localities to doubt that ALPR records were personal information. The legislature’s rejection of the Governor’s proposed amendments to the bill, which would have allowed localities to keep ALPR records for sixty days, confirms this understanding of its intent. The General Assembly preferred to keep the current version of the statute – authoritatively interpreted by the Attorney General to prohibit the passive collection and storage of ALPR data but misunderstood by some localities – rather than adopt a statute that expressly permitted localities to keep the data for sixty days.⁵

In sum, the plain language and the purpose of the Data Act support the Attorney General’s opinion – which the Court must give “due consideration” *Twietmeyer*, 255 Va. at 393, 497 S.E.2d at 861 – that ALPR records are “personal information” within the meaning of the Data Act.

the ability of law enforcement agencies to passively collect and maintain ALPR data. The General Assembly rejected the amendments and subsequently, the Governor vetoed the legislation.

⁴ This fact was public knowledge at the time the amendments were considered. *See, e.g.,* Tom Jackman, Despite Cuccinelli’s advice, N.Va. police still maintaining databases of license plates,” THE WASHINGTON POST, Jan. 16, 2014, available at http://www.washingtonpost.com/local/despite-cuccinellis-advice-nva-police-still-maintaining-databases-of-license-plates/2014/01/16/055ec09a-7e38-11e3-9556-4a4bf7bcbd84_story.html.

⁵ The FCPD cites the Governor’s veto statement to support its understanding of the legislative actions. (Defs.’ Mem. Supp. Dem. at 10.) But that statement only represents the views of the Governor, not the General Assembly.

II. THE FCPD'S COLLECTION OF PERSONAL INFORMATION USING ALPRs VIOLATES THE DATA ACT BECAUSE THE NEED FOR THE INFORMATION IS NOT ESTABLISHED IN ADVANCE AND BECAUSE THE ALPR INFORMATION SYSTEM LACKS SAFEGUARDS REQUIRED BY THE ACT.

FCPD rests its Demurrer solely on the argument that ALPR records are not personal information and ALPR databases are not information systems, apparently conceding that if the contrary is true, it follows that FCPD's passive use of ALPRs violates the Data Act. Indeed, this conclusion is unavoidable.

In his opinion, the Attorney General explained that passive collection of ALPR data violates the Data Act the information's "future value to any investigative activity is wholly speculative," so the need for the data is not "clearly established in advance." (Compl. Ex. C at 4.) Accordingly, ALPRs "may not lawfully be used to collect personal information in the passive manner, including the image of the place, the time, date and precise location of a license plate." *Id.* at 4-5 (internal quotation marks and alterations omitted).

In addition to violating the Data Act by collecting personal information for which no need was clearly established in advance, FCPD has failed to adhere to the Data Act's administrative requirements for information systems that contain personal information. Specifically, FCPD does not comply with provisions requiring it to:

- Collect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency;
- Collect information to the greatest extent feasible from the data subject directly;
- Maintain a list of all persons or organizations having regular access to personal information in the information system;

- Maintain for a period of three years or until such time as the personal information is purged, whichever is shorter, a complete and accurate record, including identity and purpose, of every access to any personal information in a system, including the identity of any persons or organizations not having regular access authority but excluding access by the personnel of the agency wherein data is put to service for the purpose for which it is obtained,

Va. Code § 2.2-3803(A)(1), (2), (5), (6), (7).

CONCLUSION

FCPD has violated the Plaintiff's rights under the Data Act, and he is entitled to redress. Plaintiff therefore respectfully requests that the Demurrer be denied.

Dated: August 14, 2015

Respectfully submitted,

HARRISON NEAL, by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2015, I served a true and correct copy of the foregoing document was served by U.S. Mail, postage prepaid, to the following:

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