

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

HARRISON NEAL,)
)
 Plaintiff,)
)
 v,)
)
 FAIRFAX COUNTY POLICE)
 DEPARTMENT, et al.,)
)
 Defendants.)

Case No. CL-2015-5902

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT**

HARRISON NEAL

Plaintiff
By Counsel

By: *Christina M. Brown*
Edward S. Rosenthal (VSB # 15780)
Christina M. Brown (VSB # 81350)
RICH ROSENTHAL BRINCEFIELD MANITTA DZUBIN & KROEGER, LLP
201 North Union Street, Suite 230
Alexandria, Virginia 22314
Telephone: (703) 299-3440
Facsimile: (703) 299-3441
Email: ESRosenthal@RRBMDK.com
Email: CMBrown@RRBMDK.com

Hope R. Amezcua (VSB No. 74629)
American Civil Liberties Union Foundation of Virginia, Inc.
701 E. Franklin St., Suite 1412
Richmond, VA 23219
Telephone: (804) 644-8080
Facsimile: (804) 649-2733
Email: hamezcua@acluva.org

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COMES NOW, Plaintiff Harrison Neal (“Neal”), by counsel, and in support of his Memorandum in Opposition to Defendants’ Fairfax County Police Department and Col. Edwin C. Roessler, Jr. Cross-Motion for Summary Judgment states as follows:

I. LEGAL STANDARD

Summary judgment is a procedure which gives courts the ability to end litigation at an early stage of the proceedings where it "clearly appears that one of the parties is entitled to a judgment in the case as made out *by the pleadings and the parties' admissions.*" *Renner v. Stafford*, 245 Va. 351, 353, 429 S.E.2d 218, 220 (1993) (emphasis added).¹ Summary judgment may only be based upon "the pleadings, the orders, if any, made at a pretrial conference, *the admissions, if any, in the proceedings*, or, upon sustaining a motion to strike the evidence." Va. Sup. Ct. R. 3:20² (emphasis added). *Narayanswarup, Inc. v. Doswell Hospitality, L.L.C.*, 80 Va.

¹ "The burden of establishing the nonexistence of a genuine issue of fact is on the party moving for summary judgment, and the court must view the facts and inferences in a light most favorable to the nonmoving party." W. Hamilton Bryson, Virginia Civil Procedure, § 6.07 (4th ed. 2005) (citing *Carson v. LeBlanc*, 245 Va. 135, 427 S.E.2d 189, 9 Va. Law Rep. 908 (1993)).

² A copy of Va. S. Ct. Rule 3:20, entitled “Summary Judgment,” is attached at **Appendix A**.

Cir. 650, 654-55 (Hanover County 2010). The filing of cross-motions for summary judgment does not, in itself, resolve the question whether material facts remain genuinely in dispute with respect to either or both motions. *Town of Ashland v. Ashland Inv. Co.*, 235 Va. 150, 154, 366 S.E.2d 100, 103 (1988); *Cent. Nat'l Ins. Co. v. VA Farm Bureau Mut. Ins. Co.*, 222 Va. 353, 356, 282 S.E.2d 4, 6 (1981). While admissions made by a party may be used in support of such a motion by its party-opponent, a party may not rely on its own statements (or those of third parties, *see e.g.* Va. Code § 8.01-420) for that purpose.

II. DEFENDANTS' "UNDISPUTED FACTS"

Although the parties have stipulated to the *authenticity* of documents produced by either side in discovery³, such stipulation did not constitute an admission of the truth of assertions contained in each other's documents. *See* email exchange of July 24-26 between Hope Amezquita and Kimberly Baucom. **Ex. 1.** "[T]his agreement is limited to matters of authenticity. It does not mean that the opposing party *admits the truth of any assertions contained in documents* that are not themselves an admission by such opposing party." *Id.* (emphasis added).

Defendants have chosen to ignore the parties' understanding and the explicit limits placed by Rule 3:20 on the factual predicates necessary to support summary judgment in Virginia ("the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence").⁴ Instead, they have put forward their own disputed assertions, questionable conclusions, public relations talking points, inconsistent statements, and inadmissible double and triple hearsay as "conclusive" and "undisputed" "evidence."

³ See FCPD Memo at 2, fn. 1.

⁴ In setting out the "legal standard" applicable to its MSJ, FCPD Memo at 6, Defendants fail to mention any of the limiting factors set forth in Rule 3:20 and repeatedly emphasized by Virginia courts.

Without any attempt to justify its departure from these fundamental precepts of the Virginia summary judgment process, Defendants in their Memorandum in Support of Motion for Summary Judgment (“FCPD Memo”) have appended as exhibits and heavily relied on their own self-serving statements contained in (1) ALPR equipment manufacturer’s promotional materials, *see e.g.*, FCPD Memo, Exs. 3 and 5;⁵ (2) a regional law enforcement plan for “goals and objectives,” *see* FCPD Memo, Ex 4;⁶ (3) internal FCPD emails describing double- and triple-hearsay stories of alleged ALPR successes, *see e.g.*, FCPD Memo Ex. 7; (4) Defendants’ own answers to Neal’s Interrogatories, FCPD Memo, Ex. 1; and even (5) a “draft press release” recounting Chief Roessler’s public statements in response to *this lawsuit*. *See* FCPD Memo, Ex. 6. FCPD’s Memo is replete with references to “facts” allegedly to be found in their own prior statements, which they characterize as undisputed. *Id.*, at 2, 3, 4, 5, 6, 10, 11, 12. None of these documents contain Plaintiff’s admissions. Rather except for Neal’s own correspondence with FCPD and his own LTA Data, *see e.g.*, FCPD Memo, Ex. 9, none of the statements has been asserted or admitted by Plaintiff – contrary to Rule 3:20 and Va. Code § 8.01-420. Because they are full of self-serving multi-layered hearsay, rank personal opinion, and unfounded, argumentative claims,⁷ these exhibits are not only inappropriate for purposes of summary

⁵ Neal has no quarrel with the use of these materials for the general purpose of describing the technological processes involved in FCPD’s ALPR program, but he vigorously disputes and objects to any consideration of the many exaggerated, conclusory, and self-serving avowals of “invaluable” law enforcement benefits and stories. Defendants’ exhibits include objectionable assertions and statements that are irrelevant to whether their policy complies with the Data Act, including phrases such as the following: “safer streets,” “safer officers,” “the safety and security of our communities and nation,” “drug interdiction,” “gang and racketeering interdiction,” “collection of unpaid taxes and fees,” and other “remarkable successes.” FCPD Memo, Ex. 3, at 1.

⁶ Neal does not object to use of the Strategic Plan to describe the parameters (but not the supposed results or benefits) of regional law enforcement agencies’ exchange of ALPR access and databases.

⁷ Among the “undisputed facts” that Defendants insist its own discovery responses have somehow “conclusively establish[ed],” FCPD asserts that the ALPR images it captures are “not state specific.” FCPD Memo at 3. Yet, its own document, the ALPR product brochure, expressly lauds the system’s ability to “identify the state that issued the plate.” FCPD Memo, Ex. 3, at 2.

judgment, but would be for the most part plainly inadmissible even at trial. These inappropriate exhibits should be disregarded for purposes of Defendants' summary judgment motion.⁸ Throughout FCPD's Memo, Defendants repeatedly – and erroneously -- refer to their own untested assertions and discovery responses as “facts not genuinely in dispute,” *id.*, at 2-5; “evidence produced in discovery [that] conclusively establishes” certain facts; *id.*, at 11; facts “demonstrated repeatedly and conclusively by the evidence,” *id.* at 12, and “[t]he uncontroverted evidence produced in discovery.” *Id.*

III. PRIOR AUTHORITY

Defendants assertion that “No binding authority exists in Virginia that addresses the issue whether license plate numbers in a database violate the Act,” FCPD Memo at 12, is misleading.

A. Defendants Ignore Judge Grace Burke Carroll's Ruling in This Case.

Notably, Defendants failed to address Judge Carroll's determination on Demurrer in this very case – that Neal's LTA Data is part of an information system that contains Neal's personal information and is subject to the requirements of the Data Act.⁹ That determination is now the law of the case, and except under exceptional circumstances not presented here, it ought to be respected and followed. *See* Neal's MSJ Memo at 10-13. Defendants avoid this fact because they cannot refute it.

B. The Attorney General of Virginia's Opinion on Automated License Plate Readers is Applicable to FCPD's ALPR Program.

Though Defendants reference the 2013 Opinion (“AG Opinion”) of the Attorney General

⁸ On the other hand, these same and similar documents, as well as portions of FCPD's interrogatory answers, may be appropriately used by Neal as evidentiary *admissions* made by *his* party-opponent (FCPD) in opposition to Defendants' MSJ or in support of Neal's cross-MSJ. *See* Va. S. Ct. Rule 2:803, attached as **Appendix B**.

⁹ The Demurrer Order and incorporated hearing transcript reflecting Judge Carroll's ruling of August 28, 2015 may be found as Exhibit 10 to Neal's Memorandum in Support of Motion for Summary Judgment filed on August 4, 2016 (“Neal's MSJ Memo”).

of Virginia (the “AG”)¹⁰ they inaccurately attempt to distinguish it from this case. FCPD seeks to avoid the obvious conclusion of the AG Opinion by insisting that its ALPR system differs in important ways from the ALPR system in the AG Opinion. *Id.*, at 12-15. “[T]he evidence produced in discovery clearly establishes that the Attorney General opinion upon which Neal relies is inapplicable to the FCPD’s database.” *Id.* at 12. This is so, they assert, “because the FCPD ALPR program does not contain personal information, and because the program clearly falls within the exemption provided in Va. Code Ann. § 2.2-3802(7), *as recognized by the Attorney General.*” *Id.*, at 13 (emphasis added). Defendants’ contentions, particularly the specious assertion that the AG recognized an exemption now claimed by FCPD are meritless.

1. The Attorney General’s Interpretation of “Personal Information” Fully Applies to the Passive Use of FCPD’s ALPR Program and is Therefore Subject to the Imperatives of the Data Act.

Defendants start with the baseless assertion that the AG merely “assumed” that the State Police program maintained personal information of data subjects, FCPD Memo at 13, and that this *assumption* does not apply to the allegedly very different FCPD ALPR program. *Id.* This assertion gravely mischaracterizes (1) the Attorney General’s opinion, (2) the State Police ALPR program, and (3) the FCPD ALPR program. The AG’s Opinion states:

Data collected utilizing LPR technology falls within this statutory definition, as, for example, it may assist in locating an individual data subject, documenting his movements, or determining his personal property holdings.¹¹ 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. [Citing § 2.2-3801 in fn. 8.]

¹⁰ A copy of the AG Opinion was attached as Exhibit C to the Complaint. It is also found as Exhibit 13 to the FCPD Memo.

¹¹ Footnote 7 to the AG Opinion reads as follows:

Readily attainable information may include the vehicle registrant’s name, address, vehicle information, and potential lien status. The definition of “information systems” also broadly encompasses records “containing personal information and the names, personal number, or other identifying particulars of a data subject.” Section 2.2-3801. A “data subject” is “an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in an information system.” *Id.* FCPD Memo, Ex. 13, at 3 (fn. 7).

Accordingly, data collected by an LPR generally meets the definition of "personal information" and thus falls within the scope of the Data Act.

FCPD Memo, Ex. 13, at 3 (emphasis added).

Clearly, the AG Opinion did not limit itself to any unique features of the State Police's ALPR system. The AG's own description of the "issues presented" make it clear that the AG was opining about features common to all current ALPR technology and did not limit the analysis to features specific to the State Police system:

Issues Presented

You inquire regarding the collection, maintenance, and dissemination of data collected *from an automated license plate reader* ("LPR"). Specifically, you ask whether the Government Data Collection and Dissemination Practices Act (the "Data Act") *permits law enforcement agencies* to collect, maintain, and disseminate LPR data. You also ask *whether such data* can be classified as "criminal intelligence information" under applicable Virginia law and thereby exempted from the Data Act's provisions.

FCPD Memo, Ex. 13, at 1. (emphasis added).

Second, the detailed description of the ALPR program at issue, as described in the AG Opinion, *see* FCPD Memo, Ex. 13, at 1-2, and the undisputed facts about the FCPD ALPR system, as described by FCPD and its own documents, make it clear that, technologically and operationally, the two record-keeping processes are essentially identical.

Third, contrary to the dictates of Rule 3:20, Defendants base their attempt to distinguish the two systems wholly upon their own self-serving and conclusory assertions, and not on any pleadings or admissions attributable to Neal. See discussion at pp. 2-3, *supra*.

Fourth, all of the Attorney General's conclusions about the applicability of the Data Act in general—and of the meaning of the terms "personal information," "data subject," and information systems"¹²—were clearly and explicitly intended to apply to all Virginia law

¹² See footnote 11, *supra*.

enforcement agencies and any agency's collection of LPR data in the passive manner. Throughout the AG Opinion, he references "data obtained through LPRs," without any qualifications, limitations, or other language to suggest that the AG was making any distinction¹³ between the State Police system and those of other Virginia law enforcement agencies such as FCPD: "LPR technology 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[.]'" FCPD Memo, Ex. 13, at 3. The AG Opinion belies Defendants' unfounded assertion that "the opinion's analysis is inapplicable to an analysis of the FCPD database." *Id.*, at 14:

Response

It is my opinion that the Data Act does not preclude *law enforcement agencies* from maintaining, using and disseminating personal information collected by *an LPR*, provided such data specifically pertains to investigations and intelligence gathering relating to criminal activity, It further is my opinion that *data collected by an LPR* may be classified as "criminal intelligence information" and thereby exempted from the Data Act's coverage only if the data is collected by or on behalf of the Virginia Fusion Intelligence Center, evaluated and determined to be relevant to criminal activity in accordance with, and maintained in conformance with the criteria specified in § 52-48 of the Code of Virginia. Finally, it is my opinion that *data collected by an LPR* that is not properly classified as "criminal intelligence information" and not otherwise relating directly to law enforcement investigations and intelligence gathering respecting criminal activity, is subject to the Data Act's strictures and prohibitions.

FCPD Memo, Ex. 13, at 1. (emphasis added.)

2. FCPD'S ALPR System Contains Neal's Personal Information and Must Conform to All of the Requirements and Precepts of the Data Act.

¹³ The AG Opinion's detailed description of the passive use of law enforcement ALPR systems demonstrates beyond any reasonable doubt that there is no substantial difference between the passive use ALPR process considered by the AG and the passive use process at issue in this case:

LPR in the passive manner . . . captures "the image of the place, the time, date and precise location the license plate in question[.]" You also explain that, "[t]he system only translates letters and numbers. This data is then stored by the capturing agency and can be searched at a later date by an alphanumeric query to determine if, when and where a license plate matching the query was encountered.

FCPD Memo, Ex. 13, at 3-4.

In his own memorandum in support of his cross-motion for summary judgment, Neal demonstrated, based on indisputable evidence and the Defendants' own materials, that his License Tag Archive Data ("LTA Data") comprises "personal information" subject to the strictures, policies, and rules of the Data Act.¹⁴ In support of their cross-motion, Defendants now suggest that both the AG and Judge Carroll are wrong, and that they may ignore the Data Act's commands with respect to the passive use of their archival ALPR data regarding Neal and his automobile.¹⁵

Defendants do acknowledge, as they must, that the term "personal information" as defined in Va. Code § 2.2-3801,

include[s] information that describes, locates or indexes anything about an individual, such as an individual's "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 the *personal characteristics of an individual*, 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."

FCPD Memo at 8, quoting statute (emphasis changed). Relying on the doctrine of *ejusdem generis*,¹⁶ Defendants then posit:

¹⁴ Please refer to Neal's MSJ Memorandum of August 4, 2016 ("Neal's MSJ Memo"), which for the sake of judicial efficiency, Neal incorporates here by reference.

¹⁵ Judicial acceptance of the Defendants' crabbed interpretation of "personal information" would mean that the Data Act would not govern, or even limit, the use by FCPD of a database containing a collection of passport numbers, financial account numbers, private telephone numbers, alien registration numbers, criminal history data, medical account information, or the like, so long as the name of the data subject was not itself also contained in that particular database. This would be true, following the Defendants' logic, even where the information in the database also contained location information (time, place, direction of travel, surroundings, images of a vehicle or other personal property owned) about the data subject, and even under circumstances where further details about the person's property ownership, full name, address, driving history, etc. were readily available and frequently used through accessible networks and the Internet.

¹⁶ Neither the rule of *ejusdem generis*, FCPD Memo at 7-8, nor the related maxim of "*expressio unius*" can be of help to the Defendants, because the General Assembly used words deliberately calculated to avoid the application of just those precepts. Thus, in defining "personal information," the General Assembly carefully specified that "this term encompasses *all* information that (i) describes, locates or indexes *anything* about an individual *including, but not limited to*" the examples Defendants want to be interpreted restrictively. Va. Code § 2.2-3801 (emphasis added).

Unlike all of the specific terms contained in the definition of "personal information," the license plate number of a vehicle, particularly one that is not connected to a particular issuing state,¹⁷ says absolutely nothing about an individual, his personal characteristics such as his fingerprints, or his membership in an organization. Indeed, the only reason that the Defendants received any of Neal's personal information was because Neal himself furnished his name, address, and a photocopy of his Virginia operator's license to the FCPD in his FOIA requests. (SJ Ex. 8; SJ Ex. 11.) ***The only information that the FCPD maintained*** in its information system relevant to Neal's claims were ***two photographs of a license plate*** bearing the characters ADDCAR, and the date, time, and location that each photo was taken. (SJ Ex. 9.) The FCPD's ALPR database contained no additional information associated with the license plate number, ***nor did it contain any information specific to Neal.*** (SJ Ex. 9.)

Id., at 8-9 (emphasis added).

Though license plate information alone is sufficient to constitute "personal information," FCPD's own letter of May 15, 2014 and the LPR documents themselves establish that FCPD's ALPR records of April 26 and May 11 of 2014 pertain to and depict much more. It shows Neal driving his silver 2011 Hyundai Accent GLS 4-door sedan ("ADDCAR"). Further, the four images (two in color, one in black-and-white) disclose the dimensions, contours, trim, and to a discerning eye, the make, model, year, physical condition, and state of registration (Virginia) of

Courts refuse to apply the maxim of *ejusdem generis* where the legislature's use of that phrase ("including, but not limited to") indicates that to do so would "thwart [the legislature's] intent as encompassed within the statute's plain language." In *Cooper Distrib. Co. v. Amana Refrig., Inc.*, then-Judge Alito observed that "[t]he rule of *ejusdem generis* applies only if the provision in question does not express a contrary intent. Thus, since the phrase '**including, but not limited to**' plainly expresses a contrary intent, the doctrine of *ejusdem generis* is inapplicable." 63 F.3d 262, 278 (3d Cir. 1995). *See also, Surlis v. Mayer*, 48 Va. App. 146, 164, (2006) ("use of those words [but not limited to] manifests a legislative intent that the statute not be given an '*expressio unius*' construction" (quoting *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 528 (1979); *United States v. Migi*, 329 F.3d 1085, 1088-89 (9th Cir. 2003) ("we need not apply *ejusdem generis* because Congress modified its list of examples with the phrase 'including, but not limited to'").

¹⁷ As indicated above, Defendants' assertion that the ALPR data do not include the issuing state is simply false. FCPD's ALPR product brochure expressly assures the user that it will "identify the state that issued the plate." FCPD Memo, Ex. 3, at 2. In most, though not all, of the examples of ALPR image data produced by FCPD, the state of issuance, along with the month of expiration, is visible and legible. *See also, Ex. 2*, DEFDOCPROD-001306-001308 (selected pages from FCPD chart showing states of issuance entered into database on nearly every captured vehicle.); *Ex. 3*, DEFDOCPROD-001109, 001157, 001184, 001185, 001191, 001195, 001196, 001202, 001244, and 001252 (selection of FCPD ALPR captured images).

ADDCAR. *See* FCPD FOIA Response, Complaint, Ex. B.¹⁸ They also show a plethora of details about Neal’s surroundings, including the roadway, road markings, medians, vegetation, street signs, traffic and weather conditions, as well as other vehicles and even nearby homes and buildings. *Id.* The associated GPS-calibrated map shows the precise latitude and longitude at which Neal was then present and operating his car. *Id.* Furthermore, although the contents are not clearly legible in the two ADDCAR examples, it is apparent from the data captured in both the April and the May ADDCAR records that the rear bumper of Neal’s silver 2011 Hyundai Accent 4-door sedan contains three bumper stickers. As the Court may judicially notice, such bumper stickers, which are ubiquitous on the roads of our county, frequently express religious, political, educational, geographical, vocational, environmental, ethnic, financial, and/or cultural messages, expressions that are highly personal and unique to the individual driver.¹⁹

Although Defendants are correct that the ALPR record did not *in and of itself* identify Neal *by name*, that is hardly material, much less dispositive. Most of the types of records specifically included in the Act’s definition of “personal information” – *i.e.*, “social security

¹⁸ Neal only recently received, courtesy of opposing counsel, copies of the actual LPR digital image files that captured a “snapshot” (both literally and figuratively) of his travels along Route 236 just west of I-395. Unlike the poor quality black-and-white photocopies that Neal possessed at the time the Complaint was filed, these digital images, attached as Ex. 4, in native PDF format, are much more legible.

¹⁹ As it so happens, the items decorating ADDCAR’s license plate and rear bumper (then and now) identify Neal’s own personal interests including identification as a “Wildlife Conservationist;” a quotation from James Madison warning that excessive militarization can lead to tyranny; advocacy for bitcoin, an example of purely digital currency; and support for Citizens for Independent Voting, a group that urges voters to consider candidates unaffiliated with the two major American political parties. *See* Ex. 5. *See also* Ex. 3 FCPD ALPR DEFDOCPROD-001109, DEFDOCPROD-001157, DEFDOCPROD-001184, DEFDOCPROD-001185, DEFDOCPROD-001191, DEFDOCPROD-001195, DEFDOCPROD-001196, DEFDOCPROD-001202, DEFDOCPROD-001244, and DEFDOCPROD-001252, of vehicles owned and driven by *other* Fairfax County residents and visitors help demonstrate (and judicial notice may be taken) that the range of information that may be routinely captured and then stored for a year or more in FCPD’s ALPR archives includes not only these kinds of messages, but commercial signs, advertisements, phone numbers, company names, and the like. *See also* Ex. 6, (FCPD’s own eLearning License Plate Reader System cover page print out, attached on a USB drive, and available via Dropbox for download as an .exe file at:

<https://www.dropbox.com/s/rc8h5pn1e50lmxq/%26FCPD%20eLearning%20LPR%20System%20110606.exe?dl=0>.
)

number, driver's license number, *agency-issued identification number*, student identification number, real or *personal property holdings* derived from tax returns – may exist in records that do not expressly include the data subject's name. Moreover, the details about Neal's preferences, property, habits, traits, and activities that may be gleaned from the information about his vehicle and travels kept for at least a year by Defendants, plainly fit within the categories of "*personal characteristics of an individual*, such as finger and voice prints, *photographs*, or *things done by or to such individual*." Defendants do not even bother trying to explain why driving a car registered in his name on Route 236 is not among the "things done by . . . such individual," nor a "record of his presence . . . in an . . . activity." Va. Code § 2.2-3801.

That LTA Data includes all of the details revealed by a visual inspection of the photographic images, complete with GPS data-stamps showing not only the precise time and date, location, and direction of travel, but also the make, model, physical condition, and color of Neal's vehicle, as well as at least some information about surrounding roads, vehicles, vegetation, buildings, and, it seems quite likely given the wide perspective of the photographic images of the automobile, even the number, if not the full features of the occupant(s).²⁰

In short, although Defendants protest that their ALPR program "does not house any of the types of information listed within the Attorney General's examples of personal information" (*i.e.*, locating a data subject, documenting his movements or determining his personal property holdings), those conclusory assertions are belied by their own evidence. Indeed, the types of

²⁰ A September 2010 evaluation entitled License Plate Recognition Technology (LPR): Impact Evaluation and Community Assessment conducted by Cynthia Lum of George Mason University (and with the full cooperation of FCPD) contains a multi-page evaluation of the privacy concerns associated with FCPD's ALPR program. See Ex. 7, at DEFDOCPROD-000763 *et seq.* (recognizing and cautioning against the dangers to personal privacy from the passive use of ALPR data for Data Collection and storage for proactive use and for predictive analysis (only pages relevant to privacy issues reproduced in exhibit.)

information listed in the AG’s Opinion are *precisely* the sole intended and useful purpose, albeit an entirely speculative and unproven purpose, of FCPD’s long-term storage of Neal’s LTA Data. As Judge Carroll trenchantly observed, “[o]therwise, what would be the point of holding that information?” Neal’s MSJ Memo, Ex. 10, at 32.

3. FCPD’s Information System Consists of More Than Just the ALPR Database.

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.

Defendants simply proclaim, without any accompanying analysis or authority, “The record-keeping process at issue here is the FCPD ALPR database.” FCPD Memo at 9.

Defendants would have this Court disregard all of the information unique to Neal and his automobile that are readily discernable upon inspection of Neal’s LTA Data, simply because of their pretense that the part of their overall ALPR system that they characterize as “the ALPR database,” does not contain within it, nor is it directly indexed by, Neal’s name.

Simultaneously, Defendants allege both that ALPR data contains no driver or owner-specific information and that the data is an “invaluable source of intelligence that has enabled FCPD officers to solve crime and apprehend criminals.” FCPD Memo at 11-12. Both cannot be true.²¹

²¹ For example, Defendants point to an alleged instance in which ALPR information about the color of a carjacked vehicle proved to be “crucial information” that allowed FCPD officers to “narrow the scope of suspect vehicles during their perimeter search” and apprehend a dangerous federal escapee. FCPD Memo at 11. Without any analysis, but in implicit recognition that this example disproves their insistence that ALPR data shows only “a license plate” and does not otherwise provide any personally identifying information, Defendants simply posit this

Defendants skirt the AG's and Judge Carroll's conclusions by ignoring that the ALPR database is only one part of an aggregation of data that includes ready access to automobile information available through the Internet, the Division of Motor Vehicles, as well as familiar state and federal law enforcement databases such as VCIN and NCIC.²² As the AG and Judge Carroll both recognized, the ALPR "database" does not exist in isolation. If a piece of ALPR data has to be viewed as a silo, having no connection with information in another readily available database, network, Internet, or law enforcement resource, then practically nothing would meet the test of "personal information." A social security number, a bank account number, a date of birth, an agency-assigned number, a driver's license number, and many other examples of "personal information" would all fail to meet FCPD's of personal information: all by itself, it must reveal specific characteristics about a specific, identified person, even under circumstances where that bit of data (e.g. a social security number or driver's license number) is readily capable

ipse dixit in a footnote: "Obviously, the color of a vehicle does not constitute personal information, and the fact that some ALPR license plate images include portions of the exterior of a vehicle does not change the analysis herein," FCPD Memo at 11, fn. 15. For all the reasons discussed in the text and in Neal's MSJ Memo, Neal begs to differ.²² Among the numerous sources of proof for the fact that the Defendants' ALPR system not only can be, but is expressly designed to be used in conjunction with such other databases is FCPD's own Memo Ex. 5, the FCPD's "Car System User Training guide from the MPH-900's manufacturer, ELSAG. See Ex. 8, DEFDOCPROD-000335 and 000337, under the headline, "Keys To Success Using LPR," this guide lists the following "multiple source data" that "can be combined":

Data – Targeted State Data is key; the system can handle up to 4M lines of data, multiple source data can be combined

- NCIC national stolen vehicle and plate data is published daily by the FBI / Virginia State Police
- Terror watch list data
- Outstanding local warrant data including sexual predators
- Motor Vehicle data to include suspended plates and drivers
- Scofflaw data such as parking violations

See also generally Ex. 9, at DEFDOCPROD-003074-003103 (some pages omitted), Ex. 10, at DEFDOCPROD-000357 (referencing "alarm[s]" for "wanted or missing person...stolen plate...suspended or revoked driver...scofflaw or other"); Ex. 11, at DEFDOCPROD-003084 (claiming "Investigative Benefits" including "Witness Identification – Pattern Recognition – Places Suspects at Scene," and "System can store months of data – and all data can be warehoused on another computer and searched at a later date."); Ex. 12, at DEFDOCPROD-003494 (a cover page from the Maryland Coordination and Analysis Center, one of the agencies with which Defendants say they work closely on ALPR Data and practices making clear the almost unlimited use of other law enforcement databases, in coordination with ALPR technology.)

of immediate cross-reference with a wealth of intimate personal details held in another silo. Defendants' elaborate effort to silo the ALPR piece of their networks and information systems from the rest of its operations, including the information readily available through the Internet, through their networks, and through their ready access to other databases, such as those available to them through the DMV, VCIC, and NCIC, should be soundly rejected.

As FCPD has admitted when arguing for the "invaluable" benefits of its ALPR program "to solve crime and apprehend criminals," FCPD Memo at 11, FCPD's "total" record-keeping process includes other data sources, such as the State Police "hotlists," DMV data, and local, regional, and national law enforcement resources. FCPD regularly utilizes those other sources in tandem with its ALPR technology. *See id.* at 10-12. The ALPR program, in all of its "total components and operations of a record-keeping process," is indistinguishable from the State Police program considered by the AG Opinion. It is an overall "information system" because, in a very real and practical sense, the program's "record-keeping process," viewed in "total," and connected "automatically or manually" via "computer networks and the Internet," is specifically designed and operated to make full use of readily available data that includes "identifying particulars" and other personal information specific to the data subject, in this case, Neal. See § 2.2-3801. Those "identifying particulars" include the unique tag number assigned by the Commonwealth to plaintiff and his motor vehicle, as well as the location, time of travel, direction of travel, appearance, surroundings and condition of plaintiff and his automobile at the moment each of the images was captured. Thus, Neal's LTA Data is "personal information," Neal is a "data subject," and their multiple sources of law enforcement data are an "information system" under the Act.

4. FCPD's Storage of Neal's LTA Information Does Not Fall Under an Exemption for Criminal Investigations Under the Act.

Defendants also argue that the AG Opinion failed to consider “the exemption contained within the Act,” *i.e.*, Va. Code § 2.2-3802(7), “‘for investigations and intelligence gathering relating to criminal activity,’ and which is the exemption relied upon by the FCPD in this case.” FCPD Memo at 14; *id.*, at 15. According to Defendants, the AG only looked at the separate statute applicable to the Fusion Center database, maintained by the State Police, that is exempted as “criminal intelligence information” under Va. Code § 52-48. FCPD Memo at 14. Defendants characterize that statute as imposing a “more restrictive [standard] than the exemption provided in the Act.” FCPD Memo at 14. Because the FCPD program, unlike the State Police practice, has been shown by Defendants’ purported “evidence” to “conclusively establish” the benefits of FCPD’s passive ALPR use in *criminal investigations*,²³ Defendants argue, this raises the question, not considered by the AG Opinion, of the exemption of passive ALPR when “deal[ing] with investigations and intelligence gathering relating to criminal activity” under § 2.2-3802(7). FCPD Memo at 15. “As such, according to the Attorney General’s analysis, the FCPD database is not governed by the Act.” *Id.*²⁴

²³ Defendants fail to acknowledge that the AG accepted as true virtually the same assertion of criminal investigative purpose and benefit that their “undisputed evidence” allegedly shows: *i.e.*, that passive use of the ALPR process “can, and has been an invaluable tool in developing leads in terrorism investigations *and criminal cases*,” FCPD Memo, Ex. 13, at 2 (emphasis added), and that the AG explicitly considered and rejected the thesis that the passive ALPR process met the “criminal investigations” exemption under § 2.2-3802(7).

²⁴ To support this distinction, Defendants assert the “undisputed fact” that their ALPR system is used as a tool for police “to identify vehicles that are of specific interest in law enforcement investigations,” FCPD Memo at 2, and asserts on that basis that its long-term retention of Neal’s LTA Data comes within the exemption for information related to criminal investigations under Va. Code § 22-3802(7). *Id.* at 10-12. FCPD provides a few “examples” of such ongoing investigations “from the time period wherein the ADDCAR license plate photograph was retained by FCPD.” *Id.*, at 11. Defendants assert, on the basis of these alleged instances that its passive use of ALPR technology *in general* “has been an invaluable source of intelligence that has enabled FCPD officers to solve crime and apprehend criminals.” *Id.* Yet, tellingly, nowhere in its papers, nor even in its discovery responses, does FCPD explain what relevance -- not to mention “specific interest” -- Neal’s LTA Data may have, even remotely, with respect to any active “law enforcement investigation.” The plain fact is that Neal’s LTA Data has no connection with any such investigations.

This is simply untrue:

On these facts I conclude that the need for such data has not been "clearly established in advance," so as to conform to the applicable principle of information practice. *Its future value to any investigation of criminal activity is wholly speculative.* Therefore, *with no exemption applicable to it, the collection of LPR data in the passive manner* does not comport with the Data Act's strictures and prohibitions, and *may not lawfully be done.*

FCPD Memo, Ex. 13, at 4. In its "Conclusion," the AG Opinion underscores the generality of its determinations by again referencing, not the State Police program alone, but ALPR systems operated by "*law enforcement agencies*" in general. *Id.* at 5 (emphasis added). Thus, "it is my opinion that the Data Act does not preclude *law enforcement agencies* from maintaining, using and disseminating personal information collected by *an LPR*, provided such data *specifically pertains* to investigations and intelligence gathering relating *to criminal activity.*" *Id.* (emphasis added). "Finally," the Opinion states,

it is my opinion that because the need for such data has not been 'clearly established in advance,' *LPR data* collected in the continuous, passive manner, that is not properly classified as 'criminal intelligence information' and not otherwise *relating directly to law enforcement investigations* and intelligence gathering *respecting criminal activity*, is subject to the Data Act's strictures and prohibitions, and it *may not lawfully be collected* through use of *LPR technology.*

Id. (emphasis added).

The AG Opinion demonstrates that it left open the possible lawful retention of a particular ALPR record, but only when that particular record, unlike Neal's LTA Data,²⁵ can be shown to "*relat[e] directly* to law enforcement investigations and intelligence gathering respecting criminal activity." FCPD Memo, Ex. 13, at 5 (emphasis added). This type of direct or

²⁵ Defendants' attempt to justify its retention of Neal's specific LTA data by pointing to the occasional benefits of the passive use of LTA data pertaining to others is somewhat ironic, since Defendants persistently refused to provide discovery regarding such third-party LTA data because, it maintained, "the intended purpose of this litigation involves the Plaintiff only and not 'similar information pertaining to other citizens.'" *See, e.g.,* FCPD's Response to Plaintiff's First Set of Requests for Admission, Objections to RFA Nos. 4, 5, and 8.

active use is undisputedly appropriate. A particular record that can be clearly shown to be pertinent to a specific criminal investigation, not the record pertaining to a person or his vehicle with no demonstrated connection to such an inquiry would, as the AG opined, come within the exemption and could lawfully be retained for use consistent with that particularized need. However, if no such direct connection can be “clearly established in advance,” then as the AG rightly concluded, “[i]ts future value to any investigation of criminal activity is wholly speculative,” it does not “*specifically pertain* [] to investigations and intelligence gathering relating to criminal activity,” it “is subject to the Data Act's strictures and prohibitions,” and “it may not lawfully be collected through use of LPR technology.” *Id.* (emphasis added).

The Defendants’ justification for the wholesale passive collection, use, maintenance, dissemination of ALPR data is illogical and does not qualify under the “criminal investigation and intelligence” exemption of the Data Act.²⁶ Defendants’ interpretation of the “criminal investigation and intelligence” exemption would encapsulate any and all individuals’ personal information on the unreasonable belief that at some undefined time, for an unspecified reason that that person may be linked to a criminal investigation. To understand the criminal investigation exemption in this indiscriminate and generalized manner renders the definition of “exemption” meaningless and circumvents the legislative purpose and privacy protections afforded to individuals under the Data Act.²⁷

According to the Department of Homeland Security’s operating principles for agencies receiving funding to operate criminal intelligence systems, including the Defendants²⁸, a project

²⁶ Va. Code Ann. § 2.2-3802(7).

²⁷ Exemption is defined as a freedom from a duty, liability, or some other requirement; an exception. Black’s Law Dictionary, (10th Edition, 2014).

²⁸ FCPD Memo Ex. 1; Response 6; FCPD Memo Ex. 3.

“may collect and maintain criminal intelligence information concerning an individual *only* if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity.”²⁹ Further, “reasonable suspicion or criminal predicate is established when information exists which establishes sufficient facts to give a trained law enforcement or criminal investigative agency officer, investigator, or employee a basis to believe that there is a reasonable possibility that an individual or organization is involved in a definable criminal activity or enterprise.”³⁰ Stated otherwise, the collection and use of personal information by law enforcement agencies must not be done indiscriminately or in a generalized manner.

The Data Act, in conjunction with DHS guidelines and the AG’s advisory opinion, cannot be interpreted to permit Defendants the freedom to indiscriminately and passively collect, use, store, maintain, and disseminate personal information of individuals not reasonably believed to be connected to particular criminal conduct or activity. The exemption exists to allow for specific information relevant to particularized circumstances that is connected to criminal conduct or activity to be collected.

The Defendants have not demonstrated a reasonable suspicion that Neal was involved in criminal conduct and that his license plate data was relevant to that conduct, justifying the passive collection, use, maintenance, and dissemination of his personal information. Further, it is illogical to understand the “criminal investigation and intelligence” exemption to give Defendants or any law enforcement agency the unfettered authority to allow the wholesale passive collection, use, storage, maintenance and dissemination of personal information of

²⁹ 28 CFR Part 23, Executive Order 12291

³⁰ *Id.*

individuals not connected to any criminal conduct on mere possibility that it may be useful at a later time. To do so would allow law enforcement agencies to be completely unrestrained from the requirements of the Data Act and allow personal information to be misused, inapposite to the purpose of the law.

CONCLUSION

For all of the reasons stated in connection with Neal's own MSJ, it is clear that Neal's LTA Data constitutes "personal information" contained within an "information system, with respect to a "data subject," and as such, is subject to all of the requirements of the Data Act. Because it is also beyond dispute, on the basis of Defendants' own discovery responses and pleadings, that Neal's LTA Data (*i.e.*, the record of his and his automobile's recorded presence on April 26 and May 11, 2014) does not "specifically pertain" or "relate[] directly" to any particular criminal investigation or criminal activity, it follows that there is no factual or legal basis upon which Defendants may base any exemption under § 2.2-3802(7) or otherwise. In line with the AG Opinion and Judge Carroll's Demurrer decision, Neal requests this Court deny Defendants' MSJ and conclude that Neal is entitled, as a matter of law, to summary judgment on his cross-motion.

Respectfully Submitted,

HARRISON NEAL
Plaintiff
By Counsel

By: Christina M. Brown
Edward S. Rosenthal (VSB # 15780)
Christina M. Brown (VSB # 81350)

RICH ROSENTHAL BRINCEFIELD MANITTA DZUBIN & KROEGER, LLP
201 North Union Street, Suite 230
Alexandria, Virginia 22314
Telephone: (703) 299-3440
Facsimile: (703) 299-3441
Email: ESRosenthal@RRBMDK.com
Email: CMBrown@RRBMDK.com

Hope R. Amezquita (VSB No. 74629)
American Civil Liberties Union Foundation of Virginia, Inc.
701 E. Franklin St., Suite 1412
Richmond, VA 23219
Telephone: (804) 644-8080
Facsimile: (804) 649-2733
Email: hamezquita@acluva.org

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2016, I served a true and correct copy of the foregoing Memorandum by electronic mail and by first class mail, postage prepaid, to the following:

Kimberly P. Baucom
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
Email: kimberly.baucom@fairfaxcounty.gov


Christina M. Brown

APPENDIX A

RULES OF SUPREME COURT OF VIRGINIA
PART THREE
PRACTICE AND PROCEDURE IN CIVIL ACTIONS

Rule 3:20. Summary Judgment.

Any party may make a motion for summary judgment at any time after the parties are at issue, except in an action for divorce or for annulment of marriage. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in that party's favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used, or unless the motion is brought in accordance with the provisions of subsection B of § 8.01-420.

Amended by Order dated June 21, 2013; effective July 1, 2013.

APPENDIX B

RULES OF SUPREME COURT OF VIRGINIA
PART TWO
VIRGINIA RULES OF EVIDENCE

ARTICLE VIII. HEARSAY

Rule 2:803 Hearsay Exceptions Applicable Regardless of Availability of the Declarant (Rule 2:803(10)(a) derived from Code § [8.01-390](#)(C); Rule 2:803(10)(b) derived from Code § [19.2-188.3](#); Rule 2:803(17) derived from Code § [8.2-724](#); and Rule 2:803(23) is derived from Code § [19.2-268.2](#))

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(0) *Admission by party-opponent.* A statement offered against a party that is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(1) *Present sense impression.* A spontaneous statement describing or explaining an event or condition made contemporaneously with, or while, the declarant was perceiving the event or condition.

(2) *Excited utterance.* A spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) *Statements for purposes of medical treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* Except as provided by statute, a memorandum or record concerning a matter about which a witness once had firsthand knowledge made or adopted by the witness at or near the time of the event and while the witness had a clear and accurate memory of it, if the witness lacks a present recollection of the event, and the witness vouches for the accuracy of the written memorandum. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of acts, events, calculations, or conditions if:

(A) the record was made at or near the time of the acts, events, calculations, or conditions by--or from information transmitted by-- someone with knowledge;

(B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making and keeping the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Reserved.*

(8) *Public records and reports.* In addition to categories of government records made admissible by statute, records, reports, statements, or data compilations, in any form, prepared by public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed within the scope of the office or agency's duties, as to which the source of the recorded information could testify if called as a witness; generally excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel when offered against a criminal defendant.

(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report was made to a public office pursuant to requirements of law.

(10) *Absence of entries in public records and reports.*

(a) *Civil Cases.* An affidavit signed by an officer, or the deputy thereof, deemed to have custody of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, stating that after a diligent search, no record or entry of such record is found to exist among the records in such office is admissible as evidence that the office has no such record or entry.

(b) *Criminal Cases.* In any criminal hearing or trial, an affidavit signed by a government official who is competent to testify, deemed to have custody of an official record, or signed by such official's designee, stating that after a diligent search, no record or entry of such record is found to exist among the records in such official's custody, is admissible as evidence that the office has no such record or entry, provided that if the hearing or trial is a proceeding other than a preliminary hearing the procedures set forth in subsection G of § [18.2-472.1](#) for admission of an affidavit have been satisfied, mutatis mutandis, and the accused has not objected to the admission of the affidavit pursuant to the procedures set forth in subsection H of § [18.2-472.1](#), mutatis mutandis. Nothing in this subsection (b) shall be construed to affect the admissibility of affidavits in civil cases under subsection (a) of this Rule.

(11) *Records of religious organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a

religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution, and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements generally acted upon as true by persons having an interest in the matter, and contained in a document in existence 30 years or more, the authenticity of which is established.

(17) *Market quotations.* Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown.

(18) *Learned treatises.* See Rule 2:706.

(19) *Reputation concerning boundaries.* Reputation in a community, arising before the controversy, as to boundaries of lands in the community, where the reputation refers to monuments or other delineations on the ground and some evidence of title exists.

(20) *Reputation as to a character trait.* Reputation of a person's character trait among his or her associates or in the community.

(21) *Judgment as to personal, family, or general history, or boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(22) *Statement of identification by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person.

(23) *Recent complaint of sexual assault.* In any prosecution for criminal sexual assault under Article 7 (§ [18.2-61](#) *et seq.*) of Chapter 4 of Title 18.2, a violation of §§ [18.2-361](#), [18.2-366](#), [18.2-370](#) or § [18.2-370.1](#), the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.

(24) *Price of goods.* In shoplifting cases, price tags regularly affixed to items of personalty offered for sale, or testimony concerning the amounts shown on such tags.

Adopted and promulgated by Order dated June 1, 2012.

Last modified by Order dated November 12, 2014, effective July 1, 2015.

From: Baucom, Kimberly [mailto:Kimberly.PaceBaucom@fairfaxcounty.gov]
Sent: Tuesday, July 26, 2016 1:03 PM
To: Hope Amezquita <hamezquita@acluva.org>
Cc: Edward S. Rosenthal <ESRosenthal@rrbmdk.com>; Leslie Mehta <lmehta@acluva.org>; Christina M. Brown <cmbrown@rrbmdk.com>
Subject: RE: Just a quick notice

Yes, my concern was one of authenticity more than anything else. Obviously, if there ends up being an issue as to whether the material facts asserted in either party's summary judgment briefs are disputed, that will just push the case into a trial and prevent the court from deciding it on summary judgment grounds.

Kimberly P. Baucom
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
Phone: (703) 324-2421
Fax: (703) 324-2665

THIS COMMUNICATION CONTAINS CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND IS NOT TO BE RELEASED TO THE PUBLIC. THIS COMMUNICATION IS EXEMPT FROM THE DISCLOSURE PROVISIONS OF THE VIRGINIA FREEDOM OF INFORMATION ACT. VA. CODE ANN. SECTION 2.2-3705.1(2) (2016).

From: Hope Amezquita [mailto:hamezquita@acluva.org]
Sent: Sunday, July 24, 2016 12:10 PM
To: Baucom, Kimberly <Kimberly.PaceBaucom@fairfaxcounty.gov>
Cc: Edward S. Rosenthal <ESRosenthal@rrbmdk.com>; Leslie Mehta <lmehta@acluva.org>; Christina M. Brown <cmbrown@rrbmdk.com>
Subject: Re: Just a quick notice

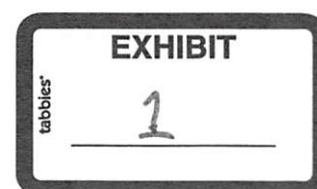
Kim:

Just to be clear, this agreement is limited to matters of authenticity. It does not mean that the opposing party admits the truth of any assertions contained in such documents that are not themselves an admission by such opposing party.

Please let us know if you have any questions.

Thanks,
Hope

From: Baucom, Kimberly <Kimberly.PaceBaucom@fairfaxcounty.gov>
Sent: Sunday, July 24, 2016 8:22 AM
To: Hope Amezquita



Cc: Edward S. Rosenthal; Leslie Mehta; Christina M. Brown
Subject: RE: Just a quick notice

And also, just to reduce our Friday conversation and agreement to writing as it related to the use of documents that were produced by the parties in discovery, we are in agreement that we will use those documents with no issue of admissibility in summary judgment or authenticity. As I said during our conversation, I was happy to propound a request for admissions related to the documents to support their use in summary judgment pursuant to Rule 3:20, but you agreed that I did not need to do that. I intend to indicate this agreement in my summary judgment brief so that the court will not be concerned about the use of the documents.

Thanks,

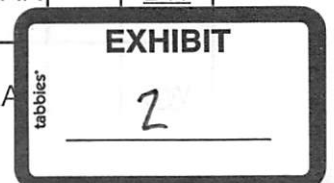
Kimberly P. Baacom

Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
Phone: (703) 324-2421
Fax: (703) 324-2665

THIS COMMUNICATION CONTAINS CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND IS NOT TO BE RELEASED TO THE PUBLIC. THIS COMMUNICATION IS EXEMPT FROM THE DISCLOSURE PROVISIONS OF THE VIRGINIA FREEDOM OF INFORMATION ACT. VA. CODE ANN. SECTION 2.2-3705.1(2) (2016).

Car: 1
 Start Date: 13-10-2010 07:30
 End Date: 13-10-2010 08:45
 Plate:
 State: ? - ALL STATES
 Query for: Reads
 Found matches: 297

Date/Time	Plate	State	Reader	Lat	Long	Alarm Flag	Note	Image
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2010-10-13 08:17:07	JVU5323	VA	LEFT	38.846123	- 77.308478	REGULAR		BW
2010-10-13 08:17:01	Y1711[A1]	?	LEFT	38.846007	- 77.308258	REGULAR		BW
2010-10-13 08:17:00	KNC7046	VA	LEFT	38.846007	- 77.308258	REGULAR		BW
2010-10-13 08:17:00	XWZ6812	VA	RIGHT	38.846007	- 77.308258	REGULAR		BW
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2010-10-13 08:16:53	YKU4057	VA	RIGHT	38.845897	- 77.308470	REGULAR		BW
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08:16:49					77.308770		
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2010-10-13 08:16:36	KMK6697	VA	LEFT	38.845935	- 77.309283	REGULAR	<u>BW</u>
2010-10-13 08:16:35	XVT7561	VA	LEFT	38.845935	- 77.309283	REGULAR	<u>BW</u>
2010-10-13 08:16:35	YS9468	VA	LEFT	38.845935	- 77.309283	REGULAR	<u>BW</u>
2010-10-13 08:16:34	8918	?	LEFT	38.845842	- 77.309317	REGULAR	<u>BW</u>
2010-10-13 08:16:34	YGB9716	VA	LEFT	38.845842	- 77.309317	REGULAR	<u>BW</u>

2010-10-13 08:16:34	XLJ2784	VA	LEFT	38.845842	- 77.309317	REGULAR	<u>BW</u>
2010-10-13 08:16:33	KBR7726	VA	RIGHT	38.845842	- 77.309317	REGULAR	<u>BW</u>
2010-10-13 08:16:15	46942L	?	RIGHT	38.845147	- 77.308385	REGULAR	<u>BW</u>
2010-10-13 08:16:12	CC5510	DC	RIGHT	38.844795	- 77.308358	REGULAR	<u>BW</u>
2010-10-13 08:16:12	[1W]K1[1D0][Q00]	?	RIGHT	38.844795	- 77.308358	REGULAR	<u>BW</u>
2010-10-13 08:16:11	5363CD	VA	LEFT	38.844795	- 77.308358	REGULAR	<u>BW</u>
2010-10-13 08:15:36	5363CD	VA	LEFT	38.841823	- 77.309342	REGULAR	<u>BW</u>
2010-10-13 08:15:32	XSZ6171	VA	LEFT	38.841330	- 77.309677	REGULAR	<u>BW</u>
2010-10-13 08:15:15	02692	MD	LEFT	38.839772	- 77.310773	REGULAR	<u>BW</u>
2010-10-13 08:15:15	KAL2692	VA	LEFT	38.839772	- 77.310773	REGULAR	<u>BW</u>
2010-10-13 08:15:02	UG[HM]N[T1Y][5S]	?	LEFT	38.838655	- 77.311585	REGULAR	<u>BW</u>
2010-10-13 08:14:56	9094CY	VA	LEFT	38.838210	- 77.311922	REGULAR	<u>BW</u>
2010-10-13 08:14:55	XSZ6171	VA	LEFT	38.838210	- 77.311922	REGULAR	<u>BW</u>
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2010-10-13 08:14:54	5363CD	VA	LEFT	38.837842	- 77.312067	REGULAR	<u>BW</u>
2010-10-13 08:14:54	CHA488	MD	RIGHT	38.837842	- 77.312067	REGULAR	<u>BW</u>
2010-10-13 08:14:33	XPZ4142	VA	LEFT	38.834872	- 77.311883	REGULAR	<u>BW</u>
2010-10-13	KCV4846	VA	LEFT	38.834567	-	REGULAR	<u>BW</u>



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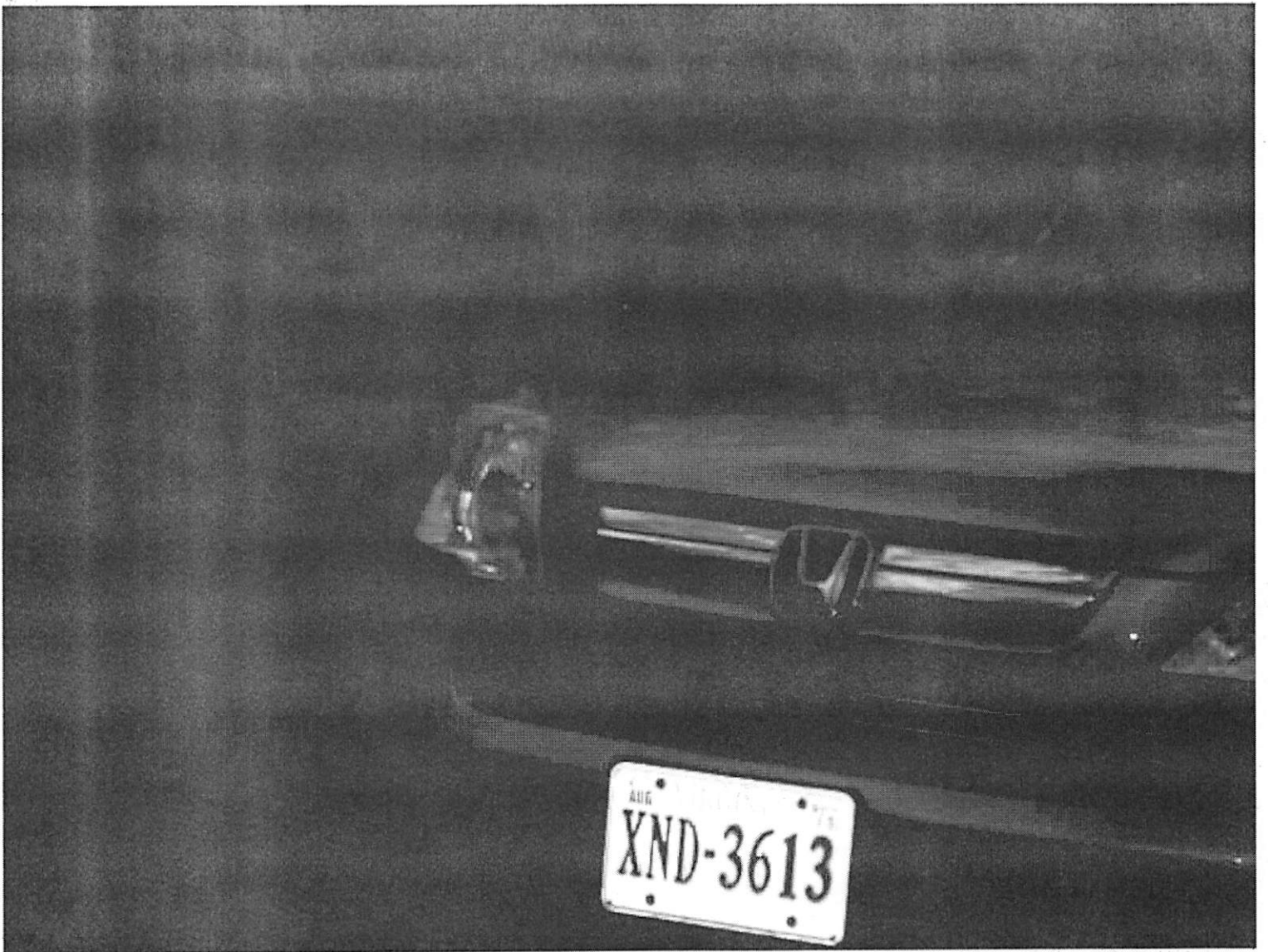










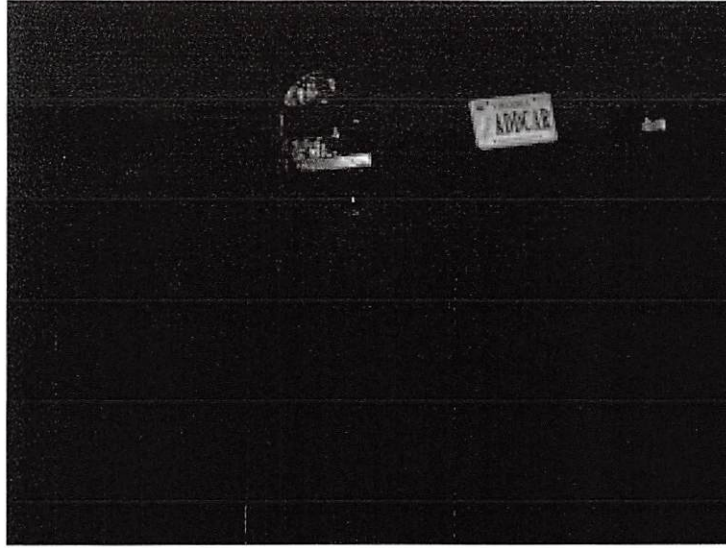




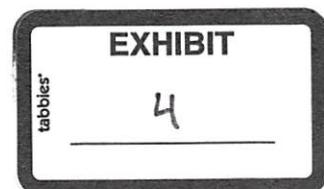


User : Crime Analyst

Date : 2014/05/15 11:35:51



Gate	Mason 4866			
Lane	0			
Transit Date and Time	26/04/2014 19:57:46	Vehicle type	Transit status	Normal Transit
License Plate	ADDCAR			
State	?			



User : Crime Analyst

Date : 2014/05/15 11:16:00



Gate		Mason 4866			
Lane		1			
Transit Date and Time	11/05/2014 16:37:25	Vehicle type		Transit status	Normal Transit
License Plate		ADDCAR			
State		?			



The means of defense against foreign
danger historically have become the
instruments of tyranny at home.
- James Madison



DON'T VOTE THE PARTY
THINK INDEPENDENTLY
VOTE THE ISSUES
CITIZENS FOR INDEPENDENT VOTING



EXHIBIT
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Introduction to the ELSAG MPH-900 Mobile License Plate Reader



Fairfax County Police Department eLearning
License Plate Reader System



MPH-900

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Slide Title

ELSAG MPH-900

- o LPR Intro Video
- o Learning Outcomes
- o Introduction
- o LPR Departmental Pu...
- o Durability Video
- o LPR Cruiser Diagram
- o LPR Camera Ranges
- o LPR Capabilities
- o LPR Camera Configur.
- o Camera Types
- o Ethernet Cable Conne.
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- o Battery Drain
- o LPR Processor
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- Camera / GPS Quiz Q...
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- LPR Operations Intro
- LPR Car System Icon
- LPR System Icon
- Hot List Update Window
- LPR System Indicator...
- Camera Direction Bar
- Hot List Alarm Examp...
- Alarm Video Example
- Infrared Toggle
- LPR Plate Capture Vid...
- Sample Alarm Sound
- Plate Read Data Displ...
- Plate Magnification
- Matching LPR Data
- Rejecting an Alarm
- Accepting Alarm
- Accepted Alarm Data
- Verifying an Alarm
- Image Adjustment
- Camera Diagnostics

LPR Mobile Plate Hunter 900

Vehicle ID: 1 Pending Alerts 0

Alerts Hazard

Management Live

Hot list last update 2006-09-05 14:23

Operations

Reader

Optional camera

TYK-2001

10 33

TYK2001 ? 22:29:58

Alarm Last events

Left camera	Optional camera	Right camera
10		33
RC[B9]22[98] ? 22:27:34		TYK2001 ? 22:29:58
VWB2379 ? 22:27:12		JER804[00] ? 22:29:18
V[00]037 ? 22:26:36		VRV6320 ? 22:28:42
VXT7404 ? 22:26:35		PZ7600 ? 22:27:50
		VRV1956 ? 22:27:35

Info Setup Menu

About

LPR GPS

2006-09-05 22:30:07

LICENSE PLATE RECOGNITION TECHNOLOGY (LPR)

IMPACT EVALUATION AND COMMUNITY ASSESSMENT



September
2010

FINAL REPORT

BY CYNTHIA LUM, LINDA MEROLA, JULIE WILLIS, AND BREANNE CAVE

Center for Evidence-Based Crime Policy, *George Mason University*

EXHIBIT

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LICENSE PLATE RECOGNITION TECHNOLOGY (LPR)

IMPACT EVALUATION AND COMMUNITY ASSESSMENT

AUTHORS:

Cynthia Lum, Ph.D. (Principal Investigator)

Linda Merola, J.D., Ph.D. (Co-Principal Investigator)

Julie Willis, M.A. (Research Associate)

Breanne Cave, M.A. (Research Associate)

GEORGE MASON UNIVERSITY CENTER FOR EVIDENCE-BASED CRIME POLICY

DEPARTMENT OF CRIMINOLOGY, LAW AND SOCIETY

4400 University Drive, MS 6D3

Fairfax, VA 22030 USA

<http://gemini.gmu.edu/cebcp>

For

SPACE AND NAVAL WARFARE SYSTEMS CENTER (SPAWAR) ATLANTIC

Dept. of The Navy / Dept. of Defense

Program Manager: Matt Snyder

PO Box 190022

North Charleston, South Carolina 29419-9022

And

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ALEXANDRIA, VIRGINIA, POLICE DEPARTMENT

FAIRFAX COUNTY, VIRGINIA, POLICE DEPARTMENT

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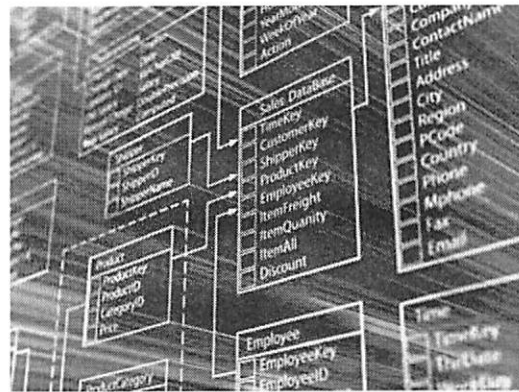
LPR is not limited to checks for open warrants. Rather, the uses of license plate readers that fall into this category can vary widely. For example, data that might be uploaded into LPR systems include the license plates of vehicles owned by registered sex offenders, those delinquent on child support payments, recently released violent offenders, or individuals arrested for selling drugs around schools or public parks. An example of this type of use might be LPR patrol around schools and parks for parked vehicles of registered sex offenders or drug dealers. All of these LPR uses involve the connection of LPR data to other data sources through motor vehicle information but for law enforcement purposes unrelated to motor vehicles or vehicular enforcement.

Similar to the second stage of the continuum, however, this step does not necessitate prolonged data storage of LPR scans (although the criminal data accessed may have been stored for some time). Despite this, novel legitimacy issues may still arise because the police have departed from using LPRs for vehicle-related law enforcement, which may seem its most obvious use. These uses of the technology are conceptually distinct from the previous step on the continuum for this reason. Since LPR is not being used as a technological tool for traffic or vehicular

enforcement at this space on the continuum, people could view these uses as promoting more generalized surveillance. We could hypothesize that these uses may heighten the likelihood that LPR adoption will impact police legitimacy, job approval, and police-community relations. However, this hypothesis remains untested.

Even within this category, different uses may evoke varying responses. For example, members of the community may view sex offenses as

grave enough to warrant the use of LPR to prevent sex offenders from entering school zones. Yet, the community might not tolerate other uses where the perceived benefits are too few or the perceived intrusion into the personal lives of community members seems too great (for example, using LPR to detect parents who don't pay child support). Though some authors writing on this topic have suggested hypotheses about the likelihood that some uses might be accepted over others, the only true way to gain an indication of community sentiment is through rigorous testing of the type conducted in this study.



4) USING LPR UNITS FOR DATA COLLECTION AND STORAGE FOR PROACTIVE USE

This step on the continuum involves the long-term storage of data from LPR readers themselves (most frequently, the location, date, time, and vehicle license plate) and its preservation for investigative purposes. For example, when attempting to view the last known locations of a wanted suspect, information saved from a LPR reader might demonstrate that a suspect's vehicle traveled to a certain location. Alibis of suspects might

also be corroborated or challenged from the information captured by LPR units placed at toll roads or near locations where an individual claimed to be. Such information applies not only to suspects. In a recent case, an Alzheimer's patient was located with the help of a license plate reader, which had detected his vehicle at a particular location. However, some have argued that this type of data retention may also prejudice the investigatory process against an individual, since LPR information may be presumed to be correct even in instances when the data may be misleading. For example, if an LPR unit records the presence of a vehicle at a particular location, this does not mean that the registered owner of the vehicle or even a particular suspect was driving the vehicle at the time. It may also be difficult for an individual to combat an assumption that the data presents an accurate picture of daily activities, since individuals do not normally keep detailed records of their day-to-day routines.

The IACP has identified a need to "establish a set of guidelines, including standard criteria, to assist law enforcement agencies in their development of retention policies for LPR data" (IACP, 2009, p. 3). Currently, however, "there is no formula for determining how long data should be retained" (p. 3), and no court has examined the issue of LPR data retention as of the writing of this report. In addition to the development of data retention policies, the IACP has also called for police agencies using LPR to undertake "regular and systematic audits [to] help ensure that the quality of data contained in a LPR system remains high." (p. 4) These audits are required because saved LPR data may become the basis for investigations.

As mentioned previously, data storage raises even more serious potential for abuse through either hacking or misuse; as a result, rigorous testing of policy in this area of the continuum is critical. Moreover, members of the community may also hold very strong opinions regarding whether or not this information should be considered private and also if data of this type should be collected and maintained by the police. The survey-experiment discussed below provides evidence regarding one community's response to these questions.

5) PREDICTIVE ANALYSIS

While proactive use of stored LPR data might apply to ongoing investigations and searches for individuals or their alibis, LPR data may also be used for more predictive analysis, an extension of this proactive use. Predictive analysis involves the analysis of collected data to determine patterns of behavior and movements in order to anticipate and prevent crime. One example might be the decision to place LPR units at locations around an arena prior to a major event. Unusual vehicular activity or multiple hits of particular vehicles in front of a location may be found by analyzing the saved data. Proactive investigations might then be generated. Similar to #1-#4 above, vehicles might also be scanned for connection to other databases in order to anticipate problems for prevention purposes.

This type of analysis may offer special challenges to the legitimacy and legality of police actions. On the one hand, large amounts of data, combining information from many incidents and individuals, would be examined for overall patterns of behavior. This type of procedure is commonly used in intelligence analysis, where patterns within what may seem like large amounts of mundane data may be found. However, such processes may also result in access to individual data and may turn the scrutiny of law enforcement toward individuals who may not pose any threat. Any type of predictive analysis runs the risk of false positives. Anticipating and reducing the negative impact of false positives is an important crime prevention goal of democratic police agencies. Again, predictive analysis utilizing LPR data may be undertaken in many different contexts, and the reaction of the community may be dependent upon the context of such use. It is useful to gauge how such deployment of LPR units might be received by the community, something we do in our survey-experiment below.

Each of these uses of LPR across the continuum can provide varying benefits and concerns for law enforcement agencies. The point that we emphasize here is that, prior to this study, hypotheses about LPR have too often remained unsupported by evidence. However, the extent to which these concerns matter and the impact that using LPR will have on police legitimacy are important empirical questions in understanding the effectiveness of license plate readers and any other police technology. In addition to secondary uses not contemplated by the community or by department policy, agencies must also consider whether or not they might be compelled to disclose information by courts presiding over civil matters wherein an individual's location is at issue. Community members may also fear that a law enforcement agency may share LPR data with other government or private entities. As Solove (2006) argues, when data is collected and stored, "the potential for secondary use generates fear and uncertainty over how one's information will be used in the future, creating a sense of powerlessness and vulnerability" (p. 522). The survey-experiment discussed below also includes information with respect to opinions about data sharing.

Also, it bears repeating that at all steps on the continuum, it is important for agencies to consider the potential for improper disclosure of saved LPR information, either by authorized users or through hacking. Improper disclosure implicates individuals' privacy and poses potentially very serious obstacles to police legitimacy. Improper disclosure may also result in serious physical harm to members of the community. Security safeguards or audits may help lessen some concerns (IACP, 2009, p. 17), but these have not been rigorously evaluated at this point.

Review of Legal Issues and Their application to the LPR Continuum

As the LPR continuum indicates, various uses can present different legal and legitimacy challenges to the police. However, as noted above, few analyses of the legal issues

related to LPR have been published, and there are no tests of LPR (or any other police technology) on police legitimacy. Additionally, only a small number of courts have adjudicated cases involving LPR use, and those that have done so are state trial courts (*New York v. Davila*, 2010; *Machado v. City of New Haven*, 2006). Though much of the judicial business in a state is handled at the trial court level, these opinions represent first attempts by courts to grapple with situations where police have utilized LPR and cannot be regarded as either exhaustive or as binding precedent. Other courts may view these issues differently, and new questions will arise over time. Additionally, even in instances where state trial courts have authored opinions referencing LPR use, there are limitations to the guidance that can be obtained from those opinions. This is primarily because only a limited number of issues have been raised by litigants at the current time. Practically, this means that it will take some time for the law enforcement community to receive a more definitive answer to the legal questions related to LPR use.



In addition to a lack of definitive guidance from the courts for agencies considering LPR adoption, few scholarly legal analyses of LPR have been published to date. Two notable exceptions are found in the IACP's *Privacy Impact Assessment Report for the Utilization of License Plate Readers* (2009) and in the article published by Hubbard (2008). Both sources provide analyses of the privacy implications of LPR, though with some similar and some disparate results. In addition to a number of differences in issue

coverage, some of the variation results from the fact that these analyses cannot rely upon a single case but must craft a discussion of the implications of LPR from prior court cases and scholarly work related either to other technologies or to privacy more generally.

This section will provide a brief review of some of the existing evidence base with respect to the constitutionality of LPR. At present, this evidence base is necessarily underdeveloped, and this review will require bringing potential legal arguments together from various sources, some specifically related to LPR and some not. The articles and court cases discussed within this section may inform an agency's decision to adopt LPR but cannot predict with complete accuracy how courts will rule once faced with LPR cases. However, one advance that can be accomplished at this time is to categorize and relate the existing legal evidence base to the continuum of LPR uses presented above. In addition to providing a useful foundation for future testing, the continuum of uses should supply a tangible way to think about the legal issues involved in LPR use.

The chief concern about LPR stems from LPR's implications for individual privacy. Though the U.S. Constitution does not explicitly guarantee a "right to privacy," the Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." (U.S. Const. art. IV). This provision of the Fourth Amendment is made applicable to actions of the states through the Due Process Clause of the 14th Amendment. Though the U.S. Supreme Court has not examined the constitutionality of LPR use specifically, some other Fourth Amendment cases can help to provide a foundation for our inquiry. We shall also discuss cases dealing with manual license plate checks to get a sense of what courts might decide with respect to LPR.

Though the U.S. Supreme Court has not specifically adjudicated the issue of license plate privacy in the face of manual checks, numerous courts (including several U.S. Courts of Appeals) have resolved this issue. Time and again, these courts have found manual checks of license plates by police to be constitutionally permissible (*U.S. v. Ellison*, 2006; *U.S. v. Walraven*, 1989; *U.S. v. Matthews*, 1980). These cases have relied upon the standard set forth by the U.S. Supreme Court in *Katz v. U.S.* (1967). The *Katz* test makes clear that no Fourth Amendment violation may occur unless there exists a "constitutionally protected reasonable expectation of privacy" (*Katz v. U.S.*, 1967, p. 360). In order for such an expectation to exist, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'" (*Katz v. U.S.*, 1967, p. 361). In this way, the expectation of privacy must be both "subjective" and "objective" in order to merit protection by the Fourth Amendment.

These requirements are difficult to satisfy with respect to license plates. Driving is not a private activity but rather an activity that one engages in while out in public. While on the road, the vehicle and, most importantly, the license plate, remain in public view (*U.S. v. Diaz-Castaneda*, 2007, pp. 1150–1151; *U.S. v. Ellison*, 2006, pp. 561–562; *Olabisiomotosho v. City of Houston*, 1999, p. 529; *U.S. v. Walraven*, 1989, p. 974). The state has a legitimate interest in motor vehicle and highway safety (*Delaware v. Prouse*, 1979) and, as a result, can properly require that license plates remain unobstructed. It is not surprising, then, that these arguments have resolved the question of an individual's privacy interest in his/her license plates for the courts that have examined the issue of manual checks. At first glance, these arguments might also seem to resolve the constitutional issues related to privacy and the use of LPR.

Moreover, while the U.S. Supreme Court has not examined license plates per se, it has examined whether or not a vehicle's VIN number is to be considered private. In the case of *New York v. Class* (1986, p. 87), the Court was asked to decide whether or not a police officer had conducted an unreasonable search when he reached into a private car and moved some papers so that he could see the car's VIN number. Much like the other courts'

holdings with respect to license plates, the Supreme Court decided that this act of reaching into the car did not violate the Fourth Amendment because the motorist did not possess a legitimate privacy interest in the VIN (*New York v. Class*, 1986, p. 91). Instead, the Court held that a VIN number must remain uncovered because “the VIN is a significant thread in the web of regulation of the automobile” (*New York v. Class*, 1986, p. 88). There is no reason to believe that the Supreme Court would consider the question of privacy with respect to license plate numbers any differently, since license plate numbers must also remain in public view according to law.

Yet, when the issues surrounding LPR use (as opposed to individual, manual license plate checks) are examined, the courts may have some additional concerns. Several authors have made the argument that LPR technology simply automates a process that could be carried out legally by individual officers (IACP, 2009, p. 12; Hubbard, 2008, pp. 6–9). However, this assertion relies on the fact that there is no significant legal distinction between individual officers checking license plates by hand and the use of LPR. In fact, several authors have argued that there is a substantial difference, even with respect to the most common use of LPR, that of detecting stolen vehicles (Hubbard, 2009). Essentially, Hubbard argues that LPR use does not merely make an officer’s job more efficient and less costly but also allows the police to gain new abilities that no human could possess. “As a Los Angeles police officer pointed out concerning the technology’s ability to read license plates at 60 mph and at night, ‘[i]t’s physically impossible for an officer to do this kind of work ... It’s reshaping the way we do policing’” (Hubbard, 2009, p. 34). Hubbard points to a number of U.S. Supreme Court cases (discussed in more detail below) in which the Court has expressed concern about the use of increasingly invasive technologies by police.

Additionally, the argument that LPR simply automates a process that has always been used by police relies upon the fact that there is no difference between manual checks and the *widespread* use of license plate readers at other points on the continuum. In fact, while this “automation” argument might possibly resolve the constitutional issues involved with some uses of LPR, it does not address the act of linking data to other databases or saving data for extended periods of time. This distinction again illustrates why the continuum of LPR uses is important. The continuum represents a clearer framework for agencies considering LPR adoption and also underscores the potential for disparate legal and legitimacy implications connected with different uses. Indeed, a single check of a license plate and the widespread and varied uses of LPR may be viewed differently by future courts adjudicating LPR issues for a variety of reasons.

For example, the second and third steps on the continuum involve connecting a license plate to an individual’s motor vehicle records or connecting the license plate with tertiary data unrelated to motor vehicles through the use of vehicular information. These locations on the continuum may be viewed as distinct from the primary use of LPR at step 1 on the continuum because they involve linking LPR data to specific individuals and their records.

This may greatly increase the chance of harm to individuals in the community and may raise serious legitimacy issues if data is misused (IACP, 2009, pp. 11–12). Though the cases mentioned earlier in this section have repeatedly shown that individuals do not have an expectation of privacy in their license plates, the courts have been more willing to find it reasonable that individuals have an expectation of privacy in certain items of personal data. Since the uses at steps two and three of the continuum involve linking LPR data to personal data, courts examining these uses may be unwilling to allow police (or LPRs) to connect with the information contained in some other databases without any suspicion of wrongdoing by the individual. In fact, in *State v. Donis* (1998, p. 40), the New Jersey Supreme Court held that it was permissible for police officers to run random [Mobile Data Terminal (MDT)] searches on license plates to determine if a vehicle was reported stolen or to verify the status of the registered owner's driver's license. However, the Court also held that it was not permissible for police officers to obtain the registered owner's personal information contained in the New Jersey Department of Motor Vehicles ("DMV") database without "reason to suspect wrongdoing" (*State v. Donis* (1998), p. 40). Following this case, the New Jersey Supreme Court required the redesign of all MDTs used in the state to incorporate a two-step process for the protection of individuals' privacy (*State v. Donis* (1998), p. 40).

The two-step process allowed police to check a license plate in order to apprehend stolen vehicles (the first step) but prevented an officer from viewing personal DMV data without initiating a separate process (the second step) (*State v. Donis* (1998), p. 40). In order to initiate the second step of the process, the officer was required to have a particularized and articulable suspicion of wrongdoing; this suspicion could later be challenged in court through a motion to suppress. Like the MDT searches that concerned the New Jersey Supreme Court, steps two and three on the LPR continuum involve the examination of personal data by the police and might be restricted by future court decisions if some individualized suspicion of wrongdoing is absent.

Moreover, steps four and five on the LPR continuum of uses may raise additional issues. Even if all of the uses discussed above are constitutionally permissible, this acceptance may not extend to the collection and storage of a large quantity of data about citizens (many of whom have committed no crime). It is the momentum toward data storage that makes LPR unique in comparison with previous police activities. Significantly, data storage may also implicate the most significant risks to the community through unauthorized disclosure (IACP, 2009, p. 17). Likewise, the decision to save LPR data may involve some particularly nuanced privacy issues because data storage could eventually make it possible for police to recreate the daily activities of individuals through LPR data. It also becomes even more difficult to extend the "automation" argument (or the idea that LPR merely automates processes already being conducted by police) to these steps on the continuum. Police do not currently store large quantities of data about citizens' activities.

No court has examined the issue of data storage at this time and, therefore, previous case law does not resolve this issue. However, it is reasonable to assume that courts may be concerned about individual privacy in the face of large-scale or long-term data storage. Courts may also be concerned that no checks would exist on the power of police with respect to their use of the saved data. Citizens may fear that data storage would result in large increases in the surveillance powers of law enforcement (Reiman, 1995).

As mentioned above, others have argued that the saving of LPR data can greatly impact entirely innocent individuals, not merely those suspected of crimes (Hubbard, 2008; Reiman, 1995).

“. . . [T]he collection and recordation functions related to the Automatic License Plate Recognition systems act to track innocent people in the event that they may commit, or be involved in, a crime in the future The asserted justification is that if in the future the police are looking for a suspect, or even victim, who owns a specific car, then they could check the database and see where the suspect has been in the last few weeks, or last few moments, to help them begin their search.” (Hubbard, 2008, p. 28).

While this is an important justification for law enforcement, the saving of data may expose innocent members of the community to harm or embarrassment (Reiman, 1995, p. 35). When LPR data is saved, innocent and guilty individuals may be treated the same. In addition, the potential for large scale surveillance and tracking may be viewed as quite distinct from other technologies by the courts.



Though no court has examined whether or under what circumstances the data storage or potential surveillance functions of LPR may violate the privacy of individuals, a few courts (including the U.S. Supreme Court) have discussed the constitutionality of police surveillance carried out through other means, such as tracking devices placed on vehicles by police (*U.S. v. Knotts*, 1983, p. 276; *U.S. v. Moran*, 2005, p. 467). In these instances, the courts were called upon to adjudicate whether or not police placement of tracking devices onto the vehicles of suspects without probable cause violated these individuals' privacy (Hubbard, 2008, pp. 28-31). Despite the fact that the officers did not possess probable cause, the courts have been unwilling to find a violation of privacy when the police could have obtained the same information by following the suspect's movements on public roads (*U.S. v. Knotts*, 1983, p. 276; *U.S. v. Moran*, 2005, p. 467). The use of tracking devices to do the same work did not create privacy violations. These precedents may suggest that the surveillance powers inherent in LPR data storage will not pose a constitutional issue. However, the courts may also view LPR data storage as allowing the

police to accomplish surveillance tasks that were previously unthinkable—not merely as a technological tool for increasing efficiency in the manner of a mobile tracking device (Hubbard, 2008, p. 33).

Indeed, there are also some Supreme Court cases that might lend credence to this view. As indicated above, in several recent decisions, the Court has seemed to express dissatisfaction with the increasingly invasive character of technology (*Kyllo v. U.S.*, 2001; *Dow Chemical Co. v. U.S.*, 1986). This has led some authors to come to the conclusion that these opinions might provide support for a finding that the most advanced technologies violate privacy if they allow police to access information that they normally would not be able to access (Hubbard, 2008, p. 38). According to Hubbard (2008, p. 32, citing *U.S. v. Ellison*, 2006, p. 562), LPR may be considered technology not available to the public and, by virtue of the capacity to (1) connect license plates to other records and (2) to engage in wholesale data collection, a court may see this as information that normally could not be collected “without ‘intrusion into a constitutionally-protected area.’” If LPR allows the police to gain access to the intimate details of individuals’ daily lives, this power may be viewed as a true departure from previous police authority. Indeed, Hubbard (2008, p. 40, citing Donohue, 2006) cites research suggesting that the movements of the average citizen are recorded approximately 300 times a day in London where LPR is routinely in use. Notions such as these may be shocking to the courts reviewing the issues related to LPR, and they may be shocking to the community.

Moreover, Reiman (1995, p. 29) makes the argument that “by accumulating a lot of disparate pieces of public information, you can construct a fairly detailed picture of a person’s private life.” For example, LPR data may allow police to determine who an individual associates with, which doctors or religious services she visits, which protests she participates in, and even which political party she belongs to. “A piece of information here or there about an individual is not very telling; but when combined, these bits and pieces of data begin to form a portrait of a person” (IACP, 2009, p. 16 citing *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 1989, p. 507). Normally, these activities are “dispersed over space and time,” so police officers can’t see them all at once (Reiman, 1995, p. 29). However, the collection and storage of data may bring many of these bits of information together on one system or connected systems. This is a strong argument for considering the spaces to the right of the continuum as—at the very least—conceptually distinct from those on the left of the continuum. In addition to the potential concerns related to privacy, the IACP report cautions that inaccurate data or even data taken out of context, may yield an erroneous picture to law enforcement, an occurrence that may actually hinder investigations (IACP, pp. 12, 14; Solove, 2006, p. 522). Misleading data may also be very difficult for individuals to refute, since people normally do not keep detailed records of their activities and may not remember their locations once time has passed.

Additionally, courts are likely to be concerned that LPR could impact the exercise of other rights and that individual behavior may eventually change as members of the community realize that their daily activities could be recorded and preserved (IACP, p. 16). It is the hope that LPR may help to suppress an individual's commission of illegal acts, but widespread use of the technology may also lead individuals to suppress unpopular, unconventional, or embarrassing actions that are not illegal (Reiman, 1995, p. 35). Specifically, courts may be concerned that it is difficult to exercise First Amendment rights, such as through participation in a rally or demonstration, without traveling to do so (IACP, 2009, p. 14). The fear is that citizens may alter their behaviors when they know that the locations they visit could be preserved and later used against them as evidence. In other contexts, the U.S. Supreme Court has at times protected individuals against being forced to identify themselves during their exercise of certain rights, for example, free press (IACP, 2009, p. 14, citing *McIntyre v. Ohio Elections Comm'n*, 1995), in their political associations (IACP, 2009, p. 14, citing *Brown v. Socialist Workers' 74 Campaign Comm.*, 1982) and in their involvement with religious groups (IACP, 2009, p. 14, citing *NAACP v. Alabama ex rel. Patterson*, 1958).

Yet, the IACP argues in its report that potential changes to individual behavior resulting from LPR may be minimized by law enforcement policies:

"[T]he development and implementation of policies regulating the collection, uses, sharing, and retention of LPR data can operate to reduce these effects. Deployment of LPR cameras based upon crime analysis that takes into account crime patterns and the types of crime targeted by LPR systems can also reduce the perception that LPRs are simply a tool for public surveillance. Developing retention periods are another way to address the potential chilling effects of LPR systems." (IACP, 2009, pp. 13-14)

The IACP also recommends that agencies develop policies "concerning the collection of license plate numbers by mobile LPR cameras in areas known to reflect an individual's political, religious, or social views, associations, or activities (e.g., churches, abortion clinics, etc.) and limit such collection to instances directly related to criminal conduct or activity." (IACP, 2009, p. 15) We concur on the logic of this statement. Such policing may aid courts in considering how to balance the legitimate interests of law enforcement with individual privacy rights. Such policies may also reduce negative perceptions in the community, although that also remains to be tested. The survey-experiment discussed below begins the process of rigorous testing in this and other areas.

LPR and Police Legitimacy: The Community Survey-Experiment

The LPR continuum of uses and the subsequent legal review reflect and emphasize two important themes in democratic policing. The first theme, as already discussed, stresses the importance of legal protections of the individual in light of crime prevention goals. The second theme is the legitimacy and authority afforded to the police by its community or



ELSAG License Plate Recognition System Car System User Training



KEYS TO SUCCESS USING LPR



1. **Data** – Targeted State Data is key; the system can handle up to 4M lines of data, multiple source data *can* be combined
 - NCIC national stolen vehicle and plate data is published daily by the FBI / Virginia State Police
 - Terror watch list data
 - Outstanding local warrant data including sexual predators
 - Motor Vehicle data to include suspended plates and drivers
 - Scofflaw data such as parking violations
2. **Technical Training** - ELSAG will train your agency in the software, installation, troubleshooting, and driving.
3. **Consistent Use** – The equipment is extremely durable and is built to be in constant operation
4. **Drive up the #'s** - Read 1,000 tags, get a stolen, read 6,000 get an arrest. Our partner agencies have read several million tags and all agree that volume reading while on patrol wins the day.



FAIRFAX COUNTY POLICE



Car System User Training



Mobile Plate Hunter 900 Series

Remington-ELSAG License Plate Recognition System

WEST SPRINGFIELD DISTRICT STATION

703-644-7377



EXHIBIT

9

tabbles

L.P.R.

LICENSE PLATE RECOGNITION SYSTEM

Vehicle ID: 1
Mobile Plate Hunter 900
Pending Alerts

Alerts
Hazard

Management Live
Hot list
Last update
2005-10-05 17:36

Reader
Optional camera

33
BER3322
14:28:45
34

Alarm Last events
33

Left camera	Optional camera	Right camera
BER3322 2 142835	BER3322 2 142845	BER3322 2 142845
DUU738 2 142830	ADP847 2 142829	ADP847 2 142829
CR1689 2 142811	DPD458 2 142820	DPD458 2 142821
CLX901 2 142810	LETOOYUUD 2 142821	LETOOYUUD 2 142821
DCP7709 2 142810	BBB9917 2 142814	BBB9917 2 142814

Info 2005-10-07 14:28:54
LPR GPS

About
Setup
Menu

MPH-900 Mobile LPR System



LP's can be read anywhere in the camera's field of view at closing speeds in excess of 120 MPH.

Infrared Cameras, work day or night to capture license plate alphanumeric string and convert into digital text sent to OCR processor.

B534HG

The 40GB processor manages both cameras, up to a 4M line hotlist and sends a message to the laptop in less than 1 second.



Cat 5 Network Cable

B534HG NY Stolen Vehicle!!

60 GB processor

Audible and visual alarms notify the officer that intervention is necessary.

MPH900
Mobile Plate Hunter 900 Series

The Benefits of LPR

Good Police Work

Stolen Vehicles

Stolen Plates

Wants & Warrants

Gang & Terrorist Watch lists

Suspended Plates

Scofflaws

MPH900
Mobile Plate Hunter 900 Series



Command Center
Software Suite

Criminal Intelligence

After Action Analytics

Crime Scene Investigations

Criminal Pattern Analytics

Critical Infrastructure

Watch list Development

Terrorist Interdiction

*Managing
Today's Work*

*Preventing
Tomorrow's Threat*

Remington-ELSAG MPH-900 **Mobile Plate Hunter**

1. The System reads across 4 lanes of traffic and captures vehicles in excess of 120MPH closing speed and 75+MPH passing speeds.
2. The MPH-900 requires no driver intervention and runs against up to 1.2M lines of hotlist files for vehicles of interest.
3. Milliseconds after a Hot list vehicle is captured, the system sounds an audible & visual alarm to the operator for immediate interdiction.
4. Easily mounted or transportable LPR systems allow officers to maintain a normal patrol stance while capturing up to 1,500 images per minute.
5. The MPH-900 reads plates from all 50 states and Canada including difficult to read flat and vanity tags – 24 hours DAY or NIGHT in all kinds of weather.



Successful Operation of the LPR Unit

1. **The Right Data** – Current and targeted data is key, the system can handle up to 4M lines of data, take advantage of this.
2. **Drive up the Numbers** - Read 1,000 tags, get a stolen, read 6,000 get an arrest. Set up in locations where you can read a high volume of vehicles.
3. **Operate Strategically** - Any time you can position in a median and read two directions or create a chokepoint, you will drive up the numbers. Use Crime Analyst data to help in your location planning.
4. **Public Awareness** –The less the better. The LPR unit should not be exposed during an arrest if possible.



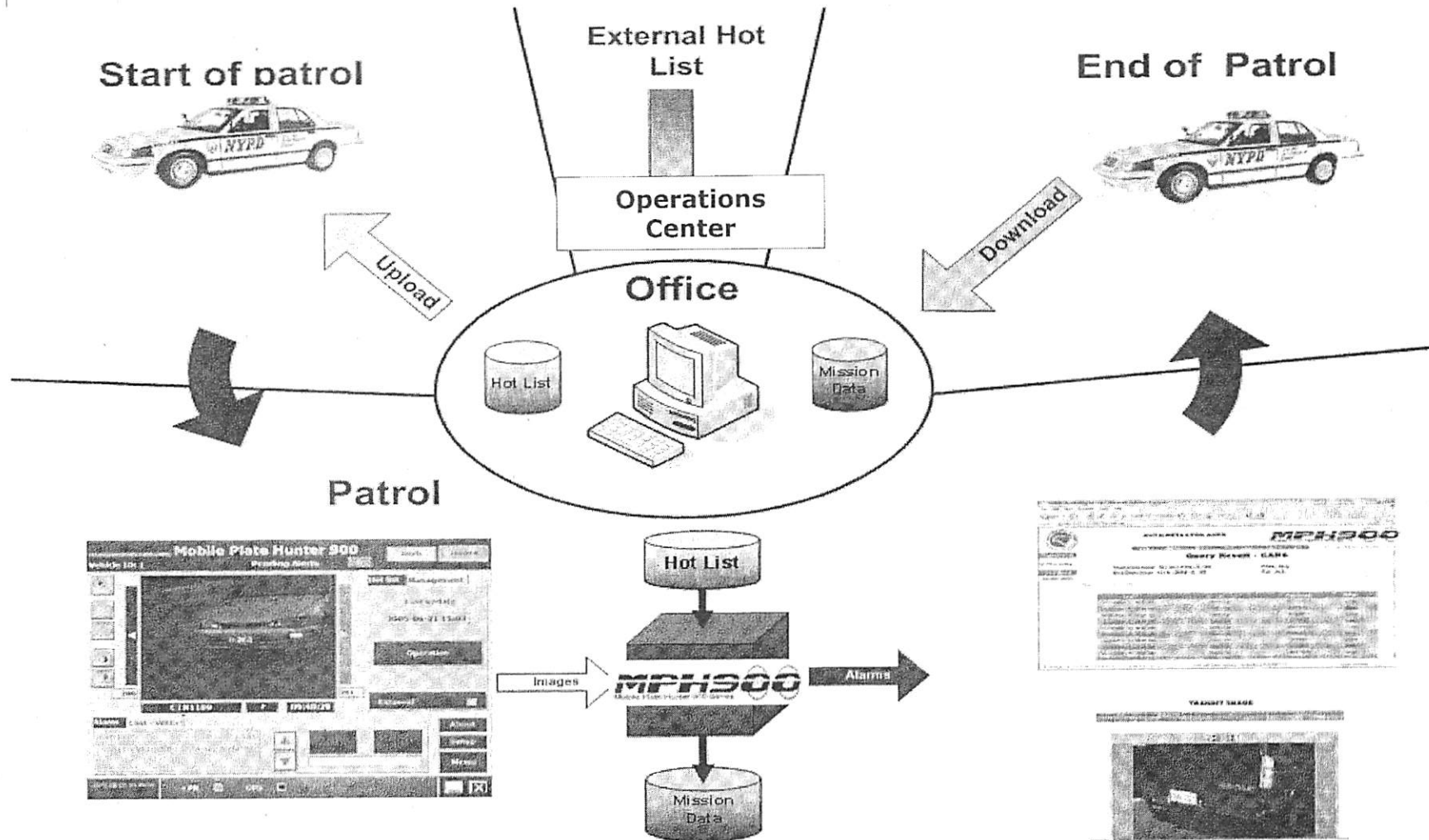
POTENTIAL FOR DATA COLLECTION

**Fairfax County can create a
Command Center Schematic
with future LPR units.**

**A data collection system such
as this has the potential for
investigative and proactive
criminal patrol that can increase
productivity and overall arrests.**

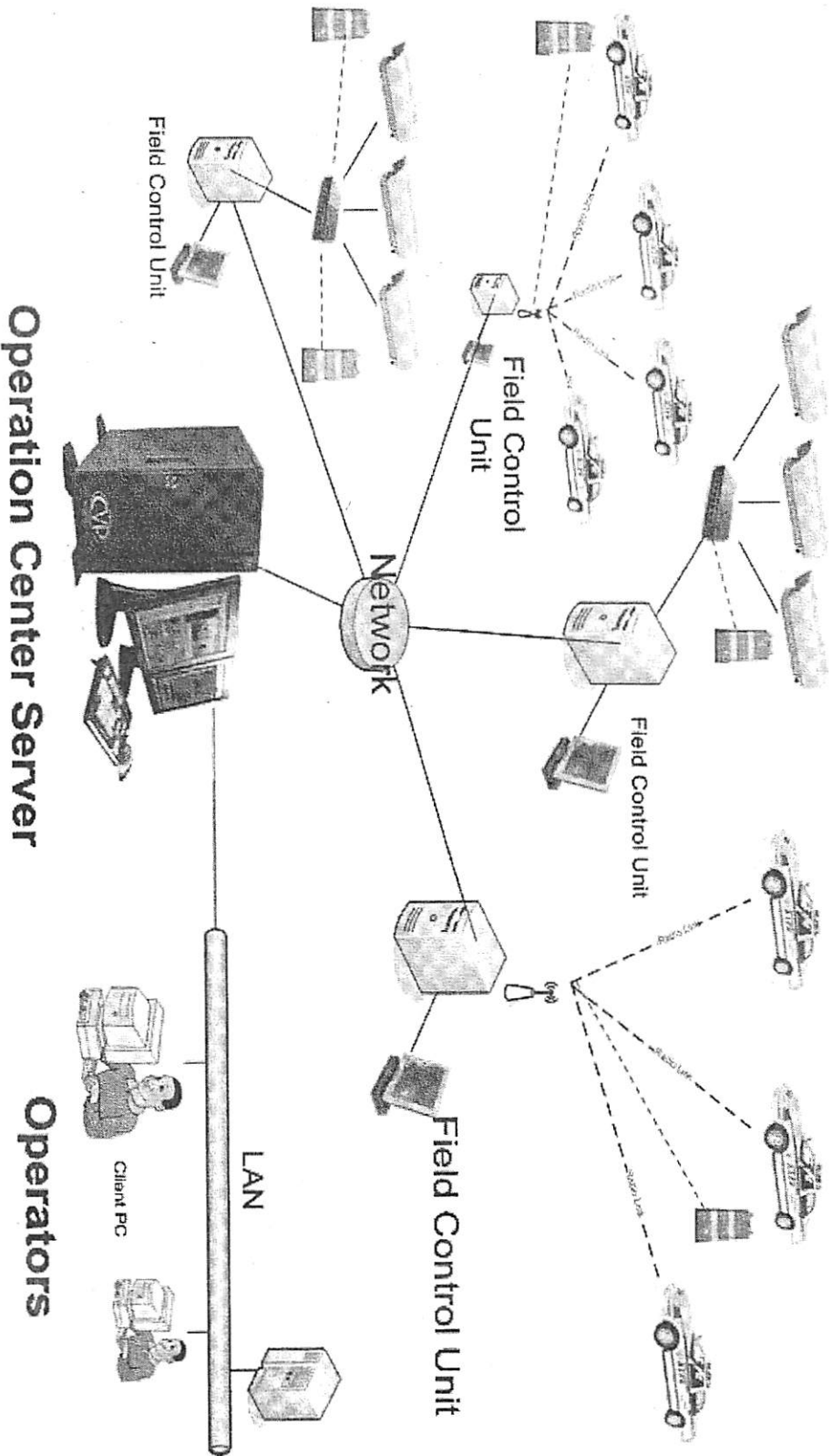


Standard Mission Schematic

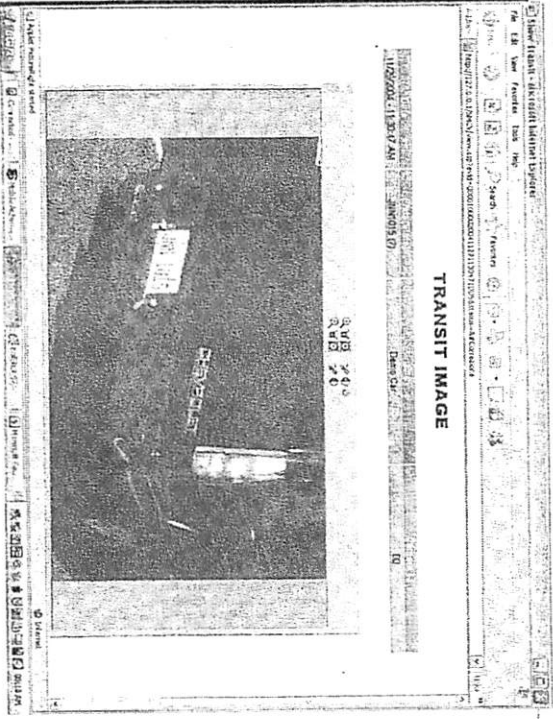


Command Center Schematic

MPH-900 Command Center is able to coordinate hundreds of fixed and mobile LPR devices in real time.



After Action Provides Detail on All Plates Scanned on a Shift with an Image of the vehicle and GPS Coordinates



TRANSIT
 Mobile Patrol Hunter and Series
 Model: LK1000 1.2004 3200 3210

AUTO-DETECTOR ANPR
Query Result - CARS

Start Date Hour: 10/30/2004 - 6:00
 End Date Hour: 12/9/2004 - 8:00
 Plate: ALL
 Car: ALL

Time	Plate	Car	Make	Model	Year
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004
11/23/2004 - 11:20:00 AM	Demo Car	3100000	BMW	3200	2004

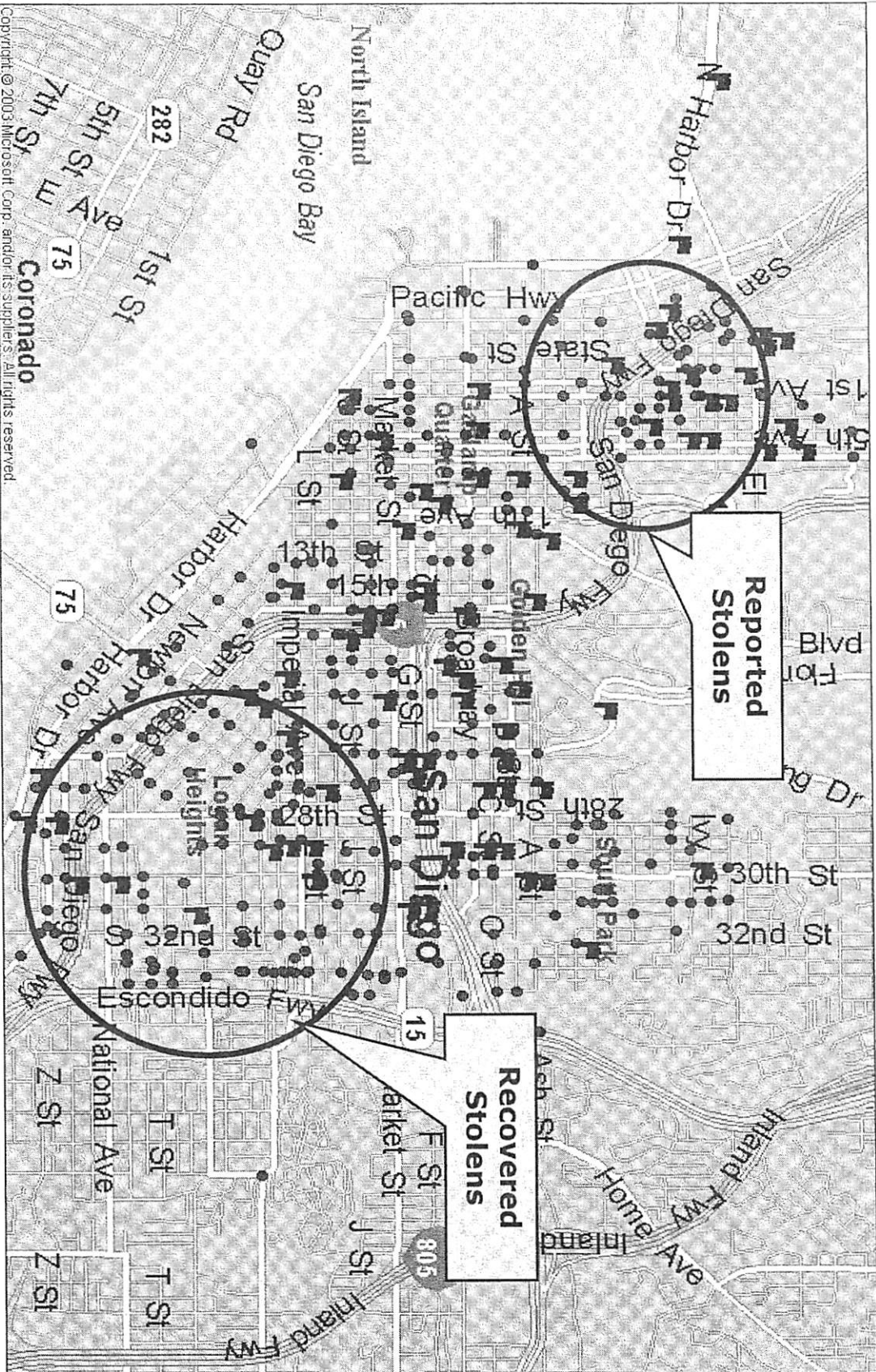
User System
 10/30/2004 3:22:07 PM

Investigative Benefits
Witness Identification - **Pattern Recognition** - **Places Suspects at Scene**
 System can store months of data – and all data can be warehoused on another computer and searched at a later date

GPS
9/27/03

GPS Mapping for Pattern Recognition

San Diego example



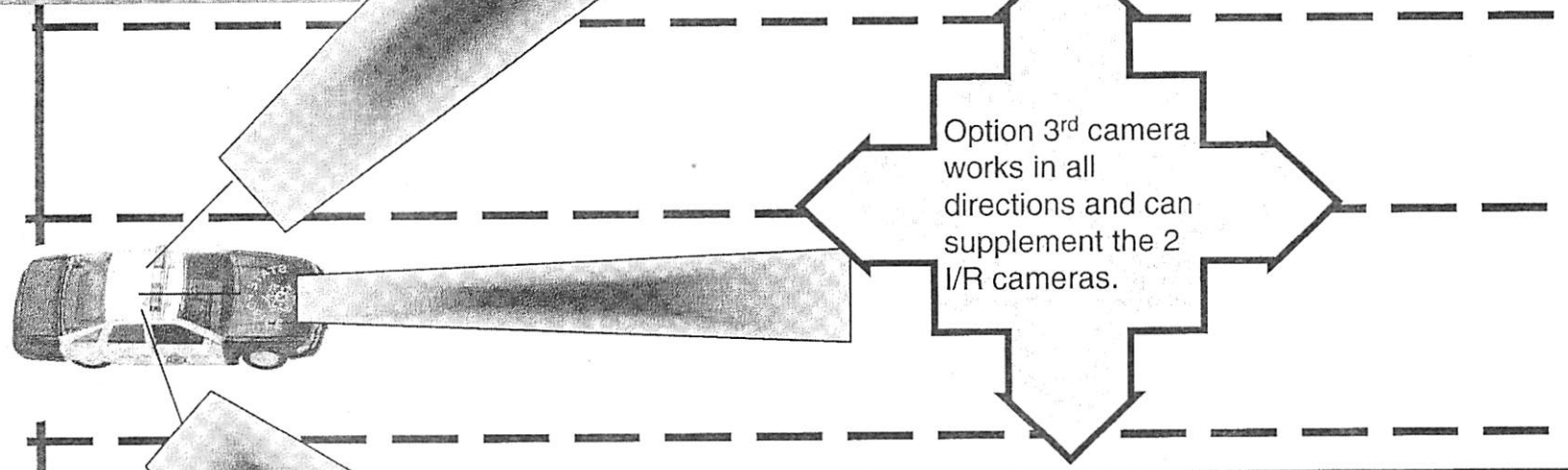
FCD
Ms

Split Camera Focal Points and Capabilities

Left Camera

Reads vehicles passing on your left and can be rotated to read rear tags

Processes both moving and parked vehicles, while the police vehicle is moving or parked.



Right Camera

Reads Parked vehicles as well as cars that are passed on right.

Images are transmitted to the processing unit at a rate of 25 frames per second which is then cross-checked versus a database of up to 4 million lines **Vehicles found in the database will alarm in milliseconds.**

Main Car System Screen

Mobile Plate Hunter 900

Vehicle ID: 1 Pending Alerts: 0

Alerts Hazard

Management Live

Hot list

Last update
2005-10-05 17:36

Operation

Reader

Optional camera

BER3322 ? 14:28:45

Alarm Last events

Left camera	33	Optional camera	Right camera	34
BER3322	? 14:28:35		BER3322	? 14:28:45
DFD7528	? 14:28:20		AJR8417	? 14:28:29
CTR1689	? 14:28:11		DFD7528	? 14:28:29
CLX9901	? 14:28:10		LE[00]NJUD	? 14:28:21
DCP7709	? 14:28:10		BBA9917	? 14:28:14

Info LPR GPS

2005-10-07 14:28:54

About Setup Menu

Reads on this side since restart

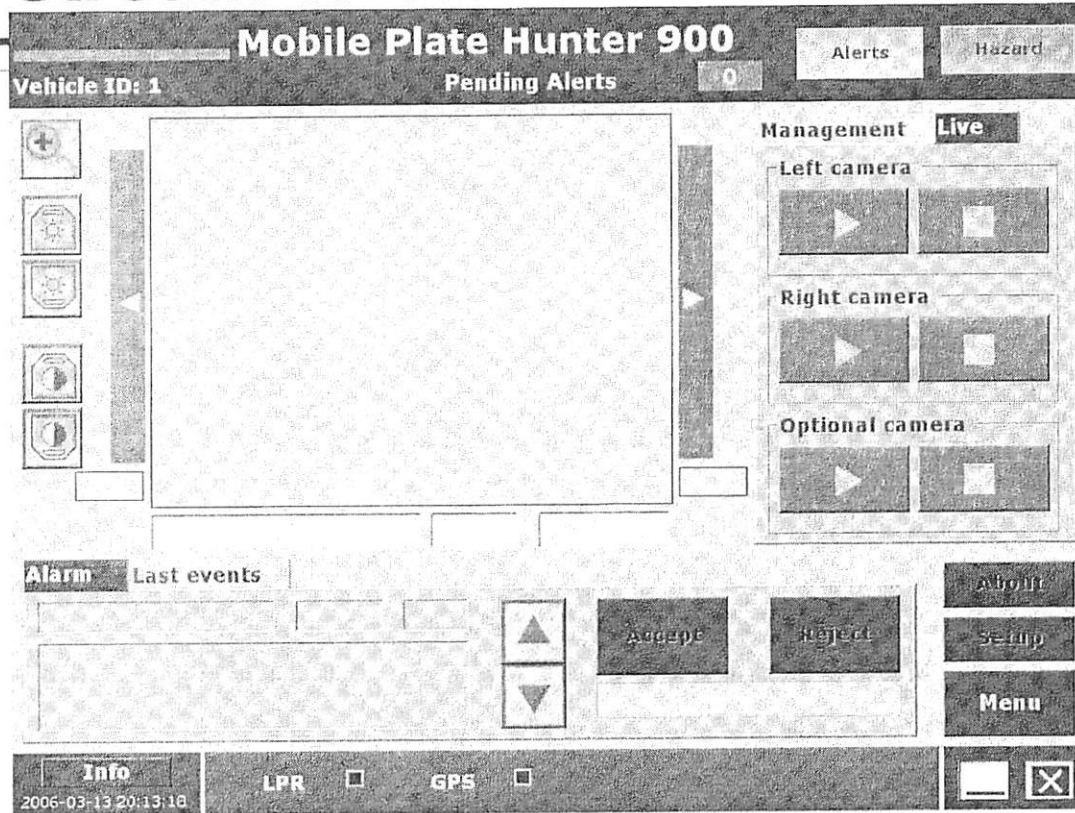
Last 5 reads on each side

Processor Status

"Live" menu for Camera adjustment

Manual plate search, insert, after action reports

✓
The Live tab allows you to turn on a video stream to calibrate cameras



The system will not scan tags while in live mode



During the shift, officers may input new tags, or query the hot list for manual input.

Mobile Plate Hunter 900

Vehicle ID: 1 Pending Alerts Alerts Hazard

Hot list Hot list results Reports Report results

Plate State ? - ALL COUNTRIES ▲ ▼ Search

Note

Insert

Delete

1	2	3	4	5	6	7	8	9	0	Delete local hot list
Q	W	E	R	T	Y	U	I	O	P	
A	S	D	F	G	H	J	K	L	↕	
Z	X	C	V	B	N	M	↶	↷	↸	
Caps						#@...	Canc		Close	

Info LPR GPS

2006-03-13 20:12:19



Shift Reporting Features

Vehicle ID: 1

Mobile Plate Hunter 900

Pending Alerts: 0

Alerts Hazard

Hot list Hot list results Reports Report results Search

Start 12 03 2006 18

End 12 03 2006 19

Plate State ? - ALL COUNTRIES

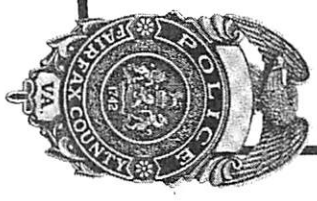
Alarms
 Rejected Alarms
 Reads

1	2	3	4	5	6	January	February	2005
7	8	9	10	11	12	March	April	2006
13	14	15	16	17	18	May	June	
19	20	21	22	23	24	July	August	
25	26	27	28	29	30	September	October	
31						November	December	

General report
 Shift report
 close

Info 2006-03-12 18:42:58 LPR GPS

The Reports tab is always defaulted to the last hour of time. Any parameter on this page can be adjusted



Shift Reporting Features

Vehicle ID: 1 Mobile Plate Hunter 900 Pending Alerts 0

Alerts Hazard

Hot list Hot list results Reports Report results

Match found 27270

Date	Plate	State	Reader
2006-02-01 11:26:00	JGD5759	?	M-00
2006-02-01 11:27:50	JRL3621	?	M-00
2006-02-01 11:27:42	YEG7707	?	M-01
2006-02-01 11:27:18	1[6812FB8100]5	?	M-00
2006-02-01 11:27:18	JM44483	?	M-00
2006-02-01 11:27:16	BERGES4	?	M-00
2006-02-01 11:27:14	JV41157	?	M-00
2006-02-01 11:27:14	JKN5001	?	M-00
2006-02-01 11:27:13	JLB8845	?	M-00
2006-02-01 11:27:13	JPA3572	?	M-00
2006-02-01 11:27:12	JBH3837	?	M-00
2006-02-01 11:27:11	HQB116	?	M-00
2006-02-01 11:27:11	JYB1178	?	M-00
2006-02-01 11:27:11	JXU7087	?	M-00
2006-02-01 11:27:10	JWKS649	?	M-00
2006-02-01 11:27:10	YEG8749	?	M-00
2006-02-01 11:27:10	JLS9261	?	M-00
2006-02-01 11:27:09	JXV2920	?	M-00

Note

Lat 0 Long 0

Export Close

Info LPR

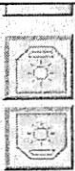
2006-02-06 18:47:10

Full detail of all tags scanned including an image and GPS coordinates is available to the system user at any time during or after a shift.



The MPH-900 works behind the scenes *Until the alarm sounds!*

Enhancement Buttons Allow User to Zoom On Plate or Brighten Image



Up to 130 characters of alarm description

260

Alarms can be transmitted to dispatch

Confirm State in Alarm matches state of License plate that alarmed.

ALL ALARMS REQUIRE REAL TIME CONFIRMATION WITH NCIC

OPERATIONS

MPH 900 Components and Installation Instructions

System Components:

- 1 laptop loaded with MPH900 Car System software
- 1 Central Processing Unit (silver suitcase)
 - 1 binocular camera head
 - 1 camera connection cable
 - 1 Ethernet cable
 - 1 power cable for processor
- 1 power inverter (to power computer via cigarette lighter)

OPERATIONS

Installation Directions:

Plug power inverter into one cigarette lighter, place below center console

Place laptop in passengers seat, plug into inverter

Place processor in car in a secure position

Place camera on top of car, centered by the rearview mirror.

Connect camera cable to the cameras and the processor (rotate collar until it slides into the connection ports on both ends with ease).

Connect LAN cable to the computer and the processor

Connect processor power cable to the processor and the cigarette lighter. If green light appears on front of processor, it is receiving power. Flip power switch to ON

OPERATIONS

Usage Instructions:

Once the above steps have been completed, the laptop can be used to operate the system.

Click on Car System Icon on the desktop

Once the Car System homepage appears on screen, click on LPR box

This places you into the main interface of the license plate reader

Verify LPR is operational (light at bottom left of screen appears green)

System is ready for hunting

Green directional arrows on either side of the image screen indicate if the last read was with the left or the right camera. Below each indicator is a tally of the number of images captured by each camera.

In the event of an alarm, the system requires user action.

If the read matches the license plate, press ACCEPT. If the read is inaccurate, press REJECT.

OPERATIONS

If you would like to run a plate you are unable to scan:

Click on the OPERATION box
Enter the plate number at the top
Be sure the correct state is selected, scroll down
and select if not
Click on the SEARCH Box
A pop up message will confirm the status of the
plate.

OPERATIONS

If you would like to add a plate to the Hot list:

Click on the OPERATION box
Enter the plate number at the top
Be sure the correct state is selected, scroll down and
select if not

Click on the INSERT Box
A pop up message will confirm the addition and ask
if you'd like to search previous history for the plate.

OPERATIONS

If you would like to create an after action report:

Click on the OPERATION box

Click on REPORTS tab at top

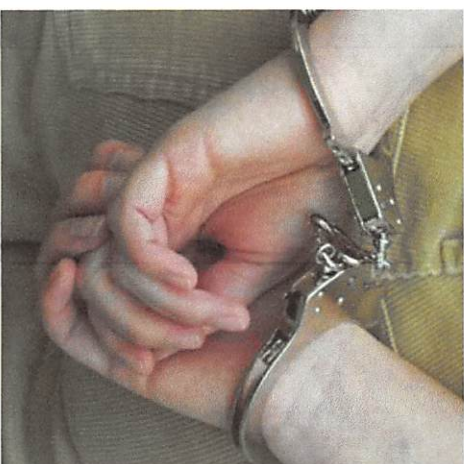
Select the parameters of your report. Dates and times can be adjusted, and you can search by total reads or by alarms only.

Click SEARCH.

Report will be produced, including GPS coordinates of the read and an image of the rear of the vehicle. You will also find options at the bottom for creating shift reports and for exporting the data from the system.

ALARM TYPES

- Class 1 – Stolen Vehicle
- Class 2 – Wanted or Missing Person
- Class 3 – Stolen Plate
- Class 4 – Suspended or Revoked Driver
- Class 5 – Scofflaw or Other

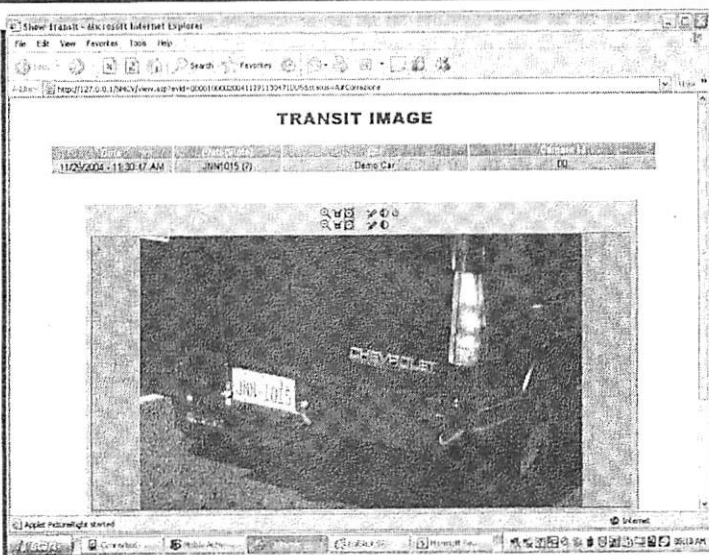


EXHIBIT

tabbles

10

After Action Provides Detail on All Plates Scanned on a Shift *with an Image of the vehicle and GPS Coordinates*



TRAFFIC MONITORING SYSTEM - Microsoft Internet Explorer

AUTO-DETECTOR ANPR **MPH900**
Mobile Plate Hunter 900 Series

Thursday, December 2, 2004 10:11 AM

Query Result - CARS

Start Date Hour: 10/30/2004 - 6:00 Plate: ALL
End Date Hour: 12/9/2004 - 6:00 Car: ALL

Page 1 of 262 - 4798 Records

Date	Car	Plate/State	Image
11/29/2004 - 11:30:59 AM	Demo Car	PZ05842(7)	Image
11/29/2004 - 11:30:49 AM	Demo Car	31P913(7)	Image
11/29/2004 - 11:30:46 AM	Demo Car	8YA487(7)	Image
11/29/2004 - 11:30:47 AM	Demo Car	807817(7)	Image
11/29/2004 - 11:30:47 AM	Demo Car	JUN1015(7)	Image
11/29/2004 - 11:30:46 AM	Demo Car	FARNALL(7)	Image
11/29/2004 - 11:30:45 AM	Demo Car	C87500(7)	Image
11/29/2004 - 11:29:29 AM	Demo Car	Y2025(7)	Image
11/29/2004 - 11:29:21 AM	Demo Car	30451K(7)	Image

Flux & Finmeccanica Company Hot List Last Update: 11/23/2004 3:22:07 PM User: system

Investigative Benefits

Witness Identification - Pattern Recognition - Places Suspects at Scene

System can store months of data – and all data can be warehoused on another computer and searched at a later date



MARYLAND COORDINATION AND ANALYSIS CENTER
Intelligence Analysis Division

Intelligence Bulletin

Phone: 443-436-8800

Fax: 443-436-8825

31 January 2011

Number 2011-20

License Plate Recognition (LPR) Program



(U) Background on License Plate Recognition Technology

(U) License Plate Recognition/Reader (LPR) systems consist of high-speed cameras and sophisticated computer algorithms that convert the images of motor vehicle license plates into computer readable data. When a vehicle comes into a LPR camera's field of view an image is captured of the license plate. The license plate number is then queried against certain law enforcement databases such as the Motor Vehicle Administration (MVA) and the National Crime Information Center (NCIC) to identify motor vehicle administration violations, stolen vehicles or stolen license plates, and wanted or missing persons associated with the license plate number. If a match is found, the system notifies the operator of the LPR camera within milliseconds of the vehicle's location and the infraction related to the license plate. This provides the operator the ability to verify the information and obtain the direction of travel of the vehicle. LPR systems are generally equipped with Global Positioning System (GPS) receivers which record the date, time, and location of the license plate captured. LPR systems can be on mounted on patrol vehicles or at fixed locations.

