In The

Supreme Court of Virginia

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RECORD NO. 170247

HARRISON NEAL,

Appellant,

v.

FAIRFAX COUNTY POLICE DEPARTMENT and CHIEF OF POLICE COLONEL EDWIN C. ROESSLER, JR.,

Appellees.

BRIEF OF APPELLANT

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MATERIAL PROCEEDINGS BELOW

This case turns on the meaning of "personal information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.* (the "Data Act") and its application to the Fairfax County Police Department's ("FCPD") program of mass collection, storage, and use of Automated License Plate Reader ("ALPR") records capturing the time, place, direction, photographs, and registration of Plaintiff Harrison Neal ("Neal") and hundreds of thousands of others who drive their cars on the roads and highways of Fairfax County.

On May 5, 2015, Neal filed a complaint in Fairfax County Circuit Court seeking relief in the form of injunction or mandamus, *see* Va. Code § 2.2-3809, to prevent FCPD[1] from the collection, storage, or use of ALPR records that reveal the date, time, location, and surroundings of his vehicular travels within Fairfax County. JA at 1-28. FCPD demurred asserting that the ALPR data it stores and uses do not fall within the statutory definition of "personal information" under the Data Act. JA at 37-38, 45-67.

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[1] The Parties have stipulated that named appellees Fairfax County Police Department and its Chief of Police, Colonel Edwin C. Roessler, Jr., are the appropriate "party or agency" answerable under the provisions of the Data Act. *See* Order (June 17, 2015), JA at 39; MSJ Tr., JA at 738. References to "FCPD" are intended to include either or both appellees.

On August 28, 2015, Judge Grace Burke Carroll ruled in favor of Neal, concluding that ALPR records pertaining to Neal's vehicle travels are "personal information" as defined in the Data Act and therefore come within its purview. *See* Order Denying Demurrer (Aug. 28, 2015). JA at 464, incorporating hearing transcript, JA at 465-496.

Following discovery, the parties filed and briefed cross-motions for summary judgment. JA at 194-329, 330-498, 509-532, 533-624. Fairfax Circuit Court Judge Robert Smith heard arguments on September 8, 2016. JA at 625-763. In his November 18, 2016 letter opinion, JA at 782-787, Judge Smith decided that Neal's ALPR records were not "personal information"; he therefore granted FCPD's motion for summary judgment and denied Neal's. A final order was entered on November 22, 2016. JA at 788-789.

Neal's Notice of Appeal was timely filed on December 20, 2016. Neal's Petition for Appeal was filed on February 22, 2017. FCPD's brief in opposition to the Neal's petition for appeal was filed on March 15, 2017. This Court heard Neal's argument on his petition on May 19, 2017 and granted this appeal on June 22, 2017.

ASSIGNMENTS OF ERROR

1. The trial court erred by granting Fairfax County Police Department and Chief of Police Colonel Edwin C. Roessler, Jr.'s motion for summary judgment because the trial court misconstrued the meaning and application of "personal information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.*

This error was preserved throughout Neal's Memorandum in Opposition to FCPD's and Col. Roessler's Cross-Motion for Summary Judgment, JA at 533-624; throughout the September 8, 2016 hearing on the Cross Motions for Summary Judgment, JA at 625-763; and in Neal's objections noted on the November 22, 2016 Order. JA at 788-789.

2. The trial court erred by denying Neal's motion for summary judgment because the trial court misconstrued the meaning and application of "personal information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.*

This error was preserved throughout Neal's Memorandum in Support of his Motion for Summary Judgment, JA at 330-498; throughout the September 8, 2016 hearing on the Cross Motions for Summary Judgment, JA at 625-763; and in Neal's objections noted on the November 22, 2016 Order. JA at 788-789.

STATEMENT OF FACTS

An ALPR is a device that captures a photograph of every license plate number that comes within its field of vision. JA at 2, 240-244, 257-289. It converts the image to a searchable, alphanumeric format and it stores that license plate number and the date, time, and location of the photograph in a searchable database. *Id*. ALPRs are typically mounted on police vehicles or on stationary objects, where they may record thousands of license plate numbers a day *Id*., as many as 3,600 captures per minute. *Id.* Once

collected, without any particularized suspicion or justification, hundreds of thousands of such individual data sets become available for whatever purpose the law enforcement agency prescribes, JA at 240-244, 257-289, 440-463 – or no purpose at all – to take advantage of the "things done by or to" the vehicle, its owner, and the "record of his presence." Va. Code § 2.2-3801.

The ALPR "information system" comprises cameras, computers, file servers, databases, and other resources linkable by networks and the internet, capable of identifying the travels and other "identifiable particulars" pertaining to a "data subject," *id.; that is, the owner and/or operator of the vehicle captured by the cameras.* In addition, FCPD regularly shares ALPR data with law enforcement agencies in nearby jurisdictions. JA at 3-4, 240-244, 257-289, 440-463. ALPR data, including but not limited to a searchable database of unique vehicle registration numbers assigned to specific vehicle owners by the Department of Motor Vehicles ("DMV"), are used by police to identify individual vehicles and their likely operators (the vehicle owner) to "describe [ ], locate[ ], and index[ ]", Va. Code § 2.2-3801, a vehicle and its owner in a "record of [an individual's] presence." JA at 257-289, 453-463. In enacting the Data Act, the Virginia General Assembly declared: "An individual's privacy is directly affected by the extensive collection,

maintenance, use and dissemination of personal information"; that "[t]he increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices"; and that "[a]n individual's opportunities to secure employment, insurance, credit, and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems." Accordingly, "[i]n order to preserve the rights guaranteed a citizen in a free society" the legislature promulgated the Act to "establish procedures to govern information systems containing records on individuals." Va. Code § 2.2-3800(B)(4)(1)-(4).

In 2013, in response to an inquiry from the State Police, then Attorney General of Virginia Kenneth Cuccinelli, II, determined that the Data Act governs law enforcement agencies' collection and storage of information using ALPRs. JA at 24-28. He wrote:

> The General Assembly enacted the Data Act in response to concerns about potentially abusive information-gathering practices by the government, including enhanced availability of personal information through technology. The Data Act serves to guide state agencies and political subdivisions in the collection and maintenance of personal information. The Data Act seeks to protect individual privacy, by placing strictures upon the governmental collection, maintenance, use and dissemination of personal information.

2013 Op. Va. Att'y Gen. ("AG Opinion"), JA at 25.

The inquiry from the State Police described two different ways of using ALPR data: "an 'active' manner, whereby law enforcement collects, evaluates, and analyzes the LPR data in real time to determine the relevance to an ongoing case or emergency, and, alternatively, a 'passive' manner, whereby law enforcement collects unanalyzed data for potential future use if a need for the collected data arises respecting criminal or terroristic activities." JA at 24-25. Neal does not challenge "active use." See also, JA at 457-463.

The AG Opinion concluded that ALPR information constitutes "personal information" as defined in Va. Code § 2.2-3801:

> 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. 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. Accordingly, data collected by an LPR generally meets the definition of "personal information" and thus falls within the scope of the Data Act. JA at 24-28.

The Attorney General found that "data collected by an LPR . . . not otherwise relating directly to law enforcement investigations and intelligence gathering respecting criminal activity, is subject to the Data Act's strictures and prohibitions." JA at 28. The Attorney General opined that law enforcement agencies violate the Data Act's requirements when they engage in the "passive" use of ALPRs: that is, the persistent maintenance

and use of hundreds of thousands of images for up to a year for some speculative future criminal activity. JA at 27.[2]

In direct response to the AG Opinion, the State Police changed their policy, banning "passive use" by purging ALPR records after 24 hours. JA at 7. FCPD refused to do likewise;[3] it maintains all its ALPR data - even the vast preponderance of those records like Neal's which are not tied by reasonable suspicion or articulable relevance to a criminal investigation - for up to one year. JA at 15.[4]

ALPR images of the 2011 Hyundai Accent GLS four-door sedan with Virginia vanity tag "ADDCAR" were captured and stored on two separate

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[2] The AG Opinion also rejected an argument that the data needs to be maintained "for potential future use if a need for the collected data arises respecting criminal or terroristic activities": "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." JA at 27.

[3] *See also,* Tom Jackman, *Despite Cuccinelli's advice, N.Va. police still maintaining databases of license plates,* Washington Post, Jan. 16, 2014, https://www.washingtonpost.com/local/despite-cuccinellis-advice-nva-police-still-maintaining-databases-of-license-plates/2014/01/16/055ec09a-7e38-11e3-9556-4a4bf7bcbd84_story.html?utm_term=.6e2ac4d424ff.

[4] FCPD's SOP allows for storage of ALPR data for 364 days. However, FCPD has at times stored ALPR data for up to 730 days as a result of incorrect computer storage settings. JA at 448-452.

occasions.[5] It is beyond genuine dispute that the vehicle was being driven on both occasions by Neal. *See* JA at 719-720. The 'ADDCAR" license plate number was automatically converted into searchable form by the ALPR system, ready to be queried, retrieved, read, and associated with other data at the discretion of FCPD at any time during the ensuing 364 days.[6]

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[5] FCPD's response to Neal's FOIA request is attached to the Complaint, JA at 19-23, and was submitted by FCPD on summary judgment. JA at 310-315. In the FOIA response, FCPD refers to the vehicle "ADDCAR" as Neal's and attaches two pictures of Neal's vehicle taken on each occasion along with a chart indicating the precise time, date, and GPS coordinates (accurate to 14 decimal places) at which the photographs were taken. As counsel for FCPD indicated at the hearing, JA at 722, many lower resolution, black-and-white photocopies of the original captured color images were attached to multiple briefs filed below; but the most faithful and accurate representation of the data as it exists in FCPD's databases was presented at the hearing. *See* JA at 575-577. Also available at: https://www.dropbox.com/s/wkrfoqt3oj220lj/%26LTA%20140426%2B140511%20Captured%20%20ADDCAR%20Photos%20Only.best.pdf?dl=0

[6] FCPD has never disputed that Neal's ALPR records pertain to his private vehicle, that he was driving his vehicle at the time the ALPR data were captured, and that FCPD has no reason to suspect Neal or his vehicle to be connected to any criminal activity. *See generally,* JA at 214-241, 440-447, 697-699. In answers to Interrogatories, FCPD stated: "The letter/number combination of the Virginia license plate and photograph provided in 14-FOIA-186 has not been deemed part of any specific law enforcement investigation or purpose as of yet." JA at 220. At the summary judgment hearing, FCPD's counsel acknowledged: "So there's no dispute here that that's Mr. Neal's car or that the ADDCAR license plate number is associated with that vehicle that's owned by Mr. Neal and someone else in his family." JA at 695-696. S*ee also,* JA at 719-722.

The parties stipulated below that if Neal's ALPR records come within the scope of the Data Act, making him a "data subject" as provided in Va. Code § 2.2-3806, then he would be entitled to injunction or mandamus under Section 2.2-3809.[7] JA at 39 (¶ 3), 630-632.

STANDARD OF REVIEW

This appeal involves statutory interpretation (First and Second Assignments of Error), which, as a pure question of law, this Court reviews *de novo*. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 99 (2007).

When considering a trial court's decision to grant or deny summary judgment (First and Second Assignments of Error), this Court reviews the application of law to undisputed facts *de novo*. *Va. Fuel Corp. v. Lambert Coal Co.*, 291 Va. 89, 97 (2016). In doing so, it considers the record in the

[7] In its summary judgment papers, FCPD also asserted – and Neal vigorously disputed – that its passive use of Neal's ALPR data was exempt from the Data Act as information "related directly to law enforcement investigations and intelligence gathering respecting criminal activity." Va. Code § 2.2-3800(C)(2). In the briefs and at oral argument, Neal directly challenged FCPD to identify any connection between Neal or his vehicle and any specific criminal investigation. FCPD was unable to do so, and implicitly acknowledged as much in its responses to Neal's discovery requests. *See generally,* JA at 214-241, 440-447, 697-699. The trial court did not reach (or mention) this question in its disposition of the case.

light most favorable to the party against whom summary judgment was granted. *Klaiber v. Freemason Assocs.*, 266 Va. 478, 481-82 (2003).

SUMMARY OF ARGUMENT

This Court should reverse the judgment below, and direct that summary judgment be granted to Neal and denied to FCPD, because the trial court's construction of "personal information" is inconsistent with the plain text, intent and purpose of the Data Act. The General Assembly enacted this statute to regulate government agencies in all aspects of collection, storage, and dissemination of information traceable to an individual. Based upon the record of undisputed facts, it is apparent that Fairfax County's ALPR program collected, stored, and repeatedly queried data that is readily traceable to Neal, his vehicle, and his personal travel activities. FCPD's own ALPR training and user documents contain detailed descriptions of the advanced technological prowess of its ALPR process as an "invaluable tool" for bringing about the prompt and efficient location, identification, arrest, and conviction of actual criminal subjects. None of that would be possible unless the ALPR record-keeping process can lead from the captured data to a suspect, *i.e.,* a person.

The Data Act was expressly adopted by the General Assembly because it recognized the significant potential for abuse of such networked

information systems combining massive databanks of information pertaining to citizens and their activities with incredibly powerful computing technologies. The ALPR data pertaining to Neal, like that of more than 99.9 percent of citizens whose whereabouts and driving patterns are captured by ALPR technology, are completely unrelated to any suspicious activity and have no connection whatsoever to any legitimate law enforcement investigation. Yet FCPD keeps these data for at least a year in the hope that something might turn up that would make Neal's travels on those captured occasions somehow relevant to some as-yet-undetermined crime.

As explained in detail by *amici see, e.g.*, Electronic Frontier Foundation's *amicus* brief below, JA at 501-507, ALPR data are susceptible to abuse (and have been misused with alarming frequency) by unregulated government agencies, and, like all GPS data, can be used to map the location of a particular car over time, and may even be capable of predictive analysis – *i.e.,* forecasting future travel from past patterns. *See, e.g.,* Jeremy Gillula & Dave Maass, What You Can Learn from Oakland's Raw ALPR Data, Eff.org, Jan. 21, 2015, https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data. The Data Act's essential purpose is to use commonsense regulation of these processes to prevent abuse and consequent loss of liberty because of unwarranted mass surveillance of the

community and to bring such data-mining by government agencies within the rule of law. *See, e.g.,* Va. Code § 2.2-3800(B) ("In order to preserve the rights guaranteed a citizen in a free society, legislation is necessary to establish procedures to govern information systems containing records on individuals").

The trial court's conclusion that Neal's ALPR records are not "personal information" under the Data Act was erroneous. In reaching that conclusion, the trial court failed to apply traditional rules of statutory construction to all the words of the statute or to the overall meaning and purpose of the Data Act. A full textual analysis leads to the inevitable conclusion that Neal's ALPR data fall within the definition of "personal information", especially considering the various categories of information given as non-exhaustive examples in the statute. Neal's captured information fits within or is directly analogous to: (1) "real or personal property holdings"; (2) a "photograph" that "describes, locates or indexes anything about an individual" or "things done by or to such individual"; (3) information that "affords a basis for inferring personal characteristics"; (4) an "agency-issued identification number"; and (5) a "record of his presence, registration, or membership in an organization or activity[.]"

The ALPR system's gateway to this type of information is precisely why law enforcement agencies deploy ALPRs: to identify individuals by the cars that are registered to and most often driven by them. It does not matter that, as FCPD maintains, license plate numbers may need to be run through another readily accessible database or the internet to precisely identify the person by name. The Data Act by its plain terms does not require identification by name. In fact, it expressly allows identification by means of any identification number, "including, but not limited to, his social security number, driver's license number, agency-issued identification number, or student identification number[.]" The record that a car was at a certain place at a certain time "affords a basis for inferring" that the individual to whom that car's license plate is registered had "done" the "activity" of driving in a particular place at a particular time, and it is a "record" of "presence … in an activity." In this case, that could be the act of driving, or a more specific activity, such as going to a mosque, or a political meeting, or a bar, or an adult establishment.

Had the lower court applied the proper analysis of the statute's text and manifest purpose, it would have reached the correct conclusion that the ALPR records of Neal's vehicular travels constitute "personal information" subject to the strictures of the Data Act. If left in place, this ruling will allow

FCPD and other law enforcement agencies throughout the Commonwealth to continue to amass millions of individual location records – creating a map of where, when, and how car owners drive their automobiles – not subject to the carefully prescribed, commonsense rules and limitations that the Data Act was designed to enforce.

Only by reversing this erroneous decision, one squarely at odds with well-reasoned opinions of the Attorney General and another Fairfax County Circuit judge, can this Court prevent the threat of continued indiscriminate, unwarranted, and unregulated monitoring of the travel activities of millions of Virginia car owners and drivers.

ARGUMENT

I. The Trial Court Erred by Granting FCPD's Motion for Summary Judgment Because the Trial Court Misconstrued the Meaning and Application of "Personal Information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.* (First Assignment of Error).

A. The Plain Text, Intent, and Overriding Purpose of the Data Act Make Clear that ALPR Data Comprise "Personal Information".

The plain text of the Data Act leads to the conclusion that the captured data pertaining to Neal and his vehicle, as collected, stored, and used by FCPD's ALPR system, constitutes "personal information" within the meaning of the Data Act. "[U]nder settled principles of statutory construction, we are

bound by the plain meaning of the statutory language." *Ramsey v. Comm'r of Highways,* 770 S.E. 487, 489, 2015 Va. LEXIS 43, at *5 (Va. 2015), *quoting Hale v. Bd. of Zoning Appeals,* 277 Va. 250, 269, (2009). The Data Act defines "personal information" as:

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

Va. Code § 2.2-3801 (emphasis added).

The Data Act protects the rights of a "data subject," that 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*." Va. Code § 2.2-3801 (emphasis added). An "information system" is defined as:

> *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 (emphasis added).

To achieve the statute's purposes, the General Assembly clearly chose words indicative of an expansive, open-ended concept of "personal information," words intended to be applied liberally to include "all information" that "describes, locates or indexes anything about an individual" or "affords a basis for inferring personal characteristics" or "things done by or to such individual," and "the record of his presence . . . in an organization or activity." *Id.*

The General Assembly intended for the statute to regulate government agencies in all aspects of collection, storage, and dissemination of information traceable to an individual. Because of that intention, the definition of "personal information" encapsulates "all information" that describes, locates, or indexes "*anything* about an individual" or allows *any* inference about an individual's "personal characteristics," activities, or associations. Va. Code § 2.2-3801 (emphasis added). Although the legislature provided specific examples, it was careful to craft the definition to be non-exhaustive, as manifested by its use of the phrase "but not limited to." It is axiomatic that "[u]se of those words [but not limited to] manifests a legislative intent that the statute not be given an '*expressio unius*' construction." *Surles v. Mayer*, 48 Va. App. 146, 164, (2006), quoting *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 528 (1979).

"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Conger v. Barrett*, 280 Va. 627, 630 (2010) (alteration in original). "'When the language of a statute is unambiguous, we are bound by the plain meaning of that language.'" *Commonwealth v. Morris*, 281 Va. 70, 76 (2011). And "'[i]f a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.'" *Id*.

This Court construes a statute "with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it." *Brown v. Commonwealth*, 284 Va. 538, 542 (2012). Importantly, this Court "will not apply an unreasonably restrictive interpretation of a statute that would subvert the legislative intent expressed therein." *Brown v. Commonwealth,* 284 Va. 538, 542 (2012).

ALPR records fit within the Data Act's definition of "personal information" and the statute's remedial purposes. The General Assembly's legislative intent and purpose behind enacting the Data Act is clearly described in the statute. The General Assembly was concerned about the proliferation of technology that might magnify the harms done by unregulated

government collection, storage, and use of personal information of individuals. *See* Va. Code § 2.2-3800(B)(4)(1)-(4). The legislative purpose was manifested by defining "personal information" broadly enough that, as new technology evolved to capture and analyze new forms of personal information, that information would fall within the statutory ambit. ALPR systems are a perfect example of such new technology.

The Data Act's purpose is to combat abuse and consequent loss of liberty because of unwarranted mass surveillance of the community. Adherence to the plain text, intent, and purpose of the Data Act requires inclusion of ALPR records as "personal information." An ALPR record, including but not limited to the photographs of the subject vehicle, "describes, locates or indexes" a vehicle, ***but not a vehicle alone***. That vehicle inevitably is registered to an owner, and it is a fair inference that the vehicle is being driven by that owner (or someone associated with him). The record entails much more than a "tag number." In addition to the license plate number (a unique identifying number issued by the DMV to a specific owner), the ALPR record (*e.g.,* Neal's own) also contains the precise GPS coordinates, a digital date and time stamp, a map of the environs, and two photographic images of the vehicle, which routinely reveal the make, model, year, trim line, and distinguishing characteristics such as vehicle condition,

color, decals, signs, stickers, surroundings, and sometimes the silhouette(s) of vehicle occupant(s). All of these parameters tell you things personal to the owner and/or operator of the imaged vehicle, including (1) his "real or personal property holdings"; (2) things that "describe[], locate[] or index[] anything about an individual"; (3) "things done by or to such individual"; (4) information that "affords a basis for inferring personal characteristics"; (5) an "agency-issued identification number"; and (6) a "record of his presence, registration, or membership in an organization or activity[.]" Va. Code § 2.2-3801.

Although FCPD is correct that the ALPR record did not in and of itself identify Neal by name, that is not dispositive. Most of the types of information specifically included in the Data Act's definition of "personal information" do not include the data subject's name. Nothing in the statutory definition suggests that the name itself must be included. Examples of information protected by the statute that does not have to appear in combination with a person's name include: a "social security *number*", a "driver's license *number*", an "agency-issued identification *number*", a "student identification *number*", real or personal property holdings, *and any "information" that "describes" or "affords a basis for inferring" a person's "education",*

"ancestry", "religion", "political ideology", or "membership in an organization or activity". Va. Code § 2.2-3801 (emphasis added).

Moreover, a license plate number is analogous to several examples listed as "personal information" despite not being expressly enumerated. FCPD has consistently stressed that its ALPR program is a vital "investigative tool to aid in the detection or investigation of terrorism or a series of related crimes." FCPD SOP 11-039, JA at 15. To paraphrase Judge Carroll, to be useful in solving crimes, an "investigative tool" must lead to a criminal, *i.e.*, a *person*. JA at 492, 495-496.

In this case, that person is Neal. He is the owner and driver of the subject vehicle.[8] Neal is thus the "data subject" about whom FCPD kept a "record of his presence" and "a photographic" showing his driving activities within an "information system" of law enforcement components connected by electronic networks and the internet. FCPD's ALPR system collected and stored data that could be searched and readily traced to Neal and his vehicle for at least a year without any reason to believe that this "personal

[8] FCPD never formally admitted that the driver of the ADDCAR vehicle at the time the information was captured was Neal, but despite repeated opportunities, in response to the pleadings, interrogatories, and requests for admission, in their motion papers, and at the hearing, they have consistently acknowledged it, at least by implication. (*See, e.g.,* JA at 695-696, 719-722, 744-745.) See generally, JA at 214-231, 440-447.

information" is relevant to any crime. FCPD thereby captured and kept records revealing Neal's travel activities, which constitute evidence of the presence, activities, travels, agency-issued identification number, and property of the owner/operator of the vehicle (who in these instances, happened to be Neal driving his own car).[9] These things describe the particulars of where Neal was and what he was doing are no less personal than the attributes of many of the examples expressly listed in the statute.

The trial court failed to apply traditional rules of statutory construction to the plain text, intent, and purpose of the Data Act. The trial court's unreasonably restrictive interpretation of the statute subverted its express legislative intent. Had the lower court applied the proper analysis of the statute's text and purpose, it would have concluded, as did the AG Opinion and Judge Carroll, that Neal's ALPR records comprise "personal information" within the reach of the Data Act.

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[9] Notably, ALPR data are consistent with the well-established meaning within the information management and security professional community of the closely-related concept of "personally identifiable information." The Department of Homeland Security (DHS) defines PII as "any information that permits the identity of an individual to be directly or indirectly inferred, including any information that is linked or linkable to that individual…" (https://www.dhs.gov/sites/default/files/publications/Handbook%20for%20Safeguarding%20Sensitive%20PII_0.pdf as of June 11, 2016).

Unless reversed by this Court, the ruling below will mean that FCPD and other law enforcement agencies possess unbridled discretion to collect, amass, analyze, disseminate, and use millions of such records, more than 99.9 percent of which record the movements of law-abiding motorists with no connection to any specific criminal investigation.[10] These records create a map over time of when, where, and how owners such as Neal drive their vehicles. The Data Act's prescribed rules and limitations establish a commonsense set of checks and balances on the otherwise unconstrained authority of government agencies like FCPD to gather, maintain, disseminate, and use massive collections of data on individuals' personal travel activities.

B. The Trial Court Defined the "One Salient Issue" Too Narrowly.

The trial court framed what it referred to as the "one salient issue" too narrowly by stating that the only question to decide was: "is a license plate number personal information?" JA at 782. The pleadings, documents, and admissions of FCPD show that their ALPR system includes information that goes well beyond Neal's license plate number. Specifically, the ALPR data include precise information regarding where, when, and how Neal was using

[10] Please refer to the Brief of Amicus, EFF, for a detailed discussion of academic, forensic, statistical, and legal analyses of ALPR systems.

his vehicle and photographic evidence that reveals details regarding the vehicle's occupancy, make, model, color, condition, bumper stickers, vanity plates, and surroundings. *See e.g.,* JA at 542-544.

The ALPR system also includes all data that make up the entire "information system," *i.e.,* "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…." Va. Code § 2.2-3801. Examples include links to the internet; connections to law enforcement networks (*e.g.,* the State Police, DMV, NCIC, VCIN); and FCPD's own training and user guides, that extol the effectiveness of the ALPR system is as an investigative tool for locating suspects, making arrests, and solving cases. *See e.g.,* JA at 240-244, 257-289, 440-447, 453-463, 580, 582, 598, 623.

The trial court's unduly restrictive characterization of the "one salient issue" led directly to its erroneous conclusion that "[a] license plate does not tell the researcher where the person is, what the person is doing, or anything else about the person." JA at 786. That may be true of a license plate number ***alone***, in isolation. But as Neal emphasized at the hearing, *see, e.g.,* JA at 744-747, it ignores all of the other data discussed in greater detail in the next section – including the vehicle photos, the GPS coordinates, the

time stamp, etc. – to which FCPD gained access when it captured and stored Neal's ALPR data, where it was subject to all of the advanced technological processes that make ALPR the effective tool for identifying suspects, making arrests, and solving crime that FCPD repeatedly touts as "invaluable."

By framing the "one salient issue" too narrowly, the trial court failed to consider the vast scope and interconnected nature of the 21st-century technology that makes up the ALPR system as actually used in FCPD's day-to-day operations. Recognizing the real-world links, networks, and interactions -- the very connections that make FCPD so enthusiastic in its embrace of this "invaluable" law enforcement tool -- leads inevitably to the conclusion that Neal's ALPR records do comprise "personal information" and are therefore subject to the rules and procedures of the Data Act.

C. A License Plate Number is an "Agency-Issued Identification Number."

Even under the trial court's overly narrow "one salient issue" construct, the court below should have concluded that Neal's ALPR data qualifies as "personal information". The trial court stated, "All the information included in the statute refers to an individual person… A license plate number leads directly to a motor vehicle." JA at 786. "I could find no Virginia case that addresses the issue of the whether a license plate is personal information." *Id*. FCPD has never explained why a license plate number – particularly a

vanity tag number like “ADDCAR” – issued to a Virginia automobile owner does not constitute an “agency-issued identification number” under the Data Act.

A license plate number is assigned by the DMV, a state agency, to the registered owner of a motor vehicle. That number is simultaneously assigned to – and will be displayed on – the motor vehicle itself, but that does not make it any less a number issued and directly connected to the registered owner. The Data Act enumerates “agency-issued identification number[s]” as a discrete category of “personal information.” Va. Code § 2.2-3801. The trial court did not discuss “this statutory category, but simply asserted, without analysis or reference to statutory or juridical authority, “All the information included in the statute refers to an individual person.” JA at 786. Unlike those other categories, the court emphasized, “A license plate number leads directly to a motor vehicle”, not to an individual. *Id.* These assertions are demonstrably incorrect.

While a license plate number is assigned to a vehicle, it is also assigned, as a matter of law, to one or more individual owners (such as a husband and wife, as in the case of Neal). The Virginia Code is replete with references to the indisputable fact – which both FCPD and the trial court ignored -- that a license plate is “issued’ or “assigned” to the owner(s) of a

motor vehicle, not just the vehicle itself.[11] Virginia courts have frequently

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[11] *See, e.g.,* Va. Code § 46.2-213 (1950) ("the certificate shall be *prima facie* evidence in any court in the Commonwealth of the ownership of the vehicle to which the distinguishing number or license plate has been assigned by the Department"); Va. Code § 46.2-733(A) (2011) ("the Commissioner shall issue appropriately designed license plates to persons…"); Va. Code § 46.2-733(B) (2011) ("Every applicant . . . shall . . . apply to the Commissioner for a registration card and license plates…"); Va. Code § 46.2-1256(B) (1997) ("the person to whom the license plate or placard is issued"); Va. Code § 46.2-619 (2012) ("the Department shall issue to the person entitled to [the motor vehicle, trailer, or semitrailer] by reason of the transfer a new registration card, license plate, or plates and certificate of title"); Va. Code § 46.2-723 (1989) ("the Department shall issue to persons engaged in the business . . . license plates to be affixed to such mobile homes or house trailers while being transported."); Va. Code § 46.2-744 (1995) ("the Commissioner shall issue to the applicant special license plates"); Va. Code §46.2-730(A) (2014) ("the Commissioner shall issue appropriately designed license plates to owners" of antique motor vehicles and trailers); Va. Code § 46.2-731 (1972) ("the Commissioner shall issue appropriately designed disabled parking license plates to persons with physical disabilities"); Va. Code § 46.2-732 (1979) ("the Commissioner shall issue appropriately designed license plates to deaf persons"); Va. Code § 46.2-734(A) (1979) ("the Commissioner shall issue to the applicant one special license plate"); Va. Code § 46.2-708 (1958) ("the Commissioner shall…suspend such owner's driver license and all of his license plates"); Va. Code § 46.2-609 (1950) ("The Department…may revoke…license plates…whenever the person to whom the…license plates…have been issued…");. *See also,* Va. Code § 46.2-2139(A) (2017) ("… a person refuses to surrender on demand to the Department license plates, identification markers, and registration cards issued under this title"); Va. Code § 46.2-1560 (1989) ("no dealer shall issue a temporary license plate except on written application by the person entitled to receive the license plate"); Va. Code § 46.2-708 (1958) ("the Commissioner shall…suspend such owner's driver license and all of his license plates").

recognized that license plates are "registered" to one or more ***individuals***.[12] A host of federal courts have similarly recognized that license plate numbers are assigned ***to people***.[13]

We have found no authority (and FCPD has identified none) consistent with the trial court's assertion that a license plate number "leads to a vehicle" but not a person. Like a driver's license number or a social security number, Neal's license plate number is a unique "identification number" which has been "assigned" (*i.e.,* registered and issued) by a state agency to both Neal

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[12] *See, e.g., Collins v. Commonwealth*, 292 Va. 486, 489 (2016) ("license plate ... was most recently registered to Eric Jones"); *Sidney v. Commonwealth*, 280 Va. 517, 520 (2010) ("the vehicle's license plate … was registered to Sidney's mother"); *Suter v. Commonwealth*, 67 Va. App. 311, 316 (2017) ("license plate … was registered in her name"); *Commonwealth v. Woolsey*, 2004 Va. Cir. LEXIS 38, 1, 6 (2004) ("ran the tags and determined it was registered to a person other than the defendant").

[13] *See, e.g., Smith v. Munday*, 848 F.3d 248, 254 (2017) ("recorded her license plate number"); *United States v. Thompson*, 584 Fed. Appx. 101, 103 n.1 (2014) ("the driver of a car with Thompson's license plate had threatened a victim with a gun"); *Howard v. Holloway*, 2015 U.S. Dist. LEXIS 9179 1, 11 (2015) ("Eason…was able to get petitioner's license plate number"); *United States v. Bosket*, 2013 U.S. Dist. LEXIS 168196 1, 3 (2013) ("the employee took down Defendant's license plate number"); *United States v. Lundy*, 601 Fed. Appx. 219, 221 (2015) ("car's license plate was registered to Lundy's wife"); *United States v. Ellington*, 396 F. Supp. 2d 695, 697 (2005) ("license plate…was registered to the defendant"); *United States v. Fisher*, 2011 U.S. Dist. LEXIS 153452 1, 13 (2011) ("license plate…was registered to Fisher").

and his vehicle.[14] This fact alone provides a full and dispositive answer (in Neal's favor) to the trial court's "one salient question" and warrants reversal of the judgment below.

D. Neal's ALPR Records Reveal a Great Deal of Information Specific to Him and his Property.

A license plate number alone is sufficient to constitute "personal information" under the Data Act because it resides within the complex network of databases, resources, connections, and networks, and processed by the powerful computing technologies readily available to the FCPD's ALPR system. However, FCPD's own FOIA response dated May 15, 2014 and the ALPR documents attached thereto, JA at 19-23, establish that Neal's ALPR records (captured on April 26, 2014 and May 11, 2014, respectively) reveal much more than just a license plate number. These ALPR records – like those pertaining to millions of other owners and drivers whose travels

[14] FCPD orally stipulated nearly as much in argument on the cross-motions, acknowledging that it "is completely undisputed, because it's what gives [Neal] standing to appear in court and argue for the injunction . . . that he is someone who is connected to a vehicle whose license plate number was captured twice by [FCPD].... We captured the ADDCAR license plate number, which it's not disputed at this point that that is his license plate number.... Mr. Neal's registration document shows that this vehicle is registered through DMV not just to Mr. Neal, but also to another member of his family who, again, I presume to be his wife." JA at 695-696.

have been captured and stored in FCPD's ALPR system – depict an individual (Neal) driving his silver 2011 Hyundai Accent GLS 4-door sedan with the license plate number "ADDCAR" at a precise time, place, and direction. The four images of the car being driven by Neal also disclose a host of attributes specific to Neal and his vehicle; *e.g.,* dimensions, contours, trim, make, model, year, color, physical condition, vanity plates, bumper stickers, and Virginia registration.

The ALPR records 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. JA at 20-21. The associated GPS-calibrated map shows the precise latitude and longitude where Neal was then present and operating his car. JA at 23. Furthermore, although the contents are not clearly legible in Neal's ALPR photographs, it is apparent from the captured images that Neal's vehicle contains three bumper stickers. JA at 20-21. The Court may judicially notice that bumper stickers often express messages that are highly personal to the individual driver and frequently reveal insights about their owner's "education, ... ancestry, religion, political ideology ... or membership in an organization or activity…." Va. Code § 2.2-3801.

Moreover, many details about Neal's preferences, property, habits, traits, and activities may be gleaned from the captured information about his vehicle and travels. These details 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." *Id.* FCPD does not explain why driving a vehicle registered in his name at a specific date, time, place, and direction is not among the "things done by . . . such individual," nor a "record of his presence . . . in an . . . activity." *Id.*

In short, although FCPD insists that its ALPR program does not house any of the types of information included in the statutory definition of "personal information," its assertions are merely conclusory and are belied by FCPD's own statements in ALPR training and user guides and other FCPD documents. As Judge Carroll trenchantly observed, "[o]therwise, what would be the point of holding that information?" JA at 496.

E. The Data Act Refers To Many Shared – Not Just Individual – Attributes and Traits.

The trial court seems to have concluded that attributes which are not unique to a single individual cannot be considered "personal" or "private". He observed that "[a]ll the information included in the statute refers to an individual person." JA at 786. To the contrary, several items expressly listed

as examples of "personal information" in the Data Act refer to more than just an individual person. Among the examples that refer to groups of individuals that share the specified attribute are: "real or personal property holdings", "education, financial transactions," and "ancestry, religion, or political ideology." Va. Code § 2.2-3801. Real and personal property can be titled to an LLC or multiple individuals and many characterizations – such as religious preference, ethnicity, political orientation, or educational background – are ***always*** common to many individuals. While a license tag number refers to a single automobile, it is ***always*** assigned by DMV to one or more individuals such as a husband and wife as it is here.

F. Neal's "ADDCAR" Vanity Plate Conveys Personal Information Unique to Himself.

In comparing a license plate number to other examples of "personal information" in the Data Act, the trial court erroneously concluded that all the other examples apply to things directly tied to an individual, whereas a license plate number, it asserted, leads only "to a vehicle."[15] As shown in the sections above, this generalization was inaccurate in several respects.

[15] "All the information included in the statute refers to an individual person. Indeed, in the case of a social security number, the information leads directly to an individual. A license plate number leads directly to a motor vehicle." JA at 786.

Virginia law gives the DMV Commissioner authority to permit vehicle owners to choose a license plate number. Va. Code § 46.2-726. Many vehicle owners elect a special letter-number combination to express some personal feeling, interest, or idea. Like the bumper stickers that are visible (but not very legible) in Neal's ALPR photographs, expressive vanity plates like Neal's frequently reveal "ancestry, religion, political ideology."[16] Neal chose a unique vanity license plate, "ADDCAR," DMV assigned to him and his vehicle. Part (ii) of Va. Code § 2.2-3801 states that information that "affords a basis for inferring personal characteristics" is "personal information." Neal's chosen expression is certainly one that "affords a basis for inferring personal characteristics" that are specific to Neal. *Id.*

G. The Fourth Amendment Privacy Rights Analysis Ultimately Relied Upon by the Trial Court Is Not the Appropriate Standard for Construing the Data Act's Explicit Definition of "Personal Information".

As this Court observed in *Hinderliter v. Humphries*, 224 Va. 439, (1982), the Data Act was adopted to prohibit the unregulated stockpiling and

[16] Naturally, what one chooses to display openly is not within the ambit of Fourth Amendment "privacy." But that misses the whole point of the Data Act: as argued in the next section, the Data Act doesn't prohibit all use of "personal information"; rather, it subjects its collection, maintenance, dissemination, and use by government agencies to a set of simple, reasonable, widely accepted, and easily implemented rules and practices.

use of countless bits of information from which the government could use advanced technology to keep track of and trace the characteristics, activities, and movements of its citizens. It was never intended merely to mirror or to be limited to privacy interests already protected by the Fourth Amendment. The trial court erred by disregarding this vital distinction.

Although it correctly acknowledged that the Data Act's definition of "personal information" is different from "the context of the Fourth Amendment and privacy" (*see* JA at 786), the trial court nevertheless inappropriately framed the statutory construction question as follows: "[I]f certain information does not enjoy a privacy interest, how could it be said that the information is personal?" JA at 787.

The Data Act itself makes clear that the General Assembly was focused on the dangers posed by technological exploitation of "the extensive collection, maintenance, use and dissemination of personal information" represented by the "increasing use of computers and sophisticated information technology", which even in 1976, had "greatly magnified the harm that can occur from these practices." Va. Code § 2.2-3800(B)(4). Specifically, the legislature was concerned about "the misuse of certain of these personal information systems" and the potential harms that might result from such misuse to "[a]n individual's opportunities to secure

employment, credit . . . due process, and . . . other legal protections." *Id.* To "preserve the rights guaranteed a citizen in a free society", the Data Act was promulgated "to establish procedures to govern information systems containing records on individuals." *Id.* "[T]he Act 'is an important initial step towards safeguarding Virginia citizens against abusive information-gathering practices.'" *Hinderliter*, 297 S.E.2d at 684,quoting 62 Va. L. Rev. 1357, 1358 (1976).

The first and most obvious proof of the legislature's focus on interests independent of the Fourth Amendment's restraints on searches and seizures of people's "persons, houses, papers, and effects," JA at 25, is that it deliberately fashioned an entirely new, expansive, and open-ended definition of what it was intended to protect, *i.e.,* "personal information." Had the General Assembly wished to limit its protection to "privacy interests" akin to those protected by the Fourth Amendment, it would have said so.

Further evidence of the importance of the distinction between Fourth Amendment "privacy interests" and "personal information" is the fact that the name of the Act was changed in 2001 from the "Privacy Protection Act of

1976" to the "Government Data Collection and Dissemination Practices Act".

As explained by the Code Commission:[17]

> The Virginia Code Commission feels that the new chapter name is more descriptive and will clarify existing misunderstanding of what is covered by the Privacy Protection Act. ***The Privacy Protection Act is in fact a data collection and dissemination statute and does not protect privacy***. This recommendation is supported by a 1982 Virginia Supreme Court case, *Hinderliter v. Humphries*, 224 Va. 438, which held that the Privacy Protection Act "[d]oes not render personal information confidential. Indeed, the act does not generally prohibit the dissemination of information. Instead, it requires certain procedural steps to be taken in the collection, maintenance, use, and dissemination of such data."

The goal of the statute was, as this Court recognized in *Hinderliter*,

> to set a basis for minimum standards for personal data collection, storage, and dissemination in the Commonwealth. The General Assembly would be well advised ***to avoid potential gross abuse of the power of intercommunicating data banks by setting reasonable, easily implemented standards of conduct***. Well managed, responsible, data systems industries and support systems are as essential to the orderly and efficient operation of modern business, industry, and government as ***uncontrolled, unrestricted gathering of total information dossiers about total populations are antithetical to a free society***.

Hinderliter, 297 S.E.2d at 686 (citation omitted) (emphasis added).

The General Assembly recognized that some data can be readily traced back to an individual or group: "proliferation in the use of automated

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[17] Final Report Of The Virginia Code Commission Recodification Of Title 2.1 And 9 Of The Code Of Virginia, http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/d79d87aa46e1519085256a07004b9135/$FILE/HD51_2001.pdf

data processing equipment, especially the electronic computer . . . has enabled government and private industry to compile detailed information on individuals in every area of personal activity." *Hinderliter, 297 S.E.2d* at 685 (internal citation omitted). The Data Act's broad, specially-worded, inclusive scope applies to any data that someone with access could use to develop a "dossier" on a person or a class of persons. The overriding purpose of the Data Act was "to obviate the possibility of the emergence of cradle-to-grave, detailed dossiers on individuals, the existence of which dossiers would, 'at the push of a button,' lay bare to anyone's scrutiny, every detail, however intimate, of an individual's life." *Id.* at 685-86 (internal citation omitted). Surely where, when, and how Neal was driving his car on the occasions when his travels were captured by FCPD's ALPR network must be considered such a detail.

To adequately address that issue, "personal information" under the Data Act extends to interconnected, searchable databases like the ones that FCPD maintains. Any other interpretation leads to dangerous consequences. With a few keystrokes, anyone with access could create a dossier about targeted persons, organizations, groups, properties, activities, travels, beliefs, associations, registrations, accounts, memberships, ancestries, allegiances, or whereabouts. Under the trial court's reasoning,

if each individual bit of data in its "record-keeping process" is not entitled to protection under the trial court's concept of "privacy interests", then FCPD has the final and only say. Such an interpretation is not in keeping with the words or purposes of the General Assembly and must be rejected.

H. The Conclusions Reached by the Attorney General and Judge Carroll that ALPR Systems are Subject to the Strictures of the Data Act Were Sound and Should Be Followed.

1. The Attorney General Reached the Correct Conclusion that ALPR Systems Are Subject to the Data Act.

In 2013, the Attorney General comprehensively analyzed the very same issue now before this Court and concluded that ALPR record-keeping processes are "information systems" including "personal information" and are therefore within the purview of the Data Act. The Attorney General found that persistent, long-term storage and maintenance of ALPR records (*i.e.,* "passive use") of records for which no particularized need has been "clearly established in advance," does not "specifically pertain" to "investigations and intelligence gathering relating to criminal activity" violates the statute. Va. Code § 2.2-3800(C)(2); § 52-48. The Attorney General rejected an argument that the data needs to be maintained "for potential future use if a need for the collected data arises respecting criminal or terroristic activities":

> 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. JA at 27.

The trial court relegated its discussion of the Attorney General's opinion, the only published Virginia authority on this issue, to one footnote. JA at 786, n.5. The court wrote: "Although instructive and helpful, the opinion is not controlling, and I am convinced by the County Attorney's argument that this case differs from the situation reviewed by the Attorney General." *Id.* The trial court's failure to provide any specific analysis of the AG Opinion, or to respond to its well-articulated rationale, suggests that it did not give the AG Opinion the "due consideration" to which it is "entitled." *Twietmeyer v. City of Hampton*, 255 Va. 387, 393 (1998). The trial court conceded that the AG opinion "conclude[d] that license plate numbers do fall within the definition of personal information," but the court did not explain why, nor did it cite any distinguishing fact, circumstance, or rationale for its disagreement, stating only that an AG Opinion "is not controlling."

Nothing in the letter opinion -- and no pleadings or admissions by Neal -- explain or support a conclusion that the instant case "differs from the situation reviewed by the Attorney General." *Id.* Since no trial was held and no admissions of fact were made by Neal to support such a conclusion, it is difficult to ascertain what the trial court based this remark upon. It is unclear whether the trial court somehow accepted at face value, despite vehement

objections by Neal on brief and at the hearing, FCPD's repeated, improper references to "undisputed facts" – in reality nothing more than its own self-serving, argumentative, and inadmissible discovery responses – as a basis for distinguishing its ALPR program from the State Police ALPR program which was the subject of the AG Opinion.[18] While admissions made by a party, in the pleadings or otherwise, may be used in support of a motion for summary judgment by its party-opponent, *see* Rule 3:20, it is axiomatic that 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. The fact that opposing parties each believe the undisputed evidence warrants summary judgment in its own favor "does not relieve the trial judge of the responsibility and duty to make an independent evaluation of the record on that issue." *Town of Ashland v. Ashland Inv. Co.*, 235 Va. 150, 154 (1988).

The evidence appropriate for consideration on summary judgment clearly establishes that there is no material difference between the "situation reviewed by the Attorney General," and the instant case. If the trial court considered any of the putative "undisputed evidence" relied upon by FCPD

[18] Neal vigorously and repeatedly objected to the use of this "evidence" which was offered in support of FCPD's cross-motion. (*See, e.g.,* JA at 533, 741-743.)

in its briefs and at the hearing in granting summary judgment to FCPD, this would have itself been reversible error.

2. Judge Carroll Reached the Correct Conclusion that ALPR Records Constitute "Personal Information".

Prior to summary judgment, on August 28, 2015, Judge Grace Burke Carroll rejected FCPD's demurrer, ruling that, as alleged in the Complaint, Neal's ALPR record constitutes "personal information" within the meaning and purview of the Data Act: "this Court finds that that information is personal information…. Otherwise what would be the point of holding that information?" JA at 656 (Tr. 31:19-20).

The factual record did not change on the question of "personal information" between the time of the demurrer and Judge Smith's decision on summary judgment. The facts material to the demurrer decision included FCPD's Standard Operating Procedure governing its ALPR program attached as Exhibit A to the Complaint, JA 11-18; FCPD's response to Neal's FOIA request, in which it acknowledged that "your tag was read twice by our ALPR system," along with black-and-white printouts of the ALPR data captured on April 26, 2014 and May 11, 2014, respectively, attached as Exhibit B to the Complaint, JA 19-23; and a copy of the AG Opinion, attached to the Complaint as Exhibit C, JA 24-28. The authenticity of those

documents, along with other documents produced by FCPD itself about its ALPR program, were stipulated for purposes of the summary judgment motions, and FCPD has never disputed the truth and accuracy of the information contained in its own documents, including Exhibit B. JA at 19-23.

Despite a paucity of available precedent, the trial court reached the opposite legal conclusion on the meaning of "personal information" without any mention of Judge Carroll's demurrer ruling,[19] and without any explanation of his reasons for rejecting the cogent and well-supported AG Opinion. Thus, the trial court failed to measure its own analysis against the only two rulings directly on point. Neal submits that Attorney General Cuccinelli and Judge Carroll got it right, and that this Court should heed the logic of their decisions, rather than that of the trial judge.

[19] Judge Carroll did not issue a written opinion. However, the demurrer pleadings, oral argument transcript and bench ruling concluding that the data is "personal information" under the statute were submitted and underscored in Neal's briefs and arguments on the cross-motions for summary judgment. JA at 82, 340-342, 644-645.

II. The Trial Court Erred by Denying Neal's Motion for Summary Judgment Because the Trial Court Misconstrued the Meaning and Application of "Personal Information" under the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.* (Second Assignment of Error)

Nearly all of what has been argued above in support of the First Assignment applies with equal force in support of the Second Assignment. Just as a correct construction of the meaning and effect of the Data Act's definition of "personal information" should have led to the denial of summary judgment to FCPD, so it should also have established Neal's entitlement to summary judgment on his own motion. For the most part, the arguments, which we beg leave to incorporate here by reference, are the same.

There is one material difference: To grant summary judgment to FCPD, the trial court could only rely on facts that were admitted by Neal, whose knowledge extended no further than his ownership and operation of his own motor vehicle and the results of his FOIA requests. If the trial court had relied upon the purported "undisputed facts" never admitted by Neal but nonetheless improperly advanced by FCPD in its summary judgment papers, it would have committed reversible error on that score alone.[20]

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[20] As indicated above, it is unclear if and to what extent the trial court relied on FCPD's proffer of these putative "undisputed facts," which were in truth nothing more than FCPD's self-serving statements,

Conversely, Neal was entitled to summary judgment based on facts admitted, in the pleadings or otherwise, by FCPD. As referenced throughout this brief, the record on the cross-motions for summary judgment is replete with authenticated documents produced by FCPD itself (including FCPD training materials, user guides, public statements, and discovery responses) identifying, describing, and commenting on their own ALPR system and its operations and capabilities in abundant detail. These documents were characterized repeatedly at the hearing below as "undisputed evidence." While it was improper for the trial court to consider these documents against Neal (who made clear that he did not admit the truth of FCPD's own self-serving statements), he had every right to use them against FCPD as admissions appropriate for consideration in support of his motion for summary judgment.

Based on the same legal arguments stated above with respect to Assignment 1, Neal submits that these admissions by FCPD were sufficient to warrant a determination as a matter of law that Neal's ALPR data constitutes "personal information" within the meaning of the Data Act.

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documents, and discovery responses that were never conceded (and for the most part, expressly disputed) by Neal.

Accordingly, Neal was entitled to, and should have been granted, summary judgment.

CONCLUSION

For the reasons stated above, this Court should reverse the Fairfax County Circuit Court's decision issued on November 18, 2016, direct that summary judgment be granted to Neal and denied to FCPD, and remand this matter for further proceedings.

Respectfully Submitted,

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By Counsel

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify compliance with Va. Sup. Ct. R. 5:26 as follows:

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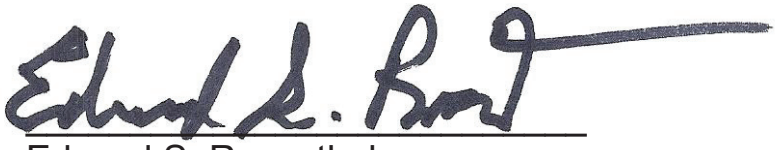
(2) On this 1st day of August, 2017, three copies of the foregoing Opening Brief of Appellant and three copies of the Appendix were filed with the Clerk of the Supreme Court of Virginia.

(3) An electronic version of this Opening Brief of the Appellant and the Appendix, in Portable Document Format (PDF), were filed with the Clerk of the Supreme Court of Virginia on August 1, 2017, in the manner prescribed by the VACES Guidelines and User's Manual, using the Appellate Courts eBriefs System (VACES).

(4) On August 1, 2017, a electronic copy on CD of this Opening Brief of the Appellant and the Appendix was served, via UPS Ground Transportation, to counsel listed above.

(5) On August 1, 2017, an electronic version of this Opening Brief of the Appellant, in PDF format, was transmitted to counsel of record for the appellee via electronic mail at the email addresses listed above.

6) I further certify that the foregoing Opening Brief does not exceed 50 pages, as required pursuant to Rule 5:26.



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