In the

Supreme Court of Virginia

At Richmond

Record No. 170247

HARRISON NEAL,

Appellant,

– v. –

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

Appellees.

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SCV: Submitted on 09-08-2017 15:53:29 EDT for filing on 09-08-2017

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I. FCPD'S ALPR SYSTEM STORES AND USES PERSONAL INFORMATION.

FCPD devotes only three pages to its defense of the Circuit Court's construction of the statutory definition of "personal information." Appellees' Brief at 8-11. Each of the assertions now made by FCPD about "personal information" was discussed and argued at length in Neal's Opening Brief, *see id.* at 14-44. We re-emphasize just a few salient points: (1) *Ejusdem generis* and similar doctrines do not apply when the legislature, as here, has deliberately chosen to call for the broadest possible construction of its terms through the explicit use of the expansive phrase "including, but not limited to."[1] (2) All of the captured data -- the driving behavior, the physical presence, the precise GPS coordinates, the recorded travel activity, the

[1] Neither *ejusdem generis* nor any related maxims support FCPD's position, because the General Assembly used words calculated to avoid the application of just those precepts. The legislature carefully specified that "personal information" encompasses "***all*** information that (i) describes, locates or indexes ***anything*** about an individual ***including, but not limited to*****"** the examples Appellees want to be interpreted restrictively. Va. Code § 2.2-3801 (emphasis added). Courts refuse to apply such maxims 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." *Cooper Distrib. Co. v. Amana Refrig., Inc.*, 63 F.3d 262, 278 (3d Cir. 1995) (opinion of then Judge Alito). "The 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." *Id. See also Surles 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" (citations omitted); *United States v. Migi*, 329 F.3d 1085, 1088-89 (9th Cir. 2003). *See generally,* Opening Brief at 14-22.

license plates, the "agency-issued identification number" (*i.e.,* "ADDCAR"), the bumper stickers, and every attribute and idiosyncrasy of the vehicle -- belong to, "describe," "locate," "afford a basis for inferring personal characteristics," and reveal "things done by or to" an individual. And that individual is, indisputably, Harrison Neal. Individually and together, these stored records provide a "record of his presence." Va. Code § 2.2-3801. *See* Opening Brief at 14-22. (3) License plates, including but not limited to vanity tags like "ADDCAR," are issued, assigned, and registered – and can be indexed – to individual owners, not just to vehicles as the trial court and FCPD erroneously presumed. *See* Opening Brief at 24-28. (4) The legislative history of the Data Act, its recitals of legislative purpose, and the widespread post-Watergate concerns about unregulated government surveillance all point to the legislative intent to regulate and control the buildup of mass collections of data traceable to individuals or groups. *See* Opening Brief at 4-5,16-18, 32-37.[2] (5) Neal's interpretation of the Data Act is in accord with the only other legal opinions to address the issue – the 2013 AG Opinion and Judge Grace Burke

[2] A September 2010 study, Lum, *et al., License Plate Recognition Technology (LPR): Impact Evaluation and Community Assessment,* Geo. Mason Univ. (2010) (in cooperation with FCPD), contains a multi-page evaluation of the privacy concerns associated with FCPD's ALPR program. *See* Neal's MSJ Memo, Ex. 7 (JA at 582-595) (extract) (recognizing and cautioning against the dangers to personal privacy from the passive use of ALPR data for data collection, interpretation, and predictive analysis).

Carroll's ruling denying FCPD's demurrer.[3]

II. FCPD'S ALPR RECORD-KEEPING PROCESS CONSTITUTES AN "INFORMATION SYSTEM" AND NEAL IS A "DATA SUBJECT".

FCPD uses most of its brief to argue that, even if Judge Smith was wrong in deciding that ALPR data contains no "personal information," the award of summary judgment to FCPD was nevertheless "right for the wrong reason." Appellees' Brief at 11-17 and n.4. One of those "right reasons," FCPD contends, is that "Neal is not a data subject as defined by the Act, and the FCPD's ALPR database is not an information system…." The Act defines *information system* 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). The same section defines "Data Subject":

> "Data subject" means 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.

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[3] Contrary to FCPD's misguided assertion, Neal does not contend that as a result of either the AG Opinion or Judge Carroll's demurrer decision, "the Circuit Court could not revisit that issue at summary judgment." Appellees' Brief at 24. *See also id.* at 17, 23. Neal's position with respect to the application of the Data Act to ALPR systems is quite simple: On the determinative legal issue of the meaning of "personal information" under the Data Act, "the trial court failed to measure its own analysis against the only two rulings directly on point", "the Attorney General and Judge Carroll got it right", and "this Court should heed the logic of their decisions, rather than that of the trial judge." Opening Brief at 41. Neal stands by that position.

FCPD says it is entitled to summary judgment because Neal cannot show that FCPD's ALPR database "house[s] both personal information and a second piece of information that constitutes 'the name, personal number, or other identifying particulars of a data subject.'" Appellees' Brief at 13. This argument fails also.

FCPD fails to reckon with its own prior admissions on this subject. It is undisputed that, on two separate occasions, FCPD furnished Neal, upon written request and proper identification, with copies of his "ADDCAR" ALPR records. FCPD Memo, Exs. 8, 9, 11, 12 (JA at 310-315, 323-324). FCPD's May 15, 2014 response to Neal's first request stated, "Within the last 364 days your tag was read twice by our ALPR system. Your documents are enclosed." FCPD Memo, Ex. 9 (JA at 311). Va. Code § 2.2-3806, entitled "Rights of data subjects," governs such requests:

> A. Any agency maintaining personal information shall . . . 4. Comply with the following minimum conditions of disclosure to data subjects: . . . b. The disclosures to data subjects required under this chapter shall be made (i) in person, if he appears in person and furnishes proper identification, or (ii) by mail, if he has made a written request, with proper identification. Copies of the documents containing the personal information sought by a data subject shall be furnished to him or his representative at reasonable charges for document search and duplication in accordance with subsection F of § 2.2-3704.

Under the Act, only "data subjects" who "furnish[] proper identification" are entitled to the disclosure of such personal information upon request. FCPD's responses providing Neal with official documentation concerning his personal

ALPR records implicitly admitted his status and standing as a "data subject" with "personal information" within their ALPR "information system." Those FCPD admissions were appropriate and material for purposes of the cross-motions for summary judgment. Beyond FCPD's admissions, however, there are many other compelling bases for rejecting FCPD's claim that its ALPR system does not amount to an "information system."

Next, FCPD misapprehends the scope of an ALPR "information system." That "information system," as broadly defined in the Act, consists of far more than just a license plate number. *See* Opening Brief at 28-32. That number, which comfortably fits the statutory definition as an "agency-assigned identification number," *see id.* at 18-21, is but one part of an aggregation of data, searchable by powerful computer applications and managed via "computer networks and the Internet," that provides ready access and interconnectivity to information about that automobile and its owner. Those interconnected elements of the system are available to ALPR system users at the click of a mouse via the Internet, DMV, VCIN, NCIC, and other linkable databases.[4] The images alone reveal a wealth of small, but

[4] According to FCPD's and the equipment manufacturer's own documentation, the ALPR system is expressly designed to be used in conjunction with such other databases. *See, e.g.,* JA at 257-289. Under the headline "Keys To Success Using LPR," one guide lists the following interconnected "multiple source data,": 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**;

nevertheless personal, details about Neal's preferences, property, habits, traits, vehicle, and movements. These details fit comfortably 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*. They fully satisfy any requirement that the "information system" must include "other identifying particulars of a data subject" in addition to "ADDCAR" (a "personal number").

As previously shown, FCPD's "information system" includes Neal's "**agency-issued identification number**" ("ADDCAR"), Neal's "**presence"** (at the time and place established by the captured GPS data, his involvement in "**an activity**" (driving his personal automobile), his **personal property holdings** (including his car's visible features), and the ALPR "**photographs"** (images showing a person we know to be Neal driving his own car). *See* Opening Brief, *id.* at 18-21, 22-24, 28-32. Notably, FCPD has never explained why documentary evidence showing Neal to be driving a vehicle registered in his name, with his ADDCAR vanity plate, and his bumper stickers at a precise date, time, place, and

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Outstanding local warrant data including sexual predators; **Motor Vehicle data** to include suspended plates and drivers; **and Scofflaw data** such as parking violations. JA at 259 (emphasis added). *See also* Neal's MSJ Memo, Ex. 9 (JA at 598-621); *id*., Ex. 10 (JA at 622) (referencing "alarm[s]" for "**wanted or missing person**…**stolen plate**…**suspended or revoked driver**…**scofflaw or other**"); *id*., Ex. 11, JA at 623 (emphasis added) ("Investigative Benefits" including "**Witness Identification** – **Pattern Recognition** – **Places Suspects at Scene**". *Id.,* Ex. 12 (JA at 624) (emphasis added).

direction is not among the "things done by . . . such individual," nor a "record of his presence . . . in an . . . activity", nor the "identifying particulars of a data subject." Va. Code § 2.2-3801.

III. FCPD'S ALTERNATIVE ARGUMENTS, BASED ON ITS OWN SELF-SERVING DISCOVERY RESPONSES, ARE WITHOUT MERIT.

FCPD's alternative arguments for affirmance of the judgment below – to the effect that Judge Smith was "right for the wrong reason," Appellees' Brief at 12, n. 4, – are unconvincing. One important reason for rejecting these alternative arguments is that they are all based upon what FCPD mischaracterizes below and describes again in this Court as "undisputed evidence." *See generally* Appellees' Brief at 16-18, 22. The trial court did not reach any of these alternative arguments, and did so wisely. In virtually every instance, the putative "undisputed evidence" is nothing more than FCPD's own narrative and documentary assertions which have been lifted straight out of ***their own*** self-serving, inadmissible discovery responses having nothing to do with Neal and his captured ALPR data. None of these assertions were ever admitted as true by Neal, introduced in any evidentiary hearing or trial, or tested under the rules of evidence. *See* Neal's Opposition Memo at 2-4 (JA at 537-539).

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 (1993) (emphasis added); Va. Sup. Ct. R. 3:20. While admissions made by a party may be used in support of such a motion by its party-opponent, it is axiomatic that a party may not rely on its own statements (or those of third parties) for that purpose. *See, e.g., R. T. Atkison Bldg. Corp. v. Archer W. Constr., L.L.C.,* 90 Va. Cir. 240 (Norfolk 2015).

The parties expressly disavowed admissions of the truth of any assertions contained in each other's documents. "This 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." JA at 560 (emphasis added). Nevertheless, FCPD persists in characterizing its own disputed assertions, questionable conclusions, public relations talking points, inconsistent statements, discovery answers, and inadmissible double and triple hearsay as "conclusive" and "undisputed" "evidence" in support of the summary judgment decision.[5]

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[5] Throughout its written and oral arguments below, FCPD repeatedly referred to its own untested assertions and discovery responses as "facts not genuinely in dispute," FCPD Memo at 2-5 (JA at 199-202); "evidence produced in discovery [that] conclusively establishes" certain facts, FCPD Memo at 11 (JA at 208); facts "demonstrated repeatedly and conclusively by the evidence," FCPD Memo at 12 (JA at 209), and "[t]he uncontroverted evidence produced in discovery," FCPD Memo at 1-6 (JA at 198-203). It continues this clearly inappropriate characterization in this Court. *See, e.g.,* Appellees' Brief at 15-19, 22.

FCPD heavily relied in its memoranda below ("FCPD Memo") – and does again in its brief – on self-serving, untested, and opinionated statements and characterizations from its own discovery responses. *See, e.g.,* Appellees' Brief at 15-19, 22; FCPD Memo at 2-12 (JA at 199-209). These highly disputable characterizations and opinions were derived from, for example: (1) ALPR equipment manufacturer's promotional materials, *see, e.g.,* FCPD Memo, Exs. 3 and 5 (JA at 240-244, 257-289); (2) a multi-jurisdictional plan for "goals and objectives," *see* FCPD Memo, Ex. 4 (JA at 245-255); (3) internal FCPD emails describing double- and triple-hearsay anecdotes of alleged ALPR successes, *see e.g.,* FCPD Memo, Ex. 7 (JA 291-309); (4) Defendants' own answers to Neal's Interrogatories and denials of his Requests for Admissions, FCPD Memo, Exs. 1, 2 (JA at 214-215, 216-231); and even (5) a "draft press release" recounting Chief Roessler's public statements in response to ***Neal's lawsuit***. *See* FCPD Memo, Ex. 6 (JA at 290). With the single exception of Neal's own requests for his ALPR data, *see e.g.*, FCPD Memo, Ex. 9 (JA at 311-315), none of FCPD's "evidence" was ever adopted or admitted as true by Neal. Because they are full of multi-layered hearsay, rank personal opinion, and unfounded, argumentative claims,[6] FCPD's "undisputed"

[6] For instance, FCPD insists that its ALPRs do not capture images that are "state specific." FCPD Memo at 3 (JA at 200). Yet the official product brochure for its own ALPR system repeatedly lauds the technology's ability to "identify the state that issued the plate." FCPD Memo, Ex. 3 (JA at 241).

facts are not only inappropriate for purposes of their summary judgment motion, but would be largely inadmissible even at trial. FCPD's "facts", derived as they are from FCPD's own inadmissible discovery responses cannot be used to affect the outcome of this appeal.[7]

IV. THE ATTORNEY GENERAL'S INTERPRETATION OF THE DATA ACT FULLY APPLIES TO FCPD'S ALPR PROGRAM AND SHOULD BE ADOPTED BY THIS COURT.

Despite the obvious scope, meaning, and rationale of the AG Opinion, FCPD insists that the opinion's analysis of whether the State Police database contains personal information is "inapplicable to an analysis of the FCPD database," Appellees' Brief at 20, because the FCPD ALPR database "does not house any of the types of information" considered by the Attorney General. *Id.; see generally* Appellees' Brief at 17-22. *See also*, FCPD Memo at 12-13 (JA at 209-210).

FCPD's first argument is a mere tautology: *since FCPD's system does not contain "personal information," it must be distinguishable from the State Police database that the AG considered*. Second, to the extent it is based upon FCPD's inappropriate proffer of so-called "undisputed evidence" contained in its own self-serving and never-admitted discovery responses, *see* Appellees' Brief at 14-17, it is

[7] On the other hand, these and similar documents, as well as portions of FCPD's discovery answers, were appropriately used by Neal as evidentiary ***admissions*** made by ***his*** party-opponent (FCPD). *Tri-Port Terminals, Inc. v. Hitch S. Branch Terminal, LLC*, 87 Va. Cir. 314 (Chesapeake 2013). *See also* JA at 557-559.

also inconsistent with the limited scope of Virginia's summary judgment process under Rule 3:20. Most importantly, FCPD's argument deserves rejection because it is a wholesale misreading of the AG Opinion itself. The plain language of that opinion clearly shows that FCPD's attempt to distinguish it based on some supposed difference in technology or practice is without merit. The AG Opinion expressly and categorically determined that passive ALPR data -- the exact functional equivalent of the Neal's dormant ALPR data in the FCPD system -- comprises "personal information" within an "information system" that pertains to a "data subject" (Neal). The equipment and operations described in the AG Opinion are indistinguishable from FCPD's:

> **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. * * *
>
> **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. * * * 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.

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", *see* JA at 327, n.7 -- were manifestly intended to apply to ***any*** Virginia law enforcement agency's passive storage of LPR data. The Attorney General's frequent references to "data obtained through LPRs" by "law enforcement agencies" are made with no qualifications, limitations, or caveats: "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[.]'" JA at 327. Technologically and operationally, all passive uses of ALPR systems are essentially identical:

> The reason for this inquiry is another growing use of this technology. LPR systems can also be used to collect raw data. Whether the LPR reader is mobile or fixed, **the data collected includes the image of the place, the time, date and precise location the license plate in question was captured by the system. This is accomplished passively and continuously**. If the LPR system is on, it will capture and store the data for every license in plain view to the public it encounters. On a routine patrol, this may include thousands of license plate numbers and locations ... This can, and has been an invaluable tool in developing leads in terrorism investigations and criminal cases. *Id.*

Later in his opinion, JA at 327-328, the Attorney General added this:

> 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."

This is a perfect description of the passive collection and storage of ALPR data that was captured and stored for at least a year within FCPD's ALPR system. FCPD's efforts to suggest some material difference are futile.

V. FCPD'S STORAGE OF NEAL'S PERSONAL INFORMATION IS NOT EXEMPT AS DATA RELATED TO A CRIMINAL INVESTIGATION.

FCPD argues that the AG Opinion has "no application" to its claimed exemption under Code § 2.2-3802(7) "for investigations and intelligence gathering relating to criminal activity," because that opinion "is only applicable to the law enforcement entity that is also governed by the Virginia Fusion Center statutes: the Virginia State Police." Appellees' Brief n.6; *see generally, id.,* at 14-15, 19, 21-22. It was only because the AG "found that the State Police database did not conform" to the Fusion Center statutes," FCPD argues that the AG "opined that the State Police ALPR database was not exempted from the Act." *Id*. at 21-22. "According to the Attorney General's analysis, the FCPD database is not governed by the Act." *Id*. at 22.[8]

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[8] For example, FCPD asserts the "undisputed fact" that its ALPR system is used "to identify vehicles that are of specific interest in law enforcement investigations," JA at 199. On that basis, it claims that its long-term retention of Neal's LTA Data comes within the exemption for information related to criminal investigations under Va. Code § 2.2-3802(7). JA at 207-209. FCPD provides a few "examples" of such ongoing investigations "from the time period wherein the ADDCAR license plate photograph was retained by FCPD." JA at 208. It argues 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 has FCPD ever explained what relevance -- not to mention "specific interest" -- Neal's ALPR data may have, even remotely, to any active "law enforcement

This is simply untrue. The AG Opinion dealt separately with the two different statutory exemptions applicable to the State Police[9] and found that the passive ALPR program was subject to and in violation of both:

> 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***.

JA at 328 (emphasis added). The AG Opinion concludes 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***." JA at 325-329 (emphasis added). Finally, the AG Opinion, JA at 529 states:

> 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***. (emphasis added).

If FCPD could show some specific connection between Neal's ALPR record and a particular criminal investigation, the Data Act would no doubt permit its

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investigation." The plain fact is that the records of Neal's vehicular travels have ***no connection whatsoever with any such investigation***.

[9] The AG opinion specifically analyzes the language of Va. Code § 2.2-3802(7) and independently concludes that passive ALPR data does not fall within its scope.

retention. But FCPD claims much more than that. It asserts a blanket exemption for all location data, even data like Neal's that has no relevance to any criminal inquiry. The Attorney General correctly determined that a dormant ALPR record is only exempt when that particular record, unlike Neal's, can be shown to "***relat[e] directly*** to law enforcement investigations and intelligence gathering respecting criminal activity." JA at 329 (emphasis added). Unless such a direct connection can be "clearly established in advance," then, this Court should affirm, "[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." JA at 325-329.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 8, 2017, the Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy of the Reply Brief was sent via email to all counsel of record, at the email addresses below:

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