In The

# Supreme Court of Virginia

RECORD NO. 170247

## HARRISON NEAL,

*Petitioner – Appellant,*

v.

## FAIRFAX COUNTY POLICE DEPARTMENT, *et al.*,

*Respondents – Appellees.*

## BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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**HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:**

Appellees, Fairfax County Police Department (FCPD) and Colonel Edwin C. Roessler Jr. (Chief Roessler), by counsel, pursuant to Rule 5:18 of the Rules of the Supreme Court of Virginia, in opposition to the Petition for Appeal filed by the Appellant, Harrison Neal (Appellant), state that the Circuit Court for the County of Fairfax (Circuit Court) properly sustained the Appellees' motion for summary judgment, properly denied the Appellant's motion for summary judgment, and properly dismissed the case, and, therefore, the Petition for Appeal should be denied.

## STATEMENT OF THE CASE

On May 5, 2015, the Appellant filed a Complaint against the FCPD and Chief Roessler, Chief of the FCPD. The Complaint alleged that the FCPD and Chief Roessler violated the Data Collection and Dissemination Practices Act (the Act), Va. Code Ann. §§ 2.2-3800 *et seq.*, by retaining photographic images of Appellant's vehicle's license plate in a database. (Compl. ¶ 33.)[1] Appellant's assertions largely were premised on a 2013 Attorney General opinion addressing a similar Virginia State Police (State Police) database. (Compl. ¶¶ 26-31.) Appellant requested that the Circuit Court issue an injunction and/or a writ of

[1] References to the Appellant's Complaint are noted by "Compl." followed by the applicable paragraph number(s).

mandamus pursuant to Va. Code Ann. § 2.2-3809, prohibiting future violations of the Act.

On August 3, 2016, the Appellees filed a motion for summary judgment, requesting that the case be dismissed due to the Appellant's failure to establish that he was entitled to an injunction. On the same date, the Appellant filed a motion for summary judgment.

On November 22, 2016, the Circuit Court granted the Appellee's motion, denied the Appellant's motion, and dismissed the case. The Circuit Court's order was based on a letter opinion (Opinion) dated November 18, 2016, which was incorporated into the November 22, 2016, order.

## STATEMENT OF FACTS

The FCPD is the primary law enforcement agency in Fairfax County, and its officers responded to 447,818 calls for service in 2014. (Def. SJ Ex. 1, Response 1.)[2] Within Fairfax County, on an average day in 2014, 21 citizens were the victim of crimes against persons, and 71 citizens were the victim of crimes

[2] References to the Appellees' Memorandum in Support of Summary Judgment are noted as "Def. SJ" followed by the applicable page or exhibit number. Exhibit 1 of the Appellees' Memorandum in Support of Summary Judgment was a copy of the Appellees' responses to the Appellant's First Request for Admissions. References to particular responses are cited as "Ex. 1, Response" followed by the applicable request number. Also included within Exhibit 1 was the Appellees' sworn response to Appellant's Second Set of Interrogatories, which addressed the Admissions denials.

against property. (Def. SJ Ex. 1, Response 1.) In 2014, FCPD officers addressed an average of 1,227 calls for service per day. (Def. SJ Ex. 1, Response 1.)

The FCPD utilizes Automatic License Plate Reader (ALPR) equipment and technology as part of its effort to detect criminal activity and promote the health, safety, and welfare of Fairfax County residents and visitors. (Def. SJ Ex. 2.)[3] The FCPD ALPR program is a tool for law enforcement to identify vehicles that are of specific interest in law enforcement investigations. (Def. SJ Ex. 2.) The FCPD receives funding and equipment for its ALPR program through a federal Department of Homeland Security Urban Areas Security Initiative (UASI) monetary grant, and utilizes equipment provided by ELSAG North America, with the MPH-900 computer application. (Def. SJ Ex. 1, Response 6; Def. SJ Ex. 3.)[4] Along with other local jurisdictions in the D.C. Metro area, the FCPD is a member of the National Capital Region (NCR), and participates in the Homeland Security Strategic Plan with all other NCR jurisdictions. The stated purpose of the Strategic Plan is to ensure that NCR jurisdictions are prepared to respond to regional events,

[3] Exhibit 2 of the Appellees' Memorandum in Support of Summary Judgment was the FCPD's current Standard Operating Procedure (SOP) 11-039, signed by Colonel Roessler on January 1, 2011, which governs the FCPD ALPR program.

[4] Exhibit 3 of the Appellees' Memorandum in Support of Summary Judgment was the MPH-900 Application Overview.

including events that require collection, analysis, and dissemination of intelligence and investigative information. (Def. SJ Ex. 4.)[5]

The FCPD ALPR program utilizes cameras, which can be stationary or mounted on a police cruiser, that capture images of passing vehicles' license plates. (Def. SJ Ex. 5; Def. SJ Ex. 6.)[6] The MPH-900 application converts license plate photos taken by ALPR cameras into a digital number/letter combination that is not state specific, and compares that number/letter combination in real time against a list of stolen or wanted license plate numbers, commonly known as a "hot list," which is published twice daily by the Virginia State Police (State Police). (Def. SJ Ex. 5.) Captured license plate images, the letter/number combination, and the GPS coordinates of the location where the image was captured, are stored in an electronic FCPD ALPR database for 364 days, after which time they are automatically purged from the database pursuant to FCPD policy. (Def. SJ Ex. 2.)[7]

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[5] Exhibit 4 of the Appellees' Memorandum in Support of Summary Judgment was the National Capital Region Homeland Security Strategic Plan.

[6] Exhibit 5 of the Appellees' Memorandum in Support of Summary Judgment was a copy of the training materials for certified FCPD ALPR users. Exhibit 6 of the Appellees' Memorandum in Support of Summary Judgment was a copy of a draft press release published by the FCPD related to its ALPR program.

[7] Appellant has no objection to the FCPD's capture of license plate images, or its electronic comparison of the resulting number/letter combinations against the State Police hot list. *See* Complaint, at ¶ 7. At issue in this matter is only the FCPD's practice of maintaining a database of the letter/number combinations in a database for 364 days, which Appellant alleged violates the Act.

Information stored in the FCPD ALPR database provides an additional investigative tool for FCPD officers in the detection or investigation of criminal activity, or in responding to other calls for service, including AMBER alerts and missing or endangered persons. (Def. SJ Ex. 2, Def. SJ Ex. 3.)

FCPD employees who have been certified and trained as ALPR system users may query the database to gather information and intelligence in FCPD criminal investigations, or at the request of other NCR member agencies for assistance in their own criminal investigations. (Def. SJ Ex. 7.)[8] The ALPR database is searchable only by license plate number. The database does not maintain the make, model, year, or registration information associated with a vehicle, nor does it photograph or identify the owner or driver of the vehicle, or capture the owner's or driver's identifying information. (Def. SJ Ex. 6.)

On May 7, 2014, Appellant submitted a request to FCPD pursuant to the Act and the Virginia Freedom of Information Act (VFOIA), Va. Code Ann. §§ 2.2-3700, *et seq.*, for all documents in the custody of the FCPD pertaining to Neal's license plate number "ADDCAR." (Def. SJ Ex. 8.)[9] On May 15, 2014, the

[8] Exhibit 7 of the Appellees' Memorandum in Support of Summary Judgment contained examples of instances wherein FCPD employees have queried the ALPR database in an effort to further these criminal investigations.

[9] Exhibit 8 of the Appellees' Memorandum in Support of Summary Judgment was a copy of Appellant's May 7, 2014, request for information pertaining to the license plate number ADDCAR.

FCPD provided a timely response to Appellant's request, producing documentation from two instances wherein a FCPD ALPR camera captured the image of the ADDCAR license plate, which were both maintained in the ALPR database. (Def. SJ Ex. 9.)[10] A photo of the ADDCAR license plate was captured by a FCPD LPR camera on two occasions: April 26, 2014, and May 11, 2014. (Def. SJ Ex. 9.) The FCPD ALPR database did not contain Appellant's name, address, date of birth, or any information related to the individual to whom the ADDCAR license plate number was registered. Likewise, it did not reflect the make, model, year or registration information for the vehicle. The only information maintained as to the ADDCAR license plate in the FCPD ALPR database was a photograph of the license plate and the GPS coordinates for the location where each photo was captured. (Def. SJ Ex. 2; Def. SJ Ex. 6; Def. SJ Ex. 9.)

During the time period that a photo of the ADDCAR license plate was maintained in the FCPD ALPR database, among other criminal investigations, the FCPD was participating in at least two regional task forces. Both task forces involved criminal investigations into a series of burglaries in the region, and both included crimes committed within Fairfax County. (Def. SJ Ex. 1, Response 1;

[10] Exhibit 9 of the Appellees' Memorandum in Support of Summary Judgment was the FCPD's response to Appellant's May 7, 2014, request.

Def. SJ Ex. 10.)[11] During the time period that the ADDCAR license plate photo was maintained in the FCPD ALPR database, certified FCPD users utilized the database to support their investigative efforts into crimes that were committed and investigated during that time. (Def. SJ Ex. 1, Response 2; Def. SJ Ex. 7.)

## STANDARD OF REVIEW

The Circuit Court's judgment in this case on the Appellees' motion for summary judgment was based upon questions of law; therefore, this Court must review the ruling *de novo*. *Janvier v. Arminio*, 634 S.E.2d 754, 759 (Va. Sup. Ct. 2006); *Sheets v. Castle*, 559 S.E.2d 616, 618 (Va. Sup. Ct. 2002). Under Rule 3:20 of the Rules of the Virginia Supreme Court, either party may make a motion for summary judgment. Moreover, the court may grant such motion if it appears that the moving party is entitled to judgment as a matter of law. *Shutler v. Augusta Health Care for Women, P.L.C.*, 630 S.E.2d 313, 315 (Va. Sup. Ct. 2006).

[11] Exhibit 10 of the Appellees' Memorandum in Support of Summary Judgment contained documentation related to both task force investigations.

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN HOLDING THAT A VEHICLEE LICENSE PLATE NUMBER IS NOT PERSONAL INFORMATION AS DEFINED IN THE ACT.

The Appellant argues on appeal that the Circuit Court erred in finding that a vehicle's license plate number does not fall within the definition of "personal information" as defined by the Act.[12] Based upon the Circuit Court's statutory construction analysis, there was no error in the court's determination that a vehicle license plate number is not personal information under the Act.

It is well settled that "[t]he plain, obvious, and rational meaning of a statute is always preferred to any curious, narrow or strained construction." *Rasmussen v. Commonwealth*, 522 S.E.2d 401, 403 (Va. Ct. App. 1999) (quoting *Gilliam v. Commonwealth*, 465 S.E.2d 592, 594 (Va. Ct. App. 1996)). "Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation." *Rasmussen*, 465 S.E.2d at 403. Furthermore,

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[12] The Appellant's claim that the Circuit Court inappropriately framed the statutory construction question through the lens of Constitutional privacy interest doctrine is misleading. The opinion clarified at numerous points that the issue of whether the term license plate number is "personal information" as defined in the Act is one of statutory construction. (Opinion at pp. 1, 2, 4, 5, 6). Further, the Circuit Court recognized that, while these Constitutional cases are helpful, they "do not answer our specific issue, *viz.*, whether a license plate number is personal information." *Id.* at 6. The Circuit Court clearly framed the issue correctly as one of statutory construction.

> [u]nder the rule of *ejusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. Likewise, according to the maxim *noscitur a sociis* . . . when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.

*Surles v. Mayer*, 628 S.E.2d 563, 572 (Va. Ct. App. 2006). *See also Wood by and Through Wood v. Henry Cnty. Public Schs.*, 495 S.E.2d 255, 94-5 (Va. Sup. Ct. 1998); *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 587 S.E.2d 701, 710 (Va. Sup. Ct. 2003).

The General Assembly has unambiguously defined the term "personal information" in the Act to include information that describes, locates, or indexes anything *about an individual*, such as an individual's "social security number, driver's license number, agency-issued identification number, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record," or the personal characteristics *of an individual*, such as "finger and voice prints, photographs, or things done by or to *such individual*; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution." Va. Code Ann. § 2.2-3801 (emphasis added).

As a license plate number is not specifically identified within the definition of "personal information," the Court must determine whether the legislature, by use of the phrase "including, but not limited to," intended to include a vehicle's license plate number as a term similar in nature to the specific examples of an individual's personal information included in the statute. *Surles*, 628 S.E.2d at 571-72. Unlike all of the specific terms contained in the definition of "personal information," the license plate number of a vehicle, particularly one that is not connected to a particular issuing state, says absolutely nothing about an individual, his personal characteristics such as his fingerprints, or his membership in an organization. Indeed, the only reason that the Appellees received any of Appellant's personal information was because the Appellant himself furnished his name, address, and a photocopy of his Virginia operator's license to the FCPD in his FOIA requests. (Def. SJ Ex. 8; Def. SJ Ex. 11.) The only information that the FCPD maintained in its information system relevant to the Appellant's claims were two photographs of a license plate bearing the characters ADDCAR, and the date, time, and location that each photo was taken. (Def. SJ Ex. 9.) The FCPD's ALPR database contained no additional information associated with the license plate number, nor did it contain any information specific to the Appellant. (Def. SJ Ex. 9.)

The Circuit Court concluded that a vehicle license plate number does not fall within the Act's definition of personal information because it is a number that is associated with *a vehicle*, as opposed to the examples of personal information contained within the Act, all of which related to numbers or information specific to *an individual*. (Opinion, p. 5.) Thus, the Circuit Court correctly held that the vehicle license plate information contained in the FCPD's ALPR database was not the personal information of an individual, and the Appellant was not entitled to an injunction.

## II. THE APPELLEES' MOTION FOR SUMMARY JUDGMENT WAS PROPER FOR THE ADDITIONAL REASONS ARGUED THEREIN, BECAUSE THE APPELLANT IS NOT AN INDIVIDUAL ENTITLED TO AN INJUNCTION UNDER THE ACT.

Even if this Court finds that the Circuit Court incorrectly determined that a vehicle license plate number is not personal information, the Appellees' motion for summary judgment was properly granted because the Appellant is not a data subject as defined by the Act, and the FCPD's ALPR database is not an information system as defined by the Act. According to the Act, government agencies that maintain an information system, which includes the personal information of data subjects must maintain that system within particular standards set out by statute. Va. Code Ann. §§ 2.2-3800, *et seq*. Before the Appellant may avail himself of the remedies provided in the Act, he must establish that the FCPD's ALPR program is governed by the Act, and that he qualifies as an

individual entitled to an injunction or writ of mandamus pursuant to Va. Code Ann. § 2.2-3809.

To qualify as an aggrieved person who is entitled to an injunction or writ of mandamus pursuant to Va. Code Ann. § 2.2-3809, the Appellant must first prove that he is a data subject whose personal information has been retained by the FCPD in an agency information system without authorization by law. *See* Va. Code Ann. § 2.2-3800. These terms, as defined in the Act, impose upon the Appellant the obligation to prove that images of the license plate ADDCAR and the corresponding date, time, and location of the camera that captured the images, constitute his personal information as defined by the Act.[13] As such, in addition to the analysis of whether a vehicle license plate number constitutes "personal information" under the Act, the meaning of the terms "data subject" and "information system" as defined in Va. Code Ann. § 2.2-3801 are applicable to the Court's inquiry.

In addition to his failure to establish that a vehicle's license plate number falls within the Act, the Appellant also failed to establish that the information regarding the ADDCAR license plate was maintained in an "information system"

[13] In the event that the Court finds the Circuit Court to have erred in its reasoning as to what constitutes personal information, this Court could still affirm its judgment as right for the wrong reason based on the analysis in Parts II and III of this brief. See *Miller & Rhouds Building, L.L.C. v. City of Richmond*, 790 S.E.2d 484, 487 (Va. Sup. Ct. 2016) (citation omitted); *Lynnhaven Dunes Condo. Ass'n v. City of Virginia Beach*, 733 S.E.2d 911, 915 (Va. Sup. Ct. 2012).

as defined by the Act. According to Va. Code Ann. § 2.2-3801, an "information system" consists of "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.*" (Emphasis added.) The record-keeping process at issue here is the FCPD ALPR database. Therefore, even if it is assumed that the Appellant's license plate number constitutes personal information as defined by the Act, the Appellant is still required to establish that the FCPD database qualifies as an information system before he would be entitled to relief.

To qualify as an "information system" that is governed by the Act, the FCPD's ALPR database must house both personal information and a second piece of information that constitutes "the name, personal number, or other identifying particulars of a data subject." Va. Code Ann. § 2.2-3801. Assuming, for the sake of argument, that the ADDCAR license plate number constitutes the Appellant's personal information, the Appellant must then establish that the FCPD's database contains at least one other piece of information that would identify him, such as his name, or a number associated with his name. It is uncontroverted that the FCPD's ALPR database maintains only the vehicle license plate number. No other information about the individual who is the owner or driver of the vehicle is

maintained in the database. Therefore, even if it is assumed that a license plate number is personal information, the fact that the database contains no additional information as required by Va. Code Ann. § 2.2-3801 is fatal to the Appellant's claim because the FCPD database cannot, by the Act's definition, be an information system.

Because a license plate number is not personal information as defined by the Act, and because the FCPD's ALPR database does not constitute an information system as defined by the Act, the Appellant is not a data subject, i.e., "an individual about whom personal information is indexed . . . in an information system." Va. Code Ann. § 2.2-3801. As such, the Appellant was not entitled to relief under to the Act, the Appellees were entitled to summary judgment, and the Complaint was properly dismissed.

## III. THE APPELLEES' MOTION FOR SUMMARY JUDGMENT WAS PROPER FOR THE ADDITIONAL REASONS ARGUED THEREIN, BECAUSE THE FCPD IS ENTITLED TO THE CRIMINAL INVESTIGATIVE EXEMPTION CONTAINED WITHIN THE ACT.

Even if the Appellant is a data subject and the FCPD ALPR database is an information system as both terms are defined in the Act, summary judgment in favor of the Appellees was proper because the FCPD ALPR database "deal[s] with investigations and intelligence gathering related to criminal activity," which operates to exclude it from the Act. Va. Code Ann. § 2.2-3802(7). The uncontroverted evidence produced in discovery established that the FCPD

maintains its database of ALPR information for 364 days in conjunction with the Homeland Security Strategic Plan, and in an effort to provide investigative assistance to its own officers, and officers in the NCR who investigate criminal activity. (Def. SJ Ex. 2; Def. SJ Ex. 4.)

This also was demonstrated by evidence of FCPD employees conducting queries of the database in criminal cases, including murder, robbery, sexual assault, and burglary investigations. (Def. SJ Ex. 7.) Specifically, during the time period wherein the ADDCAR license plate number was maintained in the FCPD ALPR database, the FCPD, in conjunction with its NCR partner jurisdictions, investigated two serial burglary cases, one involving burglaries of local business establishments, and the other involving residential burglaries of Fairfax County homes. (Def. SJ Ex. 10.) Also during this time period, NCR jurisdictions worked together to locate and capture Wossen Assaye (Assaye), a federal prisoner who escaped from a Fairfax hospital and carjacked two victims in the process of his escape. (Def. SJ Ex. 7.) Witness descriptions of the second carjacking victim's vehicle contained conflicting information as to the color of the vehicle. *Id.* ALPR information from a partner NCR jurisdiction provided this crucial information, as the color of the vehicle was visible in the photograph of the license plate, and this

information was relayed to FCPD officers, who utilized it to narrow the scope of suspect vehicles during their perimeter search.[14] *Id.*

In addition to these specific examples from the time period during which the ADDCAR license plate photograph was retained by the FCPD, evidence produced in discovery conclusively established that the ALPR database has been an invaluable source of intelligence that has enabled FCPD officers to solve crimes and apprehend criminals. (Def. SJ Ex. 7.) This evidence further establishes the public safety related need to maintain this data for passive use even if the target vehicle's license plate number is not on the State Police hot list. For example, in 2012, an FCPD officer used the ALPR database to locate a victim's stolen vehicle after the victim reported that the vehicle was stolen while he was asleep. (Def. SJ Ex. 7.) The database contained an image of the stolen vehicle's license plate number, along with the location where the photograph was captured. *Id.* The officer proceeded to that location and found the victim's vehicle. *Id.* The license plate number was not on the State Police hot list when the photograph was taken, because the victim had not yet discovered the crime.

As was demonstrated repeatedly and conclusively by the uncontroverted evidence in this case, information maintained within the FCPD ALPR database

[14] Obviously, the color of a vehicle does not constitute personal information, and the fact that some ALPR license plate images include portions of the exterior of a vehicle does not change the analysis herein.

constitutes intelligence that the FCPD utilizes routinely in its efforts to investigate crimes and make arrests of individuals who violate the law. As such, the database falls squarely within the exception provided by Va. Code Ann. § 2.2-3802(7), and the ALPR database is not regulated by the Act.

## IV. NEITHER THE ATTORNEY GENERAL OPINION NOR THE PRIOR CIRCUIT COURT OPINION WERE BINDING PRECEDENT AT SUMMARY JUDGMENT, AND THE FAILURE TO FOLLOW THEM WAS NOT ERROR.

No binding authority exists in Virginia that addresses the issue of whether retaining license plate numbers in a database violates the Act. Appellant's argument on this point is largely premised on his reliance on the related 2013 Attorney General opinion. (Compl. ¶¶ 26-31.) However, the evidence produced in discovery clearly establishes that the Attorney General opinion upon which Appellant relies is inapplicable to the FCPD's database.[15] Furthermore, while an opinion of the Attorney General is entitled to "due consideration," it is not binding authority in this Court's consideration of the matter. *See Twietmeyer v. City of Hampton*, 497 S.E.2d 858, 861 (Va. Sup. Ct. 1998).

On February 13, 2013, the Attorney General issued an opinion in response to a request by Colonel W.S. Flaherty of the State Police, regarding the State Police

[15] The Circuit Court's November 18, 2016, opinion found that, while the Attorney General opinion was "instructive and helpful," it was not controlling. (Opinion, p. 5, n. 5.) The Court further ruled that the Appellees' argument that the Attorney General's opinion was not applicable to the FCPD ALPR database was correct. *Id.*

ALPR system. Op. Va. Att'y Gen. 12-073 (February 13, 2013). The opinion related to whether law enforcement agencies, including the State Police, could maintain data such as license plate numbers in an ALPR database. As outlined below, the opinion is readily distinguishable when viewed in light of the evidence produced in this case, and therefore does not support Appellant's position that the FCPD violated the Act when it maintained the ADDCAR license plate photos in its ALPR database.

The Attorney General's opinion addressed two provisions of the Act that impacted the conclusion that the State Police ALPR program violated the Act. First, the Attorney General assumed, without any analysis, that the State Police program maintained personal information of data subjects. Op. Va. Att'y Gen. 12-073 (February 13, 2013). Second, the Attorney General concluded that the State Police program was not exempted from the Act. *Id.* While the opinion ultimately concluded that the State Police failed to demonstrate that their ALPR database met the parameters of the Act, it clearly left open the possibility that other ALPR programs could either satisfy the Act, or be excluded entirely from the Act pursuant to Va. Code Ann. § 2.2-3802(7), based upon the particulars of the database related to that program. *Id.* at 5 (concluding that the 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 related to criminal activity"). Applying the reasoning of the Attorney General opinion to the evidence produced in this case, it is clear that the Appellant's reliance on the opinion to support his claims is misguided because the FCPD ALPR program does not contain personal information, and because the program clearly falls within the exemption provided in Va. Code Ann. § 2.2-3802(7), as recognized by the Attorney General.

First, as to the issue of whether an ALPR program maintains personal information, the Attorney General opined that a database that "may assist in locating an individual data subject, documenting his movements, or determining his personal property holdings," would fall within the parameters of the Act. *Id.* at 3. In further explanation, the Attorney General stated that "[r]eadily attainable information" in such a database "may include the vehicle registrant's name, address, vehicle information, and potential lien status." *Id.* at n. 7. The FCPD ALPR database clearly falls outside of the Attorney General's definition of a database that would violate the Act because it does not house any of the types of information listed within the Attorney General's examples of personal information of an individual. Quite to the contrary, the information contained in the FCPD ALPR database contains none of the information outlined above, nor does the database index the license plate number of a vehicle with any of the types of personal information listed in the Attorney General's opinion. (Def. SJ Ex. 9.) As

such, the opinion's analysis of whether the State Police database contains personal information is inapplicable to an analysis of the FCPD database.

Second, as to the issue of whether the State Police ALPR database was exempt from the Act, the opinion's analysis also is inapplicable to this case. According to the Attorney General, an ALPR database could be excluded from the Act pursuant to two separate statutes: Va. Code Ann. § 52-48, which establishes the Virginia Fusion Intelligence Center (Fusion Center), which is to be maintained by the State Police, and Va. Code Ann. § 2.2-3802(7), which is the exemption contained within the Act for "investigations and intelligence gathering relating to criminal activity" and which is the exemption relied upon by the FCPD in this case should the Court conclude that the FCPD ALPR database is subject to the Act.

The Fusion Center database is exempted from the Act because the information contained therein constitutes "criminal intelligence information," a term that by definition is more restrictive than the exemption provided in the Act. Va. Code Ann. § 52-48. According to the Attorney General, because State Police are required to maintain intelligence information in accordance with the parameters of the Fusion Center statutes, they may not maintain a database outside of those parameters. Op. Va. Att'y Gen. 12-073, at 4 (February 13, 2013). Therefore, because the State Police database must comply with the Fusion Center statutes, which provide a more restrictive exemption for criminal intelligence information,

and because the Attorney General found that the State Police database did not conform to the requirements for the Fusion Center, the Attorney General opined that the State Police ALPR database was not exempted from the Act.

This leaves, however, the exemption provided within the Act for information related to "investigations and intelligence gathering respecting criminal activity." *Id.* at 5. In analyzing this exemption as it would relate to other ALPR databases, the Attorney General recognized that, although the State Police could not justify their ALPR database by labelling the data contained within "criminal intelligence information," an ALPR database could still be exempted from the Act if it satisfied Va. Code Ann. § 2.2-3082(7). The FCPD ALPR database does just that. The evidence produced in this case conclusively establishes, as outlined *supra*, that the FCPD database is clearly properly classified as "deal[ing] with investigations and intelligence gathering relating to criminal activity." *See* Va. Code Ann. § 2.2-3802(7). As such, according to the Attorney General's analysis, the FCPD database is not governed by the Act.

The Appellant also asserts that the Circuit Court conclusively ruled in his favor at demurrer as to the issue of whether a license plate number constitutes personal information as defined by the Act because Fairfax County Circuit Court Judge Grace Burke Carroll (Judge Carroll) ruled that the Appellant's Complaint alleged sufficient facts to establish that he was entitled to recovery. The Appellant

contends that Judge Carroll's ruling in his favor establishes the law of the case, and that the Appellees were thereafter prohibited from arguing that a license plate number is not personal information as defined in the Act.[16]

"Pursuant to the law of the case doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the 'same litigation.'" *See Kondaurov v. Kerdasha*, 629 S.E.2d 181, 187 (Va. Sup. Ct. 2006). Generally, the doctrine applies to litigation that has proceeded "in a 'linear' sequence to trial, appeal, trial on remand, and second appeal, all under the same set of pleadings." *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 826 (Va. Sup. Ct. 2008). *See also Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 524 S.E.2d 420, 429 (Va. Sup. Ct. 2000); *Kemp v. Miller*, 168 S.E. 430, 431 (Va. Sup. Ct. 1933). The doctrine has also been applied to "future stages of the same litigation" on appeal. *Kondaurov*, 629 S.E.2d at 187. In this context, this Court has held that "when two cases involve identical parties and issues, and one case has been resolved finally on appeal, [it] will not re-examine the merits of issues necessarily involved in the first appeal, because those issues have been

[16] The Appellant's assertion in his recitation of the facts of this case that Judge Carroll ruled that "ALPR records pertaining to Neal's automotive travels are indeed 'personal information' as defined in the Data Act and must be collected, maintained, and used only in conformity with its requirements" is patently false, and is belied by both of the exhibits to which the Appellant cites for support.

resolved as part of the 'same litigation' and have become the 'law of the case.'" *Miller-Jenkins*, 661 S.E.2d at 826.

The Appellant cites to no authority to support the proposition that, because the Appellees' Demurrer was overruled as to the issue of whether the Appellant's Complaint sufficiently alleged that a license plate number constituted personal information, the Circuit Court could not revisit that issue at summary judgment. Indeed, when viewed in the context of the differing legal standards for demurrer when compared to summary judgment, it is obvious that the law of the case doctrine is inapplicable here. At summary judgment, the Appellant could no longer rely on the bare assertions made in his Complaint; he was under the affirmative obligation to show that there was a material issue of fact that precluded the entry of judgment in the Appellee's favor as a matter of law. *Compare Abi-Njam v. Concord Condo., LLC*, 699 S.E.2d 483, 486 (Va. Sup. Ct. 2010) ("A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof") *with McCabe v. Reed*, 55 Va. Cir. 67, *3 (2001), *citing Stevens v. Howard D. Johnson Co.*, 181 F.2d 396 (4th Cir. 1950) ("A party is entitled to summary judgment only where the record, taken as a whole, could lead a rational trier of fact to only one conclusion").

Inexplicably, the Appellant attempts to bolster his argument by intentionally misrepresenting Judge Carroll's ruling and inserting favorable portions of the

hearing transcript, without providing the entire quote. According to the Appellant, Judge Carroll stated the following in denying the Defendants' Demurrer; "this Court finds that that information is personal information . . . [o]therwise what would be the point of holding that information?" (Petition for Appeal, p. 19.) When considered in its entirety, it is abundantly clear that Judge Carroll based her demurrer ruling on the sufficiency of the factual allegations contained in the Complaint, as required at the demurrer stage. What Judge Carroll actually said was:

> this Court finds that that information is personal information, *that it's pled, the facts are pled sufficiently enough to keep it within 2.2-3801 and that the information system as defined under that statute, that it is an information system as well with the data points and components and operations of a record keeping process.* Otherwise what would be the point of holding that information?

(Emphasis added.) (Appellant SJ Ex. 10, pp. 31-32.)[17] The Appellant cannot support his claims by intentionally misquoting Judge Carroll, who clearly recognized that the proper standard to apply at demurrer was whether the Appellant had sufficiently asserted, on the face of his Complaint, and assuming the veracity of all of the allegations therein, that a license plate number was personal information.

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[17] References to the Appellant's Memorandum in Support of Summary Judgment are noted as "Def. SJ" followed by the applicable page or exhibit number. Exhibit 10 of the Appellant's Memorandum in Support of Summary Judgment was a transcript of the parties' demurrer proceedings.

The Appellees were bound at demurrer to assume the truthfulness of the Appellant's well-pled factual allegations, including, for example, the assertion that a license plate number is connected to an individual, that maintenance of that number permits the tracking of a particular individual, or that the FCPD ALPR database indexes the personal information of an individual.[18] At summary judgment, the Appellant was no longer permitted to rely on such unsupported assumptions, nor was the Circuit Court in ruling on the parties' summary judgment motions. To the contrary, the Appellant was under an obligation to show that there was a genuine issue of material fact that precluded the entry of judgment in Appellee's favor as a matter of law, which the Circuit Court found that he failed to do.

## CONCLUSION

For the reasons stated herein, the Court should deny the Petition for Appeal filed by the Appellant against Appellees FCPD and Chief Roessler.

Respectfully submitted,

**FAIRFAX COUNTY POLICE DEPARTMENT**
**and**
**COLONEL EDWIN C. ROESSLER JR.**

[18] To the extent that the Appellant is arguing that Judge Carroll accepted his legal conclusions as true for purposes of demurrer, this would have been improper, and those accepted legal conclusions are certainly not binding on this Court.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2017, seven copies of this Brief in Opposition were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, one copy was served, via UPS Ground Transportation, to Appellant's counsel:

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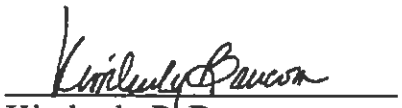

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