



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 18, 2016

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Re: *Harrison Neal v. Fairfax County Police Department, et al.*
Case No. CL-2015-5902

Dear Counsel:

This case comes before the Court on the Plaintiff's and the Defendants' motions for Summary Judgment. Plaintiff Harrison Neal brought the original action against Defendants Fairfax County Police Department (FCPD) and Colonel Edwin C. Roessler, Jr., FCPD Chief of Police. In that complaint, Neal alleges that FCPD's storage of the data collected by an Automatic License Plate Reader (ALPR) for 364 days violates the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.* (The Act). Neal requests that this Court issue an injunction and/or a writ of mandamus pursuant to Va. Code § 2.2-3809, prohibiting future violations of The Act.

There is one salient issue that this Court must decide: is a license plate number personal information? If a license plate is personal information, then FCPD has violated The Act. If a license plate number is not personal information,

then the deployment and use of ALPRs and the subsequent storage of the numbers for 364 days does not violate The Act.

I find that a license plate number is not personal information as that term is defined by The Act and therefore grant summary judgment for the Defendants. The Plaintiff's motion for summary judgment is denied.

FACTS

The parties do not dispute the following facts. FCPD is the primary law enforcement agency in Fairfax County. Since at least 2010, FCPD has used ALPR technology, in the form of specialized cameras mounted on either a police cruiser or a stationary structure, to capture and thereafter maintain a database of the captured individual license plate numbers. In addition to the license plate number, the ALPR records the date, time, and location of each capture. After an ALPR camera captures an image of a license plate, optical character recognition technology converts the image into text. FCPD's ALPRs capture license plates at a rate of up to 3,600 plates per minute. The ALPR technology automatically crosschecks captured license plates against a list of known license plates associated with suspected criminal activity—the Virginia State Police (State Police) “hot list.” Also called “active use,” Plaintiff does not challenge the propriety of the use of the hot list.

The State Police publishes the hot list twice daily, and the information is available to authorized law enforcement personnel via a secure website. The hot list is imported into the ALPR system either automatically through a server or manually by the end user. The end user may also manually enter a wanted vehicle license plate into the ALPR system along with a notation regarding the reason for entry (e.g. stolen vehicle, abduction, or robbery suspect). The ALPR software runs in the background of a Mobile Computer Terminal (MCT) and automatically alerts police operators to potential stolen vehicles or license plates in their vicinity by an audible and visual alarm on the computer screen. Irrespective of whether a “hit” occurs, FCPD stores the captured license plate information in a database for 364 days. After 364 days the data is purged from the database. This is called “passive use.” The Plaintiff's complaint exclusively addresses this passive use.

On May 7, 2014, Plaintiff Harrison Neal, a resident of Fairfax County, submitted a request to FCPD pursuant to The Act and the Virginia Freedom of Information Act (FOIA), Va. Code §§ 2.2-3700 *et seq.*, for all documents in FCPD's custody pertaining to his license plate number “ADDCAR.” On May 15, 2014, FCPD produced documentation from two instances where an FCPD ALPR camera captured an image of the “ADDCAR” license plate. The first capture occurred on April 26, 2014. The second capture occurred on May 11, 2014. FCPD maintained

both images in its ALPR database. The database did not contain Neal's name, address, date of birth or any information related to the registered owner of the vehicle associated with the "ADDCAR" license plate number. The only information stored as to the "ADDCAR" license plate was the photographs, and the date, time and GPS coordinates of the locations where the photos were captured.¹

SUMMARY JUDGMENT

A motion for summary judgment pursuant to Rule 3:20 grants trial court judges the authority to end litigation at an early stage in such cases where no material fact is genuinely in dispute. Va. Sup. Ct. R. 3:20. A trial judge may only exercise the authority to grant summary judgment "when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5 (1954). Summary judgment is not appropriate where an issue of material fact exists. Va. Sup. Ct. R. 3:20. The Court must determine whether the "moving party is entitled to judgment as a matter of law," only once it is established that there are no material facts genuinely in dispute. *Leeman v. Troutman Builds, Inc.*, 260 Va. 202, 206 (2000) (citations omitted).

The Supreme Court of Virginia has indicated repeatedly that summary judgment is considered a drastic remedy and is strongly disfavored. *Smith v. Smith*, 254 Va. 99, 103 (1997). Accordingly, a trial court considering a motion for summary judgment must "accept as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason." *Klaiber v. Freemason Assocs.*, 266 Va. 478, 484 (2003) (internal quotations omitted).

"The filing of cross-motions for summary judgment does not, in itself, resolve the question whether material facts remain genuinely in dispute." *Ashland v. Ashland Inc.*, 235 Va. 150, 154 (1988). The Court's "duty to ascertain whether facts remain in dispute or whether there are sufficient facts to decide the question presented is not obviated by cross motions for summary judgment." *Id.* (quoting *Central Nat'l Ins. Co. v. Virginia Farm Bureau Mut. Ins. Co.*, 222 Va. 353, 356 (1981)).

The issue of whether a license plate constitutes personal information presents a mixed question of law and fact which must be resolved in light of the facts and circumstances of this case. A motion for summary judgment may be properly denied where facts relevant to a mixed question of law and fact are in

¹ On January 2, 2016, Neal submitted a second request pursuant to The Act and FOIA for copies of all documents in FCPD's possession pertaining to the license plate number "ADDCAR." On January 13, 2016, FCPD notified Neal that FCPD did not have any documents responsive to his 2016 request.

issue. See *Kasco Mills, Inc. v. Ferebee*, 197 Va. 589, 593 (1956) (concluding material facts were in dispute and the trial court erred in entering a summary judgment). However, where, as is the case here, the facts relevant to resolution of a jurisdictional issue are not in dispute, the issue for the Court becomes the application of the law to the facts and determining whether the facts meet the statutory standard. *Cinnamon v. International Business Machines Corp.*, 238 Va. 471, 474 (1989) (citing *Carmody v. F.W. Woolworth Co.*, 234 Va. 198 (1987)). I believe this is such a case.

Initially we must determine exactly what the Plaintiff is challenging. As noted, the Plaintiff is challenging only the legality of the passive use. Although he could have, the Plaintiff does not challenge whether his data, or any data, for that matter, was erroneously maintained. The Plaintiff does not allege that the APLR malfunctioned², that the software that converts the image into text is flawed, that the database is subject to compromise, or any other of a myriad of possibilities. Only the legality of maintaining the database is challenged. That fact makes this case appropriate for summary disposition. The County Attorney argued at the hearing that the case is determined solely on the issues presented in the motions for summary judgment. I concur with that position.

ANALYSIS

As I noted earlier, there is one issue that decides the case. Is a license plate personal information?

The 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. "Personal information"

² ALPR technology is not infallible. An APLR can, in some instances, err, and possibly give rise to a cause of action for the person stopped and detained by virtue of the incorrect information returned by the ALPR. See, e.g., *Green v. City and County of San Francisco*, 751 F. 3d 1039 (9th Cir. 2014).

shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information.” Va. Code § 2.2-3801(emphasis added).

A license plate number is not included in the definition.³ However, by the clear (emphasized above) language of the statute, the definition is not exclusive but can include other types of information. I conclude that a license plate number should not be included in the definition.

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. By referring to other databases the license plate number can lead the researcher to the owner of the vehicle and nothing more. Even after determining the owner of a vehicle there is nothing more that can be determined. A license plate does not tell the researcher where the person is, what the person is doing, or anything else about the person.⁴

I could find no Virginia case that addresses the issue of the whether a license plate is personal information.⁵ Moreover, I could not find a case from any American jurisdiction—federal or state—that addresses the specific question of whether a license plate is personal information.⁶ The cases I have found discuss license plate numbers, but always in a different context from our specific question, usually within the context of the Fourth Amendment and privacy.

³ Some time was spent at argument about the fact that in 2015 the General Assembly passed legislation that would have included license plate numbers in the definition of personal information and that the Governor vetoed that legislation. This Court is bound by the statute as it exists. It would be improper, under these circumstances, for this Court to attempt to divine how the statute may someday read or how it may have read, or what was the intent of the General Assembly in passing legislation that was subsequently vetoed.

⁴ An ALPR does, of course, as noted, indicate the time the photograph was taken and the location where it was taken.

⁵ I am aware of the fact that there exists an Attorney General opinion that concludes that license plate numbers do fall within the definition of personal information. 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.

⁶ The Court of Appeal of Alberta (Canada) did address this specific question and concluded that a license plate is not personal information. *Leon’s Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 (CanLII). That court was not considering the propriety of ALPRs, but rather the collection of a driver’s license number and license plate number by a retailer from a customer. The Court concluded that the driver’s license number was personal information but that the license plate number was not.

The privacy analysis is helpful. Because, I submit, if certain information does not enjoy a privacy interest, how could it be said that the information is personal? By way of examples, a person has a privacy interest in a social security number. There can be no doubt that a social security number is personal information. A person has a privacy interest in medical treatment. There can be no doubt that medical treatment is personal information. However, there can be no privacy interest in information that is publicly disclosed, even if such disclosure is required by law.

When a law enforcement officer runs a check of a license plate, no search has occurred for Fourth Amendment purposes. *U.S. v. Diaz-Castaneda*, 494 F. 3d 1146 (9th Cir. 2007). In *U.S. v. Ellison*, 462 F.3d 557 (6th Cir. 2006), the Court went so far as to say that not only is there no privacy interest in a license plate number, but a subsequent entry into a computer system to retrieve other non-private information does not constitute a search. See *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529, (5th Cir. 1999) (“A motorist has no privacy interest in her license plate number.”); see also *U.S. v. Walraven*, 892 F.2d 972 (10th Cir. 1989) (concluding there is no privacy interest in a license plate because a license plate is in plain view).

The fact that these cases do not answer our specific issue, *viz.*, whether a license plate is personal information, does not mean that the cases do not assist in answering that fundamental issue. A reading of these cases logically leads to but one conclusion to that issue—license plate numbers are not personal information. It is unlikely that information that does not have a privacy interest could be classified as personal information. Notwithstanding the other arguments of counsel, once the issue of whether a license plate is personal information is decided in the negative, there is no material issue of fact and the analysis need go no further.

The County Attorney will prepare an order reflecting the Court’s decision, circulate it among counsel, and submit a signed copy to this Court by noon next Wednesday, November 23, 2016.

Sincerely,



Robert J. Smith
Judge, Fairfax County Circuit Court