

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT USE OF AUTOMATED LICENSE PLATE READER DATABASES

BENJAMIN HAYES*

INTRODUCTION

U.S. Immigration and Customs Enforcement (ICE) has completed contracts for access to privately maintained automated license plate reader databases.¹ Although these databases are a powerful tool for both law enforcement agencies and private interests,² the use of these databases raises privacy concerns.³ ICE's new access comes at a time when the use of aggregate location data has recently been addressed by the Supreme Court⁴, and the agency's enforcement efforts are increasingly being scrutinized in the public eye.⁵

AUTOMATED LICENSE PLATE READER DATABASES AND PRIVACY CONCERNS

An automated license plate reader (ALPR) is a tool that combines high-speed cameras with image-processing technology to capture images of license plates.⁶ ALPRs can capture thousands of images per hour from either fixed positions or on mobile cameras secured to vehicles.⁷ License plate images, along with other information such as time, date, GPS location of the imaging, and contextual photographs of the vehicles, are stored in databases.⁸ Law enforcement agencies use ALPR databases to connect license plates to crimes and infractions, verify witness descriptions of automobiles, identify

* Benjamin Hayes, J.D. Candidate 2020 Georgetown University Law Center; B.A. Political Science, University of Virginia 2013. © 2019, Benjamin Hayes.

Russell Brandom, *Exclusive: ICE is about to start tracking license plates across the US*, THE VERGE (Jan. 26, 2018), <https://www.theverge.com/2018/1/26/16932350/ice-immigration-customs-license-plate-recognition-contract-vigilant-solutions>.

1. Russell Brandom, *Exclusive: ICE is about to start tracking license plates across the US*, THE VERGE (Jan. 26, 2018), <https://www.theverge.com/2018/1/26/16932350/ice-immigration-customs-license-plate-recognition-contract-vigilant-solutions>.

2. *You are Being Tracked: How License Plate Readers are Being Used to Track Americans' Movements*, ACLU 6 (July 2013), <https://www.aclu.org/files/assets/071613-aclu-alpreport-opt-v05.pdf>.

3. *Id.*

4. *Carpenter v. U.S.*, 138 S. Ct. 2206, 2211-13 (2018).

5. Brandom, *supra* note 1.

6. *Automated License Plate Readers*, A National Association of Criminal Defense Lawyers (NACDL) Primer, UC Berkeley, School of Law (https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-4-28_ALPR-Primer_Final.pdf).

7. *Id.*

8. *Id.*

each vehicle entering a designated area (a tactic known as “geofencing”), construct a history of past movements, and set up “hot list” alerts to alert authorities when a particular license plate is entered into the database.⁹ Private companies contract with law enforcement agencies to provide access to massive privately-maintained ALPR databases.¹⁰

In December, 2017, the Department of Homeland Security issued a privacy impact assessment update for ICE’s acquisition and use of ALPR databases.¹¹ The assessment update concludes that the agency can utilize commercial ALPR databases to effectively carry out its mission while mitigating privacy concerns.¹² According to the assessment update, ICE agents enter license plate numbers “believed to be associated with a person of interest to ICE”¹³ into the database to generate a report. To ensure agents are able to determine whether the results are relevant, the report includes two photographs for confirmation.¹⁴ The report simultaneously generates a map of where the vehicle is located, a satellite image, GPS coordinates for the closest address, nearest intersection of the vehicle’s location, date and time the license plate was captured, and the source of the record.¹⁵

Privacy advocates warn that aggregated location data enables law enforcement and private companies to create detailed pictures of a person’s daily life.¹⁶ “Hot lists” or “alert lists” can be used to generate real-time alerts for users tracking specific license plates.¹⁷ This kind of targeted tracking, advocates warn, threatens to chill fundamental freedoms of speech and association.¹⁸ ICE’s contract provides for such an “alert list” feature, allowing ICE agents to assign as few as one and as many as 2,500 license plates to a single alert list.¹⁹ This capability comes at a time when advocates worry that ICE has targeted immigration activists for surveillance and deportation.²⁰

In response to privacy concerns, such as the potential for abuse, the assessment notes that ICE agents are required to undergo training before gaining access to ALPR databases.²¹ In March, 2018, the American Civil Liberties Union (ACLU) Foundation of Northern California filed two Freedom of

9. American Civil Liberties Union, *supra* note 2, at 5-6.

10. *Id.*, at 28.

11. U.S. DEP’T. OF HOMELAND SECURITY, DHS/ICE/PIA-039(a), PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ACQUISITION AND USE OF LICENSE PLATE READER (LPR) DATA FROM A COMMERCIAL SERVICE (2017).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. American Civil Liberties Union, *supra* note 2, at 7-8.

17. The terms “hot list” and “alert list” are synonymous. *See* PRIVACY IMPACT ASSESSMENT, *supra* note 11, at 4 n.7.

18. American Civil Liberties Union, *supra* note 2, at 8.

19. PRIVACY IMPACT ASSESSMENT, *supra* note 11.

20. Nick Pinto, *No Sanctuary. As ICE Targets Immigrant Rights Activists for Deportation, Suspicious Vehicles Outside Churches Stoke Surveillance Fears*, THE INTERCEPT (January 19, 2018), <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/>.

21. PRIVACY IMPACT ASSESSMENT, *supra*, note 11.

Information Act (FOIA) requests with ICE, seeking ICE's training materials, privacy policies and other documents, including contracts with private companies.²² In May, 2018, the ACLU Foundation of Northern California filed suit in the Northern District of California, alleging ICE improperly withheld those records.²³

AGGREGATE LOCATION DATA AND THE FOURTH AMENDMENT

ALPR databases exist in a complicated place within Fourth Amendment jurisprudence. There is no reasonable expectation of privacy in license plates because they are in "plain view". A license-plate check by law-enforcement, therefore, is not protected by the Fourth Amendment.²⁴ However, the aggregation of license plate information by ALPR databases touches on privacy concerns. The Supreme Court recently took up the issue of aggregate data and another Fourth Amendment doctrine in *Carpenter v. United States*. That case involved cell-site location information, which is a record of cell towers (or other sites) with which a cellphone connected over the course of time.²⁵ Because Mr. Carpenter had voluntarily shared his location information with wireless providers, that conveyance seemingly fell within the third-party doctrine.²⁶ In accordance with that doctrine, the Fourth Amendment does not protect information that is voluntarily conveyed to a third party.²⁷ The Court declined to apply the third-party doctrine, holding instead that law enforcement generally does need a warrant to obtain this cell-site location information.²⁸ Writing for the majority, Chief Justice John Roberts reasoned that, unlike in the past, "the Government can travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years."²⁹ ALPR databases can give law enforcement agencies the ability to retrace a person's whereabouts, to a degree limited only by the retention policies of the database administrator. The Court noted the distinction between cell-phones, which typically remain on one's person, and a vehicle that you leave behind once you exit.³⁰ Similarly to cell-site location data, ALPR data involves privately stored records of individuals' location. Though some law enforcement

22. ACLU of Northern California, *ACLU Foundation of Northern California v. ICE (License Plate Readers)* (May 23, 2018), <https://www.aclunc.org/our-work/legal-docket/aclu-foundation-northern-california-v-ice-license-plate-readers>.

23. *Id.*

24. *See, e.g.,* U.S. v. Diaz-Castaneda, 494 F.3d 1146, 1151 (9th Cir. 2007).

25. *Carpenter v. U.S.*, 138 S. Ct. 2206, 2211-13 (2018).

26. *Id.* at 2216-17.

27. *See, e.g.,* U.S. v. Miller, 425 U.S. 435, 443 (1976) ("this Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

28. *Id.* at 2217.

29. *Id.* at 2218.

30. *Id.*

agencies do create their own databases, ICE is not creating its own,³¹ drawing another parallel between ICE's use of ALPR databases and the private cell-site location data addressed in *Carpenter*. Although the dissent argued in *Carpenter* that the decision would impair law enforcement activities,³² Chief Justice Roberts and the four justices who joined his opinion remain on the Court, possibly signaling an opportunity for privacy advocates hoping to challenge the warrantless use of privately maintained ALPR data.

CONCLUSION

ICE's contract for access to ALPR databases comes at a time when both the impacts of aggregate data collection and retention and immigration enforcement are in the public eye. Advocates of immigration and privacy rights will likely find allies in one another. As the Supreme Court has now addressed the privacy implications of aggregate location-data searches, challenges to ICE's use of ALPR databases will likely shine a light on both the agency's enforcement efforts and the legality of warrantless ALPR database searches. The ACLU's efforts to assess ICE's policies for ALPR databases may be the first of a series of challenges to come.

31. PRIVACY IMPACT ASSESSMENT, *supra* note 11.

32. *Carpenter*, 138 S. Ct. at 2233 (Kennedy, J., dissenting).