STATE OF WISCONSIN COURT OF APPEALS
DISTRICT III
APPEAL NO.: 14-AP-001938

NEW RICHMOND NEWS and
STEVEN DZUBAY,

Plaintiff-Respondents,

v.

CITY OF NEW RICHMOND,

Defendant-Appellant.

On Appeal from St. Croix County Circuit Court
The Honorable Howard W. Cameron, Presiding
St. Croix County Case No. 13-CV-000163

BRIEF OF DEFENDANT-APPELLANT CITY OF NEW RICHMOND

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STATEMENT OF ISSUES

1. May law enforcement redact "personal information" or "highly restricted personal information" from motor vehicle records in response to a public records request where the requester does not specify an applicable exception to access under the federal Driver's Privacy Protection Act?

Answered by Circuit Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court should grant oral argument and publish its decision. This appeal raises important legal issues regarding the interplay between the federal Driver's Privacy Protection Act and Wisconsin's Public Records Law. Oral argument will assist the Court and a published decision will guide municipalities, citizens, and litigants regarding these pervasive issues.

STATEMENT OF THE CASE

NATURE OF THE CASE

"Concerned that personal information collected by States in the licensing of motor vehicle drivers was being released – even sold – with resulting loss of privacy for many persons, Congress provided federal statutory protection. It enacted the Driver's Privacy Protection Act of 1994, referred to here as the DPPA." ***Maracich v. Spears*, 133 S.Ct. 2191, 2195 (2013)**.

The DPPA creates a federal cause of action for knowingly obtaining, disclosing, or using personal information obtained from a state Department of Motor Vehicles (DMV) for a purpose not permitted under the statute. **18 U.S.C. § 2724(a).**

As the Seventh Circuit admonished in ***Senne v. Village of Palatine,* 695 F.3d 597, 607 (7th Cir. 2012)**, municipalities face serious penalties through unlawful disclosure of personal information contained in DMV records.

Without identifying an applicable exception under the DPPA, New Richmond News and its publisher, Steven Dzubay (hereafter "Newspaper"), sought access to personal information contained in such records from the City of New Richmond Police Department. The Department denied access to unredacted reports because ***Senne*** warned

about disclosing such information and because the request actually sought protected information without a lawful permissible purpose. The Newspaper sued claiming Wisconsin's Public Records Law allowed unfettered access.

PROCEDURAL BACKGROUND

New Richmond News filed this lawsuit in St. Croix County Circuit Court on March 18, 2013.

On November 27, 2013, after the City's unsuccessful removal of the case to the Federal Court, New Richmond News moved for judgment on the pleadings. The Honorable Howard Cameron held a hearing on January 23, 2014. The court granted the Newspapers' motion in its Decision and Order on March 20, 2014 and granted fees and costs in its Judgment on July 2, 2014.

The City timely filed this appeal on August 15, 2014.

FACTUAL BACKGROUND

Prior to this lawsuit, requesters including news organizations freely obtained from municipalities "personal information" and "highly restricted personal information" contained in motor vehicle records like accident reports. As discussed below, producing this information without redactions stemmed from the Wisconsin Attorney General's Informal Opinion in 2008 analyzing the DPPA in favor of such

disclosures. Since 20012, due to new federal precedent, Wisconsin municipalities proceed cautiously and in some cases redact personal information.

I. Newspaper's Request

New Richmond News is a media company which produces a weekly newspaper and website. **R.1:3 (Complaint p. 1)**.

The Newspaper sent a letter on January 15, 2013, to the Police Department requesting copies of accident reports, citations, and incident reports. **R.1:4-5 (Compl. pp. 2-3, Exhibit A)**. Without identifying an applicable DPPA exception (or "permissible use"), the Newspaper sought unredacted copies. ***Id.*** Realizing it actually sought protected information within those reports, the Newspaper nevertheless had "a difference of opinion on interpretation" of the Seventh Circuit decision ***Senne v. Village of Palantine*** "under which your department practices have changed on the belief that release of certain public records would now be in deference to the [DPPA]." **R.1:4-5 (Compl. p. 2-3, Exs. A, B)**. The Newspaper stated "accident and incident reports and citations issued by your department remain open records which *should be readily accessible* to members of the public *without need for prior redaction* of certain information by law enforcement." ***Id.*** (emphasis added).

The Police Department's January 21, 2013 response discussed the "TRACS System" computer program allows police officers to fill out accident reports while in their squad cars. **R.1:5 (Compl. p. 3, Ex. B)**. The program retrieves "personal information" and "highly restricted personal information" on drivers involved in an accident from DMV records and automatically populates the accident report with this information. ***Id.***

Citations are also produced using the TRACS System. Police officers can issue "uniform traffic citations" and "non-uniformed (sic) traffic citations" through this TRACS program. **R.1:5 (Compl. p. 3, Ex. B)**. The program automatically populates "personal information" on citations from information contained in DMV records. ***Id.***

Like the information officers use in filling out accident reports and citations, officers include individuals' "personal information" in incident reports that is obtained through DMV records. ***Id.***

The Police Department's response explained the Seventh Circuit's ***Senne*** decision controlled its response and "change[d] Wisconsin's open records law" regarding how the Department could handle the Newspaper's request. **R.1:5 (Compl. p. 3, Ex. B)**. "I will advise you at this time, as a result of this decision, the policy of the New Richmond Police Department has changed, in what information

we can release ..." ***Id.*** "At this point in time I am going to have to deny your request for copies of all un-redacted accidents and citations issued by this Department, based on the decision of [***Senne***] pertaining to the release of 'Personal Information' and 'Highly Restricted Personal Information' obtained through the Wisconsin DMV." ***Id***.

While the Police Chief was "content" in releasing such information as he had done in the past under the "public's right to know," he nevertheless believed he had an obligation to follow ***Senne*** before releasing such information. ***Id.*** Accordingly, he denied the Newspaper's request for unredacted records. ***Id.***

On January 30, 2013, the Newspaper requested the Police Department follow the Wisconsin Attorney General's 2008 Informal Opinion on the subject. **R.1:5 (Compl. p.3, Ex. C, pp. 1-4)**. The Newspaper also argued the Seventh Circuit's ***Senne*** decision was not binding. **R.1:5 (Compl. p.3, Ex. C, p. 2)**. The Newspaper lastly contended the City's interpretation of ***Senne*** and the DPPA led to absurd results because records access would depend on whether an individual was licensed and thus in the DMV's database. **R.1:5 (Compl. p.3, Ex. C, p. 3)**. The Newspaper asked the Police Chief to "reconsider his interpretation of ***Senne*** and, consistent with the attorney general's opinion, disclose the records ... without redacting any personal

information based on the DPPA." **R.1:5 (Compl. p.3, Ex. C, pp. 3-4)**.

The Police Department provided the requested reports with redactions of "personal information." **R.1:5 (Compl. p. 3, Exs. C-E)**. In response, the Newspaper sued the City under Wisconsin's Public Records Law, alleging the City's position – that the DPPA requires redaction of "personal information" (as defined under the DPPA) from records before disclosure – violates the Public Records Law. **R.1.**

Subsequently, the Newspaper filed for judgment on the pleadings on the basis that the City violated the Public Records Law when it redacted personal information from the requested records. **R.9, 10.**

II. Circuit Court's Decision

The Circuit Court first held ***Senne*** is factually and legally distinguishable because it did not address the application of the DPPA in connection with the Public Records Law. **R.14:6.**

In looking next at the DPPA's fourteen exceptions – none of which involved public records laws – the Circuit Court focused on the first exception, coining it an "umbrella." Specifically, the Circuit Court held "the umbrella § 2721(b)(1)" – which allows disclosure for use by any government agency in carrying out its functions – applied here. **R.14:7**. The court explained the records related directly to the affairs of

government and the official acts of police officers responding to and reporting on specific events in the City. ***Id***. Also, it is an official act of the City to provide such records. ***Id***.

The court further held the DPPA's fourteenth exception "provides a broad exception" and applied here. ***Id***. Section 2721(b)(14) allows access for uses authorized under the law of the state that holds the record if such use is related to the operation of a motor vehicle or public safety. ***Id***. This exception was satisfied by Wis. Stat. § 346.70 (4), the Uniform Traffic Accident Reports provision, which requires disclosure of accident reports upon request. ***Id***. The court reasoned such disclosure was "directly related to the public safety of the city as enforced by the police department and other agencies." ***Id***.

Finally, the court ruled "two of the three requested reports are uniform traffic accident reports, which do not fit the statutory definition of 'personal information' under § 2725(3)." ***Id.***

STANDARD OF REVIEW

Whether judgment on the pleadings should be granted is a question of law which a court of appeals reviews *de novo.* ***Freedom from Religion Foundation, Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991)**.

This appeal involves statutory interpretation. "[S]tatutory

interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cnty.*****, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110** (citations omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id***. Statutory language "is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** **¶ 46**. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." ***Id***.

At times, a reviewing court may turn to other interpretive aids, like legislative history, just as the Seventh Circuit did in interpreting the DPPA. ***See Senne,*** **695 F.3d at 607-08*.***

ARGUMENT

There is no dispute between the parties that the DPPA applies to the City and the Newspaper actually seeks redisclosure of protected information. The dispute involves balancing two competing laws.

While it would be easier to produce unredacted records as a matter of course, the City of New Richmond believes the plain language

of the DPPA does not permit blanket disclosure of protected personal information to the public. Any redisclosure of the personal information obtained must be specifically tied to one of the DPPA's fourteen exceptions. Recent federal decisions demand this restrictive approach, which was not anticipated by the Wisconsin Attorney General's earlier contrary opinion on the subject. The Newspaper's request for total access fails to satisfy any of the DPPA exceptions for disclosure.

I. OVERVIEW OF THE DUELING LAWS INVOLVING PERSONAL INFORMATION IN MOTOR VEHICLE RECORDS AND ACCESS TO PUBLIC RECORDS

Summary: Where federal and state statutes governing privacy of information and public records access intersect, deference should be given to federal court case law providing interpretive guidance that is restrictive of releasing private information.

A. The Driver's Privacy Protection Act

To obtain a driver's license or register for a vehicle, state DMVs require an individual to disclose detailed personal information, including name, home address, telephone number, Social Security number, and medical information. ***Spears*, 133 S.Ct. at 2198**.

Congress passed the DPPA to address "safety and security concerns associated with excessive disclosures of personal information held by the State in motor vehicle records." ***Senne,* 695 F.3d at 607**. As the Supreme Court observed:

> Public concern regarding the ability of criminals and stalkers to obtain information about potential victims prompted Congress in 1994 to enact the DPPA. A particular spur to action was the 1989 murder of the television actress Rebecca Schaeffer by a fan who had obtained her address from the California DMV.

***Spears*, 133 S.Ct. at 2213**. ***See also id*. at 2213** ("Congress sought to close what it saw as a loophole caused by state laws allowing requesters to gain access to personal information without a legitimate purpose.").

To address these concerns, "the DPPA establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." ***Id.* at 2198** (quotation omitted).

The DPPA's regulatory scheme contains a broad prohibition followed by exceptions, "additional unlawful acts," a civil cause of action, and definitions.

The DPPA contains only five definitions:

- **"Motor vehicle record":** "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." **18 U.S.C. § 2725(1).**

- **"Person":** "an individual, organization or entity, but does not include a State or agency thereof." ***Id.* § 2725(2).**

- **"Personal information":** "information that identifies an individual, including an individual's photograph, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." ***Id.* § 2725(3)**.

- **"Highly restricted personal information":** "an individual's photograph or image, social security number, medical or disability information." ***Id.* § 2725(4).**

- **"Express consent":** "consent in writing, including consent conveyed electronically…" ***Id.* § 2725(5)**.

Preventing the City's release of protected information is the DPPA's broad prohibition: "[A] State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:" (1) personal information about any individual obtained by the DMV in connection with a motor vehicle record, except as provided in subsection (b); or (2) highly restricted personal information about any individual obtained by the DMV "in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9)." **18 U.S.C. § 2721(a)**.

The DPPA describes two additional unlawful acts. First, it prohibits "any person" from knowingly obtaining or disclosing personal information from a motor vehicle record for any use not permitted. **18 U.S.C. § 2722(a)**. "Unlawful purpose" is the equivalent of any purpose not permitted under § 2721(b). ***See, e.g., Locate.Plus.Com, Inc. v. Iowa Dept. of Transp.*, 650 N.W.2d 609 (Iowa 2002)**. Second, it "shall be

unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record." **18 U.S.C. § 2722 (b).**

The DPPA's broad prohibition governs redisclosure by recipients like police departments. ***See*** **18 U.S.C. § 2721(c)**; ***Senne*****, 695 F.3d at 602** (discussing subsection (c) and stating "we are concerned with the secondary act of the Village's police department [in disclosing personal information].")

As a result of this broad prohibition, "personal information" may be accessed only through the DPPA's exceptions found in §2721(b) discussed below. For "highly restricted personal information," there may be access only with "express consent," unless for "uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9)." **18 U.S.C. § 2721(a)**.

The DPPA includes fourteen exceptions. Although not in its original request, the Newspaper invokes three exceptions:

> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
>
> (2) For use in connection with matters of motor vehicle or driver safety and theft....
>
> (14) For any other use specifically authorized under the law of the State that holds the record, if such use is

> related to the operation of a motor vehicle or public safety.

***Id.* § 2721(b)(1), (2) and (14)**.

The DPPA creates a private cause of action for any individual whose personal information is unlawfully disclosed. ***Id.* § 2724(a)**. Remedies include (1) actual damages but not less than $2,500; (2) punitive damages for willful or reckless violations; (3) attorneys' fees and costs; and (4) appropriate preliminary or equitable relief. ***Id.* § 2724(b)**; ***see, e.g., Senne,* 695 F.3d at 611** (Posner, J., dissenting) (Village of Palatine faced "a potential liability of some $80 million in liquidated damages — more than $1,000 per resident."); ***Schierts v. City of Brookfield*, 868 F.Supp.2d 818 (E.D.Wis. 2012)** (holding municipality liable for officer's retrieval of personal information through DMV records without permissible use exception).

B. Wisconsin's Public Records Law

Wisconsin encourages a public policy in favor of "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." **Wis. Stat. § 19.31**.

However, public records access is not absolute. The above policy "shall be construed in every instance with a presumption of complete public access, *consistent with the conduct of governmental business*." ***Id.*** (emphasis added).

Moreover, the Legislature recognized various limitations to full access. "*Except as otherwise provided by law*, any requester has a right to inspect any record." **Wis. Stat. § 19.35(1)(a)** (emphasis added).

Further, the law limits access to "[a]ny record which is specifically exempted from disclosure by state or federal law...." **Wis. Stat. § 19.36(1)**; ***see also Osborn v. Bd of Regents of Univ. of Wis. Sys., 2002 WI 83, ¶¶ 13-15, 254 Wis.2d 266, 647 N.W.2d***.

Besides the duty to produce records, there is a duty to redact where necessary: "If a record contains information that is subject to disclosure ... and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release." **Wis. Stat. § 19.36(6)**.

In addition, "whenever federal law or regulations require ... that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure ...." **Wis. Stat. § 19.36(2)**.

C. Wisconsin's Attorney General's Informal Opinion

The Wisconsin Attorney General issued an Informal Opinion on the interplay between the DPPA and Public Records Law on April 29,

2008. ***See*** **Wis. Op. Att'y Gen. 1-02-08, 2008 WL 1970575 (April 29, 2008)**. Although cautioning that it was his office's policy to decline opinions concerning federal statutes administered by federal authorities, the Attorney General nevertheless issued the opinion absent meaningful guidance from the United States Department of Justice. ***Id.*** **at *1**.

The Attorney General acknowledged the specific policy objective of the DPPA was to respond to the growing concern over crimes committed by individuals who used State DMV records to identify and locate victims of crimes. ***Id.*** **at *3**. The Attorney General's opinion also observed the following: (1) the DPPA was a legitimate exercise of federal power applicable to Wisconsin; (2) the DPPA restricted a state's ability to disseminate personal information originating from the DPPA; and (3) any disclosure under the Public Records Law must be consistent with the permitted uses under the DPPA. ***See id.*** **at *3-4**.

The Attorney General found the DPPA permitted DMVs to disclose personal information from driver records for use by any government agency in carrying out its functions. ***Id.*** **at *5-6**. The Attorney General explained that because the DPPA is "*structured in terms of permissible uses*, those subsequent disclosures properly made by a government agency in the course of carrying out its functions *need*

not be a permissible use under the DPPA." ***Id.*** **at *5** (emphasis added).

Accordingly, the Attorney General believed disclosing records was a routine function of government. ***Id.*** **at *6**.

The Attorney General also opined allowing disclosure was not the same as *requiring* disclosure because there may be other appropriate reasons to redact personal information (e.g. the balancing test, common law exceptions, or other statutory exceptions). ***Id.*** **at *5.** The Attorney General reached these conclusions, admittedly, in the midst of the "complicated" language of the DPPA and "little available interpretive legal authority" on these two laws. ***Id.***

The Attorney General also considered the DPPA's potential restriction upon Wis. Stat. § 346.70 (4)(f), which requires disclosure of Uniform Traffic Citations, Uniform Traffic Accident Reports, and related records. ***Id.*** **at *9-10**. The Attorney General found the definition of "personal information" excludes information on vehicular accidents, driving violations, and driver's status. ***Id.*** Therefore, information like a driver's name, address, and telephone number are not encompassed in the personal information protected by DPPA when that information is incorporated into an accident report or traffic citation. ***Id.***

Additionally, the Attorney General identified the DPPA exception for any use specifically authorized under law of the state that holds the

record, if such use is related to the operation of a motor vehicle or public safety. ***Id.*** **at *10-11**. The Attorney General concluded that required disclosures under Wis. Stat. § 346.70 constitute a use that is related to motor vehicle operation or public safety. ***Id***.

D. Recent Federal Court Interpretation of the DPPA Modifies Requesters' Access to Personal Information in Motor Vehicle Records.

The Circuit Court should have deferred to recent and important federal court guidance.

In ***Senne v. Village of Palatine***, the Seventh Circuit *en banc* examined the law enforcement exception under § 2721(b)(1). **695 F.3d at 599**. Jason Senne brought a class action against the Village claiming "the Village's practice of printing personal information obtained from motor vehicle records on parking tickets was a violation of the [statute]." ***Id.***

The ***Senne*** court first held the case involved the "secondary act" of redisclosure and a violation occurred by disclosing personal information through a parking citation placed on a vehicle's windshield. ***Id.*** **at 602-603**.

The Seventh Circuit then addressed the DPPA's exceptions including two raised by the Village: (1) "[f]or use by any ... law enforcement agency, in carrying out its functions ..." **18 U.S.C.**

§ 2721(b)(1), and (2) "[f]or use in connection with any civil ... [or] administrative ... proceeding ... including the service of process." ***Id.*** **§ 2721(b)(4)**.

"[I]t is necessary to view each provision in context, with an eye toward its contribution to the 'overall statutory scheme.'" ***Senne,*** **695 F.3d at 605.** "Here, the statute's purpose, clear from its language alone, is to prevent all but a limited range of authorized disclosures of information contained in individual motor vehicle records." ***Id.*** The court focused on the "[f]or use" language introducing each exception, finding they "perform a critical function in the statute and contain the necessary limiting principle that preserves the force of the general prohibition while permitting the disclosures compatible with that prohibition." ***Id.*** **at 606**. When the statute says a disclosure is authorized for a particular use, the Seventh Circuit said:

> [T]he actual information disclosed—i.e., the disclosure as it existed in fact—must be information that is *used* for the identified purpose. When a particular piece of disclosed information is not *used* to effectuate that purpose in any way, the exception provides no protection for the disclosing party. In short, an authorized recipient, faced with a general prohibition against further disclosure, can disclose the information only in a manner that does not *exceed the scope* of the authorized statutory exception. The disclosure actually made under the exception must be compatible with the purpose of the exception. Otherwise, the statute's purpose of safeguarding information for security and safety reasons, contained in the general prohibition against disclosure, is frustrated.

> Another part of the statutory language supports our conclusion. As we have noted, the statute provides even greater protection to a special class of data referred to as "highly restricted personal information." ... Clearly, this section recognizes the government's legitimate need for broader access to personal information than the statute otherwise provides. Nevertheless, it does not provide unlimited authority for law enforcement to access or disseminate the information. Instead, the statute merely allows that certain entities, including law enforcement, may both need and use more *kinds of* information than other authorized users, *within the limitations of the existing exceptions.*

***Id.* at 605-606** (emphasis in original).

The Seventh Circuit also reviewed the DPPA's legislative history. The court found persuasive testimony from Senator Harkin who:

> qualified that the exception for law enforcement use 'is not a gaping loophole in this law.' The exception 'provides law enforcement agencies with latitude in receiving and disseminating this personal information,' when it is done '*for the purpose of deterring or preventing crime or other legitimate law enforcement functions.*

Id.* at 607-608** (emphasis in original; quoted source omitted). The court also relied on the statement of Senator John Warner that '"[t]here are specific exceptions of course for law enforcement individuals and other areas where proven experience shows that this information should flow. *But in those instances we have to presume it is somewhat protected.*'" ***Id. (emphasis in original; quoted source omitted).

Finally, turning to the DPPA's effect on the Village's parking citation, the court observed the Village's disclosure of personal information constituted service of process and issuing parking citations is part of the function of the police department. ***Id.*** However, the court found the complaint put into issue whether the specific disclosure of Mr. Senne's full name, address, driver's license number, date of birth, sex, height, and weight "actually *was used* in effectuating either of these purposes." ***Id.*** (emphasis in original). The court remanded the case to address the specific disclosures under each exception, noting "the DPPA's general rule of non-disclosure of personal information held in motor vehicle records and its overarching purpose of privacy protection must inform a proper understanding of the other provisions of the statute." ***Id.*** **at 609**. The court instructed that "the disclosed information actually must be used for the purpose stated in the exception." ***Id*.**

The Seventh Circuit's ruling on the DPPA is binding on the City, as it is on any municipality within the Circuit. While state courts may not be bound by the decisions of their federal counterparts**, *see State* v. *Mechtel,* 176 Wis. 2d 87, 95, 499 N.W.2d 662, 666 (1993)**, the DPPA includes a private federal cause of action for any violation of the statute, including against municipalities and their employees.

Therefore, in a lawsuit for an alleged improper disclosure it will be the federal courts who decide whether the City is liable for the stiff penalties under the DPPA. In that sense, the Seventh Circuit's interpretation is "binding" on the City. The DPPA also preempts any contrary state law. ***See*** **Sec. IV below;** ***see also*** **Wis. Op. Att'y Gen. 2008 WL 1970575, *3-4** ("Accordingly, it is clear that any release of public records under Wisconsin law must be consistent with disclosures permitted under the DPPA.").

While the ***Senne*** opinion does not expressly involve public records laws, the redisclosure of personal information to the public through placing a parking ticket on a windshield parallels the redisclosure of personal information to the public through a records request. Both involve the secondary act of redisclosure. In both cases, the DPPA requires the actual reason for the disclosure to be compatible with one of the exceptions. ***Senne,*** **695 F.3d at 606** ("The disclosure actually made under the exception must be compatible with the purpose of the exception."). As the Seventh Circuit cautioned, this preserves the overall purpose of the DPPA – to protect personal information retrieved from DMV records. The Seventh Circuit's interpretation of the DPPA's broad prohibition, the limited exceptions, and the legislative history cannot be ignored simply because the facts did not involve a public

records request. Despite the differences in the manner of disclosure, the release in ***Senne*** and the request here are essentially the same. Through a public records request, the Newspaper sought information that was prohibited from disclosure under the DPPA, found to be protected from disclosure under ***Senne*** and created a potential basis for liability against the Village of Palantine.

The Supreme Court recently analyzed the DPPA's regulatory scheme. In ***Spears***, South Carolina attorneys submitted Freedom of Information Act requests to the state DMV for "personal information" on vehicle purchases. ***Spears*****, 133 S.Ct. at 2196**. The attorneys sought this information to identify potential class members for a lawsuit. ***Id.*** The attorneys' requested this information pursuant to the DPPA's exception for "in anticipation of litigation." ***Id.*** Using the information they received from the DMV, the attorneys sent a mass mailing to find individuals to build the class suit. ***Id.*** **at 2197.**

Like ***Senne***, the Supreme Court instructed that the chief limiting principle in analyzing the exceptions permitting disclosure is the overall purpose of the DPPA. ***Spears*****, 133 S.Ct. at 2199-2200**. "In light of the text, structure, and purpose of the DPPA, the Court now holds that an attorney's solicitation of clients is not a permissible purpose covered by the (b)(4) litigation exception." ***Id.*** **at 2196**.

II. THE NEWSPAPER MISPLACED RELIANCE ON SEVERAL DPPA EXCEPTIONS IN SEEKING ACCESS TO PERSONAL INFORMATION IN MOTOR VEHICLE RECORDS

Summary: The Newspaper's request for unredacted records does not satisfy any exception permitting disclosure under the DPPA.

The Newspaper, as the entity requesting personal information, must provide a permissible reason for disclosure of the personal information from at least one of the DPPA's exceptions. Analysis of the exceptions must be made in light of the DPPA's broad prohibition. ***See, e.g., Senne,*** **695 F.3d at 605** ("It is necessary that we respect this textually explicit purpose as we evaluate the coverage of the exceptions within the statute's broad mandate."). "[T]he actual information disclosed — i.e., the disclosure as it existed in fact — must be information that is *used* for the identified purpose." ***Id.*** **at 606.** ***Senne*** then strongly questions whether all of the disclosures on the parking ticket, including height, weight, and gender, were *used* for the Village's stated law enforcement purposes.

The only entity that knows what the *actual use* of all of the disclosed information will be is the one making the request — the Newspaper. To comply with the DPPA, the Newspaper must identify an applicable exception. It cannot do so.

A. The Law Enforcement Exception Does Not Apply.

Conspicuously absent from Subsection 2721(b)'s fourteen exceptions — covering a range of purposes and recipients — is disclosure pursuant to public records laws. ***See also*** **Section V below**.

Undeterred that a public records exception does not exist under the DPPA, the Newspaper invokes "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." **18 U.S.C. § 2721(b)(1).**

The DPPA defines neither "functions" nor "carrying out its functions." When a word is not defined within a statute, the Wisconsin Supreme Court turns to recognized dictionary definitions "to determine the common and ordinary meaning of a word." ***State v. Polashek*****, 2002 WI 74, ¶ 19, 253 Wis.2d 527, 646 N.W.2d 330**. Black's Law Dictionary defines "function" as "[An] activity that is appropriate to a particular business or profession;" an "office[or] duty;" or "the occupation of an office." ***Black's Law Dictionary*** **787 (10th ed. 2014).** For example, a court's function is to administer justice. ***Id.***

The Circuit Court erred when it rejected deference to federal guidance and avoided a more restrictive reading of this exception. ***Linzmeyer v. Forcey*** **, 2002 WI 84 ¶ 32, 254 Wis.2d 306, 646 N.W. 2d**

811 (looking to federal Freedom of Information Act as guidance for release of information under Wisconsin law).

The Supreme Court in ***Spears***, in fact, recently interpreted "in connection with" under DPPA subsection 2721(b)(4). This exception permits the disclosure of personal information "in connection with" judicial and administrative proceedings, including "investigation in anticipation of litigation." In holding that the exception does not include solicitation of clients, the Supreme Court cautioned:

> If considered in isolation, and without reference to the structure and purpose of the DPPA, (b)(4)'s exception …is susceptible to a broad interpretation. That language, in literal terms, could be interpreted to its broadest reach to include the personal information that respondents obtained here. But if no limits are placed on the text of the exception, then all uses of personal information with a remote relation to litigation would be exempt under (b)(4). The phrase "in connection with" is essentially "indeterminat[e]" because connections, like relations, "'stop nowhere.'" … So the phrase "in connection with" provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions….
>
> An interpretation of (b)(4) that is consistent with the statutory framework and design is also required because (b)(4) is an exception to both the DPPA's general prohibition against disclosure of "personal information" and its ban on release of "highly restricted personal information." §§2721(a)(1)–(2). An exception to a "general statement of policy" is "usually read . . . narrowly in order to preserve the primary operation of the provision." …It is true that the DPPA's 14 exceptions permit disclosure of personal information in a range of circumstances. *Unless commanded by the text, however, these exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design. …*

> If (b)(4) were read to permit disclosure of personal information whenever any connection between the protected information and a potential legal dispute could be shown, it would undermine in a substantial way the DPPA's purpose of protecting an individual's right to privacy in his or her motor vehicle records. The "in connection with" language in (b)(4) must have a limit. A logical and necessary conclusion is that an attorney's solicitation of prospective clients falls outside of that limit.

133 S. Ct. at 2199-2200. Later, the Court again admonished:

> It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning. The "in connection with" language of (b)(4) therefore must be construed within the context of the DPPA as a whole, including its other exceptions."

Id.* at 2203**. To determine whether the litigation exception (or any other) allowed access to a requester, the Court stressed the conduct of the requester must be examined. ***Id. ("So the question is not which of the two exceptions controls but whether respondents' conduct falls within the litigation exception at all.").

Other federal decisions provide guidance on the (b)(1) governmental "function" exception. This subsection "'provides law enforcement agencies with latitude in receiving and disseminating this personal information,' when it is done '*for the purpose of deterring or preventing crime or other legitimate law enforcement functions*,'" such as neighborhood watch organizations. ***Senne*, 695 F.3d at 608** (emphasis in original; quoted source omitted). ***See also Parus v.***

***Kroeplin*, 402 F.Supp.2d 999, 1006 (W.D.Wis. 2005)** ("[a] law enforcement agency may use protected personal information so long as the agency is 'carrying out' a 'law enforcement function.'" The court found no DPPA violation where use and disclosure of social security numbers was in conjunction with duties of law enforcement agency and its attempt to identify a suspect. By contrast, "had defendant Kroeplin told defendant Bresnahan that he was seeking plaintiff's motor vehicle record information in order to pass the information along to his nephew, the spurned lover of the vehicle owner's girlfriend, and had Bresnahan then proceeded to disclose plaintiff's information, plaintiff would have a strong argument that Bresnahan was not performing a law enforcement function when she released the information.").

Drawing on the Wisconsin Attorney General's Opinion, the Newspaper argues that part of a law enforcement agency's duties are to respond to public records requests. **Wis. Op. Att'y Gen. 2008 WL 1970575, *1**. Police departments perform a legitimate law enforcement function when they discharge their statutory duty to investigate and report on traffic accidents and thereby use DMV-related personal information for these purposes. But, the legislative text, history and federal decisions do not support unfettered public records access to the report in an unredacted form. Moreover, the tenuous connection is

highlighted by the fact that the DPPA's law enforcement exception is one of the four permissible uses for which not only personal information may be disclosed, but also "highly restricted personal information." ***See*** **18 U.S.C. § 2721(a)(2)(2013)**. A restrictive reading of the DPPA's first exception — as instructed by ***Spears*** and ***Senne*** — protects against unfettered access to highly restricted personal information.

Additionally, Wisconsin's public records policy supports a restrictive reading. The Public Records Law under Wis. Stat. § 19.31 declares providing information to the public is "an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information." Yet, if the policy declaration were read literally to associate "essential function" to all governmental entities it would eviscerate the many statutory and common law restrictions and limitations embedded throughout the Public Records Law and the DPPA's overall scheme. A more balanced reading is that a custodian's "essential function" and "duties" are to provide such information, subject to their equal duty to determine the existence of any limitation to access.

Under the more restrictive reading of § 2721(b)(1), as the Circuit

Court should have employed, the public disclosure of personal information in a traffic accident report must be appropriate or necessary for carrying out the law enforcement function attending such report. That function involves investigating and reporting accidents. Yet, the connection between this purpose and the public release of personal information is tenuous at best, if not highly questionable when considering "highly restricted personal information" may be contained in such records. A more careful balancing should have led the Circuit Court to find redactions may not only be permissible, but may be necessary in order to comply with the DPPA.

In light of ***Spears*** and ***Senne***, more information is required as to the fact-specific rationale for disclosure of personal information under the DPPA than just the general duty to respond to public records requests. The main emphasis in ***Spears*** and ***Senne*** was the actual use of disclosed personal information must serve the purposes of the law enforcement exception. Here, the Newspaper is asking for a blanket disclosure for all of its requests for any purpose whatsoever. It is far from clear that the disclosure of all personal information contained in police reports meet the law enforcement exception. Just like ***Senne***, it is difficult to see a law enforcement purpose for disclosing a person's height and weight to a newspaper.

The Attorney General's 2008 Informal Opinion construed "functions" to include public records production by taking several precarious steps. First, the Attorney General opined it is appropriate to construe "functions" as "all duties imposed by state law" because Congress is presumed to know existing law. ***See*** **2008 WL 1970575, *5**. Second, "[l]egislative history further indicates that the scope [of the exception] should not be narrowly drawn, so as not to impede the abilities of law enforcement and other governmental agencies to carry out their duties — whatever those might be." ***Id.*** Third, "[b]ecause the DPPA is structured in terms of permissible uses, those subsequent disclosures properly made by a government agency in the course of carrying out its functions need not be a permissible use under the DPPA." ***Id.*** Each of these points directly contradicts ***Spears*** and ***Senne***.

Lastly, the Attorney General looked to inapposite case law. ***See*** **2008 WL 1970575 *4** (discussing ***McQuirter*** **v.** ***City of Montgomery,*** **2008 WL 401360 (M.D.Al. 2008);** ***In re Imagitas, Inc., Drivers' Privacy Protection Act Litigation*****, 2008 WL 977333 (M.D.Fl. 2008)***;*** and ***Davis v. Freedom of Information Comm'n*****, 790 A.2d 1188, 1193 (Conn. Super. Ct. 2001)**). Those cases did not consider the DPPA's overall statutory framework and legislative history, as in ***Senne*** and ***Spears***. Nor did they define "in carrying out its functions" with particularity or in the

context of public records requests. Also, ***McQuirter*** actually supports redactions here because law enforcement in that case actually used the protected information for law enforcement purposes, i.e., processing an arrest or apprising the public of risks created by dangerous suspects at large as both a general and a specific deterrent to criminal activity.

B. The Motor Vehicle and Driver Safety Exception Does Not Apply.

The other two exceptions cited by the Newspaper also fail to apply here, beginning with the exception "[f]or use in connection with matters of motor vehicle or driver safety and theft." **18 U.S.C. § 2721(b)(2)**. As noted elsewhere, the Newspaper's request sought unredacted records without identifying its intended use under an exception. While the Newspaper invokes the driver's safety exception, it omits reference to the remainder of this exception, which provides examples of circumstances where the exception applies:

> motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

Id.

The relevant phrases in a statute must be read in its entirety and by the company it keeps (the doctrine of *noscitur a sociis*). ***See Spears*****,**

133 S. Ct. at 2199-2203 (emphasizing considering of complete statutory language and purpose). Like the Supreme Court's method of statutory interpretation of the DPPA in ***Spears***, the Circuit Court should have read this statutory exception restrictively, not expansively.

The exception cannot be read so broadly to permit the blanket disclosure of personal information in all instances where motor vehicle or driver safety may be at issue. To do so ignores the rest of the language in the exception and undermines the DPPA's broad prohibition against disclosure. It also ignores the lead-in language of subsection (b) which *mandates* disclosure of this same information "to carry out the purposes of "several federal laws." **18 U.S.C. § 2721(b)**. It also ignores the fourteenth exception which permissibly allows disclosure of such information when authorized by state law. **18 U.S.C. § 2721(b)(14).** The most natural reading of (b)(2) allows disclosure with respect to all other federal laws or matters associated with motor vehicle or diver safety. This reading harmonizes the fact that the DPPA does not have a public records exception or one for media. Further illuminating the point, the Newspaper's request for records sought an incident report surrounding the theft of gasoline from a gas station. **R.1:5 (Compl. p. 3, ¶ 12, Ex. E).** However, the disclosure of personal information obtained from the DMV from a reported theft

does not have any relation to "motor vehicle or driver safety." To read the word "theft" in the statute to extend beyond the theft of a motor vehicle is illogical and would render the exception so broad so as to undermine the very purpose of the DPPA.

C. The "Specifically Authorized Under the Law of the State" Exception for Motor Vehicle or Public Safety Does Not Apply.

The third exception relied upon by the Newspaper is "[f]or any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety." **18 U.S.C. § 2721 (b)(14)**. This exception does not apply.

The presumption in favor of disclosure of records is not a "use specifically authorized" under Wisconsin law. ***Senne*** stands for the proposition that each use of the personal information must be for a specific, permissible use. All of the personal information in the records requested by the Newspaper cannot be related back to the "operation of a motor vehicle or public safety." As an example from this case, the disclosure of the name and address of "a person employed by the victim" of the reported gas theft has no relation to motor vehicles and is, at best, questionably related to public safety. **R.1 (Compl., ¶ 12, Ex. E.)** Under the narrow construction of the "for use" language per ***Senne***, such a tenuous link to public safety is not enough.

The Newspaper also misplaces reliance on Wis. Stat. § 346.70(4)(f). That statute grants the public access to Uniform Traffic Citations and Uniform Traffic Accident Reports, but subject to the custodian's "proper care" and "orders or regulations as the custodian thereof prescribes." **Wis. Stat. § 346.70 (4)(f)**. Thus, under the statute's own terms, the custodian may exercise "proper care" and prescribe "orders or regulations," which includes the custodians' duties to review for applicable limitations, undertake the balancing test and redact where necessary. ***See State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 285, 289-90 (Ct. App. 1991)** (contemplating use of balancing test under § 346.70(4)(f)).

In light of the clear language of the DPPA's restriction on redisclosing personal information and the potential cause of action under the DPPA, a custodian of accident reports who has a policy of releasing accident reports with personal information populated from DMV records must be considered as taking proper care under the circumstances when they redact "personal information" and "highly restricted personal information."

D. The "Vehicular Accident" Component of the DPPA's "Personal Information" Definition Does Not Apply.

As noted, the DPPA defines personal information as any

information that identifies a person, including their "driver identification number, name, address (but not the five digit zip-code), telephone number, and medical and or disability information, *but does not include information on vehicular accidents, driving violations and, driver's status*." **18 U.S.C. § 2725(3)**. (emphasis added).

The Newspaper argued the italicized language authorizes the disclosure of personal information that is connected to a vehicular accident. However, these exceptions do not include a driver's name, address, or other personally identifiable information expressly prohibited from disclosure under the rest of the DPPA's language. To hold otherwise would eviscerate the meaning of the balance of the DPPA's express protections of personal information and lead to absurd results. The City released the records requested by the Newspaper but redacted "personal information" from those records, consistent with the first part of the statute.

Moreover, such a broad reading renders the other language and intent of the statute superfluous. A statute should not be construed so that portions of it are rendered meaningless. ***Senne,*** **695 F.3d at 605-606**.

Congress' intent under the DPPA was to foreclose the release through DMV records of information that might be used to promote

criminal activity. “The DPPA does not, in any way, restrict public access to information regarding an individual's vehicular accidents, driving violations, and driver's status,” but to obtain such information “the requestor must provide the DMV with the driver's name, license number, address, and date of birth.” ***Camara* v. *Metro-N. R. Co.,* 596 F.Supp.2d 517, 524 (D. Conn. 2009)**. A clear difference exists between a driver’s name and address on the one hand, and information regarding a driver’s accidents, driving violations, and driver’s status on the other hand. ***Id.*** The latter group of information does not necessarily include a driver’s name or address. ***Id.*** The protection of a person’s identifying information, including their address and telephone number, does not depend on whether or not they have been involved in a car accident.

It would be contrary to Congressional intent to read this definitional exclusion as itself mandating the release, upon any request, of all information contained in an accident report. Rather, the DPPA’s exclusion of “information on vehicular accidents” from “personal information” appears bounded by a condition that the public may access vehicular accident information only on an *individualized basis — i.e.*, absent an applicable exception under the DPPA, *state-verified* “personal information” will remain confidential in an otherwise

accessible document when disclosure might reveal individuals' personally identifiable information.

III. DEFERENCE TO THE DPPA IS CONSISTENT WITH THE PUBLIC RECORDS LAW.

Summary: Finding the Newspaper's requests deficient under the DPPA does not violate Wisconsin's Public Records Law because the Public Records Law equally protects privacy and safety.

Wisconsin's Public Records Law does nothing to alter compliance with the DPPA, as both laws protect disclosure of information when privacy and safety interests are at stake.

The Public Records Law expressly recognizes the importance of protecting an individual's personal safety by regulating the disclosure of personal information. **Wis. Stat. § 19.35(1)(am)2.a** prohibits disclosure of public records "containing personally identifiable information that, if disclosed, would ... [e]ndanger an individual's life or safety." Indeed, the Wisconsin Supreme Court has instructed that when privacy interests are implicated under an open records request, the reviewing agency must conduct the balancing test to determine if the public interest in nondisclosure outweighs the public interest in disclosure. ***State ex rel. Ardell v. Milwaukee Bd. of School Directors,* 2014 WI App 66, ¶¶ 9-14 354 Wis.2d 894, 849 N.W.2d 894**.

Moreover, the Public Records Law requires a determination

whether there is a privacy or safety concern that outweighs the presumption of disclosure — a fact-intensive inquiry determined on a case-by-case basis. For instance, in ***Ardell***, the court evaluated an open records request for employment records of a school teacher under the balancing test. ***Id.*** **at ¶¶ 2-3**. The agency balanced in favor of nondisclosure because the teacher filed a domestic abuse injunction against the requester and the requester twice violated the injunction. ***Id.*** **at ¶ 3**. The court agreed with the agency, stating the public policy of ensuring the safety and welfare of the employee overcame the broad presumption of disclosure under the Public Records Law. ***Id.*** **at ¶¶ 9-10**, citing ***Linzmeyer*****, 2002 WI, ¶ 30** (concern for the safety of the persons involved in a report is a strong public policy reason against release); ***Klein v. Wisconsin Resource Ctr.,*** **218 Wis.2d 487, 489–90, 496–97, 582 N.W.2d 44 (Ct.App.1998)** (a state employee's personnel file should not be released based upon concerns for the safety of employee and her family); and ***State ex rel. Morke v. Record Custodian, Dep't of Health & Soc. Servs.,*** **159 Wis.2d 722, 726, 465 N.W.2d 235 (Ct.App.1990)** (records custodian properly denied prisoner access to public records based upon concern for the safety and well-being of the prison staff and their families); ***see also Law Offices of Pangman & Assoc. v. Stigler*****, 161 Wis. 2d 828, 837-38, 468 N.W.2d 784 (Ct. App.**

1991) (custodian properly denied attorney access to a police officer's personnel files based upon concern for safety).

IV. DEFERENCE TO THE DPPA'S PREEMPTIVE EFFECT ON WISCONSIN'S PUBLIC RECORDS LAW.

Summary: Due to the DPPA's preemptive effect, courts should be deferential to the DPPA where any conflict exists with the Public Records Law.

The U.S. Supreme Court has explained "the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as owners of databases." ***Reno v. Condon*, 528 U.S. 141, 151 (2000)**. To effectuate its regulation, the DPPA preempts any contrary state law, including any contradictory aspect of the Public Records Law.

The preemptive quality of the DPPA originates in the Supremacy Clause and is found in standard preemption jurisprudence. ***See Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88 (1992).** The DPPA's preemptive effect has been recognized by the federal courts and the DPPA has been held to preempt state statutes and constitutional provisions requiring the disclosure of records. ***Reno*, 528 U.S. 141**. Thus, when the Public Records Law conflicts with the DPPA, the DPPA takes precedent.

Under the Supremacy Clause, any state law that conflicts with federal law is preempted. ***Gade*, 505 U.S. 88.** Conflict arises "where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ***Id.* at 98.** (internal quotes and citations omitted). Federal preemption is recognized even when "such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important. ***Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)**.

Furthermore, the DPPA has actually preempted both state law and state constitutional amendments. In ***Reno***, the United States Supreme Court upheld the constitutionality of the DPPA in light of a conflicting South Carolina law allowing disclosure of information held by the State's DMV. **528 U.S. 141**. The Court held that the DPPA was a proper exercise of Congress' power under the Commerce Clause and the DPPA regulated states as the owners of databases. ***Id.* at 150-151**. Furthermore, in ***Rios v. Direct Mail Express, Inc.***, the court found the DPPA preempted both a provision in the Florida Constitution and a Florida public records statute. **435 F.Supp.2d 1199, 1205 (2006)**.

Relying on ***Reno***, the court dismissed the state's argument that the Florida constitutional provision guaranteeing access to public records was controlling by reemphasizing that, once enacted, "[a]ny federal regulation demands compliance." ***Id*. at 1206 (quoting *Reno*, 528 U.S. at 150-151**.).

Additionally, both the Tenth and the Eleventh Circuits have expressly noted the preemptive effect of the DPPA over contrary state laws. In ***Oklahoma v. U.S*, 161 F.3d 1266, 1272 (1998)**, the Tenth Circuit upheld the constitutionality of the DPPA and stated, "the DPPA directly regulates the disclosure of ... information and preempts contrary state law." Furthermore, the court emphasized the DPPA was passed pursuant to Congress's "preemptive authority under the Commerce Clause in a manner that displaces state law and policy to some extent." ***Id*.** The Eleventh Circuit reached a similar conclusion. "The law was clear at the relevant time the DPPA preempted any conflicting state law that regulates the dissemination of motor vehicle record information." ***Collier v. Dickinson*, 477 F.3d 1306, 1312 n. 3 (11th Cir. 2007)**.

Here, under the authorities above, the DPPA's prohibition on disclosure and its exceptions must be interpreted restrictively and in a way that preempts any conflicting Wisconsin policy of providing access

to public records in the absence of a qualified exception. As a constitutional federal regulation of the states, the DPPA demands compliance.

V. THE LEGISLATIVE HISTORY OF THE DPPA SUPPORTS THE CITY'S REDACTION OF PERSONAL INFORMATION.

Summary: The legislative history of the DPPA confirms the Police Department properly redacted personal information from the sought-after records because Congress intended public records laws to yield to the DPPA and did not create an exception for news media disclosure.

It cannot be disputed that the clear intent of the DPPA is to protect individuals from the disclosure of personal information that is gathered and held by state motor vehicle departments. When speaking about the DPPA prior to its enactment, members of Congress referenced *both* safety concerns and privacy concerns as reasons for protecting this information:

> "The amendment that I am offering today will close a loophole in State law that allows anyone, for any reason, to gain access to personal information . . . in your DMV file."

139 Cong. Rec. HR7924 (Apr. 20, 1994) (statement by Rep. Moran).

> "In today's world, both personal privacy and personal safety are disappearing and this legislation would help to protect both. . . . Citizens who wish to operate a motor vehicle have no choice but to register with the Department of Motor Vehicles and they should do so with full confidence that the information they provide will not be disclosed indiscriminately."

139 Cong. Rec. S14381 (Oct. 26, 1993) (statement of Sen. Warner).

A review of the DPPA's legislative history supports the redaction of the information requested by the Newspaper because it is clear Congress intended Public Records Laws to yield to the DPPA and because Congress declined to create an exception for the press.

First, the Congressional record shows that members of Congress considered how the DPPA would interact with Public Records Laws and that these members believed such laws would yield. ***See*** **139 Cong. Rec. HR7926 (Apr. 20, 1994)**. In fact, the interaction between the DPPA and Public Records Laws "received considerable attention" during subcommittee hearings prior to the DPPA's enactment. ***Id.*** (statement by Rep. Edwards). Members of Congress heard testimony at these hearings that, "[t]he public's interest in disclosure of personal information about private citizens, unrelated to the workings of government, [is] minimal when weighed against the individual's interest in avoiding the disclosure of personal matters." **1994 WL 212813 (Feb. 3, 1994)** (testimony of Janlori Goldman, Director of ACLU's Privacy and Technology Project). Disclosures of information held by DMVs through public records requests were emphatically characterized as "an unwarranted invasion of privacy" and were strongly discouraged. ***Id.***

Ultimately, members of Congress carved out drivers' information for heightened protection exempted from public records requests. **139 Cong. Rec. HR7926 (Apr. 20, 1994)** (statement by Rep. Edwards). This information was specifically chosen because it is more "vulnerable to abuse" than other information collected and stored by State governments: "There are key differences between DMV records and other public records. There was no evidence before the subcommittee that other public records are vulnerable to abuse in the same way the DMV records have been abused." ***Id.*** It was this heightened vulnerability that led members of Congress to specifically target state departments of motor vehicles and require greater restrictions on the information they collect and store:

> Under the law in over 30 States, it is permissible to give out to any person the name, telephone number, and address of any other person if a drivers' license or vehicle plate number is provided to a State agency. Thus, potential criminals are able to obtain private, personal information about their victims simply by making a request. These open-record policies in many States are open invitations to would-be stalkers. . . . Americans do not believe they should relinquish their legitimate expectations of privacy simply by obtaining drivers' licenses or registering their cars. Yet the laws of some States do just that by routinely providing this identifying information to all those who request it.

139 Cong. Rec. S29470 (Nov. 16, 1993) (statement by Sen. Biden).

Second, Congress had the opportunity to provide an exception for disclosure to the press but declined to do so, and an exception to the

press may not be read into any of the other exceptions to the DPPA. When Congress passes a statute that contains a general prohibition followed by explicit exceptions to the prohibition, "additional exceptions are not to be implied, in the absence of a contrary legislative intent." ***Andrus v. Glover Const. Co.*****, 446 U.S. 608, 616-17 (1980).**

Prior to enacting the DPPA, members of Congress contemplated creating an exception to the DPPA for members of the press; however, they ultimately chose not to do so. ***See*** **139 Cong. Rec. HR7926 (Apr. 20, 1994)** (statement by Rep. Moran). The current version of the DPPA contains many exceptions allowing disclosure of information. However, disclosing information to the press does not fall squarely into *any* of these fourteen exceptions created by Congress. Under ***Andrus***, an exception for the press may not be implied. ***Andrus,*** **446 U.S. at 616-17.**

Congress paid particular attention to the differences between information collected by state DMVs and other public records containing similar information, "which it decided not to regulate. ***Reno*****, 528 U.S. at 151, n. 22**. Congress recognized, though similar information may be available from other types of public records, evidence showed DMV records containing personal information presented unique problems in that the information contained therein could be more easily accessible than the information contained in other records. ***Id.***

Furthermore, in 1999 Congress amended the DPPA to provide for *even greater* privacy protections and again declined to provide an exception for disclosure to the press. Prior to the 1999 Shelby Amendment, individuals who wanted their information protected under the DPPA had to sign a form with their state DMVs, but this "opt-in" system allowed the press to easily access personal information regarding individuals who had not completed the form. **18 U.S.C. § 2721 (1994); *see also Reno* 528 U.S. at 144-145.** After the Shelby Amendment, all personal information gathered and held by the DMVs was *automatically* protected. **Pub. L. 106–69 § 350; *see also* Cong. Rec. S11863 (Oct. 4, 1999)** (statement by Sen. Shelby, "I believe that there should be a presumption that personal information will be kept confidential, unless there is compelling state need to disclose that information.") In enacting the Shelby Amendment, Congress made it *even more difficult* for the public to access this personal information; thus, Congress again signaled an intention to keep personal information collected and stored by state departments of motor vehicles out of the hands of the press.

Congress intended to protect personal information, even in the face of State Public Records Laws, because the release of this information caused great safety and privacy concerns. Allowing the

unredacted release of personal information *every time* an open records request was made for a vehicular accident report, a driving violation, or a driver's status would be contrary to the purpose and spirit of the Act and would lead to an absurd result. Moreover, in amending the DPPA, Congress chose to provide *even greater protections* to information protected by the DPPA. Had Congress intended the press to have access to this personal information, it would have expressly allowed disclosure of information upon open records request or created a statutory exception for the press. But Congress did neither.

Thus, the legislative history of the DPPA supports the redaction of the information requested by New Richmond News.

VI. THE PUBLIC RECORDS LAWS SHOULD TREAT REQUESTERS' ACCESS TO PERSONAL INFORMATION IN HARMONY UNDER THE DPPA, FERPA AND HIPAA.

Summary: Guidance on the interplay between the federal DPPA and the state Public Records Law can also be found in and should be harmonized with the handling of Public Records Law requests under FERPA, wherein the federal law takes precedence.

The Police Department's redactions followed the DPPA's terms, federal court interpretation, the Congressional history and Public Records Law duties to limit access and redact where appropriate.

Additionally, the Police Department's redactions aligned with precedent involving analogous federal privacy laws. Beginning in 1974

and lasting through the 1990s, Congress passed a series of privacy laws aimed at protecting personal information from public disclosure. ***See*** **Privacy Act of 1974, 5 U.S.C. § 552(a); Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; DPPA, 18 U.S.C. § 2721; Health Insurance Portability and Accountability Act, Pub. L. 104-191 (HIPAA).**

In so doing, Congress asserted federal control over the disclosure of certain personal information collected by State governments. ***See Id.*** FERPA, DPPA and HIPAA are all laws passed by Congress that regulate the disclosure of private information collected and stored by state governments, within schools, medical care facilities and services, and state departments of motor vehicles. ***See*** **20 U.S.C. § 1232g; 18 U.S.C. § 2721; Pub. L. 104-191.**

The general structure of the Acts are similar: (1) the Acts prohibit or discourage the disclosure of certain personal information collected and stored at the State level; (2) the Acts then list exceptions to non-disclosure; and (3) finally, the Acts create federal enforcement power or private civil causes of action. ***See*** **20 U.S.C. § 1232g; 18 U.S.C. § 2721; Pub. L. 104-191.**

A. Family Educational Rights and Privacy Act

In 1974 Congress passed the Family Educational Rights and Privacy Act (FERPA) to protect the privacy of student records. **29 U.S.C. § 1932g.** The Act, which applies to all schools who receive funds under a particular federal program, requires schools to obtain consent — from either the student or the guardian of a minor student — before disclosing a student's educational record. **29 U.S.C. § 1232(g)(b)**. The Act itself does not prohibit disclosure; rather, it threatens to cut off public funds if disclosure occurs. ***Id.*** However, given the importance of receiving federal funds, FERPA has been interpreted "according to what records or information [a school] can disclose without jeopardizing its eligibility for funding." ***Osborn,*** **2002 WI 83 at ¶ 18**.

To this end, Wisconsin courts have held that educational institutions must comply with FERPA, even in the face of open records requests. ***Osborn*** involved a case where FERPA limited public access to information in educational records only to disclosure of information that is not personally identifiable. The records at issue contained some personal information as well as some non-personal information. The court directed "[t]he University should comply with FERPA and, in those few situations, refuse to disclose the information if it would

indeed involve the release of personally identified information." **2002 WI 83, ¶ 31;** ***see also Rathie v. Northeastern Wisconsin Technical Institute*****, 142 Wis.2d 685, 419 N.W.2d 296 (Ct.App. 1987)**(denying request for records that included students' name, social security number, telephone number, attendance, and final grades).

B. Heath Insurance Portability and Accountability Act

Soon after Congress passed the DPPA, it enacted HIPAA. **Pub. L. 104-191**. Through HIPAA, Congress delegated, to the Department of Health and Human Services, the power to promulgate the medical Privacy Rule. **45 U.S.C. § 1320d-2**. Together, HIPAA and the Privacy Rule "are intended to protect the privacy of a broad range of health care information." ***Johannes v. Baehr*****, 2008 WI App 148 ¶ 11, 314 Wis.2d 260, 757 N.W.2d 850.** The Privacy Rule regulates the use and disclosure of Protected Health Information (PHI) held by entities covered under HIPAA, and is generally intended to prevent the disclosure of PHI without actual consent. **45 C.F.R. § 160.103**. The general prohibition on disclosure under HIPAA is followed by a number of statutory exceptions for disclosure of information and is federally enforced. **45 C.F.R. § 164.512(e); 42 U.S.C. § 1320d-5**.

While no Wisconsin courts have directly addressed HIPAA's interaction with the Public Records Law, when the matter arises it

would seem reasonable that custodians and courts should accord deference to federal interpretive case law and the Congressional protection of privacy, as opposed to allowing unfettered access under expansive readings of HIPAA's statutory framework and purpose.

C. FERPA, HIPAA, and the DPPA

The framework and purpose of FERPA, HIPAA, and the DPPA are premised on the protection of private personal information. To give effect to this structure and purpose, the Public Records Laws should be interpreted as yielding to the DPPA in favor of redactions where appropriate in the same way that it yields to FERPA in favor of redactions where necessary. Through these various federal enactments, Congress believed protecting the privacy of personal information stored by the government was of paramount concern.

Municipal custodians cannot take a cavalier attitude to privacy laws but must instead undertake a complex task in giving effect to such laws. Both FERPA and the DPPA were among a string of privacy laws passed by Congress due to the growing concern of public access to personal information gathered and stored by governments.

To grant the Newspaper *carte blanche* access to unredacted copies would be as offensive to the DPPA' s regulatory scheme as granting *carte blanche* access to records containing health or student

information in contravention of FERPA's and HIPAA's regulatory schemes.

CONCLUSION

The City of New Richmond requests the Circuit Court's decision be reversed and remand with instructions dismissing this lawsuit.

Respectfully submitted this 19th of January, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (c) Stats., for a brief and appendix produced with a Proportional serif font. The length of this brief is 10,859 words.

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CERTIFICATION OF MAILING & ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and three copies served on all opposing parties at the below address.

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