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

NEW RICHMOND NEWS and
STEVEN DZUBAY,

Plaintiffs-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

# REPLY BRIEF
# OF DEFENDANT-APPELLANT CITY OF NEW RICHMOND

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## INTRODUCTION

There are few ironclad rules in the Public Records Law, yet the Newspaper seeks *carte blanche* access to people's personal information in contravention of the DPPA. The Supreme Court and Seventh Circuit do not consider the DPPA's federal prohibition as inconsequential. Nor did Congress view the DPPA lightly. ***Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 944 (7th Cir. 2015)**.

The Newspaper's position, advocating the Wisconsin Attorney General's informal opinion, guts the DPPA despite significant changes to the legal landscape since 2008. The Attorney General reached the informal opinion, admittedly, with "little available interpretive legal authority" on the intersection between the DPPA and the Public Records Law. **Wis. Op. Att'y Gen. 1—02—08, 2008 WL 1970575, *5 (April 29, 2008)**.

It takes a leap of gargantuan proportions to believe Congress would allow the same stalker who accessed Rebecca Schaeffer's personal information to do so again so long as he asserts to a police department his request is a public records law request, thereby falling under the "agency function" exception. If the Newspaper is right, under every circumstance the custodian must disclose personal information. Unless Congress and federal courts reverse course, the

City of New Richmond appropriately handled the records request at issue.

## ARGUMENT

### I. THE NEWSPAPER'S REQUEST DOES NOT SATISFY ANY EXCEPTION TO NONDISCLOSURE UNDER THE DPPA.

#### A. The Newspaper Offers an Overly Expansive Interpretation of the "Agency Function" Exception.

The blanket "agency function" exception advocated by the Newspaper violates the careful holding of ***Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012)**. Seeking personal information through public records laws did not protect the defendants facing a DPPA lawsuit in ***Maracich v. Spears,* 133 S.Ct., 2191, 2196-97 (2013)** . After all, the DPPA is a statute of *nondisclosure*, with disclosure only allowed under compliance with at least one of fourteen exceptions. **18 U.S.C. § 2721(a)(1)-(2); *Spears*, 133 S.Ct. at 2198**.

Contrary to the Newspaper's approach to disclosure, ***Senne*** required a more nuanced approach in considering a municipality's disclosure of personal and highly restricted information on parking citations. ***Senne*, 695 F.3d at 605**. The "for use" language in relation to "agency function" required that information disclosed be used for an acceptable purpose. ***Id.* at 605-06**. Like the Newspaper's position here, the disclosing municipality's position in ***Senne*** would naturally lead to

the acceptable disclosure of even highly restricted personal information, so long as the disclosure somehow related to a governmental agency's "function." This outcome was considered absurd by the Seventh Circuit, ***Id.* at 606**, and is equally absurd here.

Nor is the Newspaper's "functions" argument supported by Wisconsin's statutes governing law enforcement — Wis. Stats. Ch. 59-68 or 164-177 — which generally describe the functions of law enforcement as investigating, deterring and preventing crime. Congress had such functions in mind when creating this exception, not producing personal information without limitation. ***See generally* Wis. Stat. Ch. 59-68, 164-177.**

Moreover, the Newspaper incorrectly argues the DPPA's exceptions cannot be read narrowly. **Newspaper Br. at 41-42**. "The fact that the statute maintains for highly restricted personal information the existing exceptions for use and dissemination provides further support for the view that the exceptions must be read narrowly." ***Senne*, 695 F.3d at 606**. "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.* at 603**. Interpretation of the DPPA's exceptions must be read consistently "with the statutory framework and design" because the exceptions are

exceptions to the DPPA's general prohibition against disclosure of 'personal information.'" ***Spears*, 133 S.Ct. at 2200** (quotation and citation omitted). "Unless commanded by the text, however, these exceptions ought not operate to the farthest reach of their linguistic possibilities...." ***Id***.

The Newspaper wrongly argues only the "use" of the drivers' personal information by the City should be considered, not the use associated with any redisclosure. **Newspaper Br. at 36-37**. Both the Supreme Court and Seventh Circuit were concerned with redisclosures. The Supreme Court observed:

> Each distinct disclosure or use of personal information acquired from a state DMV must be permitted by the DPPA ... If the statute were to operate otherwise, obtaining personal information for one permissible use would entitle attorneys to use that same information at a later date for any other purpose.

***Spears*, 133 S.Ct. at 2208**. ***Senne*** involved a redisclosure and its lengthy and detailed analysis focused only on that redisclosure. **695 F.3d at 602**.

In ***Spears***, the Court considered the DPPA's (b)(4) exception allowing disclosure of personal information "for use in connection with any civil, criminal, administrative, or arbitral proceeding," and for "investigation in anticipation of litigation." **133 S.Ct. at 2199-2200**. Though the language of (b)(4) is obviously subject to broad

interpretation, the Supreme Court cautioned that the DPPA's structure and purpose required the meaning of the words "in connection with" in the exception be tempered given the DPPA's purpose. ***Id.* at 2199-2200**. As the City has argued, the Supreme Court interpreted the exception narrowly, held client solicitation exceeded the scope of the exception and remanded to determine the requesters' "predominant purpose" in seeking the personal information. ***Id*. at 2205 – 2210**.

As the above authorities observe, so long as the personal information originated from DMV records, the DPPA protects such information from disclosure. ***See also Whitaker v. Appriss Inc.*, 2014 WL 4536559, *4 (N.D. Ind. 2014)** ("If the original source of the other government agency's information is the state department of motor vehicles, the DPPA protects the information throughout its travels."); ***Deicher v. City of Evansville, Wis.*, 545 F.3d 537, 540 (7th Cir. 2008)** (police officer's disclosure of personal information obtained from the state department of motor vehicles violated DPPA). This interpretation is not novel, as it has been accepted by other states. ***See, e.g.*, Ind. Op. Pub. Acc. Couns., 8–FC–152,** *available at* **http://www.in.gov/pac/advisory/files/formal_opinion_08-FC-152.pdf (January 26, 2008)** *(last accessed March 13, 2015)* (DPPA's restrictions prohibited disclosure of personal information in parking tickets which

would have been otherwise disclosable under public records law); ***Republican Party of New Mexico v. N.M. Tax. & Rev. Dept.*, 2010 – NMCA – 080, 242 P.3d 444**, *rev. on other grounds*, **283 P.3d 853 (N.M. 2012)** ("except as otherwise provided under law" exception to state public records law recognized DPPA restrictions); **Tenn. Op. Compt. Treas. 10-03, available at: https://www.comptroller.tn.gov/openrecords/pdf/InfoReleaseFromDeptOfSafety.pdf, (March 6, 2009)** *(last accessed March 12, 2015)* (even though state statute expressly provided accident reports are disclosable under public records law, DPPA required redaction of personal information).

Moreover, the Newspaper's hypotheticals are unpersuasive. **Newspaper Br. at 61-64**. The hypotheticals can be resolved in a different case and also under a different exception that does not involve an interpretation of "agency functions." The hypotheticals could be resolved under the exception for actions taken "in connection with any ... criminal proceeding." **§ 2721(b)(4).** Some of the hypotheticals deal only with verifying personal information, rather than receiving personal information—as is the case here.

### B. The Newspaper's Request Cannot Be Reconciled with the Definitional Components of the DPPA or the (b)(2) and (b)(14) Exceptions.

The Newspaper argues the DPPA's definition of personal information does not include personal information contained in accident reports. **Newspaper's Br. at 49**.

Other authorities criticize this view:

> As you can see from the "personal information" definition set out above, the DPPA does not provide any protection for "information on vehicular accidents." This might at first glance be read as authority for releasing accident reports pursuant to the Arkansas statutes. It is apparent upon further review, however, that this is an improper reading... 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., that absent an applicable exception under the DPPA, state-verified "personal information" will remain confidential in an otherwise accessible document when disclosure might reveal a potential victim's identity.

**Op. Ark. Att'y Gen., 2013-090, p. 6-7 n. 16, 2014 WL 201001 (January 13, 2014)**; ***see also Whitaker*, 2014 WL 4536559, *2-3**.

Further support for the City's interpretation can be found in the Seventh Circuit's recent ***Dahlstrom*** decision, which analyzes this definition and makes several important observations. First, the definition of "personal information" is illustrative and not limitative. **777 F.3d at 943**. The ***Dahlstrom*** court even pointed out that the Reporters Committee for Freedom of the Press, a nonprofit organization that provides legal advice, resources, and advocacy to

journalists, also interprets "personal information" broadly. ***Id.*** **at 945 n. 7;** *see also* **Reporters Comm. For the Freedom of the Press, *FERPA, HIPPA, & DPPA: How Federal Privacy Laws Affect Newsgather 4* (Spring 2010).** Second, Congress intended to encompass a broader range of personal details than a limited reading would allow. ***Id.*** **at 944**. Third, the DPPA's purpose and history supported an expansive interpretation protecting personal information. Fourth, prior case law – specifically ***Senne*** – constituted "helpful guidance" favoring the DPPA's privacy coverage. ***Id.*** **at 945**. Fifth, the court observed "acquisition of [individual's] personal information is sufficient to establish a violation of the [DPPA]." ***Id.*** **at 949**.

***Dahlstrom*** not only favored the DPPA's privacy coverage but found the DPPA withstood a First Amendment challenge based on the newspaper's "publishing [of] truthful information of public concern." ***Id.*** **at 941, 946-947** (unlike the public's limited right of access to certain governmental proceedings, like criminal trials, "there is no corresponding need for public participation in the maintenance of driving records, which can hardly be described as an 'essential component' of self-government.").

The Newspaper's interpretation renders the rest of the definition and the DPPA's purpose meaningless. Why protect a driver's name and

address in the first part of the definition, but then except those things from protection in the last part of the definition? Why have one "exception" in the definition and 14 additional exceptions following? If the Newspaper's interpretation is the interpretation Congress intended, Congress could have drafted the language "but does not include personal information contained on vehicular accidents." But, Congress did not fashion this construct.

The Newspaper's arguments regarding disclosure under the "vehicle safety" exception of (b)(2) and (b)(14) are similarly unpersuasive. In relying upon Wis. Stat. § 346.70(4)(f), the Newspaper ignores a state records custodian's duty to exercise "proper care" and consider "order or regulations" regarding the disclosure of accident reports. Courts allow custodians to consider context and balance other laws, which must include the DPPA. ***See, e.g., Hempel v. City of Baraboo*, 2005 WI 120, ¶ 66, 284 Wis. 2d 162, 699 N.W.2d 551; *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 285, 289-90 (Ct. App. 1991).** If a custodian must consider whether a public employee's email is purely personal or evinces misconduct, ***see Schill v. Wisconsin Rapids School Dist*., 2010 WI 86, 327 Wis.2d 572, 786 N.W.2d 177**, then surely a custodian must also consider privacy protections under the DPPA, FERPA or HIPAA.

Moreover, in arguing that the (b)(2) and (b)(14) exceptions allow disclosure of any accident report because it is simply related to vehicle safety, the Newspaper ignores the caution required by federal courts in analyzing the purpose and scope of the DPPA: an interpretation of each exception must conform to the purpose and design of the overall statute, necessarily including a narrow reading of the exceptions. ***Spears*, 133 S.Ct. at 2199-2200**; ***Senne*, 695 F.3d at 605**.

### C. The Newspaper's "Government Oversight" Justification Does Not Satisfy a DPPA Exception.

The Newspaper's blanket reliance upon the public's right to governmental oversight is not supported by any authority interpreting the DPPA. Moreover, the Seventh Circuit in ***Dahlstrom*** found personal information could be withheld from disclosure, despite similar First Amendment interests. ***See* section I.A. above**.

## II. CONGRESS INTENDED FOR THE DPPA TO PREEMPT CONTRARY STATE LAW.

### A. The Newspaper Fails to Contradict the DPPA's Legislative History.

Throughout its brief the Newspaper makes the conclusory statement that the Congressional record does not show an intention to protect accident and incident reports. ***See, e.g.,* Newspaper Br. at 58.** This argument misses the point. Congress was not concerned with

particular documents; rather, Congress sought to protect *personal information* in the government's possession *solely because* an individual applied for a license. **139 Cong. Rec. S29470 (Nov. 16, 1993)**. It is the personal and highly restricted personal information that concerned Congress, not the form of the records.

The Newspaper does not point to a single statement in the Congressional record revealing the DPPA must yield to public records laws. The Newspaper cites to only one piece of legislative history, **Newspaper Br. at 58**, but omits the sentence immediately preceding:

> Recognizing this distinction [that DMV records are more vulnerable to abuse than other records] this amendment applies only to specified categories of personal information contained in motor vehicle records. It does not apply to any other system of public records maintained by States or local governments.

**139 Cong. Rec. HR7926 (Apr. 20, 1994) (statement by Rep. Edwards).**

Read in its entirety, this statement reveals Congress was concerned with *information* within the motor vehicle records, and wanted to exempt this information from public records access—whether it is being held by the DMV or by another entity that received the information from the DMV. Congress regulated not only disclosures of "personal information contained in motor vehicle records" but also *redisclosures* of that information. Even when information has been disclosed from a DMV to another entity, this information is still protected as the same

"personal information contained in motor vehicle records" discussed throughout the legislative history.

The Newspaper's view cannot overcome the Congressional record showing public records laws were given "considerable attention." **140 Cong. Rec. HR7925 (Apr. 20, 1994)**. Testimony at subcommittee hearings explained and advocated for the need for individual privacy through the protection of DMV records. **1994 WL 212813 (Feb. 3, 1994**). Congress discussed the need to protect personal information because "the laws of some states ... routinely provid[e] this identifying information to all those who request it. **139 Cong. Rec. S29470 (Nov. 16, 1993)**. These laws were deemed "open invitations to would-be stalkers." ***Id.***

A public records law should not be interpreted as that "open invitation" which alarmed Congress.

**B. The DPPA Preempts the Public Records Law.**

The Newspaper tries to sidestep the preemption issue by arguing the DPPA only expressly conflicts with the Public Records Law "as applied to motor vehicle records maintained by the DMV," but not with respect to "routine law enforcement records." **City Br. at 57**. However, the DPPA does not protect records as records; rather, it protects *information* within records held by the DMV and secondary users who

redisclose such information. A direct conflict of laws exists here, even as to routine law enforcement records. Additionally, as shown through the legislative history of the DPPA, Wisconsin's Public Records law conflicts with purposes and objectives of the DPPA.

As a constitutional federal regulation of the states, the DPPA demands compliance from conflicting public records laws. In addition to the Congressional record, the Supreme Court considered the DPPA's interaction with a state law allowing the disclosure of DMV records and upheld the DPPA's regulation of states as constitutional. ***Reno v. Condon*, 528 U.S. 141 (2000)**. ***Reno*** involved a state law making DMV records available to the public. ***Id*. at 147**. The Court unanimously held Congress had the power to regulate conditions under which states and private parties could use, share, and sell motor vehicle information and the DPPA regulates "the States as the owners of data bases." ***Id.* at 150-151**.

At least two Courts of Appeals and two Attorneys General have expressly noted the preemptive nature of the DPPA. ***Oklahoma ex rel. Oklahoma Dep't of Public Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998),** *cert denied*, **528 U.S. 1114 (2000)** ("the DPPA directly regulates the disclosure of [personal information from motor vehicle records] and preempts contrary state law"); ***Collier v. Dickinson*, 477**

**F.3d 1306, 1312 n.3 (11th Cir. 2007)** ("The law was clear at the relevant time the DPPA preempted any conflicting state law that regulates the dissemination of motor vehicle record information"); **Op. N.C. Att'y Gen.**, *available at* : **http://www.ncdoj.com/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Drivers-Privacy-Protection-Act.aspx** (**February 9, 2005)** *(last accessed on March 13, 2015)* ("Therefore, federal law controls, and the State's Public Records Act is preempted by the DPPA where there is a direct conflict."); **Op. Ark. Att'y Gen., 2013-090, p. 6-7 n. 16, 2014 WL 201001 (January 13, 2014)** (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*.").

The Newspaper's argument that Wisconsin's Public Records Law includes a balancing test obscures the point. **Newspaper Br. at 59-60.** When Congress enacted the DPPA it regulated the states as the owners of databases. ***Reno*, 528 U.S. 141.** Thus, in cases involving the disclosure of personal information, the owner of such personal information will not conduct a balancing test because the DPPA demands nondisclosure unless an exception applies. In essence, the DPPA creates a "floor" of protection for personal information gathered and stored by the DMVs. Under ***Reno***, states must comply with its

protections. This statutory construction is in line with other examples of partially preempted state law. ***Protecting Driver Privacy*, 1994 WL 212698 (Statement of Rep. Moran)** ("Additionally, the bill allows states to enact tougher restrictions and gives them room to craft their own specific responses to the regulations."); ***see. e.g.* 120 Cong. Rec. 39,862 (1974) (Joint Statement)** (Regarding FERPA, states may further limit the number or type of State or local officials who will continue to have access or to provide parents/students with greater access.)

### C. The Privacy Interests of HIPAA and FERPA Inform Consideration of the DPPA's Scope.

The Newspaper largely ignores whether the DPPA should be interpreted in general harmony with other similar privacy laws passed by Congress. Because the intent, structure, and enforcement of FERPA and HIPAA are akin to those of the DPPA, Wisconsin's Public Records law should not stand as a wholesale obstacle to the DPPA's privacy concerns.

## CONCLUSION

For all these reasons, reversal of the circuit court's decision is warranted.

Respectfully submitted this 16th day of March, 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 2,998 words.

Respectfully submitted this 16th day of March, 2015.

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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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