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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014AP001938

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

Non-Party Brief of the Wisconsin Newspaper Association and the Reporters Committee for Freedom of the Press

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This case asks whether the federal Drivers' Privacy Protect Act, 18 U.S.C. § 2721, *et seq*. ("DPPA") prohibits local police departments from releasing basic information that happens to be derived from state motor vehicle records in response to a request under the Wisconsin Open Records law, Wis. Stat. § 19.31 *et seq.* ("Open Records law"). Defendant-Appellant City of New Richmond ("the City") overapplies the DPPA, in a manner unsupported by statutory language or precedent from other jurisdictions. The City's interpretation also imposes significant and unwarranted burdens on records custodians and requesters, and fails to serve the interests the DPPA was enacted to address. *Amici curiae* the Wisconsin Newspaper Association and the Reporters Committee for Freedom of the Press ("Reporters Committee") accordingly urge this Court to affirm the circuit court's order and direct disclosure of the unredacted accident and incident reports.

ARGUMENT

I. THE CITY'S INTERPRETATION IS UNSUPPORTED BY STATUTE.

The Open Records law declares Wisconsin's official policy of broad public access to government information,

and provides that "only in an exceptional case may access be denied." Wis. Stat. § 19.31. Records "specifically exempted" from disclosure by state or federal law may be withheld, Wis. Stat. § 19.36(1), but consistent with the law's "presumption" in favor of "complete public access" Wis. Stat. § 19.31, this exemption is limited. *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶22, 249 Wis. 2d 242, 638 N.W.2d 625.

Until recently, the DPPA has not been considered a specific exemption to Wisconsin's broad policy of access. *See* R.1, Ex. B (City Appx-07). Its objectives are simply to prevent motor vehicle data from being obtained and used for committing crimes, and to prevent states from selling personal information to direct marketers. *Dahlstrom v. Sun-Times Media*, 777 F.3d 937, 944 (7th Cir. 2015). None of the DPPA case law cited by the City or municipal insurers appearing as *amici curiae*[1] ("Insurers") alters the accessibility of the basic law enforcement information

1 Non-Party Brief and Appendix of Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation, filed March 31, 2015.

requested by the New Richmond News under the Open Records law.

A. The requested records are not subject to the DPPA.

The DPPA applies to a variety of information that "identifies an individual," but it specifically and expressly carves out "information on vehicular accidents, driving violations, and driver's status" from the definition of "personal information." 18 U.S.C. § 2725(3); *see also* 103 Cong. Rec. H.2522 (Apr. 20, 1994, Stmt. of Rep. Moran) ("It is very important to note that the amendment in no way affects access to accident information about the car or driver."). For example, where a driver crashed and was cited for drunken driving, the accident report containing his name, address, phone number, and drivers' license number was found not to contain "personal information" under the DPPA. *Mattivi v. Russell*, No. 01-WM-533, 2002 U.S.Dist.LEXIS 24409, *2-3, 14 (D.Colo. Aug. 2, 2002) (concluding the statute's "plain language . . . makes clear that Congress did not intend 'information on vehicular accidents' to be included within the Act's prohibition of disclosures of 'personal information'").

The City argues that "personal information" should be broadly construed, relying on *Dahlstrom*, 777 F.3d at 943. (City Reply Br. at 7-8.)[2] *Dahlstrom*, however, did not address the carve-out for information on "vehicular accidents, driving violations, and driver's status" and is of limited value here. *See Dahlstrom*, 777 F.3d at 942-46. The two accident reports at issue in this case plainly constitute "information on vehicular accidents, driving violations, and driver's status" under 18 U.S.C. § 2725(3), as the circuit court correctly found, R.14 at 7 (City Appx-44); *see also* R.1, Ex. D (City Appx-25).

Similarly, the incident report regarding a complaint of gas theft falls outside the DPPA because it does not contain personal information "obtained" from a "motor vehicle record" under 18 U.S.C. § 2721(a). As the report reveals, it relied on the responding officer's interview with the gas station manager, security video, and sheriff's dispatch. *See* R.1, Ex. E (City Appx-36). At most, the

[2] The City notes the *Dahlstrom* court's citation of an online guide published by *amicus* the Reporters Committee. City Reply Br. at 7-8 (citing 777 F.3d at 945 n.7). After the *Dahlstrom* decision was issued, the Reporters Committee submitted a letter to the Seventh Circuit clarifying that the language quoted from its online guide did not reflect the Reporters' Committee's own interpretation of "personal information." (*See* WNA/RC Appx-1.)

incident report's information was "verified" through state motor vehicle records, *id*. Ex. B at 1, not "obtained" from motor vehicle records as required by the statute. *See Dahlstrom*, 777 F.3d at 949 ("the [DPPA] is agnostic to the dissemination of the very same information *acquired from* a lawful source") (emphasis added). The DPPA would not pass First Amendment muster if it restricted disclosure of information obtained from another source, *id*. at 950, and should not preclude access to the unredacted incident report.

B. The requested records fall within DPPA "permissible use" exceptions.

Assuming, *arguendo*, that the requested reports contained "personal information" from motor vehicle records, disclosure would still be allowed as a "permissible use" under the DPPA. 18 U.S.C. § 2721(b).

Two "permissible use" exceptions, 18 U.S.C §§ 2721(b)(2) and (14), reflect Congress's recognition that wider knowledge of motor vehicle and driver safety information benefits the public. These exceptions allow, for example, release of school bus driver names and commercial drivers' license numbers, *Atlas Transit*, 249

Wis. 2d 242, ¶¶23, 25 (noting "the safety of our students while riding a bus" allowed disclosure under the DPPA), as well as information in Wisconsin accident reports, Wis. Stat. § 346.70(4)(f), 18 U.S.C. § 2721(b)(14). The exceptions permit production of the accident and incident reports here as matters of motor vehicle safety and theft.

Also applicable is 18 U.S.C. § 2721(b)(1), which permits disclosure "[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). In Wisconsin, responding to open records requests is an "essential function" and "an integral part of the routine duties of [government] officers and employees." Wis. Stat. § 19.31. The City's police department carries out these functions and engages in a "permissible use" of personal information when it provides reports in response to an Open Records request.[3]

[3] Contrary to the City's and Insurers' arguments, it is unnecessary for open records requesters to in turn identify their own "permissible use" of the record. The DPPA's redisclosure requirements only apply to *one* party, the "authorized recipient," not multiple iterations of disclosure after the initial "permissible use." 18 U.S.C. § 2721(c).

This interpretation does not provide a special exemption to the DPPA for the media, as the City suggests. (City Br. at 47.) The City is correct that Congress rejected a special media exception, but it did so only because "[the press] didn't want to be treated any differently than the general public." 103 Cong. Rec. H.2522 (Apr. 20, 1994, Stmt. of Rep. Moran). The exception for information sought through an open records request is thus available to all. *Id*. at 2523 (Stmt. of Rep. Edwards); *Dahlstrom*, 777 F.3d at 948 (obtaining information through "a state FOIA request" was "a lawful source"). Section 2721(b)(1) allows production of the unredacted reports requested here.

C. The DPPA does not preempt the Open Records law in this case.

The City's insistence that the DPPA preempts the Open Records law and bars full disclosure of the redacted reports goes too far. (City Br. at 41-44.) As just shown, there is no "actual conflict" between the DPPA and the Open Records law. *See Wis. Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (holding local ordinance restricting pesticide application not preempted by federal pesticide

law). If the case for preemption were clear, custodians would have begun redacting accident and incident reports shortly after the DPPA's passage in 1994. *See* R.1, Ex. B. Furthermore, news gathering on local law enforcement activities and motor vehicle safety does not undermine the DPPA's two objectives—preventing criminal activity and bulk sale of personal data. *Dahlstrom*, 777 F.3d at 944-45.

Because the DPPA does not apply or, alternatively, because the records fall within the DPPA's exceptions, the unredacted reports are not "specifically exempted" from disclosure under the Open Records law.

II. THE CITY'S INTERPRETATION IS NOT SUPPORTED BY OTHER STATE AND FEDERAL AUTHORITY.

The City's interpretation of the DPPA is not only unsupported by the language and purpose of that statute, it also finds no support in case law from other states and federal jurisdictions. *Amici*'s review of relevant authority addressing the disclosure of law enforcement records under the DPPA and the public records laws of all 50

states and the District of Columbia demonstrates that the position proffered by the City is as novel as it is meritless.[4]

To the best of *amici*'s knowledge, the DPPA has *never* been held to allow a law enforcement agency to withhold information in response to a public records request.[5] Given the number of cases brought under the DPPA since 2000 (Insurers' Br. at 6), the absence of any case law supporting the City's argument is telling, and underscores why that argument should be rejected by this Court.

Moreover, the attorneys general of several states, including Wisconsin, have determined that it is entirely appropriate for law enforcement agencies to comply with open records requests *even when* it involves disclosure of data that those agencies obtained from the DMV. *See* Wis.

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4 While the briefs of the City and Insurers discuss *Senne v. Village of Palantine* at great length, that case did not involve a request for disclosure under a public records law. *See* 695 F.3d 597, 616 (7th Cir. 2012). For that reason, as the circuit court here properly recognized, *Senne* is inapposite.

5 *City of Lakewood v. David Koenig*, No. 08-2-05892-7 (WA Sup. Ct. Dec. 16, 2011) is one *possible* exception. The trial court granted the City's motion for summary judgment in that case without identifying the specific law that exempted the records from disclosure.

Op. Atty. Gen. I-02-08 (R.1, Ex. C, City Appx-13) (concluding that personal information "obtained from the state DMV and contained in law enforcement records may be provided in response to a public records request . . . ."); Op. Att'y Gen. Fla. 2010-10[6] ("Once personal information contained in a motor vehicle record is received from the department and used in the creation of new records, however, it is no longer protected by DPPA [or the Florida implementing statute]."); Att'y Gen. Ky. 02-ORD-19[7] (stating that the DPPA "is inapplicable to law enforcement agencies, and the accident reports they generate, notwithstanding the fact that some of the information that appears in an accident report is extracted from motor vehicle records"). These opinions are aligned with court decisions that conclude the DPPA does not prohibit the required release of information to the public by non-DMV agencies, even when the release includes information obtained from the DMV. *See Davis v. Freedom of Info.*

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6 *Available at* http://perma.cc/88ME-FELF.

7 *Available at* http://ag.ky.gov/civil/orom/2002/02ORD019.doc.

Comm'n, 790 A.2d 1188, 1194 (Con. Super. Ct. 2001), *aff'd* 787 A.2d 530 (Conn. 2002).

To the extent that the DPPA *has* been held to prohibit the release of information under state public records laws, it has been in situations that the DPPA was specifically designed to address; namely, when the information was being sought directly from the DMV for impermissible purposes. *See*, *e.g.*, *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. 2005) (holding that the DPPA prohibits disclosure by the DMV of personal information for the purpose of soliciting clients); *Maracich v. Spears*, 133 S.Ct. 2191 (2013) (same). These cases recognize the DPPA was "designed principally to protect against the disclosure of personal information obtained from searches of DMV records by DMV employees . . . ." *Fontanez v. Skepple*, 563 F. App'x 847, 848-49 (2d Cir. 2014).

Indeed, while the Insurers note that 57 DPPA cases have been filed since 2000, *amici* is aware of only *one* such case that involves disclosure of data under an open records

law.[8] And that case is distinguishable because it involved the disclosure of records directly from the South Carolina DMV, *not* a law enforcement or other agency, to lawyers impermissibly attempting to gather data for client solicitation. *See Maracich*, 133 S.Ct. 2191. Nearly all of the remaining cases identified by the Insurers involve improper searches that the DPPA was designed to address. *See*, *e.g.*, *Kampschroer v. Anoka Cnty et al.*, No. 13-cv-2512 (D.Minn.) (filed 09-15-2013) (alleging that numerous law enforcement personnel accessed a local TV personality's records to satisfy their own curiosity and without a permissible purpose).

Circumstances like these cannot be compared to legitimate public records requests that, when answered, can enhance public knowledge of safety risks, deter future criminal activity, and bolster confidence in law enforcement. *McQuirter v. City of Montgomery*, Case No. 2:07-cv-234, 2008 U.S.Dist.LEXIS 10319, *17-18

8 Not all cases cited by Insurers appear on PACER, making a thorough review of the facts of each case difficult. Additionally, it is not clear whether *Mattivi v. Russell*, 2002 U.S.Dist.LEXIS 24409 (D.Colo. Aug. 2, 2002) involved a public records request. Regardless, the court in that case determined the accident report at issue did not contain "personal information" and was not a "motor vehicle record" under the DPPA.

(M.D.Ala. Feb. 12, 2008) (determining a law enforcement agency's release of information to the media, obtained from the DMV and covered by the DPPA, was a permissible use under 18 U.S.C. § 2721(b)(1)). The DPPA should not be interpreted to prohibit the release of information by a law enforcement agency pursuant to an open records request.

III. THE CITY'S INTERPRETATION UNNECESSARILY BURDENS CUSTODIANS, REQUESTERS, AND ACCESS TO INFORMATION.

Finally, the City's interpretation of the DPPA imposes significant burdens on records custodians and requesters, which will severely inhibit public awareness of government activities.

Consider the process that the City and Insurers advocate for obtaining a local law enforcement record: First, a requester and custodian must ascertain whether the requested information was derived from state motor vehicle records. Second, the requester must cite a "permissible use" under the DPPA for the information, and provide a "fact-specific rationale for disclosure." (City

Br. at 25, 31.) Third, "the conduct of the requester must be examined" by the custodian, who must evaluate the identified use against the DPPA's fourteen exceptions. (*Id*. at 38.) Fourth, the custodian must redact each piece of information derived from motor vehicle records if he or she disagrees that a "permissible use" applies. (*Id*. at 16.)

This proposed process is time-consuming, costly, and unworkable. It assumes requesters and custodians are legal experts on the DPPA, which is unlikely given the law's complexity. It imposes an unprecedented fact-finding and legal gatekeeping function on the custodian, and directly contravenes the Open Records law, which does not require requesters to identify themselves or the reasons for their requests. Wis. Stat. § 19.35(1)(i). If the requester is a media member, the government becomes empowered to decide what information falls within an exception and is therefore newsworthy. (City Br. at 35 (questioning the value of information in the incident report).) The City's restrictive process will also assuredly fail, leading to over-redactions (where the requester and custodian cannot correctly identify an applicable

exception) or under-redaction (where the custodian gets the DPPA analysis wrong).

The City's proposed process does not advance the DPPA's objectives. A potential criminal cannot currently obtain motor vehicle information simply by asking a local law enforcement agency to recall it from a database. *See* Wis. Stat. § 19.35(1)(k) ("this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format"). A local law enforcement agency can only provide information it already has, which means an accident or violation of the law must have already occurred and appropriate records prepared. This case does not open the floodgates to criminals or bulk data providers, because local law enforcement has so little "personal information" to begin with.[9] Even then, it is only produced if no other exceptions to access apply.

Moreover, the City's interpretation undermines the purpose of the Open Records law: to inform the electorate,

[9] Notably, much of the "personal information" Congress intended to protect is now widely available online, through social media, or via innumerable other sources that did not exist when the DPPA was created.

upon which a representative government depends. Wis. Stat. § 19.31. As the Legislature has stated, "[t]he denial of public access generally is contrary to the public interest," *id.*, and courts have affirmed the special importance of public access to law enforcement records. *E.g.*, *Kroeplin v. DNR*, 2006 WI App 227, ¶¶44-52, 297 Wis. 2d 254, 725 N.W.2d 286, *rev. denied*, 2007 WI 59. Recent interpretations of the DPPA have already substantially burdened access to information; the Wisconsin Newspaper Association has identified at least 77 agencies now redacting information obtained through motor vehicle records. (WNA/RC Appx-4.)

Congress, too, recognized that "[b]road public access to these records remains enormously important to our society, for preservation of a free press, for government accountability, and for a number of valuable economic and business applications." 103 Cong. Rec. H.2524 (Stmt. of Rep. Edwards). That is why the DPPA was never intended to apply to state and local records "accessible in accordance with applicable State law." *Id.*

By advocating a broad interpretation of the DPPA's prohibitions and a narrow interpretation of its exceptions,

the City imposes unnecessary burdens on access to information, requesters, and ultimately itself. Its interpretation should be rejected.

CONCLUSION

For all of the foregoing reasons, *amici curiae* Wisconsin Newspaper Association and the Reporters Committee respectfully request that this Court affirm the circuit court.

Dated this 16th day of April, 2015.

By:_____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,994 words.

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 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 served on all opposing parties.

By:_____

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