

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

RECEIVED

04-16-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

NEW RICHMOND NEWS and STEVEN DZUBAY,

Petitioners-Respondents,

v.

Appeal No. 2014AP001938

CITY OF NEW RICHMOND

Respondent-Appellant.

**LEAGUE OF WISCONSIN MUNICIPALITIES' AND
WISCONSIN COUNTIES ASSOCIATION'S JOINT AMICUS
CURIAE BRIEF AND SUPPLEMENTAL APPENDIX**

Appeal from St. Croix County Circuit Court, The Honorable Howard W. Cameron
Presiding, St. Croix County Case No. 2013-CV-000163.

Claire Silverman
State Bar No. 1018898
LEAGUE OF WISCONSIN MUNICIPALITIES
131 W. Wilson (Suite 505)
Madison, WI 53703
(ph) 608-267-2380
(fax) 608-267-0645
(email) cms@lwm-info.org

Andrew T. Phillips
State Bar No. 1022232
WISCONSIN COUNTIES ASSOCIATION
von Briesen & Roper, s.c.
411 E. Wisconsin Ave. (suite 1000)
Milwaukee, WI 53202
(ph) 414-287-1570
(fax) 414-238-6439
(email) aphillips@vonbriesen.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF INTEREST.....1

ARGUMENT.....2

I. MUNICIPAL AND COUNTY LAW ENFORCEMENT AGENCIES NEED CLARIFICATION REGARDING HOW THE DPPA INTERSECTS WITH WISCONSIN’S PUBLIC RECORDS LAW AND CANNOT REASONABLY RELY ON THE ATTORNEY GENERAL’S 2008 INFORMAL OPINION WHICH PREDATES IMPORTANT FEDERAL CASES AND WHICH THE AG HAS NOT REVISITED.....2

II. LAW ENFORCEMENT AGENCIES NEED CLARIFICATION AND CERTAINTY SO THAT THEY CAN APPROPRIATELY RESPOND TO PUBLIC RECORD REQUESTS WITHOUT THREAT OF SUIT AND ENORMOUS POTENTIAL LIABILITY REGARDLESS OF WHAT ACTIONS THEY TAKE......6

CONCLUSION.....10

FORM/LENGTH AND ELECTRONIC FILING CERTIFICATION.....11

ELECTRONIC APPENDIX FILING CERTIFICATION.....11

TABLE OF AUTHORITIES

Cases

<i>Deicher v. City of Evansville</i> , 2007 WL 5323757 (W.D. Wis. 2007).....	4
<i>Maracich v. Spears</i> , 133 S. Ct. 2191(2013).....	5
<i>Milwaukee Journal Sentinel v. City of Milwaukee</i> , 2012 WI 65, 341 Wis.2d 607, 815 N.W.2d 367	10
<i>Parus v. Cator</i> , 2005 WL2240955 (W.D. Wis.).....	4
<i>Parus v. Kroepelin</i> , 402 F. Supp.2d 999 (W.D. Wis. 2005)	4
<i>Senne v. Village of Palatine</i> , 695 F.3d 597 (7 th Cir. en banc, 2012).....	3, 5
<i>Senne v. Village of Palatine</i> , Cert denied, 133 W. Ct. 2850 (2013).....	6

Statutes

Wis. Stat. secs. 19.31-19.37.....	1
Wis. Stat. sec. 19.36(6).....	9
Wis. Stat. sec. 19.65.....	7
18 U.S.C. §2721- 2725.....	1, 5, 9

STATEMENT OF INTEREST

The League of Wisconsin Municipalities (League), established in 1898, is a non-profit, voluntary association of 586 Wisconsin cities and villages cooperating to improve and aid the performance of local government. The Wisconsin Counties Association (WCA), statutorily created in 1935, works to protect the interest of Wisconsin's 72 counties and promote better county government. The League and WCA sought to file a joint *amicus* brief in this case because it involves an issue of great concern to our members, who provide law enforcement in towns, cities, villages and counties and who are similarly affected by the issue.

This case concerns the interaction between the federal Drivers Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725 and Wisconsin's Public Records Law, §§ 19.31-19.37, in the context of public records requests to law enforcement agencies. More specifically, it involves public records requests for law enforcement records where some of the record's fields have been automatically populated using a system that pulls DPPA-protected information directly from Department of Motor Vehicle (DMV) records. The question is whether the DPPA allows law enforcement agencies to disclose those records containing that protected information to the media and general public without redacting the DPPA-protected information obtained from DMV records and, if so, which of the specific DPPA exceptions authorize the release. Although our

members do not uniformly interpret the DPPA, and their redaction practices with regard to such information vary, all of our members would benefit from clarity on this issue. For many of our members, simply having the correct answer is more important than what the answer actually is.

ARGUMENT

We wholly agree with the legal arguments made by both the City of New Richmond (City) and by Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation in their *amicus* brief. The circuit court's decision must be reversed. To avoid unnecessary repetition, we do not repeat those same arguments. Instead, we explain the chain of events that led to this case and the concerns of cities, villages and counties whose law enforcement agencies need clarification to understand the intersection of the DPPA and the Wisconsin Public Records Law in light of recent federal case law. Clarification of the law will enable them to perform the duties required of them as authorities under the Public Records Law and free them from the constant threat of litigation and the possibility of substantial liability that currently hangs over their heads regardless of what actions they take.

I. MUNICIPAL AND COUNTY LAW ENFORCEMENT AGENCIES NEED CLARIFICATION REGARDING HOW THE DPPA INTERSECTS WITH WISCONSIN'S PUBLIC RECORDS LAW AND CANNOT REASONABLY RELY ON THE ATTORNEY GENERAL'S 2008 INFORMAL OPINION WHICH PREDATES IMPORTANT FEDERAL CASES AND WHICH THE ATTORNEY GENERAL HAS NOT REVISITED.

Petitioners-Respondents New Richmond News and Steven Dzubay (collectively “Newspaper”) characterize the City’s reading of *Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012) “hyper-cautious.” Newspaper’s Response Brief at p. 4. Additionally, the brief suggests that the City was alone in its reading of *Senne*, and standing way out in left field to boot. That is inaccurate. The City’s reading of *Senne* was not the unilateral reading of one law enforcement department. Rather, the reading was prompted by organizations like the League, WCA, and municipal insurers who, after reading *Senne*, alerted members and policyholders to the case and suggested that law enforcement agencies proceed with caution and, in consultation with their attorneys, examine the ways in which they use and redisclose information obtained from DMV records. Many municipalities thought it significant that the Seventh Circuit, rehearing the case *en banc*, vacated the court’s earlier decision and concluded that a police officer in a small village might potentially have violated the DPPA -- with potential liability of as much as \$80 million in the event of a class action lawsuit -- simply by placing a parking ticket containing DPPA-protected information taken from DMV records under the windshield of a parked vehicle. *Amici* do not think such significant concerns are “hyper-cautious.”

The issue in this case did not come out of left field. The Drivers Privacy Protection Act has been on the radar screen of Wisconsin law enforcement departments for some time. The DPPA was the subject of legal

comments in the May and June 2007 issues of the League's magazine, *the Municipality*. Those legal comments followed a cluster of then-recent cases¹ that brought the DPPA more clearly to the forefront and raised serious questions regarding under what circumstances law enforcement agencies could release information obtained from DMV records. Those cases, unlike the case at hand, involved situations where police officers directly obtained information from DMV records and used it for non-law enforcement related purposes or redisclosed the information for purposes unrelated to law enforcement functions. Reading the explicit text of the DPPA raised serious and difficult questions relating to whether uniform accident reports subject to 346.70(4)(f) and containing information from DMV records could be released without redaction.

In July 2007, Attorney Robert Dreps and Jennifer Peterson requested an opinion from the Attorney General's office on the interaction between the DPPA and the Wisconsin Public Records Law "in the context of public records requests to law enforcement agencies." The request was made on behalf of several media organizations and the Wisconsin Freedom of Information Council. In an informal Attorney General opinion dated April 29, 2008, the AG noted that although private parties are not entitled to formal opinions and that it was the longstanding policy of Wisconsin Attorneys General not to

¹ *Deicher v. City of Evansville*, 2007 WL 5323757 (W.D. Wis. 2007), *Parus v. Kroepelin*, 402 F. Supp.2d 999 (W.D. Wis. 2005) and *Parus v. Cator*, 2005 WL2240955 (W.D. Wis.)

issue opinions concerning applicability of federal statutes administered exclusively by federal authorities except in extraordinary circumstances, the Attorney General's office found "extraordinary circumstances" given, among other things, the Attorney General's "unique role in construing the Public Records Law" and "the need for guidance expressed by Wisconsin law enforcement agencies diligently attempting to comply with both the DPPA and the Wisconsin Public Records law." Informal Op. Att'y Gen. I-02-08 at p. 1.

The Attorney General's informal 2008 opinion evidently provided law enforcement records custodians with a strong measure of comfort in providing unredacted accident reports despite the fact that the records contained DPPA-protected information. However, that comfort level was substantially eroded in 2012 when, as explained in the City's brief and Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation's amicus brief, the Seventh Circuit's *en banc* rehearing decision in *Senne*, particularly with regard to the limitations of the "for use by" language in § 2721 (2)(b)1 of the DPPA, seriously undermined the conclusions and assertions in the Attorney General's informal 2008 opinion. The comfort level was further eroded in 2013 when the U.S. Supreme Court's decision in *Maracich v. Spears*, 133 S. Ct. 2191, confirmed that DPPA exceptions should be narrowly construed to avoid subverting the DPPA's purpose.

Following the decision in *Senne*, which came four years after the Attorney General had issued his informal opinion, those tasked with advising

law enforcement records custodians on how to comply with Wisconsin's Public Records Law, sought guidance from the Attorney General. Municipal attorneys representing some of Wisconsin's most heavily populated² municipalities wrote the Attorney General and requested that he issue an opinion providing guidance on how *Senne* impacted the Public Records Law and, more particularly, his 2008 informal opinion. By letter dated November 20, 2012, Assistant Attorney General Kevin Potter responded to the request, declining to provide guidance and writing that although they "understand that *Senne* has created a degree of uncertainty, and that law enforcement and others would benefit from clear guidance," *Senne* was the subject of a certiorari petition to the U.S. Supreme Court and it made sense to wait until the petition was either denied or the U.S. Supreme Court decided the case. On June 24, 2013, the U.S. Supreme Court denied the Village of Palatine's petition for certiorari. 133 S. Ct. 2850. In July 2013, the Wisconsin Association of County Corporation Counsels wrote the Attorney General's office seeking guidance on the same issue. That request was also declined.

II. LAW ENFORCEMENT AGENCIES NEED CLARIFICATION AND CERTAINTY SO THAT THEY CAN APPROPRIATELY RESPOND TO PUBLIC RECORD REQUESTS WITHOUT THREAT OF SUIT AND ENORMOUS POTENTIAL LIABILITY REGARDLESS OF WHAT ACTIONS THEY TAKE.

² The letter, dated August 24, 2012, and included in the supplemental appendix to this brief, was signed by the municipal attorneys from Milwaukee, Madison, West Allis, Wauwatosa, Brookfield and Neenah.

The Newspaper has refused to loosen its grip on the Attorney General's informal 2008 opinion. The Newspaper and other media steadfastly insist that the Attorney General's informal opinion issued seven years ago, which the Attorney General has declined to revisit despite new case law casting it in serious doubt, stands as iron-clad authority for law enforcement agencies' ability to release unredacted records containing DPPA-protected information pursuant to requests under Wisconsin's public records law.

However, for the legitimate reasons detailed above in the briefs of other *amici*, many law enforcement agencies have lost any confidence they once had in the 2008 informal opinion. As "authorities" under the Public Records Law, our members are tasked not only with releasing information requested, but the concomitant duty to not release information that is protected from disclosure under Wisconsin or federal law. The Public Records Law mandates that public record law authorities (1) develop rules of conduct for its employees who are involved in collecting, maintaining, using, providing access to, sharing or archiving personally identifiable information; and (2) ensure that those persons know their duties and responsibilities relating to protecting personal privacy, including applicable state and federal laws. Wis. Stat. §19.65. Given the unsettled state of the law, it is nearly impossible for law enforcement agencies to ensure that they do not violate the DPPA when responding to a public records request unless all potentially protected information is redacted.

On behalf of our members, we ask this Court to provide law enforcement agencies with the guidance they need in order to perform their duties under the Public Records Law with regard to records containing DPPA-protected information obtained from DMV records. We ask that this Court not limit its opinion to the particular records requested in this case but, instead, speak to any records containing such information. Our members have been left twisting in the wind for three years and they need guidance. Providing access to records, which Wis. Stat. sec. 19.31 says is an “integral part of the routine duties of officers and employees whose responsibility it is to provide such information,” should not be so fraught with uncertainty and significant potential liability.

Without guidance and certainty, our members’ and their law enforcement agencies are in an untenable position and face potential serious liability regardless of what course they take. If they redact DPPA-protected information contained in law enforcement records obtained directly from DMV records, they face lawsuits from the media and liability for damages and attorney fees if they have not correctly applied the law. If they do not redact information, they face potential lawsuits from those whose DPPA-protected information is wrongfully redisclosed with the prospect of liability for damages and attorneys fees under the DPPA. It is a no-win situation. As we said at the outset, our members are not united in what the law requires. For most of our members, clarity is more important than the actual answer.

As also indicated at the outset, *amici* wholly agree with the legal arguments in the City’s brief and in Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation’s *amicus* brief. Ironically, the answer *amici* think is legally correct is not the answer most advantageous to our members. We suspect law enforcement departments would be thrilled to learn that police department records containing “personal information” and “highly personal information” pulled directly from DMV records and requested pursuant to Wisconsin’s public records law need not be redacted.

If this Court concludes that redisclosure of such information in response to a public records request under Wisconsin law falls squarely within any of the exceptions in 18 U.S.C. § 2721(2)(b), it will come as welcome news to law enforcement departments. Redacting records to avoid violating the DPPA is laborious, time consuming, and costly. In a time when municipal and county budgets are strained and local officials must provide constituents with the same level of services with less funds, municipal officials would be happy to shed law enforcement’s DPPA-related redaction costs. Redaction costs do not translate obviously into tangible benefits that residents enjoy. Unfortunately, redacting records as required by law is not a service that local officials can choose not to provide. Wis. Stat. § 19.36(6) requires that authorities redact. And, also unfortunately, although the public records law authorizes authorities to recover certain actual, direct and necessary costs associated with providing public records, authorities cannot recoup from requesters the costs associated

with redaction. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, 341 Wis.2d 607, 815 N.W.2d 367.


CONCLUSION

The City of New Richmond's brief and Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation's *amicus* brief clearly demonstrate that the circuit court's decision in this case is incorrect and should be reversed. We ask that this Court not only reverse the circuit court's decision but, more importantly, provide clear direction to Wisconsin's law enforcement agencies regarding whether the federal DPPA requires redaction of law enforcement records containing DPPA-protected information obtained from DMV records that are requested by the media and the general public under Wisconsin's public records law. If this Court concludes that redaction is not required, we request that it clearly identify which DPPA exception(s) authorize release without redaction.

Respectfully submitted this 16th day of April, 2015.

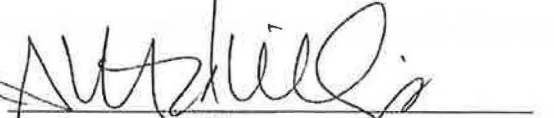
League of Wisconsin Municipalities

By:


Claire Silverman (State Bar #1018898)

Wisconsin Counties Association

By:


Andrew T. Phillips (State Bar #1022232)
von Briesen & Roper, s.c.


CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2272 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of sec. 809.19(12) and that the 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 mailed to all parties.

Dated: April 16, 2015.

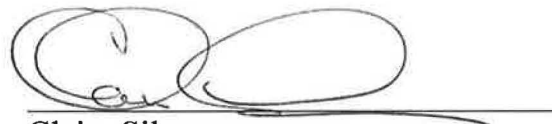


Claire Silverman

ELECTRONIC APPENDIX FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. sec. 809.19(12)(f) that the text of the electronic copy of the Supplemental Appendix to this brief is identical to the text of the paper copy of the appendix.

Dated: April 16, 2015



Claire Silverman

