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DISTRICT III
APPEAL NO.: 14-AP-001938

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CLERK OF COURT OF APPEALS
OF WISCONSIN

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. *Linzmeier 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 driver 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 *Linzmeier*, 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. Health 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.

Respectfully submitted this 19th of January, 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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OF WISCONSIN**

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

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INTRODUCTION

The accident and incident reports at issue in this lawsuit are basic and routine records indistinguishable from official reports generated daily by law enforcement agencies across Wisconsin. Like all government records, they are subject to disclosure under the Public Records Law, which is founded on this state's longstanding policy that "all persons are entitled to 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 (2013-14).¹ This policy is nowhere more important than in public oversight of law enforcement.

The New Richmond News and Steve Dzubay (the "Newspaper") brought this enforcement action to compel the City of New Richmond (the "City") to fulfill its obligations

¹ All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

under the Public Records Law and release, without redaction, three such law enforcement records. The New Richmond Police Department (the “Department”) began redacting names and addresses from its reports in 2012 because it uses state Department of Motor Vehicles (“DMV”) records to verify the identities of persons named in those reports. The City argues that Congress—back in 1994—prohibited it from re-disclosing personal information contained in accident or incident reports by enacting the Drivers’ Privacy Protection Act (the “DPPA”), which restricts public access to motor vehicle records held by a state DMV.

The City maintains that congressional intent to dramatically alter the application of state public record laws to law enforcement reports went unrecognized for nearly two decades. Moreover, the City’s expansive interpretation of the DPPA is neither applied in any other state nor compelled by any federal or state court decision involving the disclosure of

law enforcement reports in compliance with a state public records law. The circuit court correctly rejected the City's interpretation as contrary to the DPPA's plain language.

Nothing in the statute or its legislative history suggests that Congress intended the DPPA to supersede state public records laws, except with respect to motor vehicle records maintained by a state DMV. Congress intended the DPPA to remedy two abuses:

The DPPA was enacted as a public safety measure, designed to prevent stalkers and criminals from utilizing motor vehicle records to acquire information about their victims. Prior to the law's enactment, anyone could contact the department of motor vehicles in most states and, simply by providing a license plate number and paying a nominal fee, obtain the corresponding driver's address and other pertinent biographical information—no questions asked.

A secondary purpose of the DPPA [was] . . . to protect against "the States' common practice of selling personal information to businesses engaged in direct marketing and solicitation."

Dahlstrom v. Sun-Times Media, LLC, No. 14-2295, 2015 WL 481097, at *4-5 (7th Cir. Feb. 6, 2015), (*quoting Maracich v. Spears*, 133 S. Ct. 2191, 2198 (2013)).

The Newspaper does not dispute that the DPPA preempts Wisconsin law where the two conflict—indeed, the DPPA is the reason Wisconsin’s DMV no longer sells personal information of licensed drivers and vehicle owners. However, the DPPA *explicitly* authorizes the use of personal information “by any government agency, including any court or law enforcement agency, in carrying out its functions,” 18 U.S.C. § 2721(b)(1) (2013), and the disclosure of incident and accident reports is an essential function of law enforcement agencies under Wisconsin law. Additional exceptions provide further bases for disclosing accident reports and other law enforcement records related to motor vehicle safety.

The City’s hyper-cautious reading of *Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012), the basis for its

sudden policy change, is insupportable. The circuit court agreed that *Senne* is inapplicable, choosing instead to follow our attorney general's analysis in an informal opinion that specifically addresses the DPPA's effect on Wisconsin's Public Records Law. *See* Informal Opinion of Wis. Att'y Gen. to Robert J. Dreps and Jennifer L. Peterson, Godfrey & Kahn, S.C., I-02-08, 2008 WL 1970575 (Apr. 29, 2008). This court should do the same.

STATEMENT OF ISSUES

The Newspaper disagrees with the City's statement of the issues presented. The issue is not whether the City "may" redact personal information from law enforcement reports "under the federal Driver's Privacy Protection Act." Brief of Respondent-Appellant City of New Richmond ("City Br.") at 1. The issue is whether it "must" do so based upon federal preemption. *See* Wis. Stat. § 19.36(1) ("Any record which is specifically exempted from disclosure by state or federal law

or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1)”).

**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

The Newspaper agrees with the City that the court should grant oral argument and publish its decision.

STATEMENT OF THE CASE

I. RELEVANT STATUTES

A. The Driver’s Privacy Protection Act.

1. History and Purpose

The Driver’s Privacy Protection Act, or DPPA, was enacted in 1994 to restrict the disclosure or sale of personal information by state departments of motor vehicles, or DMVs. Congress adopted the statute, in part, in response to the 1989 murder of actress Rebecca Schaeffer by a stalker who procured her unlisted address from the California DMV. *Senne*, 695 F.3d at 607.

Whereas the privacy concerns of today arise from sophisticated hacking attacks against companies like Sony Pictures, Target, and Anthem, the DPPA addresses a far simpler problem: DMV service counters that literally sold personal information—either individually or in bulk—to anyone willing to pay for it. As the U.S. Supreme Court has explained,

The DPPA regulates the disclosure and resale of personal information contained in the records of state DMVs. State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. Congress found that many States, in turn, sell this personal information to individuals and businesses.

Reno v. Condon, 528 U.S. 141, 143 (2000); *see also id.* at 144 (noting that the Wisconsin Department of Transportation had

been earning “approximately \$8 million each year from the sale of motor vehicle information.”).

The immediate accessibility of a driver’s personal information to anyone who enters the DMV was the problem Congress sought to eliminate. As DPPA sponsor California Sen. Barbara Boxer explained,

In 34 States, someone can walk into a State Motor Vehicle Department with your license plate number and a few dollars and walk out with your name and home address. Think about this. You might have an unlisted phone number and address. But, someone can find your name or see your car, go to the DMV and obtain the very personal information that you may have taken painful steps to restrict.

Mr. [Senate] President, the American people think that is wrong.

139 Cong. Rec. 29,466 (1993).

Congress consciously singled out state DMVs for regulation because the ubiquity of license plates rendered DMV records uniquely susceptible to abuse:

The key difference between DMV records and other public records comes from the license plate, through which every vehicle on the public highways can be linked to a specific individual. Anyone with access to data linking license plates with vehicle ownership has the ability to ascertain the name and address of the person who owns that vehicle. Other public records are not vulnerable to abuse in the same way.

Unlike with license plate numbers, people concerned about privacy can usually take reasonable steps to withhold their names and addresses from strangers, and thus limit their access to personally identifiable information. By contrast, no one is free to conceal his or her license plate while traveling by automobile.

Recognizing this distinction, 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.

140 Cong. Rec. 7,925 (1994) (statement of Rep. James P. Moran); *see also* 139 Cong. Rec. 29,469 (1993) (statement of Sen. Joe Biden) (emphasis added) (“By protecting the privacy of addresses and telephone numbers—which would otherwise

be available *at the mere mention of a license plate or driver's license number*—the amendment is another weapon against [stalking].”).

2. *The Statute*

The DPPA is organized into three basic components: the prohibition, the exceptions, and the enforcement procedures and remedy.

First, the prohibition:

In general.—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 department in connection with a *motor vehicle record*, except as provided in subsection (b) of this section . . .

18 U.S.C. § 2721(a) (emphasis added).² The italicized terms

above are all defined in the statute:

(1) “motor vehicle record” means 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;

(2) “person” means an individual, organization or entity, but does not include a State or agency thereof;

(3) “personal information” means information that identifies an individual, including an individual’s photograph, social security number, 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.

18 U.S.C. § 2725.

² The DPPA includes a separate, stricter prohibition against the disclosure of “highly restricted personal information,” 18 U.S.C. § 2721(a)(2), which encompasses only “an individual’s photograph or image, social security number, medical or disability information,” 18 U.S.C. § 2725(4). The provisions governing “highly restricted personal information” are not at issue here, because no such information appears in any of the records requested.

The prohibition, far from absolute, is qualified by fourteen exceptions. “Against the backdrop of the general rule prohibiting disclosures in subsection (a), subsection (b) provides . . . several categories of permissive disclosures.” *Senne*, 695 F.3d at 605. Personal information “may be disclosed” by DMVs in fourteen circumstances, three of which are relevant here:

- (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; 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.

...

(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.

18 U.S.C. § 2721(b).

The prohibition and its exceptions also extend to authorized *recipients* of personal information from the DMV, who “may resell or redisclose the information only for a use permitted under subsection (b),” subject to certain exceptions not applicable here. 18 U.S.C. § 2721(c).

Finally, the DPPA’s enforcement provisions include a criminal fine for intentional violations, and daily civil fines against any state DMV that has a policy or practice of substantial noncompliance. 18 U.S.C. § 2723(a) and (b). The City’s principal concern, however, is that the DPPA creates “a private right of action for any individual whose personal information has been obtained or disclosed in violation of the

Act.” *Dahlstrom*, 2015 WL 481097, at *2 (citing 18 U.S.C. § 2724(a)); see City Br. at 15, 22-23.

B. The Public Records Law.

The Wisconsin legislature has declared the state’s official policy of virtually unfettered public access to government records:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be 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.

Wis. Stat. § 19.31. The legislature reinforced that official public policy with a statutory presumption that all

government records are open to public inspection, upon request, by any person.

To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Id. The Supreme Court has emphasized the power of this legislative command, calling it “one of the strongest declarations of policy to be found in the Wisconsin statutes.” *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240.

Only three exceptions qualify the Open Records Law’s strong presumption of public access: (1) specific statutory exceptions; (2) specific common law exemptions; or (3) a judicial determination, supported by factual findings, that the public interest in secrecy outweighs the public interest in disclosure under the common law balancing test. *Hathaway*

v. Joint Sch. Dist., 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). Because the City claims that the DPPA prohibits its disclosure of personal information obtained or verified from DMV records, this case involves the first of these exceptions:

Any record which is *specifically* exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1)....

Wis. Stat. § 19.36(1) (emphasis added). Exceptions to the Public Records Law must be “narrowly construed,” moreover, which means that “unless the exception is explicit and unequivocal, it will not be held to be an exception.” *Hathaway*, 116 Wis. 2d at 397.

C. Section 346.70, Wis. Stat.

Wisconsin law requires “[e]very law enforcement agency investigating or receiving a report of a traffic accident” to “forward an original written report of the accident or a report of the accident in an automated format to

the department [of transportation] within 10 days after the date of the accident.” Wis. Stat. § 346.70(4)(a). Those reports are open to public inspection:

[A]ny person may with proper care, during office hours, and subject to such orders or regulations as the custodian thereof prescribes, examine or copy such uniform traffic accident reports, including supplemental or additional reports, statements of witnesses, photographs and diagrams, retained by local authorities, the state traffic patrol or any other investigating law enforcement agency

Wis. Stat. § 346.70(4)(f). Furthermore, any law enforcement agency that investigates or receives such a report is required to forward it to the county traffic safety commission or another appropriate body, depending on where the accident occurred. Wis. Stat. § 346.70(4)(h).

II. RELEVANT AUTHORITY

Three opinions are central to this appeal. The Wisconsin Attorney General addressed the application of the

DPPA to law enforcement reports under Wisconsin's Public Records Law in a 2008 informal opinion. The City disputes that opinion based on two recent federal court decisions, neither of which addressed the DPPA's application to law enforcement reports disclosed in compliance with a state public records law. The Newspaper briefly reviews these opinions below.

A. The Attorney General's 2008 Opinion.

In his April 29, 2008 informal opinion, Attorney General J.B. Van Hollen addressed "the interaction between" the DPPA and Wisconsin's Public Records Law "in the context of public records requests to law enforcement agencies." Appendix of Respondent-Appellant City of New Richmond ("App.") at 13. He concluded that the DPPA does not constrain law enforcement agencies in responding to open records requests: "after a law enforcement officer has written

a report or citation, including certain personal information obtained from the DMV, the officer’s agency may provide a copy of the report or citation in response to a public records request.” *Id.* at 17. This is principally because, “[j]ust like writing the report or citation, responding to a related public records request is a function of the law enforcement agency”, *id.*—a function expressly mandated by state law—and the DPPA expressly allows personal information to be disclosed “[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).

Closely examining this “agency functions” exception, Attorney General Van Hollen observed that the DPPA neither defines nor limits the “functions for which another government agency permissibly may use personal information.” App. at 15. The statutory language is not “limited to one ‘function’ for which the agency initially might

have requested the information—the permissible use is for the agency ‘in carrying out its functions.’” *Id.* at 15-16.

Furthermore, “Congress is presumed to be aware of existing law—including state law—when it passes legislation, particularly if the existing law is pertinent to the legislation.” *Id.* at 16.

Therefore, it is appropriate to construe the “functions” of a state governmental agency to include, at a minimum, *all duties imposed by state law*. Legislative history further indicates that the scope should not be narrowly drawn, so as not to impede the abilities of law enforcement and other government agencies to carry out their duties—whatever those might be.

Id. (emphasis added).

In addition to relying on the “agency functions” exception, the Attorney General concluded that several “additional DPPA provisions also authorize public records access to personal information in law enforcement records related to vehicular accidents, driving violations, and driver

status.” *Id.* at 18. First, the definition of “personal information” excludes such records from the DPPA’s disclosure prohibitions: “personal information” is defined as “information that identifies an individual . . . but *does not include information on vehicular accidents, driving violations, and driver’s status.*” See 18 U.S.C. § 2725(3) (emphasis by attorney general). Second, Wisconsin law specifically requires access to Uniform Traffic Accident Reports, see Wis. Stat. § 346.70(4)(f), disclosure of which falls within the exception “[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). Finally, the Attorney General found that accident reports, traffic citations, and similar records “facially constitute uses in connection with a matter of motor vehicle and/or driver safety” and are

therefore exempt from the prohibition under 18 U.S.C. § 2721(b)(2). App. at 19.

B. Senne v. Village of Palatine.

The City contends the *Senne* decision compels its conclusion that the DPPA requires it to redact personal information before disclosing law enforcement records under the Public Records Law. *Senne* arose out of the Village of Palatine's practice of serving parking citations containing personal information derived from DMV records by placement under a vehicle's windshield wiper. The plaintiff had received such a ticket and argued that placing a printed citation on a car parked on a public street, where any person might see his personal information, is a disclosure prohibited by the DPPA. 695 F.3d at 601-03.

The Seventh Circuit, reviewing *en banc* the district court's dismissal of the lawsuit, which a panel of the court

had initially affirmed, held that the citation’s placement on the windshield constitutes a “disclosure” under the DPPA. The court did not determine whether the Village had violated the DPPA, however, because that question hinged on whether any exceptions authorized the disclosure. The court remanded for further proceedings to determine “whether all of the disclosed information actually *was used* in effectuating” an exempt purpose. *Id.* at 608.

On remand, the district court observed that the en banc majority had been “less than clear regarding how a court should go about determining whether the disclosed information is actually used for the purpose stated in the statutory exception.” *Senne v. Vill. of Palatine*, 6 F. Supp. 3d 786, 795 (N.D. Ill. 2013). The court concluded that “the correct reading is that the *ultimate* or *potential* use of personal information qualifies as acceptable use under the DPPA if it is for a permissible purpose listed in section 2721(b).” *Id.*

Since the evidence presented on remand established that the Village, in some situations, “uses the personal information that it discloses on parking tickets to void erroneously issued tickets and to help identify drivers lacking other identification,” the district court found that its justifications for “disclosure of DPPA-protected personal information are sufficient under subsection 2721(b)(1).” *Id.* at 797. The plaintiff’s appeal from that decision is pending before the Seventh Circuit.

C. Maracich v. Spears.

In *Maracich v. Spears*, the U.S. Supreme Court considered the DPPA exception that allows a DMV to disclose personal information for “use in connection with any civil, criminal, administrative, or arbitral proceeding . . . , including . . . investigation in anticipation of litigation.” 18 U.S.C. § 2721(b)(4). The defendants in *Spears* were trial

lawyers who had “obtained names and addresses of thousands of individuals from the South Carolina DMV in order to send letters to find plaintiffs for a lawsuit they had filed against car dealers for violations of South Carolina law.” *Spears*, 133 S. Ct. at 2196. The lower courts held this was a lawful use of the (b)(4) exception. The Supreme Court reversed, however, holding that the “in connection with” language “must have a limit,” and “that an attorney’s solicitation of prospective clients falls outside of that limit.” *Id.* at 2200. Among other issues, the Court directed the lower courts to consider on remand “whether [the lawyers’] conduct was permissible under the (b)(1) governmental-function exception.” *Id.* at 2210. That issue has not yet been decided by the district court.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Request and Response.

The Newspaper, exercising its rights under the Public Records Law, regularly requests law enforcement reports related to activity appearing on the St. Croix County Dispatch Center's daily log. *See App.* at 6. This lawsuit arises out of a request for complete copies of four such records—concerning two car accidents, one theft, and one act of property damage—that the Newspaper made of the Department on January 15, 2013. *Id.* The Department denied the request less than a week later. *Id.* at 7.

The Department acknowledged it had historically disclosed accident and incident reports to the media and other requesters, without redacting names and addresses, even though DMV records are used to prepare the reports. *Id.* at 6, 7. The police chief's response explained that officers produce accident reports and citations from their vehicles using a computer system called "Tracs," which automatically incorporates a driver's personal information from

“information contained in the State of Wisconsin DMV Records.” *Id.* at 7. Officers also use DMV records to obtain and verify the “personal information” of persons identified in “incident reports.” *Id.* Before late 2012, the Department’s release of unredacted reports in compliance with the Public Records Law was never seen as inconsistent with the DPPA.

The Department changed its disclosure policy in response to the ruling in *Senne*, which it said “is ‘binding’ on the State of Wisconsin and does change Wisconsin’s Open Records Law.” App. at 7. Based on the *en banc* majority’s reasoning, the Department concluded that the DPPA prohibits public disclosure of any reports containing personal information obtained or verified using DMV records. The Newspaper asked the Department to reconsider its interpretation of the DPPA based on the attorney general’s 2008 opinion, *id.* at 9-12, but the Department refused.

As a result, three of the four records the Newspaper requested were produced with extensive redactions. For the two accidents, the City concealed the names, birth dates, addresses, telephone and driver's license numbers of the drivers, vehicle owners and witnesses from the standard Wisconsin Motor Vehicle Accident Report form. App. at 25-35; *see* Wis. Stat. § 346.70. The incident report for the theft omitted the name, address, and phone number of the complainant, suspect, and one "other" person; the name of the "Victim" still appeared, but only because it was a business, "Kwik Trip." *Id.* at 36-37. Personal information in the fourth report was not redacted because it was neither obtained from nor verified using DMV records. *See* App. at 27.

B. Proceedings Below.

The Department's interpretation of the DPPA prevents the public from learning the identity of *any person*—whether a driver, passenger, witness, victim or suspect—involved in

traffic accidents, crimes, or any other official police action or investigation in which DMV records are used to obtain or verify personal information. The Newspaper brought this enforcement action under the Public Records Law, Wis. Stat. § 19.37(1)(a), to challenge that interpretation. App. at 1-37.

With no material facts in dispute, the Newspaper moved for judgment on the pleadings, which the circuit court granted on March 20, 2014. App. at 38-45. The court found *Senne* inapplicable and concluded that the exception for “use by any government agency . . . in carrying out its functions,” 18 U.S.C. § 2721(b)(1), permitted full disclosure of all three records at issue here. The circuit court recognized that the requested records “all relate to the official acts of police officers responding to and reporting on specific events in the City,” and that “it is an official act of the City to respond to such records requests in compliance with the Open Records Law.” *Id.* at 44. “As such,” the court concluded, “the

umbrella of § 2721(b)(1) allows for such permissible disclosure to allow the City to carry out this ‘essential function.’” *Id.*, (quoting Wis. Stat. § 19.31).

The court also found that two additional rationales support the disclosure of the two Uniform Traffic Accident Reports. First, they fall within the “broad exception for uses 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.’” App. at 44 (quoting 18 U.S.C. § 2721(b)(14)). Second, the accident reports “do not fit the statutory definition of ‘personal information’ under § 2725(3).” *Id.*

The court held, accordingly, that the “DPPA does not require the redaction of the information requested by [the Newspaper] because such disclosure is permitted under § 2721(b) and the Wisconsin Open Records Law requires the City to respond to records requests and provide such

information in the performance of official duties by the City.”
App. at 45. The City timely appealed from that decision.

STANDARD OF REVIEW

The City appeals from the circuit court’s ruling in favor of the Newspaper on its motion for judgment on the pleadings pursuant to Wis. Stat. § 802.06(3). “[I]n reviewing an order granting judgment on the pleadings,” appellate courts in Wisconsin follow “the methodology for reviewing summary judgments” *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). “[A]n appellate court will reverse a summary judgment only if the record reveals that material facts are in dispute or if the circuit court misapplied the law.” *Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 48, 235 Wis. 2d 700, 612 N.W.2d 297.

ARGUMENT

This appeal is not, as the City claims, about “balancing two competing laws.” City Br. at 10. There is no balancing³ to perform: Wisconsin law expressly mandates broad access to government records, subject to exceptions specifically provided by law, and the DPPA imposes only a “targeted restriction” on “the acquisition of personal information from a single, isolated source.” *Dahlstrom*, 2015 WL 481097, at *8. Wisconsin long ago deferred to the DPPA’s targeted restriction by terminating the DMV’s sale of personal information to marketers and anyone else who asked. However, the Public Records Law does not conflict with the DPPA with respect to law enforcement reports; rather, the

³ The Department did not deny the Newspaper’s request based on the common law balancing test. App. at 7. The issue is federal preemption. See § II below.

DPPA expressly defers to state law as to the disclosures at issue here.

The City's hyperbolic insistence that the Newspaper is demanding "total access" or "blanket disclosure" is not only incorrect but confuses the issues. City Br. at 11, 31.⁴ The Newspaper's request is narrow: it seeks access to unredacted reports of law enforcement agencies that concern the performance of official duties. Only three such records are at issue here, and there is no evidence that Congress intended to preempt Wisconsin's authority to open them to public inspection as a means to hold law enforcement officers and agencies accountable for their official acts.

⁴ So, too, is the City's repeated references to "highly restricted information," like social security numbers, which does not appear in any of the records at issue. City Br. at 13, 30, 31.

I. MULTIPLE EXCEPTIONS TO THE DPPA PERMIT THE DISCLOSURE OF LAW ENFORCEMENT RECORDS PURSUANT TO WISCONSIN'S OPEN RECORDS LAW.

The circuit court and attorney general both concluded, correctly, that the DPPA's "agency functions" exception allows the Department to disclose all three disputed records, without redacting personal information, because doing so fulfills an agency function expressly mandated by state law. They also found several additional provisions of the DPPA specific to motor vehicle safety authorize the disclosure of the two Uniform Traffic Accident Reports, again without redacting personal information. These conclusions are correct as a matter of law, and the circuit court should be affirmed.

A. The "Agency Functions" Exception Allows the Department to Disclose Personal Information in Carrying Out its Functions Under the Public Records Law.

1. The plain language of the “agency functions” exception supports its application here.

The DPPA’s “agency functions” exception permits disclosure of personal information “[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) (emphasis added). The exception is broad: it applies to *any* agency at *any* level of government and requires only that the information be used by the agency “in carrying out its functions.” It is also specific, singling out courts and law enforcement agencies since they are most likely to use DMV records in the course of their duties. Congress did not define or limit the “functions” for which a law enforcement agency or court may use or redisclose personal information from DMV records.

Defining agency functions is a matter of state law, and Wisconsin’s Public Records Law could not be more explicit:

It is “an *essential function* of a representative government” to furnish the public with information “regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31 (emphasis added). Like every other law enforcement agency in this state, the Department is an “authority” subject to the Public Records Law and shares the responsibility to carry out that “essential function.” *See* Wis. Stat. § 19.32(1) (defining “authority”).

The City misconstrues the “agency functions” exception by arguing it requires the Newspaper to show how *it* intends to “use” the personal information included in the reports at issue. City Br. at 25. Quite the contrary, Congress expressly intended this exception to authorize the “use” of personal information “by any government agency . . . in carrying out its functions.” 18 U.S.C. § 2721(b)(1). By releasing incident and accident reports in response to a public

records request, a Wisconsin law enforcement agency “uses” the personal information within its reports to carry out its *statutorily mandated* function to provide “all persons . . . the greatest possible information [concerning] . . . the official acts of [its] officers.” Wis. Stat. § 19.31.

The public’s right to monitor “the official acts” of law enforcement officials would be eviscerated if personal information had to be removed from reports before disclosure. The public could not verify and, conversely, law enforcement officials could not demonstrate that traffic and criminal laws are fairly enforced, without favoritism, against all persons. Congress never intended the DPPA to preclude the routine operation of this vital state policy. As the Wisconsin Supreme Court has recognized, “the process of police investigation is one where public oversight is important”:

The ability of police to investigate suspected crimes is an official

responsibility of an executive government agency, and much like the ability to arrest, it represents a significant use of government personnel, time, and resources. The investigative process is one that, when used inappropriately, can be harassing or worse.

Linzmeyer v. Forcey, 2002 WI 84, ¶ 27, 254 Wis. 2d 306, 646

N.W.2d 811 (citation omitted); *see also Newspapers, Inc. v.*

Breier, 89 Wis. 2d 417, 435-36, 279 N.W.2d 179 (1979)

(This “strong public-policy interest . . . is particularly significant where arrest records are concerned”); *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670 (Ct. App. 1996) (“The public has a compelling interest in monitoring the use of deadly force by police officers . . .”).

The redaction of names and addresses from routine law enforcement reports like those at issue here would, as the attorney general’s 2008 opinion notes, “subvert the important governmental objective of facilitating public oversight of

police” conduct. App. at 17. Nothing in the DPPA or its legislative history indicates any congressional intent to end this longstanding state policy.

The City never disputes that state law can define and mandate a local law enforcement agency’s functions, but it argues the Department’s statutory disclosure duties somehow do not qualify as “government agency . . . functions” under 18 U.S.C. § 2721(b)(1). It expressly acknowledges that “police departments perform a legitimate law enforcement function when they discharge their statutory duty to investigate and report on traffic accidents,” as Wis. Stat. § 346.70(4)(a) requires, while denying that they perform a legitimate law enforcement function when disclosing those reports to the public under subsection (4)(f) of the same statute. City Br. at 29. There is, of course, no principled basis to distinguish among a law enforcement agency’s statutory duties under 18 U.S.C. § 2721(b)(1). All statutory

duties qualify as agency functions, exempt from the DPPA's prohibition, as the attorney general and circuit court correctly concluded.

2. *The City relies on inapposite federal case law to argue for a limited reading of the "agency functions" exception.*

Since the DPPA itself never defines an agency's "functions," the City turns to the dictionary: a "function" is an "activity that is appropriate to a particular business or profession," an "office[or] duty," or "the occupation of an office." City Br. at 26 (quoting Black's Law Dictionary 787 (10th ed. 2014)). The Newspaper agrees—responding to open records requests is a function—*i.e.* a "duty" of or "activity that is appropriate" to—the Department. Indeed, the City's definition is far more expansive than the attorney general's interpretation that "the 'functions' of a state

governmental agency . . . include, at a minimum, *all duties imposed by state law.*” App. at 16 (emphasis added).

The City cites this definition only to ignore it, however, arguing instead that the circuit court should have deferred “to federal guidance” and adopted “a more restrictive reading of this exception.”⁵ City Br. at 26. To support its “restrictive reading,” the City relies on *Spears* and *Senne*—neither of which addressed the disclosure of law enforcement records in compliance with a state public records law.

Spears deals with a different exception—authorizing disclosure of personal information for “use in connection with any . . . proceeding . . . , including . . . investigation in

⁵ This is wrong on two levels: neither the DPPA’s text nor anything in *Senne* or *Spears* suggests Congress intended a restrictive reading of “government agency . . . functions” in exception (b)(1), especially for courts and law enforcement agencies. Moreover, federal preemption principles preclude finding congressional intent to override, by implication alone, state laws governing disclosure of law enforcement reports. *See* § II below.

anticipation of litigation,” 18 U.S.C. § 2721(b)(4)—that has no bearing here. Recognizing that “connections, like relations, stop nowhere,” the Court insisted that the language “in connection with” “must have a limit” and determined “that an attorney’s solicitation of prospective clients falls outside of that limit.” *Spears*, 133 S. Ct. at 2200 (internal quotation marks omitted). This court does not need to consider the outer limits of the “agency functions” exception at issue here, however, because it must “include, at a minimum, all duties imposed by state law,” as the attorney general concluded. App. at 16.

The City draws from *Spears* the lesson that “the conduct of the requester must be examined.” City Br. at 28. But the “requester” here is the Department, which first obtained personal information from the DMV based on the “agency functions” exception, which authorizes the “use [of personal information] *by any government agency . . . in*

carrying out its functions.” 18 U.S.C. § 2721(b)(1) (emphasis added). The same exception authorizes the Department to fulfill its obligations under the Public Records Law and Wis. Stat. § 346.70(4)(f). No further explanation or justification for redisclosure is necessary when a government agency uses personal information to fulfill a statutory duty.

Neither *Spears* nor *Senne* dealt with a scenario in which the disclosure was mandated by state law. *Senne* involved a *voluntary* disclosure of personal information, since no statute required the Village of Palatine to serve parking tickets in a manner that publicly exposed that information.⁶ That is why the court required the Village to explain and justify on remand how each item of personal information it

⁶ Nor did any law require the Village to include a vehicle owner’s height and weight on the citation. The Newspaper agrees that “it is difficult to see a law enforcement purpose for disclosing a person’s height and weight to a newspaper, City Br. at 31, but none of the records at issue here included such personal data. If they did, it would properly be redacted under the common law balancing test, not the DPPA.

disclosed “actually *was used* in effectuating” a law enforcement function. 695 F.3d at 608. Here, by stark contrast, state law both mandates disclosure *and* explains the permissible purpose—the records at issue are presumptively open to public inspection so the public can hold law enforcement officers and agencies accountable for their official acts. *See* Wis. Stat. § 19.31.

Far more relevant is the Seventh Circuit’s recent decision in *Dahlstrom*,⁷ which arose from a newspaper’s reporting about the Chicago Police Department’s investigation of a man’s death following an altercation with the former mayor’s nephew, R.J. Vanecko. *Dahlstrom*, 2015 WL 481097, at *1. The department declined to recommend charges against Vanecko after witnesses failed to identify him from a lineup in which five Chicago police officers served as

⁷ *Dahlstrom* was decided February 6, 2015, after the City filed its initial brief in this appeal.

“fillers.” The *Chicago Sun-Times* questioned the lineup’s validity in a story highlighting “the physical resemblance between Vanecko and the lineup ‘fillers’ in an effort to demonstrate that the Officers resembled Vanecko too closely for the lineup to be reliable.” *Id.*

The officers named in the article filed suit claiming the *Sun-Times* violated the DPPA “by acquiring and publishing” personal details that it “knowingly obtained” from “motor vehicle records maintained by the Secretary of State”⁸—namely “the months and years of [the officers’] birth, their heights, weights, hair colors, and eye colors.” *Id.* at *1-2.

⁸ In Illinois, the Secretary of State performs the functions of a state department of motor vehicles. *See* 625 Ill. Comp. Stat. 5/2-101 (2015) (vesting the Secretary of State “with powers and duties and jurisdiction of administering Chapters 2, 3, 4, 5, 6, 7, 8 and 9 of The Illinois Vehicle Code”); 625 Ill. Comp. Stat. 5/2-106 (“The Secretary of State shall prescribe or provide suitable forms of applications, certificates of title, registration cards, driver’s licenses and such other forms requisite or deemed necessary to carry out the provisions of this Act and any other laws pertaining to vehicles the enforcement and administration of which are vested in the Secretary of State.”).

The newspaper also obtained lineup photographs and the names of each officer used as a “filler” from the Chicago Police Department pursuant to a request under the Illinois Freedom of Information Act. *Id.* at *1.

The court ruled that determining the *source* of the information at issue is critical in applying the DPPA.

The DPPA proscribes only the publication of personal information that has been obtained from motor vehicle records. The origin of the information is thus crucial to the illegality of its publication

Id. at *9. Even the plaintiff officers did *not* challenge the publication of their photographs or names, information they conceded was “lawfully obtained . . . pursuant to [a] FOIA request.” *Id.* at *2. The court agreed, noting in rejecting the newspaper’s First Amendment defense that much of the personal information it unlawfully obtained from the DMV “can be gathered from physical observation of the Officers or

from other lawful sources (including, of course, a state FOIA request)” *Id.* at *8.

In short, none of the “federal guidance” the City claims to follow alters the attorney general’s thorough assessment of this issue in his 2008 opinion. City Br. at 26. The City’s criticisms of this opinion are unfounded. The City disputes his conclusion that the term “functions” includes “all duties imposed by state law,” *id.* at 32, but how could it not? Are statutory mandates not “functions” under the City’s own definition? Of course they are. This court should adopt the attorney general’s straightforward analysis:

Just like writing the report or citation, responding to a related public records request is a function of the law enforcement agency. *Cf.* Wis. Stat. § 19.31. The DPPA does not require redaction of the personal information from law enforcement records provided in response to the public records request.

App. at 17.

B. The Accident Reports and Similar Records Related to Motor Vehicle or Driver Safety Are Exempt from the Prohibition.

Additional provisions of the DPPA and Wisconsin law support the disclosure of accident reports and other records related to motor vehicle safety, which account for two of the three records at issue here. The attorney general and circuit court both concluded that “personal information” contained in accident reports and driving citations is excluded from the DPPA’s definition of that term, and is properly disclosed under exception 18 U.S.C. § 2721(b)(14) in any event. *See* App. at 18-19, 44.⁹

⁹ The circuit court did not address the attorney general’s further conclusion that exception (b)(2) also authorizes the disclosure of personal information in Uniform Traffic Citations and Uniform Traffic Accident Reports. *See* App. at 18.

The DPPA expressly excludes “information on vehicular accidents” from its definition of “personal information”:

“personal information” means information that identifies an individual, including an individual’s photograph, social security number, 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.*

18 U.S.C. § 2725(3) (emphasis added). This exception to the statutory definition would not have been necessary if Congress intended to treat “personal information” on a citation or accident report the same way the DPPA expressly does “personal information” on a motor vehicle record held by the DMV. The attorney general correctly concluded this exception “mean[s] that information such as a driver’s name, address and telephone number are not encompassed in the personal information protected by the DPPA when that

information is incorporated into . . . an accident report or citation.” App. at 19. The City’s interpretation, by contrast, gives the exception no effect whatsoever. City Br. at 37.

In addition, Wisconsin law mandates that law enforcement agencies provide complete public access to uniform traffic accident reports:

[A]ny person may with proper care, during office hours, and subject to such orders or regulations as the custodian thereof prescribes, examine or copy such uniform traffic accident reports, including supplemental or additional reports, statements of witnesses, photographs and diagrams, retained by local authorities, the state traffic patrol or any other investigating law enforcement agency.

Wis. Stat. § 346.70(4)(f).¹⁰ This disclosure mandate provides further support for the conclusion that the Department’s disclosure of accident reports is an “agency function” exempt

¹⁰ This statutory mandate is separate from the presumptive right of access state law extends generally to all government records in the Public Records Law.

from the DPPA's general prohibition. The statute's purpose also fits the DPPA's exception "[f]or use in connection with matters of motor vehicle or driver safety," 18 U.S.C. § 2721(b)(2), which necessarily encompasses the documentation of traffic accidents using Wisconsin's Uniform Traffic Accident Reports. Likewise, the broad exception 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," applies with equal force to the accident reports. 18 U.S.C. § 2721(b)(14).

The City mistakenly relies on *Camara v. Metro-North Railroad Co.*, 596 F. Supp. 2d 517 (D. Conn. 2009) to argue that the DPPA requires a requester to provide the driver's name and other personal information in order to obtain information on accidents, violations, and driver's status. City Br. at 38. That court correctly interpreted the exception to the

statutory definition of “personal information,” holding that “[t]he DPPA does not, in any way, restrict public access to information regarding an individual’s vehicular accidents, driving violations, and driver’s status.” *Id.* at 524. Contrary to the City’s assumption, however, it was Connecticut law—not the DPPA—that the court held restricted access to “such information” to those who can provide “the driver’s name, license number, address, and date of birth.” *Id.*

Other states have similar restrictions on public access to accident reports. *See, e.g.*, Cal. Veh. Code § 20012 (2013) (accident reports are for the confidential use of the California DMV and only persons with “a proper interest” in the report, including the drivers involved, may obtain access). Wisconsin’s legislature adopted a different policy, authorizing “any person” to “examine or copy . . . uniform traffic accident reports” maintained by any “investigating law enforcement agency.” Wis. Stat § 346.70(4)(f). The

exception to the DPPA’s definition of “personal information” plainly demonstrates that Congress did not intend to prohibit that public policy choice.

The City also claims that accident reports do not fall within the (b)(2) exception for “matters of motor vehicle or driver safety,” which “must be read in its entirety and by the company it keeps (the doctrine of *noscitur a sociis*).” City Br. at 33. The full exception shows this doctrine does not apply because the list of exempt purposes are not all associated with “matters of motor vehicle or driver safety and theft.”

For use in connection with matters of motor vehicle or driver safety and theft; 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.

18 U.S.C. § 2721(b)(2). Their variety demonstrates that each exempt purpose stands alone; they are not intended as subcategories of the first.

Equally flawed is the City’s argument that the exception in 18 U.S.C. § 2721(b)(14)—for “any other use . . . related to the operation of a motor vehicle or public safety”—does not apply because “[a]ll 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.’” City Br. at 35. The City is right—the (b)(14) exception does not apply to the gas theft—but the Newspaper does not rely on this exception as a basis for obtaining the unredacted incident report. The Newspaper never argued that this exception applied to “all” of the records it requested and even the City does not deny that accident reports are “related to the operation of a motor vehicle or public safety.” It cannot, since state law requires “[e]very law enforcement agency

investigating or receiving a report of a traffic accident . . . [to] forward a copy . . . to the county traffic safety commission” Wis. Stat. § 346.70(4)(h).

II. CONGRESS DID NOT INTEND THE DPPA TO PREEMPT STATE PUBLIC RECORDS LAWS

The question before this court is ultimately one of preemption: does the DPPA preempt the application of Wisconsin’s “presumption of complete public access” to routine law enforcement records? Wis. Stat. § 19.31. The law presumes it does not and the City has found nothing in the statute’s text or legislative history to overcome that presumption.

Under the Supremacy Clause of the U.S. Constitution, “state law that conflicts with federal law is ‘without effect.’” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Although the Constitution grants Congress the authority to preempt state law, “analysis of preemption claims begins with

the presumption that ‘Congress does not intend to supplant state law.’” *Miezin v. Midwest Express Airlines, Inc.*, 2005 WI App 120, ¶ 9, 284 Wis. 2d 428, 701 N.W.2d 626 (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)). Whether Congress intended the DPPA to supplant Wisconsin’s transparency laws presents a question of law. *See Miller Brewing Co. v. DILHR*, 210 Wis. 2d 26, 33, 563 N.W.2d 460 (1997).

The City appears to agree that conflict preemption is the *only* kind of preemption at issue here. *See City Br.* at 42. “Conflict preemption occurs ‘to the extent that there is an actual conflict between federal and state law.’” *M&I Marshall & Ilsley Bank v. Guar. Fin.*, 2011 WI App 82, ¶ 25, 334 Wis. 2d 173, 800 N.W.2d 476. A conflict exists when “‘compliance with both the federal and state laws is a physical impossibility or when a state law is a barrier to the

accomplishment and execution of Congress objectives and purposes.”” *M&I*, 334 Wis. 2d 173, ¶ 25. To satisfy this standard, ““courts typically require clear evidence of legislative intent to preempt.”” *Megal Dev. Corp. v. Shadof*, 2005 WI 151, ¶ 37, 286 Wis. 2d 105, 705 N.W.2d 645.

The DPPA *does* expressly conflict with Wisconsin’s Public Records Law, but only as applied to motor vehicle records maintained by the DMV. Before the DPPA’s passage, our DMV “sold its records for use in creating mailing lists,” bringing in “approximately \$8 million in annual revenue.” *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998). Because of the DPPA, that practice is no longer allowed. Likewise, the DMV’s compliance with the Public Records Law’s presumption of complete public access to driver license or vehicle title records and with the DPPA’s prohibition of such disclosure, except for an exempt purpose,

“is a physical impossibility”—which means the DPPA must prevail.

With respect to routine law enforcement records, however, the City cannot overcome the “strong presumption” against federal preemption because there is no “clear evidence of legislative intent to preempt” state law. *Megal*, 286 Wis. 2d 105, ¶ 37. The DPPA neither creates a broad, general right of privacy for drivers or vehicle owners, nor expressly mandates any change in state laws governing access to routine law enforcement reports. Personal information remains widely available in property records, voter registration records, and numerous other sources, and the DPPA’s sponsors expressly stated it “does not apply to any other system of public records maintained by States or local governments.” 140 Cong. Rec. 7,925 (1994). The attorney general’s 2008 analysis got it exactly right:

Reading § 2721(b)(1) so restrictively
that law enforcement agencies would be

precluded from carrying out public records functions . . . would serve neither of the specific purposes identified by Congress for enacting the DPPA: crime-fighting, and controlling commercial use of driver information in driver records held by DMVs. Instead, it would subvert the important governmental objective of facilitating public oversight of police investigations, impair public confidence in law enforcement activities, and do exactly what Congress intended to avoid -- impede execution by law enforcement officers of their legitimate public duties and responsibilities.

App. at 17 (citations omitted).

As the attorney general recognized, public access to accident and incident reports is simply not the wrong that the DPPA was devised to remedy. Congress was clear about its intent: to prevent the abuse of driver registration records by criminals and direct marketers. *Dahlstrom*, 2015 WL 481097, at *4-5. Nothing suggests Congress was concerned that marketing firms or stalkers might identify and target individuals based on accident or incident reports. If there were such a risk for any individual, Wisconsin law already

provides adequate protections under the common law balancing test—if “the release of some police records might endanger the safety of persons involved in that report,” that presents a “strong public policy reason which would work against release.” *Linzmeier*, 254 Wis. 2d 306, ¶ 30.

The congressional record offers no hint that Congress was even aware that police officers did or would use DMV records to automatically populate accident and incident reports. What Congress did recognize is that states can and do use information originating with the DMV for a variety of legitimate functions—and the “agency functions” exception allows such practices to continue unhampered by the DPPA. Thus it is not a “physical impossibility” to comply with the DPPA and the Public Records Law’s presumption of complete access to law enforcement records, because disclosure in compliance with a state-law mandate fits well within the DPPA’s exceptions.

The City's interpretation, if endorsed, would result in an ever-expanding barrier to access as records are shared among government agencies. When an arrested person whose identity is verified by police using DMV records is prosecuted, is that defendant's personal information forever tainted as he advances through the criminal justice system? Assume that the police forward the incident report to the district attorney, who drafts a charging document and files it with the circuit court. The defendant is identified in court records, including the Wisconsin Circuit Court Access system, and his name—originally verified using DMV records—is now available to the public at the click of a few keys. Under the Newspaper's reading of the DPPA, the "agency functions" exception allows each of these uses as well as the ultimate disclosure to the public, because each is a function of the agency that "uses" the name.

Under the City's theory, by contrast, public disclosure is unlawful because the "agency functions" exception, which expressly singles out law enforcement agencies and courts, somehow does not allow public access to personal information in their records. Would every clerk of court need to assess, with respect to every court record containing personal information, whether that information was originally obtained or verified by police using DMV records? How could they even make such a distinction?

The problems with the City's theory multiply as the hypothetical defendant advances from arrest to prosecution to conviction and incarceration. Did Congress intend the DPPA prohibit public identification of arrested persons or jail inmates? Of course not, for that would contradict the very foundations of our judicial system.

From at least the time of the Magna Carta and the formalization of the writ of habeas corpus, the concealment of the reason for arrest has

been as odious as the concealment of the arrest itself. It is fundamental to a free society that the fact of arrest and the reason for arrest be available to the public.

Breier, 89 Wis. 2d at 438 (holding the reason for arrest, as well as the name of the arrested person, is always public information under the Open Records Law); *see also* Wis. Stat. §§ 59.27(2) and 62.09(13)(c) (requiring maintenance of a public record containing the name and authority for committing all persons in a city or county jail). Under the City's interpretation of the DPPA, however, a jailer could avoid that statutory duty by verifying all inmates' personal information with the DMV. Only those persons who have no DMV record, or whose identity a jailer chose not to verify this way, would be identified on a public jail register.

What if a municipality considers it an appropriate function to use DMV records to verify the identity of a "final candidate" for a public position? Does the DPPA override

the Public Records Law’s provision that the names of final candidates are subject to disclosure? *See* Wis. Stat. § 19.36(7). And when one of those candidates is hired, can the government not announce who it is because her identity was previously confirmed by a DMV record? The ramifications of the City’s argument quickly devolve into the absurd.

The presumption against federal preemption in this context mirrors the Public Records Law’s presumption in favor of public access to law enforcement agency records— “[w]hen it is not clear whether an exception to the open records law exists, we are to construe exceptions to the open records law narrowly.” *Chvala v. Bubolz*, 204 Wis. 2d 82, 88, 552 N.W.2d 892 (Ct. App. 1996); *see also Hathaway*, 116 Wis. 2d at 397 (“[U]nless the exception is explicit and unequivocal, it will not be held to be an exception.”). Since the DPPA creates no “explicit and unequivocal” exception to

the Public Records Law, except with respect to motor vehicle records maintained by the DMV, this Court should find the DPPA does not otherwise preempt its routine operation.

CONCLUSION

The City displays its misperception of preemption principles by arguing that federal pupil and medical record privacy laws are somehow relevant here. City Br. at 53. Each is, indeed, a privacy law “passed by Congress due to the growing concern [over] public access to personal information gathered and stored by governments.” *Id.* Accordingly, our state and presumably all others have given each federal law its full, intended preemptive effect over any conflicting state laws, just as they do for the DPPA. But other states have not, and Wisconsin should not, expansively construe the DPPA beyond its full, intended preemptive effect, as the City has, simply because it is a privacy law.

Congress knows how to specifically override state public records laws, as the DPPA does for motor vehicle records held by state DMVs. To extend that law’s preemptive effect to routine law enforcement records that Congress chose not to specifically address, however, would itself violate federal law—the presumption that Congress does not intend to supplant state law. Far from endorsing “a cavalier attitude to privacy laws,” *id.*, the circuit court’s ruling in this case respects the expressed intent of the DPPA as well as Wisconsin’s Public Records Law. That ruling should be affirmed.

Dated: February 20, 2015.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with a proportional font. The length of this brief is 10,242 words.

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

03-16-2015

CLERK OF COURT OF APPEALS
OF WISCONSIN

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

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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

rediscover 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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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III**

New Richmond News
and Steven Dzubay,

APPEAL NO. 2014AP001938

Petitioners-Respondents

v.

City of New Richmond,

Respondent-Appellant.

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

**Non-Party Brief and Supplemental Appendix of
Wisconsin County Mutual Insurance Corporation and
Community Insurance Corporation**

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ARGUMENT

Wisconsin municipal law enforcement agencies generate accident reports, citations, and incident reports utilizing “personal information” obtained from the DMV on a daily basis. This case requires the Court to determine whether, under the Driver’s Privacy and Protection Act (DPPA), 18 U.S.C. § 2721 et seq., a municipality is permitted to re-disclose “personal information” obtained from the DMV to a newspaper in response to a request under Wisconsin’s Public Record’s Law. Municipalities face significant penalties, including statutory punitive damages and attorney fees, and are exposed to costly class action lawsuits for improperly releasing personal information protected by the DPPA.

The DPPA was enacted as a public safety measure and prohibits any person from knowingly using, obtaining, or disclosing “personal information” from motor vehicle records, subject to limited exceptions for specific uses of information. 18

U.S.C. § 2722(a). There is no exception in the DPPA for news reporting.

The United States Supreme Court and Seventh Circuit Court of Appeals have held that the DPPA disclosure exceptions should be narrowly construed. The Seventh Circuit has held that re-disclosure of each piece of “personal information” in a document must be for a use specifically authorized by statute. *Senne v. Vill. of Palatine*, 695 F.3d 597, 606 (7th Cir. 2012).

Contrary to the dictates of *Senne*, the circuit court below determined that a municipality was required to re-disclose “personal information” contained in police reports based on the reason the *documents* were *generated*. The court failed to analyze the purpose for the re-disclosure of each piece of “personal information” in the police reports. Put plainly, re-disclosure of “personal information” to New Richmond News is not “for” any use authorized by the DPPA.

Moreover, the circuit court created a gaping hole in the DPPA’s public safety protections by concluding that any

disclosure of personal information pursuant to Wisconsin's Public Records Law (regardless of its intended use) is justified under § 2721(b)(1) as a governmental function. This conclusion is inconsistent with the purpose of the DPPA and creates a public safety risk by allowing precisely what the DPPA was designed to prevent—unfettered public access to “personal information.”

The circuit court decision is contrary to established precedent, flatly inconsistent with the DPPA's purpose, and creates significant liability for Wisconsin municipalities. It must be reversed.

I. The DPPA Provides a Broad Prohibition Against Disclosure and Use of “Personal Information” Obtained From DMV Records To Protect Public Safety.

The DPPA prohibits the disclosure and use of certain information contained in state DMV records. 18 U.S.C. § 2721(a)-(b). It was enacted as “a public safety measure,” *Senne*, 695 F.3d at 606, and designed “to protect the personal privacy and safety of all American licensed drivers.” 140 Cong. Rec. H2,526 (daily ed. Apr. 20, 1994) (statement of Rep. Goss).

The DPPA was enacted as a public safety measure, designed to prevent stalkers and criminals from utilizing motor vehicle records to acquire information about their victims. Prior to the law's enactment, anyone could contact the department of motor vehicles in most states and, simply by providing a license plate number and paying a nominal fee, obtain the corresponding driver's address and other pertinent biographical information—no questions asked.

Dahlstrom v. Sun-Times Media, LLC, No. 14-2295, slip op., 2015 U.S. App. LEXIS 1941 at 14-15 (7th Cir., Feb. 6, 2015).

By default, DMVs are prohibited from “knowingly disclos[ing] or otherwise mak[ing] available to any other person or entity” “personal information” and “highly restricted personal information,” as defined by the statute, “about any individual obtained by the department in connection with a motor vehicle record” 18 U.S.C. § 2721(a)(1)&(2). “Personal information” means “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address . . . telephone number, and medical or disability information” 18 U.S.C. § 2725(3). “Highly restricted personal information” means “an individual’s

photograph or image, social security number, medical or disability information[.]” 18 U.S.C. § 2725(4).

The DPPA also regulates what is at issue here—“the separate activity that occurs when the *recipient* of a record from the DMV [such as a law enforcement agency] is responsible for a secondary disclosure to a third party.” *Senne*, 695 F.3d at 602. “An authorized recipient of personal information . . . may resell or redisclose the information only for a use specified under subsection (b).” 18 U.S.C. § 2721(c). It is illegal “for any person knowingly to obtain or disclose personal information from a motor vehicle record, for any use not permitted under section 2721(b) of this title.” 18 U.S.C. § 2722(a).

A. Municipalities Face Significant Liability For DPPA Violations.

Section 2724 creates a civil cause of action against any “person who knowingly obtains, discloses or uses personal information from a motor vehicle record, for a purpose not permitted under this chapter.” Section 2724(b) sets forth the remedies for DPPA violations, including actual damages (not less

than \$2500), punitive damages, reasonable attorney fees, litigation costs, and other equitable relief.

Judge Posner's dissent in *Senne* explained how even a relatively mundane act, such as printing extraneous information on a parking ticket, can result in significant DPPA liability for a municipality:

So little Palatine (its population roughly one-fortieth that of Chicago) faces, in this class action suit filed on behalf of everyone who has received a parking ticket in the Village within the period of the statute of limitations, a potential liability of some \$80 million in liquidated damages—more than \$1,000 per resident.

Senne, 695 F.3d at 611 (Posner J., dissenting).

A search of PACER case coding and Lexis CourtLink reveals that since 2000, there have been 57 DPPA cases filed across the country, 30 of which have been class action lawsuits.¹ Indeed, because DPPA violations generally stem from common official policy or practice relating to the release and redaction of personal information, such cases are amenable to class

¹ A list of these cases is included in the Appendix to this Brief.

treatment. Thus, the potential liability exposure for a municipality for DPPA violations is enormous.

B. The DPPA Contains Limited Exceptions For Specified Uses of Personal Information That Are Narrowly Construed.

The DPPA contains 14 specific exceptions when “personal information” may be disclosed by a DMV and re-disclosed by recipients of such information. 18 U.S.C. § 2721(b) & (c). Four of these exceptions apply to disclosure of “highly restricted personal information.” 18 U.S.C. § 2721(a)(2). The exceptions at issue here are the exceptions found at § 2721(b)(1) (“for use by any governmental agency . . . in carrying out its functions”), § 2721(b)(2) (“for use in connection with matters of motor vehicle or driver safety”), and § 2721(b)(14) (for any other use authorized by state law “related to the operation of a motor vehicle or public safety”). Note that there is no exception for use of personal information in connection with news reporting. *See Dahlstrom*, 2015 U.S. App. LEXIS 1941 at 23 (rejecting newspaper’s

argument that DPPA prohibition on use and disclosure of personal information violated the First Amendment).

Both the United States Supreme Court and Seventh Circuit Court of Appeals have instructed that DPPA exceptions should be narrowly construed. “The default rule of the statute is that the DMV, and any person or entity authorized to view its records, is *prohibited* from sharing the information.” *Senne*, 695 F.3d at 603. *See also Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (“[a]n exception to a general statement of policy is ‘usually read . . . narrowly in order to preserve the primary operation of the provision’) (internal quotes omitted).

Maracich held that the DPPA “exceptions ought not [to] operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design[.]” 133 S. Ct. at 2200. Likewise, *Senne* was clear that each of the DPPA exceptions “has a limited object and limited class of recipients[.]” and that “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, 605 (emphasis added). A narrow construction is particularly justified when the exception at issue applies both to “personal information” and “highly restricted personal information”—as is the case here. *Maracich*, 133 S. Ct. at 2198, 2202; *Senne*, 695 F.3d at 606.

II. The Circuit Court Decision is Contrary to *Senne*, Which Requires That Re-Disclosure of Each Piece of Personal Information To The Public Must Be For an Authorized Use.

In *Senne*, 695 F.3d 597, the Seventh Circuit held that re-disclosure of each piece of “personal information” must be for a use authorized by a specific DPPA exception. *Senne* involved a law enforcement officer who placed a parking citation on a vehicle windshield, containing “personal information.” The municipality argued that the exceptions for use by governmental agencies, § 2721(b)(1), and for use in connection with service of process, § 2721(b)(3), applied. 695 F.3d at 605.

Senne ruled that courts must analyze the purpose of the final disclosure at issue, not the original disclosure by the DMV

to the law enforcement agency that generated the report. *Id.* at 602 (“[W]e are concerned with the secondary act of the Village’s police department in placing the citation, which included Mr. Senne’s personal information on the windshield.”) Next, the court held that it was not sufficient to look merely at the purpose of the parking citation; rather, it needed to determine whether the *disclosure of each piece of personal information* contained on the parking citation fell within a statutory exception. *Id.* at 605 (rejecting argument that so long as “*some* disclosure is permitted, *any* disclosure of information otherwise protected by the statute is exempt, whether it serves an identified purpose or not”) (emphasis in original).

The court was explicit that in order for a statutory exception to apply, “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.” *Id.* at 606 (emphasis in original). *See also*

Maracich, 133 S. Ct. at 2206 (ruling, consistent with *Senne*, that in determining whether a recipient of personal information violated the DPPA, the “proper inquiry” is the “predominant purpose” the recipient had in utilizing the information).

Senne’s interpretation of the DPPA is binding authority in all federal courts in the Seventh Circuit. Thus, any lawsuit filed against a Wisconsin municipality under the DPPA will be analyzed by a federal district court under the standards set forth in *Senne*. A DPPA plaintiff cannot avoid the *Senne* analysis by filing in state court, since such cases are readily removable. And, *Maracich* is binding on all state and federal courts.

Here, the circuit court’s analysis is entirely inconsistent with *Senne*. The court concluded that the law enforcement reports at issue in this case fell under the “umbrella” of the exception in § 2721(b)(1) for use by government agencies, reasoning: “[I]t is an official act of the City to respond to such records requests in compliance with the Open Records Law.” (Cir. Ct. Op. at 7.) The circuit court also concluded that the §2721(b)(1)

exception applied because “[t]he records all relate to the official acts of police officers responding to and reporting on specific events in the City.” (*Id.*) Next, it ruled that the “broad” exception in § 2721(b)(14) applied because the disclosure of uniform traffic accident reports is “related to public safety.” (*Id.*) Finally, the court stated that uniform traffic accident reports “do not fit the statutory definition of ‘personal information.’” (*Id.*)

This rationale is completely backwards. *Senne* emphasized that the DPPA addresses the disclosure of *information*, not documents. There is no dispute here that the law enforcement reports at issue contain personal information obtained from the state DMV.

Next, the fact that a municipality has an obligation to produce documents under the Public Records Law does not answer the question of whether re-disclosure of each piece of specific “personal information” contained in any document is for a use that falls within a DPPA exception. Also contrary to *Senne* and *Maracich*, the circuit court focused on the initial disclosure of

personal information by the DMV to The City of New Richmond when the records were generated instead of the subsequent re-disclosure of the information to New Richmond News. The circuit court was required to determine that re-disclosure of each piece of personal information contained in the law enforcement reports at issue to New Richmond News was for a use specified in one of the DPPA exceptions.

Under *Senne* and *Maracich*, it is clear that none of the exceptions asserted by New Richmond News apply. First, disclosure of personal information for news reporting does not fall within the “governmental function” exception to the DPPA, 18 U.S.C. § 2721(b)(1). Simply put, the re-disclosure of “personal information” to *New Richmond News* is not “for use by any governmental agency . . . in carrying out its functions[.]” New Richmond News is not a government agency, so the exception cannot apply. The argument that re-disclosure is part of New Richmond’s “governmental functions” ignores the statutory language that the *disclosure* must be “for use by any

governmental agency.” Yet, even under the circuit court’s rationale, disclosing “personal information” to a news agency is not necessary for New Richmond to “carry[] out its functions,” as the documents requested (police reports) can be produced with the personal information redacted. And, as explained below, allowing any member of the public to obtain “personal information” via a request under the Public Record Law, without any regard for reason why the information is obtained, frustrates the entire point of the DPPA.

Second, the exception in § 2721(b)(2)—“for use in connection with matters of motor vehicle or driver safety and theft”—does not apply. Under *Senne*, the fact that the initial disclosure of information from the DMV to New Richmond to generate the police reports was for purposes of motor vehicle safety does not satisfy the exception. Rather, the disclosure of the personal information contained in the reports *to New Richmond News* must be “for use in connection with matters of motor vehicle or driver safety.” It is not.

Third, and for the same reason, the exception in § 2721(b)(14) does not apply. Disclosing personal information in a police report to a newspaper is not a “use related to the operation of a motor vehicle or public safety.” 18 U.S.C. § 2721(b)(14).

III. The Circuit Court Decision Creates a Categorical Exception for Personal Information Obtained Via Public Records Requests That is Contrary to Supreme Court Precedent And Entirely Inconsistent With The DPPA’s Purpose.

The circuit court’s decision also undermines the very purpose of the DPPA. Under the court’s rationale, *any* disclosure of personal information made by a municipality under the Public Records Law falls within the government use exception in § 2721(b)(1), *regardless of the end-user’s intended use* of the information. The circuit court’s decision thus creates a gaping hole in the DPPA for information obtained via a state’s public records laws.

This result is contrary to the United States Supreme Court’s decision in *Maracich*, 133 S. Ct. 2191. That case involved a lawsuit brought against a group of plaintiffs’ attorneys who obtained “personal information” by submitting “a state Freedom

of Information Act (FOIA) request to the South Carolina's DMV to determine if charging illegal administrative fees was a common practice so that a lawsuit could be brought as a representative action under [state law]." *Id.* at 2196. The issue was whether the defendants' use of the information fell within the litigation exception in § 2721(b)(4). The Court ruled that the defendants' use did not fall within the exception because they "had the predominant purpose to solicit" clients. *Id.* at 2206. In other words, *Maracich* examined the end-user's intended use of the information. This is consistent with the analysis in *Senne*.

There was no argument in *Maracich* that disclosure of the information was permissible simply because the defendants obtained it via a FOIA request to a state DMV. Indeed, nearly every state has some form of a FOIA or public records law. A categorical exception for information obtained from state DMVs via such laws would result in the exception swallowing the general rule of non-disclosure.

The circuit court’s decision also undermines the purpose behind the DPPA. Recall that the DPPA was enacted to end the common practice of state DMVs providing personal information to anyone who walked in and paid a fee—a practice that created a public safety hazard. The DPPA sought to eliminate this hazard by allowing disclosure of personal information only for very narrow specified uses. Importantly, Wisconsin’s Public Records Law does not require that a requester identify himself or the purpose for which public records are sought. Wis. Stat. § 19.35(1)(i). The requester simply pays the custodian’s reasonable and customary copying fee. Wis. Stat. § 19.35(3).

Note the exception under § 2721(b)(1) applies to *both* “personal information” and “highly restricted personal information.” § 2721(a)(2). This means that under the circuit court’s rationale, any would-be thief, stalker, or other criminal can use a Public Records Request to obtain someone’s “photograph or image, social security number, medical or disability information[,]” § 2725(4), in addition to their “driver

identification number, name, address . . . [and] telephone number.” § 2725(3). No objective reading of the legislative history behind the DPPA can support such a result.

Imagine the liability a municipality would face if it re-disclosed “personal information” to a stalker who files a Public Records request after noticing his ex-girlfriend received a speeding ticket and then uses that information to locate and murder her. In short, the circuit court’s decision allows a person to circumvent the DPPA’s protections and accomplish precisely what Congress sought to prevent. And, it exposes municipalities to significant liability by requiring disclosures that do not meet the standards in *Maracich* and *Senne*.

CONCLUSION

For these reasons, the circuit court decision must be reversed.

Dated this 31st day of March, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a non-party brief produced with a proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief is 3000 words.

Dated this 31st day of March, 2015.

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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.

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. 2010-10⁶ (“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-19⁷ (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.*

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., Kroepelin 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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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 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.

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STATE OF WISCONSIN
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DISTRICT III

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**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.

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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.

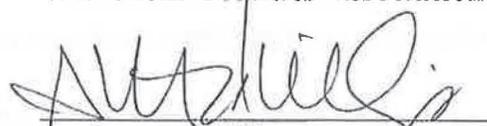
League of Wisconsin Municipalities

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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.

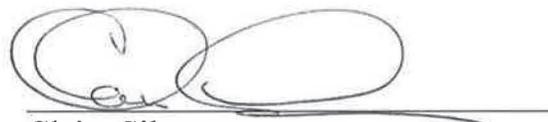


Claire Silverman

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

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP1938

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-163

NON-PARTY BRIEF AND SUPPLEMENTAL APPENDIX OF
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INTRODUCTION

The Wisconsin Department of Justice submits this non-party brief to provide guidance regarding the interaction between the federal Driver's Privacy Protection Act 18 U.S.C. §§ 2721, et seq. ("DPPA"), and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31-19.37, in the context of public records requests to law enforcement agencies.

As discussed in greater detail below, the Department of Justice continues to endorse the informal opinion it issued on April 29, 2008, addressing this very same issue. *See* I-02-08 (Apr. 29, 2008), <http://www.doj.state.wi.us/ag/informal-opinions>.

After the 2008 Attorney General opinion issued, the Seventh Circuit issued a decision addressing whether the placement of a parking violation citation on the windshield of a vehicle violated the DPPA. *Senne v. Vill. of Palatine, Ill.*, 695 F.3d 597 (7th Cir. 2012) (en banc). In 2013, the U.S. Supreme Court issued a decision addressing whether disclosure of names and addresses sought by trial lawyers to find potential plaintiffs fit one of the DPPA's exceptions. *Maracich v. Spears*, 133 S. Ct. 2191 (2013).

Both of these decisions have caused some confusion in Wisconsin's legal, local government, and law enforcement communities. The Appellants ("City of New Richmond") argue that these two decisions demand a "restrictive approach" that was "not anticipated by the Wisconsin

Attorney General’s earlier contrary opinion on the subject.”
(City of New Richmond Br. 11.)

For the reasons explained below, the Department of Justice disagrees with this restrictive approach and reading of *Senne* and *Maracich*, and therefore continues to endorse the 2008 Attorney General opinion.

**INTEREST OF DEPARTMENT OF JUSTICE FILING
NON-PARTY BRIEF**

The Attorney General is authorized to enforce the public records law. Wis. Stat. § 19.37 (1)(b). The Attorney General also is authorized to give advice to any person about the application of the public records law to any set of circumstances. Wis. Stat. § 19.39. The Wisconsin Supreme Court has recognized that the Attorney General’s opinions and writings have special significance in interpreting public records law. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 41, 341 Wis. 2d 607, 624 N.W.2d 367 (2012) (“The opinions and writings of the Attorney General have special significance in interpreting the Public Records Law, inasmuch as the legislature has specifically authorized the Attorney General to advise any person about the applicability of the Law.”).

The Attorney General’s role as the principal statewide interpreter, and enforcer, of the public records law gives the Department of Justice a unique, legislatively recognized interest that extends beyond the resolution of individual controversies. Many individuals making public records

requests, as well as many public records custodians, are not legally trained. Even ostensibly straightforward provisions of the public records law can prompt inquiries to the Department of Justice, particularly in light of a federal statute that could be misinterpreted as contradicting the state's policy toward open government.

Given that the parties in this case, as well as local governments throughout the state, have questions about the interaction between the DPPA and Wisconsin public records law as it relates to requests for copies of law enforcement records, the Department of Justice has an interest in providing the Attorney General's opinion on this matter.

ARGUMENT

I. The DOJ continues to endorse the 2008 informal Attorney General opinion addressing interaction between Driver's Privacy Protection Act and Public Records Act

On April 29, 2008, former Attorney General J.B. Van Hollen published his informal opinion in response to a request by Mr. Robert J. Dreps and Ms. Jennifer L. Peterson on behalf of their clients, Capital Newspaper Portage, the *Wisconsin State Journal*, *The Capital Times*, *The Janesville Gazette*, the *Milwaukee Journal Sentinel*, and the Wisconsin Freedom of Information Council. I-02-08 (Apr. 29, 2008). Specifically, the request sought the Attorney General's opinion "regarding the interaction between the federal [DPPA] . . . and the Wisconsin Public

Records Law,... in the context of public records requests to law enforcement agencies.” (Amicus Supp. App. 1.)

The following legal principles are listed at the conclusion of the opinion:

- a. If the authority did not obtain the information from a state DMV, the DPPA does not prohibit disclosure. This is true even if it is the same type of information that is confidential in the hands of a state DMV.
- b. If the requested information does not meet the DPPA’s statutory definitions of “personal information” or “highly restricted personal information,” the DPPA does not limit disclosure.
- c. If the information does meet the DPPA’s statutory definition of “personal information” or “highly restricted personal information,” *and* was obtained from a state DMV, the information may be used for a permissible use as specified in 18 U.S.C. § 2721(a)(2) (for highly restricted personal information) or § 2721(b) (for personal information).
- d. A permissible use, pursuant to 18 U.S.C. § 2721(b)(1), for both personal information and highly restricted personal information is “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.” Responding to public records requests is a required function of law enforcement agencies. Personal information or highly restricted personal information obtained from the state DMV and contained in law enforcement records may be provided in response to a public records request unless the

public records balancing test or statutory prohibitions other than the DPPA preclude disclosure.

- e. Additional DPPA provisions also authorize disclosure of personal information, but not highly restricted personal information, when the following types of records are disclosed in response to public records requests:
- Uniform Traffic Citations;
 - Driving-related warnings;
 - Uniform Traffic Accident Reports, their attachments, and related materials; or
 - Other law enforcement records related to vehicular accidents, driving violations, or driver status.
- f. A law enforcement officer may not obtain and/or disclose personal information from DMV records for a purpose not authorized as a permissible use in 18 U.S.C. § 2721(b).

(Amicus Supp. App. 14-15.)

These well-reasoned legal principles have served the public well over the past nearly seven years since the 2008 Attorney General's opinion was issued. The Department of Justice continues to endorse these legal principles despite the recent federal court decisions.

II. Two recent federal court decisions interpreting sections of the Driver's Privacy Protection Act do not alter the Attorney General's 2008 informal opinion.

City of New Richmond argues that two recent federal court decisions—*Senne* and *Maracich*—alter the Attorney

General's 2008 opinion. Neither *Senne* nor *Maracich* is on point or is controlling. Therefore, the DOJ continues to endorse the 2008 Attorney General opinion.

A. *Maracich v. Spears* is not on point

In *Maracich*, the U.S. Supreme Court opined on two of the exceptions provided by the DPPA. The Court examined whether 18 U.S.C. § 2721(b)(4)¹ or (12)² allowed the DMV to provide personal information of thousands of car buyers, by means of a state law freedom of information act request, to attorneys seeking plaintiffs for a class action lawsuit. *Id.* at 2195. The Court determined that solicitation of prospective clients was not permitted under either the (b)(4) or (b)(12) exception. *Id.* at 2209. However, the Court explicitly stated that it “has not considered whether the respondents’ conduct was permissible under the (b)(1) governmental-function exception.” *Id.* at 2210.

The Attorney General's 2008 opinion that the DPPA permits state DMVs to disclose personal information from driver records to fulfill public records requests was based on

¹“For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.”

²“For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.”

18 U.S.C. § 2721(b)(1). (Amicus Supp. App. 2, 6-12.) The *Maracich* holding was limited to the interpretation of two very specific phrases: “in connection with” litigation, and “investigation in anticipation of litigation,” neither of which is found in § 2721(b)(1). 133 S. Ct. at 2210.

Maracich is wholly inapplicable as to whether fulfilling an open records request under Wisconsin law is permitted by the DPPA’s 18 U.S.C. § 2721(b)(1) government-function exception. The Court left the door open to arguments that state law authorizing the release of information otherwise protected under the DPPA may be permissible under § 2721(b)(1).

Moreover, nothing in *Maracich* changes the Attorney General’s opinion that the definition of “personal information” under 18 U.S.C. § 2725(3) excludes personal information incorporated into an accident report or traffic citation. (See Amicus Supp. App. 12.) Nor does the *Maracich* holding affect the Attorney General’s opinion that the DPPA does not preclude public access to the Uniform Traffic Accident Reports and related records. (Amicus Supp. App. 13.)

For all these reasons, *Maracich* is not on point and does not affect the 2008 Attorney General opinion.

B. *Senne v. Village of Palatine* is not controlling

In *Senne*, the Seventh Circuit concluded a parking ticket with the driver’s personal information placed on the

windshield of the vehicle constituted a disclosure under the DPPA. The holding does not cast doubt on the conclusion reached by the 2008 Attorney General opinion.

Specifically, the court in *Senne* evaluated the dismissal of a complaint asserting the Village of Palatine's practice of printing personal information obtained from motor vehicle records on a parking ticket was a violation of the DPPA. The parking ticket in question was left on the windshield of Mr. Senne's car and listed his full name, address, driver's license number, date of birth, sex, height, and weight. *Id.* at 600.

The court took no issue with the disclosure of the information by the DMV to the village, but rather focused on how the village's police department used that information. *Id.* at 602. The decision turned on whether all of the disclosed information *was used* either by a law enforcement agency in carrying out its function under 18 U.S.C. § 2721(b)(1), or in connection with a civil or administrative proceeding, including service of process under § 2721(b)(4). *Id.* at 608.

Ultimately, the court reversed and remanded the dismissal, holding that the parking ticket was a disclosure under the DPPA, and explaining that, to fall under the 18 U.S.C. § 2721(b)(1) exception, the disclosure of information must "comply with those legitimate uses of information identified in the statutory exceptions." *Id.* at 609.

Like *Maracich*, the Seventh Circuit's decision in *Senne* has no impact on the 2008 Attorney General opinion. The facts of *Senne* have no relation to a public records request under Wisconsin state law. The Seventh Circuit did not address the merits of Mr. Senne's claim. Instead, the court concluded that the parking ticket constituted a disclosure regulated by the DPPA, and remanded the case back to the district court for further proceedings. On remand, the district court again held that the Village of Palatine did not violate the DPPA. *Senne v. Village of Palatine*, 6 F.Supp.3d 786 (N.D. Ill. 2013).

Accordingly, *Senne* is not controlling and does not affect the 2008 Attorney General opinion.

CONCLUSION

For the reasons stated, the Department of Justice argues that neither *Senne* nor *Maracich* alters the 2008 Attorney General opinion.

Dated this 16th day of April, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,882 words.

Dated this 16th day of April, 2015.

ANDREW C. COOK
Deputy Attorney General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this 16th day of April, 2015.

ANDREW C. COOK
Deputy Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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ANDREW C. COOK
Deputy Attorney General

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