



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

April 29, 2008

I—02—08

Mr. Robert J. Dreps
Ms. Jennifer L. Peterson
Godfrey & Kahn, S.C.
Post Office Box 2719
Madison, WI 53701-2719

Dear Mr. Dreps and Ms. Peterson:

Your July 3, 2007, letter on behalf of your clients Capital Newspapers Portage, the *Wisconsin State Journal*, *The Capital Times*, *The Janesville Gazette*, the *Milwaukee Journal Sentinel*, and the Wisconsin Freedom of Information Council requests our opinion regarding the interaction between the federal Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-25, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31-19.37, in the context of public records requests to law enforcement agencies. Thank you for your patience while we reviewed relevant legal authorities during a period of significant demands on our public records staff, attempted to obtain federal guidance on this issue (given the dearth of interpretive guidance on the DPPA), and developed a comprehensive response to the questions you posed after consultation with a number of authorities.

It long has been the policy of Wisconsin Attorneys General not to issue opinions concerning applicability of federal statutes administered exclusively by federal authorities, except in extraordinary circumstances. *See* 77 Op. Att'y Gen. Preface 2 (1988); 77 Op. Att'y Gen. 287, 291-92 (1988). The United States Department of Justice ("US DOJ") enforces the DPPA, although a federal civil cause of action also is provided for persons whose personal information is obtained, disclosed, or used for a purpose not permitted under the DPPA. *See* 18 U.S.C. §§ 2723-24. Although private parties are not entitled to formal opinions of the Attorney General, *see* 77 Op. Att'y Gen. Preface, at 1, the Attorney General has a unique role in construing the scope of the Public Records Law. *See* Wis. Stat. § 19.39. We also recognize the need for guidance expressed by Wisconsin law enforcement agencies diligently attempting to comply with both the DPPA and the Wisconsin Public Records Law. We recognize, as well, the legitimate interests of your clients in reporting matters of significant public concern and of the public in law enforcement matters implicating public safety and personal liberty. Under these extraordinary circumstances, absent guidance from US DOJ, our analysis therefore is set forth below.

SUMMARY OF CONCLUSIONS

The DPPA identifies permissible uses for which a state motor vehicle department (a “DMV”) may disclose personal information from motor vehicle records. It is a permissible use for a DMV to disclose personal information “[f]or 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.” 18 U.S.C. § 2721(b)(1). The Wisconsin Department of Transportation (“DOT”) may disclose personal information from its motor vehicle records for use by law enforcement agencies in carrying out their functions.¹

The Wisconsin Public Records Law imposes a statutory duty on law enforcement agencies to respond to public records requests. In the course of carrying out its functions, including responding to public records requests, a law enforcement agency may disclose personal information obtained from DOT that is held by the law enforcement agency. Depending on the totality of circumstances related to a particular public records request, non-DPPA statutory, common law, or balancing test considerations may warrant redaction of certain personal information pursuant to the usual Public Records Law analysis.

We further conclude that other DPPA provisions specifically support public records access to personal information in law enforcement records related to vehicular accidents, driving violations, and driver status. These DPPA provisions include the definition of “personal information” in 18 U.S.C. § 2725(3); permissible use under 18 U.S.C. § 2721(b)(14) for uses specifically authorized under law of the state that holds a record, like Wis. Stat. § 346.70(4)(f), if such use is related to the operation of a motor vehicle or public safety; and directed disclosure in 18 U.S.C. § 2721(b) and (b)(2) for use in connection with matters of motor vehicle or driver safety and theft.

DISCUSSION

Policy Objectives of the Wisconsin Public Records Law and the DPPA.

Any analysis of the Wisconsin Public Records Law begins with the Wisconsin Legislature’s declaration that it is “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.” Wis. Stat. § 19.31. The Public Records Law

¹Because the focus of this opinion is public records responses by law enforcement agencies, we do not address which DOT subdivisions constitute DMVs for DPPA purposes. We also do not address DMV responsibilities under the DPPA.

must be generally construed to favor disclosure, exceptions must be narrowly construed as instances in derogation of general legislative intent, and exceptions will not be recognized unless explicit and unequivocal. *Hathaway v. Joint Sch. Dist. No. 1*, 116 Wis. 2d 388, 396-97, 342 N.W.2d 682 (1984).²

While the public policy underpinnings of the Public Records Law favor the broadest practical access to government, the presumption of access is not absolute. *Hempel v. City of Baraboo*, 2005 WI 120, ¶¶ 22, 28, 284 Wis. 2d 162, 699 N.W.2d 551. In fact, the broad grant of a right to inspect public records is expressly subject to, and qualified by, other applicable law:

APPLICATION OF OTHER LAWS. 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), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

Wis. Stat. § 19.36(1); *see also* Wis. Stat. § 19.35(1)(a) (“*Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect.*”); *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 156, 469 N.W.2d 638 (1991) (“Access should also be denied where there is a clear statutory exception . . .”).

Specific public policy objectives also underlie the DPPA. Congress enacted the DPPA to limit the release of personal information contained in state motor vehicle records. *Parus v. Kroeplin*, 402 F. Supp. 2d 999, 1005 (W.D. Wis. 2005). The DPPA legislation was introduced in response to growing concern over crimes committed by individuals who used DMV records to identify and locate their victims, including, most notoriously, murdered actress Rebecca Schaeffer. *Kroeplin*, 402 F. Supp. 2d at 1005-06; *Margan v. Niles*, 250 F. Supp. 2d 63, 68 (N.D.N.Y. 2003). “Through the DPPA, Congress intended to prevent stalkers, harassers, would-be criminals, and other unauthorized individuals from obtaining and using personal information from motor vehicle records.” *Margan*, 250 F. Supp. 2d at 68. Congressional concerns about commercial use of personal information from motor vehicle records also motivated enactment of the DPPA, but it is primarily crime-fighting legislation rather than general privacy protection legislation. *Margan*, 250 F. Supp. 2d at 68 n.4.

² “[T]he general presumption of our law is that public records shall be open to the public *unless there is a clear statutory exception*, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.” *Hathaway*, 116 Wis. 2d at 397 (emphasis added).

The DPPA was not intended to impede the ability of law enforcement officers to carry out their duties. *Kroeplin*, 402 F. Supp. 2d at 1006. Senator Harkin, a chief sponsor of the legislation, explained that “‘with respect to law enforcement agencies [a DPPA provision allowing disclosure for use by any government agency in carrying out its functions] should be interpreted so as not to in any way restrict or hinder law enforcement and crime prevention strategies,’ even when those strategies might include releasing personal information to the general public.” *Kroeplin*, 402 F. Supp. 2d at 1006, quoting 139 Cong. Rec. S15962 (Nov. 17, 1993) (Statement of Sen. Harkin); *cf. McQuirter v. City of Montgomery*, 2008 WL 401360, *5 (M.D. Ala. Feb. 12, 2008). *See also* 139 Cong. Rec. S14381 (Oct. 26, 1993) (S. 1589 § 1(b)) (purpose of the Driver’s Privacy Protection Act of 1993, as introduced by Sen. Boxer, “is to protect the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government”).³

The DPPA Preempts Contrary State Law.

In *Reno v. Condon*, 528 U.S. 141 (2000), the United States Supreme Court upheld Congress’ power, in enacting the DPPA, to restrict a state’s ability to disseminate information:

The DPPA establishes a regulatory scheme that restricts the States’ ability to disclose a driver’s personal information without the driver’s consent. The DPPA generally prohibits any state DMV, or officer, employee, or contractor thereof, from “knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.” 18 U.S.C. § 2721(a).

528 U.S. at 144 (bracketed changes in original). Consequently, the Court found impermissible conflict between the DPPA and a South Carolina law permitting direct DMV sales of personal information to any person who filled out a form providing the person’s name, address, and affirmation that the information would not be used for telephone solicitation. *Condon*, 528 U.S. at 147. *See also Collier v. Dickinson*, 477 F.3d 1306, 1312 n.3 (11th Cir. 2007) (“Defendants’ argument that there was conflicting state law is unavailing. The law was clear at the relevant time that the DPPA preempted any conflicting state law that regulates the dissemination of motor vehicle record information.”); *State ex rel. Oklahoma Dep’t of Public Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998) (“the DPPA directly regulates the disclosure of such [personal] information [from motor vehicle records] and preempts contrary state law”); *Rios v.*

³Originally introduced as stand-alone legislation, the DPPA later was incorporated in the Violent Crime Control and Law Enforcement Act of 1993. *See Margan*, 250 F. Supp. 2d at 68; 139 Cong. Rec. S14381 (Oct. 26, 1993) (Statement of Sen. Boxer); 139 Cong. Rec. E2747 (Nov. 3, 1993) (Statement of Rep. Moran); 139 Cong. Rec. S15793 (Nov. 16, 1993) (Statement of Sen. Boxer); 139 Cong. Rec. S15745-01 (Nov. 16, 1993) (Statements of Sen. Boxer and others).

Direct Mail Express, Inc., 435 F. Supp. 2d 1199, 1205-06 (S.D. Fla. 2006) (DPPA preempts state law).

Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998), reaches a similar conclusion. In that case, the Wisconsin Department of Transportation intervened in a challenge to the DPPA as applied to Wisconsin. The Seventh Circuit, like the courts cited above, held that the DPPA was a legitimate exercise of federal power that was applicable to Wisconsin. *Id.*, at 1001. Accordingly, it is clear that any release of public records under Wisconsin law must be consistent with disclosures permitted under the DPPA.

The DPPA Permits State DMVs to Disclose Personal Information from Driver Records for Use by Any Government Agency in Carrying Out Its Functions.

We are mindful, in analyzing interaction of the Wisconsin Public Records Law and the DPPA, that both state and federal statutes must be read “with the saving grace of common sense[.]” *Bell v. United States*, 349 U.S. 81, 83 (1955); *State v. Eisch*, 96 Wis. 2d 25, 38, 291 N.W.2d 800 (1980) (internal quotation omitted).

In general, the DPPA prohibits a state DMV or its contractors from disclosing or otherwise making available “personal information”⁴ except as provided in 18 U.S.C. § 2721(b). See 18 U.S.C. § 2721(a)(1); *Parus v. Cator*, 399 F. Supp. 2d 912, 917 (W.D. Wis. 2005) (DPPA prohibits release of motorists’ personal information from DMV database, with specific exceptions). Cf. *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶ 23, 249 Wis. 2d 242, 638 N.W.2d 625 (DPPA does not preclude government agency from releasing information collected and provided by a private employer);⁵ *Locate.Plus.Com v. Iowa Dep’t of Trans.*, 650 N.W.2d 609, 614 (Iowa 2002) (DPPA “generally regulates the authority of state motor vehicle departments to disclose personal information maintained in their records”); *Mattivi v. Russell*, 2002 WL 31949898, *4 (D. Colo. Aug. 2, 2002) (accident report generated by Colorado State Patrol not a DMV “motor vehicle record” subject to disclosure restrictions of DPPA).

⁴ “[P]ersonal 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).

⁵ A similar conclusion was reached in *O’Brien v. Quad Six, Inc.*, 219 F. Supp. 2d 933 (N.D. Ill 2002). In that case, the court held that the DPPA did not prohibit redisclosure of information obtained by a business from an individual’s driver’s license because the information was procured directly from the individual, not from a state DMV. The court, likewise, held that the DPPA did not apply; the driver’s license was not a “motor vehicle record” because, although it was issued by the state DMV, it was no longer in the custody of the state DMV. *Id.* at 934.

Mr. Robert J. Dreps
Ms. Jennifer L. Peterson
Page 6

Section 2721(b), in turn, identifies permissible uses for which personal information must or may be disclosed. Disclosure of the subset of “highly restricted personal information”⁶ is permitted only for four of the permissible uses, unless express consent is obtained from the person to whom the highly restricted personal information applies. *See* 18 U.S.C. § 2721(a)(2).⁷

As for disclosures by a state DMV to other government agencies, “[t]he plain language of the DPPA is written in terms of permissible ‘uses’ rather than permissible ‘users.’” *Russell v. Choicepoint Serv., Inc.*, 302 F. Supp. 2d 654, 665 (E.D. La. 2004) (referring to 18 U.S.C. § 2721(b)). Congress’ intent in the DPPA to regulate *use* of drivers’ personal information, rather than *users* of such information, is demonstrated by DPPA word choice and the different language used in other federal privacy-related statutes that do regulate users. *Russell*, 302 F. Supp. 2d at 666. Congress could have constructed § 2721(b) in terms of persons authorized to access personal information instead of the uses permitted for such data. *Id.* The relevant inquiry, therefore, is not to which specific persons the DPPA authorizes disclosure of personal information from DMV records, but for what purpose.

One of the permissible uses for which a DMV may disclose personal information is “[f]or 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.” 18 U.S.C. § 2721(b)(1). This also is one of the limited permissible uses for which highly restricted personal information may be disclosed by a DMV without express consent of the person to which the information applies. 18 U.S.C. § 2721(a)(2).

The functions for which another government agency permissibly may use personal information pursuant to 18 U.S.C. § 2721(b)(1) are not defined or limited by the statutory language of the DPPA. Nor is the statutory language 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*.” It is well established that 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. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). 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

⁶ “[H]ighly restricted personal information’ means an individual’s photograph or image, social security number, medical or disability information[.]” 18 U.S.C. § 2725(4).

⁷ Unless otherwise indicated, we use the term “personal information” in this letter to refer to both personal information and highly restricted personal information.

other government agencies to carry out their duties—whatever those might be. *Cf. Kroepelin*, 402 F. Supp. 2d at 1006.

Implicit in the § 2721(b)(1) authorization for a DMV to disclose personal information for “use by any government agency . . . in carrying out its functions” is authorization for the receiving government agency to further disclose the information to other persons as necessary in carrying out the agency’s functions. 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.

In *McQuirter*, for example, a United States district court recently held that the DPPA was not violated when a police officer obtained a driver’s license photo—from state DMV records—that then was used in a press release announcing the results of a prostitution sting operation. Under § 2721(b)(1), the court reasoned, disclosure of the photograph by the police department was a permissible use because the media outlets receiving the press release were “private persons acting on behalf of” the police department in carrying out its law enforcement functions. *McQuirter*, 2008 WL 401360, at *6. Law enforcement functions served by such releases include “appriz[ing] the public of risks created by dangerous suspects at large, [] *bolster[ing] public confidence in law enforcement activities*, [] *advis[ing] the public of information needed to increase public safety*, and [] *act[ing] as both a general and a specific deterrent to criminal activity.*” *Id.* (emphasis added). Unstated, but obvious, was permissibility under § 2721(b)(1) of further disclosure by the media to the public in order to accomplish these identified functions.

In a Connecticut case, similarly, a municipal tax assessor was provided personal information by the commissioner of motor vehicles for the purpose of preparing the municipality’s annual “grand list” of property—including motor vehicles—for public inspection *Davis v. Freedom of Information Comm’n*, 790 A.2d 1188, 1193 (Conn. Super. Ct. 2001), *aff’d*, 787 A.2d 530 (2002) (*per curiam*). The grand lists, by statute, were required to be made available for public inspection. *Davis*, 790 A.2d at 1193. Because neither the DPPA nor state law expressly prohibited disclosure of the DMV information by the assessor, the court reasoned that she was required to disclose the grand lists because to conclude otherwise would require implicit repeal of the grand list statute and Connecticut’s historical practice of making grand lists available to the public for correction and disputation. *Id.* at 1194.

Conversely, a recent federal court decision suggests that redisclosure for purposes other than performance of the receiving government agency’s functions would not be consistent with the § 2721(b)(1) permissible use. *In re Imagitas, Inc., Drivers’ Privacy Protection Act Litigation*, 2008 WL 977333 (M.D. Fla. Apr. 9, 2008). *Imagitas* involves the Florida DMV’s use of a contractor to furnish and mail notices to vehicle owners, reminding them to renew their vehicle registrations. The contractor uses personal information obtained from the DMV to target various advertising materials also included in the renewal envelopes. Advertisers pay the

contractor for this targeted advertising service, and their fees offset the costs of registration renewal and other public service announcements included in the mailing. *Imagitas*, 2008 WL 977333 at *1. Analogizing the § 2721(a) prohibition on “otherwise mak[ing] available” personal information unless there exists a permissible use to allowing viewing of the information, the court found that permitting advertisers to include their solicitations in the DMV renewal envelopes did not mean that the contractor “makes available” personal information about vehicle registrants to the advertisers. *Id.*, at *14. Law enforcement agencies complying with the Wisconsin Public Records Law in responding to public records requests differ from the *Imagitas* contractor in two significant respects. First, unlike the Florida DMV contractor, those law enforcement agencies are not contractors directly regulated by 18 U.S.C. § 2721(a). Second, also unlike *McQuirter* and *Davis*, the Florida contractor’s use of personal information does not involve a government agency’s performance of a statutory function requiring public access to information.

Under Wisconsin law, making records available for inspection pursuant to the Public Records Law is a duty of public officers and employees and a routine function of the government agencies by which they are employed. Providing such information is “an essential function of a representative government and an integral part of the routine duties” of officers and employees responsible for providing such access. Wis. Stat. § 19.31. The statutory presumption of openness “reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society.” *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811.⁸

Reading § 2721(b)(1) so restrictively that law enforcement agencies would be precluded from carrying out public records functions, including redisclosing personal information obtained from the state DMV and used in law enforcement reports, 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, *Linzmeyer*, 254 Wis. 2d 306, ¶ 27; impair public confidence in law enforcement activities, *cf. McQuirter*, 2008 WL 401360, at *6; and do exactly what Congress intended to avoid—impede execution by law enforcement officers of their legitimate public duties and responsibilities. If § 2721(b)(1) allows a law enforcement agency to *proactively* release personal

⁸*See also Nichols v. Bennett*, 199 Wis. 2d 268, 275, 544 N.W.2d 428 (1996) (“It is ‘an integral part of [a district attorney’s] routine duties’ to facilitate access to public records in his office and thereby provide the public with information about his own official acts as well as those of other government officials and employees.”); *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶¶ 21, 24, 26, 31, 259 Wis. 2d 276, 655 N.W.2d 510 (regarding duty to respond under Public Records Law); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 15, ___ Wis. 2d ___, 742 N.W.2d 530 (Public Records Law addresses duty to disclose records).

information to the public through media agents for functions including bolstering public confidence in law enforcement activities, it certainly should allow law enforcement agencies to release personal information in their reports when engaged in their statutory function of *responding* to public records requests.

Based on our analysis of the complicated DPPA language and the little available interpretive legal authority, we conclude that 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. 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.⁹

We observe that *allowing* a law enforcement agency responding to a public records request to redisclose personal information obtained from the DMV and included in the law enforcement agency's records is not the same as *requiring* redisclosure of that personal information. We recognize that other reasons may exist under the Public Records Law to redact some or all of the personal information in a particular record either pursuant to the Public Records Law's balancing test, a common law exception (Wis. Stat. § 19.35(1)(a)), or pursuant to a specific statutory exception such as Wis. Stat. § 19.36(8) (protecting identities of law enforcement informants). Ordinary public records screening procedures should be followed.

Redisclosure of personal information included in law enforcement records in response to a public records request, pursuant to 18 U.S.C. § 2721(b)(1) as discussed above, is not the type

⁹We also note that the same analysis would apply to the related law enforcement function of providing access to Uniform Traffic Accident Reports and related records pursuant to Wis. Stat. § 346.70(4)(f).

of redisclosure prohibited by another section of the DPPA. Under 18 U.S.C. § 2721(c),¹⁰ resale or redisclosure of personal information by an authorized recipient to other persons or entities is prohibited unless a DPPA permissible use allows the resale or redisclosure. Section 2721(c) only “regulates the resale and redisclosure of drivers’ personal information *by private persons* who have obtained that information *from a state DMV.*” *Condon*, 528 U.S. at 146 (emphasis added); *see also Parus v. Cator*, 2005 WL 2240955, *4 (W.D. Wis. Sept. 14, 2005) (distinguishing between commercial entity authorized under § 2721(c) to resell personal information for a purpose permitted under § 2721(b) and a law enforcement officer permitted to obtain personal information pursuant to § 2721(b)(1)). Section 2721(c) and its recordkeeping requirements therefore do not apply when a government agency that has obtained personal information from a DMV responds to a public records request as part of that agency’s authorized functions. As the Oregon Attorney General has explained,

To the extent a government agency’s functions require that agency to provide information to someone other than a government agency, we believe a court would conclude . . . that the agency’s action was not a “redisclosure” prohibited by 18 USC § 2721(c). Rather, such an action should be a necessary element of carrying out that agency’s functions and therefore a permitted use under 18 USC § 2721(b)(1).

49 Or. Op. Att’y Gen. 127, 1998 WL 665882, *6 (Or. A.G. 1998). *See also Davis*, 790 A.2d at 1193 (§ 2721(c) disclosure prohibitions apply only to DMV, and employee in a government agency may use motor vehicle personal information obtained from DMV in carrying out

10

An authorized recipient of personal information (except a recipient under [two specific permissible uses involving the express consent of the person to whom the personal information pertains]) may resell or redisclose the information only for a use permitted under subsection (b) (but not for [those two specific permissible uses]). An authorized recipient under subsection (b)(11) [permissible use for any purpose if the express consent of the person to whom the personal information pertains has been obtained] may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) [permissible use for bulk distribution for surveys, marketing or solicitations if the express consent of the person to whom the personal information pertains has been obtained] may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

agency's functions, including distributing information furnished by DMV in furtherance of receiving agency's functions).¹¹

Two recent DPPA cases that have caused concern and confusion for Wisconsin law enforcement agencies do warrant some further comment. These cases involved disclosure of personal information obtained by law enforcement agencies from the state DMV under circumstances involving doubt as to whether the information was obtained for a § 2721(b) permissible use.

In one case, arising from the same northern Wisconsin facts as the *Kroeplin* case cited above, a law enforcement officer had requested the local dispatcher to "run a plate." Why the law enforcement officer requested personal information relating to that license plate later was disputed; one possibility was that the officer's nephew had asked for the information in order to check up on a car parked outside the home of the nephew's former girlfriend. *Parus v. Cator*, 399 F. Supp. 2d 912, 913-17 (W.D. Wis. 2005). When the officer's actions in obtaining and disclosing the information were challenged in a federal lawsuit, the matter was allowed to proceed to jury determination of whether the officer had obtained the personal information about the license plate for a non-law enforcement purpose contrary to 18 U.S.C. § 2721(b)(1). *Cator*, 399 F. Supp. 2d at 918.

Similarly, in *Deicher v. City of Evansville*, 2006 WL 3751402 (W.D. Wis. Dec. 18, 2006), a law enforcement officer accessed DMV records to obtain the address of a requester's former wife. The requester told the officer that he needed his former wife's signature to complete the sale of a house, but used the address information to harass his former wife. It later was disputed whether the officer provided the address information because he believed that the requester needed the information to serve process on his former wife regarding sale of a house related to a divorce. If that were true, then another of the DPPA permissible uses would have applied: 18 U.S.C. § 2721(b)(4), permitting disclosure of personal information for use in connection with court proceedings including service of process. It was unclear, as a factual matter, whether the § 2721(b)(4) permissible use applied to the disclosure; consequently, that matter also was allowed to proceed to a jury determination. *Deicher*, 2006 WL 3751402 at *1-*2.

Neither *Cator* nor *Deicher* involved responses to public records requests for law enforcement records containing personal information obtained from the DMV for permissible uses under 18 U.S.C. § 2721(b). Instead, both cases involved the questionable existence of permissible uses in the first place. So long as a law enforcement agency obtains personal

¹¹Because the permissible extent of § 2721(c) redisclosures and resales presents a pure legal question of federal statutory interpretation, inapplicable in the public records context about which you inquire, we will refrain from any further discussion of that DPPA provision.

Mr. Robert J. Dreps
Ms. Jennifer L. Peterson
Page 12

information from DMV records for a permissible use, however, it is our conclusion that the DPPA does not preclude access to that personal information included in the agency's records when a public records request is made for those records.

Uniform Traffic Citations, Uniform Traffic Accident Reports, and Related Records.

Our above analysis applies to all law enforcement records that include personal information obtained from the state DMV for use in carrying out functions of the law enforcement agency. It is our view that additional DPPA provisions also authorize public records access to personal information in law enforcement records related to vehicular accidents, driving violations, and driver status: Uniform Traffic Citations; driving-related warnings; Uniform Traffic Accident Reports, their attachments and related materials; and other law enforcement records related to vehicular accidents, driving violations, and driver status. Several DPPA provisions, which we discuss below, support this view; it further is our view, however, that these types of law enforcement records also may be released in response to public records requests under the analysis outlined in the previous section of this letter.

First, the definition of "personal information" excludes these types of records from the disclosure prohibitions imposed by the DPPA. That definition states:

"[P]ersonal 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). As one federal district court has explained, the "plain language of exception in section [2725(3)]¹² makes clear that Congress did not intend 'information on vehicular accidents' to be included within the Act's prohibition of disclosure of 'personal information.'" *Mattivi*, 2002 WL 31949898, *4. The same rationale would apply to information on driving violations and driver status. We believe it is reasonable to interpret this exclusion from the "personal information" definition to mean 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 a document such as an accident report or traffic citation. This construction is consistent with the primary crime prevention purpose of the

¹²In an obvious typographical error, the *Mattivi* decision cites to "section 2725(e)" for the exclusion of "information on vehicular accidents" from the prohibition on disclosing "personal information." There is no 18 U.S.C. § 2725(e). The definition of "personal information" is set forth in 18 U.S.C. § 2725(3) and specifically excludes "information on vehicular accidents, driving violations and driver's status."

DPPA, as discussed above, and with the legislative history of the DPPA that indicated a clear intention not to hinder law enforcement or crime prevention strategies.

Please note that the DPPA definition of “highly restricted personal information” does not exclude information on vehicular accidents, driving violations, and driver’s status; release of photographs, social security numbers, and medical or disability information therefore would not be authorized pursuant to this same rationale.

Second, one of the DPPA permissible uses authorizes disclosure of personal information “[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). Wisconsin law specifically requires public access to one category of law enforcement records concerning operation of motor vehicles and public safety, namely Uniform Traffic Accident Reports and related records. Under Wis. Stat. § 346.70(4)(f):

Notwithstanding s. 346.73 [prohibiting use of accident reports at trial], any 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.

Section 346.70(4)(f) authorizes broad access to related materials, including officers’ narrative reports. *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 285-86, 477 N.W.2d 340 (Ct. App. 1991). Unless access is restricted by some other statute, all these materials are subject to access under the Public Records Law. *Id.*, at 291. Consequently, we believe there is a reasonable basis to conclude that the right to obtain accident reports under Wis. Stat. § 346.70(4)(f) constitutes disclosure for a use that “is related to the operation of a motor vehicle or public safety.” *Cf.* 18 U.S.C. § 2721(b)(14). In particular, the right to obtain accident reports is included within a statute that imposes certain obligations on motorists to report accidents, requires law enforcement agencies to prepare written reports using a prescribed format, and requires the Department of Transportation to compile statistics on accidents. Because these provisions are obviously designed to promote safe operation of motor vehicles and public safety, one could also conclude that making accident reports public was also designed to serve the same goal. Therefore, even if some information in Uniform Traffic Accident Reports and related records did constitute personal information—contrary to our conclusion above—release of that information in response to a public records request would be authorized by Wis. Stat. § 346.73(4)(f) and 18 U.S.C. § 2721(b)(14). Again, please note that the § 2721(b)(14) permissible use is not one pursuant to which highly restricted personal information may be released without express consent. *Cf.* 18 U.S.C. § 2721(a)(2).

Third, introductory language in the DPPA permissible use section requires that personal information *shall* be disclosed “for use in connection with matters of motor vehicle or driver safety and theft” and certain other specified purposes and the same language appears in a specific permissible use section, 18 U.S.C. § 2721(b); inexplicably, the same language is employed to describe a discretionary permissive use in 18 U.S.C. § 2721(b)(2). Construing the § 2721(b)(2) permissible use language, one court held that obtaining names and addresses of persons who registered their snowmobiles with a state natural resources department in order to promote snowmobiling and membership in the state snowmobile association was not a use in connection with matters of motor vehicle or driver safety. *Hartman v. Department of Conservation and Nat. Res.*, 892 A.2d 897, 904-05 (Pa. Commw. Ct. 2006). In comparison, we believe that public records disclosure of Uniform Traffic Citations, driving-related warnings, Uniform Traffic Accident Reports and their attachments, and other law enforcement records related to vehicular accidents, driving violations, and driver status facially constitute uses in connection with a matter of motor vehicle and/or driver safety. Again, this provision does not apply to highly restricted personal information. *Cf.* 18 U.S.C. § 2721(a)(2) and (b).

To reiterate, as discussed in the preceding section, we have concluded that the § 2721(b)(1) permissible use by government agencies in carrying out their functions allows disclosure of personal information and highly personal information in law enforcement records in response to public records requests—regardless of the nature of the matter in connection with which law enforcement requested the information from the DMV, so long as it was requested in pursuance of the law enforcement agency’s official duties and functions. We further have concluded, as discussed in this section, that various other DPPA provisions provide additional support for release of personal information in certain types of law enforcement records, namely Uniform Traffic Citations; driving-related warnings; Uniform Traffic Accident Reports; their attachments and related materials; and other law enforcement records related to vehicular accidents, driving violations, and driver status.

Summary of Key Legal Principles.

Under the DPPA, it is our conclusion for the reasons previously set forth that the following basic legal principles apply when a public records request is made to the records custodian of an authority other than a state DMV:

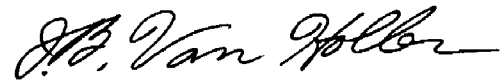
- a. If the authority did not obtain the information from a state DMV, the DPPA does not prohibit disclosure. This is true even if it is the same type of information that is confidential in the hands of a state DMV.
- b. If the requested information does not meet the DPPA’s statutory definitions of “personal 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).

Mr. Robert J. Dreps
Ms. Jennifer L. Peterson
Page 16

Thank you for your interest in understanding access to law enforcement records permitted by the DPPA and the Wisconsin Public Records Law.

Sincerely,

A handwritten signature in cursive script, appearing to read "J.B. Van Hollen".

J.B. Van Hollen
Attorney General

JBVH:SPM:MEB:cla