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July 3, 2007

Receipt of copy of the within acknowledged  
this 3rd day of July  
20 07 Time 4:02  
Attorney General of Wisconsin  
By C. Cushman

Hon. J.B. Van Hollen  
Attorney General  
17 West Main Street  
P.O. Box 7857  
Madison, WI 53707-7857

**HAND DELIVERED**

Dear Mr. Van Hollen:

We are writing on behalf of Capital Newspapers Portage, the *Wisconsin State Journal*, *The Capital Times*, *The Janesville Gazette*, the *Milwaukee Journal Sentinel* and the Wisconsin Freedom of Information Council ("FOIC") to request a formal opinion under Wis. Stat. § 19.39 on the applicability of the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721 to 2725, to the Wisconsin Open Records Law in the following circumstances.

The DPPA prohibits the release of certain personal information from state motor vehicle records. The statute defines "personal information" as "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). The prohibition on the release of personal information states:

(a) 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, as defined in 18 U.S.C. §2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. §2725(4), about any individual obtained by the department 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):  
Provided, That subsection (a)(2) shall not in any way affect the use  
of organ donation information on an individual's driver's license  
or affect the administration of organ donation initiatives in the  
States.

18 U.S.C. § 2721(a). After the prohibition, 18 U.S.C. § 2721(b) enumerates several "permissible  
uses":

(b) Permissible uses. Personal information referred to in  
subsection (a) shall be disclosed 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 and dealers by motor  
vehicle manufacturers, and removal of non-owner records from the  
original owner records of motor vehicle manufacturers to carry out  
the purposes of titles I and IV of the Anti-Car Theft Act of 1992,  
the Automobile Information Disclosure Act (15 U.S.C. §1231 et  
seq.), the Clean Air Act (42 U.S.C. §7401 et seq.), and chapters  
301, 305, and 321-331 of title 49 (49 U.S.C. §30101 et seq.,  
§30501 et seq., §32101 et seq.-§33101 et seq.), and, subject to  
subsection (a)(2), may be disclosed as follows:

(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.

....

We have recently learned that various Wisconsin municipalities are citing the DPPA to  
justify the denial of public access to information in police records. For example, in response to  
an open records request for copies of a uniform motor vehicle accident report, a Uniform Traffic  
Citation, and an incident report, the City of Reedsburg Police Department ("Reedsburg")  
redacted information from those records pursuant to the DPPA (attached, Exhibit A).  
Specifically, on the motor vehicle accident report and the traffic citation, Reedsburg redacted all  
information about the individuals involved except the first and last names and the zip codes. On  
the first page of the incident report relating to an "other animal complaint," Reedsburg redacted  
all information about the complainant except the first and last name and the zip code. On the  
second page, however, the record includes the complainant's full name, including middle initial,  
and the name of the owner of the dog complained about.

We have learned these municipalities are citing the DPPA to withhold information from police records based on a federal court decision in *Deicher v. City of Evansville*, W.D. Wis. Case No. 06-C-356-S (memorandum and order dated Dec. 18, 2006) (Exhibit B). In that case, a police officer accessed the Department of Motor Vehicle records and obtained an address of an individual to provide to that individual's ex-spouse. The requester indicated that he needed the address to get his former spouse's signature to complete the sale of their home. Instead, he used the information to harass his ex-spouse. The court denied summary judgment to the defendants under the DPPA because a genuine dispute of fact remained as to whether the police officer provided the information pursuant to a court proceeding under 18 U.S.C. § 2721(b)(4). The jury subsequently ordered the police officer to pay the plaintiffs \$25,000 in damages.

Furthermore, it appears to us that entities advising municipalities about DPPA and the Open Records Law are struggling with this issue. For example, the League of Wisconsin Municipalities has published a column by its legal counsel, Claire Silverman, on this exact issue. (Exhibit C). We agree with Ms. Silverman's conclusion that public access to law enforcement records is not restricted under the DPPA.

Given Wisconsin's public records law and the express wording of the DPPA, as well as existing case law, it appears that police departments would only violate the DPPA by directly obtaining information from DMV records and using it for non-law enforcement related purposes or by redisclosing the information for purposes unrelated to law enforcement functions. The release of uniform accident reports which are subject to inspection and copying under [Wis. Stat.] sec. 346.70(4)(f) does not clearly violate the DPPA.

Our concern with Ms. Silverman's advice, however, is her final recommendation: "Nonetheless, record custodian may want to be cautious and redact any information that was obtained from DMV records." This recommendation to redact all DMV information – without any basis under Wisconsin or federal law – illustrates the need for clarification of the relationship between DPPA and the Wisconsin Open Records Law.

We believe, pursuant to the presumption of complete public access under Wisconsin's Open Records Law, *see* Wis. Stat. § 19.31, that any claim that the DPPA limits or prevents the release of information in otherwise public police records is erroneous. First and foremost, we believe that the DPPA does not limit public access to records of law enforcement agencies. The statute specifically prohibits the release of personal information by "[a] State department of motor vehicles, and any officer, employee, or contractor, thereof..." That list does not include any local governmental entity, including police departments. *See, e.g., Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶¶ 21-22, 249 Wis. 2d 242, 638 N.W.2d 625 (DPPA does not apply to school district's disclosure of identities of bus drivers).

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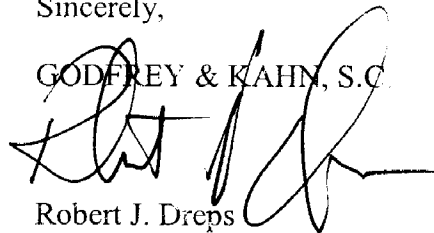
Second, we believe a specific statutory exception would allow a police department to disclose personal information in its records.<sup>1</sup> *Id.* at ¶ 23. The DPPA explicitly states that personal information “may be disclosed ... [f]or use by any government agency ... in carrying out its functions....” 18 U.S.C. § 2721(b)(1). A police department’s “functions” include providing public access to information about its activities, as reflected in citations and accident reports, under the Open Records Law. In fact, the legislature has declared that providing public access to information “regarding the affairs of government” 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.” Wis. Stat. § 19.31.

Accordingly, we believe that no Wisconsin governmental entity should be able to rely on the DPPA to prevent disclosure of the types of information redacted from the police records by Reedsburg. Municipal police department records are not “state motor vehicle records.” That some of the information in a police record may also be included in the state motor vehicle records database, or may even have come from that database, does not prohibit a police department from disclosing that information to the public in connection with a citation, an incident or accident report, or any other record of its law enforcement activities. In fact, some of the information redacted by Reedsburg is publicly available on the Wisconsin Court System’s website, Wisconsin Circuit Court Access (WCCA) – including the full name and address of the recipient of the traffic citation attached in Exhibit A. Moreover, the legislature has determined that uniform traffic accident reports are always public. *See* Wis. Stat. § 346.70(4)(f). Given the legislative mandate of openness, we believe that applying the DPPA to prohibit public access to identifying information in routine police records runs counter to the Open Records Law’s presumption of complete public access.

Thank you for your attention to this matter. We look forward to reviewing your opinion.

Sincerely,

GODFREY & KAHN, S.C.



Robert J. Dreps  
Jennifer L. Peterson

JLP:rk  
Enclosures  
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<sup>1</sup> We believe a police department would be an “authorized recipient of personal information” within the meaning of 18 U.S.C. § 2721(c) and, therefore, “may ... redisclose the information only for a use permitted under subsection (b).”