

Driver's Privacy Protection Act Update

Paul M. Ferguson
Assistant Attorney General
Office of Open Government
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
(608) 267-2220
fergusonpm@doj.state.wi.us

- I. Driver's Privacy Protection Act (DPPA)
 - A. 18 U.S.C. § 2721 et seq.
 - B. Federal statute enacted in 1994
 - C. Purpose
 - 1. To limit the release of an individual's personal information contained in driver's license record to those with a legitimate and lawful need for the information
 - D. Concerns:
 - 1. Growing threat from stalkers and criminals
 - 2. States' practice of selling personal information to businesses
 - E. Law prohibits the release of certain types of information:
 - 1. Personal information – 18 U.S.C. § 2721(a)
 - a) Information about an individual, including an individual's photo, SSN, driver ID number, name, address, telephone number, and medical or disability information – 18 U.S.C. § 2725(3)
 - b) Does not include information on vehicular accidents, driving violations, and the driver's status
 - 2. Highly restricted personal information – 18 U.S.C. § 2721(a)
 - a) An individual's photo or image, SSN, medical or disability information – 18 U.S.C. § 2725(4)

F. 14 permissible uses (exceptions) (although not all apply to highly restricted personal information) – 18 U.S.C. § 2721(b)

1. For use by any government agency in carrying out its functions (“agency functions” exception)
2. For use in connection with matters of vehicle or driver safety or theft; recalls and advisories; performance monitoring; parts and dealers, etc.
3. For use in normal course of business to verify accuracy of personal information or obtain correct information
4. For use in connection with a legal proceeding
5. For use in research activities
6. For use by an insurer, etc.
7. For use in providing notice for towed or impounded vehicles
8. For use by a licensed private investigative agency or security service
9. For use by to obtain or verify CDL related information
10. For use in connection with the operation of private toll facilities
11. For any other use in response to requests for such records if express consent is provided
12. For bulk distribution of surveys/marketing/solicitations if express consent is provided
13. For use by any requester if written consent is obtained from individual
14. For any other use specifically authorized under the law of the state holding the record, if the use is related to the operation of a motor vehicle or public safety (“state law” exception)

G. Enforcement

1. Penalties – 18 U.S.C. § 2723
 - a) Criminal fine for knowingly violating the DPPA
 - b) State DMV with a policy or practice of substantial noncompliance faces a civil penalty of not more than \$5,000/day
2. DPPA creates a private right of action for any individual whose personal information is unlawfully disclosed – 18 U.S.C. § 2724(a)

- a) Available remedies – 18 U.S.C. § 2724(b)
 - (1) Actual damages, but not less than liquidated damages of \$2,500
 - (2) Punitive damages for willful or reckless violations
 - (3) Attorney fees and costs
 - (4) Other preliminary and equitable relief

II. Wisconsin Public Records Law

A. Wis. Stat. §§ 19.31 to 19.39

1. Presumption of complete public access. Wis. Stat. § 19.31

- a) Consistent with conduct of government business

B. DPPA related considerations

1. Requester has the right to inspect any record except as otherwise provided by law – Wis. Stat. § 19.35(1)(a)

2. Any record specifically exempted from disclosure by state or federal law is exempt from disclosure – Wis. Stat. § 19.36(1)

3. When a record contains information subject to disclosure and information not subject to disclosure, authority shall provide the former and redact the latter – Wis. Stat. § 19.36(6)

C. 2008 informal opinion from Attorney General – Letter from Wis. Atty. Gen. J.B. Van Hollen to Robert J. Dreps and Jennifer L. Peterson, 2008 WL 1970575 (Apr. 29, 2008)

- 1. Wisconsin Court of Appeals did not wholly endorse

III. *Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012)

A. Background

1. Village police department routinely placed parking tickets containing personal information obtained from DMV records on vehicle windshields

2. Individual brought class action alleging DPPA prohibited disclosure

3. District court dismissed the lawsuit

- a) Parking tickets did not constitute disclosure

- b) Even if it did, the disclosures were permitted under the “agency functions” exception
- 4. Seventh Circuit reviewed *en banc*
 - a) Held that parking tickets were disclosures
 - b) “For use”: When a piece of disclosed information is not used to effectuate a purpose identified in one of the exceptions, the exception provides no protection
 - c) Remanded to district court to determine if each piece of personal information on ticket furthered a permissible use
 - (1) District court determined that all of it did

IV. DPPA and the Wisconsin Public Records Law

A. *New Richmond News v. City of New Richmond*, 2016 WI App 43, 881 N.W.2d 339

- 1. Background
 - a) New Richmond News requested two accident reports and two incident reports from the City of New Richmond police department pursuant to the public records law
 - b) PD provided the reports but redacted information identifying individuals (it provided one incident report without redaction)
 - (1) Relying on *Senne*, PD contended that DPPA required redaction
 - c) Newspaper sued City of New Richmond alleging violation of the public records law
- 2. Circuit court granted judgment on the pleadings to the paper
 - a) DPPA did not prohibit the PD from providing the unredacted reports
- 3. Supreme Court granted petition to bypass Court of Appeals
 - a) Supreme Court deadlocked 3-3
 - b) Vacated decision granting petition to bypass and remanded to Court of Appeals

4. Court of Appeals affirmed circuit court in part and reversed in part and remanded
 - a) Accident reports: permitted to be released unredacted
 - (1) Pursuant to DPPA exception allowing disclosures
 - (a) Specifically authorized under state law, if such use is related to the operation of a motor vehicle or public safety. *See* 18 U.S.C. § 2721(b)(14)
 - (i) Wis. Stat. § 346.70(4)(f): requires PDs to release accident reports upon request
 - (2) Court did not address whether PD’s redaction of personal information contained in accident reports was proper pursuant to the public records law’s balancing test
 - b) Incident reports: release of DMV information prohibited unless DPPA exception applies
 - (1) Mere compliance with public records request not a “function” of the PD and therefore does not fall under exception
 - (a) To construe otherwise would lead to “untenable results”
 - (b) Permitting an authority—including DMV—to disclose personal information in response to public records requests would “eviscerate the protection provided by the DPPA”
 - (2) Remanded to determine whether disclosure served any other PD function other than compliance with public records law
 - c) Information obtained from another source and verified using DMV records is not protected by DPPA
 - (1) So long as information is not substantially altered to conform to DMV records
 - (2) DPPA permits publication of identical information if information is obtained from a source other than DMV records
 - (3) Remanded to determine if redacted information was obtained from DMV records, and if so, whether its disclosure served an agency function other than compliance with public records law

V. Moving Forward

A. Accident reports

1. Personal information obtained from DMV records may be disclosed without redaction

a) Redactions pursuant to other statutes or balancing test permissible

(1) Court left open this possibility when it did not address the issue

(2) Case-by-case basis keeping in mind the presumption of complete public access

B. Incident reports

1. Personal information obtained from DMV records may not be disclosed unless a DPPA exception applies

a) Complying with the public records law is not considered an agency function

C. Information verified by DMV records

1. Identical information that is prohibited from disclosure if obtained from DMV records may be disclosed if obtained from other sources

2. Presents problem of determining how information was obtained

a) Automatic population of documents using personal information obtained from DMV records

b) Driver's license information: Obtained from DMV?

D. Unanswered questions: For the courts or legislature to decide

VI. Further Information

A. Consult legal counsel

B. Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>

C. Call the Office of Open Government: (608) 267-2220

D. Write to: Office of Open Government
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Open Government Lightning Round:
Fees and the Wisconsin Public Records Law
Social Media and Public Records Law Compliance

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Assistant Attorney General
Office of Open Government
Wisconsin Department of Justice
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I. Open Government Lightning Round

A. Fees and the Wisconsin Public Records Law

1. Wisconsin Public Records Law

a) Wis. Stat. §§ 19.31 to 19.39

2. Fees – Wis. Stat. § 19.35(3)

a) An authority may only charge for the actual, necessary and direct cost associated with responding to public records requests

(1) Unless otherwise specific by law

(a) E.g., Wis. Stat. § 59.43(2)(b) and (c) (setting fees for copies from register of deeds)

b) Permissible fees

(1) Copying and reproduction

(2) Photographing a record that cannot be copied

(3) Location of a record if the costs are \$50.00 or more

(4) Mailing or shipping

c) Impermissible fees

(1) An authority may not charge for redaction

d) Prepayment may only be required if total costs exceed \$5.00

e) An authority may waive fees or provide them for a reduced charge

3. Cost of a response
 - a) Clarifying a request may help:
 - (1) Reduce costs to the requester
 - (2) Eliminate records not of interest to the requester
 - (3) Facilitate a quicker and more efficient response
 - b) Cost estimates should be reasonable
 - (1) Based on information available before preparing the response or developed during preparation
 - c) An authority should keep careful records supporting cost calculations
4. Wisconsin Department of Justice Fees
 - a) Office of Open Government established on June 1, 2015
 - (1) Prior to that time, other areas of DOJ were involved in public records responses
 - (2) OOG centralized the process
 - b) Prior to the OOG, DOJ's fee schedule was simple
 - (1) \$0.15 per page for paper copies
 - (2) \$0.14 per page for electronic copies
 - c) Difficult to determine how DOJ arrived at previous costs, in particular, the cost for electronic copies
 - d) Undertook a review of DOJ's costs
 - (1) Included a breakdown of the true "actual, necessary and direct costs" incurred by DOJ
 - (a) Staff time
 - (b) Materials
 - (c) Electronic records
 - e) Developed a new fee schedule (see Appendix A)
 - (1) More complex than previous fee schedule
 - (2) \$0.15 per page for paper copies

- (3) \$0.07 per page for scanning paper into digital format
- (4) Flat fees, based on staff time, for copying electronic records into other formats or onto physical media
- (5) Established costs for physical media (DVDs, thumb drives) based on actual costs for such media
- (6) Location fees
 - (a) Hourly, based on staff time
 - (b) Flat fee for email archive search, based on staff time and software licensing fee

B. Social Media and Public Records Law Compliance

1. Records

- a) Defined in Wis. Stat. § 19.32(2)
 - (1) “[A]ny material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.”
 - (2) Certain materials are not considered records including drafts, notes, and preliminary documents
- b) Content not format determines if something is a record
- c) Records may include:
 - (1) Material not created by the authority but in the authority’s possession
 - (2) Personal email, texts, etc. on an authority’s accounts
 - (3) Business email, texts, etc. on personal accounts
 - (4) Contractors’ records
 - (5) Data in a database
 - (6) Social media content

2. The use of social media by authorities is growing

- a) Includes Facebook, Twitter, YouTube
 - b) Such social media accounts are likely “records” if created or maintained by an authority
 - c) Records custodians must be cognizant of this fact
 - d) There are a lot of unanswered questions concerning social media and the public records law
3. Things to consider when using social media:
- a) The authority’s familiarity with the site
 - b) The manner in which records (posts, comments, etc.) are archived, if at all
 - c) Who may post, manage, or control the content?
 - d) How long is content available?
 - e) Third-party posts, comments, messages, etc. may be records
 - f) Inappropriate posts: removal and archiving
 - g) Does the authority have a social media policy?
4. Tips
- a) Develop a social media policy
 - b) Establish best practices for retention and searching of social media records
 - c) Authorities must retain social media records in accordance with applicable record retention schedules (RDAs)
 - (1) Record retention
 - (a) Wis. Stat. §§ 19.35(5)
 - (b) Record retention laws:
 - (i) Wis. Stat. § 16.61: State authorities
 - (ii) Wis. Stat. § 19.21: Local authorities
 - (c) Copies of records in electronic formats permissible
 - (2) Retention considerations
 - (a) Costs

- (b) Equipment
- (c) Maintenance
- d) Authorities must search social media records when locating records responsive to public records requests

5. Resources

- a) Contact the Public Records Board:
<http://publicrecordsboard.wi.gov/>
- b) Consult legal counsel
- c) Office of Open Government: <https://www.doj.state.wi.us/office-open-government/office-open-government>
- d) PROM Line: (608) 267-2220
- e) Address: Office of Open Government
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Appendix A



Wisconsin Department of Justice
Office of Open Government

“An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.” Wis. Stat. § 19.35(3)(a).

Public Records Request Fee Schedule

<p>Hard Copies</p>	<p>Includes any paper records provided by:</p> <ul style="list-style-type: none"> • Copying a paper record • Printing an electronic record 	<p>\$0.15 per page Fee calculation: staff time + materials (e.g., paper, toner).</p>
<p>Electronic Copies</p>	<p>Includes any electronic records provided by:</p> <ul style="list-style-type: none"> • Email • PDF • DVD • Thumb drive • Other electronic format 	<p>Paper to Digital Includes scanning physical documents and saving them into a digital format for electronic distribution.</p>
	<p>Digital to Physical Includes copying records already in digital format onto physical medium for distribution.</p>	<p>\$1.87 + cost of physical medium: DVD (each): \$0.14 Thumb drive (each): \$5.25 (2 GB) \$5.53 (4 GB) \$5.60 (8 GB) \$6.29 (16 GB) \$10.49 (32 GB) \$19.59 (64 GB) Fee calculation: avg. staff time of 5 minutes calculated at a rate of \$22.54 per hour + cost of physical medium used.</p>
	<p>Digital to Digital Includes copying records from one digital format to another for distribution (e.g., email).</p>	<p>\$1.87 Fee calculation: avg. staff time of 5 minutes calculated at a rate of \$22.54 per hour.</p>
	<p>Location Fees May only be imposed if the cost is \$50 or more. Includes searching for and identifying responsive records but does not include redaction.</p>	<p>\$22.54 per hour staff time (lowest possible hourly rate) + \$2.57 flat fee email archive search Fee calculation: staff time + software licensing fee (based on annual fee associated with the email archive system, which is necessary to search DOJ's email archives).</p>

An authority may require prepayment of any fee imposed if the total amount exceeds \$5.