

DPPA EXEMPTION AUTHORIZES RELEASE OF UNREDACTED UNIFORM TRAFFIC ACCIDENT REPORTS

By: Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

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For several years now, law enforcement record custodians have been navigating difficult, uncharted terrain when responding to requests under Wisconsin’s public records law for law enforcement records containing fields automatically populated using a system that pulls information directly from Department of Motor Vehicle (DMV) records. Law enforcement agencies have been forced to steer a path between potential liability for violating the Drivers Privacy Protection Act (DPPA), a federal law which prohibits disclosure of personal information obtained directly from Department of Motor Vehicle records unless pursuant to a specific exemption, and potential liability under Wisconsin’s Public Records Law for improperly redacting information from requested records.

A recent Wisconsin Court of Appeals decision, *New Richmond News v. City of New Richmond*, 2014 AP 1938 (Ct. App. 5/10/2016, publication recommended), provides law enforcement agencies with some clarity regarding release of uniform traffic accident reports but leaves many questions unanswered relating to how personal information taken directly from DMV records and contained in other types of records should be handled. The case involves a lawsuit brought by the New Richmond News (the Newspaper) against the City of New Richmond (City) after the City’s police department responded to its request for two accident reports and two incident reports by redacting information identifying individuals referenced in both of the accident reports and one of the incident reports. The police department contended the redactions were required by the DPPA. The circuit court held that the Newspaper was entitled to unredacted reports. The City appealed, with LWMMI, the League’s insurance program, funding the appeal in hopes of obtaining some clarity for law enforcement agencies. The Wisconsin Supreme Court granted the parties’ joint request to bypass the court of appeals and have the case decided by the Supreme Court but deadlocked following Justice Crooks’ death, and vacated its bypass decision sending the case back to the court of appeals to decide.

The court of appeals decision provides clarity for law enforcement agencies with regard to requests for uniform traffic accident reports but less clarity regarding when other types of records containing personal information obtained from DMV records must be redacted or when they can be released without redaction under a DPPA exception which allows disclosure of personal information from DMV records “[f]or use by any government agency, including any court of law enforcement agency, in carrying out its functions.” The court rejected the Newspaper’s argument that the government agency function exception authorizes law enforcement agencies to provide unredacted records on the grounds that providing access to public records is a function of police departments. The court of appeals said:

If disclosure of personal information in response to public records requests constituted a “function” of government agencies, for purposes of the DPPA’s agency functions exception,

then any time an “authority” under the public records law received a public records request for personal information protected by the DPPA, it could disclose that information. This would include the Wisconsin DMV, which is an “authority” under the public records law....

Permitting the DMV to disclose personal information every time a public records request was made would eviscerate the protection provided by the DPPA, which was enacted to limit the circumstances in which state DMVs could disclose drivers’ personal information in order to protect their safety and privacy.

New Richmond News at ¶43. The court concluded that interpreting the agency functions exception to allow unfettered disclosure of personal information in response to public records requests would be “inconsistent with the manifest purpose of the DPPA and would therefore be unreasonable.” *Id.* The court was unconvinced by arguments that police departments have a heightened need to comply with the public records law, as compared with other authorities, such that responding to public records requests is uniquely a “function” of police departments for purposes of the DPPA’s agency functions exception. *Id.* at ¶45. The court also stated that the agency functions exception to the DPPA cannot be interpreted to permit the disclosure of personal information based solely on the fact that a public records request has been made. *Id.* at ¶46, citing *Maracich v. Spears*, 133 S. Ct. 2191(2013).

Importantly, the court held that law enforcement agencies can release unredacted accident reports under DPPA exception 18 U.S.C. §2721(b)(14) which allows disclosure of personal information from DMV records “[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.” The court said that Wis. Stat. sec. 346.70(4)(f), which provides that any person may “with proper care ... and subject to such orders or regulations as the custodian thereof prescribes, examine or copy ... uniform traffic accident reports ... retained by local authorities ... or any other investigating law enforcement agency” is a use specifically authorized under Wisconsin law and is related to the operation of a motor vehicle or public safety. Accordingly, a law enforcement agency’s disclosure of personal information contained in accident reports is permissible under 18 U.S.C. § 2721(b)(14).

The court said the City’s argument that the DPPA preempts state law where the two conflict was “misplaced” because the DPPA and Wisconsin’s public records law are consistent by virtue of Wis. Stat. §19.36(1) which states that “[a]ny record which is specifically exempted from disclosure by state or federal law ... is exempt from disclosure under s. 19.35(1)” The court concluded, “Thus, in circumstances where the DPPA prohibits the release of personal information obtained from DMV records, the public records law exempts that information from disclosure.” *Id.* at ¶48.

The court emphasized that information that is obtained from another source and subsequently verified using DMV records is not subject to the DPPA as long as, upon verification, the information is not substantively altered to conform to the DMV records.

The court of appeals affirmed the circuit court’s decision that the City should have released the uniform traffic accident reports without redaction but reversed the circuit court’s determination that release of the incident report was permissible under the agency functions exception by virtue of the public records law. However, it remanded the case to the circuit court to determine

whether release of the incident report serves some other function of the police department beyond mere compliance with the public records law.

Guidance for Law Enforcement Agencies

1. Law enforcement agencies can release unredacted uniform traffic accident reports regardless of whether personal information in the reports was obtained from DMV records based on Wis. Stat. § 346.70(4)(f) and DPPA exception 18 U.S.C. §2721(b)(14).
2. For records other than uniform traffic accident reports, like incident reports, law enforcement agencies need a reliable means of determining whether “personal information” contained in those records has been taken directly from DMV records or came from another source and was simply verified using DMV records. If the information was not obtained from DMV records, the DPPA does not protect it and the information may be released unless another statute, common law, or the balancing test prohibits the information from being released. If the information came directly from DMV records, then the DPPA prohibits the release of personal information unless one of the DPPA’s 14 exceptions applies. “Highly restricted personal information” may only be released if one of four exceptions applies. The release of information under the government agency functions exception must serve a function of the police department other than mere compliance with the public records law. Law enforcement agencies should not rely on the DPPA as a basis for nondisclosure unless they can show that the information was taken directly from DMV records

About the Author:

Claire Silverman is Legal Counsel for the League of Wisconsin Municipalities. Claire’s responsibilities include supervising the legal services provided by the League, answering questions of a general nature for officials and employees of member municipalities, writing legal articles for the League’s magazine and amicus briefs in appellate cases involving issues of statewide concern to municipalities, organizing an annual institute for municipal attorneys, and educating local officials on a variety of topics pertaining to their duties. In addition, she coordinates legal material for the League’s web page. Claire joined the League staff in 1992. She can be reached at cms@lwm-info.org

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