



# Good News Finally?

## The Continuing Saga of the Federal Driver's Privacy Protection Act and the Seemingly Unresolvable Conflict with Wisconsin Open Records Law

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Attorneys Since 1885

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Wisconsin municipalities are subject to Wisconsin Open Records Law, which means that the records they create and retain are public records and must be disclosed when requested, unless there is some other law that prevents the disclosure. For the past few years, municipalities have been confronting the problems created when their records, which must be released pursuant to Open Records Law, contain personal information obtained from the Wisconsin Division of Motor Vehicle's ("DMV") database. This information may not be disclosed pursuant to the Federal Driver's Privacy Protection Act ("DPPA"), unless a specific permissible use applies. The requestors point to the Open Records Law stating "You must provide unredacted records." The municipalities point to the DPPA stating, "I want to, but I can't." There may be some good news finally. Legal counsel on both sides of this issue have reached a compromise through the use of a "Limited Vehicle/Driver Records Information Request Form" which, hopefully, will result in the requestors obtaining the records they want under Open Records Law and the municipalities maintaining compliance with the DPPA. The Form may be only a temporary solution until State and Federal courts address the intersection of the DPPA and Open Records Law.

### I. The DPPA

The DPPA was originally enacted in 1994 to protect the privacy of personal information collected and maintained by each state's motor vehicle agency. It was enacted in response to the murder of an actress by a stalker who had obtained the actress's unlisted home address from the California DMV. The DPPA prohibits any state motor vehicle agency (or anyone who obtains such information) from releasing or re-releasing personal information or highly personal information about an individual obtained from a motor vehicle database.

"Highly restricted personal information" is defined in 18 U.S.C. § 2725(4), and "personal information," is defined in 18 U.S.C. § 2725 (3) and include the following information which is set forth in this table from the DMV website. The DPPA sets penalties for violations and holds violators civilly liable to the individual

Personal data elements include:	Highly restricted data elements include:
Driver's license or ID number	An individual's photograph
Name	Social Security Number
Address	Medical or disability information
9 digit zip code (but not 5 digit zip code)	Any signature collected under Wisconsin State Statute Chapter 343 (operator's licenses)
Date of birth	Biometrics, such as fingerprints
Telephone Number	
Email Address	

to whom the released information pertains. After the DPPA withstood initial challenges regarding restrictions on the states' ability to sell the information contained in the DMV databases, litigation regarding the DPPA was largely limited to a few cases involving an individual's access, use, and/or misuse of information obtained from the DMV database. Now, DPPA cases are class actions with the potential for substantial damages.

The DPPA lists numerous "permissible uses," which are often referred to as exceptions to the DPPA.

Municipalities routinely use the information obtained from the DMV database in order to perform their functions as permitted under the DPPA. The personal information which is lawfully obtained from the DMV database often finds its way into reports and records of the municipalities, which in turn become the subject of Open Records Requests. For many years, municipalities believed that they were allowed to release an unredacted copy of a record if the personal information contained therein was obtained pursuant to one of the permissible uses.

## II. Litigation Concerning the DPPA

For many years, the DPPA was largely forgotten and municipalities went about their business until a class action lawsuit put the DPPA front and center in the minds of municipalities, their insurers, and the municipal associations. That case, *Senne v. Village of Palatine, Ill.*, 695 F.3d 597 (7th Cir. 2012), is now a household name.

In *Senne*, Jason Senne parked his vehicle on a public way and left the vehicle overnight, in violation of a village ordinance banning overnight parking. Police placed a parking citation under the vehicle's wiper blade at 1:35 a.m. Senne returned approximately five hours later and retrieved his vehicle with the citation. The citation included the date and time of the offense, the officer's name and badge number, the basis for the citation, information about the vehicle, and personal information about Senne, the owner of the vehicle, including: his full name, address, driver's license number, date of birth, sex, height and weight. There was no evidence that anyone other than Senne saw the citation.

Senne filed a federal court class action lawsuit against the Village of Palatine under the DPPA on his own behalf as well as on behalf of all other similarly situated individuals. The Village moved to dismiss the case claiming that the ticket was not a "disclosure" under the DPPA and that certain statutory exceptions were applicable. The trial court agreed and dismissed the case. Senne appealed to the Seventh Circuit Court of Appeals, which reversed the trial court's decision.

The appeals court first looked at whether the ticket on the windshield was a disclosure under DPPA and concluded that it was. The next question was whether an exemption to the DPPA allowed the disclosure. The primary exemption asserted by the Village was the law enforcement functions exemption. The court concluded that the Village did not describe how disclosure of all information on the ticket served the purpose of this exemption or any other exemption. The court rejected the argument that, just because an exemption applies to some information, it should apply to all information. The court required that the Village show that each separate piece of personal information that was disclosed actually fit within the law enforcement function.

The *Senne* court was very concerned with the public safety purpose of the DPPA and stated:

Specifically, it is clear that safety and security concerns associated with excessive disclosures of personal information held by the State in motor vehicle records were the primary issue to be remedied by the legislation. See, e.g., 140 Cong. Rec. H2526 (daily ed. Apr. 20, 1994) (statement of Rep. Porter Goss) ("The intent of this legislation is simple—to protect the personal privacy and safety of all American licensed drivers."). In hearings held in the House Subcommittee on Civil and Constitutional Rights, numerous witnesses testified regarding the grave consequences of open access to government records of personal information. Not surprisingly, many witnesses mentioned the murder of an actress, Rebecca Schaeffer, by a stalker who had obtained her unlisted home address through the California DMV, a crime that was viewed as a catalyst for both state law privacy protections and the DPPA itself. Other witnesses testified about the impact of the availability of DMV records on the safety of domestic violence victims and law enforcement officers and their families targeted for retribution. Also mentioned, however, were more random acts of violence, including a crime spree of home invasion robberies in Iowa that began when teenagers took down license numbers of expensive vehicles and then obtained the registered owners' home addresses from DMV records. The bill, it seems, was viewed predominantly as a public safety measure.

Id. at 607 (footnotes omitted).

The *Senne* case was sent back to the trial court where the case was again dismissed. The case was again appealed to the Seventh Circuit. Hopefully, *Senne II* will provide additional insight and guidance.

The DPPA discussion continued in the United States Supreme Court. In *Maracich v. Spears*, 133 S. Ct. 2191 (2013), the United States Supreme

Court decided whether the litigation exception to the DPPA covered attorney solicitations. *Maracich* answered a very narrow question, whether disclosure of personal information from the DMV to attorneys seeking information to solicit clients fell within the litigation exception to the DPPA. The Supreme Court answered this question “no” and recognized the important public policy of citizen privacy which the DPPA furthers. The Court reasoned that “an exception to ‘general statement of policy’ is usually read ... narrowly in order to preserve the primary operation of the provision.” In discussing the narrow interpretation of exceptions to the DPPA, the Court commented that the exception should not operate to the farthest reach of their linguistic possibilities if that would contravene the statutory design. The Supreme Court further noted that a narrow interpretation is particularly warranted where the exception allows disclosure of personal information and highly restricted personal information. The Supreme Court suggested that each individual piece of personal or highly restricted personal information must be justified by the particular exception.

### III. Interpretations of the DPPA clashes with the Wisconsin Open Records Law

The fear of a class action lawsuit after *Senne* and *Maracich* resulted in municipalities taking a justifiably conservative position when it came to responding to open records requests for any record that contained information obtained from the DMV database, sometimes redacting every piece of personal information on a record. This conservative position led to an open records lawsuit filed by a newspaper in 2013, *New Richmond News v. City of New Richmond*. The St. Croix County Circuit Court found in favor of New Richmond News. The court determined that the “DPPA does not require the redaction of the information requested by Plaintiffs 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.” The court briefly discussed the holding and analysis in *Senne*, but determined that the case was factually and legally distinguishable from the circumstances in *Senne*. The court also stated that *Senne* does not address the intersection of the DPPA and an open records request and therefore does not apply. It is important to note the court looked only at the records as a whole. It did not analyze the personal information contained within those records which will necessarily be disclosed to determine if the information is actually “a use related to the operation of a motor vehicle or public safety.” The court also found that the accident reports did not fit the definition of personal information under § 2725(3) of the DPPA.

It is important to note that the Village of Palatine made the same argument that was adopted by the *New Richmond News* court, that the record as a whole had a law enforcement purpose. The Seventh Circuit rejected that argument because the Village of Palatine did not describe how disclosure of all personal information in the record served the purpose of the proposed exemption, or any other exemption. Just because an exemption applies to some information, it does not necessarily apply to all information. The *Senne* court required that the Village of Palatine show that each separate piece of personal information that was disclosed actually fit within the law enforcement function.

### IV. Discussions and compromise between legal counsel for municipalities and members of the press.

Legal counsel for the municipalities have concluded that the language of the DPPA, *Maracich*, and *Senne* prohibit disclosure of personal and highly restricted personal information in records (such as accident reports) routinely requested by the media and other requesters. Legal counsel for Wisconsin Newspaper Association (“WNA”), Wisconsin Broadcaster’s Association, and other Wisconsin news media representatives believe that the DPPA allows accident reports and certain other records to be disclosed in unredacted form.

After much discussion, legal counsel on both sides of this issue reached a compromise by agreeing to use a “Limited Vehicle/Driver Records Information Request Form (“Form”). The purpose of the Form is to allow requestors to obtain the records they want under Open Records Law and the municipalities to maintain compliance with the DPPA. The Form may be only a temporary solution until State and Federal courts address the intersection of the DPPA and Open Records Law.

Attached is a Word version of the Form. We recommend completion of this Form by requestors every time a governmental body receives a request for records which contain information obtained from the DMV database. We anticipate that over time, requestors will become more familiar with this Form and its use will become commonplace.

Section II of the Form contains, among others, a provision entitled “Reason for request of particular items of “personal information” or “highly restricted personal information.” If a requester wants, for example, name and address, they should list “name and address” and then add the reason (motor vehicle, public safety, etc.) We recommend that municipalities not release personal information (i.e., should redact) unless the personal information is identified in Section II with some reason provided. It is acceptable to rely on the requestor’s reasoning unless there is an obvious “red flag.” If a records custodian is unclear about some reasoning, it is better to err on the side of consulting with legal counsel

until custodians (and the requestors) become more familiar with the process.

Section III of the Form references one of fourteen (14) permissible uses under the DPPA. The requestor should circle one or more uses and sign the Form. The DPPA does not list news reporting as a permissible use. The permissible use proposed by WNA is Number 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." The state law being invoked by WNA is Wisconsin's Open Records Law. The use must then relate to operation of a motor vehicle or public safety. For example, if a record relates to a motor vehicle accident, publicizing this information may relate to a motor vehicle. If a record relates to a criminal act, publicizing this information may relate to public safety.

One final note, the U.S. Supreme Court in *Maracich* specifically held that the permissible use relating to litigation (Number 7) did not include attorney solicitation of clients. In the event that municipalities receive a request for accident reports or OWI citations from a law firm and the personal information requested is "names, addresses, and telephone numbers," it follows that "solicitation" is not a valid reason for the request and is probably a "red flag" mentioned above. Law firms certainly may use the Form to request client records (with consent) or for other permissible uses. However, municipalities should request more information from the requester if it appears that the records request is related only to solicitation and, when in doubt, redact or consult with legal counsel.

## V. Conclusions

*We view the use of this Form to be good news for municipalities because it should result in less time spent redacting records and worrying about what should be released and what should be redacted. It will be, hopefully, a reasonable and workable compromise for all concerned unless and until the legal issue is finally decided specifically with regard to Open Records Law and the DPPA. We anticipate there will be a learning curve while municipalities and requestors become familiar with the Form. If there is a particular issue causing concern over the release of certain personal information, do not hesitate to contact legal counsel for assistance. Legal minds on both sides of this issue (judges, practicing lawyers, and legal scholars) cannot agree, so it certainly is expected that those who do not deal with the DPPA on a regular basis will need some assistance from time to time.*

***Records custodians should be prepared to provide the Form to anyone requesting documents which contain personal information obtained from the DMV and have a stockpile of Forms printed and ready to go.***

[City, Village, or County of] \_\_\_\_\_

## LIMITED VEHICLE/DRIVER RECORD INFORMATION REQUEST FORM

### Required for Disclosure of Personal Information or Highly Restricted Personal Information

The Federal Driver's Privacy Protection Act (DPPA) (18 U.S.C. § 2721) prohibits the disclosure of certain "personal information" or "highly restricted personal information" which originates from a State motor vehicle record. Under current controlling law, disclosure of each item "personal information" or "highly restricted personal information" must be justified by the specific permissible use identified below. Failure to provide such justification may result in redaction of the record requested. Such information shall not knowingly be disclosed or otherwise made available without the express consent of the person to whom the information pertains or unless specifically permitted by the DPPA. For purposes of determining whether such information should be released or redacted, please complete and return this form.

#### PRINT LEGIBLY

#### II. I. Requester Information

Date of Request: \_\_\_\_\_ Requester Phone #: \_\_\_\_\_

Requester Name and Company: \_\_\_\_\_

Requester Address: \_\_\_\_\_

#### II. II. Requested Information

Type of records sought: \_\_\_\_\_

Dates of records sought: \_\_\_\_\_

Name of person about whom records are requested, if known: \_\_\_\_\_

Reason for request of particular items of "personal information" or "highly restricted personal information": \_\_\_\_\_

#### II. III. Authorization

I/We are authorized under the Driver's Privacy Protection Act to obtain the identified records containing personal information based upon the following:

Circle all that apply:

- II. 1. Authorized for use, if Requester has obtained the written consent from the person about whom the information pertains.
  - a. I am requesting a copy of my own record.
  - b. I am a parent or legal guardian or a minor child and I am requesting a copy of his/her record.
  - c. I am requesting the record of another person and have attached their written and notarized consent.
  
- a. 2. For use in connection with matters of a 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 to carry out the purposes of the Automobile Information Disclosure Act, the Anti-Car Theft Act of 1992, and the Clean Air Act.
  
- b. 3. A government agency (Federal, State, local, or tribal) or employed by such, for the purposes of the

government agency to carry out its official functions.

- c. 4. A Federal, State, Circuit, local, or tribal court, or employed by such, for the purposes of the court to carry out its official functions.
- d. 5. A law enforcement agency, or employed by such, for the purpose of the law enforcement agency to carry out its functions.
- e. 6. Authorized representative, agent, contractor, or employed by such, of a legitimate business and the vehicle/driving record being requested will be used for normal course of business, but only to:
  - f. a. Verify accuracy of the personal information;
  - g. b. If such information as so submitted is not correct or is no longer correct, to obtain correct information, but only for purposes of preventing fraud, pursuing legal remedies, or collecting a debt.
- a. 7. Authorized for use in connection with any civil, criminal, administrative, or arbitral proceedings in any federal, state, circuit, local, or tribal court or agency, or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution of enforcement of judgments and orders, or pursuant to an order of a federal, state, circuit, local, or trial court.
- b. 8. Authorized for use in research activities and producing statistical reports, as long as the personal information is not published, re-disclosed, or used to contact individuals.
- c. 9. Authorized representative, agent, contractor, or employed by such, of an insurer, insurance support organization, or self-insured entity and the vehicle/driving record(s) being requested will be used only in connection with the following:
  - d. a. Claims investigation;
  - e. b. Anti-fraud activities;
  - f. c. Rating or underwriting.
- g. 10. Authorized for use in providing notice to the owners of towed or impounded vehicles.
- h. 11. Authorized representative or owner of a licensed private investigative agency or licensed security service and the vehicle/driving record is being requested for the use of purposes permitted under the Driver's Privacy Protection Act.
- i. 12. Authorized as an employer, or its agent or insurer for use in obtaining or verifying information relating to a holder of a commercial driver license (CDL).
- j. 13. Authorized representative or owner of a private toll transportation facility for use in the operation of the facility.
- k. 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

a. IV. Penalties

The Driver Privacy Protection Act (DPPA) is enforced by the U.S. Department of Justice, which may seek civil and criminal penalties for improperly obtaining, disclosing, or using personal information from a motor vehicle record for a purpose not permitted by the DPPA. In addition, private citizens may also seek civil damages in Federal Court.

a. V. Certification

I agree that the use of the records I have requested is specifically authorized under the laws of the State of Wisconsin and the DPPA and that my intended use of the records is related to the operation of a motor vehicle or public safety or for other use as identified above.

I certify that the information and statements on this request are true and correct and understand that the unauthorized disclosure of information obtained from these records for a purpose other than stated on this request form, or the sale or other distribution of the information to a person or organization not disclosed in this request, may result in civil and criminal penalties imposed under Title 18 U.S.C. Section 2724.

I further understand that I have the right to request a mandamus review of the responses provided to this request under Wisconsin Statute Section 19.37(1).

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Requester Signature

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Date Signed