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April 29, 2008

I—02—08

Mr. Robert J. Dreps
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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).

⁵A 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.

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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. Kroepflin*, 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

