



legal issues

WHEN OPEN RECORDS OBLIGATIONS CLASH WITH DPPA REQUIREMENTS

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SUMMARY

In the wake of the Seventh Circuit's *en banc** decision in *Senne v. Village of Palatine*, Wisconsin counties, as well as other Wisconsin municipalities, are left with the difficult choice of whether to redact certain personal information from requested records and face a challenge under Wisconsin's open records law, or disclose the records without redaction and risk substantial liability under the federal Driver's Privacy Protect Act (DPPA). The short answer, at this time, is to redact all personal information and highly restricted personal information, which was provided by the Wisconsin Division of Motor Vehicles (WDMV) rather than risk the significant potential liability under DPPA.

DPPA

DPPA is a federal criminal statute that also provides for civil liability. The law prohibits disclosure or use of personal information, which is provided by a state department or division of motor vehicles. The law contains a number of exceptions or permissible uses,

including a law enforcement exception. Personal information is defined in the statute and includes any information that identifies an individual including an individual's name, address (excluding zip code), telephone number, social security number, photograph, and medical or disability information. Highly restricted personal information is also defined in the law.

DPPA allows for a private right of action for violation of the law. Remedies include: actual damages but not less than \$2,500 per violation; punitive damages; equitable relief; and actual reasonable attorney's fees and costs. DPPA also allows for class action proceedings. The statute of limitations, although not specifically set forth in the statute, is likely the general federal four year statute of limitations. Some cases have suggested that the defense of qualified immunity may be available in a DPPA action. The courts are split as to whether an individual can use § 1983, the Federal Civil Rights law, as a vehicle to bring a DPPA case. The Seventh Circuit has not yet ruled on the issue.

**Editor's Note: En banc is a legal term used to refer to a case heard or to be heard before all judges of a court - in other words, before the entire bench - rather than by a panel selected from them.*

WISCONSIN COUNTIES ARE LEFT WITH THE DIFFICULT CHOICE OF WHETHER
TO REDACT CERTAIN PERSONAL INFORMATION FROM REQUESTED RECORDS
AND FACE A CHALLENGE UNDER WISCONSIN'S OPEN RECORDS LAW, OR
DISCLOSE THE RECORDS WITHOUT REDACTION AND RISK SUBSTANTIAL
LIABILITY UNDER THE FEDERAL DRIVER'S PRIVACY PROTECT ACT.

SENNE V. VILLAGE OF PALATINE
(SEVENTH CIRCUIT – AUGUST 6, 2012)
DECISION

The *Senne* case involved a parking ticket, which was left on the windshield of a vehicle that was improperly parked overnight. The parking ticket included information from the Illinois Department of Motor Vehicles regarding the vehicle owner's identity. The issues in the case were whether the parking ticket was a disclosure under DPPA and, if so, whether the disclosure was within any of the exceptions, such as the law enforcement exception, to DPPA. The trial court dismissed Senne's class action and the Seventh Circuit affirmed.

The Seventh Circuit then granted *en banc* review and reversed the panel decision. The *en banc* decision found that placing the parking ticket, with the personal information written on the ticket, on the vehicle windshield was a disclosure. The Court of Appeals decision next gave a narrow reading to the permissible uses, including the law enforcement exception. The court ruled that a municipality needed to justify each and every piece of personal information that is being disclosed under the particular exception. This is a far more restrictive reading of the exceptions to DPPA than

had previously been the case. The Village of Palatine petitioned the United States Supreme Court for review of the Court of Appeals' decision. On June 24, 2013, the United States Supreme Court denied the petition for *writ of certiorari*. The *Senne* case will now return to the United States District Court for the Northern District of Illinois for further proceedings.

NEW RICHMOND NEWS CASE

Earlier this year, the *New Richmond News* brought an open records action against the City of New Richmond based upon the city's redaction of motor vehicle accident reports. The city, based upon the *Senne* decision, had concluded that release of the information in an un-redacted form potentially violated DPPA. The city removed the *New Richmond News* case to federal court where it is assigned to Magistrate Judge Crocker. The *New Richmond News* has filed a motion seeking remand of the case to the state circuit court. As of June 17, 2013, the motion to remand was fully briefed and awaiting decision from Magistrate Judge Crocker.

The parties to the *New Richmond News* case have agreed that the issues can be resolved by motion and that a trial will not be necessary. If the case stays in federal court, there likely will be an appeal of any

THE BEST COURSE OF ACTION IS TO REDACT PERSONAL INFORMATION AND HIGHLY RESTRICTED PERSONAL INFORMATION, WHICH WAS PROVIDED BY THE WDMV FROM ALL RECORDS PROVIDED TO THE PUBLIC IN RESPONSE TO RECORDS REQUEST.

judgment to the Seventh Circuit. If the case is remanded back to state court, given the state-wide significance of any decision, there likely will be an appeal through the state court appellate process.

The Attorney General (AG) has not taken a position as to whether it will intervene or otherwise appear in the *New Richmond News* case. The AG had issued an informal opinion in 2008 regarding the exceptions to DPPA. The Attorney General's prediction that the courts would interpret certain exceptions, such as the litigation exception and government function exception broadly has been contradicted by the Supreme Court's decision in *Maracich v. Spears* case and the Seventh Circuit's *en banc* decision in *Senne*. The AG's office has not agreed, at this time, to issue any further guidance regarding the scope of these exceptions and their interplay with Wisconsin's open records law.

THE MARACICH V. SPEARS DECISION

On June 17, 2013 the United States Supreme Court, in a five to four decision, decided the case of *Maracich v. Spears*, a Driver's Privacy Protection Act case involving the litigation exception to DPPA. Attorneys, under South Carolina's Freedom of Information Act (similar to Wisconsin's open records law), made multiple requests of the South Carolina DMV for information about citizens who purchased new and used cars in certain South Carolina counties during a specific time period. The requests specifically noted that they were being made under exception (b)(4), the litigation exception to DPPA. The attorneys were pursuing a class action on behalf of

citizens based upon car dealerships' alleged unlawful administrative fees. The United States Supreme Court ruled that, if on remand, solicitation of clients was the predominate purpose for the lawyer sending out a letter to over 30,000 citizens, this conduct would not fall within the litigation exception to DPPA.

This case answers the narrow question whether disclosure of personal information from the DMV to attorneys seeking information to solicit clients falls within the litigation exception to DPPA. The Supreme Court answered this question "no." Although the decision addressed only one DPPA exception in one circumstance, the language of the Supreme Court in the *Maracich* decision provides some direction on the Supreme Court's view of DPPA and its exceptions to liability. The Supreme Court recognized the important public policy of citizen privacy which DPPA furthers. The Court reasoned "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 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 for disclosure of not only personal information but also highly restricted personal information. Both the litigation exception and the law enforcement exception allow for disclosure of highly personal information. The Supreme Court, like the Seventh Circuit in *Senne*, suggested that each individual

piece of personal information or highly restricted personal information must be justified by the particular exception.

BOTTOM LINE

The state of the law in this very important area is generally unresolved. The Seventh Circuit's decision in the *Senne* case and the Supreme Court's decision in the *Maracich* case indicate that these courts, which control the law in Wisconsin on issues of federal law, have concluded that the exceptions to DPPA are to be read narrowly. It is not likely that either the U.S. Supreme Court or the Seventh Circuit will be providing further guidance in this area in the near future. This means that, under the current state of the law, courts are more likely to find that disclosure of personal information or highly restricted personal information will fall outside the exceptions to DPPA and, accordingly, will be in violation of DPPA. There is significant potential

liability in a DPPA case, not only in cases brought by individuals but in class action cases as well. The *New Richmond News* case may provide some guidance, but, given the state-wide impact of any decision, whether by a federal or a state court, there likely will be an appeal, leaving the issue unresolved for more than a year. Until there is guidance that counties can reasonably rely upon, the best course of action is to redact personal information and highly restricted personal information which was provided by the WDMV from all records provided to the public in response to records request. Additionally, if the county is including such personal information or highly personal information on documents such as law enforcement citations, these documents should not be left where they are publicly accessible, (e.g. on a vehicle windshield). Rather, the citation should be placed in the mail. 📧

COUNTY JOB OPPORTUNITY

BURNETT COUNTY ADMINISTRATOR

Burnett County, Wisconsin, located in beautiful Northwestern Wisconsin is currently seeking candidates for the position of County Administrator. This position is responsible for all County Administration functions in a rural county with a population of 15,000 and an annual budget of approximately \$22 million. Ideally, candidates will have demonstrated experience in all facets of public administration for a minimum of five years, including budget preparation and administration, supervisory management, fiscal management and public relations. A minimum of a bachelors degree in Public Administration, Finance, Business Administration or a related field, followed by relevant experience or an equivalent combination thereof. Compensation package based upon qualifications and experience.

To apply, please send or e-mail a resume along with letter of interest indicating salary requirements to: Northwest Regional Planning Commission, Attn: Myron Schuster, 1400 South River Street, Spooner, WI 54801 (e-mail: mschuster@nwrpc.com). Resumes must be received by September 6, 2013.