Court of Appeals Addresses the Interplay Between the DPPA and Wisconsin Public Records Law

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Based on conflicting statutory duties, confusing court decisions, and potential liability risks, local law enforcement agencies have struggled with their duty to provide the public with access to law enforcement records under Wisconsin's Public Records Law and their duty to withhold "personal information" and "highly restricted personal information" under the federal Driver's Privacy Protection Act. On May 10, 2016, the Wisconsin Court of Appeals issued its decision in *New Richmond News v. City of New Richmond* and provided some direction to law enforcement agencies for responding to public records requests for law enforcement accident reports and incident reports that contain "personal information" and "highly restricted personal information" from department of motor vehicle records.

Three core principles emanate from the Court of Appeals' decision:

- **Uniform Traffic Accident Reports.** Law enforcement agencies can release unredacted uniform traffic accident reports in response to a public records request even if personal information in the accident report came from a DMV record. The Court of Appeals found a DPPA exception permitting public access to this information applied which allows disclosure of personal information if specifically authorized under state law where such use is related to the operation of a motor vehicle or public safety. The Court of Appeals concluded that Wis. Stat. § 346.70(4)(f) specifically authorizes public access to accident reports, such that law enforcement agencies can provide unredacted copies of accident reports without violating the DPPA.
- **Incident Reports.** With regard to incident reports, the Court of Appeals found the DPPA prohibits the release of personal information from a DMV record unless a specific exception in the DPPA allows release. The DPPA only permits release of personal information if one of fourteen narrow exceptions applies, and highly restricted personal information may only be released if one of four narrow exceptions applies. Although the DPPA provides an exception for a government agency to release personal information in a DMV record in carrying out its "functions," the Court concluded that responding to a public records request was not a "function" within the meaning of the DPPA exception. The Court of Appeals remanded this case to the circuit court to address whether one of the exceptions to the DPPA would permit release of personal information from the DMV record if such information came from a DMV record.
- **Information Verified Using DMV Records.** The Court of Appeals found that if personal information was first obtained from other sources and was only verified using DMV records, then that personal information is not prohibited from release by the DPPA.

Guidance for Local Law Enforcement Agencies
The Court of Appeals decision forces law enforcement agencies to tread carefully in deciding whether to provide or withhold access to personal information and highly restricted personal information. First, law enforcement agencies must release uniform traffic accident reports in response to a valid public records request—the DPPA does not prohibit release of personal information in those reports when responding to a request under the Public Records Law for such reports. While many agencies have directed requesters to the Department of Transportation to obtain these records, these local law enforcement agencies may release these records.

Records other than uniform traffic accident reports present different challenges in determining the appropriate response. In order to apply the Court of Appeals rationale under the DPPA and Public Records Law, a law enforcement agency must know whether the information in the incident report or other law enforcement records was first obtained from a DMV record or from another source. If the personal information was first obtained from a DMV record, then the DPPA prohibits release of that personal information unless one of the fourteen DPPA exceptions applies, and if the information constitutes highly restricted personal information, then the agency must determine whether one of the four exceptions applies. If this information was first obtained from a source and then verified using a DMV record, then the DPPA does not apply and the information may be released unless another statute, common law, or the balancing test prohibits release of the record.

Under the Public Records Law, the burden of establishing a legitimate basis to withhold access to the record belongs to the law enforcement agency and not the requester. An agency withholding access under the DPPA must be able to prove the information within the requested record was first obtained from a DMV record if the agency claims the DPPA prohibits release. Likewise, in order to preserve a defense to a DPPA violation claim, a law enforcement agency asserting the DPPA does not apply should be in a position to prove the information was first obtained from a source other than the DMV record and was merely verified using the DMV record.

If the DPPA does prohibit release of the requested information, then the requester must demonstrate that he or she meets one of the narrow exceptions to the prohibition of release under the DPPA. If the agency determines the exception applies and releases the personal information from the DMV record, then the agency should identify the applicable exception and inform the requester of the requester's duty to comply with the DPPA relating to use and redisclosure of protected information.

Law enforcement officials should also note that even if the DPPA does not apply, there may be other statutory exemptions that prohibit the agency from disclosing certain information under the Public Records Law, such as law enforcement agency records of juveniles. Furthermore, a records custodian must also conduct a balancing test to determine if the public interest in withholding information in a record outweighs the strong interest in disclosure of public records.

There were various amici before the Court of Appeals, including the Wisconsin Counties Association and the League of Wisconsin Municipalities, that urged the Court of Appeals to avoid placing law enforcement agencies in the unenviable position of choosing which law to potentially violate—the Public Records Law or the DPPA. Unfortunately, the Court of Appeals did not provide much clarity and workability for custodians regarding their obligation under both laws, particularly with regard to requests for incident reports. As such, we anticipate that one or both parties in the *New Richmond News* case may petition the Wisconsin Supreme Court to review the decision.

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