IN THE IOWA SUPREME COURT

NO. 17-1961

MARK LEONARD MILLIGAN,

Plaintiff/Appellee,

vs.

OTTUMWA POLICE DEPARTMENT and CITY OF OTTUMWA, IOWA,

Defendants/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
HON. JUDGE RANDY S. DEGEEST
WAPELLO COUNTY CASE NUMBER EQEQ110695

IOWA LEAGUE OF CITIES' AMICUS CURIAE FINAL BRIEF

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE

The Iowa League of Cities is an organization founded in 1898 that has more than 870 member cities. (https://www.iowaleague.org/Pages/WhoWeAre.aspx) The Iowa League of Cities provides guidance to its membership through services, research, publications and other collaborations.

STATEMENT OF THE AMICUS CURIAE'S INTEREST IN THE CASE

This case involves the Court resolving a conflict between laws with two different and conflicting goals. The issues in this case involve the intersection of Iowa's Open Records law in Iowa Code Chapter 22 and the federal Driver's Privacy Protection Act (DPPA). The provisions of Iowa Code Section 321.11 are substantially identical to DPPA.

The terms of DPPA are designed to promote confidentiality and privacy for individuals that provide personal information to the federal and state departments of transportation. The statute prohibits the release and use of certain personal information from State motor vehicle records. 18 U.S.C. § 2721(a) and (c). An authorized recipient of personal information may only redisclose the personal information for one of the reasons stated in 18 U.S.C. § 2721(b). It is unlawful for any person to knowingly disclose personal information from a motor vehicle record for a use not permitted under section 2721(b). 18 U.S.C. § 2722. A person who knowingly violates DPPA is subject to a criminal fine. 18 U.S.C. § 2723(a).

The DPPA creates a federal cause of action for tortious wrongful disclosure of certain personal information and permits a prevailing party to recover liquidated damages not less than $2,500, punitive damages upon sufficient proof, reasonable attorneys' fees and costs, and equitable relief. 18 U.S.C. § 2724.

In contrast, the Iowa Open Records law promotes the free disclosure of public documents. Iowa Code Section 22.10(3)(b) allows for the assessment of damages against "persons who participated in" a violation of the Open Records law. I.C.A. § 22.10(3)(b). The law creates a state cause of action for tortious non-disclosure of certain public records and permits a prevailing party to recover damages, attorneys' fees and costs, and equitable relief. Section 22.10(3)(c) allows for an order for the payment of all costs and reasonably attorney fees who successfully establishes a violation of the law. I.C.A. § 22.10(3)(c).

The Iowa League of Cities is interested in this case because the conflict between these two laws creates a significant issue for the Iowa League of Cities' membership. The member cities possess countless documents that may contain confidential information obtained from a state Department of Motor Vehicles. It is extremely important to those cities that the Court reconcile the Iowa Open Records law with the DPPA and balance the competing interests of privacy rights and open inspection of public records.

STATEMENT OF AUTHORSHIP

Neither party nor parties' counsel authored this brief in whole or in part.

STATEMENT CONCERNING CONTRIBUTION OF FUNDING

Neither party nor parties' counsel contributed money to fund the preparation or submission of the brief. No other person contributed money to fund the preparation or submission of this brief.

ARGUMENT

ISSUE I: THE DISTRICT COURT INCORRECTLY DETERMINED THAT THESE RECORDS WERE OPEN RECORDS THAT SHOULD BE DISCLOSED TO THE PUBLIC

A. Preservation of error and standard of review.

The District Court issued its Findings of Facts, Conclusions of Law and Ruling on November 28, 2017. (Findings of Facts, Conclusions of Law and Ruling on November 28, 2017). The Defendants properly preserved error on this matter by filing a notice of appeal on December 5, 2017. (Notice of Appeal filed December 5, 2017).

The customary standard of review for an action brought under Iowa Code Chapter 22 is de novo. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 651 (Iowa 2011).

B. Argument.

The District Court, in interpreting DPPA and the Iowa Code Section 321.1,1 determined that "[b]oth statutes exempt information on driving violations from

their general prohibition of personal information disclosure." (Findings of Facts, Conclusions of Law and Ruling on November 28, 2017 p. 5). The District Court concluded that "[t]he name of speed regulation violators, which was requested, is information on driving violations, and is therefore not confidential information under the DPPA or Iowa Code §321.11." (Findings of Facts, Conclusions of Law and Ruling on November 28, 2017 p. 5). This Court should properly define the "driving violations" exception to DPPA and Iowa Code Section 321.11(2).

History of the DPPA

The DPPA was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. *Camara v. Metro-North R.R.*, 596 F. Supp.2d 517, 524 (D. Conn. 2009). (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, 108 Stat. 2099-2102, 18 U.S.C. § 2721, et seq.). The DPPA was "a response to reports of crimes committed by stalkers who obtained their victims' home addresses from DMV Records." *Camara* at 524. (citing *Margan v. Niles*, 250 F. Supp. 2d 63, 68 (N.D.N.Y 2003)). The Congressional purpose in passing the DPPA was "to protect the physical safety of an individual who entrusts her personal information to a state DMV, not a list of her traffic violations." *Id.*

The history behind the DPPA demonstrates that the purpose of the statute was to prevent individuals from using license plate numbers to acquire an

individual's personal information. The federal district court for the Northern District of New York explained:

> The DPPA was part of crime fighting legislation enacted in response to the murder of a young woman in Los Angeles, California in 1989. See 139 Cong. Rec. S15745-01, S15761-66 (1993); 145 Cong. Rec. S14533-02, S14538 (1999). Rebecca Schaeffer was an actress who starred on a television show *My Sister Sam* in the late 1980s. See 139 Cong. Rec. S15745-01, S15765. One of Schaeffer's "fans," Robert Bardo, retained a private investigator who recorded Schaeffer's license plate number. The investigator then went to the California State Department of Motor Vehicles where, for a nominal fee, he was able to obtain Ms. Schaeffer's home address. See id. With the knowledge of Schaeffer's home address, Bardo went to her home and murdered her. See id.
>
> Following this incident, several members of Congress sought to prevent state motor vehicle departments from freely providing personal information obtained from motor vehicle records. See 145 Cong. Rec. S14533-02, S14538. In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, of which the DPPA was a part. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, 108 Stat. 2099-2102, 18 U.S.C. § 2721 *et. seq.* 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. See 145 Cong. Rec. S14533-02, S14538 ("The murder of Rebecca Schaeffer led to the [DPPA]."); 141 Cong. Rec. H416-06, H447 (1995) (statement of Rep. Dingell) ("Last year, as part of the crime bill, Congress heard the concerns of women who were being stalked because of easy access to motor vehicle records that reveal … addresses. To address this problem, Congress enacted the [DPPA]."); 140 Cong. Rec. H2518,01, H2527 (1994) (statement of Rep. Goss) ("The intent of this bill is simple and straightforward: We want to stop stalkers from obtaining the name and address of their prey before another tragedy occurs … The [DPPA] … is a reasonable and practical crime fighting measure."); 139 Cong. Rec. S15745-01, S15764-66 (1993) (statements of Sens. Robb, Biden and Harkin) (stating that "this amendment closes a

> loophole in the law that permits stalkers to obtain - on demand - private, personal information about their potential victims" and discussing situations where: (1) anti-abortion activists obtained the name and address of an obstetrical patient from department of transportation records and sent her threatening letters; (2) an obsessive fan obtained the address of a fashion model from the department of motor vehicles, and then went to her home and assaulted her; and (3) a gang of teens located cars with expensive stereos, recorded the license numbers and found the owner's home address through motor vehicle records.) To further its intended goal, the DPPA provides for criminal penalties, 18 U.S.C. § 2723(a), and a private cause of action, 18 U.S.C. § 2724(a).
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> *Margan v. Niles*, 250 F. Supp. 2d 63, 68-69 (N.D.N.Y. 2003)

The stated purpose of the statute was to prevent "loopholes" that allow individuals to obtain private information that they did not already possess.

The issue in this case concerns the protection of a person's name from disclosure. The DPPA explicitly includes an individual's "name" as personal information that is not to be disclosed. 18 U.S.C. § 2725(3). However, the statute also exempts "driving violations" from the definition of personal information. 18 U.S.C. § 2725(3) (defining "personal information" but stating the definition "does not include information on vehicular accidents, driving violations, and driver's status."). As a result the issue is whether a person's involvement in "vehicular accidents" or "driving violations" means that the individual's name is no longer confidential information under DPPA. Does a person's involvement in a driving violation mean that person's "personal information" from a state DMV can now be disclosed?

History of the Iowa Open Records Law

The general purpose of the Iowa Open Records law is to require state and local entities to make records available to the public upon request. *Iowa Film Prod. Servs v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 217 (Iowa 2012). The Iowa Supreme Court explained "[t]he purpose of chapter 68A [now chapter 22] is to open the doors of government to public scrutiny – to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Iowa Civil Rights Com. v. Des Moines/Personnel Dep't*, 313 N.W.2d 491, 495 (Iowa 1981). As a result there is a "presumption of openness and disclosure under" the Iowa Open Records law. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011). A party seeking to prevent the disclosure of documents must confront the following standard: "[d]isclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *Id.* (citing *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999). The statute includes exemptions to disclosure. I.C.A. § 22.7(11).

The interpretation of the statute's exemptions has become a matter of controversy in recent years. In *ACLU Found. Of Iowa, Inc. v. Records Custodian*, 818 N.W.2d 231 (Iowa 2012) the Iowa Supreme Court divided upon the proper method for evaluating an exemption. A majority of the Justices determined that a

balancing test should not be applied to requests that fall in the "plain language of the statute." *ACLU* at 235-236 (e.g., disciplinary files). The majority determined that "to suggest that a balancing test should be applied in this case undermines the categorical determination of the legislature and rewrites the statute." *Id.* at 236. (Cady dissenting). Moreover, the majority held that applying a balancing test would add a "logical problem" to the plain language in that it would subject identical information to different levels of protection based on the degree of public interest. *Id.*

The dissenting Justices explained "[t]he majority opinion takes a step backward from the new age of open government in this state." *ACLU* at 236 (Cady, C.J., dissenting). The dissent favored a balancing test because "[t]his law has allowed our state to sort through the thicket of difficult and sensitive clashes between the individual privacy interests of personnel files on government employees and the competing right of the public to know." *Id.*

A court may prevent disclosure of information even if the public record does not fall under one of the stated exemptions. *In re Langholz*, 887 N.W.2d 770, 776 (Iowa 2016). This type of injunction is an equitable remedy that is independent of those listed in section 22.7. *Id.* (citing *Burton v. Univ. of Iowa Hosps. & Clinics*, 566 N.W.2d 182, 189 (Iowa 1997)). A court may only issue this sort of injunction when it finds that "the examination would not clearly be in the public interest" and

that "the examination would substantially and irreparably injure any person or persons." *Id.* (citing *Burton* at 189 and I.C.A. §22.8(1)). The party opposing disclosure must establish those elements by clear and convincing evidence. *Langholz* at 776. (citing I.C.A. § 22.8(3)).

Federal Supremacy and Preemption

The interplay between the federal DPPA law and Iowa's Open Records law also raises questions concerning the Supremacy Clause of the U.S. Constitution and federal preemption doctrine. It is elementary that federal law is the supreme law of the land and that "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. NCAA*, 2018 U.S. LEXIS 2805 (May 14, 2018). The Supremacy Clause enshrines as "the supreme Law of the Land" those federal Acts that accord with constitutional design. *Alden v. Maine*, 527 U.S. 706, 731 (1999). (citing *Printz v. United States*, 521 U.S. 898, 924 (1997)).

The Iowa Supreme Court explained "[t]he federal preemption doctrine derives from the Supremacy Clause of the Federal Constitution." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). The doctrine of preemption applies when "state and federal law directly conflict, state law must give way." *Id.* (citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). However, Iowa law holds that there "is a presumption against preemption which counsels a narrow construction of preemption provisions." *Id.* (citing *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d

208, 213 (Iowa 1998)). A federal statute and a state statute directly conflict when: (1) it is impossible to comply with both the state law and federal law; or (2) if the state law would obstruct the objectives of the federal law. *Huck* at 364.

The United States Supreme Court considered the interplay between DPPA and state FOIA laws in *Maracich v. Spears*, 570 U.S. 48 (2013). In *Maracich* the Court confronted a situation where class action lawyers made FOIA requests to the South Carolina DMV for purposes of acquiring personal information. *Marachich*, 570 U.S. at 53-55. The Court then determined that the attorneys violated the terms of DPPA without analyzing whether the purposes of the state FOIA law should be weighed against DPPA's intent. *Id*., 570 U.S. at 57-79. The implication is that DPPA is the supreme law of the land and preempts the purposes of state FOIA laws.

The Interplay between DPPA and Iowa Open Records Law

The DPPA supports privacy concerns related to stalking and uninvited solicitation. The Iowa Open Records law promotes openness in municipal records for purposes of fair and free government. The Supremacy Clause and the federal preemption doctrine provide that the federal law should be the supreme law of the land. The correct conclusion is that DPPA's prohibition on disclosure should constitute a justification for nondisclosure of records under Iowa's Open Records law.

The appropriate interpretation of DPPA and Iowa Open Records law can be viewed as three questions. The first is whether DPPA preempts the Iowa Open Records law. The second is – assuming that preemption does not apply – whether Iowa's Open Records law includes an exemption that applies to this information under Iowa Code Section 22.7 for the personal information of a citizen involved in a driving violation. Lastly, in the absence of preemption is there an equitable reason to exempt this information from disclosure. The Iowa Supreme Court's disagreement concerning the application of a balancing test to Section 22.7's exemptions complicates the matter.

The federal DPPA statute preempts Iowa's Open Records law. Again, a federal statute and a state statute directly conflict when: (1) it is impossible to comply with both the state law and federal law; or (2) if the state law would obstruct the objectives of the federal law. *Huck* at 364. Impossibility preemption applies in this context. A municipality confronted with an open records request for an individual's "name" that the municipality acquired from a state DMV cannot follow both laws under these circumstances. The DPPA includes fourteen different permissible uses that allow disclosure, or redisclosure, of state DMV information. 18 U.S.C. 2721(b)(1)-(14). However, if the disclosure is in response to requests for individual motor vehicle records, then the prior express consent of the individual person is required. Id. at (11).

Here, where the municipality would be compelled to produce the personal information without prior express consent, ostensibly to obey the Iowa Open Records law, then it would necessarily be risking federal civil or criminal liability under the DPPA. The municipality would be disclosing the personal information, in this case the name, without having one of the permissible purposes for disclosure stated in 18 U.S.C. 2721(b). The terms of that section include fourteen different permissible uses that allow disclosure, or redisclosure, of state DMV information. 18 U.S.C. 2721(b)(1)-(14). Alternatively, if the municipality refuses to produce the personal information pursuant to DPPA, then third parties may allege civil torts against it under the Iowa Open Records law. Consequently, this impossibility of obeying both laws must be resolved in favor of DPPA because it is the supreme law of the land. *Huck*, 850 N.W.2d at 362.

The next question is whether the statute itself exempts the information sought from the definition of "personal information." A recent decision in the Arkansas Supreme Court accurately sets out the two schools of thought on the exception. In *Ark. State Police v. Wren*, 2016 Ark. 188, 491 S.W.3d 124 (Ark 2016) the Arkansas Supreme Court decided whether a records custodian could redact the name and address of individuals from an accident report. *Wren* at 125. The facts of the case demonstrated that "ninety-nine percent of the time" an officer creating the accident report would obtain that information from the magnetic strip

on the back of a driver's license. *Id.* at 126. The information from the magnetic strip came from the Arkansas Office of Motor Vehicles' database. *Id.* The Arkansas State Patrol ("ASP") claimed to have a policy of redacting the reports to comply with DPPA. *Wren* at 126. However, "attached to appellee's posthearing brief were five newspaper articles in which the ASP reported the names and hometowns of those individuals in fatal vehicle crashes in June 2015." *Id.* Additionally, ASP witnesses testified "that a person involved in an accident can get an unredacted copy of the report, including the other driver and any passenger's personal information, without the other parties' consent." *Id.*

The Arkansas Supreme Court then had to interpret the intersection between the federal Freedom of Information Act ("FOIA") and DPPA:

> The Arkansas Supreme Court determined "Keeping in mind the intent of Congress in passing the DPPA, it is clear that a vehicle-accident report is not included in the definition of 'motor vehicle record,' regardless of whether, as a matter of convenience, some of the information included in an accident report may be taken from or verified by a database maintained by the Office of Motor Vehicles." *Wren* at 128.

The Court relied upon *Mattivi v. Russell,* 2002 U.S. Dist. LEXIS 24409, 2002 WL 31949898 (D. Colo. Aug. 2, 2002) and the plain language of the statute to determine that "personal information" does not include information on vehicular accidents. *Id.*

The dissenting opinion in *Wren* took issue with the majority analysis and offered a different interpretation to harmonize the two statutes. The dissent explained:

> The parties agree that accident reports contain the names, addresses, telephone numbers and driver identification numbers of persons in the accident. The parties disagree as to the meaning of the phrase "does not include information on vehicular accidents" in the definition, and the interpretation of this phrase is critical to whether the DPPA applies to this matter. ASP asserts that the phrase means that only information regarding the actual accident is excluded from DPPA protection. Wren contends that the phrase is a blanket exception and that the entire accident report is excepted from the DPPA.
>
> *Wren* at 131.

The dissent continued, "accident reports in Arkansas include detailed information as to the cause, conditions then existing, the persons and vehicles involved, information about whether the accident was caused as a result of the driver's lapse of consciousness, physical disability, disease, or disorder or any other medical condition of the driver." *Id.* at 132. The dissent stated, "based on the plain language of the DPPA, to the extent that an accident report contains information beyond information related to the accident, I would hold that the information is not information 'on [a] vehicular accident' and constitutes protected personal information under the DPPA." *Id.* at 132. The dissent reasoned that "the DPPA prohibits the release of the remaining information in the accident reports, including name, address, telephone numbers, and personal identifying information on

Arkansas motor-vehicle-accident reports by the ASP as obtained from the Office of Motor Vehicles." *Id.*

A comparison of the majority and dissent in *Wren* highlights the issue that municipalities face when confronted with an Open Records request for documents that contain information obtained from state DMVs. The dissent identified the concept that a document may not be confidential, but that portions of the information may in fact be confidential as information obtained from a state DMV. In contrast, the majority opinion simply concluded that anything that appears on an accident report does not constitute personal information obtained from a state DMV regardless of the source of that information. The resolution of that issue has implications for municipalities both in terms of fines under DPPA or, as in this case, payment of attorney fees under Iowa Open Records law.

The *Wren* dissent's reasoning is the correct interpretation of the plain language of the DPPA and its purpose. It makes little sense for the DPPA to prohibit the disclosure of personal identifying information, but to make an exception for all of that information should the private individual be in a car accident or commit a driving violation. Under the District Court and *Wren* majority's reasoning, stalkers could request records about speeding violations and accident reports for purposes of determining personal identifying information provided to the state DMV. There is no logical reason to conclude that Congress

intended to prevent disclosure of personal identifying information, unless for an authorized purpose, but left a loop hole where the copying of that information onto an accident report exposed it to the public. The stated purpose of the DPPA is close "loopholes" that allow individuals to get personal information on-demand. *Margan* at 68-69. Moreover, the majority's reasoning in *Wren* invites the same logical problem that the Iowa Supreme Court sought to avoid in that driver A's personal information is better protected than driver B's solely because A has a better driving record. *See ACLU,* 818 N.W.2d at 236. The two requests, one for the information directly and the other indirectly requesting the list of drivers violations, accomplish exactly the same objective, the disclosure of personal information from the state DMV database. The extra step of asking for an accident report or list of violators is not meaningful and constitutes an end run around the privacy requirements.

The DPPA statute already contains fourteen permissible reasons for disclosure of information and, therefore, does not obliterate the legitimate purposes that someone may have to obtain information on an accident report or related to driving violations. 18 U.S.C. 2721(b). The federal district court for Connecticut dealt with a similar issue in *Camara*. The *Camara* case involved a lawsuit from a class of individuals who brought suit against their employer for "improperly obtaining and using their personal information from motor vehicle records

maintained by various state departments of motor vehicles ('DMVs')." *Camara* at 519. The Metro-North Railroad would periodically request its driving employees' driver histories from state DMVs, either directly or through a third party vendor. *Id.* at 521. Metro-North would "provide the DMV with the driver's name, license number, address, and date of birth" in order to obtain the driving history. *Id.* at 524.

The case presented the district court with the issue of how to define personal information under DPPA. *Id.* at 523-525. First, the *Camara* district court held that "[t]he plain language of section 2725(3) makes clear that driving violations and driver's status are not personal information and therefore not protected by the DPPA." *Camara* at 523. Next, the court determined that "Connecticut driving histories do, however, contain information other than the driver's traffic violation and license status information." *Id.* The district court explained "the Connecticut DMV includes Camara's name, birth date, driver's license number, and driver's license expiration date." *Id.* The court concluded that "[u]nder section 2725(3), Camara's name and driver's license number are protected personal information." *Camara* at 523. As a result, the Connecticut district court had to resolve the dispute about whether the "driving violations" exception waived the confidentiality of information that was otherwise confidential personal information under DPPA.

The *Camara* court resolved the matter through the application of the

underlying purposes of the statute. The court noted, "Metro-North..., in requesting the driving histories of Camara and its other employees, … provided the Connecticut DMV with the employees' names, addresses, birth dates, driver's license numbers, and license classes." *Camara* at 523. As a result the court found "when the DMV sent Metro-North driving histories containing the employees' names and license numbers, it provided no personal information that it had not received from Metro-North in Metro-North's original request." *Id.* The court concluded:

> Congress explicitly allowed public access to information regarding an individual's vehicular accidents, driving violations, and driver's status. If the DMV were to provide requestors with this information without any means of identifying the individual to whom the information pertains, the information would be unsuitable for any use but statistics.
>
> This was not Congress' intent.
>
> *Id*. at 525.

It is not necessary for an agency to excise "all personal information" even if the request does not have a DPPA permitted use. *Id.*

The undergirding of the *Camara* decision was that the disclosure of driving violations or history in those circumstances did not make a person "more able to engage in criminal activity of the type Congress meant to thwart than he was when he first requested the information." *Camara* at 525. The court relied upon the fact

that the requestor had "no more 'personal information' than Metro-North had submitted to the DMV in order to obtain those histories" in reaching its conclusion. As a result the requests could not be considered to be obtaining or using personal information and, therefore, did not implicate the protections of the DPPA. *Id.*

The Seventh Circuit's interpretation concerning the breadth of the statute's definition of "disclosure" provides more insight into the statute's intent. The Seventh Circuit interpreted the meaning of "disclosure" in *Senne v. Vill. of Palatine*, 695 F.3d 597 (7th Cir. 2012). The circuit court determined that placing personal information on a parking ticket and then attaching it to the windshield of an automobile constituted a "disclosure" under the law. *Senne* at 601-603. The court explained that "…the statute forbids a state DMV from 'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity' protected personal information." *Id*. at 602. The court then held, "[i]n our view, attaching the terms 'or otherwise make available' to the term 'disclose' leaves little doubt the breadth of the transactions Congress intended to regulate." *Id*. The Seventh Circuit determined that Congress employed "broad language" when it discussed the definition of disclosure under the statute. *Id.* The Court concluded:

> "The action alleged here, placing the information on the windshield of the vehicle in the plain view on a public way, is certainly sufficient to come within the activity regulated by the statute regardless of whether another person viewed the information or whether law enforcement intended it to be viewed by Mr. Senne

> himself. The real effect of the placement of the ticket was to make available Mr. Senne's motor vehicle record to any passer-by. This sort of publication is certainly forbidden by the statute."
>
> *Senne* at 603.

The plain language of DPPA demands a broad interpretation of the statute's prohibitions on disclosure.

The present case involves a person acquiring more personal information than the person originally possessed. The Plaintiff requested that the Defendants provide him with the names of the owners of certain vehicles. Plaintiff did not previously possess those individuals' names. *Cf. Camara* at 523. The plain language of the statute forbids "the release and use of certain personal information from State motor vehicle records." 18 U.S.C. § 2721(a) and (c). The statue forbids an authorized individual that possesses such information from redisclosing the information, unless there is an enumerated lawful purpose for doing so. 18 U.S.C. § 2721(b).

The present case involves a request that Defendants disclose to the Plaintiff information that the statute identifies as confidential personal information. Specifically, the Plaintiff requested that names, which the plain language of the statute designates as confidential, be turned over to him from records obtained from a DMV. A response to an Open Records request is undoubtedly a disclosure under DPPA. The District Court in this case did not find that any of the

enumerated fourteen lawful reasons for disclosure applied to this request. *See* 18 U.S.C. § 2721(b)(1)-(14). Instead, the District Court decided to rewrite the definition of personal information by excluding from it personal information provided in connection with information on driving violations.

The issue boils down to whether releasing a person's name in response to an open records request frustrates the purpose behind the DPPA. The first point that must be considered is that Congress decided that "name" was personal information. 18 U.S.C. § 2725(3). The statute defines "personal information" as "information that identifies an individual" and then lists examples. A "name" identifies an individual. The creation of this definition undoubtedly involved a determination that getting someone's name from a state DMV would be beneficial to potential stalkers and solicitors.

The reasoning behind such a determination is not hard to fathom. An individual trying to find another person might have different pieces of information. For instance, in this case the municipality has the license plate of the car in the picture. The municipality can only learn the owner's "name" through referencing that material through a state DMV. Essentially, the municipality (or in this case a third-party on the municipality's behalf) asks the state department of transportation what is the "name" of the individual that owns the car with a certain license plate. The state department of transportation reveals the "name" of the owner.

Additionally, the department of transportation divulges other information that does not appear to be at issue in the present case, such as address, phone number, etc.

The District Court in this case confronted a difficult issue because the only information sought were the "names" of reported speeding violators. An individual's name, in the absence of other information, is certainly less revealing than the disclosure of home address, date of birth, social security numbers and other personal identifying information. However, the context of providing a "name" is important to this analysis because the municipality only acquired the "name" through running a license plate through a state DMV. A municipality revealing a person's name in connection with speeding in that town provides more information than simply the name because the disclosure narrows down the possible residence of the individual.

The issue then becomes does the disclosure of the "name" of an owner or driver identify the person and make them easier to stalk or locate in this context? The answer is most likely in the affirmative. A person of reasonable intelligence could glean a lot from an open records request for the names of individuals driving in a certain town. For example, a stalker trying to track down the town in which a person lives in might use such a request to narrow down his or her search.

A hypothetical illustrates this last point. A hypothetical individual, Mary Sue, lives in Ottumwa. She has been avoiding her ex-boyfriend from high school

and moved to a different town to get away from him. Her ex-boyfriend may be able determine in what town Mary Sue currently lives under the District Court's interpretation of DPPA. He would only need to submit a letter to the potential resident municipalities asking that they provide him with the list of violators cited due to the municipality's speed camera since the time Mary Sue moved out of town. Next, he could narrow down his search for Mary Sue if she appears on a list of potential violators in her new town. The fact that "Mary Sue" was driving in Ottumwa is a good indicator that "Mary Sue" might live in Ottumwa. The correlation becomes more likely should "Mary Sue" appear on the traffic cam list on multiple dates.

Any individual could request the "disclosure" of names in a manner that would be very beneficial to locating a person. A person could submit to a municipality the following open records request "Does Mary Sue appear on the list of speed violators reported to the municipality's police department?" Under the District Court's determination, the requestor would be entitled to know if "Mary Sue" was driving around in the municipality. This would not require a large expenditure of money on the requestor's part. It would simply require sending a letter with that request. At the same time it would very much assist a person looking for the city which Mary Sue resides. The information, ***from the municipality***, both "identifies" Mary Sue and makes her easier to locate.

The nature of the current request further complicates the issue. Plaintiff in this case requested the names of individuals speeding in town. A determined individual could not locate a person based on their vehicle appearing on a city speed cam even if the individual was issued a speeding ticket. The Plaintiff's request seeks the disclosure of names and locations in a manner that is not otherwise available to a requestor. A city's list of potential violators narrows down that individual's possible residence in a way that State and county issued tickets do not. Those tickets only reference the county where the violation occurred. A search for Mary Sue's speeding tickets on Iowa Courts Online might show she was speeding in Story County, but would not reveal the specific town in which the violation occurred. Iowa's electronic filing procedures would then protect the disclosure of Mary Sue's confidential information such as home address. Iowa Rules of Electronic Procedure Rule 16.604.

The case of a city a issuing a ticket based on state law raises many of these same issues. The case would be entitled City of Ottumwa v. Mary Sue. However, Mary Sue would have both notice and an opportunity to request the file be sealed. The same is not true for an Iowa Open Records request. Mary Sue would not have an opportunity to protect herself from requests for her name from a municipality, especially in the context of a mass request for information.

The Iowa Public Information Board already considers local municipal records as a potential source of personal information. The Iowa Public Information Board has a responsibility to interpret and apply Code Chapters 21 and 22. Iowa Public Information Board 13FO:0003, https://www.ipib.iowa.gov/advisory-opinions/iowa-association-municipal-utilities-iamu. The Iowa Public Information Board confronted a similar issue when asked for an advisory opinion concerning the interaction between Chapter 22 and Iowa Code Section 388.9A. *Id.* Iowa Code Section 388.9A states, "(n)otwithstanding section 22.2, section 1, public records of a city utility or combined utility system, or a city enterprise or combined city enterprise as defined in section 384.80, which shall not be examined or copied as of right, include private customer information." I.C.A. § 388.9A. IPIB interpreted that to mean that such records were exempt from disclosure under Chapter 22 at the discretion of the utilities. The Board concluded:

> "Section 388.9A does not provide that any records within its purview are no longer public records. The records affected by section 388.9A are limited to private customer records under the definition stated within the section. We conclude that those records are still public records subject to chapter 22. We believe that section 388.9A does, however, hold in abeyance application of the provisions of chapter 22 to private customer records which would otherwise be subject to inspection and copying. As to those records, the section 22.2 right to examine and copy is suspended at the discretion of the utility. In other words, section 388.9A is a grant of discretion to utilities concerning the release of specified

> information that otherwise would be subject to release as a matter of right under section 22.2."
>
> *Id.*

The same analysis applies to the current situation. The DPPA prevents individuals that legally gain access to personal information from disclosing that information to third parties, unless that third party has a legal purpose for acquiring the information. The exception to "personal information" is designed to allow the disclosure of driving violations and other records to the extent those records do not contain personal identifying information. The records about driving violations are open records, but portions of those records must remain confidential to protect personal identifying information. *See Senne*, 695 F.3d at 602-603.

The Court should properly define the term "personal information" under federal DPPA law and Iowa Code Section 321.11. The inclusion of "name" under personal information was made intentionally and with the purpose of preventing individuals from acquiring names from state DMVs without a proper purpose. In the context of cities, the request for the "names" of individuals whose vehicles are captured on a speed cam provides personal information in a manner that frustrates the DPPA's purpose. It allows a determined individual to simply send a letter and narrow the potential location of a victim.

ISSUE II: THE DISTRICT COURT ERRED IN GRANTING ATTORNEY FEES IN THIS SITUATION

A. Preservation of error and standard of review.

The District Court issued its Ruling on Plaintiff's application for attorney fees on February 22, 2018. (Ruling on Plaintiff's Application for Attorney Fees). The Defendants properly preserved error on this matter by filing a notice of appeal on March 1, 2018. (Notice of Appeal filed March 1, 2018).

The customary standard of review for an action brought under Iowa Code Chapter 22 is de novo. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 651 (Iowa 2011).

B. Argument.

The District Court awarded the Plaintiff attorney fees under Iowa Open Records law in the amount of $57,315.75. (Ruling on Plaintiff's Application for Attorney Fees p. 5). The District Court's analysis considered factors "such as the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service." (Ruling on Plaintiff's Application for Attorney Fees pp. 3-4). This Court should require a district court to consider additional factors when evaluating attorney fees for a violation of Iowa Open Records law.

As a preliminary matter, the Iowa Open Records law provides a remedy to

government officials who are in doubt about disclosure to avoid attorney fees. The law allows a lawful custodian or its designee to bring an action in district court to determine the legality of allowing or refusing the examination of public records. I.C.A. § 22.10(4). The statute also allows the government official to seek an opinion of the attorney general or the attorney for the lawful custodian. I.C.A. § 22.10(4). Typically, a governmental entity that seeks an injunction in district court should not be required to pay attorney fees if there is a successful counterclaim to that action. *Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666, 671 (Iowa 1992). However, the Iowa Supreme Court left open the possibility that "attorney fees might arise in favor of a counterclaimant in a proper case." *Id.* (explaining "[t]he question does not turn on which party is the first to reach the courthouse."). The determination for awarding attorney fees then turns on "good faith" in bringing the declaratory judgment action. *Id.*

The Court should address the rubric for granting attorney fees in cases where the requestor "won" the race to the courthouse. The Court was correct in determining that the question does not turn on "which party is the first to reach the courthouse" and, therefore, needs to establish elements to evaluate good faith when the requestor reaches the courthouse first. The Court should implement the rubric used in federal FOIA requests. The District of Columbia Circuit has created a four

factor test for evaluating entitlement to attorney fees in a FOIA case. *Davy v. CIA*, 550 F.3d 1155, 1159 (D.C. Circuit 2008). The four factors are: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents. *Id.* A review of these factors would help a district court in evaluating the "reasonableness" of attorney fees in an Iowa Open Records enforcement action.

CONCLUSION

The Court should reverse the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 6,919 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

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CERTIFICATE OF SERVICE

I, Brent L. Hinders, a member of the Bar of Iowa, hereby certify that on the 14th day of June, 2018, I served the above Amicus Curiae Brief by electronic filing thereof to the following:

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