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Understanding Your Liability Under The Driver's Privacy Protection Act

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Recently, Audrey Forbush of Plunkett Cooney PC and Legal Advisor to the Law Enforcement Action Forum asked LEAF members if they thought that Michigan law enforcement executives know about and understand the Driver's Privacy Protection Act of 1994 (DPPA or Act). The DPPA, a federal statute (18 U.S.C. §2721) regulates the disclosure and resale of personal information contained in the records of state Departments of Motor Vehicles (DMV). Forbush's specific concerns were whether top management understood their direct liability for the actions of all employees in the handling of information resulting from queries of drivers' license and vehicle databases and if they understood that this liability was in addition to the Criminal Justice Information System (CJIS) and Law Enforcement Information Network (LEIN) sanctions.

State DMVs have long required drivers and automobile owners to provide personal information to obtain a driver's license or register an automobile. It was only when they found that they could generate significant revenue by selling this information to interested parties for a nominal fee that a problem arose. With anyone able to obtain the information for a fee, the inevitable happened, and some individuals bought information and misused it resulting in cases of harassment and criminal acts, including murder.

These abusive activities led to a public uproar. In response, Congress investigated the issue and realized that the information for sale, when compiled, was generally protected and considered confidential in other venues. They passed the DPPA to restrict the ability of states to sell the information without the consent of the driver. At the same time, they recognized the importance of the information to governmental agencies. As a result, the DPPA contains fourteen exceptions to the Act. Among the exceptions is use of the information by any government agency, including any law enforcement agency or court, in carrying out its functions and in any proceeding by a governmental agency, including the service of process.

Under the DPPA, it is unlawful for any "person" knowingly to obtain or disclose any record for a use that is not permitted or to make a false statement in order to acquire personal information from a motor vehicle record. The Act allows any person whose information is used, disclosed or unlawfully obtained to sue. The court can award actual damages (not less than \$2500), punitive damages if there is a willful or reckless disregard of the law, attorneys' fees and costs, and *"any preliminary and equitable relief as the court determines to be appropriate."*

Forbush cautions that these potential violations are where the mallet hits the wallet! She wasted no time pointing out that governmental entities must evaluate their procedures to ensure compliance with the DPPA and remarked that violations from what might appear to be innocuous practices or actions have the potential to be costly. She cited the following as examples.

What! That Wasn't The Intent.

In a recent case from the 7th Circuit Court of Appeals, *Senne v Village of Palatine* 695 F.3d 597(CA 7,2012), the Village included personal information, gathered from running the vehicle registration through DMV records, such as Senne's driver's license number, address, date of birth and weight on a parking ticket. The officer placed the ticket on the windshield of Senne's car. Senne sued on behalf of himself and a class of others that the Village treated similarly. A three-judge panel of the Court originally ruled that the use of the information met the "service of process" exception in the law. However, an en banc re-hearing before the Court concluded that,

Any disclosure must comply with those legitimate uses of information identified in the statutory exceptions. The Village's placement of protected personal information in view of the public constituted a disclosure regulated by the statute, regardless of whether plaintiff can establish that anyone actually viewed it.

Forbush said the Court was very clear in its thoughts on the definition of disclosure as it reflects on the activity of the Village. The Court said,

The action alleged here, placing the information on the windshield of the vehicle in 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 only 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.

Because of such rulings, Forbush cautions entities and departments to evaluate how they handle information from the Michigan LEIN to ensure it remains confidential and protected. Similar laws affect other information received through the Network and violation of the intent of the law can have unsettling and unexpected consequences.

Senne v Village of Palatine 695 F.3d 597(CA 7, 2012) was remanded to the District Court to decide if Palatine really needed to include all the information on their parking tickets. Forbush forecast that if the court found Palatine guilty of the violation, the entity, which has reportedly issued as many as 32,000 parking tickets over the 4-year statute of limitations period, each of which could bring a \$2500 per ticket minimum award, would incur damages of around \$80 million. Palatine appealed to the U.S. Supreme Court.

However, because the case was remanded back to District Court for further proceedings, the Village was able to file a motion asking the court to dismiss the punitive damages, potentially \$80 million, citing several affirmative defenses. Senne filed a motion to dismiss the Village's affirmative defenses. The District Court on January 4, 2013,, citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), ruled municipalities were immune from punitive damages at common law. This means punitive damages are not available under the DPPA because Congress did not specifically authorize them. The case was appealed again! The 7th Circuit Court of Appeals ruled the disclosures fell within one of the permissible uses of personal information allowed under 18 U.S. C. § 2721(b). As a result, it was remanded to the District Court.

The Village filed a summary judgment motion in August 2013. On November 27, 2013, the United State District Court for the Northern District of Illinois granted the motion, specifically addressing the Village's argument that its disclosure of the information on Mr. Senne's parking ticket was permissible. To this point, the Village provided undisputed evidence from its police officers that personal information on citations was used occasionally to identify people without drivers' licenses or to determine whether to void a citation issued to an out-of-town resident, and thus making the use of personal information for law enforcement purposes permissible. The court explained that it is the ultimate or potential use of personal information that qualifies a disclosure for an exception under § 2721(b). Therefore, even if not every citation is used for the permitted purpose, the justifications are sufficient to qualify all citations for the permitted use. Mr. Senne once more appealed to the 7th Circuit Court of Appeals on December 5, 2013. The saga continues!

She Was Cute!

Forbush bets that most administrators will know or guess what *Menghi v Suffolk County*, 745 F. Supp 2d 89 (E.D.NY 2010) is about from the title of this section. If this is true, she mused that, in itself, indicates a need for reflection.

In this case, an officer accessed personal information, including Menghi's telephone number, several times over a period of twelve months. He then stopped her and arrested her for drunk driving. For the next three years, Menghi received threatening and harassing telephone calls that caused her to file a complaint with the police department. Upon investigation, the department determined that the calls to Menghi and several other women came from the officer. Although he quit, he was criminally charged.

The investigation had determined that the officer was acting within the scope of his employment when he obtained, disclosed or used Menghi's personal information obtained from a DMV record. It was the purpose for which he used the information that was impermissible. The jury

awarded Menghi \$1,000,000 in compensatory damages and \$2,000,000 in punitive damages against the officer.

Because the officer violated the DPPA while acting within the scope of his employment, Suffolk County was liable for his conduct under the Act. The County, however, asserted that the officer was acting outside the scope of his employment and they were not liable for that conduct. The court rejected the County's argument ruling that Congress intended local governments to be accountable for the violations of the Act by their employees. The evidence showed that the County did not train or supervise the activities of their officers in the use of the computer and the resulting information they obtained. The lack of administrative controls was evident in that the password to use the computer was posted on the side of monitor. This evidence clearly supports a finding that although the officer was not authorized to do so, he commonly performed computer searches for both legitimate and illegitimate purposes. There was also evidence that the County not only anticipated that its officers might perform unauthorized searches and issued memos warning against them but knew the searches were taking place. Forbush said the trial court eventually reduced the award to \$800,000, which includes around \$232,000 in attorney fees and costs.

She remarked that she thought *Menghi v Suffolk County* provides a good example of management not managing or holding their employees accountable for appropriate behavior. Mid-level managers and supervisors should have taken responsibility to address inappropriate behavior and to monitor officer activity to ensure it conformed to policy, procedure and expectations as promulgated by top management. Top management failed to audit the activity of the department to ensure compliance with established policy, procedures and rules of behavior.

Just Trying To Help!

Forbush points to *Schierts v City of Brookfield*, 868 F. SUPP. 2d 818 (ED. Wis., 2012) a case from Wisconsin involving two people who had a child but

lived apart. Schierts lived in Arizona. On a visit to Wisconsin, Schierts went to his child's daycare center during which a confrontation with the mother about custody occurred and the police were called. After this confrontation, the parents communicated by email concerning the care of the child. The mother also forwarded the emails to the officer who responded to the dispute at the daycare who offered his advice on the situation. The mother eventually got around to asking the officer if there was a way to find out the father's address. The officer ran the information through Arizona DMV, emailed the information to the mother along with the warning "You didn't get this from me!"

The father somehow accessed the mother's e-mail account, discovered the emails from the officer, and proceeded to copy them to his attorney. A lawsuit followed that prompted the officer, after he was served, to email the mother and ask her if she had told the father that he gave her the address. He wanted to make sure they were on the same page that she would say she got the information from Child Services. The police department no longer employs the officer.

The United States District Court Eastern District of Wisconsin rejected the argument made by the City by adopting a ruling from the District Court Northern District of New York in *Margan v. Niles*, 250 F. Supp. 2d 63 (N.D.N.Y. 2003). In *Margan*, the Court found that a municipality was vicariously liable for a DPPA violation committed by one of its police officers because the officer acted with apparent authority. They noted that the Supreme Court has held that "[w]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Id.* at 74 (quoting *Meyer v. Holley*, 537 U.S. 280, 285 (2003)). The Court found that nothing in the DPPA indicated that Congress did not intend for ordinary vicarious-liability rules to apply in DPPA cases, and thus it held that the DPPA imposed vicarious liability. The Court also

held that municipalities could be held vicariously liable under the DPPA even if the violation was not committed pursuant to a municipal policy, practice or custom. This opinion was also the finding in *Menghi*.

The Court ruled that the father was entitled to summary judgment on the vicarious liability claim because there was no dispute that the officer acted with the apparent authority of the City when he obtained the father's addresses from the Arizona Department of Transportation for an impermissible purpose. Thus, the officer acted with the apparent authority of the City when he violated the DPPA.

Mitigate to Reduce the Risks

All of these cases were costly and as Forbush commented, *Menghi* and *Schierts* clearly illustrate departmental inadequacies can contribute to an increased liability exposure. She recommends that top levels of management review the LEAF Newsletter from October, 2003, *The Devils In The Detail* and the December, 2009 Newsletter, *Don't Wait Until The Gear Fails When Regular Maintenance Can Prevent It!* Both Newsletters outline how management can ensure that their departments are keeping up with the law and industry standards by monitoring employee activities for compliance with both department expectations and any applicable laws. The key is to regularly audit the activity of the department especially as it relates to use of information sources, social media and portable electronic devices that are either provided or allowed in the workplace.

The Newsletters are found at:
http://www.mml.org/insurance/shared/risk_resources/leaf_newsletters.html

Departments Need an Eyewitness Identification Policy!

In keeping with the intent of the Video Recording of Interrogation regulations as a way to safeguard that the right person is brought to justice crimes they committed, MCOLES, MACP and others participated with the Michigan Bar Association to develop a *Policy Writing Guide for Law Enforcement and Witness Identification*. In addition, the Innocence Project has developed a Model Policy as an example for departments. **Soon**, MCOLES will be posting these documents on their website at <http://www.michigan.gov/mcoles>. The MML's Law Enforcement Action Forum strongly recommends departments adopt a Witness Identification and a Video Recording of Interrogation Policy to help guide their officers in performing these important job tasks.

Are you an MML Insurance Program Member?

If you are, go to the League's online Law Enforcement Risk Control Manual, **now compatible with any browser**, to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or to <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account" line and create an account. To add to the ease of use, the manual now contains a complete keyword search function. New Chapters covering Video Interrogation and Seizure & Search of Portable Video and Recording Devices are scheduled to be added soon.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
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