

## Suit filed on county redacting

By Ryan Whisner Union regional editor | Posted: Thursday, March 5, 2015 9:02 am

JEFFERSON — On behalf of a Wisconsin Reporter writer, the Wisconsin Institute for Law & Liberty has filed a lawsuit against the Jefferson County Sheriff's Office over the redaction of relevant information in public requests for reports.

Wisconsin Reporter bureau chief and reporter Matt Kittle contends that the Jefferson County Sheriff's Office illegally redacted portions of incident reports about a Germantown kindergarten teacher who was cited for disorderly conduct after ripping out and stepping on Republican Party signs at the Jefferson County Republican Party tent at the 2014 Jefferson County Fair.

Counties and municipalities across the state have adopted policies calling for the redaction — or blacking out — of identifying information from routine police reports and citations in response to a Seventh Circuit Court of Appeals ruling related to the federal Drivers Privacy Protection Act (DPPA) in which Jason Senne sued the Village of Palatine, Ill.

“The Seventh Circuit Court did not find that the village had violated DPPA,” explained Tom Kamenick, associate counsel and open government specialist at WILL. “It wasn't even an open records case. In fact, on remand, the Illinois district court found that an exception to DPPA permitted that disclosure.”

Kittle noted that the problem extends far beyond Jefferson County to many municipalities and counties across the state that have overreacted to the Senne ruling.

Within the Jefferson County area, several municipalities including Fort Atkinson, Jefferson and Whitewater, have adopted policies of records release requiring the redaction of information.

“They have interpreted it in the most strict means possible,” Kittle said. “I get the whole privacy issue, but there has got to be a decent balancing measure between the privacy rights of the individual and the rights of the public to obtain information from their governments.”

The reporter said he was not intending to “pick” on Jefferson County.

“A lot of counties and a lot of news organizations are dealing with the same thing,” Kittle said. “The public has the right to know, without hindrance, what their government agencies are doing.”

In this instance, he contends that the public had the right to promptly know the name of the individual arrested in a property crime incident at the Jefferson County Fair.

“Wisconsin Reporter hopes to remove artificial encumbrances to information like those found in the Jefferson County Sheriff's Department policy so that the public interest can be fully served,” Kittle said.

Per Wisconsin statute, a records requester who is unlawfully denied a record is entitled to a writ of mandamus compelling the records custodian to release the requested record and award the requestor his actually reasonable attorney fees, courts costs and statutory damages of \$100.

Kittle is seeking those damages, as well as a declaration by the sheriff's office that its requirement that record requestors use specific form is unlawful.

The dispute stems from a lawsuit in which an Illinois man, Jason Senne, sued the Village of Palatine for \$80 million after personal information was printed on a \$20 parking ticket and then left on his vehicle's windshield. Senne argued that the ticket, which bared his name, Social Security number and address, violated the federal Drivers Privacy Protection Act (DPPA).

The case was dismissed by a district panel of judges in August 2011, but a year later, the Seventh Circuit Court of Appeals (with its Wisconsin jurisdiction) ruled that sufficient evidence existed to support Senne's claim that the ticket and its bounty of intelligence, which sat visible to passersby for hours, violated his privacy.

Police agencies statewide were blacking out information from reports in the wake of the Senne case, including names, birth dates and addresses.

Wisconsin Attorney General Brad Schimel has taken no position on the issue. His predecessor, J.B. Van Hollen, authorized an informal opinion in 2008 in which he stated that an exemption to DPPA that allows police agencies to access DMV records as a function of their job duties also should apply when responding to open records requests.

A St. Croix County judge in March 2014 ruled that the appellate ruling does not directly apply to requests made under Wisconsin's open records law. The city has appealed the ruling to the Wisconsin Court of Appeals. Both parties have agreed to jointly file a petition to bypass the court of appeals and have the Wisconsin Supreme Court directly take it.

Following the New Richmond case, representatives from the WNA and the Wisconsin League of Municipalities met to discuss a compromise in early June. As a result of the session, WNA executive director Beth Bennett said, local government representatives and insurers agreed to recommend that their members/clients release uncensored reports containing personal information derived from the DMV database.

The release of those records, however, would be contingent upon the requester completing a form indicating that the use of the information satisfies exception 14 of the DPPA specifying that the "use is related to the operation of a motor vehicle or public safety."

Kittle's lawsuit also challenges that form.

"We think that's excessive for reporters and for citizens, as well," he said. "It's a good faith effort by the WNA. As it was explained to me by the organization, it's a temporary fix while they go after a long-term solution."

Kittle said he understands that anything to make it easier to obtain the public access to public records is great. However, he views the form as simply a Band-Aid to a bigger problem.

"Public agencies cannot demand that requesters use any particular form," Kamenick added. "This form is illegal in a number of ways: It requires requesters to identify themselves, it puts the burden on requesters to explain why they are entitled to the records, and it requires that requesters have intimate knowledge of a highly-complex federal law. The presumption of Wisconsin law is that all records are available to the public. It's up to the record custodian

to prove that a record may be withheld or redacted.”

According to the lawsuit, on July 9, 2014, a Germantown kindergarten teacher was issued a citation for disorderly conduct after ripping out and stepping on Republican Party signs at the Jefferson County Republican Party tent at the Jefferson County Fair. Kittle requested a copy of the incident and citation related to the July 9 incident on July 21.

According to the lawsuit, he was told the information identifying the Germantown teacher would be redacted due to a recent change in Jefferson County Sheriff’s Office policy.

With his request, Kittle submitted the sheriff’s office request form. However, he did not fill out any of the boxes to identify which exception he was requesting the information under. Rather, he wrote a new box and checked it, writing “reporter, seeking information that is public under Wisconsin open records law.”

“I had at that time contacted the Wisconsin Institute of Law and Liberty and they were very curious about it because obviously this has been a problem across the state and it is an issue that is resonating beyond Wisconsin’s borders, as well,” Kittle said.

Along with his request was a letter from WILL explaining why “law enforcement agencies may not redact identifying information from citations, reports and the like while responding to open records requests.”

Around Aug. 4, “heavily redacted” records removing all identifying information of the teacher, her husband and the complaining witness were released by the sheriff’s office to Kittle.

“I talked to the corporation counsel and he said, ‘this is the way it is; that’s the law,’” Kittle said. “Well, then the law needs to change because this is a matter of significant public import.”

He simultaneously was able to write a story identifying the woman, having obtained an unredacted copy of the incident report from another source. Kittle said the woman who observed the incident and followed the suspect around Jefferson County Fair Park until a deputy approached obtained an unredacted copy of the incident report, thus revealing the names of all parties involved.

Meanwhile, the accompanying note from the sheriff’s office that came with Kittle’s redacted copy stated, “The records have been redacted in compliance with the DPPA 18 U.S.C. 2721 Act. In addition, after we applied the balancing test, personal information has been redacted to prevent the clearly unwarranted invasion into an individual’s privacy and prevent the unauthorized misuse of said information, such as is found in identity theft or harassment cases.”

Kittle’s lawsuit noted that under Wisconsin statutes it is declared public policy that every citizen is entitled to the greatest possible information regarding the affairs of government.

He contends the incident report and citation were written documents created by the sheriff’s office and therefore would be considered records. The Wisconsin Open Records Law contain no exception permitting or requiring the redaction of information that would identify a person issued a citation for disorderly conduct.

Now, eight months after his initial request, Kittle notes that it goes beyond just the story.

“The story is where it is now,” he said. “The story is done. It really is the broader implication, so your folks at your

publication don't have to go through this and we don't have to go through this and the general public doesn't have to go through this. If the average citizen wants this information, they should be able to have it.”