

Commentary

An Overview Of The Driver's Privacy Protection Act Of 1994

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I. Introduction

The collection, storage and transfer of information that identifies an individual (such as name, address and social security number) are mainstays in today's Information Age The value of this information is apparent considering that the market in personal information tops several billion dollars each year¹ Considering not only the number of formal data brokers currently operating, but also the fact that most commercial Internet sites collect, retain and use personal information from visitors to those web sites, it can fairly be said that a "[c]onsumer's personal information is everywhere"²

Despite the prevalence of personal information, there is an increasing desire to protect the disclosure of that information As a result, there is a need to balance the use of that information for legitimate governmental and business purposes against the desire to protect the privacy of that information One statutory scheme attempting to find the proper balance is the Driver's

Privacy Protection Act of 1994 ("DPPA"), 18 U S C § 2721 *et seq*³ As we approach the tenth anniversary of the effective date of the DPPA, this article presents an overview of the DPPA and discusses specific issues that have arisen in the relatively few cases that have dealt with the DPPA since its enactment

II. The DPPA Regulates The Disclosure Of Personal Information In Motor Vehicle Records

A. General Prohibitions

Prior to the introduction of the DPPA, an individual's personal information found in motor vehicle records could be accessed by anyone However, Congress began to take a serious look at the availability of this information after 1989, when actress Rebecca Schaeffer was shot by a stalker who obtained her information from her motor vehicle records⁴ The murder of Ms Schaeffer was one of the factors leading to the DPPA's enactment 139 Cong Rec E2747 (1993) Other notable events concerned incidents in Iowa in which a group of teenagers looked up the personal information of drivers of expensive cars in order to break into and rob their homes *Id* The DPPA was designed to prevent these crimes⁵ However, the DPPA has not spawned a flood of litigation As of the date of this article, less than 100 cases have referenced the DPPA in some way, and fewer still have discussed the DPPA in any detail⁶

The DPPA recognizes that government agencies and businesses have vital needs for information

from motor vehicle records. As a result, despite the desire to protect the personal information in motor vehicle records, Congress also understood that many businesses “depend on access to motor vehicle records to serve their customers, including insurance companies, financial institutions, vehicle dealers, and others.” 139 Cong. Rec. E2747 (1993). “In enacting the DPPA, Congress intended to strike ‘a critical balance between legitimate governmental and business needs for this information, and the fundamental right of our people to privacy and safety.’”⁷

As its name suggests, the DPPA “regulates the disclosure and use of motor vehicle records.”⁸ Specifically, the DPPA makes it “unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.” 18 U.S.C. § 2722(a).⁹ 18 U.S.C. § 2721 states

“(a) In general. A State department of motor vehicles shall not knowingly disclose or otherwise make available to any person or entity

(1) personal information, as defined in 18 U.S.C. § 2725(3)¹⁰ except as provided in subsection (b) of this section, or

(2) highly restricted personal information, as defined in 18 U.S.C. § 2725(4),¹¹ without the express consent¹² of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9).”

Simply put, the DPPA permits the disclosure of personal information in motor vehicle records for specific permissible uses (described below) enumerated in 18 U.S.C. § 2721(b). If that information consists of highly restricted personal information, that is, a social security number, a photograph or image, or a medical restriction (such as a requirement that the driver wear prescription lenses), then that information may be disclosed only for the uses listed in 18 U.S.C. § 2721(b)(1), (4), (6), or (9). Any obtainment, use or disclosure outside of this rule may constitute a violation of the DPPA.

B. Permissible Uses

The “permissible uses” consist of a list of uses for which disclosure of personal information and highly restricted personal information are allowed. Despite the name, some of the uses are couched in mandatory terms, while others are permissive.

“(b) Permissible uses. Personal information referred to in subsection (a) shall¹³ be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti-Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305 and 321-33 of title 49, and, subject to subsection (a)(2), may be disclosed as follows

(1) For use by a government agency in carrying out its functions or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions

(2) For use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls or advisories, performance monitoring of motor vehicles, motor vehicle parts and dealers, motor vehicle market research activities, including survey research, and removal of non-owner records from the original owner records of motor vehicle manufacturers

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only --

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors, and

- (B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual
- (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court
- (5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals
- (6) For use by an insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, anti-fraud activities, rating or underwriting
- (7) For use in providing notice to the owners of towed or impounded vehicles
- (8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection
- (9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49
- (10) For use in connection with the operation of private toll transportation facilities
- (11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains
- (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains¹⁴
- (13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains
- (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety" (Emphasis added)

Despite the fact that the DPPA has been in existence nearly a decade, the courts have surprisingly construed the reach of very few of these permissible uses such that there are few rules that can be gleaned governing the uses. As might be expected, the use by a government agency (particularly law enforcement use) and the use in anticipation of litigation have generated the most attention, but even for these uses the opinions are few and not necessarily clear.

1. Use By A Government Agency

18 U S C § 2721(b)(1) permits "use by any government agency or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." At its broadest, this use encompasses any legitimate government use, as long as the actions of the entity using the information are aimed at carrying out the government agency's functions.

An obvious government agency that might make use of this permissible use is one specifically mentioned in § 2721(b)(1), a law enforcement agency. It first must be noted that law enforcement agency is not specifically defined by the DPPA. In addition, the use appears to provide broad powers to such agencies to use personal information from motor vehicle records. One court has held that law enforcement agencies are "not liable for disclosing personal information from a motor vehicle record, so long as [the agency] does so while carrying out the functions of a law enforcement agency"¹⁵. However, that court did not define what "functions" are appropriate and what are not.

A district court in New Hampshire has held that posting the names, addresses, telephone numbers and driver's license numbers of family members of a wanted fugitive to locate his whereabouts "plainly qualifies under this exception as [the law enforcement agency] disclosed the information in furtherance of a lawful effort to apprehend a fugitive"¹⁶ The court permitted the application of this exception even though "it is not clear how the disclosure of the [driver's license] numbers furthered defendants' effort to apprehend [the wanted fugitive]"¹⁷

Unanswered questions include whether a person can claim any privacy interests in DPPA information to challenge a warrantless search based on information obtained from motor vehicle records For example, can a police officer run a license number of a car at random to determine whether that individual is wanted for any crimes, and use the resulting information to further an investigation? Is that action a use in carrying out the functions of a law enforcement agency? Such questions could implicate well-established Fourth Amendment law No court has addressed whether such access or use is permitted under the DPPA¹⁸

2. Motor Vehicle Or Driver Safety

The DPPA provides access to personal information from motor vehicle records "[f]or use in connection with matters of motor vehicle or driver safety and theft" 18 U S C § 2721(b)(2) Hartman v Dep't of Conservation and Natural Res., 892 A.2d 897, 904-05 (Pa Commw Ct 2006), rejected a claim of protection under this use by a magazine devoted to promoting snowmobiling in Pennsylvania The defendant sought motor vehicle records from the state to mail copies of the official publication of the Pennsylvania State Snowmobile Association, Inc ("PSSA") to snowmobile registrants¹⁹ The court found that, although the publication "contained some safety announcements," a total of "40 out of the 48 pages contained advertisements and listings for vendors of snowmobiles, snowmobile gear, motels, restaurants, stores, campground and other segments of the tourism industry associated with snowmobiling"²⁰ As a result, "the main purpose of the [publication] was to promote the PSSA and to increase its membership," a use that was not contemplated by the DPPA²¹

While Hartman defined what use does not fall under § 2721(b)(2), no court has described what use is encompassed by this subsection For example, what actions constitute use in connection with matters of motor vehicle or driver safety? Similarly, what actions constitute use in connections with matters of motor vehicle theft? Can a person obtain personal information from motor vehicle records to determine whether a seemingly-abandoned vehicle has been stolen, in an attempt to return the car to its rightful owner? The answers to these questions await further explanation by the courts

3. Use In Anticipation Of Litigation

18 U S C § 2721(b)(4) permits the use of personal information from motor vehicle records "in connection with any civil, criminal, administrative, or arbitral proceeding including the service of process [and] investigation in anticipation of litigation" Pichler v UNITE (Union of Needletrades, Indus & Textile Employees AFL-CIO), 339 F Supp 2d 665 (E D Pa 2004), devoted much space to construing this exception In Pichler, two unions were accused of improperly obtaining personal information from motor vehicle records as part of a campaign to organize the employees of a manufacturing company²² According to Pichler, "the [use in anticipation of litigation] exception applies only if a defendant obtains protected information for a permitted 'use,' [and that] 'use' implies a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding"²³ Thus, to show that this permissible use applies, the union had to "prove that (1) they undertook an actual investigation, (2) at the time of the investigation, litigation appeared likely, and (3) the protected information obtained during the investigation would be of 'use' in the litigation[]"²⁴

"Rather than envisioning assistance in the solicitation of clients for a potential lawsuit, the test articulated in Pichler focuses on the use of protected information in actual or 'likely' litigation, and where the information would be 'of use in the litigation' in the sense of being material to its subject matter"²⁵ "In stressing the need for 'an actual investigation' as the first prong of its test, we believe that the court meant the type of background work or search for material which would determine, substantively, whether one has a viable

theory of litigation, or enough of a basis to avoid a motion for sanctions on the ground that a frivolous lawsuit has been filed”²⁶

Thus, “acquiring personal information for the purpose of finding and soliciting clients for a lawsuit is not a ‘permissible use’ within the meaning of § 2721(b)”²⁷

Therefore, it is clear that the litigation exception of the DPPA does not permit “any use that pertains to a [judicial] proceeding”²⁸ However, the use does permit a person to obtain such information to verify information pertinent to a specific judicial proceeding In *Manso v Santamarina & Assoc.*, No 04 Civ 10276, 2005 U S Dist LEXIS 7316, at *17-18 (S D N Y Apr 26, 2005), the court ruled that the exception applied when the defendants obtained personal information “as part of an effort to establish that the plaintiff did not primarily reside at his home,” which was pertinent to a proceeding before the Housing Court The court assumed, without deciding, that the standard of *Pichler* (requiring a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding) applied, and that the defendant satisfied that standard

C. State ‘Mini’ DPPAs

With the enactment of the DPPA, Congress chose not to expressly preempt state action in this field As a result, nearly every state has enacted its own version of the DPPA These versions vary widely Some states have adopted mini-DPPAs that nearly mirror the federal version Others have adopted shorter statutory enactments that omit large portions of the federal version, such as the remedy provisions

An overview of the various versions of the DPPA from all 50 states is outside the scope of this article Suffice it to say that care must be taken when dealing with the obtainment, use or disclosure of personal information from motor vehicle records, for some states have restricted the permissible uses governing that information and expanded the definition of personal information For example, New Mexico does not provide permissible uses corresponding to 18 U S C § 2721(b)(4) and (b)(8), and it severely restricts the operation of the permissible use under 18 U S C § 2721(b)(3)²⁹

Similarly, other state statutes have granted uses in addition to those mandated by the DPPA For example, certain states have altered the § 2721(b)(7) use noted above by permitting that use for other types of vehicles than those listed in the federal DPPA³⁰ Care must be taken when examining the reach of both the federal and corresponding state DPPAs because it is currently unresolved whether an entity that is using DPPA information for a more-expansive state use is, although complying with the state law, running afoul of the federal

D. Resale Or Rediscovery Of Driver’s And Motor Vehicle Records

The DPPA explicitly permits and regulates the resale and redisclosure of DPPA information

“An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)) An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12) Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request”³¹

Under the terms of the DPPA only an “authorized recipient” is permitted to resell or redisclose DPPA-regulated information The DPPA, however, does not define “authorized recipient”

The DPPA, § 2721(c), imposes only two requirements on entities that obtain DPPA information and resell or redisclose that information First, resellers must maintain records identifying the person or entity that received DPPA information and the permissible purpose for which the receiving person or entity will use that information The DPPA does not specify