IN THE SUPREME COURT OF IOWA

No. 17-1961

OTTUMWA POLICE DEPARTMENT and CITY OF OTTUMWA, IOWA,

Appellants,

versus

MARK LEONARD MILLIGAN,

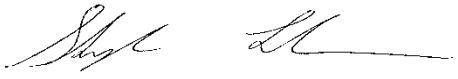
Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR
WAPELLO COUNTY
THE HONORABLE RANDY DEGEEST
NO. EQEQ110695

APPELLANTS' REPLY BRIEF

SMITH MILLS SCHROCK
BLADES MONTHEI P.C.

/s/ Dave Schrock
David E. Schrock, AT0006969



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ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING THE CITY TO PRODUCE RECORDS TO MILLIGAN.

A. The Driver's Privacy Protection Act (DPPA) applies to the City and RedSpeed.

Milligan argues that the DPPA regulates the authority of *State* motor vehicle departments, and does not apply to other government agencies. Milligan Brief at 23, 30-32. But Milligan misstates the law. In citing distinguishable and non-binding case law, his narrow view ignores well-settled Iowa case law; "the disclosure restrictions of the Act apply not only to state government, but also apply to persons or entities who have obtained the information from motor vehicle departments." Locate.Plus.Com, Inc. v. Iowa Dep't of Transp., 650 N.W.2d 609, 615 (Iowa 2002) (citing Reno v. Condon, 528 U.S. 141, 146 (2000)). Likewise, Milligan's argument that the DPPA "prescribes only the publication of personal information" has no merit.

Milligan also contends the vehicle owner records that RedSpeed accessed through NLETS are out of reach of the DPPA's prohibitions. Milligan Brief, 31-32. But Milligan's argument rests on his flawed impression of the facts and technology.

For background, the National Law Enforcement Telecommunications System (NLETS) is a non-public database owned by the States. (App. 376) (Trial tr. p. 65); NLETS http://www.nlets.org/ (stating NLETS is owned by the States). State motor vehicle departments input their records into the NLETS database, which is then made available to authorized users across the country. In Judicial Branch, State Court Adm'r v. Iowa Dist. Court For Linn Cty., 800 N.W.2d 569 (Iowa 2011) (abrogated on other grounds), the Court explained,

> …the Department of Public Safety (DPS) established a statewide system known as the Iowa on-line warrants and articles (IOWA) criminal justice information system. *See id*. § 692.14; Iowa Admin. Code r. 661–8.101.
>
> The IOWA system provides access to databases from various state agencies within Iowa, from the Federal Bureau of Investigation's National Crime Information Center (NCIC), and from the motor vehicle departments of other states nationally through the National Law Enforcement Telecommunications System (NLETS). Information on an international basis is also provided by NCIC and NLETS through interfaces to Canadian Police Information Centre and to INTERPOL. The NLETS system also provides administrative message traffic between Iowa criminal justice agencies and criminal justice agencies throughout the United States.

Judicial Branch, 800 N.W.2d at 574.

In this case, Lieutenant Hucks testified at trial that NLETS allows authorized users to "access to each state's individual system. For instance, the Iowa system here in this state." (App. 376) (Trial tr. p. 65: 12-18). But

"[t]he State has control and access through the DOT in Iowa." (App. 377) (Trial tr. p. 66). To view State motor vehicle records corresponding to a license plate, authorized users simply access the database through a portal. The City and its agent, RedSpeed, use NLETS to obtain the state-owned motor vehicle records to identify registered owners for automated traffic enforcement. This is no different than other municipalities in Iowa with ATE. See e.g., Behm v. City of Cedar Rapids, 898 N.W.2d 204, 2017 WL 706347 (Iowa Ct. App. 2017) (unpublished, table) (recognizing the City of Cedar Rapids and ATE vendor Gatso identify vehicle owners through NLETS database access).

In short, the database is owned by the States, motor vehicle departments input records into the database, and then make those records available to authorized users through a portal. The States own the records. The City and RedSpeed simply use NLETS to retrieve the state-owned motor vehicle records to identify the registered owner for ATE. Hence, Milligan's argument is fundamentally flawed.

B. The DPPA Prohibits Disclosure or Otherwise Making Available "Personal Information" to Any Person Unless for a Permissible Use.

The Iowa Freedom of Information Council (IFOIC) argues that the information gathered by the City under its ATE Ordinance is exempt from

the confidentiality provisions of the DPPA and Iowa Code section 321.11(2). IFOIC Brief at 11. Simply because the City and RedSpeed obtained "personal information" from DMV records doesn't mean that the City may disclose the information it obtained to an Open Records requestor. IFOIC's argument, like Milligan's, ignores the DPPA's express prohibition on disclosing or making available personal information. Under the statute, "A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity...personal information…about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section…" 18 U.S.C. § 2721(a), (1); see also 18 U.S.C. § 2722 ("It shall be 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." (emphasis added)). What's more, Milligan and IFOIC ignore Iowa Code section 321.11(1)'s prohibition on disclosure to a requestor unless permitted under 18 U.S.C. § 2721. See Locate.Plus.Com, 650 N.W.2d at 615; Iowa Code section 321.11(1). Notably, to respond an Open Records request would constitute a "disclosure" under section 2721. See 18 U.S.C. § 2721.

Moreover, just because the City may have the identified the names of vehicles' registered owners through NLETS doesn't mean that Milligan, who did not have the names in the first place, is entitled to disclosure of this "personal information" from the City. Nothing in the DPPA or Iowa Code expressly requires the City to make this information available, and the use requirements of section 2721(b) still apply. It follows that Milligan had to (1) provide the City with facts to establish that he met the specific requirements under 18 U.S.C. § 2721(b), and/or (2) show a permissible use under that section. See Locate.Plus.Com, 650 N.W. 2d at 616-617 (identifying and discussing the specific categories of permissible users of confidential information and their associated permissible uses). The undisputed record evidence shows Milligan offered no consent from the individuals on the DOT privacy act agreement form, App. 186-189, and no use authorized under the DPPA, therefore his argument is meritless. See 18 U.S.C. § 2721(b)(11); Iowa Code section 321.11(2) (2017) (requiring State to have the express written consent of a person to release their confidential personal information to a requestor).

Here, NLETS was only able to disclose "personal information" from State department of transportation records, such as a registered owner's name, to the City because the City had a permissible use; ATE (law

enforcement). See e.g., 18 U.S.C. § 2721(b)(1), (4), (14). Milligan had no permissible use. Notably, Milligan and IFOIC suggest that RedSpeed could not access the personal information from the DMV records, however, this argument disregards the text of the statute. See 42 U.S.C. § 2721(b)(1) ("For use by any government agency, including any court or law enforcement 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.") RedSpeed was an agent of the City. (App. 80-96).

C. To Disclose or Obtain Confidential Records Would Risk Liability.

As pointed out in the City's brief and the Iowa League of City's Amicus Brief, to disclose the names of registered owners that the City and RedSpeed only obtained by accessing State DMV records through NLETS would open the City and its employees up to both criminal and civil liability under the DPPA. 18 U.S.C. § 2723; 18 U.S.C. § 2724. To add to the League's well-reasoned points, no exemption is found in the DPPA for a municipality to comply with state freedom of information statutes in a case such as this, and no such express statute exists under Iowa law. See League Brief at 18. If this Court adopted Milligan's arguments, that would put the City in the awkward position of having a defense under state law but not federal law. Also, the City would run the risk of receiving administrative

sanctions, such as losing access to the Iowa System or NLETS, which would criple the City's law enforcement capabilities.

In short, the City was in an impossible position, surrounded by risk on all sides. If the City responded to Milligan's request with the names of registered owners who were or were not issued citations – even though that isn't what he requested – the City would risk litigation and liability in actions brought by federal and state governments, criminal prosecutors, third-parties, in addition to losing access to an essential law enforcement tool. Without access, the City would not be able to engage in ATE.

Additionally, if Milligan obtained the names, he would also risk liability. See e.g., McDonough v. Anoka Cty., 799 F.3d 931, 945 (8th Cir. 2015) ("It is clear that under § 2724, obtaining drivers' information without a permissible purpose, regardless of whether that information is subsequently used, violates the DPPA.")

D. This Court Should Pass On Milligan's Policy Arguments.

Milligan argues "The refusal by the Police Department and the City to produce these 'RedSpeed' records impedes the transparency of police department activities in enforcing Municipal Code § 23-13.2."[12] Milligan

[1] The police department is not a legal entity; it is a department of the City, a municipal corporation.
[2] The records Milligan describes as "RedSpeed records" are not owned by RedSpeed, they are Department of Motor Vehicle records. Again, RedSpeed simply accessed the State's records found in the NLETS database.

Brief at 31. But his policy arguments lack merit in that Congress, in enacting the DPPA, established the policy of the land. It is not the role of the courts to second-guess Congress. See Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223, 235 (Iowa 2018) ("Any [further] determination on the merits of the policy arguments is not for the court, but the political organs of government by an informed electorate."); In re K.N., 625 N.W.2d 731, 734 (Iowa 2001) ("The role of courts is only to interpret statutes, not second-guess the underlying policies."). Milligan should direct his transparency argument at Congress, not this Court.

E. This Court Should Reject Milligan's Meritless Contentions regarding Driving Violations

Milligan contends driving violations and a driver's status are not personal information, and, therefore, not protected under the DPPA. Milligan Brief at 27. Milligan points to Camara v. Metro-N. R. Co., 596 F. Supp. 2d 517 (D. Conn. 2009). There, a government employer, Metro-North was sued by employees under the DPPA. Id. at 523. In relevant part the court noted, "As Metro–North repeatedly points out, in requesting the driving histories of Camara and its other employees, it [Metro-North] provided the Connecticut DMV with the employees' names, addresses, birth dates, driver's license numbers, and license classes. Consequently, when the DMV sent Metro–North driving histories containing the employees' names

and license numbers, it provided no personal information it had not received from Metro–North in Metro–North's original request." Id.

Camara and this case are easily distinguished. Most importantly, Metro-North already had the confidential personal information, the names of its employees, in its possession when Metro-North requested information from the Connecticut DMV, whereas Milligan sought names – "personal information" he did not have – from the City as part of his request. See Camara 596 F. Supp. 2d at 523 (noting "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."). Thus, this case is just the opposite of Camara. As such, Milligan's reliance on Camara is misplaced.

Milligan also misconstrues Camara in that the court reasoned the DPPA didn't apply in those particular circumstances because Metro-North already had all of the information that the Connecticut DMV had. With that information in hand, including the names of individuals, Metro-North could request and receive the individuals' driving history, such as traffic violations, without triggering the DPPA. Camara 596 F. Supp. 2d at 523. Notably, there was no risk of frustrating the purpose of the DPPA in Camara.

Additionally, Milligan cites the Arkansas Supreme Court's opinion in Arkansas State Police v. Wren, 491 S.W.3d 124, 2016 Ark. 188 (Ark. 2016), and the Wisconsin Court of Appeals' opinion in New Richmond News v. City of New Richmond, 881 N.W.2d 339, 370 Wis. 2d 75 (Wi. Ct. App. 2016). Milligan Brief at 26, 29-30. But these decisions are dissimilar from this case. The courts in Wren and New Richmond examined whether requests for entire "accident reports" were properly considered to be requests for confidential and protected information, whereas this case concerns Milligan's written request for the names of individual drivers accessed through NLETs. Further, to a considerable degree, the courts in both Wren and New Richmond decided the cases on their state open records statutes rather than provisions of the DPPA.

Notably, the court in New Richmond observed,

> there is a factual dispute regarding whether the redacted information in the incident report was obtained from department of motor vehicle (DMV) records, or merely verified using those records. If the redacted information was obtained from other sources and was only verified using DMV records, it is not protected by the DPPA in the first instance. We therefore direct the circuit court on remand to determine, as a threshold matter, whether the redacted information in the incident report was obtained from DMV records.

New Richmond, 881 N.W.2d at 343. Thus, New Richmond suggests that if law enforcement obtained the "personal information" from DMV records,

then the DPPA would apply. Here, the City did not have the names of registered owners. It and RedSpeed had to get the names from access to the NLETS database, where the records were located, which the City did. As such, the DPPA applies. Therefore, Milligan's reliance on dissimilar out-of-state opinions is out of place.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING UNREASONABLE AND EXCESSIVE ATTORNEY FEES AND COSTS TO MILLIGAN.

Milligan argues that "[t]he relevant market rate is not confined to Ottumwa, Iowa, nor the entire state of Iowa, because attorneys from the surrounding metropolitan areas in the Midwest regularly appear in Iowa courts in many cases." Milligan Brief at 37. But this argument flies in the face of the realities of this case. This is not a matter where an attorney from out-of-state represented Milligan; Milligan's counsel is from Ottumwa. Thus, the market rate should be confined to Ottumwa.

Citing Mathur v. Board of Trustees of Southern Illinois Univ., 317 F.3d 738 (7th Cir. 2003), Milligan contends that the district court correctly did not reduce his hourly rate of $400. But Mathur is distinct as it was an employment discrimination and retaliation case. It is well known among practitioners that these cases are much more complicated, resource consuming, and difficult to litigate than Open Records litigation. Further,

employment discrimination and retaliation cases are tried at law, almost always to a jury, whereas Open Records cases are usually tried in equity to the court. Notwithstanding the vast differences between the two types of litigation, Mathur cuts against Milligan's argument.

Milligan emphasizes "just because the proffered rate is higher than the local rate does not mean that a district court may freely adjust that rate downward." Milligan Brief at 38 (quoting Mathur, 317 F.3d at 743). Milligan misses the boat. The hourly rate is based on the "prevailing market rates in the relevant community."). See Dutcher v. Randall Foods, 546 N.W.2d 889, 896 (Iowa 1996) (internal citations omitted). Where the rate claimed is higher than the prevailing market rate in the relevant community, as in this case, this Court should hold that the attorney seeking the higher rate must submit evidence for the district court to consider the attorney's experience in the particular area of litigation, such as Open Records litigation, otherwise the district court must reduce the high rate. This promotes transparency, provides guidance to the bar and district court, and ensures that fee awards are reasonable under the statute.

Additionally, Milligan argues Mathur recognizes, "[a]n attorney may charge higher than the community's average if she possesses an *unusual* amount of skill, the ability to empathize with the jury, investigative abilities,

or other qualities which command a premium. *However, if the district court decides that the proffered rate overstates the value of an attorney's services, it may lower them accordingly*." Mathur, 317 F.3d at 743 (emphasis added). Here, the district court made no findings that Milligan's counsel possessed an "unusual amount of skill." There was no record evidence to support such a finding, especially in Open Records litigation. As highlighted in the City's brief, the district court has the power to cut the rate. This Court should reaffirm that proposition, and hold that the district court should not rubberstamp fee award requests.

Next, Milligan contends "lawyers who fetch above-average rates are presumptively entitled to them, rather than to some rate devised by the Court." Milligan Brief at 37 (citing Gusman v. Unysis Corp., 986 F.2d 1146, 1150 (7th Cir. 1993). But Milligan's argument assumes that his counsel receives above-average rates. While $400 per hour is undoubtedly "above-average", there is no record evidence to support his contention.

Similarly, Milligan's argument that his fees "should be in line with those fees traditionally received by the lawyer from fee-paying clients" doesn't help his case. Milligan Brief at 36 (citing McDonald v. Armontrout, 860 F.2d 1456, 1459 (8th Cir. 1998). There is no record evidence of what

Milligan's counsel received in any cases, particularly Open Records cases. One has to wonder why. Thus, this Court should substantially cut his rate.

Additionally, Milligan's counsel argues that he took a substantial risk that he would recoup no money for his services because his client wouldn't have to pay if he did not prevail. Milligan Brief at 37. But he chose to not charge Milligan, which he could have done. Moreover, he seemingly mitigated this risk by filing several lawsuits.

Milligan's arguments are inconsistent with the purpose of the attorney fee statute. In City of Riverdale v. Diercks, 806 N.W.2d 643, 645 (Iowa 2011), the Court observed that statutory attorney-fee awards motivate lawyers to step up and fight city hall on behalf of residents whose elected officials refuse requests for disclosure. But a reasonable attorney fee award was not intended under the statute to be turned into a windfall for an attorney. A $57,315.75 attorney fee award at $400 per hour for Milligan's attorney, who introduced no proof he ever received anywhere close to that from paying clients or in any prior Open Records fee awards is most certainly a windfall.

Additionally, this Court should be mindful of the message such a rate and award – if upheld – would send to the bar, the public, and municipalities in difficult situations, such as the City in this case. The award encourages

questionable attorney billing practices as there is a lack of checks and balances, particularly in a case such as this where the district court rubberstamps an application and exercises no discretion. There is little risk for counsel that Milligan would review counsel's bill or even complain about it because the City is footing the bill. What's more, this hefty award is far more than the median income of an Iowan for the entire year. The median yearly earnings for a male in Iowa as of 2016 was $49,385, and for a female was $37,791. Iowa State Data Center Quick Facts (https://www.iowadatacenter.org/quickfacts#section-3). The award is also significantly higher than the median household income for Ottumwa, Iowa residents. According to the U.S. Census Bureau, the median household income in 2016 dollars for Ottumwa, Iowa was $38,090. U.S. Census Bureau Quick Facts Ottumwa, Iowa (https://www.census.gov/quickfacts/fact/table/ottumwacityiowa/PST04521). This suggests the excessive nature of Milligan's award. Also, municipalities running the risk of awards such as this would have their backs against the wall and could effectively be forced to bring litigation, defend litigation, or settle, particularly when there is an open question or matter of first impression. Fee awards were not intended to be a sword against

municipalities, which is unfair and unjust. Simply put, this Court should carefully consider the implications of upholding such a hefty fee and award.

Finally, the League of Cities argued that this Court should provide guidance for cases where the requestor "won" the race to the courthouse. League Brief at 34 (citing Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 671 (Iowa 1992)). The City agrees with the League. Just ten days after the City responded to Milligan's Open Records request, he brought his claim in district court. Open Records cases should not be a race to the courthouse, especially when the City was in the process of working with the IPIB to address the matter out of court. (App. 446). Thus, this Court should provide guidance, including as to whether fee awards are available when the requestor races to the courthouse.

CONCLUSION

The district court should not have concluded the City violated the Open Records Act in declining to provide Milligan records pursuant to the Driver's Privacy Protection Act and Iowa Code section 321.11. In constructing and interpreting the law, the district court erred by failing to follow the plain language of the law and well-established maxims. The court essentially rewrote the law and rendered textual provisions surplusage.

Moreover, the district court erred in applying the law to the facts. The court's ruling was inconsistent with its own findings of fact and Milligan's records request. This Court must reverse the district court's ruling.

This Court should reverse the award of attorney fees and costs because Milligan failed to meet his burden of proof, and because the district court's decision was not supported by substantial record evidence.

The district court abused its discretion by awarding Milligan unreasonable attorney fees and costs. Despite the City's detailed contentions, the district court made no reductions in Milligan's award. The court simply rubberstamped Milligan's application without detailed findings of fact or sufficient analysis. Moreover, the court improperly weighed factors in Milligan's favor, despite Milligan's failure to introduce sufficient evidence to support his application. In considering the attorney fee and cost issue, the City requests this Court to clarify the factors and provide clear guidance for the future.

PROOF OF SERVICE

The undersigned certifies that on the 24th day of August, 2018, he served the Appellants' Reply Brief on counsel for the Appellee electronically using the EDMS. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of the Iowa Court Rules.

Skylar Limkemann

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 3,667 words, excluding the parts of the brief exempted.

2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2013 in Times New Roman 14 point type.