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**IN THE IOWA SUPREME COURT**

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**NO. 17-1961**

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**MARK LEONARD MILLIGAN,**

**Plaintiff/Appellee,**

**vs.**

**OTTUMWA POLICE DEPARTMENT and CITY OF OTTUMWA,  
IOWA,**

**Defendants/Appellants.**

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

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**AMICUS CURIAE BRIEF OF THE IOWA FREEDOM OF  
INFORMATION COUNCIL**

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## **STATEMENT OF IDENTITY OF THE AMICUS CURIAE**

The Iowa Freedom of Information Council is a coalition of journalists, librarians, lawyers, educators and other Iowans who are devoted to open government. It is among the oldest statewide freedom-of-information organizations in the country.

## **STATEMENT OF THE INTEREST OF THE AMICUS CURIAE IN THE CASE**

The Iowa Freedom of Information Council is a staunch advocate for open government and believes, as Justice Hugo Black wrote, “[t]he press was protected [in the Constitution] so that it could bare the secrets of the government and inform the people.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring). The Iowa Open Records Act, Chapter 22, Iowa Code, is a key to that mission. The Iowa FOI Council was one of the driving forces promoting adoption of the law by the Iowa General Assembly, as well as some of its amendments. The Iowa FOI Council has a significant interest in the application and interpretation of the Iowa Open Records Act.

## **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**

#### **The district court was correct when it held that records from the City of Ottumwa Automatic Traffic Enforcement Program are public records and are governed by chapter 22 of the Iowa Code**

The issue before this court is whether or not the Driver's Privacy Protection Act (DPPA), 18 U.S.C. § 2721 et seq.<sup>1</sup> (as well as similar provisions of Iowa Code Section 321.11<sup>2</sup>) take precedence over or create an exception to chapter 22 of the Iowa Code, and its policy that records maintained by Iowa governments are to be free and open to inspection. This court is called upon to interpret section 321.11 and 18 U.S.C. § 2721, as well as their relationship to chapter 22 of the Iowa Code.

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<sup>1</sup>This court has stated that the DPPA was adopted in response to public safety concerns over access by stalkers and other criminals to personal information maintained by state motor vehicle departments. *See, Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 614 (Iowa 2002).

<sup>2</sup>[O]ur legislature amended section 321.11 to provide that records of the Department of Transportation are open to public inspection except "those made confidential and not permitted to be open" under the DPPA. *Locate.Plus.Com, Inc.*, 650 N.W.2d at 615.

The Iowa Open Records Act (Iowa Code chapter 22) generally requires state and local entities to make their records available to the public. See Iowa Code §§ 22.1(3), .2(1). “The purpose of the statute is ‘to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.’” *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (quoting *Rathmann v. Bd. of Dirs.*, 580 N.W.2d 773, 777 (Iowa 1998)). We have said the Act establishes “**a presumption of openness and disclosure.**” *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996); see also *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012).

*Iowa Film Prod. Servs. v. Iowa Dep’t of Econ. Dev.*, 818 N.W.2d 207, 217–18 (Iowa 2012)(Emphasis added). As the court applies chapter 22 and the detailed exceptions which it contains,

. . . we are guided by several well-established principles. There is a presumption in favor of disclosure under our freedom of information statutes. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011); *Ne. Council on Substance Abuse, Inc. v. Iowa Dep’t of Pub. Health*, 513 N.W.2d 757, 759 (Iowa 1994). Although we should not thwart legislative intent, the specific exemptions contained in freedom of information statutes are to be construed narrowly. *Ne. Council on Substance Abuse, Inc.*, 513 N.W.2d at 759. Freedom of information acts establish a liberal policy in favor of access to public records. *City of Dubuque v. Tel. Herald, Inc.*, 297 N.W.2d 523, 526 (Iowa 1980), superseded by statute, Iowa Code § 22.7(18) (1985), as recognized in *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979).

*Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012).

The DPPA prohibits the release of “personal information” about any individual

by a state department of motor vehicles<sup>3</sup>. 18 U.S.C. 2725(3) defines “personal information”:

(3) “personal information” means information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.

There are exceptions to the prohibition on release of information:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions . . . .

(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.

18 U.S.C. §2721(b)(1), (4). Section 321.11 of the Iowa Code incorporates the exceptions in the DPPA. “2. Notwithstanding subsection 1, personal information shall not be disclosed to a requester, except as provided in 18 U.S.C. § 2721 . . . .” Iowa Code § 321.11(2).

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<sup>3</sup>In this case, it is the City of Ottumwa that has the information regarding persons who have been cited for violations of its ATE Ordinance and not the Iowa Department of Transportation. The ATE Ordinance specifically provides, “In no event will an automated traffic citation be sent or reported to the state department of transportation or similar department of any other state for the purpose of being added to the vehicle owner’s driving record.” Ottumwa, IA Code of Ordinances §23-9(c)(3).



Section 321.236 authorizes local governments to adopt ordinances to enforce the traffic laws of the state of Iowa:

In this provision [section 321.236], the legislature has expressly authorized local governments to establish rules of conduct related to rules of the road. The legislature used no words of limitation in the section. Further, as pointed out by the City, the legislature in other sections of the Code has authorized municipal action over traffic subjects not contained in section 321.236. See, e.g., Iowa Code §§ 321.255 (traffic devices), 321.273 (traffic reports), 321.293 (speed). We do not regard the fourteen categories in Iowa Code section 321.236, therefore, as exclusive or as overriding the general command of Iowa Code section 321.235 that authorizes additional traffic regulations where they are not contrary to or inconsistent with state law.

*City of Davenport v. Seymour*, 755 N.W.2d 533, 542 (Iowa 2008).

When it created an Automated Traffic Enforcement program (ATE), the City of Ottumwa adopted an Ordinance (currently Ottumwa, IA Code of Ordinances §23-9 (2018)). The Ordinance is very similar to one reviewed by this court in

*City of Davenport v. Seymour*. The Ordinance provides in relevant part:

*Automated traffic citation* shall mean a notice of fine generated in connection with the automated traffic enforcement system.

*Automated traffic enforcement contractor* shall mean the company or entity, if any, with which the city contracts to provide equipment and/or services in connection with the automated traffic enforcement system.

*Automated traffic enforcement system* shall mean an electronic system consisting of a photographic, video, or electronic camera and a vehicle sensor installed to work in conjunction with an official traffic controller or police department employee to automatically produce photographs, video or digital images of each vehicle violating a standard traffic control device or speed restriction.

Ottumwa IA Code of Ordinances §23-9(b). Notice of violation is mailed to the owner of the vehicle involved:

. . . The notice shall include the name and address of the vehicle owner; the vehicle make, if available and readily discernable, and registration number; the violation charged; the time; the date; and the location of the alleged violation; the applicable fine and monetary penalty which shall be assessed for late payment; information as to the availability of an administrative hearing in which the notice may be contested on its merits; and that the basis of the hearing in which the notice may be contested on its merits; and that the basis of the notice is a photographic record obtained by an automated traffic enforcement system.

*Id.*, §23-9(d)(1). There is a schedule of civil fines. The Notice can be contested by the vehicle owner before an impartial administrative appeals board. The owner also has the right to contest the Notice in small claims division of the Iowa district court. *Id.*, §23-9(e)(2).

The information which the City of Ottumwa has gathered about a vehicle owner alleged to have violated the ATE ordinance is used by an agency of government to carry out one of its functions: enforcement of traffic laws within the city limits of the City of Ottumwa. See, Subsection (b)(1) of 18 U.S.C. 2721. Under Iowa law local government is allowed to use its police powers to enforce the state's traffic regulations. The City of Ottumwa takes the information gathered, including but not limited to the name of the owner of the vehicle involved in the alleged violation, for the purposes of enforcing the

Ordinance. The information is being used for a government function. The information gathered by the City of Ottumwa pursuant to its ATE Ordinance is exempt from the confidentiality provisions of the DPPA and section 321.11(2) of the Iowa Code. Subsection (b)(4) of 18 U.S.C. 2721 states “personal information” is authorized “[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency . . . .” Citations issued by the City of Ottumwa in connection with its ATE program are part of an enforcement program and are records of the city government. Civil penalties are assessed depending upon the nature of the violation. The Notice can be contested using an administrative procedure or in court. Again, the information in the records regarding Notices issued pursuant to the City of Ottumwa ATE Ordinance, including a driver’s or owner’s name are within the exceptions of the DPPA and section 321.11(2) of the Iowa Code. The information is a public record and is subject to review by the public under the provisions of chapter 22 (the same as any other citation for a violation of an Ordinance in the Ottumwa, IA Code of Ordinances).

### **CONCLUSION**

The Driver’s Privacy Protection Act (DPPA), 18 U.S.C. § 2721 et seq. and companion provisions of Iowa Code Section 321.11 do not exempt

information gathered by the City of Ottumwa in connection with its ATE program. The records are subject to the provisions of Chapter 22 of the Iowa Code. The public should have access to the information, including the names of owners of vehicles, to whom Notice has been issued pursuant to the City of Ottumwa ATE program.

The decision of the district court was correct, and it should be affirmed.

Respectfully submitted,

I O W A F R E E D O M O F  
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
REQUIREMENTS**

1. This brief complies with type-volume limitations contained in Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains **1,883** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with typeface requirements of Iowa R. App. P. 6.903(1)(e) and type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface, namely Times New Roman 14 point font / WordPerfect®.

/S/ George F. Davison, Jr.  
George F. Davison, Jr.

**PROOF OF SERVICE AND CERTIFICATE OF FILING**

I hereby certify that on **July 19, 2018**, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification to the parties of record.

/S/ George F. Davison, Jr.  
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