

# HON. JENNIFER L. WESTON

STATE OF WISCONSIN

CIRCUIT COURT

JEFFERSON COUNTY

MATTHEW KITTLE,  
214 N. Henry St.  
Suite 207  
Madison, WI 53703

JEFFERSON CO CIRCUIT COURT  
AUTHENTICATED COPY  
**FILED**

**FEB 27 2015**

BY SK  
NO. \_\_\_\_\_ Clerk (Dep.)

Petition for Writ of Mandamus

Case Code: 30952

Case No. 15-CV-77

Plaintiff,

v.

JEFFERSON COUNTY  
SHERIFF'S DEPARTMENT,  
411 South Center Ave.  
Jefferson, Wisconsin 53549

Defendant.

## SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, 311 S. Center Ave., Room 115, Jefferson, WI 53549**, and to Wisconsin Institute for Law & Liberty, Plaintiff's attorney, whose address is: **1139 East Knapp Street, Milwaukee, WI 53202**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 24th day of February, 2015.

Respectfully submitted,  
WISCONSIN INSTITUTE FOR  
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**PETITION FOR WRIT OF MANDAMUS AND  
COMPLAINT FOR DECLARATORY JUDGMENT**

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Plaintiff Matthew Kittle, by his attorneys, the Wisconsin Institute for Law & Liberty, as a  
Complaint against Defendant Jefferson County Sheriff's Department, alleges to the Court as follows:

**FACTUAL ALLEGATIONS**

1. This action seeks to compel the release of records under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31 – 19.39. The Defendant unlawfully redacted information from records requested by the Plaintiff. This action also seeks a declaration that the Defendant may not require record requesters to use a particular form to make requests.

2. Plaintiff Matthew Kittle is an adult citizen of the State of Wisconsin and the bureau chief for Wisconsin Reporter, a project of the Franklin Center for Government and Public Integrity. In that capacity, he is an investigative reporter covering policy and politics in Wisconsin. His address is 214 North Henry Street, Suite 207, Madison, Wisconsin 53703.

3. Defendant Jefferson County Sheriff's Department has its official office at 411 South Center Avenue, Jefferson, Wisconsin 53549.

4. As a "local office" or "department," the Sheriff's Department is an "authority" under Wis. Stat. § 19.32(1).

5. This Court has jurisdiction over the petition for a writ of mandamus under Wis. Stat. § 19.37(1)(a).

6. This Court has jurisdiction over the request for declaratory judgment under Wis. Stat. § 806.04 in that: (a) there is a controversy between the parties as to the legal propriety of the form the Sheriff's Department requires record requesters to use; (b) the interests of the Plaintiff and the Defendant are adverse in that the Plaintiff believes the form is improper and the Defendant believes it is proper; (c) the Plaintiff has a legally-protected interest in being able to make record requests without having to use an unlawful form; and (d) the controversy is ripe for determination in that the Defendant has used, is using, and plans to continue to use that particular form and the Plaintiff intends to make record requests of the Defendant in the future.

7. Venue is proper in Jefferson County pursuant to § 801.50(2)(a), (b), and (c). The claim arose in Jefferson County, the personal property that is the subject of this claim (the records), are located in Jefferson County, and the Defendant does substantial business in Jefferson County.

8. On July 9, 2014, a Germantown kindergarten teacher was issued a citation by a Jefferson County Sheriff's deputy for disorderly conduct after she destroyed property belonging to a GOP group who had a booth at the Jefferson County Fair.

9. On or about July 21, 2014, Kittle called the Sheriff's Department and asked for copies of the incident report and citation for the July 9<sup>th</sup> incident.

10. Tammy Young, who upon information and belief is the record custodian for the Sheriff's Department, informed Kittle during that phone call that the documents would be released on July 22, but information identifying the Germantown kindergarten teacher would be redacted due to a Jefferson County policy that had recently changed.

11. On July 22, 2014, Kittle sent an email to Tammy Young, formally requesting “the incident report and the subsequent citation for disorderly conduct . . . related to [the July 9<sup>th</sup> incident.]” A true and accurate copy of that email is attached as Exhibit A.

12. Attached to that email, Kittle included a filled-out form provided by the Sheriff’s Department titled “Federal Driver Privacy Protection Act (DPPA) Permissible Uses/Request Form” (the “Form”). A true and accurate copy of the submitted form is attached as Exhibit B.

13. On the form, Kittle did not check any of the boxes indicating which exception to the DPPA he was requesting the information under. Instead, he wrote a new box and checked it, writing “Reporter, seeking information that is public under Wisconsin’s open records law”

14. Also attached to that email, Kittle included a letter from the Wisconsin Institute for Law & Liberty (“WILL”) explaining why “law enforcement agencies may not redact identifying information from citations, reports, and the like when responding to open records requests.” A true and accurate copy of that letter is attached as Exhibit C.

15. On or about August 4, 2014, the Sheriff’s Department responded to Kittle’s request by providing copies of several documents related to the July 9<sup>th</sup> incident.

16. However, the records were heavily redacted, removing all identifying information of the kindergarten teacher, her husband, and the complaining witness. Names, dates of birth, phone numbers, addresses, race, height, weight, driver’s license number, hair color, eye color, and vehicle plate numbers were all blacked out. One page had the vast majority of information redacted with large black boxes, making it unclear exactly what had been redacted.

17. On a cover letter sent from the Sheriff’s Department with the records, the following statement was checked:

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.

## **FIRST CLAIM – Writ of Mandamus to Produce Records Without Unlawful Redaction**

18. The preceding paragraphs are hereby incorporated and realleged as if fully stated herein.

19. Under Wis. Stat. § 19.31, it is the declared public policy of this state that every citizen is entitled to the greatest possible information regarding the affairs of government. The statute provides that “[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied, establishing a presumption of complete public access to government records, consistent with the conduct of governmental business.”

20. Wis. Stats. § 19.35(1)(a) and (b) provide that “any requester has a right to inspect any record” and “to make or receive a copy of a record.”

21. Subject to certain qualifications, Wis. Stats. §19.32(2) defines a record as “any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or kept by an authority.”

22. The incident reports and citation requested by Kittle were written documents on which information is recorded or preserved, both created and kept by the Sheriff’s Department. Therefore, the incident reports and citations are “records.”

23. The Open Records Law contains no exception permitting or requiring the redaction of information that would identify a person issued a citation for disorderly conduct.

24. The DPPA is a federal law that generally prohibits the “disclosure” of “personal information” obtained from a “motor vehicle record,” unless one of thirteen exceptions apply. 18 U.S.C. § 2721(a), (b).

25. In 2012, the *en banc* Seventh Circuit Court of Appeals concluded that the Village of Palatine, Illinois, had “disclosed” identifying information when one of its police officers had left a ticket containing the owner’s personal information under the windshield wiper of an illegally-parked car. *Senne v. Vill. of Palatine, Ill.*, 685 F.3d 597 (7th Cir. 2012) (cert. denied, 133 S. Ct. 2850, Jun. 24, 2013).

26. In response to *Senne*, many Wisconsin municipalities and counties, including Jefferson County, began wholesale redaction of information on incident reports and tickets that had previously been

routinely disclosed, because such information is typically either obtained or verified through the State DOT's driver database.

27. Those policies have severely hamstrung the ability of reporters, like Plaintiff, to report the basic facts of disturbances within their communities, such as the names of individuals issued tickets by the police. Efforts to combat the abuse of police powers have also been compromised by the inability of reporters to contact arrestees and witnesses.

28. Those policies are an overreaction not justified by *Senne*. The Seventh Circuit did not find the village liable for a DPPA violation, but instead remanded the case to the Northern District of Illinois to determine whether any of the exceptions to DPPA applied. *Id.* at 608-09. On remand, the lower court concluded that the police department's disclosure of the identifying information was *exempted* from the DPPA as "use by any government agency, including any court or law enforcement agency, in carrying out its functions." *Senne v. Vill. of Palatine*, 6 F. Supp. 786, 793, 797 (N.D. Ill. 2013) (appeal pending).

29. Another Wisconsin Circuit Court has recently concluded that the DPPA does not require redaction of identifying information provided in response to open record requests to law enforcement officials. In *New Richmond News v. City of New Richmond*, St. Croix County Case No. 13-cv-163 (Mar. 20, 2014) (appeal pending), the court concluded that such information was exempted from the DPPA under both the exception identified by the district court in *Senne* and another exception for "uses 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.'" *Id.* at \*7 (quoting 18 U.S.C. § 2721(b)(14)). A true and accurate copy of that decision is attached as part of Exhibit C.

30. Furthermore, in 2008, the Wisconsin Attorney General opined that the DPPA did not preclude the disclosure of personal information in response to an open records request, because such requests fall under a DPPA exception for carrying out enforcement functions, and responding to open record requests is a statutory function of law enforcement. Informal Opinion I-02-08 (2008).

31. The records requested here fall under both exceptions recognized by the *New Richmond News* court.

32. The Sheriff's Department is a "law enforcement agency" and one of its statutory functions is obeying the Open Records Law. *See* 18 U.S.C. § 2721(b)(1) (permitting disclosure "[f]or any use by any government agency, including any court or law enforcement agency, in carrying out its functions").

33. Responding to an Open Records Request is a use specifically authorized by Wisconsin law, and here the record is related to public safety as it concerns the violent and destructive actions of a person in a public space. *See* 18 U.S.C. § 2721(b)(14) (permitting disclosure "[f]or 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").

34. Furthermore, much of the information redacted appears likely to have been obtained from direct observation or communication at the scene (*e.g.*, the names of witnesses and the kindergarten teacher, the make and license plates of a vehicle). That information was not "obtained . . . in connection with a motor vehicle record" and therefore is not covered by DPPA.

35. Finally, the letter sent along with the redacted records failed to indicate what had been redacted according to the DPPA and what had been redacted under the balancing test. Nor did the letter explain the application of the balancing test any more than vague assertions of "unwarranted invasion into an individual's privacy." This clearly violates the Sheriff's Department obligations to set forth its reasons for redacting a record with specificity in order to determine whether the redactions are lawful.

36. By redacting the requested records, the Sheriff's Department partially denied Kittle's request.

37. A record requester whose request is unlawfully denied is entitled to a writ of mandamus compelling the custodian to release the requested record and awarding the requester his actual reasonable attorney fees, court costs, and statutory damages of \$100. Wis. Stat. § 19.97.

38. Defendant has violated Wis. Stat. § 19.35(1) by unlawfully redacting information from the requested records.

39. The Plaintiff is therefore entitled to a writ of mandamus compelling the Defendant to release the requested records without redaction.

**SECOND CLAIM – Declaratory Judgment that the Sheriff’s Department’s Form Is Unlawful**

40. The preceding paragraphs are hereby incorporated and realleged as if fully stated herein.

41. Several aspects of the Form that the Sheriff’s Department requires record requesters to use violate the open records law as well.

42. First, the very beginning of the Form states, “Based upon the Federal Driver’s Privacy Protection Act, this Request must be completed before information containing personally identifiable information in the police report can be released without redaction.”

43. But a requester cannot be forced to use a specific form. “No specific form is required by the public records law.” Wisconsin Attorney General, Wisconsin Public Records Law Compliance Outline, Sept. 2012, at 13. “[A] request must only reasonably describe the requested record or information requested.” *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23. “None of [the open record] statutes requires a request to contain any ‘magic words’ . . .” *Id.*

44. Second, the Form requires the requester to identify himself or herself by name, firm/corporation, phone number, and physical address.

45. But a requester does not need to identify himself to make an open records request. Wis. Stat. § 19.35(1)(i) (“[N]o request . . . may be refused because the person making the request is unwilling to be identified.”).

46. Third, the Form requires the requester to identify the purpose of his request by indicating which DPPA exception applies to the request. Nearly all of the exceptions relate to the particular use to which the record will be put.

47. But a requester does not need to identify the purpose for his or her request. Wis. Stat. § 19.35(1)(i) (“[N]o request . . . may be refused because the person making the request is unwilling to . . . state the purpose of the request.”).

48. Finally, the Form requires the requester to have a detailed understanding of the DPPA in order to justify release of the requested record. It does this in several ways. First, at the top of the Form it states, “Knowledge of what access and uses are permitted under the listed Federal Act is the responsibility of the requestor.” Second, the Form requires the requester be familiar enough with the DPPA to know which of the 13 exceptions his or her request falls under. Third, the Form requires the requester to certify by signature that the request complies with DPPA and that the requester understands he or she could be subject to civil and criminal penalties under DPPA.

49. But, under the Open Records Law, the requester does not have to establish that he or she has a legal right to the records sought. The law presumes open access and places the burden on the custodian to justify withholding a requested record or redacting information on that record. *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589 (1989).

50. Therefore, the Defendant’s requirement that record requesters use the Form is unlawful.

51. Defendant’s actions have caused and will continue to cause injury to the Plaintiff in that they required him, and will continue to require him for future requests, to undertake unnecessary and impermissible burdens in order to make a record request.

### **RELIEF REQUESTED**

WHEREFORE, the Plaintiff demands the following relief:

1. A writ of mandamus compelling the Defendant to provide the Plaintiff with unredacted copies of the requested records;

2. A declaration that the Defendant’s requirement that record requesters use the Form is unlawful;

3. Judgment awarding the Plaintiff reasonable attorney fees, actual costs, and damages under Wis. Stat. § 19.37(2); and

4. Such other relief as the Court deems appropriate.

Dated this 24th day of February, 2015.

Respectfully submitted,  
WISCONSIN INSTITUTE FOR  
LAW & LIBERTY  
Attorneys for Plaintiff



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