

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

RUTHELLE FRANK, et al., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as
Governor of the State of Wisconsin, et al.,

Defendants.

Civil Action No. 2:11-cv-01128 (LA)

**PLAINTIFFS' EXPEDITED NON-DISPOSITIVE MOTION UNDER LOCAL RULE 7(h)
FOR CLARIFICATION OF THE STIPULATED PROTECTIVE ORDER**

Plaintiffs respectfully request an order clarifying that the Stipulated Protective Order (“PO”) [Dkt. 268] entered on May 25, 2016 [Dkt. 269], permits Plaintiffs to use information produced by Defendants in discovery to contact a limited set of individuals whom Plaintiffs have identified as having personal knowledge of material issues in this case, and/or who may be class members. Plaintiffs notified Defendants of this contemplated use, and Defendants objected. *See* Declaration of Laurence J. Dupuis (“Decl.”) Ex. A. At a meet and confer on July 13, 2017, Plaintiffs offered to contact only those individuals who indicated in their Department of Transportation (“DOT”) records that they did not object to being contacted, Decl. ¶¶ 4-6. Defendants nevertheless objected. Defendants claimed that the use proposed by Plaintiffs may implicate Wis. Stat. §§ 85.103, 343.50(8), 939.61, as well as the Driver’s Privacy Protection Act (“DPPA”) (18 U.S.C. § 2721, *et seq.*). Decl. ¶ 6; Decl. Ex. A. Having been unable to resolve the issue, the Plaintiffs seek redress from this Court.

First, the PO’s limitations on use and disclosure do not apply here. The PO outlines the disclosure rules for “[a]ll information *designated* Confidential” and limits use of certain “*designated* Confidential” information. PO ¶¶ 2, 3. Defendants have not “designated” the relevant documents as “Confidential” in any way when producing them to Plaintiffs. *See, e.g.*, Decl. Ex. B.¹ Accordingly, the PO’s provisions limiting use and disclosure of the information do not apply to the undesignated documents at issue.

Second, even if the documents were considered “Confidential” under the PO, Plaintiffs’ contemplated use is permissible under its terms. The PO requires information designated Confidential be used only for “purposes of this litigation.” Dkt. 268 at ¶ 3. Plaintiffs intend to

¹ Although Defendants asserted that many of the documents “contain confidential information that is subject to the protective order in this case,” in an email notifying Plaintiffs of their completed document production, this perfunctory, blanket statement falls far short of a proper confidentiality designation that is based on a legitimate analysis of each, individual document. Decl. Ex. C.

use the information to communicate with individuals who may have information directly relevant to *this* litigation.² Decl. Ex. A. Accordingly, the PO permits the contemplated use.

Third, Defendants' assertion that Plaintiffs' contemplated use is prohibited under state and federal law is misguided. The PO states that "*the statutes are silent as to the circumstances under which*" the documents at issue "*may be disclosed to parties in litigation,*" making it explicitly clear that those statutes do *not* apply to the use of information in this litigation. PO at 1 (emphasis added). The DPPA is also silent as to disclosure of data in litigation and therefore does not prohibit its use for Plaintiffs' purposes. Plaintiffs received the documents pursuant to federal discovery rules³ as part of litigation and not under the disclosure scheme outlined by Section 343.50(8). Section 343.50(8) only restricts DOT from disclosing information to persons who received information under its provisions.⁴ § 343.50(8)(b) ("persons entitled to receive any record or other information *under [the] paragraph* shall not disclose the record or other information to other persons or agencies."). Furthermore, the DPPA's underlying purpose is to protect persons from "stalkers who went to motor vehicle bureaus to obtain the home addresses of their intended victims," *Senne v. Vill. of Palatine, Illinois*, 784 F.3d 444, 448 (7th Cir. 2015). This purpose is entirely distinct from Plaintiffs' intended use: to contact a limited set of individuals in connection with litigation of which they may well be class members.

² A completely separate provision prohibits the use of contact information for "purpose[s] *unrelated* to this litigation." Dkt. 268 at ¶ 3.

³ The Federal Rules of Civil Procedure do not restrict Plaintiffs' intended use of the information received during discovery. *See generally* Fed. R. Civ. P. 26-37.

⁴ The remaining statutes cited by Defendants, Wis. Stat. §§ 85.103 and 343.235 (Decl. Ex. A; Decl. ¶ 6), do not apply. Section 85.103 limits the DOT's disclosure of personal identifiers, does not refer to re-disclosure of information by parties other than DOT, and is silent as to use of information disclosed in federal litigation. Section 343.235 similarly limits the DOT's disclosure of personal identifiers and records, and requires those who have received the information under Section 343.235(3) keep that information confidential. Plaintiffs have not received information under Section 343.235, which applies primarily to law enforcement agencies, state authorities, district attorneys, or other enumerated agencies, as well as insurers, and thus Section 343.235's limitations do not apply to Plaintiffs. Because Plaintiffs' use would not result in any statutory violation, Wis. Stat. § 939.61, which imposes a penalty for certain statutory violations, also does not apply.

Last, the Seventh Circuit has made clear that plaintiffs have a “right” to “contact potential class members,” and that this right must be “careful[ly] balance[ed]” with the “potential for abuse” when issuing a protective order that may constrain it. *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 759 (7th Cir. 2000) (vacating a protective order that prohibited plaintiffs from contacting putative class members, because the district court had not carefully balanced the potential for abuse arising from plaintiffs’ communication with defendant’s former customers, with plaintiffs’ right to contact potential class members). Defendants’ incorrect reading of the PO impinges on this right, without the required careful balancing.⁵ This reading also restrains Plaintiffs’ and counsels’ First Amendment rights. As the Supreme Court has reflected that when “litigation is not a technique of resolving private differences” but a “form of political expression and political association,” restrictions on soliciting clients for such litigation improperly interferes on that constitutionally protected expression and association. *In re Primus*, 436 U.S. 412, 428-29 (1978) (finding discipline of an ACLU attorney based on a rule restricting solicitation of clients violated his First Amendment rights) (citation and quotations omitted).

Plaintiffs’ request for an order clarifying that they may use the materials that Defendants produced in discovery for the purpose stated herein should be granted.

⁵ In support of their position, Defendants cite *Balschmitter v. TD Auto Fin. LLC* (Decl. Ex. A), wherein the Court held a protective order prohibited plaintiffs from using personal information disclosed in discovery to contact those individuals. No. 13 Civ. 1186, 2015 WL 2451853, at *5 (E.D. Wis. May 21, 2015). But there, plaintiffs intended to use the information to mail nearly 200,000 notices to putative class members after certification had been denied. *Id.* at *6-8. The court found that plaintiffs’ efforts were likely a “ruse” to “identify new clients and thereby recoup money [p]laintiffs’ counsel ha[d] expended in [an] attempt to certify the class[.]” and expressed a concern that it raised “a risk of Court-sanctioned junk mail.” *Id.* at *7-8. Plaintiffs here are not seeking money damages, and wish to contact only about 20 individuals who are likely to have information directly relevant to this litigation.

Dated this 28th day of August 2017,

Respectfully submitted,

/s/ Alora Thomas

KARYN L. ROTKER
State Bar No. 1007719
LAURENCE J. DUPUIS
State Bar No. 1029261
American Civil Liberties Union of Wisconsin
Foundation
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
krotker@aclu-wi.org
ldupuis@aclu-wi.org

NEIL A. STEINER
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3822
neil.steiner@dechert.com

CRAIG G. FALLS
Dechert LLP
1900 K Street NW
Washington, DC 20006
(202) 261-3373
craig.falls@dechert.com

ANGELA M. LIU
Dechert LLP
35 West Wacker Drive, Suite 3400
Chicago, IL 60601
(312) 646-5816
angela.liu@dechert.com

DALE E. HO
ALORA THOMAS
SOPHIA LIN LAKIN
American Civil Liberties Union Foundation,
Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693
syoun@aclu.org
dale.ho@aclu.org
slakin@aclu.org

LAUGHLIN MCDONALD
American Civil Liberties Union Foundation,
Inc.
230 Peachtree Street, Suite 1440
Atlanta, GA 30303
(404) 523-2721
lmcdonald@aclu.org

TRISTIA BAUMAN
National Law Center on Homelessness &
Poverty
2000 M Street NW, Suite 210
Washington, DC 20036
(202) 638-2535
tbauman@nlchp.org

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, the Plaintiffs' Expedited Non-Dispositive Motion Under Local Rule 7(h) for Clarification of the Stipulated Protective Order was filed with the Clerk of the Court for the United States District Court for the Eastern District of Wisconsin by using the CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Sean Michael Murphy
Wisconsin Department of Justice
Office of the Attorney General
17 W Main St
PO Box 7857
Madison, WI 53707-7857
608-266-5457

Gabe Johnson-Karp
Wisconsin Department of Justice
Office of the Attorney General
17 W Main St
PO Box 7857
Madison, WI 53707-7857
608-267-8904

Jody J Schmelzer
Wisconsin Department of Justice
Office of the Attorney General
17 W Main St
PO Box 7857
Madison, WI 53707-7857
608-266-3094

Clayton P Kowski
United States Department of Justice (ED-WI)
17 W Main St
Madison, WI 53703
608-266-7477

Brian P Keenan
Wisconsin Department of Justice
Office of the Attorney General
17 W Main St
PO Box 7857
Madison, WI 53707-7857
608-266-0020

Attorneys for Defendants

/s/ Alora Thomas
Alora Thomas

General Information

Court	United States District Court for the Eastern District of Wisconsin; United States District Court for the Eastern District of Wisconsin
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	2:11-cv-01128