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APPEALS DIV I  
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STATE OF WASHINGTON  
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SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL GENDLER,

Respondent,

v.

JOHN BATISTE, WASHINGTON STATE PATROL CHIEF and  
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Petitioners.

AMICUS CURIAE BRIEF OF  
ALLIED DAILY NEWSPAPERS OF WASHINGTON and  
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION  
IN SUPPORT OF RESPONDENT

BY RONALD R. CARPENTER  
CLERK

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STATE OF WASHINGTON

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## I. INTRODUCTION

After a truck broadsided a small SUV last October in Freeland, Wash., injuring four people, the local deputy fire chief told a newspaper reporter: “That’s a scary intersection.” Noting that two people died in earlier accidents at the same poor-visibility spot, he said, “Something needs to be done.”<sup>1</sup> And perhaps, because of public attention to the danger, something will be done. Maybe lives will be saved.

The policy of open government is most important when it involves threats to public safety. Hazards are more likely to be fixed if they are discussed publicly, as in Kirkland, where the city responded to pedestrian fatalities by providing fluorescent flags at busy crossings, and as in Seattle, where a City Councilman’s Web site provides a forum for citizens to report unsafe intersections.<sup>2</sup> To conceal reports authored by police for investigative purposes, simply because another agency uses the reports for planning purposes, would contradict policies of openness and accountability and run afoul of the United States Supreme Court’s directive in Pierce County v. Guillen.

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<sup>1</sup> See: <http://www.seattlepi.com/default/article/Four-injured-in-T-bone-collision-at-notorious-900166.php>

<sup>2</sup> See: <http://www.seattle.gov/council/licata/crossings.htm> and <http://community.seattletimes.nwsourc.com/archive/?date=20060909&slug=flag09e>.

For more than 70 years, Washington state has required the State Patrol to collect and publish accident data “which may prove of assistance in determining the cause of vehicular accidents.”<sup>3</sup> The federal privilege at issue here, 23 U.S.C. 409, was not intended to cut off this state’s long tradition of relying on the Patrol for objective accident reports. Guillen established that 23 U.S.C. 409 cannot make records requesters worse off than they were before the statute was adopted in 1966. Thus, the federal law does not apply here, where an accident victim asked the Patrol how often other bicyclists were injured on the Montlake Bridge.

This case highlights why the State Patrol and other first-response agencies should reveal accident histories to the public. Perhaps if the public had known sooner about the gap in the bridge deck which caught Michael Gendler’s bicycle tire in 2007, it would have been fixed and he would not be in a wheelchair today. His injury was a matter of public interest because the same thing could happen to other people, and because Gendler accused the state of negligence. Disclosure of accident records in a negligence case aids the justice system’s search for truth and supports the aggrieved citizen’s right to petition the government for redress.

In sum, the Court of Appeals correctly recognized that State Patrol accident records serve important public purposes independent of state-

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<sup>3</sup> RCW 46.52.060.

federal highway safety planning. This Court should affirm the order for disclosure and award of fees under the Public Records Act.

## II. IDENTITY AND INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) is a trade association representing 120 weekly community newspapers throughout Washington. Both Allied and WNPA (“The Newspapers”) regularly advocate for public access to records in order to inform readers about matters of public concern. Newspapers frequently use government records as sources of information.

The Newspapers are interested in this case because accident records are important to readers, who should know which roads and bridges are unsafe in order to avoid hazards, and to evaluate the government’s handling of risks to public safety. Also, the Newspapers have an interest in effective functioning of this state’s courts, and believe that public access to the Patrol’s accident reports is essential to the handling of accident cases.

## III. DISCUSSION<sup>4</sup>

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<sup>4</sup> The Newspapers adopt the Restatement of the Facts in the Brief of Respondent.

The central issue is whether the Public Records Act, Chapter 42.56 RCW, prohibited the State Patrol from withholding accident reports for the Montlake Bridge unless Gendler promised not to use them in an action for damages. The Court of Appeals correctly held that the federal evidentiary privilege invoked by the Patrol did not justify the withholding. By its plain language, 23 U.S.C. 409 applies only to reports and data “compiled or collected *for the purpose of* identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions or railway-highway crossings, *pursuant to* sections 130, 144, and 148 of this title” (italics added), or for developing particular highway safety projects. Here, there is no question that the Patrol compiled the bridge data for its own purposes based on state law, not for federal purposes. Therefore, the privilege is inapplicable.

A. The Patrol Compiled the Records for Its Own Purposes.

The State Patrol consists of a chief and officers who are charged with “such police powers and duties as are vested in sheriffs and peace officers generally.” RCW 43.43.030. Its “primary function” is “the detection and apprehension of persons committing infractions or violating the traffic or criminal laws.” RCW 10.93.020(1). In short, it is a law enforcer, not a highway planner.

Since 1937, the State Patrol has been required to:

file, tabulate and analyze all accident reports and *to publish* annually...and monthly...statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof and other statistical *information which may prove of assistance in determining the cause of vehicular accidents.*

RCW 46.52.060 (italics added). Thus, for more than 70 years, the Patrol has had a statutory duty to “publish” accident statistics, by location, for the purpose of “determining the cause” of accidents. *Id.* And while the statute says the Patrol’s accident reports “shall be available to the directors of the departments of highways, licenses [and] public service...for further tabulation and analysis” relating to “highway traffic, highway construction, vehicle operators and all other purposes,” it does not charge the Patrol itself with analyzing data for highway-related purposes. *Id.* Rather, it simply says Patrol reports “shall be available” for other agencies to analyze for their own purposes. *Id.*

RCW 46.52.060 is dispositive. The plain language of 23 U.S.C. 409 limits its application to accident reports compiled for purposes of the federal Highway Safety Act of 1966. The U.S. Supreme Court has already established that the federal privilege “does not protect information that was originally compiled or collected for purposes unrelated to” the federal act, “and that is currently held by the agencies that compiled or

collected it.” Pierce County v. Guillen, 537 U.S. 129, 144, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003). That is precisely the situation here, where the State Patrol by law is the custodian of the records, and the records were originally compiled pursuant to state law for purposes of determining the cause of accidents.

B. The Legislature Rejected Giving Control of the Accident Database to the State Transportation Department.

The state suggests that the federal evidentiary privilege applies to the Gendler accident reports because in 2004, the State Patrol “transferred” its responsibility for producing reports under RCW 46.52.060 to the state Department of Transportation (DOT) through a memorandum of understanding. Supplemental Brief of Petitioner, p. 9. In essence, the state is attempting an end run around the Legislature. In 2003, just after Guillen was decided, the DOT asked the Legislature to amend RCW 46.52.060 so as to transfer all accident reporting duties from the State Patrol to the DOT. Appendix 1, HB 1482. The bill did not pass.

By arguing that the agencies accomplished by contract what the Legislature declined to do by statute, the Patrol and DOT are asking this Court to sidestep the policymaking process. There is no authority for recognizing a contract as a transfer of statutory responsibilities. Contracting out data processing – whether to a private contractor or DOT

– does not alter the Patrol’s status as custodian of the accident records, as the Court of Appeals properly recognized. Gendler v. Batiste, 158 Wn.App. 661, 670 (2010) (the contract itself stated that reports remained the “property of WSP”). Accordingly, the “transfer” argument should be rejected.

C. This Court’s Guillen Decision Was Reversed.

In arguing for reversal, the Patrol and DOT rely almost exclusively on this Court’s 2001 decision in Guillen, 144 Wn.2d 696, 31 P.3d 628. Supplemental Brief of Petitioner, pp. 11-19. But that decision was reversed by the United States Supreme Court after this Court expressly sought its instruction, as follows:

If this state court has misconstrued the United States Constitution’s limitations upon the federal government’s power to intrude upon the exercise of state sovereignty in so fundamental an area of law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads, we are confident that the United States Supreme Court will so instruct, as is its constitutional role under our federalist system of government.

144 Wn.2d at 745. The U.S. Supreme Court reversed this Court’s constitutional analysis as well as its interpretation of 23 U.S.C. 409. Guillen, 537 U.S. at 144-147. It is that latter decision, therefore, which should guide this Court’s present analysis.

Of particular relevance here, the U.S. Supreme Court said:

However, the text of §409 evinces no intent to make plaintiffs worse off than they would have been had §152 funding never existed. Put differently, there is no reason to interpret §409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to §152, held by government agencies not involved in administering §152, if, before §152 was adopted, plaintiffs would have been free to obtain such information from those very agencies.

Id. at 146. Here, there is no question that if the Highway Safety Act had never passed, Mr. Gendler could have obtained accident reports compiled by the State Patrol for purposes of determining accident causes pursuant to RCW 46.52.060. Guillen thus requires disclosure.

D. The Noerr-Pennington Rule of Construction Applies.<sup>5</sup>

The Patrol and DOT urge this Court to hold that “collision reports in Washington are either collected or compiled for §152 purposes” and therefore are privileged. Supplemental Brief of Petitioner, p. 15. This assertion is not explained, but apparently is based on the contractual arrangement whereby the actual processing of the Patrol’s accident location data is handled by DOT, and on the fact that DOT may use the same data for highway safety purposes. Id., p. 17 (the records sought by

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<sup>5</sup>A party may argue any ground for affirming a trial court decision which is supported by the record. RAP 2.5(a). The purpose of an amicus brief is to help the court with points of law. RAP 10.3(e). While Constitutional issues were not raised in the courts below, illuminating such issues is consistent with appellate rules and the purpose of an amicus brief.

Gendler “can only be accurately produced from the protected §152 database”). In essence, the Patrol and DOT are asking this Court to construe 23 U.S.C. 409 broadly to encompass databases used by multiple agencies for multiple purposes, without regard to which agency receives the records request, and regardless of that agency’s purpose for collecting the data.<sup>6</sup> Such a broad construction is inconsistent with the U.S. Supreme Court decision in Guillen, and also violates the Noerr-Pennington rule of statutory construction.

“The Noerr-Pennington doctrine derives from the First Amendment’s guarantee of the ‘right of the people...to petition the Government for a redress of grievances.’ ” Sosa v. DIRECTV, 437 F.3d 923, 929 (9<sup>th</sup> Cir. 2006). The right of access to the courts is one aspect of the right of petition. Id. “[T]he Noerr-Pennington doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.” Id. at 931. Under that rule, “we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.” Id.

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<sup>6</sup> The database is not used exclusively for Highway Safety Act purposes, and in fact is routinely used to respond to records requests by private parties. Here, for example, if Gendler had waived his right to use records in litigation, the state would have disclosed them, thereby serving a public purpose unrelated to the Highway Safety Act.

Applying that rule here, this Court must construe 23 U.S.C. 409 to avoid burdening the right of accident victims like Gendler to pursue lawsuits based on their accidents.

The Sosa Court explained a three-part test for applying the Noerr-Pennington doctrine: 1) does the application of 23 U.S.C. 409 place a burden on petitioning?; 2) looking at the precise petitioning activity at issue, does the burden implicate the Petition Clause?; and 3) can 23 U.S.C. 409 be fairly construed to avoid burdening protected petitioning activity? Sosa, 437 F.3d at 930-31. Here, the Patrol told Gendler he could not obtain accident records under the Public Records Act unless he promised not to use the records in a personal injury suit. This clearly burdened his right to petition, because Gendler wanted the records in part to support his negligence claims against the state. The Ninth Circuit recognizes that “not only petitions sent directly to the court in the course of litigation, but also ‘conduct incidental to the prosecution of the suit’ is protected by the Noerr-Pennington doctrine.” Sosa at 934. For example, discovery communications and pre-lawsuit demand letters are protected as incidental to the prosecution of a suit. *Id.* at 935-36. This Court should hold that a Public Records Act request, when related to a planned or pending lawsuit, is protected by the Petition Clause.

Having established that the Patrol's withholding of records unless Gendler promised not to use them in a suit was a burden on protected petitioning activity, the next step is to determine if 23 U.S.C. 409 can be fairly construed to avoid such a burden. The U.S. Supreme Court already determined that it can, by interpreting the statute to exclude police records that were collected for law enforcement or other non-federal purposes. The Guillen decision maintains traditional avenues for personal injury litigants to obtain the information they need to prosecute their suits, without detracting from the purpose of 23 U.S. 409 to prevent highway-safety planning activities from being used against highway-safety planners in court. Accordingly, this Court should adhere to the Guillen decision and affirm the disclosure order.

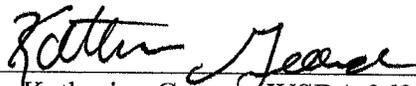
#### IV. CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Dated this 9<sup>th</sup> day of September, 2011.

HARRISON BENIS & SPENCE LLP

By: \_\_\_\_\_



Katherine George, WSBA 36288  
Attorney for Amici

## HOUSE BILL 1482

State of Washington

58th Legislature

2003 Regular Session

By Representatives Wallace, Ericksen and Rockefeller; by request of Department of Transportation

Read first time 01/28/2003. Referred to Committee on Transportation.

AN ACT Relating to transferring accident data processing to the department of transportation; amending RCW 46.52.030, 46.52.050, 46.52.060, 46.52.065, 46.52.080, 46.52.085, and 46.29.060; reenacting and amending RCW 46.52.120; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1 RCW 46.52.030 and 1997 c 248 s 1 are each amended to read as follows:

- (1) Unless a report is to be made by a law enforcement officer under subsection (3) of this section, the driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to the property of any one person to an apparent extent equal to or greater than the minimum amount established by rule adopted by the ~~((chief of the Washington state patrol))~~ secretary of transportation in accordance with subsection (5) of this section, shall, within four days after such accident, make a written report of such accident to the chief of police of the city or town if such accident occurred within an incorporated city or town or the county sheriff or state patrol if such accident occurred outside incorporated cities and towns. Nothing in this subsection prohibits accident reports from being filed by drivers where damage to property is less than the minimum amount or where a law enforcement officer has submitted a report.
- (2) The original of the report shall be immediately forwarded by the authority receiving the report to the ~~((chief of the Washington state patrol))~~ secretary of transportation at Olympia, Washington. The ~~((Washington state patrol))~~ department of transportation shall give the department of licensing full access to the report.
- (3) Any law enforcement officer who investigates an accident for which a report is required under subsection (1) of this section shall submit an investigator's report as required by RCW 46.52.070.
- (4) The ~~((chief of the Washington state patrol))~~ secretary of transportation may require any driver of any vehicle involved in an accident, of which report must be made as provided in this section, to file supplemental reports whenever the original report in the ~~((chiefs))~~ secretary's opinion is insufficient, and may likewise require witnesses of any such accident to render reports. For this purpose, the ~~((chief of the Washington state patrol))~~ secretary of transportation shall prepare and, upon request, supply to any police department, coroner, sheriff, and any other suitable agency or individual, sample forms of accident reports required hereunder, which reports shall be upon a form devised by the ~~((chief of the Washington state patrol))~~ secretary of transportation and shall call for sufficiently detailed information to disclose all material facts with reference to the accident to be reported thereon, including the location, the circumstances, the conditions then existing, the persons and vehicles involved, the insurance information required under RCW 46.30.030, personal injury or death, if any, the amounts of property damage claimed, the total number of vehicles involved, whether the vehicles were legally parked, legally standing, or moving, and whether such vehicles were occupied at the time of the accident. Every required accident report shall be made on a form prescribed by the ~~((chief of the Washington state patrol))~~ secretary of transportation and each authority charged with the duty of receiving such reports shall provide sufficient report forms in compliance with the form devised. The report forms shall be designated so as to provide that a copy may be retained by the reporting person.
- (5) The ~~((chief of the Washington state patrol))~~ secretary of transportation shall adopt rules establishing the accident-reporting threshold for property damage accidents. ~~((Beginning October 1, 1987, the accident-reporting threshold for property damage accidents shall be five hundred dollars.))~~ The accident-reporting threshold for property damage accidents shall be revised when necessary, but not more frequently than every two years. The revisions shall only be for the purpose of recognizing economic changes as reflected by an inflationary index recommended by the office of financial management. The revisions shall be guided by the change in the index for the time period since the last revision.

Sec. 2 RCW 46.52.050 and 1961 c 12 s 46.52.050 are each amended to read as follows:

Every coroner or other official performing like functions shall, on or before the tenth day of each month, report in writing to the sheriff of the county in which he or she holds office and to the chief of the Washington state patrol, the director of the traffic safety commission, and the secretary of transportation the death of any person within his or her jurisdiction during the preceding calendar month as a result of an accident involving any vehicle, together with the circumstances of such accident.

Sec. 3 RCW 46.52.060 and 1998 c 169 s 1 are each amended to read as follows:

~~((It shall be the duty of the chief of the Washington state patrol to))~~ The secretary of transportation shall file, tabulate, and

<http://search.leg.wa.gov/advanced/3.0/ViewHtml.asp?Item=0&Action=Html&X=908215629> 9/8/2011

analyze all accident reports and ~~((to))~~ publish annually, immediately following the close of each ~~((fiscal))~~ calendar year, and monthly during the course of the year, statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof, and other statistical information ~~((which))~~ that may prove of assistance in determining the cause of vehicular accidents.

Such accident reports and analysis or reports thereof shall be available to the director of licensing, the ~~((department of transportation))~~ chief of the Washington state patrol, the utilities and transportation commission, the traffic safety commission, and other public entities authorized by the ~~((chief of the Washington state patrol))~~ secretary of transportation, or their duly authorized representatives, for further tabulation and analysis for pertinent data relating to the regulation of highway traffic, highway construction, vehicle operators and all other purposes, and to publish information so derived as may be deemed of publication value.

Sec. 4 RCW 46.52.065 and 1977 ex.s. c 50 s 1 are each amended to read as follows:

Every coroner or other official performing like functions shall submit to the state toxicologist a blood sample taken from all drivers and all pedestrians who are killed in any traffic accident where the death occurred within four hours after the accident. Blood samples shall be taken and submitted in the manner prescribed by the state toxicologist. The state toxicologist shall analyze these blood samples to determine the concentration of alcohol and, where feasible, the presence of drugs or other toxic substances. The reports and records of the state toxicologist relating to analyses made pursuant to this section shall be confidential: PROVIDED, That the results of these analyses shall be reported to the state patrol and department of transportation and made available to the prosecuting attorney or law enforcement agency having jurisdiction: PROVIDED FURTHER, That the results of these analyses may be admitted in evidence in any civil or criminal action where relevant and shall be made available to the parties to any such litigation on application to the court.

Sec. 5 RCW 46.52.080 and 1979 c 158 s 162 are each amended to read as follows:

All required accident reports and supplemental reports and copies thereof shall be without prejudice to the individual so reporting and shall be for the confidential use of the county prosecuting attorney and chief of police or county sheriff, as the case may be, ~~((and))~~ the director of licensing, the secretary of transportation, and the chief of the Washington state patrol, and other officer or commission as authorized by law, except that any such officer shall disclose the names and addresses of persons reported as involved in an accident or as witnesses thereto, the vehicle license plate numbers and descriptions of vehicles involved, and the date, time, and location of an accident, to any person who may have a proper interest therein, including the driver or drivers involved, or the legal guardian thereof, the parent of a minor driver, any person injured therein, the owner of vehicles or property damaged thereby, or any authorized representative of such an interested party, or the attorney or insurer thereof. No such accident report or copy thereof shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that any officer above named for receiving accident reports shall furnish, upon demand of any person who has, or who claims to have, made such a report, or, upon demand of any court, a certificate showing that a specified accident report has or has not been made to the ~~((chief of the Washington state patrol))~~ secretary of transportation solely to prove a compliance or a failure to comply with the requirement that such a report be made in the manner required by law: PROVIDED, That the reports may be used as evidence when necessary to prosecute charges filed in connection with a violation of RCW 46.52.088.

Sec. 6 RCW 46.52.085 and 1979 c 34 s 1 are each amended to read as follows:

Any information authorized for release under RCW 46.52.080 and 46.52.083 may be furnished in written form for a fee sufficient to meet, but not exceed, the costs incurred. All fees received by the ~~((Washington state patrol))~~ department of transportation for such copies shall be deposited in the motor vehicle fund.

Sec. 7 RCW 46.52.120 and 1998 c 218 s 1 and 1998 c 165 s 10 are each reenacted and amended to read as follows:

(1) The director shall keep a case record on every motor vehicle driver licensed under the laws of this state, together with information on each driver, showing all the convictions and findings of traffic infractions certified by the courts, together with an index cross-reference record of each accident reported relating to such individual with a brief statement of the cause of the accident and whether or not the accident resulted in any fatality. The ~~((chief of the Washington state patrol))~~ secretary of transportation shall furnish the index cross-reference record to the director, with reference to each driver involved in the reported accidents.

(2) The records shall be for the confidential use of the director, the chief of the Washington state patrol, the director of the Washington traffic safety commission, and for such police officers or other cognizant public officials as may be designated by law. Such case records shall not be admitted into evidence in any court, except where relevant to the prosecution or defense of a criminal charge, or in case appeal is taken from the order of the director, suspending, revoking, canceling, or refusing a vehicle driver's license.

(3) The director shall tabulate and analyze vehicle driver's case records and suspend, revoke, cancel, or refuse a vehicle driver's license to a person when it is deemed from facts contained in the case record of such person that it is for the best interest of public safety that such person be denied the privilege of operating a motor vehicle. The director shall also suspend a person's driver's license if the person fails to attend or complete a driver improvement interview or fails to abide by

conditions of probation under RCW 46.20.335. Whenever the director orders the vehicle driver's license of any such person suspended, revoked, or canceled, or refuses the issuance of a vehicle driver's license, such suspension, revocation, cancellation, or refusal is final and effective unless appeal from the decision of the director is taken as provided by law.

**Sec. 8** RCW 46.29.060 and 1987 c 463 s 1 are each amended to read as follows:

The provisions of this chapter, requiring deposit of security and suspensions for failure to deposit security, subject to certain exemptions, shall apply to the driver and owner of any vehicle of a type subject to registration under the motor vehicle laws of this state which is in any manner involved in an accident within this state, which accident has resulted in bodily injury or death of any person or damage to the property of any one person to an apparent extent equal to or greater than the minimum amount established by rule adopted by the ~~((director. The director shall adopt rules establishing the property damage threshold at which the provisions of this chapter apply with respect to the deposit of security and suspensions for failure to deposit security. Beginning October 1, 1987, the property damage threshold shall be five hundred dollars. The thresholds shall be revised when necessary, but not more frequently than every two years. The revisions shall only be for the purpose of recognizing economic changes as reflected by an inflationary index recommended by the office of financial management. The revisions shall be guided by the change in the index for the time period since the last revision and by the threshold established by the chief of the Washington state patrol for the filing of accident reports as provided in))~~ secretary of transportation under RCW 46.52.030.

**NEW SECTION. Sec. 9** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2003.

--- END ---