

K

FILED

JAN 31 2011

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 84127-6

85408-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL W. GENDLER,

Respondent,

v.

JOHN R. BATISTE, WASHINGTON STATE PATROL CHIEF,
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Petitioners.

ANSWER TO PETITION FOR REVIEW

STRITMATTER KESSLER
WHELAN COLUCCIO

Keith L. Kessler, WSBA 4720
Garth Jones, WSBA 14795
413 Eighth Street
Hoquiam, WA 98550
(360) 533-2710

MASTERS LAW GROUP, PLLC

Kenneth W. Masters,
WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Co-Counsel for Respondent

CLERK
2011 JAN 31 AM 9:19
STATE OF WASHINGTON

TABLE OF CONTENTS

INTRODUCTION.....	1
RESTATEMENT OF THE CASE.....	2
A. Attorney Mickey Gendler was rendered quadriplegic when his front bicycle wheel wedged in a seam on the Montlake Bridge – his was not the first such accident.....	2
B. The Washington State Patrol denied Gendler access to accident reports for the Montlake Bridge.....	2
C. WSP’s Chief has been legally responsible for collecting accident reports since 1937, and had routinely produced such reports in the past.....	3
D. After WSDOT failed to obtain new legislation side-stepping <i>Guillen</i> , WSP and WSDOT entered into a “Memorandum of Understanding,” attempting to shield accident reports from the public.....	4
E. Gendler filed suit against WSP to gain access to the accident reports and obtained a summary judgment based on <i>Guillen</i>	7
F. The Court of Appeals affirmed the trial court’s summary judgment based on <i>Guillen</i>	9
WHY THE COURT SHOULD DENY REVIEW.....	10
A. Both the trial and appellate courts correctly applied the U.S. Supreme Court’s <i>Guillen</i> decision in a manner consistent with the Public Records Act.....	10
B. WSP cannot circumvent <i>Guillen</i> by transferring its accident reports to WSDOT.....	12
C. Inconvenience does not excuse WSP from complying with the Public Records Act.....	15
D. The State’s arguments regarding RCW 46.52.080 are unsupported and insupportable.....	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	12
<i>Gendler v. Batiste</i> , 158 Wn. App. 661, 242 P.3d 947 (2010).....	9, 10, 13, 15
<i>Guillen v. Pierce County</i> , 144 Wn.2d 696, 31 P.3d 628 (2001).....	16
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	12, 16
<i>Light v. State</i> , 560 N.Y.S.2d 962, 149 Misc. 2d 75 (Ct. Cl. 1990).....	10
<i>Pierce County v. Guillen</i> , 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003)	passim
<i>Soter v. Cowles Publ'g Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	11
<i>Zink v. City of Mesa</i> , 140 Wn. App. 328, 166 P.3d 738 (2007), <i>rev. denied</i> , 162 Wn.2d 1014 (2008)	15, 16
<i>Yakima County v. Yakima Herald-Republic</i> , 2011 Lexis 76 (January 13, 2011).....	11, 12
STATUTES	
23 U.S.C. § 152.....	passim
23 U.S.C. § 409.....	passim

RCW 42.56.010.....	12, 16
RCW 42.56.030.....	12
RCW 42.56.080.....	15
RCW 42.56.520.....	15
RCW 42.56.550.....	15
RCW 46.52.030.....	3
RCW 46.52.060.....	passim
RCW 46.52.080.....	16, 17

INTRODUCTION

These trial and appellate court decisions involve no issue of substantial public interest that should be determined by this Court. Any questions about the application of 23 U.S.C. § 409 raised by this Petition were already answered by the U.S. Supreme Court in ***Pierce County v. Guillen***, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). Both the trial and appellate courts carefully followed ***Guillen***. There is no need for this Court to grant review.

Specifically, after attorney Mickey Gendler was rendered quadriplegic when his front bicycle wheel was trapped in a seam on Seattle's Montlake Bridge, he sought relevant prior accident reports from the Washington State Patrol. WSP said it "could not" provide accident reports by location as they had for many years prior to 2003. WSP is legally required to compile these public records since 1937, but after ***Guillen***, WSDOT and WSP agreed that WSDOT would keep WSP's reports on its database – to shield them from disclosure. The trial and appellate courts saw through this transparent ruse.

The trial and appellate courts correctly followed ***Guillen***'s clear holdings in requiring production under the Public Records Act. This Court should deny review.

RESTATEMENT OF THE CASE

A. Attorney Mickey Gendler was rendered quadriplegic when his front bicycle wheel wedged in a seam on the Montlake Bridge – his was not the first such accident.

On October 28, 2007, attorney Mickey Gendler was riding his bicycle across Seattle's Montlake Bridge¹ when his front bicycle wheel suddenly became trapped in a seam in the bridge-deck grating. CP 20. Gendler was thrown onto the roadway. CP 23. His spine was injured, causing quadriplegia. *Id.*

Gendler subsequently learned of other similar incidents on this bridge. CP 23. Concerned about the danger, he sought out the history of such incidents, making a public records request to WSP for police reports on all accidents on the Montlake Bridge involving bicycles. CP 21.

B. The Washington State Patrol denied Gendler access to accident reports for the Montlake Bridge.

WSP's written response to Gendler's records request referred him to a contact person to obtain the records, but did not disclose that she was an employee of WSDOT, not WSP. CP 37, 50. Gendler called, but was referred back to WSP and to a form

¹ The Bridge is part of State Route 513, operated by the State. CP 20. The Bridge is well traveled by bicycles. CP 20-21.

available on the WSP website. CP 21-22. But when Gendler downloaded WSP's "Request for Collision Data" form, he discovered that it required a certification that he would not use the records in a lawsuit against the State or other government agency. CP 22, 27. Gendler called WSP and was told that the State Patrol "could not" retrieve accident reports by location. CP 22-23.

C. WSP's Chief has been legally responsible for collecting accident reports since 1937, and had routinely produced such reports in the past.

Section 135 has been part of the Washington Motor Vehicle Act since 1937. Laws 1937, ch. 189 (now codified in RCW 46.52.030).² It requires law enforcement officers to prepare reports on state highway accidents and forward them to WSP's Chief. RCW 46.52.060. Section 138 of the Act (codified in RCW 46.52.060) requires the Chief to file, analyze and tabulate all accident reports. *Id.* Further, the reports must be made available to various directors "for further tabulation and analysis" *Id.*

For many years, WSP routinely provided copies of accident reports upon public request, including not only reports for a specific accident, but also all accidents occurring at the same location. CP

² Copies of all relevant statutes are attached to this Answer.

295. In addition, WSP and other agencies also provided accident photographs, complaints, road-maintenance records, and many other types of information upon request. *Id.*

The WSP Collision Records Section had long collected paper reports and sorted the collision-report reference numbers by city-street names and five-digit county-road reference numbers. CP 305. If a citizen requested reports for a specific location, WSP would use the street name or the reference number (available through county engineers, CP 304) to search the paper reports for the collision-report numbers responsive to the location request. CP 305. But this all changed in 2003.

D. After WSDOT failed to obtain new legislation side-stepping *Guillen*, WSP and WSDOT entered into a “Memorandum of Understanding,” attempting to shield accident reports from the public.

The U.S. Supreme Court decided *Guillen* in January 2003. As discussed more fully below, the crux of *Guillen* is that the limited statutory privilege created by 23 U.S.C. § 409 applies to an agency (like WSDOT) that collects information for 23 U.S.C. § 152 purposes (*i.e.*, to meet the requirements of the Federal Highway Safety Act), but it is “inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies

[such as WSP] that are not pursuing § 152 objectives.” **Guillen**, 537 U.S. at 145-46. This is an unambiguous interpretation.

Within two weeks after **Guillen** came down, WSDOT asked the Legislature to pass a bill that would transfer WSP’s responsibility for accident reports to WSDOT. CP 314-17 (2003 S.B. 5499). The agencies apparently believed that this change would shield accident reports from discovery and disclosure. WSDOT’s bill died. CP 312.

Two months later, the Federal Highway Administration stated in a memo that a state might avoid producing accident reports if its agencies pooled them in one “integrated” database. CP 199-200. With its proposed legislation dead, WSDOT seized upon this new idea, entering into a “Memorandum of Understanding” (“MOU”) with WSP. CP 205-12 (copy attached). Since the MOU, WSP scans-in accident reports received from local law enforcement under RCW 46.52.060, WSDOT stores them on its computers, and the paper originals are destroyed. CP 202, 205-06.

The MOU requires that any request for an accident report must be submitted to WSDOT – not to WSP – on a form created by WSDOT. CP 205, 208. In addition, “[a]ny request for multiple reports based solely on a location will be treated as a request for

collision data, and the request will be referred to the WSDOT's Collision Data and Analysis Branch. . . ." CP 209. WSDOT's form requires the requester to affirm that the accident reports will not be used in any current or anticipated lawsuits against a governmental entity. CP 27. The MOU also provides that the accident reports themselves – including scanned images of them – remain WSP's property (CP 206):

[T]he original PTCR [Police Traffic Collision Report] and VCR/Citizen Reports and scanned images of those reports are the property of WSP Data collected and tabulated by WSDOT from those reports is the property and responsibility of WSDOT.

WSDOT built a separate database for its purposes. CP 302. Collision reports prepared by local law enforcement agencies are still sent to WSP as required by RCW 46.52.060. When WSP scans-in the reports to create electronic images (CP 202) its staff enters the following data into fields: name of roadway, collision report number, name of driver/pedestrian/property owner/bicyclist/passenger, date of collision, date of birth, and the county. CP 307.

Since the MOU, WSP refuses to respond to requests by location, notwithstanding the searching capability of its Index. CP 209, 307. WSP's Chief Information Officer, Dan Parsons, testified that if asked to create a collision-records database searchable by

location, his Division could do so. CP 309. Nonetheless, WSP refused to provide these public records to Gendler.

E. Gendler filed suit against WSP to gain access to the accident reports and obtained a summary judgment based on *Guillen*.

Gendler filed a PRA suit against WSP Chief John Batiste, seeking the records, statutory penalties, costs and fees. CP 7-11. Gendler did not sue WSDOT, but WSDOT filed a motion to intervene as a party defendant, claiming to be the "owner" of the requested reports: "The request for location specific records being sought by the plaintiff in this case is in the portion of the CRS database that is owned and maintained by WSDOT, not by the Washington State Patrol." CP 135. WSDOT relied on the MOU even though it says that WSP owns the reports. *Id.* Although Gendler opposed intervention, the Honorable Chris Wickham allowed WSDOT to intervene. CP 167-68.

Before WSDOT intervened in the lawsuit, WSP admitted in its Answer that the accident reports were public records. CP 13. Based on this admission, Gendler had moved for summary judgment. CP 18-19. After WSDOT's intervention, WSDOT and WSP filed a cross-motion for summary judgment. CP 255-57.

After hearing argument on these motions, Judge Wickham issued a memorandum decision granting summary judgment to Gendler. CP 320-23 (copy attached). He later entered findings, conclusions, and a final judgment, including an award of statutory penalties, costs and attorney fees as the PRA requires. CP 486-87, 489-95. He relied on **Guillen's** interpretation of § 409:

Sec. 409 protects only information compiled or collected for Sec. 152 purposes, and does not protect information compiled or collected for purposes unrelated to Sec. 152, as held by the agencies that compiled or collected that information

CP 321 (quoting **Guillen**, 537 U.S. at 146). Judge Wickham reasoned that the accident reports are compiled and collected pursuant to RCW 46.52.060, not § 152, and that the scanned-in accident reports remain WSP's property (CP 321-22):

Applying that standard to the facts of this case, the Police Traffic Collision Reports collected by Defendant Washington State Patrol are compiled or collected for purposes unrelated to Sec. 152. They are compiled and collected pursuant to the long-standing statutory duty of the Washington State Patrol to ... file, tabulate, and analyze all accident reports RCW 42.52.060.

Since the creation of the joint Washington State Patrol/Department of Transportation database, both agencies have been able to review these reports. But as the Memorandum of Understanding between Defendants confirms, the reports remain the property of the Washington State Patrol. [Citing the MOU at CP 126-33] They continue to be held by that agency within the database. *Id.* The fact that the Department of Transportation now also has

immediate access to the records and reports does not change their character and does not transform them into information "compiled or collected for Sec. 152 purposes."

Judge Wickham also reasoned that WSP's decision not to develop the software to search its database does not obviate WSP's obligation to provide the records upon request (CP 322):

The placement of public records in an electronic database alone cannot prevent the public from reviewing them under the Public Records Act. . . . If anything, these documents currently should be more available to the public, just as they are more available to the agencies who manage the database.

F. The Court of Appeals affirmed the trial court's summary judgment based on *Guillen*.

WSP and WSDOT appealed Judge Wickham's ruling. Division Two affirmed, holding that accident reports WSP collects for law enforcement purposes are subject to disclosure under the PRA and *Guillen*:

We hold that the trial court acted properly when it ordered the WSP "to provide copies of these records on request without the limitation offered by Defendant." CP at 322.

Although the WSDOT may use the PTCR records to comply with § 152, the WSP does not. The WSP has an independent statutory obligation to collect traffic collision reports. Apparently, it stopped doing this in 2003, but delegating its duty to maintain the records to another agency does not shield WSP from its obligations under the PRA.

Slip Op. at 11 (copy attached); *Gendler v. Batiste*, 158 Wn. App. 661, 242 P.3d 947 (2010).

WHY THE COURT SHOULD DENY REVIEW

A. Both the trial and appellate courts correctly applied the U.S. Supreme Court's *Guillen* decision in a manner consistent with the Public Records Act.

Just as *Guillen* held that the Pierce County Sheriff's office does not compile or hold accident reports for § 152 purposes, here the trial and appellate courts determined that WSP does not compile or hold these reports for § 152 purposes, so its accident reports are subject to public disclosure (Slip Op. at 12):

What the State fails to explain . . . is how the county sheriff in this example is any different from the WSP or how the Public Works Department is any different from the WSDOT. The PTCR report, in the hands of the WSP, would not be privileged as it would be in WSDOT's hands because each agency uses that report for different purposes.

It is undisputed that WSP collects accident reports for purposes that have nothing to do with § 152 and has been doing so since at least 1937. WSP obviously collects these accident reports for purposes unrelated to § 152, since § 152 was not enacted until 1973. The WSP had already been collecting accident reports for some 36 years before Congress enacted § 152.

The central purpose of § 409 is insuring that documents collected and compiled under § 152 for federal purposes are not used as an "additional, virtually no-work, tool for direct use in private litigation." *Light v. State*, 560 N.Y.S.2d 962, 965, 149 Misc.

2d 75 (Ct. Cl. 1990). But the State seeks again to use § 409 to prevent private litigants from gaining access to accident reports otherwise available from WSP since 1937, making private litigants worse off than they were before § 152's adoption. This is directly contrary to **Guillen**, 537 U.S. at 146:

[T]he 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.

The State's position is also contrary to **Guillen's** narrow construction of evidentiary privileges. **Guillen**, 537 U.S. at 145 ("§ 409 establishes a privilege; accordingly, to the extent the text of the statute permits, we must construe it narrowly"). This Court need not accept review just to reaffirm **Guillen's** unequivocal holdings.

Moreover, the trial and appellate court decisions follow this Court's long-standing (and very recently reiterated) recognition that the PRA is a "strongly worded mandate for broad disclosure of public records." **Yakima County v. Yakima Herald-Republic**, 2011 Lexis 76 at *21 (Jan 13, 2011) (quoting **Soter v. Cowles Publ'g Co.**, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (quoting

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978))). “The PRA must be ‘liberally construed and its exemptions narrowly construed.’” *Yakima*, at *16 (quoting RCW 42.56.030; *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344, 217 P.3d 1172 (2009)); see also RCW 42.56.010(2) (“public records” include any writing “prepared, owned, used, or retained” by an agency, “**regardless of physical form or characteristics**”) (bold added).

In *Yakima*, a newspaper sought records held both by the trial court and by other county agencies. 2011 Lexis at * 7-8. While this Court adhered to its rulings that court records are not subject to the PRA, it rejected the argument – similar to the State’s claims here regarding WSDOT – that records held in non-judicial hands were nonetheless protected as judicial records. The trial and appellate court’s rulings are wholly consistent with this Court’s very recent and correct analysis. Review is unwarranted.

B. WSP cannot circumvent *Guillen* by transferring its accident reports to WSDOT.

The MOU does not change this analysis. As Judge Wickham noted – and the Court of Appeals affirmed – the MOU says “the reports remain the property of the Washington State Patrol.” CP 206, 322. WSDOT has a right to “publish, translate,

reproduce, deliver, perform, display, and dispose of copies of the scanned images,” but WSP still owns the reports. *Id.* WSDOT owns only the data it has collected and tabulated from the reports, not the reports themselves. *Id.* The MOU includes these provisions because of WSP’s statutory duty to collect reports. Section 409 simply does not apply to WSP’s accident reports.

In relying on the MOU, the State seems to make two arguments, neither of which is correct. First, the State argues that if WSDOT uses the accident data for any § 152 purpose, then the reports (in anyone’s hands) are protected by the § 409 privilege. But **Guillen** rejected this “black hole” interpretation – so long as a law enforcement agency collects the reports for law enforcement purposes, they are not subject to § 409. 537 U.S. 145-46. As the Court of Appeals noted, WSP does not collect the reports for § 152 purposes, but rather for law enforcement purposes under RCW 46.52.060. **Gendler**, Slip Op. at 5-6.

Second, the State argues that any request for accident reports at a particular location is necessarily a request for WSDOT analysis of the raw data for § 152 purposes. This argument is factually false. **Gendler** did not ask for an analysis (or anything else) from WSDOT. Rather, he requested accident reports from

WSP, the agency charged by statute with compiling, tabulating, and analyzing the reports by location. CP 36-37; RCW 46.52.060. As Judge Wickham recognized, WSP's further argument that it cannot produce records by location is also false (CP 322):

Defendants further argue that it is only with the coding employed by Department of Transportation that Washington State Patrol is able to determine the location of a particular accident. However, the record establishes that long before the creation of the database Defendant Washington State Patrol was searching its reports and finding the information requested in this case by Plaintiff. (see Declaration of John L. Messina). The fact that Washington State Patrol has elected not to develop the software to search its own records now in electronic format does not relieve it of the obligation to provide such records upon request.

Of course, an agency can petition the Legislature to reassign another agency's duties to it. In 2003, WSDOT did so in response to **Guillen**, asking the Legislature to transfer all responsibilities for accident reports from WSP to WSDOT. 2003 S.B. 5499 (CP 314-17). When its 2003 bill failed, WSDOT immediately attempted to circumvent the Legislature (and **Guillen**) with the MOU. CP 128-312. WSDOT again asked the Legislature to change the law in 2009, this time in response to Judge Wickham's decision in this case. WSDOT proposed 2009 S.B. 6020, which would have prohibited the release of traffic accident information. CP 446-47. Again the Legislature refused. Now the State asks this Court to do

what the Legislature will not. There are two unambiguous opinions (*Guillen* and *Gendler*) and two legislative refusals to override them. There is no “substantial” or “important” issue left to litigate. Review is thus unwise and unwarranted.

C. Inconvenience does not excuse WSP from complying with the Public Records Act.

The State also tries to bolster its claims by arguing inconvenience. But inconvenience is no excuse for failing to comply with the PRA, as several provisions of the Act make clear. “Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad.” RCW 42.56.080. An agency is allowed a reasonable amount of additional time “to locate and assemble the information requested” RCW 42.56.520. “Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

Washington courts have long recognized that compliance with the PRA may impose an administrative burden on an agency entrusted with public records. See, e.g., *Zink v. City of Mesa*, 140 Wn. App. 328, 337, 166 P.3d 738 (2007), *rev. denied*, 162 Wn.2d

1014 (2008). But administrative inconvenience does not excuse strict compliance with the Act. *Id.*; **Hearst Corp. v. Hoppe**, 90 Wn.2d at 131-32.

Indeed, Judge Wickham noted that since WSP has created electronic copies of the reports, “these documents currently should be **more** available to the public, just as they are more available to the agencies who manage the database.” CP 322 (emphasis added). Nor does WSDOT’s electronic access to the reports “change their character” or “transform them into information ‘compiled or collected for Sec. 152 purposes.’” *Id.* All of this is consistent with the PRA, which defines “public record” to include “any writing . . . regardless of form or characteristics.” RCW 42.56.010(2). Alleged “inconvenience” cannot justify review here.

D. The State’s arguments regarding RCW 46.52.080 are unsupported and insupportable.

The State claims that for decades prior to this Court’s ruling in **Guillen v. Pierce County**, 144 Wn.2d 696, 31 P.3d 628 (2001), *revs’d in Guillen, supra*, all accident reports were “confidential” pursuant to RCW 46.52.080. Petition at 2. As explained above, this claim is simply untrue. WSP routinely gave citizens access to PTCRs upon request. CP 295.

In any event, the State's sole authority is an Attorney General Opinion from its own legal counsel. Based on this, the State argues that this Court should review its own opinion in *Guillen* as to whether § .080 applies to all collision reports or just to individual citizens' reports. Petition at 2, 11-13. But again, WSP has never treated any such reports as confidential, so the AGO is irrelevant, self-serving, and incorrect.

Finally, § .080's "confidentiality" contains a proviso that WSP officers "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" RCW 46.52.080 (emphases added). Citizens plainly have a proper interest in knowing about road conditions that endanger their lives and health. At a minimum, WSP violated the PRA by failing to disclose this information. But these reports have never been treated as confidential, so the issue is moot.

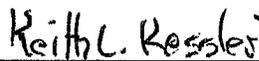
CONCLUSION

For the reasons stated above, this Court should deny the State's Petition for Review.

RESPECTFULLY SUBMITTED this 26th day of January 2010.

STRITMATTER KESSLER
WHELAN COLUCCIO

MASTERS LAW GROUP, P.L.L.C.


Keith L. Kessler

Keith L. Kessler, WSBA 4720
Garth Jones, WSBA 14795
413 Eighth Street
Hoquiam, WA 98550
(360) 533-2710


Kenneth W. Masters
WSBA 22278

241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY EMAIL AND U.S. MAIL

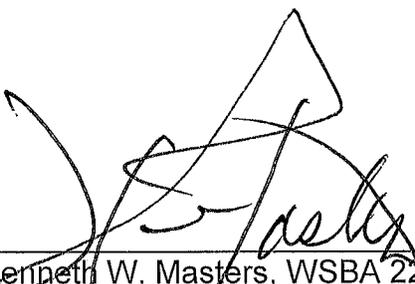
I certify that I emailed and mailed, or caused to be emailed and mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 26th day of January 2010, to the following counsel of record at the following addresses:

Co-Counsel for Respondent

Keith L. Kessler
Garth Jones
Stritmatter Kessler Whelan Coluccio
413 Eighth Street
Hoquiam, WA 98550

Counsel for Petitioners

Rene Tomisser
Attorney General's Office
P.O. Box 40126
Olympia, WA 98504



Kenneth W. Masters, WSBA 22278
Co-Counsel for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL GENDLER,

Appellant,

v.

JOHN R. BATISTE, WASHINGTON STATE
PARTROL,

Respondent.

No. 39333-6-II

PUBLISHED OPINION

Penoyar, C.J. — The Washington State Patrol (WSP) appeals from a summary judgment order requiring it to disclose historical bicycle accident records occurring on Seattle's Montlake Bridge. The WSP claims that federal law, 23 U.S.C. § 409 (2005), prohibits it from disclosing the records to Michael Gendler unless he agrees not to use the information in litigation against the State. Because RCW 46.52.060 imposes a duty on the WSP to create and provide such public records, and because the federal privilege applies only to the Washington State Department of Transportation (WSDOT) not the WSP, we affirm. We also award Gendler his attorney fees and costs for this appeal.

Facts

On October 28, 2007, Gendler was crossing the Montlake Bridge in Seattle when his bicycle tire became wedged in the bridge grating, tossing Gendler from his bicycle onto the bridge deck. He suffered a serious spinal injury, leaving him with quadriplegia, unable to live independently, and unable to work full time in his law practice.

After learning that other bicyclists had had similar debilitating accidents on the Montlake Bridge, Gendler suspected that the roadway had been unsafe for cyclists since 1999 when the

State replaced the bridge decking. He sought records of other bicycle accidents from Kip Johnson, the WSP Public Records employee. Johnson explained that she could provide records to Gendler if he identified the person involved in the collision and the collision date. She explained that WSP does not store accident reports by location and thus she could not provide him with such a list. Gendler also learned that he could obtain specific records from the WSP website, but only if he certified that he would not use the records in a lawsuit against the State of Washington.¹

Gendler acknowledges that he may sue the State if the reports show that the State was on notice for years that the bridge deck was unsafe for bicyclists. He further explains that he does not want to waive his right to use public records in a civil suit to hold the State accountable for its negligence nor does he want to waive his right as a public citizen to be fully informed about the history of the bridge and the government agencies' conduct toward keeping the roadway reasonably safe.

This current action stems from Gendler's complaint against the WSP for violating the Public Records Act (PRA), chapter 46.52 RCW, claiming that these are public records and the WSP must provide them without requiring him to certify that he would not use them against the State. He seeks an order requiring the WSP to provide the records, attorney fees, costs, and fines.

The trial court allowed the WSDOT to intervene as it now compiles the traffic data that WSP provides to it and only WSDOT can produce an historic list of traffic accidents based on a

¹ The form, "Request for Collision Data DOT Form 780-032 EF," requires the requesting party to agree to the following: "I hereby affirm that I am not requesting this collision data for use in any current, pending or anticipated litigation against state, tribal or local government involving a collision at the location(s) mentioned in the data." Clerk's Papers (CP) at 27.

physical location. On cross-motions for summary judgment, the trial court granted relief to Gendler after finding that the WSP had a statutory duty under RCW 46.52.060 to provide the requested information notwithstanding 23 U.S.C. § 409. Additionally, the trial court awarded Gendler his attorney fees, costs, and penalties, totaling \$140,798.79.

The question before us in this appeal is whether collision records collected and compiled by the WSDOT in compliance with the "Federal Highway Safety Act" are privileged under 23 U.S.C. § 409 such that the WSP need not provide these records despite its duty under RCW 46.52.060 to "file, tabulate, and analyze all accident reports and to publish annually . . . the number of accidents, the location, the frequency, . . . and the circumstances thereof." The WSP also asserts that Gendler's use of the PRA to obtain a ruling on an evidentiary rule disqualifies his claim to attorney fees, costs, and penalties.

ANALYSIS

I. Federal Privilege

A. Background

In 1966, Congress passed 23 U.S.C. § 402, the highway safety programs, which created national highway safety standards, required the states to design programs to implement these standards, and provided federal grants to help support state programs. 23 U.S.C. § 402(a), (m). In 1968, the United States Department of Transportation required states to identify and correct high-collision locations by collecting traffic records that identified collision locations, collision types, injury types, and environmental conditions. 33 Fed. Reg. 16560-64 (Nov. 14, 1968).

In 1973, Congress passed 23 U.S.C. § 152, the Hazard Elimination Program. This program funded improvements on non-federal roads, requiring a greater collection and

compilation of data to identify locations and priorities for improvements. Specifically, it required that states plan highway safety improvements "on the basis of crash experience, [or] crash potential" and required states to collect and maintain a record of highway collision data. 23 C.F.R. § 924.9(a)(3)(i)(A).

In 1987, Congress passed 23 U.S.C. § 409 to protect the states from tort liability engendered by the increased self-reporting of hazardous collision data. Amended twice to further broaden protections for states, § 409 now provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or 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 or for the purposes of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The United State Supreme Court explained the scope of this provision in *Pierce County v. Guillen*, 537 U.S. 129, 145-46, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003):

The interpretation proposed by the Government, however, suffers neither of these faults. It gives effect to the 1995 amendment by making clear that § 409 protects not just the information an agency generates, i.e., compiles, for § 152 purposes, but also any information that an agency collects from other sources for § 152 purposes. And, it also takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation.

Our conclusion is reinforced by the history of the 1995 amendment. As we have already noted, the phrase "or collected" was added to § 409 to address confusion among the lower courts about the proper scope of § 409 and to overcome judicial reluctance to protect under § 409 raw data collected for § 152 purposes. . . . By amending the statute, Congress wished to make clear that § 152 was not intended to be an effort-free tool in litigation against state and local

governments.

The WSP argues that its police traffic collision reports (PTCR) fall under § 409 protections because it provides and WSDOT collects the data for a 23 U.S.C. § 152 purpose, namely, compliance with the "Hazard Elimination Program." It notes that the Federal Highway Administration (FHA) issued a memorandum after *Guillen*, explaining that even if the collision reports are stored in an integrated database (i.e., used by multiple agencies for different purposes), the collision data remains protected under § 409 because it is, at least in part, there for a § 152 purpose. Finally, the WSP argues, citing *Guillen*, that the data is subject to unbridled disclosure only when it is collected solely for law enforcement purposes and is held by a law enforcement agency.

The WSP explains that the PTCR was developed specifically for § 152 compliance, that WSDOT must demonstrate its compliance to the FHA, and that it is undisputed that the WSDOT database was developed specifically for showing that compliance.

B. RCW 46.52.060

In 1937, our state legislature passed the "Washington Motor Vehicle Act." Laws of 1937, ch. 189. Section 135 of this comprehensive legislation requires law enforcement officers to prepare accident reports on state highways. Section 138 imposes a duty on the WSP Chief:

It shall be the duty of the chief of the Washington state patrol to file, tabulate and analyze all accident reports and to publish annually, immediately following the close of each calendar year, and monthly during the course of the calendar year, 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.

Such accident reports and analysis or reports thereof shall be available to the directors of the departments of highways, licenses, public service 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.

RCW 46.52.060 (Laws of 1937, ch. 189, § 138). In fulfilling this duty, for many years, the WSP and other agencies provided accident histories at particular locations, photographs, complaints, traffic counts, road maintenance records, and other information. Until 2003, the WSP could provide data based on location, but its ability to do so was limited.²

In 2003, the Supreme Court decided *Guillen*, which held in part, that § 409 “does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point ‘collected’ by another agency for § 152 purposes.” 537 U.S. at 144.

² Kip Johnson explained in her deposition:

We entered all this information into a mainframe, and from that mainframe we got printed reports on city streets and country roads. We did—I think state routes might have been just too much for our system, so we never did do that.

[WSDOT] also had a system where we downloaded the information to them that—we got this information back from them on the locations and the diagram data, and we entered that, and then they downloaded it into their system, and we left all that up to them.

We did county roads and city streets, and we had sort of like canned reports, printed reports that would come out that would—like for country roads it would have all these five-digit road log numbers, so you had to know the mileposts and the five-digit road log number, and, as far as I know, no average person knows that for the country roads.

Cities would have been a little bit easier because I would have had a city street name and then a reference, but I would have to look through all the reports because even the data entry was not consistently uniform. So I would roll out a big long bunch of paper reports and try to find every reference to that particular street I could, and that was time-consuming. Now a computer does that.

Shortly after the *Guillen* decision, the WSDOT and the WSP entered into a memorandum of understanding (MOU) that as of July 1, 2003, WSDOT would maintain all accident reports in its database.³ While the WSP gave the WSDOT a “nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, display, and dispose of copies of the scanned images or PTCR and VCR/Citizen Reports,” “the reports and scanned images of those reports are the property of WSP.” Clerk’s Papers (CP) at 206.

The MOU also provided:

[2(a)(1).] All public disclosure requests for copies of any PTCR must be submitted in writing on DOT Form 780-030 “Request for Copy of Collision Report” to the WSDOT’s Collision Records Request Section, located in the Transportation Data Office in Olympia.

.....
[2(a)(5).] Searches for PTCRs must be based on an involved person’s name or a report number. Any request for multiple reports based solely on location will be treated as a request for collision data, and the request will be referred to the WSDOT’s Collision Data and Analysis Branch (see below).

.....
[5(e).] . . . The WSP public disclosure policy will control the release of all PTCR and VCR/Citizen Reports. The WSDOT public disclosure policy will control the release of all collision data.

CP at 208, 209, 212.

C. Public Records Act

In 1973, the people of this State adopted the “Public Disclosure Act” (PDA) through initiative.⁴ The public records portion of this Act required all state and local agencies to disclose any public record upon request, unless it fell within an enumerated exception. Former RCW

³ The WSP would scan the documents into the system, send them to the WSDOT, and destroy the originals.

⁴ See Laws of 1973, ch.1 (Initiative 276, then codified as chapter 42.17 RCW).

39333-6-II

42.17.260(1) (2005). Now codified in chapter 42.56 RCW, the PRA's purpose is set out in RCW

42.56.030:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

Progressive Animal Welfare Soc. v. Univ. of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

The purpose of the PRA is to provide "full access to information concerning the conduct of government on every level . . . as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The PRA, RCW 42.56.001-.902 (formerly codified as RCW 42.17.250-.348 in the PDA) requires all state and local agencies to disclose any public record upon request, unless it falls within certain specific enumerated exemptions. *See Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004); *King County v. Sheehan*, 114 Wn. App. 325, 335, 57 P.3d 307 (2002); RCW 42.56.070(1). The requested record must be

made available “for public inspection and copying.” RCW 42.56.070(1). The Washington State Patrol is an “agency” subject to the provisions of the act. RCW 42.17.020(2) (defining agency to include any state office or department) (Laws of 2005, ch. 445, § 6); *see also* RCW 42.56.010 (referencing RCW 42.17.020) (Laws of 2005, ch. 274, § 101).

Public records subject to inspection under the act include (1) any writings (2) that contain information related to the “conduct of government or the performance of any governmental or proprietary function” and (3) that are “prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(2); former RCW 42.17.020(42). An agency has no duty under the PRA, however, to create or produce a record that does not exist at the time the request is made. *Sperr*, 123 Wn. App. at 136-37; *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000). Further a request under the PRA must be for an “*identifiable public record*,” *see Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004) (quoting former RCW 42.17.270), and a mere request for *information* does not so qualify. *Wood v. Lowe*, 102 Wn. App. 872, 879, 10 P.3d 494 (2000); *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410-12, 960 P.2d 447 (1998). Moreover, although there is no official format for a valid PRA request, “a party seeking documents must, at a minimum, [1] provide notice that the request is made pursuant to the PDA[/PRA] and [2] identify the documents with reasonable clarity to allow the agency to locate them.” *Hangartner*, 151 Wn.2d at 447.

Gendler argues that the WSP has done exactly what these statutes prohibit; i.e., not produce records in its control that it has an obligation to produce. He points to the deposition testimony of Daniel Parsons, the Chief Information Officer of the WSP, who testified that the

39333-6-II

WSP could develop a database to produce historical collection records based on location.

D. Analysis

We hold that the trial court acted properly when it ordered the WSP “to provide copies of these records on request without the limitation offered by Defendant.”⁵ CP at 322.

Although the WSDOT may use the PTCR records to comply with § 152, the WSP does not. The WSP has an independent statutory obligation to collect traffic collision reports. Apparently, it stopped doing this in 2003, but delegating its duty to maintain the records to another agency does not shield WSP from its obligations under the PRA.

The Supreme Court in *Guillen* made clear that information gathered by law enforcement agencies for law enforcement purposes is not protected under § 409. What complicates the current situation is that the WSP through the MOU makes the WSDOT the custodian of its records and has the WSDOT compile and analyze the data. It was for this reason that Gendler sued the WSP and not the WSDOT. His position has been from the outset that the WSP has a duty, independent of WSDOT’s § 152 obligations, to collect data and publish reports “showing the number of accidents, the location, the frequency, . . . and the circumstances thereof.” RCW 46.52.060. As Gendler notes, administrative inconvenience does not relieve an agency of its duty to comply with the PRA. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978) (cost and excessive disruption to department of assessments did not outweigh the public benefit of disclosure).

In its reply brief, the State acknowledges that RCW 46.52.060 requires the WSP to report collisions by location, which it claims its reports now provide by naming the county where the

⁵ Gendler’s request was for “[a]ll police reports relating to collisions involving bicycles on the Montlake Bridge in Seattle (SR 513).” CP at 320.

39333-6-II

accident occurred. It argues that to accept Gendler's argument would be to require the WSP to produce reports in greater detail than is necessary for law enforcement purposes. It argues that even though it is technologically possible for it to do so, it should not be required to do so because that is beyond what it needs for law enforcement purposes. The only purpose for building such a database, it argues, would be to circumvent § 409 for litigation purposes.

The State goes on to argue, however, that the PTCRs themselves are privileged because the WSDOT has custody of the records and it is a § 152 agency. It then misconstrues *Guillen* to apply privilege when the data has been collected for both § 152 and non-§ 152 purposes:

Under this interpretation, an accident report collected only for law enforcement purposes and held by the county sheriff would not be protected under § 409 in the hands of the county sheriff, even though that same report would be protected in the hands of the Public Works Department, so long as the department first obtained the report for § 152 purposes.

Guillen, 537 U.S. at 144. What the State fails to explain, however, is how the county sheriff in this example is any different from the WSP or how the Public Works Department is any different from the WSDOT. The PTCR report, in the hands of the WSP, would not be privileged as it would be in WSDOT's hands because each agency uses that report for different purposes.

The State then argues that the WSP does not use many of the categories of information in the PTCR and that information is collected only for the WSDOT, which uses it for its compliance with § 152. The trial court found little merit to this claim, discounting it because law enforcement officers still complete the form for WSP statutory purposes. Gendler argues that this State revised the PTCR in 1968, yet Congress did not enact § 152 until 1973 so the State's claim is flawed. Gendler also reasons that regardless of the information on the PTCR, it is a public record filled out by a law enforcement officer as part of his duties under state law.

The WSP argues that the legislature has never defined “location” as that term is used in RCW 46.52.060 and it claims that its annual reports, which show accident data by county, fulfill its statutory duty. We disagree. As we set out above, RCW 46.52.060 requires the WSP Chief to “file, tabulate, and analyze all accident reports.” It also requires the WSP to produce “statistical information based thereon showing the number of accidents, the location, the frequency, . . . and the circumstances thereof, and other statistical information which may prove of assistance in determining the cause of vehicular accidents.” RCW 46.52.060.

Certainly, there is one overriding purpose here and that is to improve the safety of our roadways. A report indicating only that a certain percentage of accidents occurred in King or Pierce County would serve no purpose other than an academic one. It would not and does not assist the WSP on where and when to assign troopers and it would not assist the WSP or anyone else in analyzing the causes of vehicular accidents, which is the express purpose that animates the obligation RCW 46.52.060 imposes on the WSP.

While we agree that the WSDOT need not provide unbridled access to collision data, the WSP must produce the reports in compliance with its independent statutory obligation and as such must disclose those reports when requested under the PRA.

II. Non-PRA Purpose

The WSP also argues that the trial court erred in imposing costs, attorney fees, and penalties because Gendler’s purpose in filing his complaint was not to obtain public records but to get a ruling on the interplay of § 409 and the PRA. The WSP relies on *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002), which held that a plaintiff “must show that the action was necessary to obtain the information in the first place.”

39333-6-II

The State explains that Gendler did not have to file a PRA lawsuit to obtain the collision records as the records were available and the WSP routinely provides them upon request. The State reasons that Gendler's PRA lawsuit instead was solely to resolve an evidentiary dispute over whether the collision records were within the § 409 privilege forbidding their use in actions for damages.

The State ignores, however, that Gendler could not obtain the records from the WSP without agreeing that he would not use them in litigation against the State. Gendler's argument throughout has been that the WSP must produce the records under its duty imposed by RCW 46.52.060. Whether the State had an obligation to produce the collision records under the PRA without such a caveat is the crux of this matter and resolving that question involves the scope of the PRA. Gendler had to resort to this lawsuit in order to obtain the public records he wanted without a § 409 limitation. The trial court properly awarded costs, attorney fees, and penalties for this remedial action.

III. Attorney Fees

Gendler requests an award of attorney fees as the prevailing party on appeal. RCW 42.56.550(4) allows such fees and includes attorney fees on appeal. *Progressive Animal Welfare*, 125 Wn.2d at 271. His request is appropriate and upon his compliance with RAP 18.1, a commissioner of this court will determine the proper amount of the award.

Affirmed.

Penoyar, C.J.

We concur:

39333-6-II

Worswick, J.

Becker, J.

CO40225GSC

MEMORANDUM OF UNDERSTANDING
BETWEEN

STATE OF WASHINGTON
WASHINGTON STATE PATROL

AND

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION

This Memorandum of Understanding (MOU), pursuant to Chapter 39.34 RCW, is made and entered into by and between the Washington State Patrol, ATTN: ACCESS/WACIC Section, PO Box 42619, Olympia WA 98504-2619, hereinafter referred to as "WSP," and the Washington State Department of Transportation, ATTN: Transportation Data Office, PO Box 47830, Olympia WA 98504-7830, hereinafter referred to as "WSDOT."

The purpose of this MOU is to grant WSDOT access to collision records, as provided by the 2003-2005 enacted biennium budget for WSDOT, program T, received by WSP under the authority granted to WSP by RCW 46.52.030.

1. Responsibilities.

- a. Unit Co-location. WSDOT shall provide all equipment and services necessary for the storage of Police Traffic Collision Reports (PTCR) and Vehicle Collision Reports (VCR; also known as Citizen Driver Reports) received by WSP in both paper and electronic media. WSDOT shall also provide the necessary workspace and equipment to co-locate WSP's Collision Records Section with WSDOT's Transportation Data Office. WSDOT shall provide at least thirty (30) calendar days' notice to WSP prior to any change in information technology organization, software or hardware that could affect WSP's access to these reports.
- b. Access to Reports. WSP grants to WSDOT access to both paper and electronic media version of all PTCR and VCR/Citizen Reports received by WSP.
- c. Retention of Reports. Once the paper reports are successfully scanned the paper copy can be destroyed immediately, as the scanned image is the report of record. The scanned report image must be kept in accordance with the record retention schedule as established by the Secretary of State.
- d. Information Disclosure. Both WSP and WSDOT shall disclose collision record information to the public in accordance with RCW 46.52.080, RCW 46.52.083, Chapter 42.17 RCW, and Exhibit A, Collision Records Policy, which is attached hereto and incorporated in this MOU.
- e. Collection of Fees. All fees collected in accordance with Chapter 46.52 RCW shall be managed per Exhibit A, and accounted for by WSP's Budget and

Fiscal Services. WSP shall provide WSDOT with a copy of monthly cash Journal warrant registers detailing the fees collected for collision record information disclosure. Both parties shall comply with Office of Financial Management regulations regarding cash handling.

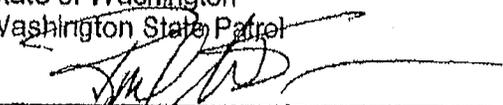
2. **Rights In Data.** Both parties acknowledge that the original PTCR and VCR/Citizen Reports and scanned images of those reports are the property of WSP, however, WSP grants to WSDOT a nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, display, and dispose of copies of the scanned images of PTCR and VCR/Citizen Reports. Data collected and tabulated by WSDOT from those reports is the property and responsibility of WSDOT.
3. **Period of Performance.** Subject to its other provisions, the period of performance of this MOU shall commence on July 1, 2003, and shall continue until terminated as provided in this MOU.
4. **WSP Staff.** WSP staff providing services under the terms of this MOU shall be under the direct command and control of the Chief of WSP or designee and shall perform the duties required by this MOU in a manner consistent with WSP policy and regulations, applicable state and local laws, and the Constitutions of the State of Washington and the United States. The assignment of personnel to accomplish the purpose of this MOU shall be at the discretion of the Chief of WSP or designee.
5. **MOU Management.** The work described in this MOU shall be performed under the coordination of Mr. Roger E. Horton of WSDOT, and Lieutenant Sean J. Hartsock of WSP, or their successors. They shall provide assistance and guidance to the other party necessary for the performance of this MOU.
6. **Indemnification.** Each party shall defend, protect and hold harmless the other party from and against all claims, suits and/or actions arising from any negligent or intentional act or omission of that party's employees, agents, and/or authorized subcontractor(s) while performing this MOU.
7. **MOU Alterations and Amendments.** This MOU may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.
8. **Termination.** Except as otherwise provided in this MOU, either party may terminate this MOU, upon thirty (30) days' written notification to the other party. If this MOU is so terminated, the terminating party shall be liable only for performance in accordance with the terms of this MOU for performance prior to the effective date of termination.
9. **Disputes.** In the event that a dispute arises under this MOU, it shall be determined in the following manner: The Chief of WSP shall appoint one member to the Dispute Board. WSDOT shall appoint one member to the Dispute Board. The Chief of WSP and WSDOT shall jointly appoint an additional member to the Dispute

Board. The Dispute Board shall evaluate the dispute and make a determination of the dispute. The determination of the Dispute Board shall be final and binding on the parties hereto. If applicable and as an alternative to this process, either of the parties may request intervention by the Governor, as provided by RCW 43.17.330, in which event the Governor's process will control.

10. **Complete Agreement.** This MOU contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this MOU shall be deemed to exist or to bind any of the parties hereto.

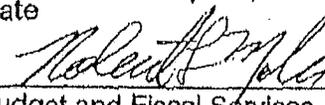
IN WITNESS WHEREOF, the parties have executed this MOU.

State of Washington
Washington State Patrol



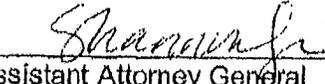
Ronal W. Serpas, Chief

Date



Budget and Fiscal Services

Date



Assistant Attorney General

Date

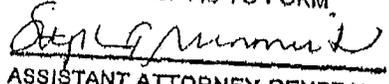
State of Washington
Department of Transportation



Douglas B. MacDonald, Secretary

Date

APPROVED AS TO FORM



ASSISTANT ATTORNEY GENERAL

12/10/03

Collision Records Policy

1. Introduction**a. Purpose**

To establish policy for the release of collision records and collision data collected, prepared and maintained by the Washington State Department of Transportation's (WSDOT) Collision Data and Analysis Branch, and the Washington State Patrol's (WSP) Collision Records Section, for use in conjunction with assigned areas of responsibility.

b. Definitions

Collision Record - For purposes of this policy statement, the term "collision record" will include copies of Police Traffic Collision Reports (PTCR), Vehicle Collision Report Forms (VCR; also known as citizen or driver reports) and supporting documents derived from microfilm images, electronic images and original paper forms. These collision records are under the authority of the WSP, located at the WSDOT Transportation Data Office, and constitute the official public record of the collision.

Collision Data - For purposes of this policy statement, the term "collision data" will include:

- WSDOT electronic files containing data derived from PTCRs, VCR/Citizen Report Forms, and supporting documents. These files may reside in mainframe or server computer systems.
- Computer printouts derived from these WSDOT electronic files. These printouts can contain information about individual collisions, including location, date, time, severity, and collision type; or they can contain summary totals for collisions occurring within a specific jurisdiction, such as city, county, or state.

Unit - The term "Unit" refers to the combined interagency unit consisting of the WSDOT Collision Data and Analysis Branch and the WSP Collision Records Section.

2. Disclosure Policies**a. Disclosure Requests for the Police Traffic Collision Report (PTCR) Form**

- 1) All public disclosure requests for copies of any PTCR must be submitted in writing on DOT Form 780-030 "Request for Copy of Collision Report" to the WSDOT's Collision Records Request Section, located in the Transportation Data Office in Olympia. The person requesting the copy may elect to receive it by mail or fax, or they may choose to obtain the copy in person at the Transportation Data Office.

- 2) For each copy requested, a reasonable charge as specified in RCW 46.52.085 will be imposed to reimburse the WSP for the record search. No search will be conducted until the requestor has completed a written application and paid this search fee. Checks shall be made payable to "Washington State Patrol."
- 3) Upon payment of the search fee, once the requested copy has been located the Unit will convey it to the person who requested it in the manner they specified within five business days, without redaction.
- 4) The Request for Copy of Collision Report Form will serve as the requestor's five (5) business day public disclosure request notification. Any requestor not completing the form in person shall have a form completed for them by WSP personnel and a copy of the form shall be mailed to the requestor.
- 5) Searches for PTCRs must be based on an involved person's name or a report number. Any request for multiple reports based solely on a location will be treated as a request for collision data, and the request will be referred to the WSDOT's Collision Data and Analysis Branch (see below).
- 6) In the event it is determined that a pre-existing restraining order or other legal restriction prevents the disclosure of a requested PTCR, the request will be denied. The requesting party will receive a denial letter, signed by the WSDOT Public Records Officer, within five business days of the request denial determination.
- 7) WSDOT will pre-authorize PTCR denials through the WSP public disclosure office.
- 8) WSP shall deposit the funds according to state regulations and deliver the receipt daily to the WSP Budget and Fiscal Services office.

b. Disclosure Requests for the Vehicle Collision Report (VCR/Citizens Report) Form

- 1) Only those persons who may have a proper interest are eligible to receive a copy of a VRC/Citizen Report Form, as specified in RCW 46.52.080. These persons are:

- a. Any driver involved in the collision.
 - b. The legal guardian of any driver involved in the collision.
 - c. The parent of any minor driver involved in the collision.
 - d. Any person injured in the collision.
 - e. The owner of any vehicle or property damaged in the collision
 - f. Any authorized representative, attorney or insurer of any of the persons cited in subsections 1 a) through 1 e) above.
- 2) All requests for copies of VCR/Citizen Report must be submitted in writing on DOT Form 780-030 "Request for Copy of Collision Report" to the WSDOT's Collision Records Request Section, located in the Transportation Data Office in Olympia. The person requesting the copy may elect to receive it by mail or fax, or they may choose to obtain the copy in person at the WSDOT Transportation Data Office.
 - 3) For each copy requested, a reasonable charge as specified in RCW 46.52.085 will be imposed to reimburse the WSP for the record search. No search will be conducted until the requestor has paid this search fee. Checks shall be made payable to "Washington State Patrol."
 - 4) Upon payment of the search fee and if located, a complete copy of the requested VCR/Citizen Report Form must be provided by the Unit to either:
 - a. The person who signed the requested VCR/Citizen Report Form; or
 - b. The attorney representing the person who signed the requested VCR/Citizen Report Form
 - 5) Upon payment of the search fee and if located, a redacted copy of the requested VCR/Citizen Report Form must be provided by the Unit to any of the eligible persons cited in subsections 1 a) through 1 f) above, with the exception of those persons cited in subsections 4 a) and 4 b) above. As stipulated in RCW 46.52.080, the only information available in the redacted copy of the requested VCR/Citizen Report Form provided to these persons is:
 - The names and addresses of those persons reported as involved in the collision.
 - The vehicle license plate numbers and descriptions of vehicles involved in the collision.
 - The date, time and location of the collision
 - 6) The Request for Copy of Collision Report Form will serve as the requestor's five (5) business day public disclosure request notification. Any requestor not completing the form in person shall have a form completed for them by WSP personnel and a copy of the form shall be mailed to the requestor.

- 7) Searches for VCR/Citizen Report Forms must be based on an involved person's name or a report number. Any request for reports based solely on a specific location will be treated as a request for collision data, and the request will be referred to the WSDOT's Collision Data and Analysis Branch (see below).
- 8) In the event it is determined that a pre-existing restraining order or other legal restriction prevents the disclosure of a requested VCR/Citizen Report Form, or the person making the request is not entitled under RCW 46.52.080 to receive a copy of the VCR/Citizen Report Form, then the request will be denied. The requesting party will receive a denial letter, signed by the WSDOT Public Records Officer, within five business days of the request denial determination.

3. Audit Functions

The entire collision records function will be subject to a WSP audit and inspection on an annual basis or as deemed appropriate by the Chief of the State Patrol or his/her designee.

4. Financial Issues

The WSP Business Office will perform monthly audits to ensure compliance with the signed inter-agency agreement.

5. Rules

a. Forms

- 1) All forms used in conjunction with the collision records function will be approved by the WSP and contain the official State Patrol logo.
- 2) WSDOT will be responsible for printing and providing all forms used in conjunction with the collision records function.

b. WSP Public Disclosure Manager

The WSP process for responding to requests for public records is managed by the WSP Evidence Records Division. The WSP Collision Records Manager, on behalf of the WSP Evidence Records Division, will refer persons requesting collision records or collision data to the appropriate sections within WSDOT following established WSP policy and procedures. The WSP public disclosure policy will control the release of all PCTR and VCR/Citizens Reports.

c. DOT Public Records Officer

The WSDOT process for responding to requests for public records is managed by the WSDOT Records and Information Services Office, Finance and Administration Division. The WSDOT Public Records Officer will refer persons requesting collision records or collision data to the appropriate sections within WSDOT.

d. Collision Records Section Manager

WSP's Collision Records Section Manager reports to the WSP Collision Records Section Commander. The WSP Collision Records Section Manager and his/her

subordinates will respond to written requests for public disclosure of collision records maintained at the WSDOT Transportation Data Office. The WSP Collision Records Section will be available to serve the public Monday through Friday, excluding legal holidays.

e. **Collision Data and Analysis Branch Manager**

WSDOT's Collision Data and Analysis Branch Manager reports to the WSDOT Transportation Data Office General Manager. The WSDOT Collision Data and Analysis Branch Manager and his/her subordinates will respond to written public information requests for collision data maintained at the WSDOT Transportation Data Office. The WSDOT Collision Data and Analysis Branch will be available to serve the public Monday through Friday, excluding legal holidays. The WSP public disclosure policy will control the release of all PCTR and VCR/Citizen Reports. The WSDOT public disclosure policy will control the release of all collision data.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

MICHAEL GENDLER,

Plaintiff,

vs.
JOHN R. BATISTE, WA STATE
PATROL, et al,

Defendants.

NO. 08-2-01833-1

**MEMORANDUM DECISION
Clerk's Action Required**

Plaintiff Michael W. Gendler filed suit against John R. Batiste, Washington State Patrol Chief (hereafter Washington State Patrol) alleging a violation of RCW 42.56.550, the Washington Public Records Act. The suit arose after Defendant denied Plaintiff's request for "All police reports relating to collisions involving bicycles on the Montlake Bridge in Seattle (SR 513)"

Washington State Patrol denied the request, asserting that the documents requested had been scanned and entered into a database created and compiled for federal highway safety reporting purposes and were therefore protected from discovery by federal law, citing U.S.C. Sec. 409. Defendant offered to make the information available to Plaintiff subject to verification that he does not intend to use the records in an action for damages. Plaintiff, having been seriously injured in a bicycle accident on the Montlake Bridge, refused to agree to the limitation offered by Defendant.

Washington Department of Transportation, the other agency using the database, moved

1 to intervene and was granted party status as a co-Defendant.

2 Both sides have moved for summary judgment, there being no disagreement as to the
3 facts of this case and the only issue presented being Defendant Washington State Patrol's legal
4 obligation to provide the reports requested by Plaintiff.

5 Congress first adopted the limitation now set forth in 23 U.S.C. Sec. 409 in 1987. A
6 complete history of the statute and ensuing litigation is set forth in *Guillen v. Pierce County*,
7 144 Wn. 2d 696 (2001) (hereafter *Guillen I*). To apply for federal assistance in funding
8 highway improvements, state and local governments were required by 23 U.S.C. Sec 152 to
9 collect certain data regarding accidents and safety hazards to support their funding requests.
10 When the data was found to be helpful to plaintiffs in litigation against the highway
11 departments collecting it, Congress acted to shield the government entities from the use
12 against them of the reports and underlying data in litigation. Our Supreme Court believed
13 Congress had gone too far and held Sec. 409 to be unconstitutional. *Guillen I*.

14 In the U.S. Supreme Court appeal of *Guillen v. Pierce County*, 537 U.S. 129 (2003)
15 (*Guillen II*), the U.S. Supreme Court reversed the Washington Supreme Court and upheld the
16 constitutionality of Sec. 409, but limited its effect. The Court held that:

17 Sec. 409 protects only information compiled or collected for Sec. 152 purposes,
18 and does not protect information compiled or collected for purposes unrelated to
19 Sec. 152, as held by the agencies that compiled or collected that information
20” 537 U.S. 129, 146

21 Applying that standard to the facts of this case, the Police Traffic Collision Reports
22 collected by Defendant Washington State Patrol are compiled or collected for purposes
23 unrelated to Sec. 152. They are compiled and collected pursuant to the long-standing statutory
24 duty of the Washington State Patrol to

25 ...file, tabulate, and analyze all accident reports and to publish annually,
26 immediately following the close of each fiscal year, and monthly during the
27 course of the year, statistical information based thereon showing the number of
28 accidents, the location, the frequency, whether any driver involved in the
accident was distracted at the time of the accident and the circumstances thereof,

1 and other statistical information which may prove of assistance in determining
2 the cause of vehicular accidents ... RCW 42.52.060

3 Since the creation of the joint Washington State Patrol/Department of Transportation
4 database, both agencies have been able to review these reports. But as the Memorandum of
5 Understanding between Defendants confirms, the reports remain the property of the
6 Washington State Patrol. Declaration of Kip Johnson, Attachment 1. They continue to be held
7 by that agency within the database. *Id.* The fact that the Department of Transportation now
8 also has immediate access to the records and reports does not change their character and does
9 not transform them into information "compiled or collected for Sec. 152 purposes."

10 Defendants argue that the form utilized by the Washington State Patrol is a uniform
11 form developed by the Federal Highway Administration to assist in data collection. However,
12 the form is still completed by law enforcement officials for the statutory purposes set forth
13 above.

14 Defendants further argue that it is only with the coding employed by Department of
15 Transportation that Washington State Patrol is able to determine the location of a particular
16 accident. However, the record establishes that long before the creation of the database
17 Defendant Washington State Patrol was searching its reports and finding the information
18 requested in this case by Plaintiff. (see Declaration of John L. Messina). The fact that
19 Washington State Patrol has elected not to develop the software to search its own records now
20 in electronic format does not relieve it of the obligation to provide such records upon request.
21 The placement of public records in an electronic database alone cannot prevent the public
22 from reviewing them under the Public Records Act. The strong public policy towards
23 openness of government expressed by the Act supports this result. If anything, these
24 documents currently should be more available to the public, just as they are more available to
25 the agencies who manage the database.

26 Accordingly, Defendant remains under a duty under the Public Records Act to provide
27 copies of these records on request without the limitation offered by Defendant. Judgment will
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

be granted to Plaintiff. The Court will determine fees and costs under the statute at a hearing on presentation of the order from this decision.

Issued this 2nd day of February, 2009

Chris Wickham
Chris Wickham
Superior Court Judge

*- by Rev Morgan, JTA
at Judge Wickham's
direction to avoid delay.*

23 USCS § 409

§ 409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or 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 [23 USCS §§ 130, 144, and 148] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

[Added April 2, 1987, P.L. 100-17, Title I, § 132(a), 101 Stat. 170; Dec. 18, 1991, P.L. 102-240, Title I, Part A, § 1035(a), 105 Stat. 1978; Nov. 28, 1995, P.L. 104-59, Title III, § 323, 109 Stat. 591; Aug. 10, 2005, P.L. 109-59, Title I, Subtitle D, § 1401(a)(3)(C), 119 Stat. 1225.]

23 USCS § 152

§ 152. Hazard elimination program

(a) In general.

(1) Program. Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(2) Hazards. In carrying out paragraph (1), a State may, at its discretion--

- (A) identify, through a survey, hazards to motorists, bicyclists, pedestrians, and users of highway facilities; and
- (B) develop and implement projects and programs to address the hazards.

(b) The Secretary may approve as a project under this section any safety improvement project, including a project described in subsection (a).

(c) Funds authorized to carry out this section shall be available for expenditure on--

- (1) any public road;
- (2) any public surface transportation facility or any publicly owned bicycle or pedestrian pathway or trail; or
- (3) any traffic calming measure.

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b) [23 USCS § 104(b)] except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard eliminating program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title [23 USCS § 401].

[Added Aug. 13, 1973, P.L. 93-87, Title II, § 209(a), 87 Stat. 286; May 5, 1976, P.L. 94-280, Title I, § 131, 90 Stat. 441; Nov. 6, 1978, P.L. 95-599, Title I, § 168(a), 92 Stat. 2722; Nov. 9, 1979, P.L. 96-106, § 10(b), 93 Stat. 798; Dec. 21, 1982, P.L. 97-375, Title II, § 210(b), 96 Stat. 1826; Jan. 6, 1983, P.L. 97-424, Title I, § 125, 96 Stat. 2112; April 2, 1987, P.L. 100-17, Title I, § 133(b)(12), 101 Stat. 172; Nov. 28, 1995, P.L. 104-59, Title III, § 325(c), 109 Stat. 592; June 9, 1998, P.L. 105-178, Title I, Subtitle D, § 1401, 112 Stat. 235.]

RCW 42.56.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(3) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

[2007 c 197 § 1; 2005 c 274 § 101.]

RCW 42.56.030

Construction.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

[2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW 42.17.251.]

RCW 42.56.080

Facilities for copying — Availability of public records.

Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter.

[2005 c 483 § 1; 2005 c 274 § 285; 1987 c 403 § 4; 1975 1st ex.s. c 294 § 15; 1973 c 1 § 27 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.270.]

RCW 42.56.520

Prompt responses required.

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[2010 c 69 § 2; 1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.320.]

RCW 42.56.550

Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

RCW 46.52.030

Accident reports.

(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 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 at Olympia, Washington. The Washington state patrol 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 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 chief'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 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 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, whether such vehicles were occupied at the time of the accident, and whether any driver involved in the accident was distracted at the time of the accident. Distractions contributing to an accident must be reported on the accident form and include at least the following minimum reporting options: Not distracted; operating a handheld electronic telecommunication device; operating a hands-free wireless telecommunication device; other electronic devices (including, but not limited to, PDA's, laptop computers, navigational devices, etc.); adjusting an audio or entertainment system; smoking; eating or drinking; reading or writing; grooming; interacting with children, passengers, animals, or objects in the vehicle; other inside distractions; outside distractions; and distraction unknown. Every required accident report shall be made on a form prescribed by the chief of the Washington state patrol 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 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.

[2005 c 171 § 1; 1997 c 248 § 1; 1996 c 183 § 1; 1989 c 353 § 5; 1987 c 463 § 2; 1981 c 30 § 1; 1979 c 158 § 160; 1979 c 11 § 2. Prior: 1977 ex.s. c 369 § 2; 1977 ex.s. c 68 § 1; 1969 ex.s. c 40 § 2; 1967 c 32 § 54; 1965 ex.s. c 119 § 1; 1961 c 12 §46.52.030; prior: 1943 c 154 § 1; 1937 c 189 § 135; RRS § 6360-135.]

RCW 46.52.060

Tabulation and analysis of reports — Availability for use.

It shall be the duty of the chief of the Washington state patrol to file, tabulate, and analyze all accident reports and to publish annually, immediately following the close of each fiscal year, and monthly during the course of the year, statistical information based thereon showing the number of accidents, the location, the frequency, whether any driver involved in the accident was distracted at the time of the accident and the circumstances thereof, and other statistical information which may prove of assistance in determining the cause of vehicular accidents. Distractions contributing to an accident to be reported must include at least the following: Not distracted; operating a handheld electronic telecommunication device; operating a hands-free wireless telecommunication device; other electronic devices (including, but not limited to, PDA's, laptop computers, navigational devices, etc.); adjusting an audio or entertainment system; smoking; eating or drinking; reading or writing; grooming; interacting with children, passengers, animals, or objects in the vehicle; other inside distractions; outside distractions; and distraction unknown.

Such accident reports and analysis or reports thereof shall be available to the director of licensing, the department of transportation, the utilities and transportation commission, the traffic safety commission, and other public entities authorized by the chief of the Washington state patrol, 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.

[2005 c 171 § 2; 1998 c 169 § 1; 1979 c 158 § 161; 1977 c 75 § 67; 1967 c 32 § 56; 1961 c 12 § 46.52.060. Prior: 1937 c 189 § 138; RRS § 6360-138.]

RCW 46.52.080

Confidentiality of reports — Information required to be disclosed — Evidence.

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 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 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.

[1979 c 158 § 162; 1975 c 62 § 15; 1967 c 32 § 58; 1965 ex.s. c 119 § 3; 1961 c 12 § 46.52.080. Prior: 1937 c 189 § 140; RRS § 6360-140.]