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STATE OF WASHINGTON

NO. 85408-4

Court of Appeals No. 39333-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL W. GENDLER,

Respondent,

v.

JOHN R. BATISTE, et al.,

Petitioners.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

John R. Batiste, Chief of the Washington State Patrol, The Washington State Patrol (WSP), and The Washington State Department of Transportation (WSDOT) (State Defendants), file this petition for discretionary review pursuant to RAP 13.3 (a)(1).

II. CITATION TO COURT OF APPEALS DECISION

The petitioners seek review of the opinion published by Division II in *Gendler v. Batiste, et. al.* (No. 39333-6-II) (WL 4793306, Nov. 24, 2010), copy attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Where the State's ability to produce an accurate report of collisions at a specific site exists solely by virtue of the federal requirements imposed on WSDOT under 23 U.S.C. § 152, and where it is undisputed that records maintained in the § 152 database are protected by the privilege enacted under 23 U.S.C. § 409, does the ruling by the Court of Appeals conflict with federal law by requiring the WSP to produce reports from the protected § 152 database without regard to the § 409 privilege?

2. Did the Court of Appeals erroneously interpret RCW 46.52.060 as requiring the WSP to create and produce a report under the Public Records Act (PRA) that is not required by the statutory language,

that the WSP does not maintain in the ordinary course of business, and that would serve no police purpose?

IV. AUTHORITY SUPPORTING ACCEPTANCE OF REVIEW

For decades prior to this court's decision in the *Guillen* case in 2001, all accident reports were confidential pursuant to the express direction of RCW 46.52.080. Attorney General Opinions, 24th Biennial Report (1937-1938, p. 226). In *Guillen v. Pierce County*, 537 U.S. 129, 146 (2003), this court changed Washington law by ruling that accident reports filed by officers were public and that the "all required reports" language of RCW 46.52.080 only applied to reports filed by citizens.

Assuming *arguendo* that the distinction between officer reports and citizen reports grafted into RCW 46.52.080 by this court in *Guillen* was correct, then this case does not involve the issue of whether the public can obtain accident reports under the public records act. Since the *Guillen* decision the public has been given access to accident reports filed by officers. However, this court's analysis of the application of 23 U.S.C. § 409 to collision records was sharply reversed by the U.S. Supreme Court. *Guillen*, 537 U.S. 129, 146 (2003). This court has not reconciled its ruling that officer's accident reports are public with the U.S. Supreme Court's mandate to apply 23 U.S.C. § 409.

The question presented in this appeal is whether accident reports, which are collected, compiled and held by WSDOT for purposes of allocating federal highway improvement funds pursuant to 23 U.S.C. § 152 can be used in a lawsuit against the state to establish liability, when federal law specifically prohibits that particular use of accident reports. 23 USC § 409.

The decision of the Court of Appeals that accident reports are collected, compiled and held by the WSP to create a report of accidents by specific location, pursuant to RCW 46.52.060, is void of evidentiary support. The undisputed facts establish that WSP has never compiled accident data by specific location or included such information in its annual reporting of accidents under RCW 46.52.060 and has no law enforcement need to be as precise as WSDOT's location reporting to the federal government under § 152.

Stemming from this court's decision in *Guillen* that officer's accident reports are public, the Court of Appeals has extended that ruling to find that the WSP has an independent duty under RCW 46.52.060 to collect collision reports for specific locations and provide them to the public under the PRA even though the analysis necessary to produce the reports sought by plaintiff can only be accomplished by utilizing

WSDOT's federally protected database for a purpose in violation of federal law.

Since this court's decision in *Guillen*, the State has developed a procedure accommodating both this court's ruling that officers' accident reports are public records and the U.S. Supreme Court's instruction to apply § 409 to reports that are collected, compiled and held by WSDOT. The State has accomplished harmonization by allowing public access to the records, but under the proviso that the records cannot be used for purposes forbidden by § 409. The decision by the Court of Appeals erroneously finds a duty to produce reports of accidents at specific locations and in doing so frustrates the mandatory federal privilege imposed by § 409.

The decision by the Court of Appeals has created a conflict between the requirements of state law under the PRA and the requirements of federal law under § 409. This conflict presents recurring issues and involves questions of substantial public interest and should be reviewed under RAP 13.4(b).

V. STATEMENT OF THE CASE

A. Background

Mr. Gendler was injured in a bicycle accident while riding on a State road (the Montlake Bridge) on October 28, 2007. Mr. Gendler filed

an action for damages against WSDOT in Thurston County Superior Court.¹ In support of his action for damages, Mr. Gendler submitted a request under the PRA to the WSP seeking collision reports for all bicycle accidents occurring on the Montlake Bridge. Due to federal reporting requirements mandated by 23 U.S.C. § 152, it is undisputed that WSDOT has the technical capability to produce an accurate compilation of all the collision reports filed for accidents at any specific site down to an accuracy of 1/100th of a mile. CP 196.

It is also undisputed, as correctly noted by the Court of Appeals in this case, that records and reports produced by WSDOT from the § 152 database are subject to federal restrictions on the use of that data as imposed by 23 U.S.C. § 409. *Gendler*, Slip Op. p. 12. Recognizing that barrier, Mr. Gendler bypassed WSDOT and filed his request for bicycle collision reports on the Montlake Bridge with the WSP. CP 248.

WSP responded to the request by advising counsel for Mr. Gendler:

In order to retrieve your collision report, we must have information about the collision date, the names of the persons involved, and the collision location (county/city; street, road, or highway). We cannot retrieve collision Reports [sic] using a specific location only. If you wish to receive a history of collision at this location, please contact the Collision Data and Analysis Branch at (360) 580-2454.

¹ *Gendler v. State*, Thurston County Superior Court No. 09-2-00428-2.

(Footnote added.)

CP 203. The Collision Data and Analysis Branch is part of WSDOT and is responsible for complying with the federal highway safety reporting requirements under 23 U.S.C. § 152. CP 232-33.

WSDOT offered Mr. Gendler the collision reports for accidents on the Montlake Bridge subject to the restrictions on use of the records imposed by federal law in § 409. Mr. Gendler declined to accept the collision records from WSDOT with the restrictions imposed by federal law and instead sued the WSP for production of the same history he declined to accept from WSDOT. CP 7-11.

On September 3, 2008, WSDOT moved to intervene in the lawsuit on the basis that it was the real party in interest because the collision records being sought could only be generated from the protected § 152 database. CP 134-38. On October 3, 2008, WSDOT's motion for intervention was granted over the objection of Mr. Gendler. CP 167-68.

On January 27, 2009, the trial court heard cross-motions for summary judgment. The sole issue was whether the WSP was required by the PRA to produce the collision reports for bicycle accidents occurring on the Montlake Bridge. On February 2, 2009, the trial court ruled in favor of the plaintiff. CP 500-02. The trial court's decision was affirmed by the Court of Appeals on November 24, 2010.

B. The Collection and Use of Uniform Police Traffic Collision Reports (PTCR) in Washington

The current collision report form used by all law enforcement agencies in Washington contains 113 data points which have been created by WSDOT and are used by WSDOT to meet the specificity required for federal highway safety reporting under § 152. CP 194.² The data is collected by law enforcement officers at the scene of a collision by simply filling out the uniform collision report form. CP 194. The United States Department of Transportation encouraged standard data elements in uniform collision report forms to implement the federal Highway Safety Programs. CP 194.

Implementing federal regulations for the federal Hazard Elimination Act of 1973 requires each state to maintain collision reports in a comprehensive computerized database. CP 195. This is known as the § 152 database or is sometimes referred to as the Data Mart. CP 195. WSDOT collects and compiles the data, which includes collision reports, needed to comply with federal highway safety reporting requirements. CP 195. The federal regulations require WSDOT to analyze the raw collision

² The decision by the Court of Appeals contains a factual error in its statement that the information collected in Washington's collision reports predates the federal reporting requirements. *Gendler*, Slip Op. p. 11. The undisputed record describes the information collected in Washington's collision report forms evolving over time in response to increasingly specific federal requirements. CP 193-97.

reports and to locate all collisions that occur on public roadways with an accuracy down to 1/100th of a mile. CP 195.

Local and state law enforcement agencies submit their raw collision reports from the field to the WSP Collision Records Section (CRS). CP 195-96; 201. Drivers involved in collisions may also submit Vehicle Collision Reports (VCR). CP 196. The WSP scans the collision reports into WSDOT's § 152 database. CP 196; 202. The scanned report becomes the official record and the paper report is destroyed. CP 196. There are currently over 950,000 collision reports in the database. CP 202.

The WSP indexes the scanned reports only by PTCR or VCR number, individual driver or property owner, date of collision, and name of roadway or county if included. CP 196; 202. The WSP does not index or code the raw reports by specific location prior to scanning them into the WSDOT database, nor does the WSP have the capability to search records according to type of vehicle – such as “bicycle”. CP 194 and 202. The WSP does not have the capability to accurately retrieve collision reports based on a search by specific location. That capability exists solely as a product produced through WSDOT's analysis of collision reports for federal § 152 purposes. CP 194-98, 202.

The Court of Appeals in this case erroneously assumed that the WSP indexed the raw collision reports by specific location and could therefore retrieve reports by specific location. *Gendler*, Slip Op. p. 6, fn. 2. This assumption is contrary to the record. As explained by Kip Johnson, the WSP collision records supervisor:

Q. So you [WSP] could index by location; you just don't feel the need to do it because WSDOT is doing that, correct?

A. No.

Q. No what?

A. We [WSP] don't index by location. We don't have the resources to do that, we don't have the knowledge to do that anymore, and we don't have the fields. CP 202, 329.

The WSP cannot perform an accurate search of collision records using a specific location for reference, nor would a manual search of the 950,000 collision records produce an accurate report because raw reports scanned into the database by WSP are not reported by law enforcement officers at the necessary level of precision. In addition, the reporting errors in the raw reports are only corrected by WSDOT. CP 202. Corrected and accurate collision reports searchable by a location as specific at the Montlake Bridge are only available by virtue of WSDOT performing its § 152 analysis of the raw collision reports. CP 194-97, 202-03.

As the states increasingly began to adopt computerized databases in order to comply with § 152 requirements, an issue arose over the application of the § 409 privilege in states where the database was integrated or shared among more than one agency. In Washington, this issue exists because the collision records database is shared between the WSP and WSDOT. The Federal Highway Administration has addressed this issue:

One such issue involves the situation where a State or local government stores crash report information only in a single set of electronic files that all government agencies having a need for such information could access by the use of a networked computer system. In such a situation, we believe that Section 409 would apply to all crash reports contained within the system, regardless of the agency that may possess or retrieve a report. This is so because all of the crash reports in such a system would be stored in the database, at least in part, for a Section 409 purpose.

CP 200 (emphasis added).

In 2003, a Memorandum of Understanding (MOU) was executed between the WSP and WSDOT regarding collision records. CP 197; 202; 205-17. This agreement reflected the differing business needs of the agencies and in particular the data collection and analysis requirements imposed on WSDOT for federal highway safety purposes. CP 197. Unlike WSDOT in complying with § 152, the WSP is under no obligation to collect or compile collision records with the location precision produced by WSDOT nor is there any evidence of a law enforcement need for such

precision. For example the WSP has produced an annual report of law enforcement issues related to traffic for over 70 years as required by RCW 46.52.060, including collisions, but has never reported the locations of collisions much more specifically than by county. The Legislature has never requested more specificity of the WSP in its reporting the locations of collisions under RCW 46.52.060.³

VI. ARGUMENT

A. This Court Should Reconcile Its Ruling In *Guillen v. Pierce County* That Collision Reports Filed By Police Officers Are Public Records With The Ruling From The U.S. Supreme Court That Collision Reports Collected, Compiled And Held By WSDOT For § 152 Purposes Must Be Shielded By The 409 Privilege.

In *Guillen v. Pierce County*, this court held collision reports prepared by law enforcement officers are subject to public disclosure under RCW 46.52.080. *Guillen v. Pierce County*, 144 Wn.2d 696, 713, 31 P.3d 628 (2001), reversed on other grounds, 537 U.S. at 145. This ruling grafted a distinction into the plain language of RCW 46.52.080 which specifically provides that all collision reports are confidential. The statute makes no distinction between collision reports submitted by the persons involved in an accident and the investigating police officer.

³ The report mandated by RCW 46.52.060 is publically available at <http://www.wsdot.wa.gov/mapsdata/tdo/accidentannual.htm>. There is no support in the record for the assertion by the Court of Appeals that a police purpose is served by requiring the WSP to produce collision reports for specific locations. *Gendler*, Slip Op. p. 12.

RCW 46.52.083 only allows the interested parties named in RCW 46.52.080 to have access to the collision reports.⁴ For decades, Washington law had interpreted the plain language in RCW 46.52.080 as a legislative determination that all collision reports were confidential. Attorney General Opinions, 24th Biennial Report (1937-1938, p. 226).

However, in *Guillen* this Court stated:

We have held that the phrase ‘accident reports and supplemental reports’ in RCW 46.52.080 refers to reports prepared pursuant to RCW 46.52.030(1) or .040 by persons involved in the accidents, not to official ‘police officer’s reports’ or investigator’s reports’ prepared pursuant to RCW 46.52.030(3) or .070. *Superior Asphalt & Concrete Co. v. Dep’t of Labor & Indus.*, 19 Wn. App. 800, 806, 578 P.2d 59 (1978) (noting RCW 46.52.080 ‘mandates confidentiality of reports made by persons involved in an accident’) (citing *Gooldy v. Golden Grain Trucking Co.*, 69 Wn.2d 610, 419 P.2d 582 (1966)).

Guillen, 144 Wn.2d at 714-15 (footnote omitted).⁵

The Court of Appeals in this case, bound to follow *Guillen*, premised its holding on the conclusion that collision reports filed by

⁴ RCW 46.52.083 states: “All of the factual data submitted in report form by the officers, together with the signed statements of all witnesses, except the reports signed by the drivers involved in the accident, shall be made available upon request to the interested parties named in RCW 46.52.080.”

⁵ Upon closer review, neither of the cases cited by the court, *Superior Asphalt* nor *Gooldy*, support the conclusion that the confidentiality provision of RCW 46.52.080 does not apply to collision reports submitted by police officers. To the contrary, the actual holding in *Gooldy* was that the investigating officer’s report filed pursuant to RCW 46.52.080 is confidential. *Gooldy*, 69 Wn.2d at 613-14. The decision in *Superior Asphalt* did not involve an officer’s report and merely holds that the report of a person involved in an accident is confidential under RCW 46.52.080. *Superior Asphalt*, 19 Wn. App. at 806. The interpretation of RCW 46.52.080 was not briefed for this court by the parties in *Guillen*.

officers are available to the public. *Gendler*, Slip Op. p. 10.⁶ This premise contributed to the error of the court below in ruling that the WSP could be required under the PRA to produce officers' collision reports for specific locations.

B. The Court Of Appeals Decision Conflicts 23 USC § 409 By Requiring The WSP To Produce Collision Reports That Can Only Be Obtained From WSDOT's Protected Database.

1. It Is Undisputed That Collision Records Produced From The Protected § 152 Database Would Be Privileged Under 23 U.S.C. § 409 If Requested From WSDOT.

The Court of Appeals correctly ruled that WSDOT would not be required to produce collision records from the protected § 152 database in the absence of the § 409 disclaimer. *Gendler*, Slip Op. p. 12. However, it is also undisputed that an accurate compilation of collision records for a site specific location can only be generated from WSDOT's § 152 database. CP 194-197, 202. There is no other source of data capable of producing an accurate response to a demand for collision reports occurring at a specific location. CP 194-197, 202. Therefore, as a practical matter

⁶ The State raised concerns about this aspect of the ruling in the court below, but recognized that the lower courts were powerless to do anything other than follow the distinction created by this court in *Guillen*, 144 Wn.2d at 714.

Collision reports contain a great deal of information about the individuals involved in collisions including their names, dates of birth, addresses, telephone numbers, and driver's license numbers. Absent correction of the error in *Guillen*, all of this information would be subject to disclosure to anyone making a request for collision records.

WSP would have to turn to the § 152 database to gather an accurate compilation of collision reports for a specific location.

As explained by Ms. Johnson, the WSP does not have the technology, the resources, or the knowledge necessary to duplicate the precision in reporting collisions by specific location that WSDOT has by virtue of its § 152 capability. CP 202. The Congressional privilege enacted in § 409 would be frustrated by creating a situation where WSP was required to produce protected records for a purpose contrary to federal law. The frustration is particularly acute in this situation because it is undisputed that the plaintiff sought the collision records for use in his damages action – the very purpose forbidden by Congress.

2. Permitting The WSP To Produce Collision Records From the § 152 Database Without The § 409 Privilege Is Contrary To The U.S. Supreme Court Decision In *Pierce County v. Guillen*.

Despite Congress' repeated efforts to bolster and define the protection afforded to the states for their federally mandated collision data collection and analysis, litigants attempted to whittle away at § 409 and require disclosure of protected collision data and analysis. See, *Guillen*, 537 U.S. at 145. In *Guillen*, the plaintiffs argued that § 409 applied only to records generated specifically for § 152 purposes and held by the agency responsible for complying with § 152. *Guillen*, 537 U.S. at 145.

Although the Washington State Supreme Court agreed with this argument, *Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628 (2001), the United States Supreme Court reversed this interpretation as too narrow and failing to give the protection intended by Congress when it amended § 409. *Guillen*, 537 U.S. at 145.

The proper interpretation of § 409 as explained by the Supreme Court provides:

The interpretation proposed by the [United States], 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. See *supra*, at 725. 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.

Guillen, 537 U.S. at 145–46 (emphasis added).

Under *Guillen*, the collision reports for collisions on the Montlake Bridge are within § 409 because the data is collected for a § 152 purpose

and is held by the agency responsible for complying with § 152. *Guillen*, 537 U.S. at 145. The fact that WSDOT collects the raw collision reports from the WSP does not defeat the application of § 409 because the reports are raw data collected for § 152 purposes. *Guillen*, 537 U.S. at 146. As specifically noted in *Guillen*, § 409 applies to “. . . any information that an agency collects from other sources for § 152 purposes.” *Guillen*, 537 U.S. at 146.

Under *Guillen*, collision information is not protected under § 409 only when collision data is *collected only for law enforcement purposes and is held by the law enforcement agency*. *Guillen*, 537 U.S. at 144. That is not the situation for collision reports in Washington and would be different than the example from *Guillen* where the Pierce County Sheriff held collision reports for a law enforcement purpose.

The collection by the state of the data in collision reports is not done ‘only for a law enforcement purpose’, nor are the reports held by the WSP. Rather, the collision reports themselves are composed of the raw data needed by WSDOT to comply with federal § 152 reporting requirements. CP 194-197. Collision reports pass through the hands of WSP on their way to the § 152 database. CP 194. The FHWA has determined that an integrated database, such as Washington’s, does not lose its status as privileged under § 409. CP 200.

More importantly, the report of collisions sought by Mr. Gendler (the compilation of all collision reports for Montlake Bridge) never exists as a WSP record at anytime. CP 202-203. A report of collisions at a location as specific as the Montlake Bridge is created only after the analysis performed on the raw reports by WSDOT. CP 194-97, 202-03.

The product of WSDOT's § 152 analysis and the raw data, such as collision reports, underlying its analysis are within the privilege mandated by § 409. *Guillen*, 537 U.S. at 145-46. The reports are held in an integrated database that meets the policy announced by the FHWA that § 409 protections are to be afforded as long as the database is "at least in part" for § 152 purposes. CP 200. Accordingly, WSP may not, consistent with federal law, be required to access the § 152 database and produce the product of WSDOT's analysis without the § 409 privilege.

3. The Court Of Appeals Erroneously Interpreted RCW 46.52.060 As Requiring The WSP To Produce Site Specific Collision Reports.

The Court of Appeals erroneously held that RCW 46.52.060 created an independent obligation on the WSP to produce the collision reports for bicycle accidents on the Montlake Bridge in response to public records requests. *Gendler*, Slip Op. p. 12. The pertinent section of RCW 46.52.060 provides:

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.

RCW 46.52.060 has been on the books since 1937. CP 205-14.

The WSP has dutifully published its required annual report on accidents in Washington every year for over 70 years. The report has never attempted to report accidents by site specific locations – such as the Montlake Bridge. Rather, the “by location” reporting done by the WSP under this statute has always been at essentially the county level.⁷

For more than 70 years the Legislature has been satisfied with the level of specificity used by the WSP in reporting under RCW 46.52.060. The Legislature has not indicated a desire for WSP to increase its reporting capacity, and there is no law enforcement purpose that would be served by such reporting. *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 813, 666 P.2d 329 (1983) (legislative acquiescence in agency interpretation of statutory duties). In fact, the only purpose of such a duplicate database would be to circumvent § 409. It is undisputed that the WSP has neither

⁷ The annual WSP report, which is publically available at www.wsdot.wa.gov/mapsdata/TDO/accidentannual.htm, provides a wide variety of collision data but “locations” are only specified by county.

the resources nor the expertise necessary to extract the accident location precision accomplished by WSDOT through its § 152 analysis of the raw collision reports, nor is there any other way to produce an accurate report of all collisions at a location as specific as the Montlake Bridge. CP 201 – 203. Requiring WSP to report under RCW 46.52.060 with the same precision as WSDOT reports for 23 U.S.C. § 152 would require significant resources and should be imposed by the Legislature not the court.

Although Mr. Gendler cites the reporting requirement of RCW 46.52.060, it is important to understand that he is not seeking the report that WSP has been producing for decades under that statute. In reality Mr. Gendler is demanding WSDOT's report with locations down to 1/100th of a mile. The PRA does not require an agency to invest resources to create a reporting capability that is beyond the needs of the agency. Creating the capability for WSP to duplicate the capability of WSDOT's § 152 database is far more than mere administrative inconvenience. CP 201-03.

The mere fact that it would be technologically possible for the WSP to create a capability comparable to WSDOT's § 152 ability does not obligate the WSP to do so when the Legislature has not indicated a desire for WSP to increase its reporting capacity and there is no law enforcement purpose that would be served by such reporting.

Consistent with current state and federal law, WSDOT's reporting information from the § 152 database is available to Mr. Gendler, subject to the privilege of § 409. The court of appeals erred in holding that the WSP was required under the PRA to compile collision reports of bicycle accidents for a specific location free of the § 409 privilege.

VII. CONCLUSION

For the reasons stated above, this Court should grant the State's petition for discretionary review.

RESPECTFULLY SUBMITTED this 27th day of December, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "RDT for 29840".

RENE D. TOMISSER, WSBA #17509
Senior Counsel
Attorneys for Defendants Washington State
Department of Transportation and
Washington State Patrol

PROOF OF SERVICE

I certify that I served a copy of on all parties or their counsel of record on the date below
as follows:

ABC/Legal Messenger

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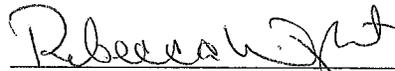
Via Email

Charles Wiggins via Email

Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the
foregoing is true and correct.

DATED this 27 day of December, 2010, at Tacoma, WA.



Rebecca Wright, Legal Assistant

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STATE OF WASHINGTON
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APPENDICES

A. Gendler v. Batiste, et al. (No. 39336-II)
(WL 4793306, Nov. 24, 2010)

B. 23 U.S.C. § 152

C. 23 U.S.C. § 409

D. RCW 46.52.030

E. RCW 46.52.040

F. RCW 46.52.060

G. RCW 46.52.080

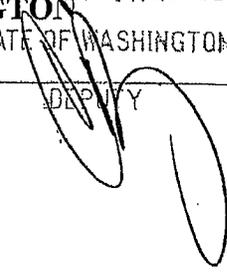
H. RCW 46.52.083

Appendix A

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

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

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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.

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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

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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.

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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).

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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

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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 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 accident occurred. It argues that to accept Gendler’s argument would be to require the WSP to

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.

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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

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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.”

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

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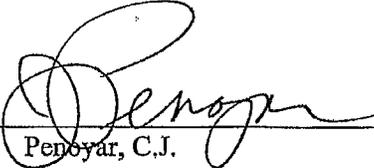
over whether the collision records were within the § 409 privilege forbidding their use in actions for damages.

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.

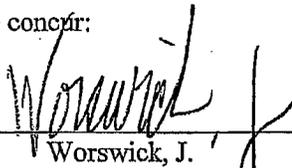
III. ATTORNEY FEES

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:


Worswick, J.


Becker, J.

Appendix B

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23 U.S.C.A. § 152

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C

Effective: June 9, 1998

United States Code Annotated Currentness

Title 23. Highways (Refs & Annos)

▣ Chapter 1. Federal-Aid Highways (Refs & Annos)

→ § 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 there-

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of.

(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), 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 elimination 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.

CREDIT(S)

(Added Pub.L. 93-87, Title II, §209(a), Aug. 13, 1973, 87 Stat. 286, and amended Pub.L. 94-280, Title I, §131, May 5, 1976, 90 Stat. 441; Pub.L. 95-599, Title I, § 168(a), Nov. 6, 1978, 92 Stat. 2722; Pub.L. 96-106, § 10(b), Nov. 9, 1979, 93 Stat. 798; Pub.L. 97-375, Title II, § 210(b), Dec. 21, 1982, 96 Stat. 1826; Pub.L. 97-424, Title I, § 125, Jan. 6, 1983, 96 Stat. 2113; Pub.L. 100-17, Title I, § 133(b)(12), Apr. 2, 1987, 101 Stat. 172; Pub.L. 104-59, Title III, § 325(c), Nov. 28, 1995, 109 Stat. 592; Pub.L. 105-178, Title I, § 1401, June 9, 1998, 112 Stat. 235.)

Current through P.L. 111-62 approved 8-19-09

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Appendix C

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Effective: August 10, 2005

United States Code Annotated Currentness

Title 23. Highways (Refs & Annos)

▣ Chapter 4. Highway Safety (Refs & Annos)

→ § 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 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.

CREDIT(S)

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170, and amended Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591; Pub.L. 109-59, Title I, § 1401(a)(3)(C), Aug. 10, 2005, 119 Stat. 1225.)

Current through P.L. 111-62 approved 8-19-09

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Appendix D

**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.]

Notes:

Effective date – 2005 c 171: "This act takes effect January 1, 2006." [2005 c 171 § 3.]

Effective date – 1997 c 248: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 2, 1997]." [1997 c 248 § 2.]

Effective date – 1996 c 183: "This act takes effect July 1, 1996." [1996 c 183 § 3.]

Severability – Effective date – 1989 c 353: See RCW 46.30.900 and 46.30.901.

Appendix E

RCW 46.52.040

Accident reports — Report when operator disabled.

Whenever the driver of the vehicle involved in any accident, concerning which accident report is required, is physically incapable of making the required accident report and there is another occupant other than a passenger for hire therein, in the vehicle at the time of the accident capable of making a report, such occupant shall make or cause to be made such report. Upon recovery such driver shall make such report in the manner required by law.

[1967 c 32 § 55; 1961 c 12 § 46.52.040. Prior: 1937 c 189 § 136; RRS § 6360-136.]

Appendix F

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.]

Notes:

Effective date -- 2005 c 171: See note following RCW 46.52.030.

Appendix G

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.]

Notes:

Severability -- 1975 c 62: See note following RCW 36.75.010.

Appendix H

RCW 46.52.083

Confidentiality of reports — Availability of factual data to interested parties.

All of the factual data submitted in report form by the officers, together with the signed statements of all witnesses, except the reports signed by the drivers involved in the accident, shall be made available upon request to the interested parties named in RCW 46.52.080.

[1965 ex.s. c 119 § 4.]