

NO. 39333-6-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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MICHAEL W. GENDLER,

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

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**APPELLANT STATE OF WASHINGTON'S REPLY BRIEF**

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COURT OF APPEALS  
DIVISION II

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## I. INTRODUCTION

An attempt to take advantage of the Public Records Act (PRA) should be denied when invocation of the PRA is mere subterfuge for what is in reality an evidentiary dispute over the application of 23 U.S.C. § 409 to collision records in Mr. Gendler's tort action against the State. Mr. Gendler's responsive brief never overcomes the uncontroverted fact that public access to collision records is not denied in Washington and, in fact, collision records are routinely provided on hundreds of occasions every year. CP 467. Nothing is more telling than the fact that Mr. Gendler was offered the collision records for the Montlake Bridge, but he declined to accept them if they could not be used in his tort action – the very purpose which is forbidden by § 409.

This case has nothing to do with ensuring public access to collision records. This case is about whether collision records are going to be admissible in damages actions against state and local transportation agencies. The PRA was not intended for the use sought by Mr. Gendler.

The trial court should be reversed because Mr. Gendler has failed to state a claim under the PRA. Resolution of the dispute regarding § 409 should either be determined by the court presiding over Mr. Gendler's tort action, or this Court could reach the merits on the basis that the dispute over collision records is recurrent, has been fully briefed and would

provide guidance to public officials. *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994).

## II. LAW AND ARGUMENT

### A. **Neither the Public Nor Mr. Gendler Are Denied Access To Collision Reports And The PRA Should Not Be Used To Litigate Questions of Admissibility**

It is the purpose of the PRA to ensure public access to government records. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The specific records at issue in this case are collision reports. The State complies with the PRA by routinely providing access to collision reports on hundreds of occasions every year. CP 467. In fact, during the pendency of this case a request for collision reports on the Montlake Bridge was received and responsive records were provided within 9 days. CP 467.

The dispute in this case is whether collision records are discoverable and admissible, when viewed against 23 U.S.C. § 409, in damages action against the State and local governments. The dispute has nothing to do with public access to collision reports and therefore is not a case to be resolved under the rubric of the PRA.

Under the PRA an agency may not normally inquire into the purpose underlying a PRA request. An exception is recognized where knowing the purpose is necessary to determine whether the records are

subject to disclosure. *See e.g.*, RCW 42.56.070 (agencies may not “sell or provide access to lists of individuals requested for commercial purposes”). Similarly in this case, an inquiry is mandated when collision records are requested because of the specific privilege in § 409 limiting how collision records can be used. Verifying compliance with § 409 comports with the mandate of federal law and does so without imposing an onerous burden on public access to collision records.

Mr. Gendler distinguishes the decision in *Daines*<sup>1</sup> on its facts, but avoids addressing the principle of its holding. The principle underlying *Daines* is that the PRA is not properly applied when a lawsuit was not necessary to obtain access to records. *Id.* Mr. Gendler does not deny that his PRA lawsuit was unnecessary to gain access to the records. Mr. Gendler was offered the collision reports for the Montlake Bridge but he declined to accept them. Resp. Br. pp. 32-39. Accordingly, this lawsuit is not about public access to collision records.

Mr. Gendler declined to accept the reports due to the underlying dispute of whether 23 U.S.C. § 409 would apply to bar discovery and admissibility of the collision records in his tort action. Accordingly, this lawsuit was not necessary to obtain access to collision records, but was

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<sup>1</sup> *Daines v. Spokane County*, 111 Wn. App. 342, 44 P.3d 909 (2002).

filed to resolve an evidentiary issue relevant to a collateral action for damages.

Therefore, this PRA action should be dismissed and the evidentiary dispute over 23 U.S.C. § 409 left to the court presiding over Mr. Gendler's tort action, or in the alternative decided by this Court since the issue is fully briefed.

**B. RCW 46.52.060 Does Not Require The WSP To Produce Collision Reports By Specific Location**

Mr. Gendler relies on RCW 46.52.060 for his argument that the WSP has a duty to produce collision reports by specific location such as “the Montlake Bridge.” Resp. Br. p. 30. That statute provides in pertinent part:

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 court 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.

RCW 46.52.060.

Mr. Gendler seizes on the term “location” and concludes that WSP is therefore required by RCW 46.52.060 to produce collision reports for any specific location requested. Resp. Br. p. 30. However, the term

“location” is not defined by the WSP as specifically as desired by Mr. Gendler.

The WSP complies with its duty under RCW 46.52.060 by publishing its report, including collisions by “location,” at [www.wsdot.wa.gov/mapsdata/TDO/accidentannual.htm](http://www.wsdot.wa.gov/mapsdata/TDO/accidentannual.htm). The report provides “location” by organizing collisions according to the county where the collision occurred. This level of detail is adequate for law enforcement purposes and the Legislature has never required more specificity for the report mandated by RCW 46.52.060.

Mr. Gendler presents no authority for the proposition that the PRA should be used to require the WSP to increase the detail in its reports beyond what it needs for law enforcement purposes. Nor does Mr. Gendler present authority supporting his implicit argument that because it is technologically possible for the WSP to build the requisite computer capacity, that it should be required to do so regardless of whether the capacity is needed for law enforcement purposes.

The WSP collision records section has never had the ability to generate an accurate list of site specific collisions without accessing WSDOT’s 23 U.S.C. § 152 database. CP 196-197. Mr. Messina’s declaration is not to the contrary. CP 295. His declaration does not specify when he received collision reports, whether the reports were site

specific, or whether he obtained them by verifying compliance with § 409. CP 295.

In practical terms, Mr. Gendler is seeking to require the WSP to build a database that mirrors the capability that exists in WSDOT's § 152 database. The WSP database would serve no purpose other than supplying collision reports for damages actions against the State and local transportation agencies.

Copies of site specific collision reports are routinely provided to the public in compliance with § 409. In 2008, copies of collision reports for specific locations were produced under the PRA on 708 occasions. CP 467. Requests were denied only on the six occasions when the requester would not verify compliance with § 409. CP 467. The WSP database that Mr. Gendler argues must be built would serve only those six requestors. The PRA does not require the WSP to build a database that is unnecessary for its law enforcement purposes and would exist solely as a mechanism to circumvent § 409.

**C. Collision Reports That Have Been Collected Or Compiled For Federal Highway Safety Purposes Are Exempt From Public Disclosure When Sought For Use In An Action For Damages**

**1. Police Traffic Collision Reports Are Public Records, However, They Are Exempt From Public Disclosure**

The PRA requires that agencies make all public records available for inspection and copying unless the record falls within a specific exemption. RCW 42.56.070(1). “Public record” is defined broadly and the State does not dispute that the police traffic collision reports (PTCR), e.g., collision reports prepared by police officers, at issue in this lawsuit are public records.<sup>2</sup> See RCW 42.56.010(2) (“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”).

Contrary to Mr. Gendler’s assertion, the fact that a record is a public record does not make it automatically subject to disclosure. Rather, the records are subject to disclosure unless an exemption applies. See RCW 42.56.070(1). In the present case, 23 U.S.C. § 409 applies to the

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<sup>2</sup> By contrast vehicle collision reports (VCR), collision reports prepared and submitted by citizens, may not be public records, however, vehicle collision reports are not at issue in the present lawsuit.

collision records at issue, prohibiting their disclosure when they are sought for use in an action for damages.

**2. It Is Immaterial That Police Traffic Collision Reports Are Initially Collected By The Washington State Patrol Prior To Being Forwarded To Washington State Department Of Transportation**

In *Guillen* the United States Supreme Court held that 23 U.S.C. § 409 applied to collision reports once they have been collected for 23 U.S.C. § 152 purposes regardless of whether the information was initially collected by another agency for a purpose unrelated to § 152. *Pierce County v. Guillen*, 537 U.S. 129, 145, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). In addition, the PTCR itself has been built to satisfy WSDOT's need to comply with the precision demanded for reporting under § 152. CP 194. There is no evidence that the Washington State Patrol (WSP) has a law enforcement need to calculate a list of accidents by location down to an accuracy of 1/100<sup>th</sup> of a mile. It is the collision reports from that site specific list that is sought by Mr. Gendler – a list generated solely by WSDOT for § 152 purposes. CP 194-195.

It is immaterial that the PTCR's are initially collected by WSP, and it is immaterial that the WSP may have a purpose for the PTCR that is unrelated to § 152 purposes. *Guillen*, 537 U.S. at 147. Once the PTCR goes into the database used by WSDOT for § 152 purposes it falls under

the privilege created by § 409 and is exempt from public disclosure. *See Guillen*, 537 U.S. at 146.

Mr. Gendler refers to the State's argument as creating a "black hole" into which records can be swept from public view. Resp. Br. pp. 24-26. However, it is the function of a privilege to protect records and it is a legislative prerogative to enact such a privilege. *See Guillen*, 537 U.S. at 147. The privilege enacted by Congress in § 409 is limited in purpose but is absolute within its scope. Contrary to rejecting the "black hole" theory, the U.S. Supreme Court upheld the § 409 privilege for all records collected or compiled for § 152 purposes. *Guillen*, 537 U.S. at 145.

As explained by the Supreme Court:

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.

*Guillen*, 537 U.S. at 145 (emphasis added). The protection of § 409 is not lost by the fact that WSDOT collects collision reports from the WSP, a non-§ 152 agency. *Guillen*, 537 U.S. at 145.

In an attempt to circumvent *Guillen*, Mr. Gendler concocts his "interception" theory. Under this theory, a record loses its 23 U.S.C. § 409 status if at any point in the chain of collecting or compiling the record

a non-§ 152 agency has custody of the record. A claimant merely has to identify the non-§ 152 link in the chain and submit the records request to that agency.

The “interception” theory was rejected by the language in *Guillen* describing the two conditions that would prevent application of § 409:

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 (emphasis added).

Collision reports are not collected “only” for law enforcement purposes. CP 194. The reports are largely designed to allow WSDOT to collect the data necessary for reporting under § 152. CP 194-196. Nor are the collision reports “held” by the WSP. The WSP scans the reports into WSDOT’s § 152 database. CP 194-195. The database is integrated and according to Federal Highway Administration should receive § 409 protection. CP 200.

Under *Guillen*, collision reports in Washington do not lose their protection under § 409 because they are not collected only for law enforcement purposes and are not held solely by the WSP. *Guillen*, 537 U.S. at 144. Collision records do not lose their § 409 status merely by

passing through the hands of a non-§ 152 agency. *Id.* It is undisputed that collision reports are collected and compiled by WSDOT for § 152 purposes. The fact that Mr. Gendler did not sue WSDOT is an implicit concession that collision records in the § 152 database are protected by § 409. Mr. Gendler's "interception" theory should be rejected.

In Washington, local and state law enforcement agencies submit the original copy of the PTCR to the WSP Collision Records Section. CP 195-196; 201. The WSP Collision Records Section scans the collision reports into WSDOT's database. CP 196; 202. The WSP Collision Records Section indexes the scanned reports by PTCR, individual driver or property owner, date of collision, and name of roadway or county if included. CP 196; 202. The raw collision reports are sent to a WSDOT collision analyst who extracts and compiles data from the reports for entry into the comprehensive collision database required by federal highway safety laws. CP 196. The collision analyst reviews the location information, collision, and injury codes on the report forms and corrects the raw coding as necessary from the analysis of the collision. CP 196. The corrected data is then entered into the collision database. CP 196.

Data fields that have been embedded in the PTCR for 23 U.S.C. § 152 purposes provide the raw data for collection that allows WSDOT, through further compilation and analysis, to create an accurate list of

collisions that have occurred at a specific location. CP 196. It is not possible for either the WSP or WSDOT to generate an accurate list of collisions at a specific location using nothing other than the raw collision report. CP 196. The ability to accurately identify all collisions at a specific location can only be produced by WSDOT by virtue of the analysis performed by WSDOT for 23 U.S.C. § 152 purposes. CP 203.

The WSP Collision Records Section and WSDOT share the collision records database, but have different levels of access. CP 197. The WSP Collision Records Section can only access and search collision reports using the original information that it indexes from the reports; it does not have access to the WSDOT data. CP 202. The WSP cannot generate an accurate list of collisions at a specific location without accessing WSDOT's 23 U.S.C. § 152 database, nor does the WSP Collision Records Section have any need to be able to generate such a list. CP 202. The ability to produce an accurate list of collisions solely by reference to a specific location has always been a function of WSDOT, not the WSP. CP 270. In fact, when the WSP Collision Records Section asks WSDOT for a list of all collisions at a specific location WSDOT requires verification that the records won't be used in litigation against the State. CP 268.

**3. Civil Litigants May Obtain The Same Records That They Could Obtain Prior To 23 U.S.C. § 409**

Mr. Gendler argues that the State's position would result in civil litigants being worse off than they were prior to the passage of 23 U.S.C. § 409. Respondent's Brief at 27-28. However, this is not the case. Mr. Gendler is not requesting collision reports based on PTCR number, driver's name, or date of location – one of the ways in which the WSP Collision Records Section is capable of accurately searching its records. Rather, Mr. Gendler is requesting collision records based on the *location* of the collision. The WSP Collision Records Section cannot perform an accurate search solely by location. CP 196. Short of building a database to duplicate the § 152 database, the only way for WSP to locate the requested reports is to access the reports from WSDOT's database. CP 196-197.

It is Mr. Gendler's position that would constitute a change – it would place him in a far better position as it would allow him to gain access to WSDOT's database which is protected under 23 U.S.C. § 152. The Supreme Court specifically noted that the mandate imposed under § 152 was not intended to make the State's data collection a one-stop shopping effort-free litigation tool. *Guillen*, 537 U.S. at 146.

**4. The Washington State Patrol May Delegate Its Statutory Responsibilities Relating To Collision Records To The Washington State Department Of Transportation**

RCW 46.52.060 requires that the WSP file, tabulate, and analyze collision reports. The WSP has delegated this responsibility to WSDOT through a Memorandum of Understanding. CP 202-203; 205-217. This agreement reflects 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.

Mr. Gendler argues that the WSP cannot delegate its responsibilities under RCW 46.52.060, *see* Resp. Br. at 31. No authority is cited for the proposition that the responsibility is non-delegable. The WSP is permitted to contract with another state agency to carry out this responsibility. Chapter 39.34 RCW specifically allows such agreements between agencies. The only requirement would be that the responsibility ultimately be carried out.

The WSP's responsibility is ultimately carried out by WSDOT pursuant to the Memorandum of Understanding (MOU) between the two agencies. Significantly, Mr. Gendler does not argue that the statutory responsibilities under RCW 46.52.060 are not being performed. His sole

argument is that it is not being done by the WSP. The Legislature has not overridden the MOU.

The duty imposed on the WSP under RCW 46.52.060 is delegable. In Washington, the class of statutes that courts have found to impose *non-delegable* duties are those involving the protection of children and vulnerable adults, common carriers, and workplace safety regulations. See *Pettit v. Dwoskin*, 116 Wn. App. 466, 68 P.3d 1088 (2003); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997).

These non-delegable statutes have a common theme of imposing a responsibility for protection of another person. RCW 46.52.060 does not involve the protection of individuals in a vulnerable position and, therefore, does not impose non-delegable duties. The duties regarding collision records can, therefore, be delegated as reflected in the Memorandum of Understanding between the agencies.

Mr. Gendler also argues that because legislation that would have amended RCW 46.52.060 to transfer WSP's responsibility to WSDOT failed to pass the Legislature, that the Memorandum of Understanding between WSP and WSDOT is somehow an attempt to circumvent the Legislature's intent. Resp. Br. at 31-32. While legislative intent may be gleaned from the legislative history of *adopted* legislation, the same is not true for failed legislation. See *Our Lady of Lourdes Hosp. v. Franklin*

*County*, 120 Wn.2d 439, 453 n. 4, 842 P.2d 956 (1993) (“We refuse to speculate about the reasons for nonpassage of the bills. There are simply too many possibilities for us to reach the conclusion which DSHS has advanced.”); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 n. 11, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) (“[U]nsuccessful attempts at legislation are not the best of guides to legislative intent.”). The WSP may delegate its statutory responsibilities to WSDOT and the Memorandum of Understanding does not contradict the Legislature’s intent.

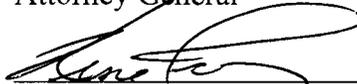
### III. CONCLUSION

The State respectfully requests that this Court reverse summary judgment and the award of costs and attorney fees in favor of Mr. Gendler.

If the Court chooses to reach the merits of the § 409 dispute, then the Court should direct judgment in favor of the State on the basis that in Washington, collision records are collected and compiled for § 152 purposes and are therefore protected by § 409.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2009.

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**PROOF OF SERVICE**

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

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

DATED this 21<sup>st</sup> day of December, 2009, at Olympia, WA.

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