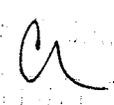


COURT OF APPEALS
DIVISION II
JAN 27 2001
STATE OF WASHINGTON
BY 

No. 41198-9-II

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

EVERGREEN FREEDOM FOUNDATION,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Washington State Ferries, a division of the Washington State Department of Transportation (“WSDOT”) operates one of the largest ferry systems in the world, with nearly 23 million riders per year.

On August 30, 2009, the M/V *Wenatchee*, a vessel in the Washington State Ferries fleet, approached its landing dock in Seattle too quickly and collided with the dock, causing hundreds of thousands of dollars of damage and injuring a passenger. Appellant Evergreen Freedom Foundation (“Foundation”) requested post-accident investigative records in order to discover the cause of the accident and to evaluate the state’s remedial actions. Respondent WSDOT supplied numerous records, but redacted details about the drug and alcohol tests performed on the crew of the *Wenatchee*. WSDOT cited a federal confidentiality regulation to justify withholding this information.

The Public Records Act provides for broad disclosure of public records, unless a statutory exemption exempts or prohibits disclosure of specific information or records. The goal of the Public Records Act is to keep the people of the state informed so they may exercise control over governmental entities. RCW 42.56.030.

The key legal dispute in this case is whether a federal regulation, which provides for the confidentiality of drug and alcohol testing results, can prohibit the disclosure of public employees' test results.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

The trial court erred in denying Evergreen Freedom Foundation's Motion for Summary Judgment and granting Washington State Department of Transportation's Cross-Motion for Summary Judgment on August 20, 2010.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err in declining to order WSDOT to produce unredacted records related to the drug and alcohol testing of public employees?

2. Did the trial court err in ruling that federal regulation 49 C.F.R. § 40.321 is an "other statute" exemption to the Public Records Act pursuant to RCW 42.56.070(1), thereby exempting from disclosure the drug and alcohol test results of public employees?

3. Were WSDOT's redactions of the records it produced overbroad, resulting in a violation of the Public Records Act?

4. Is the Foundation a prevailing party under the Public Records Act when WSDOT redacted nonexempt information from public records and then months later unredacted some of the information?

III. STATEMENT OF THE CASE

A. Factual History

On August 30, 2009, Washington State Ferry vessel M/V *Wenatchee*, operating on her normal Seattle - Bainbridge Island route, was making an approach to Colman Terminal in Seattle. Clerk's Papers ("CP") 31. The *Wenatchee* impacted the landing dock, causing hundreds of thousands of dollars of damage and one passenger injury. *Id.* The official investigative report compiled by the Washington State Ferries attributed the incident to heavy fog and shiphandling miscalculations. CP 30-31.

1. First Records Request

Evergreen Freedom Foundation is a not-for-profit corporation based in Olympia, Washington. CP 10. On August 31, 2009, Scott St. Clair, an employee of the Foundation, e-mailed a public records request to the Washington State Ferries, a division of WSDOT. CP 10-11, 13. In his records request, which was numbered "PDR-09-0968" by the agency, Mr. St. Clair requested specific records related to the collision of the ferry M/V *Wenatchee* that occurred on August 30, 2009. *Id.*

WSDOT acknowledged Mr. St. Clair's request on September 1, 2009, within the 5-day response time required by RCW 42.56.520. CP 74.

On November 5, 2009, WSDOT provided a number of responsive records. CP 11. Among the records provided by WSDOT was Form CG-2692B, "Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident," completed by Master Tom Webster on August 30, 2009. CP 14. WSDOT redacted several items from Form CG-2692B, including answers to questions about whether five crew members provided specimens for drug and alcohol testing (boxes 16a and 16b); the source of the alcohol test specimen (e.g., blood, saliva, or breath) (box 16); and the alcohol test results (also box 16). *Id.* WSDOT cited RCW 42.56.510, 49 U.S.C. § 322(a), and 49 C.F.R. § 40.321 as authority for redacting the drug and alcohol testing results. CP 11, 15-17.

On November 18, 2009, the Foundation through counsel wrote to WSDOT requesting the agency to reconsider its decision to redact information pertaining to drug and alcohol testing results found on Form CG-2692B. CP 32. On November 24, 2009, WSDOT responded by letter and declined to provide the redacted information contained within Form CG-2692B. CP 33-35.

On December 2, 2009, the Foundation through counsel requested a non-binding review of the denial by the Office of the Attorney General, pursuant to RCW 42.56.530. CP 33.

On February 5, 2010, during the course of the Attorney General review, WSDOT provided the Foundation with a new version of Form CG-2692B which included some information that had been previously redacted. CP 33 and 79. Specifically, WSDOT provided the information as to whether the five crew members provided specimens for drug and alcohol testing (boxes 16a and 16b), along with the source of the alcohol test specimen (box 16). CP 79. WSDOT continued to withhold the individual results of the alcohol tests administered. *Id.*

On March 22, 2010, Senior Counsel Steve E. Dietrich, writing for the Office of the Attorney General, concluded that WSDOT's decision to withhold the employee testing results was proper. CP 36-43.

2. Second Records Request

Meanwhile, on November 19, 2009, Foundation employee Scott St. Clair sent a second public records request to the Washington State Ferries, again seeking records related to the *Wenatchee* hard landing incident. CP 11. This request was numbered "PDR-09-1322" by the agency. *Id.* In this second request Mr. St. Clair requested the division's

investigative report related to the *Wenatchee* incident. *Id.* The request was acknowledged by the Ferries division on November 20, 2009. CP 75.

On December 22, 2009, WSDOT provided Mr. St. Clair with a copy of the Washington State Ferries investigative report related to the *Wenatchee* incident. CP 11. Multiple documents provided in this second records request were redacted, including documents related to the drug and alcohol testing of the *Wenatchee's* crew. CP 19-29. On another copy of Form CG-2692B (which had been produced pursuant to the first records request), WSDOT again redacted information about the employee testing (all of box 16), as well as the names of the testing laboratories (boxes 17 and 18). CP 19. Seven separate versions of the U.S. Department of Transportation Alcohol Testing Form were uniformly redacted to withhold the names and identification numbers of the employee (Step 1(A) and (B)), the signature of the employee (Step 2), the date and signature field to be completed if the employee's test result was 0.02 or higher (Step 4), and the screening results field. CP 20-26. Finally, WSDOT wholly redacted the post-accident test result summaries of two records created by the testing company HealthForce Partners. CP 27-28.

WSDOT again cited RCW 42.56.510, 49 U.S.C. § 322(a), and 49 C.F.R. § 40.321 as exempting from disclosure information related to drug and alcohol testing results of the *Wenatchee* crew. CP 29.¹

B. Procedural History

On April 16, 2010, the Foundation filed a complaint in Thurston County Superior Court alleging violations of the Public Records Act (“PRA”). CP 3. The parties agreed that no material facts were in dispute. CP 45 and 174. On July 23, 2010, Thurston County Superior Court Judge Paula Casey heard cross motions for summary judgment. The Foundation argued that the records sought were public records and that no valid exemption justified nondisclosure. CP 44-62. WSDOT argued that 49 C.F.R. § 40.321 is an “other statute” exemption to the PRA.² CP 174-89.

In an order entered on August 20, 2010, Judge Casey held that 49 C.F.R. § 40.321 prohibited WSDOT from releasing drug and alcohol testing records, and that the regulation was promulgated under 49 U.S.C. § 5331. CP 256. Judge Casey further held that 49 C.F.R. § 40.321 falls within the “other statute” exemption of the Public Records Act in RCW

¹ Additional redactions were made to withhold public employee home addresses and phone numbers, and video-screen shots from the onboard security system, but these redactions are not challenged by the Foundation. CP 47.

² WSDOT also argued that Coast Guard regulations preempt the PRA, CP 183-86, but Judge Casey did not reach this issue.

42.56.070(1), and that any records made confidential by 49 C.F.R. § 40.321 were exempt from disclosure. *Id.* Judge Casey denied the Foundation's Motion for Summary Judgment and granted WSDOT's Cross-Motion for Summary Judgment. CP 255-57.³

The Foundation timely filed this appeal. CP 253.

C. Overview of Coast Guard and USDOT Rules

A brief overview of the regulatory provisions applicable to the drug and alcohol testing of marine employees is helpful. The U.S. Coast Guard oversees the regulation of marine employers operating commercial vessels such as the Washington State Ferries. The Coast Guard, in turn, conducts its drug testing programs in accordance with the U.S. Department of Transportation's ("USDOT") testing procedures. USDOT procedures were adopted pursuant to the Omnibus Transportation Employee Testing Act of 1991. A discussion of each follows.

1. Coast Guard Oversight of Marine Employers

The U.S. Coast Guard is a military service within the U.S. Department of Homeland Security which regulates the safety of marine vessels operating in waters subject to the jurisdiction of the United States,

³ At the summary judgment hearing and also in the August 20 Order, Judge Casey suggested that the purpose behind the promulgation of a regulation could affect whether the requested records should be disclosed. CP 257 and Verbatim Report of Proceedings at 21. Neither party had raised or briefed this issue and the Appellant does not raise it on appeal.

including the ferry vessels operated by the Washington State Ferries. 14 U.S.C. § 1 & 2.

The Coast Guard is given the authority to prescribe regulations to promote “maritime safety and seamen’s welfare” at 46 U.S.C. § 2103. Congress also directed the Coast Guard to prescribe regulations on reporting marine casualties, including whether the use of alcohol contributed to the incident. 46 U.S.C. § 6101. Congress empowers the Coast Guard to prescribe standards for individuals who operate a vessel under the influence of alcohol or a dangerous drug. 46 U.S.C. § 2302(c).

The Coast Guard regulations apply to marine employers. “Marine employer” is defined as: “the owner, managing operator, charterer, agent, master, or person in charge of a vessel other than a recreational vessel.” 33 C.F.R. § 95.010 and 46 C.F.R. §§ 4.03-45, 16.105. Both parties in this case agree that Washington State Ferries meets the definition of marine employer. *See* Declaration of Darnell Baldinelli, CP 83-86.

The Coast Guard’s regulations governing drug and alcohol testing are found at 33 C.F.R. pt. 95 (Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug, 46 C.F.R. pt. 4 (Marine Casualties and Investigations), and 46 C.F.R. pt. 16 (Chemical Testing)).

Among its duties, the Coast Guard investigates marine casualties or accidents, as well as serious marine incidents. 46 C.F.R. pt. 4.

Generally speaking, “marine casualties or accidents” means an event involving a marine vessel such as a fall overboard, an injury, loss of life, grounding, stranding, collision, explosion, or other incidents defined by regulation. 46 C.F.R. § 4.03. “Serious marine incident” is a marine casualty or accident that results in one of several incidents, including one or more deaths, an injury to a crewmember or passenger that requires professional medical treatment, damage to property in excess of \$100,000, and other incidents. 46 C.F.R. § 4.03–2.

Marine employers involved in a marine casualty are required to determine if there was any evidence of drug or alcohol use by any individuals directly involved in the incident. 46 C.F.R. § 4.05-12. The Coast Guard mandates drug and alcohol testing following a serious marine incident involving vessels in commercial service. 46 C.F.R. § 4.06. In these events, the marine employer is to complete Form CG-2692B, “Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident.” (The Form CG-2692B completed after the *Wenatchee* incident is one of the records sought by the Foundation.)

Pursuant to 46 C.F.R. § 16.113, the Coast Guard’s drug testing programs are conducted in accordance with 49 C.F.R. pt. 40, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs.”

Specimens collected for drug testing are tested for marijuana, cocaine, opiates, phencyclidine, and amphetamines. 46 C.F.R. § 16.113(b).

Drug testing is distinguished from alcohol testing. “The provisions in 49 CFR part 40 for alcohol testing do not apply to the Coast Guard or to marine employers” 46 C.F.R. § 16.500(a)(2).

2. USDOT Workplace Testing Procedures

For purposes of drug testing, the Coast Guard incorporates the USDOT’s procedures for transportation workplace drug and alcohol testing programs, found at 49 C.F.R. pt. 40. *See* 46 C.F.R. § 16.113.

Generally speaking, the testing procedures address transportation employer duties, urine specimen collection, drug testing laboratories, alcohol screening, and other duties surrounding testing procedures. USDOT’s testing regulations include the confidentiality rule at issue in this case, 49 C.F.R. § 40.321 (attached as Appendix A).

3. Omnibus Transportation Employee Testing Act

The U.S. Department of Transportation’s testing procedures were promulgated pursuant to the Omnibus Transportation Employee Testing Act of 1991, Pub.L. 102-143, 105 Stat. 952 (Oct. 28, 1991) (OTETA). CP

224-37. OTETA is codified in relevant part at 49 U.S.C. § 5331 (attached as Appendix B).⁴

The Congressional Findings in OTETA stated that alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the nation. 105 Stat. 952. Given the millions of citizens that utilize transportation systems, Congress sought to eliminate the abuse of alcohol or illegal drugs by those individuals involved in the operation of the transportation infrastructure. 105 Stat. 953.

In OTETA, Congress required the reasonable suspicion, random, and post-accident testing of transportation employees for the use of controlled substances and the use of alcohol. 49 U.S.C. § 5331(b)(1).

IV. ARGUMENT

A. Standard of Review

Courts conduct *de novo* review of agency actions under the Public Records Act (PRA). RCW 42.56.550(3); *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1152 (2010). Appellate courts also employ *de novo* review of legal questions decided on summary judgment. *Jones v. State, Dept. of Health*, 242 P.3d 825, 831 (2010).

⁴ Among its sections, OTETA amended the Urban Mass Transportation Act, Pub. L. 102-143, Sec. 6, codified at 49 App. U.S.C. § 1618a. This provision was recodified at 49 U.S.C. § 5331 in a comprehensive restructuring of Title 49 which occurred in 1994. See *United Public Employees v. City and County of San Francisco*, 53 Cal.App.4th 1021, 1024, n.1, 62 Cal.Rptr.2d 440 (1997).

In a review of an agency action, the PRA admonishes: “Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). It also states:

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.

B. The Public Records Act is a Strongly Worded Mandate for Broad Disclosure of Public Records.

The primary legal dispute in this case is whether a federal regulation (49 C.F.R. § 40.321) is incorporated as the “other statute” exemption of the PRA.

The PRA provides “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The stated purpose of the PRA 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.” *Progressive Animal Welfare Soc. v. University of Wash. (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Agencies are to provide the “fullest assistance” to requesters and “the most timely possible action on requests for information.” RCW 42.56.100.

The PRA mandates that every agency “shall make available for public inspection and copying all public records” RCW 42.56.070(1).

The PRA defines “agencies” as:

“Agency” includes all state agencies and all local agencies.
“State agency” includes every state office, department, division, bureau, board, commission, or other state agency.

RCW 42.56.010(1). “Public record” is defined to include:

“Public record” includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(2).

An agency may only withhold a public record if a specific exemption would justify nondisclosure. RCW 42.56.070(1); *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009). The PRA contains numerous exemptions to the requirement of disclosure. Additionally, the PRA recognizes that exemptions to disclosure may exist elsewhere in law, and allows agencies to withhold information or records if an exemption is found in some “other statute[.]” RCW 42.56.070(1). Absent a specific statutory exemption, however, the public record must be disclosed. The agency bears the

burden of proof to establish that non-disclosure is justified. RCW 42.56.550(1).

As stated above, the Foundation is seeking records related to the drug and alcohol testing of ferry crew members. WSDOT admitted that it is an agency subject to the provisions of the PRA, CP 9, and that the records sought by the Foundation fall within the definition of a public record. VRP 7. The remaining question, then, is whether any exemption would justify WSDOT's redaction of the information about drug and alcohol testing contained within the responsive records.

C. The Records Sought in this Case Are Public Records and WSDOT Cannot Cite a Valid, Statutory Exemption to Justify Withholding the Records.

In response to the Foundation's records requests, WSDOT cited RCW 42.56.510, 49 U.S.C. §322(a), and 49 C.F.R. § 40.321 as authority for redacting information related to drug and alcohol testing results.⁵

None of these citations is sufficient to justify disclosure under the PRA. First, RCW 42.56.510 states:

Duty to disclose or withhold information — Otherwise provided. Nothing in RCW 42.56.250 and 42.56.330 shall affect a positive duty of an agency to disclose or a positive duty to withhold information which duty to disclose or withhold is contained in any other law.

⁵ While WSDOT cited RCW 42.56.510 and 49 U.S.C. §322(a) in its response to the two records requests, the agency did not rely on these authorities as exemptions to the PRA in its cross-motion for summary judgment. CP 174-88.

This section is not a recognized exemption within the PRA, but simply provides that RCW 42.56.250 & .330 are inapplicable if another law requires an agency to withhold or disclose a record. In its review of WSDOT's records denial, the Attorney General's Office agreed that RCW 42.56.510 is not an independent exemption. CP 38.

The federal statute cited by WSDOT, 49 U.S.C. §322(a), merely authorizes the U.S. Secretary of Transportation to promulgate administrative regulations, but does not provide an exemption to the PRA.

It states:

The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.

The remaining citation offered by WSDOT, 49 C.F.R. § 40.321, is found in the administrative regulations for transportation workplace drug and alcohol testing programs, promulgated by the U.S. Department of Transportation. 49 C.F.R. § 40.321 states:

What is the general confidentiality rule for drug and alcohol test information?

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

- (a) A “third party” is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.
- (b) “Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases,” in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

WSDOT argued, and the trial court held, that 49 C.F.R. § 40.321 is incorporated into the PRA as an “other statute” exemption, pursuant to RCW 42.56.070(1), and that information redacted by WSDOT was exempt from disclosure.

This is incorrect for several reasons.

1. 49 C.F.R. § 40.321 Does Not Apply to Alcohol Testing of Marine Employees.

To the extent that Coast Guard regulations have different procedures for drug testing and alcohol testing, access to WSDOT records about drug and alcohol testing must be analyzed separately.

As noted above, the Coast Guard incorporates the USDOT’s testing procedures for purposes of *drug* testing, found at 49 C.F.R. pt. 40 (which includes 49 C.F.R. § 40.321, the confidentiality provision at issue in this case). *See* 46 C.F.R. § 16.113. However, Coast Guard regulations

explicitly state that the USDOT procedures for *alcohol* testing do not apply: “The provisions in 49 CFR part 40 for alcohol testing do not apply to the Coast Guard or to marine employers” 46 C.F.R. § 16.500(a)(2).

Thus, for purposes of records relating to *alcohol* testing, WSDOT cannot rely on 49 C.F.R. § 40.321 to exempt records from disclosure.⁶

In the proceedings below, WSDOT cited numerous other statutes and regulations related to the Coast Guard’s regulatory authority over maritime safety and marine employers: 46 U.S.C. § 6101 (Coast Guard’s authorization to prescribe rules for marine casualties), 46 U.S.C. § 2303 (duties related to marine casualties), 33 C.F.R. pt. 95 (regulations adopted by the Coast Guard pertaining to operating a vessel under the influence), 46 C.F.R. § 4.06 (mandatory chemical testing following a serious marine incident), and 46 C.F.R. pt. 16 (chemical testing requirements for marine employers). *See* CP 189-223.

None of these authorities prohibits the release of alcohol testing results following a serious marine incident, and WSDOT cited no such

⁶ This distinction between drug tests and alcohol tests found at 46 C.F.R. § 16.500(a)(2) was not raised below. However, consideration of this distinction is appropriate as this Court reviews *de novo* the question of whether 49 C.F.R. § 40.321 exempts requested records from disclosure. *See* Standard of Review discussion above. Additionally, “a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal.” *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990).

prohibition. Thus, records sought by the Foundation related to the alcohol testing of public employees must be disclosed.

2. 49 C.F.R. § 40.321 Is Not a Valid, Statutory Exemption to the Public Records Act.

Coast Guard regulations incorporate 49 C.F.R. § 40.321 for purposes of drug testing, but this is not a sufficient basis for withholding information from disclosure under the PRA.

The text of the PRA states that an agency may only rely on specific *statutory* exemptions for nondisclosure. “Each agency . . . shall make available . . . **all** public records, unless the record falls within the **specific exemptions** of subsection (6) of this section, this chapter, or other **statute** which exempts or prohibits disclosure.” RCW 42.56.070(1) (emphasis added). An agency bears the burden of showing that its refusal to disclose “is in accordance with a **statute** that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1) (emphasis added).

Similarly, numerous cases reiterate the necessity of citing statutory exemptions. *See PAWS II*, 125 Wn.2d at 259 (“agencies having public records should rely only upon statutory exemptions or prohibitions”); *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008) (“an agency must disclose a public record unless a statutory exemption

applies.”); *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008) (records are disclosable unless “within a specific [PRA] exemption or other statutory exemption”); and *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (any refusal to disclose a record must be “in accordance with a statute”).

A statute is defined as “[a] law passed by a legislative body.” *Black’s Law Dictionary* at 1420 (7th ed. 1999). In contrast to the PRA’s requirement that exemptions be found in a statute, the confidentiality provision cited by WSDOT is contained within a federal agency’s administrative regulations.

The Washington State Supreme Court has discussed the public policy justifications for requiring that exemptions to disclosure be based in a statute. As the Supreme Court stated in *Hearst Corp. v. Hoppe*, courts are precluded from deferring to an agency’s rule exempting records from disclosure: “leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” 90 Wn.2d at 131.

In case after case, courts have refused to recognize agency regulations or decisions as valid exemptions to the PRA’s mandate of broad disclosure. “The Legislature did not intend to entrust to either

agencies or judges [the power of] wielding broad and malleable exemptions.” *PAWS II*, 125 Wn.2d 260.

For example, the Supreme Court declined to rely on an administrative regulation as a basis for withholding records in *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). A newspaper publishing company requested records specifying the reasons for teacher certificate revocation, with the goal of printing investigative articles on teacher sexual misconduct with students. The superintendent of public instruction argued that the court should defer to an administrative regulation that guaranteed the confidentiality of the records sought. The Supreme Court rejected this argument. “Our unanimous decision in *Hearst* precludes granting any deference to this regulation. In *Hearst*, we explained that the agency is without authority to determine the scope of exemptions under the act.” *Id.* at 794.

Courts have also refused to allow agencies to expand the scope of exemptions by agency fiat. In *Hearst*, a newspaper sought information from the King County Assessor. The assessor refused, claiming he was invested with a public trust to protect private information provided by taxpayers. The Supreme Court held that “an agency’s promise of confidentiality or privacy is not adequate to establish the nondisclosability of information; promises cannot override the [PRA].” 90 Wn.2d at 137.

Similarly, the Supreme Court declined to enjoin the Washington State Liquor Control Board from releasing investigative records where the agency had promised confidentiality. *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 769 P.2d 283 (1989). The Spokane Police Guild Club held a bachelor party on premises licensed by the Liquor Board, which was attended by a number of off-duty police officers. It was determined later that liquor regulations had been violated at the party. A Liquor Board investigation occurred, and a newspaper reporter sought a copy of the investigative report. The police guild argued that statements by attendees had been taken under a pledge of confidentiality by the Liquor Board investigator, and that the agency promise should apply to the release of the investigative report. The Supreme Court disagreed, noting that an agency's assurances could not override the requirements of the PRA. *Id.* at 40.⁷

3. "Other Statute" Exemptions to the Public Records Act Must Have Their Basis in Statute.

As noted above, the PRA allows agencies to withhold records on the basis of an "other statute" outside of the PRA. RCW 42.56.070(1).

⁷ See also *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834-35, 904 P.2d 1124 (1995) ("It is the court, and not the agency, which determines whether records are exempt"); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) (rejecting a city's assertion that it had adopted a statute governing *state* employees which allowed for the destruction of records when a state employee was cleared of alleged misconduct).

Courts have incorporated other exemptions into the PRA, but these exemptions are either statutory or have a specific basis in statute.

For example, this Court recognized that RCW 48.13.220(4)(g) prohibits disclosure of an insurance company's notice of intent to acquire another insurer—records that would otherwise be disclosable under the PRA. *Washington Citizen Action v. Office of Ins. Com'r*, 94 Wn.App. 64, 70, 971 P.2d 527 (1999). Similarly, this Court held that chapter 13.50 RCW, which governs production of juvenile dependency records, was an “other statute” exemption under the PRA. *Deer v. Department of Social and Health Services*, 122 Wn.App. 84, 92, 93 P.3d 195 (2004).

The Washington State Supreme Court has also incorporated statutes into the PRA. In *Hangartner v. City of Seattle*, the Court held that a number of records were exempt from disclosure under the attorney-client privilege codified at RCW 5.60.060(2)(a). 151 Wn.2d 439, 452-53, 90 P.3d 26 (2004). More recently, the Court concluded that the federal Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, is an “other statute” exemption. *Ameriquist Mortg. Co. v. Washington State Office of Atty. Gen.*, 241 P.3d 1245, 1255 (2010).

The *Ameriquist* case is especially relevant to this present dispute as it involves a federal statute and an associated regulatory rule. The Attorney General's Office investigated Ameriquist's lending practices and

obtained loan files, e-mails, and other papers from the mortgage company. A member of the public requested the investigative records compiled by the attorney general. Ameriquest objected, arguing that the Gramm-Leach-Bliley Act (GLBA) bars the attorney general from disclosing the information obtained from Ameriquest.

In the GLBA, Congress required a financial institution to “respect the privacy of its customers” and “protect the security and confidentiality of those customers’ nonpublic personal information.” 15 U.S.C. § 6801(a). A financial institution is not allowed to disclose a consumer’s nonpublic personal information to a nonaffiliated third party unless the consumer receives a prior notice and an opportunity to opt out. 15 U.S.C. § 6802(a)(b). Pursuant to rulemaking authority granted in the GLBA, the Federal Trade Commission adopted 16 C.F.R. § 313 (Privacy of Consumer Financial Information).

Given the explicit confidentiality mandates enacted by Congress, the Supreme Court concluded that “the GLBA (together with the FTC rule enforcing it) is an ‘other statute.’” *Ameriquest*, 241 P.3d at 1255. The FTC rule was incorporated as an “other statute” exemption because of its specific basis in statute.⁸

⁸ See also *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws*, Section 12.2 (Greg Overstreet, ed., Wash. State Bar Assoc. 2006) (“provisions found solely in rules should not be given effect to exempt records

This is quite unlike the confidentiality provision found at 49 C.F.R. § 40.321, which is inconsistent with its underlying statute. As stated above, this regulation was promulgated pursuant to the Omnibus Transportation Employee Testing Act of 1991 (OTETA), codified in relevant part at 49 U.S.C. § 5331.

In enacting OTETA's testing programs for transportation employees, Congress directed the U.S. Secretary of Transportation to develop requirements that:

[P]rovide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section;

49 U.S.C. § 5331(d)(7).

The text of the statute expressly exempts information about alcohol and controlled substances from any confidentiality regulations promulgated by the Secretary. This suggests that Congress was concerned with the privacy of tested employees and wished to shield any medical information that might be available through the testing process, but did not wish to extend the same confidentiality to the improper use of alcohol or controlled substances.

from disclosure without a specific basis in statute and would not fall within the 'other statute' provision.").

Unlike the FTC rule in *Ameritrust*, which had an explicit basis in statute, 49 C.F.R. § 40.321 goes beyond Congressional guidance by exempting information from release.

In only one other case has the Washington Supreme Court found that an administrative rule may rise to the level of a statute under the PRA. The Court incorporated the Superior Court Civil Rules as an “other statute” exemption. *O’Connor v. Department of Social and Health Services*, 143 Wn.2d 895, 25 P.3d 426 (2001).

Kathleen O’Connor filed a lawsuit against DSHS alleging that an agency employee had molested and abused her son. Counsel for O’Connor filed a public records request with the Attorney General’s Office for documents related to the case. The Attorney General’s Office denied the request and DSHS filed for a protective order directing the plaintiff to use the Civil Rules and not the PRA for discovery. The trial court granted DSHS’s motion and quashed O’Connor’s records requests.

On direct appeal, the Supreme Court concluded that records sought were available under both the Civil Rules and the PRA. The court noted the PRA’s “party to a controversy” exemption, former RCW 42.17.310(1)(j):

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for

causes pending in the superior courts are exempt from disclosure under this chapter.⁹

The Supreme Court's "plain language" interpretation of this section was "that records relevant to a controversy to which an agency is a party are exempt from public inspection and copying under the Public Records Act if those records would not be available to another party under superior court rules of pretrial discovery." *O'Connor*, at 906. The court concluded that the Civil Rules are incorporated as an "other statute" exemption to the PRA.

O'Connor can be distinguished from this current controversy. At best, *O'Connor* stands for the proposition that the Civil Rules are incorporated as an "other statute" exemption. The Supreme Court, however, reached this conclusion in part by noting that the PRA explicitly refers to the Civil Rules in former RCW 42.17.310(1)(j). Thus, the incorporation of the Civil Rules has a basis in statute.

Moreover, while the Court did not discuss the separation of powers doctrine in *O'Connor*, its holding there is consistent with other cases that uphold the judiciary's authority to govern court procedure under the doctrine of the separation of powers. *See, e.g., Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009) (statutory requirement that a medical expert provide a certificate of merit

⁹ Recodified as RCW 42.56.290.

prior to commencement of medical malpractice lawsuit conflicted with civil rules regarding pleadings); *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010) (90-day notice requirement for medical malpractice actions conflicted with judiciary's power to set court procedures). No such separation of powers conflict exists in this current action.

O'Connor cannot be inflated to incorporate other administrative regulations (such as 49 C.F.R. § 40.321) into the "other statute" exemption without their explicit basis in statute. Indeed, it has never been cited for such a proposition.

4. The Regulatory Context is Consistent with the PRA's Interest in Disclosing Information About a Public Employee's On-the-Job Conduct.

One of the challenges in this case is that USDOT testing regulations do not differentiate between *public* transportation employers and *private* transportation employers. In the context of the PRA, there may be no public interest in the disclosure of the testing results of a self-employed truck driver or a private railroad employee.

But there is a significant public interest in the on-the-job conduct of public employees who operate a taxpayer-funded ferry system. The Washington State Ferries boasts operating the "nation's largest ferry

system,” with 450 trips a day and nearly 23 million riders per year.¹⁰ The potential harm that could be inflicted on life, private property, and public property as the result of a ferry employee’s misconduct is substantial, and justifies a high level of accountability. Indeed, the PRA’s aim is to preserve a central tenant of democracy: “the accountability to the people of public officials and institutions.” *PAWS II*, 125 Wn.2d at 251.

The federal regulatory scheme cited by WSDOT suggests that agency may release public employee chemical testing records in response to a records request.

In fact, USDOT testing regulations permit the release of testing information in several specific instances. 49 C.F.R. § 40.331. Employers *must* release information when requested by state or local authorities. “If requested by a Federal, state or local safety agency with regulatory authority over you or the employee, you must provide drug and alcohol test records concerning the employee.” 49 C.F.R. § 40.331(e). State authorities that obtain this information from employers not prohibited from releasing testing information of employees. In this case, WSDOT has regulatory oversight of its own divisions, such as the Washington State Ferries. Federal regulations do not prohibit state or local agencies with

¹⁰ *WSDOT Ferries Division (WSF) - Nation’s Largest Ferry System*, available at <http://www.wsdot.wa.gov/ferries/pdf/WSFLargest.pdf> (last visited Jan. 25, 2011).

regulatory authority over ferry employees from releasing the information sought by the Foundation.

Additionally, the U.S. Department of Transportation has taken steps to avoid conflicts with state laws that might require the disclosure of testing results. In 2010, USDOT adopted a final rule authorizing employers to disclose the drug and alcohol violations of employees who hold commercial driver licenses to State CDL authorities when a state law requires such reporting. 49 C.F.R. § 40.331(g); CP 70-72.

USDOT indicated that the rulemaking was intended to “remove a legal conflict that could have interfered with the implementation of beneficial State laws.” 75 Fed.Reg. 8525 (February 25, 2010). And later: “We do not want Part 40 to pose an impediment to employers in their efforts to comply with their respective State’s legal requirements.” *Id.* at 8526. While the rulemaking does not specifically address state public records laws, it indicates the USDOT’s policy of avoiding conflicts with state laws that require disclosure.

D. WSDOT’s Redactions of Responsive Records Were Overbroad.

Should this Court determine that WSDOT properly relied upon 49 C.F.R. § 40.321 as an “other statute” exemption, WSDOT redacted more information than was justified under the regulation.

Agencies are not relieved from the duty to produce a record if the exempt portion of the record can be redacted. RCW 42.56.550(1). But if an agency redacts nonexempt information, a violation of the PRA has occurred. “If an exemption applies and the requested records contain both exempt and nonexempt information, the exempt information may be redacted, but the remaining information must be disclosed.” *Mechling v. City of Monroe*, 152 Wn.App. 830, 843, 222 P.3d 808 (2009).

Notwithstanding this rule, WSDOT wrongfully withheld nonexempt information.

First, as noted above, 49 C.F.R. § 40.321 does not apply to *alcohol* testing of marine employees. 46 C.F.R. § 16.500(a)(2). Thus, the regulation cannot be invoked to exempt information related to the alcohol testing of the *Wenatchee* crew.

Next, the confidentiality rule at 49 C.F.R. § 40.321 prohibits transportation employers from releasing “individual test results” and “medical information about an employee” without an employee’s consent.

The USDOT’s testing regulations define “medical information” as: “prescriptions, information forming the basis of a legitimate medical explanation for a confirmed positive test result,” 49 C.F.R. § 40.131(b)(3), and “information on medications or other substances affecting the performance of safety-sensitive duties that the employee reports using or

medical conditions the employee reports having.” 49 C.F.R. § 40.135(d)(2). Under both definitions, medical information is the information provided by an employee to a medical review officer, who is a licensed physician responsible for reviewing laboratory results generated by a drug test and evaluating medical explanations for certain drug test results. 49 C.F.R. § 40.3.

Thus, under 49 C.F.R. § 40.321 an employee’s test results and certain information provided by the employee to a reviewing physician are to be kept confidential.

WSDOT went beyond this minimal shelter and redacted information about whether alcohol and drug testing actually occurred, what types of testing specimens were provided, the names and ID numbers of the tested employees, the name of the laboratory conducting the testing, and other information not protected under the U.S. Department of Transportation’s confidentiality regulation.

Specifically, in response to the Foundation’s August 31 records request, WSDOT provided a copy of Form CG-2692B. CP 14. WSDOT redacted information about whether five crew members provided specimens for drug and alcohol testing (boxes 16a and 16b), the source of the alcohol test specimen (box 16), and the alcohol test results (also box

16). *Id.*¹¹ The Foundation maintained that these redactions were overbroad from the outset of its communication with WSDOT.

In response to the Foundation's November 19 request, WSDOT again redacted information not exempted by the claimed regulation. WSDOT again provided a copy of Form CG-2692B and withheld details surrounding the employee testing (all of box 16), as well as the names of the testing laboratories (boxes 17 and 18). CP 19. Seven separate versions of the U.S. Department of Transportation Alcohol Testing Form were uniformly redacted to withhold the names and identification numbers of the tested employee (Step 1(A) and (B)), the signature of the employee (Step 2), the date and signature field which was to be completed if the employee's test result was 0.02 or higher (Step 4), and the screening results field. CP 20-26. Finally, WSDOT wholly redacted the post-accident test result summaries of two records created by the testing company HealthForce Partners. CP 27-28.

Assuming for argument's sake that 49 C.F.R. § 40.321 applies, the only information WSDOT can properly withhold is individual drug test results and medical information provided to a medical review officer. None of the information withheld by WSDOT, however, falls under the

¹¹ WSDOT subsequently provided a new version of Form CG-2692B, unredacting some of the information previously withheld. The issue of subsequent production is discussed below.

regulatory definition of “medical information.” Any information related to the identity of the employee, the testing circumstances, and the methodology must be disclosed, and WSDOT violated the PRA by withholding this information.

E. WSDOT Violated the Public Records Act by Withholding and Subsequently Producing Nonexempt Information.

Apparently recognizing that its redactions were overbroad, months after initially redacting Form CG-2692B, WSDOT produced a new copy of the record, unredacting some of the information previously withheld.¹² The withholding and subsequent production of information constitutes a separate violation of the PRA.

A recent decision from the Washington Supreme Court is directly on point. *Sanders v. State*, 240 P.3d 120 (2010). Supreme Court Justice Richard Sanders sued the Attorney General’s Office (AGO) for inadequately responding to a public records request and for withholding nonexempt documents in violation of the PRA. After suit was filed, the AGO determined that several of the documents were “innocuous” and produced them in a good-faith effort to narrow the scope of the dispute, though maintaining that the documents were still exempt. *Id.* at 131.

¹² After this appeal was filed, WSDOT decided to provide partially-unredacted copies of the records responsive to the Foundation’s second records request, though portions of the records remain redacted.

Justice Sanders contended that AGO waived its right to claim that the records were exempt when it produced them after suit was filed. The Supreme Court disagreed with the argument that subsequent production after a requester files suit is an admission of a wrongful withholding by the agency. Instead, courts are to review the lawfulness of the initial withholding:

[T]he appropriate inquiry is whether the records are exempt from disclosure. If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant. If they are nonexempt, the agency wrongfully withheld the records and the appropriate penalty applies for the numbers of days the record was wrongfully withheld-in other words, until the record was produced.

Id. at 132. A key question when an agency subsequently produces records is whether the agency continues to assert an exemption but nevertheless chooses to release the record.

In this case, WSDOT determined that some of the redactions in the Foundation's first records request were overbroad. On February 5, 2010, 158 days after the Foundation's first request, WSDOT provided a new version of Form CG-2692B, unredacting the information about whether crew members supplied drug and alcohol specimens (boxes 16a and 16b) and the alcohol test specimen source (box 16). CP 79. In a letter accompanying the corrected record, WSDOT Records Officer Rick

Phillips explained: “After further review and discussion with the United States Coast Guard, it has been determined portions of the previous redacted information within the referenced form above in fact can be released.” CP 78.

Under the rule provided in *Sanders v. State*, if an agency’s withholding is lawful, its subsequent production of a record is irrelevant if an agency continues to assert an exemption that legitimately applies. *Sanders*, 240 P.3d at 132. But if the withholding is not lawful, a violation has occurred. The determination of whether an agency waives an exemption is a mixed question of law and fact. *Id.* at 131. WSDOT did not assert that the subsequently-provided information continued to be exempt. Rather, WSDOT’s letter indicates that it was correcting an incorrect withholding.

Thus, WSDOT violated the PRA by withholding the information it subsequently produced on February 5, 2010.

F. Costs and Penalties

Under RAP 18.1, a prevailing party may be awarded attorney fees when allowed by applicable law.

The PRA provides that a party who prevails against an agency in an action seeking a public record shall be awarded all costs, including reasonable attorney’s fees, incurred with such legal action. RCW

42.56.550(4). The Supreme Court has noted that the PRA makes an award of costs mandatory: “the statute is very clear that the court ‘shall’ award attorney’s fees to a person who prevails against an agency in an action seeking the disclosure of public records.” *Amren*, 131 Wn.2d at 35.

In determining when a party prevails for purposes of the statute, the Supreme Court in *Spokane Research & Defense Fund v. City of Spokane* said that the key question is whether records were wrongfully withheld—not whether the lawsuit caused disclosure. 155 Wn.2d 89, 117 P.3d 1117 (2005). In *Spokane Research*, a requester obtained records he sought because the agency was ordered to release the records in a separate case. In reviewing whether he was entitled to an award, the Supreme Court said that the proper inquiry is “the legal question of whether the records should have been disclosed on request.” *Id.*, at 103-04.

A requester can also be a prevailing party if he or she wins disclosure of some, but not all, records sought. “If the trial court determines that attorney fees are appropriate, the award should relate only to that which is disclosed and not to any portion of the requested documents found to be exempt[.]” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998). *See also Dawson v. Daly*, 120 Wn.2d 782, 800, 845 P.2d 995 (1993).

In addition to an award of costs, the PRA grants a prevailing party a per-day penalty between \$5 and \$100 for each record that was wrongfully withheld. An penalty award is mandatory, though the amount within the statutory range is within the court's discretion. *Limstrom*, 136 Wn.2d at 617. The Supreme Court has identified sixteen mitigating and aggravating factors for trial courts to evaluate when setting the per-day penalty amount. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). The penalty runs "for the time between the request and the disclosure[.]" *Spokane Research*, 155 Wn.2d at 104.

The PRA's penalty and fee provisions are "intended to encourage broad disclosure and to deter agencies from improperly denying access to public records." *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 746, 948 P.2d 805 (1997). The PRA advises courts to bear in mind its public policy goal of broad disclosure: "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

In this case, WSDOT wrongfully withheld information in response to both of the Foundation's records requests, and continues to withhold nonexempt information. Thus, the Foundation should be entitled to its reasonable attorney fees and costs incurred in this legal action, as well as a

per-day penalty for WSDOT's refusal to provide unredacted copies of responsive records.

V. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's order denying Evergreen Freedom Foundation's Motion for Summary Judgment, and remand to assess proper costs and penalties.

RESPECTFULLY SUBMITTED this 26th day of January, 2011.

EVERGREEN FREEDOM FOUNDATION

A handwritten signature in black ink, appearing to read "Michael J. Reitz". The signature is written in a cursive style with a horizontal line underneath the name.

Michael J. Reitz, WSBA No. 36195
Attorney for Appellant

Appendix A

[Code of Federal Regulations]
[Title 49, Volume 1]
[Revised as of October 1, 2009]
From the U.S. Government Printing Office via GPO Access
[CITE: 49CFR40.321]

[Page 597-598]

TITLE 49--TRANSPORTATION

Subtitle A--Office of the Secretary of
Transportation

PART 40 PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND
ALCOHOL TESTING PROGRAMS--Table of Contents

Subpart P_Confidentiality and Release of
Information

Sec. 40.321 What is the general confidentiality rule for
drug and alcohol test information?

Except as otherwise provided in this subpart, as a
service agent or employer participating in the DOT drug or
alcohol testing process, you are prohibited from releasing
individual test results or medical information about an
employee to third parties without the employee's specific
written consent.

(a) A "third party" is any person or organization to
whom other subparts of this regulation do not explicitly
authorize or require the transmission of information in the
course of the drug or alcohol testing process.

(b) "Specific written consent" means a statement signed
by the employee that he or she agrees to the release of a
particular piece of information to a particular, explicitly
identified, person or organization at a particular time.
"Blanket releases," in which an employee agrees to a
release of a category of information (e.g., all test
results) or to release information to a category of parties
(e.g., other employers who are members of a C/TPA,
companies to

[[Page 598]]

which the employee may apply for employment), are
prohibited under this part.

Appendix B



Effective: August 10, 2005

United States Code Annotated Currentness

Title 49. Transportation (Refs & Annos)

▣ Subtitle III. General and Intermodal Programs (Refs & Annos)

▣ Chapter 53. Public Transportation (Refs & Annos)

→ § 5331. Alcohol and controlled substances testing

(a) Definitions.--In this section--

(1) “controlled substance” means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) whose use the Secretary of Transportation decides has a risk to transportation safety.

(2) “person” includes any entity organized or existing under the laws of the United States, a State, territory, or possession of the United States, or a foreign country.

(3) “public transportation” means any form of public transportation, except a form the Secretary decides is covered adequately, for employee alcohol and controlled substances testing purposes, under section 20140 or 31306 of this title or section 2303a, 7101(i), or 7302(e) of title 46. The Secretary may also decide that a form of public transportation is covered adequately, for employee alcohol and controlled substances testing purposes, under the alcohol and controlled substance statutes or regulations of an agency within the Department of Transportation or the Coast Guard.

(b) Testing program for public transportation employees.--(1)(A) In the interest of public transportation safety, the Secretary shall prescribe regulations that establish a program requiring public transportation operations that receive financial assistance under section 5307, 5309, or 5311 of this title to conduct preemployment, reasonable suspicion, random, and post-accident testing of public transportation employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of a controlled substance in violation of law or a United States Government regulation, and to conduct reasonable suspicion, random, and post-accident testing of such employees for the use of alcohol in violation of law or a United States Government regulation. The regulations shall permit such operations to conduct preemployment testing of such employees for the use of alcohol.

(B) When the Secretary of Transportation considers it appropriate in the interest of safety, the Secretary may prescribe regulations for conducting periodic recurring testing of public transportation employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of alcohol or a controlled substance in violation of law or a Government regulation.

(2) In prescribing regulations under this subsection, the Secretary of Transportation--

(A) shall require that post-accident testing of such a public transportation employee be conducted when loss of human life occurs in an accident involving public transportation; and

(B) may require that post-accident testing of such a public transportation employee be conducted when bodily injury or significant property damage occurs in any other serious accident involving public transportation.

(c) Disqualifications for use.--(1) When the Secretary of Transportation considers it appropriate, the Secretary shall require disqualification for an established period of time or dismissal of any employee referred to in subsection (b)(1) of this section who is found--

(A) to have used or been impaired by alcohol when on duty; or

(B) to have used a controlled substance, whether or not on duty, except as allowed for medical purposes by law or regulation.

(2) This section does not supersede any penalty applicable to a public transportation employee under another law.

(d) Testing and laboratory requirements.--In carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall--

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimens;

(2) for laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any amendments to those guidelines, including mandatory guidelines establishing--

(A) comprehensive standards for every aspect of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards requiring the use of the best available technology to ensure the complete reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimens collected for controlled substances testing;

(B) the minimum list of controlled substances for which individuals may be tested; and

(C) appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform

controlled substances testing in carrying out this section;

(3) require that a laboratory involved in controlled substances testing under this section have the capability and facility, at the laboratory, of performing screening and confirmation tests;

(4) provide that all tests indicating the use of alcohol or a controlled substance in violation of law or a Government regulation be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance;

(5) provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a 2d confirmation test done independently at another certified laboratory if the individual requests the 2d confirmation test not later than 3 days after being advised of the results of the first confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations that may be necessary and in consultation with the Secretary of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(e) Rehabilitation.--The Secretary of Transportation shall prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of any public transportation employee referred to in subsection (b)(1) of this section who is found to have used alcohol or a controlled substance in violation of law or a Government regulation. The Secretary shall decide on the circumstances under which employees shall be required to participate in a program. This subsection does not prevent a public transportation operation from establishing a program under this section in cooperation with another public transportation operation.

(f) Relationship to other laws, regulations, standards, and orders.--(1) A State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section. However, a regulation prescribed under this section does not preempt a State criminal law that imposes sanctions for reckless conduct leading to loss of life, injury, or damage to property.

(2) In prescribing regulations under this section, the Secretary of Transportation--

(A) shall establish only requirements that are consistent with international obligations of the United States; and

(B) shall consider applicable laws and regulations of foreign countries.

[(3) Repealed. Pub.L. 109-59, Title III, § 3030(c), Aug. 10, 2005, 119 Stat. 1625]

(g) **Ineligibility for assistance.**--A person is not eligible for financial assistance under section 5307, 5309, or 5311 of this title if the person is required, under regulations the Secretary of Transportation prescribes under this section, to establish a program of alcohol and controlled substances testing and does not establish the program.

CREDIT(S)

(Added Pub.L. 103-272, § 1(d), July 5, 1994, 108 Stat. 832, and amended Pub.L. 103-429, § 6(13), Oct. 31, 1994, 108 Stat. 4379; Pub.L. 104-59, Title III, § 342(a), Nov. 28, 1995, 109 Stat. 608; Pub.L. 109-59, Title III, §§ 3002(b)(3), (4), 3030, Aug. 10, 2005, 119 Stat. 1545, 1625.)

COURT OF APPEALS
DIVISION II

11 JAN 27 2011 5:51

STATE OF WASHINGTON
BY _____
DEPUTY

No. 41198-9-II

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

EVERGREEN FREEDOM FOUNDATION,
a Washington nonprofit corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, division of
Washington State Ferries,

Respondent.

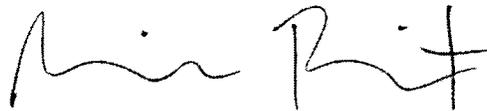
CERTIFICATE OF
SERVICE

I certify that on January 26, 2011, I served a copy of the foregoing

Brief of Appellant by first class mail, postage prepaid, on the following:

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DATED this 26th day of January, 2011.



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