

NO. 39333-6-II

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

MICHAEL W. GENDLER,

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

APPELLANT STATE OF WASHINGTON'S OPENING BRIEF

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I. INTRODUCTION

On October 28, 2007, plaintiff Michael Gendler was injured when he fell from his bicycle while crossing the Montlake Bridge in Seattle. Mr. Gendler blames the bridge for his accident and in a separate action is seeking damages from the Washington State Department of Transportation (WSDOT) for negligent design of the bridge.¹ In furtherance of his tort action, Mr. Gendler is seeking collision records for accidents on the Montlake Bridge. Rather than submitting a request for production for collision records to WSDOT in the tort action, Mr. Gendler made public records requests to WSDOT and the Washington State Patrol (WSP) and subsequently filed the present lawsuit against the WSP under the Public Records Act (PRA).

This case presents an unusual twist on PRA litigation. In this case, WSDOT has offered the requested records to Mr. Gendler, however, Mr. Gendler refused to accept the records. Mr. Gendler filed suit under the PRA, not to obtain public records, but to litigate an evidentiary dispute on an issue of federal law relevant to his action for damages against the State.

The controlling issue of federal law is whether the collision records at issue fall within the privilege mandated by 23 U.S.C. § 409 barring the

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

discovery of information that is collected or compiled for purposes of complying with Federal Highway Safety Programs. *See* 23 U.S.C. § 409, and §§ 152, 144, and 130. Section 409 provides, in pertinent part, that reports, lists, and any other data compiled or collected for federal highway safety purposes:

[S]hall 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.

23 U.S.C. § 409. In 2003, the United States Supreme Court applied the § 409 privilege over an argument based on Washington PRA. *Pierce County v. Guillen*, 537 U.S. 129, 145, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).

WSDOT collects and compiles collision records to comply with federal highway safety requirements. The ability of WSDOT to generate the list of accidents in the form requested by Mr. Gendler, accidents sorted by precise location, exists solely due to the analysis of collision records required by federal law.

The mandate in § 409 prohibits discovery or use of collision records in an action for damages, but does not change the fact that collision reports are otherwise public records and subject to the PRA. The State has harmonized any conflict between the PRA and § 409 by

developing a simple verification form. Anyone requesting collision records from WSDOT is asked to check a box on the request form verifying that the records are not being sought for use in an action for damages.

The affirmative verification procedure is intended to provide notice of the limitation on use of the records imposed by § 409 and to eliminate claims that the § 409 privilege had been waived by releasing the records with no mention of the limitation. The result is that the records are available to anyone while maintaining compliance with the mandate of § 409. In this case, Mr. Gendler refused to accept the records with the § 409 proviso because his sole interest in the records is for use in his action for damages against WSDOT – the very purpose forbidden by federal law.

WSDOT collects and compiles collision records for federal highway safety purposes and therefore the trial court erred in refusing to apply 23 U.S.C. § 409 to prohibit discovery of collision records absent verification that the records were not for use in a damages action.

II. ASSIGNMENTS OF ERROR

1. In ruling on cross-motions for summary judgment, the trial court erred in granting the plaintiff's motion and denying the defendants' motion on the grounds that 23 U.S.C. § 409 does not bar the discovery of

collision records when it was undisputed that the records were sought for use in an action for damages and the requestor refused to verify compliance with federal law.

2. The trial court erred in awarding attorney fees, costs, and penalties under the Public Records Act because the purposes underlying awards under the PRA are not promoted when the PRA lawsuit was not necessary to obtain access to public records.

III. STATEMENT OF ISSUES

1. Whether collision records are collected or compiled by WSDOT for federal Highway Safety Act purposes and therefore within the privilege mandated by 23 U.S.C. § 409 barring discovery of such records when sought for use in an action for damages?

2. Whether penalties and attorney fees should be awarded under the Public Records Act when the lawsuit is not filed to obtain access to public records, but was filed to resolve an evidentiary dispute relevant to other litigation between the parties?

IV. STATEMENT OF FACTS

A. Procedural History

Mr. Gendler's bicycle accident occurred on October 28, 2007.² In February and March 2008, Mr. Gendler and his attorney communicated with employees of the WSP and WSDOT about collision records for the Montlake Bridge. CP 203; 221; 223-46; 247-54. Mr. Gendler was informed that sorting collision records solely by location can only be done by WSDOT and the records are provided with the proviso on use of the records required by 23 U.S.C. § 409. CP 203; 224; 232-33.

On April 3, 2008, Keith Kessler, Mr. Gendler's attorney, submitted a public records request to the WSP for collisions involving bicycles on the Montlake Bridge. CP 248; 252. WSP responded to Mr. Kessler's request, by informing him:

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)580-2454.³ (Footnote added.)

CP 203.

² His notice of tort claim for damages against WSDOT for negligent design of the Montlake Bridge was filed on February 23, 2009.

³ 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.

In March 2008, there was an exchange of correspondence between WSDOT and Mr. Gendler's attorney regarding the application of § 409 to the records sought by Mr. Gendler. CP 232-33. Mr. Gendler's attorney threatened to sue WSDOT if they refused to waive the § 409 privilege. CP 243-44. Mr. Gendler declined to accept the collision records with the restriction imposed by federal law. Mr. Gendler never denied that his purpose in seeking collision records was for use in his damages action against the State.

It was explained to Mr. Gendler's attorney that producing the list of collisions and the associated collision reports solely by reference to precise location can only be accomplished by accessing WSDOT's § 152 database and accordingly the records are produced under the § 409 privilege. CP 232-33. Mr. Gendler filed this PRA lawsuit on August 4, 2008, in Thurston County Superior Court against the WSP demanding production of the collision records regardless of § 409. CP 7-11. Mr. Gendler sued the WSP regardless of knowing that WSDOT was the agency enforcing compliance with § 409.

On September 3, 2008, WSDOT moved to intervene in the lawsuit on the basis that it was the real party in interest regarding the application of 23 U.S.C. § 409 to collision records. 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 (Judge Wickham) heard cross-motions for summary judgment. The sole issue was whether 23 U.S.C. § 409 applied to the collision records sought by Mr. Gendler for his tort lawsuit. The State argued that discovery of collision records is barred by § 409 absent verification that the requestor will comply with federal law prohibiting use of the records in an action for damages. It was undisputed that Mr. Gendler wants the collision records for use in his action for damages against the WSDOT. On February 2, 2009, the trial court ruled in favor of the plaintiff, holding that § 409 does not apply to collision records. CP 500-02. On April 21, 2009, the court awarded penalties and attorneys' fees to Mr. Gendler under the PRA over the State's argument that the lawsuit was not necessary to obtain the records and has been filed to litigate an issue relevant to his ongoing tort action. CP 489-95; 506-12.

The State's Notice of Appeal was filed on May 20, 2009. CP 497.

B. History Of The Uniform Police Traffic Collision Reports And Collision Reports Database

Prior to the adoption of the federal Highway Safety Programs in 1966, there were no uniform Police Traffic Collision Report (PTCR) forms. CP 193. Law enforcement agencies utilized a myriad of different

rudimentary report forms that did not specifically focus on a system for the collection of highway safety data. CP 193. Prior to 1966, collisions were not coded to precise locations on roads, nor was collision data collected in a manner that would allow the WSP or WSDOT to generate an accurate list of collisions occurring at any specific location. CP 193.

A comprehensive collision records database was created in the late 1960s and early 1970s to comply with federal highway safety reporting requirements. CP 193. In order to qualify for federal highway safety funding, the Federal Highway Administration (FHWA) began requiring states to maintain a computerized collision record database. CP 193. The uniform PTCR was created during this time in order to capture and collect the data that was necessary for WSDOT to satisfy federal reporting requirements. CP 194.

The PTCR contained numerous database fields and created a comprehensive and uniform system by which law enforcement officers, by simply filling out the PTCR form, would collect the collision data necessary for WSDOT to evaluate a given collision location for highway safety purposes pursuant to 23 U.S.C. §§ 152, 130, and 144. CP 194. The United States Department of Transportation was instrumental in encouraging standard data elements in uniform collision reports in response to the federal Highway Safety Programs. CP 194.

The uniform PTCR currently has approximately 113 data elements that were specifically created and embedded in the PTCR in response to the federal Highway Safety Programs and the ensuing regulatory guidelines. CP 194.

C. Description Of The Evolving Collision Records System In Washington

Until 1997, the WSP entered collision data from the PTCRs into a computer database. The WSP computer could only produce certain pre-programmed collision summaries and reports, but could not sort data in response to specific queries. CP 194. The WSP computer could not generate an accurate list of collisions by specific location, nor has the WSP ever coded collisions by precise location. CP 194. The WSP does not have the ability to produce an accurate list of accidents by precise location, nor does the WSP have a business need to be able to produce such a list.

The WSP maintenance of the collision database, but not individual collision reports, ended in 1997 when there was an unsuccessful attempt to convert to an optical character recognition system. CP 195. After 1997, WSDOT maintained the state highway collision database to comply with essential federal highway safety requirements. CP 195.

D. The Current Collision Records System

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. WSDOT compiles and collects the data needed by WSDOT and the local jurisdictions to prioritize and fund improvements to state highways and local roads in a computer system known as the Data Mart. CP 195. A significant portion of the raw data compiled by WSDOT are the uniform PTCRs for collisions on all state and local roads. CP 195. The database contains extensive coding of highway features and collision causes useful in developing federally funded highway safety improvement projects. CP 195.

The federal regulations also require WSDOT to accurately locate all collisions that occur on public roadways with an accuracy down to 1/100th of a mile. CP 195. This degree of accuracy is not required for officers or motorists who complete the forms (approximately 10 percent of the collision reports are submitted by vehicle operators and not law enforcement officers). CP 195.

Local and state law enforcement agencies submit the original copy of the PTCR 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 CRS scans the collision reports into WSDOT's database. CP 196; 202. The scanned report becomes the official record and the paper report is destroyed. CP 196.

The WSP indexes the scanned reports by PTCR or VCR number, individual driver or property owner, date of collision, and name of roadway or county if included. CP 196; 202. After the raw collision reports are scanned the reports are sent to one of approximately 30 WSDOT collision analysts. CP 196. The role of the analyst is to extract and compile 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. CP 196. The analyst 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.

For collisions on state highways, the WSDOT analyst also determines and enters a precise location for each collision, accurate to 1/100th of a mile. CP 196. The ability to precisely locate a collision is critical to the analysis of potentially hazardous situation and is required by federal highway safety reporting requirements. 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. An accurate list of collisions at a specific location can only be generated after the collection of the data embedded in the PTCR, compilation of that data, and analysis of the raw collision reports that is performed by WSDOT for federal § 152 purposes. CP 196-97.

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. The WSP CRS and WSDOT share the collision records database, but have different levels of access.⁴ CP 197. The WSP CRS can only access and

⁴ In order to locate a specific PTCR, the WSP CRS must have either: a PTCR number; or the name of one of the involved parties, the date of the collision, and preferably the county in which the collision occurred. CP 202. The WSP CRS cannot perform an accurate search of collision reports solely by location. CP 202. The WSP CRS also cannot search collision reports by type of vehicle. CP 202. WSDOT can prepare a collision history that lists all collisions, by report number, at a given location within the state, however, it cannot print collision reports. CP 220. Thus, in order to obtain a list of collisions by location (and vehicle type) a requestor must obtain a collision history from WSDOT, and then go to the WSP CRS who can pull the reports by number. CP 209 However, because the collision history is generated from protected WSDOT database, in order to receive a collision history requestors must acknowledge that they will not use the data in an action for damages. CP 196; 221.

search collision reports using the original information that it indexed 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 § 152 database, nor does WSP have any need to be able to generate such a list. CP 202. The portion of the database containing the ability to generate an accurate list of collisions at a specific location was created in order to comply with 23 U.S.C. § 152, the federal Highway Safety Act. CP 196. The database used for compliance with § 152 is owned and operated by WSDOT. CP 197.

The reports that can be generated from the § 152 database are public records – subject to the restriction of § 409. For example, in 2008, the State provided collision histories in response to public records requests on 703 occasions. CP 467. This included providing the collision reports for accidents on the Montlake Bridge. CP 467. On six occasions, attorneys would not accept the records subject to the § 409 proviso because they sought collision records for use in damages actions. CP 467.

E. Federal Restrictions On The Use Of Collision Data

The FHWA treats 23 U.S.C. §§ 152 and 409 as grant conditions with which states must abide by if they are to participate in the federal hazard elimination program and be eligible for federal highway safety funds. CP 197. Washington participates in this federal program. CP 197.

The limited privilege in § 409 was intended by Congress to provide assurance to the states that collecting and compiling the data required by the various highway safety acts would not put them at risk of increased liability. See United States Dep't. of Transp. and Dev., *Secretary's Annual Report on Highway Safety Improvement Programs* (1986).

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 FHWA 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).

V. LAW AND ARGUMENT

A. Standard Of Review

1. The issue of whether 23 U.S.C. § 409 applies to collision records was presented to the trial court on cross-motions for summary

judgment. The standard of review for orders entered on summary judgment is *de novo*. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 345, 3 P.3d 211 (2000).

2. Whether the Public Records Act should be interpreted to allow an award of attorney fees and penalties when a lawsuit was filed for reasons other than obtaining public records is a question of statutory interpretation and is reviewed *de novo*. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 219, 151 P.3d 1079 (2007).

B. Collision Records 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. Evolution Of The Privilege Under 23 U.S.C. § 409

The federal government initiated requirements for collection and analysis of collision data by the states with the passage of the Highway Safety Programs, 23 U.S.C. § 402, in 1966. The legislation established national highway safety standards, required the states to design programs to implement the standards, and initiated a system of federal grants to help support the state programs. 23 U.S.C. § 402(a), (m). In 1967, the United States Department of Transportation National Highway Safety Bureau issued sixteen uniform standards for state Highway Safety Programs. *See* 33 Fed. Reg. 16337 (Nov. 7, 1968); 33 Fed. Reg. 16560-64 (Nov. 14,

1968). Standards 9 and 10 required the states to create programs to identify and correct high-collision locations and to create a traffic records system which included collision records containing collision locations, collision type, description of injuries and environmental conditions, and causes and contributing factors. *See* 33 Fed. Reg. 16560-64 (Nov. 14, 1968).

The process for collecting and compiling highway safety information became even more important when the Hazard Elimination Program, 23 U.S.C. § 152, was enacted in 1973. This major reorienting of the federal Highway Safety Program to funding of specific safety improvements on non-federal roads created a greater need to use collision reports, and analysis of those reports, to determine which locations should be funded with federal highway safety funds and the priority of those improvements. The implementing regulations for the Hazard Elimination Program specifically required that states plan highway safety improvements “on the basis of accident experience or accident potential” and that states collect and maintain a record of highway collision data. 23 C.F.R. § 924.9(a)(1), (2).

The resulting tort liability engendered by requiring the states to self-report hazardous collision locations was addressed by the enactment of 23 U.S.C. § 409 in 1987. *See* United States Dep’t. of Transp. and Dev.,

Secretary's Annual Report on Highway Safety Improvement Programs (1986). Section 409 has been amended twice and each time the amendments have broadened the scope of protection for the states. In 1991, in response to state court rulings that § 409 precluded admission of the protected information at trial but not in discovery, Congress added the prohibition against discovery – “shall not be subject to discovery or admitted into evidence.” See *Intermodal Surface Transportation Efficiency Act of 1991*, Pub. L. No 102-240, 105 Stat. 1914.

Significantly for this case, § 409 was amended again in 1995 to clarify the term “compiled” was intended to include not only the raw data from a collision but also the resulting analysis of that data. To clarify this intent, Congress added the words “or collected” after “compiled” to clarify that the § 409 privilege extended to include the raw data collected by the states for § 152 purposes as well as the final analysis and conclusions. See *National Highway System Designation Act of 1995*, Pub. L. No. 104-59, 109 Stat. 568.

Section 409 currently 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 enhancements 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.

23 U.S.C. § 409.⁵

2. *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, some state courts, including those in Washington, attempted to whittle away at § 409 and required disclosure of protected collision data and analysis. In *Guillen*, 537 U.S. at 145, the plaintiffs' personal representative sought records from the Public Works Department relating to the collision history of an intersection where the plaintiff was killed. *Guillen*, 537 U.S. at 136-37. In their public disclosure request, the plaintiffs claimed they did not want reports written specifically for safety improvements but they wanted all of the documents underlying those reports including a list of collisions at the intersection. *Guillen*, 537 U.S. at 137 n.3.

⁵ In 2005, Congress extended the language of § 409 to include the expanded reporting requirements of the Highway Safety Improvement Program. 23 U.S.C. § 148(g)(4).

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 Mr. Gendler's argument, *Guillen v. Pierce County*, 144 Wn. 2d 696, 31 P.3d 628 (2001), the United States Supreme Court reversed rejecting 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 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. 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); see *Vega v. State of New York*, 804 N.Y.S.2d 229, 233 (N.Y. Ct. Cl., 2005) (“evidentiary prohibition extends to both compilations . . . and the raw data from which the compilations were developed”); in accord, *Long v. Louisiana Dept. of Transportation and Dev.*, 916 So.2d 87 (2005).

Under *Guillen*, the list of collisions and the underlying PTCRs for collisions on the Montlake Bridge is 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 PTCRs from the WSP does not defeat the application of § 409 because it is 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.

Following the Supreme Court decision in *Guillen*, the FHWA issued a memorandum instructing that data that has been collected or compiled for § 152 purposes remains protected under § 409 even if the data is part of an integrated database regardless of whether other agencies can also access the data for non-§ 152 purposes as long as the collision records are stored in part for § 152 purposes. CP 199-200. As explained by the FHWA:

In such a situation [integrated databases], 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 eligible purpose.

CP 200.

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 in Washington where it is undisputed that the collision reports, such as those requested by Mr. Gendler, are collected not only for law enforcement purposes, but to allow WSDOT to comply with § 152. CP 194. In fact, the PTCR has been designed primarily to collect data needed by WSDOT to comply with § 152. CP 194. An accurate list of collisions at a specific location is a product of the analysis performed on the raw PTCRs by WSDOT for § 152 purposes. CP 194.

The product of WSDOT's § 152 analysis and the raw data 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. It is undisputed that the collision records

database used by the WSP and WSDOT was built for the purpose of complying with § 152. CP 195.

3. Mr. Gendler's Reliance On RCW 46.52.060 Is Misplaced And Would Frustrate The Congressional Intent Underlying § 409

Mr. Gendler has argued below that because the WSP is required under RCW 46.52.060 to file, tabulate, and analyze all accident reports and to publish an annual report on accidents in Washington that the WSP should be required to generate a list of accidents at the Montlake Bridge. This argument has at least two significant flaws beginning with the fact that Mr. Gendler's public disclosure request does not ask for the annual WSP report. 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. This level of generality is insufficient for Mr. Gendler's purpose, and therefore, he did not request the annual report required by RCW 46.52.060.

The second primary flaw in Mr. Gendler's argument is that the duties under the statute to "file, tabulate, and analyze all accident reports" were transferred from the WSP to WSDOT in 2003. This transfer was accomplished through a Memorandum of Understanding (MOU) and recognized the efficiencies of formally transferring accident analysis to WSDOT. WSDOT was already performing a detailed analysis in order to

comply with § 152 and the WSDOT analysis was more sophisticated than any analysis that was necessary for WSP purposes. The Legislature has not overridden that MOU.

4. The Requested Records Are Not Subject To Discovery When Sought For Use In An Action For Damages

Collision records are privileged under 23 U.S.C. § 409 when sought for use in an action for damages. To the extent a federal privilege exists, the privilege overrides a state public records act due to the Supremacy Clause. *Guillen*, 537 U.S. at 144. Although the privilege under § 409 is limited to barring the discovery and admissibility of records collected or compiled for § 152 purposes, the privilege is absolute within the scope of its application. Because the records requested by Mr. Gendler are within the scope of § 409, they are exempt from public disclosure.

RCW 42.56.070(1) provides that:

Each agency, in accordance with published rules, shall make available for public inspection and copying 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 of specific information or records.*

(Emphasis added.) Section 409 is an “other statute that exempts or prohibits disclosure” under the PRA. Accordingly, the records are exempt from public disclosure. *See Guillen*, 537 U.S. at 144 (reversing decision

that required disclosure of collision data under Washington's PRA to the extent § 409 applied).

Additionally, RCW 42.56.290 provides that: “[r]ecords 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.” A controversy is “completed, existing, or reasonably anticipated litigation.” *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 732, 174 P.3d 60 (2007); *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). Section 409 is a federal privilege against discovery of collision records for purposes of litigation. Thus, collision records are not available to another party under discovery rules for causes pending in superior courts. Accordingly, the express exemption of RCW 42.56.290 is triggered.

C. The Court Should Award No Penalties And Fees Where The PRA Action Was Used To Resolve An Evidentiary Dispute Relevant To A Separate Tort Lawsuit And Was Not To Promote Public Access To Records

An award of penalties and fees under the PRA is appropriate when the action was reasonably necessary to obtain public records. *Daines v. Spokane County*, 111 Wn. App. 342, 347-48, 44 P.3d 909 (2002). As noted in *Daines*, in order to recover attorney fees or penalties under the

PRA, the plaintiff “. . . must show that the action was necessary to obtain the information in the first place.” *Id.* at 349. In *Daines*, the plaintiff made a request for public records that were already in his possession through discovery in a related lawsuit. *Id.* at 344-46. The county erroneously denied the public disclosure request under the mistaken belief that it did not possess the records. *Id.* at 345.

The plaintiff in *Daines* filed an action under the PRA to obtain the records from the county. *Id.* at 345. The trial court refused to award attorney fees or penalties even though the plaintiff had been wrongfully denied public records. *Id.* at 346. Affirming the trial court, the court of appeals held:

To trigger the remedial provisions of the PDA, the action must be one that could “ ‘reasonably be regarded as necessary’ ” to obtain the records. *Coalition on Gov’t Spying v. King County Dep’t of Public Safety*, 59 Wash.App. 856, 864, 801 P.2d 1009 (1990) (quoting *Miller v. United States Dep’t of State*, 779 F.2d 1378, 1389 (8th Cir. 1985)).

But Mr. Daines concedes that (a) he had the records in his own files before he filed the action, and (b) he knew this. It was precisely this discovery that alerted him that the County’s response to his request was false.

In other words, his suit cannot reasonably be regarded as necessary to obtain the information. The remedy provisions of the PDA do not, therefore, extend to this action.

Daines, 111 Wn. App. at 348.

The legal standard articulated in *Daines* has substantial bearing on this case. Where a PRA action was not reasonably necessary to obtain records, then the purpose of imposing the remedial provisions of the PRA do not apply. *Daines*, 111 Wn. App. at 348. Mr. Gendler does not actually contend that his PRA lawsuit was necessary to obtain the collision records. It is undisputed that collision records are routinely provided on hundreds of occasions every year. CP 466-67. Significantly, collision records for the Montlake Bridge were provided to one requestor within nine days of his request. CP 467-70. Mr. Gendler filed this lawsuit not to obtain access to the collision records but to litigate whether the records were subject to § 409.

The point of Mr. Gendler's PRA action is to resolve an evidentiary dispute over whether collision records were within the § 409 privilege forbidding use of collision records in actions for damages. Mr. Gendler's action has nothing to do with public access to collision records. Under *Daines*, the Court is within its authority to rule that a PRA action is not necessary to obtain collision records and therefore the trial court should have made no award of fees, costs, or penalties.

D. Pursuant To RCW 46.52.080 And .083 Accident Reports And The Factual Data Contained In Those Reports Are Confidential

RCW 46.52.030, .040, and .070 require that persons involved in accidents and law enforcement officers submit accident reports. RCW 46.52.080 directs that all required accident reports are confidential except as to certain government officials and other persons having “a proper interest” in the accident. RCW 46.52.083 permits only the interested parties named in RCW 46.52.080 access to the factual data submitted in accident reports filed by law enforcement officers and witness statements.

However, in *Guillen*, 144 Wn. 2d at 693 n.8, the Washington State Supreme Court held that a member of the public could obtain public disclosure of the raw data from the reports: “the number of accidents” at the location in question, the “frequency,” and that “circumstances thereof.” This holding is arguably controlling, notwithstanding the subsequent reversal of this opinion by the United States Supreme Court. In light of this language in footnote 8, the State did not argue an exemption from public disclosure based on RCW 46.52.080 and .083. However, a better view is that all the accident reports required by Chapter 46.52 RCW and the factual data contained therein are confidential and exempt from public disclosure. If this case is reviewed by the State Supreme Court, as an alternative basis to reverse, the State preserves the

right to argue that the court's holding that accident data is not privileged from disclosure under state law should be reversed, just as was the holding that the accident data was not privileged under federal law. *Guillen*, 537 U.S. at 145-46.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 10th day of September, 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:

US Mail Postage Prepaid via Consolidated Mail Service

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

DATED this 10th day of September, 2009, at Olympia, WA.

Kath. Sisson
KATHRINE SISSON

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APPENDICES

23 U.S.C. § 152

23 U.S.C. § 409

RCW 42.56.290

RCW 46.52.030

RCW 46.52.040

RCW 46.52.060

RCW 46.52.070

RCW 46.52.080

RCW 46.52.083

Westlaw

23 U.S.C.A. § 152

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Effective: June 9, 1998

United States Code Annotated Currentness
Title 23. Highways (Refs & Annos)
 ⁸ 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-

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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23 U.S.C.A. § 409

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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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END OF DOCUMENT

RCW 42.56.290
Agency party to controversy.

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.

[2005 c 274 § 409.]

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.

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.]

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.

RCW 46.52.070
Police officer's report.

(1) Any police officer of the state of Washington or of any county, city, town or other political subdivision, present at the scene of any accident or in possession of any facts concerning any accident whether by way of official investigation or otherwise shall make report thereof in the same manner as required of the parties to such accident and as fully as the facts in his possession concerning such accident will permit.

(2) The police officer shall report to the department, on a form prescribed by the director: (a) When a collision has occurred that results in a fatality; and (b) the identity of the operator of a vehicle involved in the collision when the officer has reasonable grounds to believe the operator caused the collision.

(3) The police officer shall report to the department, on a form prescribed by the director: (a) When a collision has occurred that results in a serious injury; (b) the identity of the operator of a vehicle involved in the collision when the officer has reasonable grounds to believe the operator who caused the serious injury may not be competent to operate a motor vehicle; and (c) the reason or reasons for the officer's belief.

[1999 c 351 § 2; 1998 c 165 § 8; 1967 c 32 § 57; 1961 c 12 § 46.52.070. Prior: 1937 c 189 § 139; RRS § 6360-139.]

Notes:

Effective date -- 1998 c 165 §§ 8-14: "Sections 8 through 14 of this act take effect January 1, 1999." [1998 c 165 § 15.]

Short title -- 1998 c 165: See note following RCW 43.59.010.

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.

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.]