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SUPREME COURT
STATE OF WASHINGTON
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NO. 85408-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

MICHAEL GENDLER,

Respondent,

v.

JOHN BATISTE, WASHINGTON STATE PATROL CHIEF &
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Petitioners.

GENDLER'S CONSOLIDATED REPLY TO AMICUS BRIEFS

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ORIGINAL

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INTRODUCTION

The Washington Cities Insurance Authority and the Washington Counties Risk Pool (collectively, "WC") posit a counterfactual test for applying § 409: if the 1966 Federal Highway Safety Act ("FHSA") "never existed," then the WSP's collision reports are not privileged. WC's test is inconsistent with the plain language of *Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003), which held that § 409 "evinces no intent to make plaintiffs worse off than they would have been **had §152 funding never existed**" (not, as WC claims, had the 1966 FHSA never existed). 537 U.S. 146 (emphasis added). The 1966 FHSA is simply irrelevant to *Guillen's* holding.

WC also misunderstands the facts. Gendler requested neither federal highway safety data nor "precise location" data. And contrary to WC's claims, it is undisputed that WSP has long provided police traffic collision reports (PTCRs) by location.

By contrast, Amicus Washington State Association for Justice Foundation ("Foundation") provides detailed and insightful analysis. With two minor exceptions noted below, the Foundation is also correct on the facts. Gendler agrees with all of the legal arguments in the Foundation's Amicus Brief ("FAB").

Amici Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association provide expert PRA policy analysis on the correct facts. They cogently emphasize the importance of open government in a public-safety context. Again, Gendler agrees with this helpful amicus brief.

Ultimately, the *amici* make clear that the WSP's state-law duty to collect collision information by location for law enforcement purposes, together with its state-law duty to produce these public records under the PRA, resolve this case and render § 409 inapplicable. There is no conflict with **Guillen**; rather, the cases are on all fours, with WSP in the same position as the Pierce County Sheriff's office, and WSDOT in the same position as the Pierce County Public Works Department. WC's misreading of **Guillen** is unsupported and irrelevant. This Court should affirm.

REPLY TO STATEMENTS OF THE CASE

WC provides a selective "history" of the FHSA in an attempt to bolster its strained claim that the §409 privilege applies unless the 1966 FHSA "never existed." See, e.g., WC Amicus Brief (WCAB) at 1-7, 12-15. **Guillen** held that §409 "evinces no intent to make plaintiffs worse off than they would have been had §152 funding never existed." Contrast *id.* from 537 U.S. 146. Section

152 was enacted in 1973. BR 35. The 1966 FHSA is irrelevant to **Guillen's** holding. *Id.* WC's FHSA "history" is irrelevant here.

By contrast, the Foundation sets forth a thorough, well supported, and helpful Statement of the Case. FAB at 1-8. The Foundation does, however, make two mistaken inferences from the appellate opinion in this case, **Gendler v. Batiste**, 158 Wn. App. 661, 665, 673 n.5, 242 P.3d 947 (2010), *rev. granted*, 171 Wn.d 1001 (2011). First, Gendler never requested a "list" of collisions (FAB 2, 3 n.3). The Foundation cites **Gendler** for this "list" assertion, but the opinion says the WSP refused to produce a list (158 Wn. App. at 665), not that Gendler asked for a list, which he did not. CP 415 (attached). Gendler later reminded WSP that he was "not requesting collision reports submitted by citizens, and RCW 46.52.080 and .083 are therefore irrelevant." CP 416.

Second, there is no "dispute between the parties" that WSP previously provided collision reports by location. FAB at 3. As **Gendler** accurately notes, in the past "WSP could provide data based on location, but its ability to do so was limited." 158 Wn. App. at 669 & n.2 (quoting at length CP 305, WSP's Kip Johnson); *see also* CP 295-96 (John Messina notes, for example, that WSP has historically provided "Accident reports, not only for the subject

collision, but all other collisions that occurred at the site of the collision"). The source of the alleged "dispute" is rather WC's (and the State's) appellate assault on a straw man; e.g., "There is no evidence that . . . WSP . . . ever reported collisions at *precise* locations." State's Suppl. Brief at 9 (second emphasis added). As further discussed below, Gendler never requested police reports by "precise" location. See *a/so* BR 8.

REPLY TO ARGUMENTS

A. Gendler did not request any federal highway safety data.

WC argues that local governments have an interest in preventing the use of federal highway-safety data to expand "road-improvements liability." WCAB 8-11. While this may be so, it is irrelevant here. Gendler never sought "federal safety data to create liability for alleged failures to improve federal-aid eligible roads for which safety improvements have not yet been funded." WCBA 10. He did not request any "federal" data. Rather, he requested "All police reports relating to collisions involving bicycles on the Montlake Bridge in Seattle (SR 513)." CP 415.

Nothing in those PTCRs has anything to do with creating liability for failures to improve roads: they are (as the Foundation notes) reports made in compliance with WSP's statutory duty to

"collect detailed information about vehicle accidents, specifically including, but not limited to, the location of such accidents." FAB at 12 (citing RCWs 46.52.030(4), 46.52.070(1) & 46.52.030(2)). They are not collected solely for § 152 purposes and are not privileged under § 409. *Id.* at 12-13. WC's arguments are irrelevant.

A copy of one such PTCR is in the record at CP 436-38 (attached). WSP produced this PTCR (and others) after the trial court's ruling requiring production. CP 410, 435. On its face, this PTCR shows the date of the collision (9/28/06), its location (Montlake Blv., 3000 block), its nearest cross street (E. Shelby St.), and that a "pedal cycle" was involved. *Id.* WSP can thus produce PTCRs for bicycle collisions on the Montlake Bridge. CP 435-38. That is all that Gendler requested.

But in light of WC's argument about "federal safety data," it is equally important to note what is not in the PTCR. It says nothing about federal road safety, about whether this road is safe or unsafe, about funding road improvements, about federal aid, or about any § 152 issues. CP 435-38. Gendler neither requested nor received any § 152 compilations, collections, or analyses. *Id.*; CP 415. WC's hypothetical concerns about someone else seeking such data are simply irrelevant here.

- B. WC misstates *Guillen's* key holding that § 409 “evinces no intent to make plaintiffs worse off than they would have been had §152 funding never existed.”**

WC misstates *Guillen's* key holding, converting it from a plain statement that § 409 “evinces no intent to make plaintiffs worse off than they would have been ***had §152 funding never existed***” (537 U.S. 146, emphasis added) into something *Guillen* never said: plaintiffs may obtain only data that would be available “if the ***federal highway safety laws*** ‘never existed’” (WCAB 12, emphasis added). Section 152 has existed only since 1973, but WSP’s duty to “file, tabulate, and analyze” police reports, including by location, has existed since 1937. WASH. LAWS 1937, Ch. 189, § 138. *Guillen* does not support WC’s argument. See, e.g., BR 5-7, 24-36; Ans. to Pet. 10-15. This Court should affirm.

- C. WC misstates the issue, the facts and the law in arguing that “precise” highway locations were not previously available: Gendler requested only police reports for collisions on the Montlake Bridge, reports long available from WSP.**

In arguing that “precise” highway locations were not previously available, WC misstates the issue, the facts, and the law. It argues that prior to the 1966 FHSA, WSP could not produce PTCRs by “precise highway location,” so under WC’s misreading of *Guillen* rebuffed above, plaintiffs cannot obtain them now. WCAB

13-17. As Gendler previously noted, this “precise location” argument began as a claim on appeal that WSP could not produce an accurate list by specific location. BR 7 (citing BA 8, 9, 12, 13). This assertion in turn relies on the federal definition of “accuracy”: 1/100th of a mile, or within roughly 53 feet. BR 8 (citing BA 10).

Gendler did not specify any level of accuracy, but requested only “police reports relating to collisions involving bicycles on the Montlake Bridge in Seattle (SR 513).”¹ CP 415. The federal “precise” location standard is irrelevant.² As a result, WC fails to address the salient issues in this appeal.

WC’s myopic focus on “precise location” also leads it into error on the facts: it is not true that “the only evidence in the record concerning the historical availability of the collision reports sought by [Gendler] is the declaration of Brian Limotti.” WCAB 14. As the Court of Appeals quoted, WSP’s own Kip Johnson contradicts WC’s apparent claim that WSP could not previously produce police reports by location. **Gendler**, 158 Wn. App. at 669 & n.2 (quoting CP 305). Additional evidence includes John Messina’s testimony

¹ The court may take judicial notice that the Montlake Bridge is well over 300 feet long. See, e.g., http://en.wikipedia.org/wiki/Montlake_Bridge.

² See also FAB 6 n.8 (citing WAC 308-330-240, “requiring local government entities to file copies of accident reports . . . ‘alphabetically by location’ using ‘a suitable system of filing,’” not by “precise location”).

that WSP historically provided such reports. CP 295-96. In any event, the trial court correctly found that WSP's failure to maintain software to retrieve the electronic documents that it undisputedly owns "does not relieve it of the obligation to provide such records upon request" under the PRA. CP 322.

Yet WC does seem to argue that WSP has no legal duty to maintain software sufficient to allow it access to its own records, thus getting the law wrong too. WCAB at 15-16. The Foundation is particularly salient on this point, carefully delineating the origin and extent of the WSP's duties under RCW Ch. 46.52, the PRA, and the MOU. FAB at 15-20 & nn.19-22. As the Foundation notes, this Court correctly held in *Guillen I* that RCW Ch. 46.52's confidentiality provisions apply only to citizen reports, not to "investigator's reports" like PTCRs. FAB at 15-16 (citing *Guillen v. Pierce Cnty.*, 144 Wn.2d 696, 714-15 & n.8, 31 P.3d 628, 34 P.3d 1218 (2001), *rev'd on other grnds*, 537 U.S. 129 (2003); Wash. Atty. Gen. Op. No. 8 (Sept. 25, 2001); RCW 42.56.070(1); RCW 46.52.030(3); RCW 46.52.070; RCW 46.52.080; RCW 46.52.083). Neither the State nor WC has shown that this holding is incorrect or harmful. *Id.* at 16 (citing *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). And the State has never directly raised a

claim of administrative inconvenience – much less impossibility – but rather has conceded that producing such records is “technologically possible.” *Id.* at 17 n.19 (quoting State’s PFR at 19). In any event, administrative expense or difficulty is no excuse. *Id.* (citing ***Zink v. City of Mesa***, 140 Wn. App. 328, 337-38, 166 P.3d 738 (2007)).

As the Foundation also points out – but WC ignores – under the Interlocal Cooperation Act, “[n]o agreement made pursuant to this chapter [(such as the MOU)] relieves any public agency of any obligation or responsibility imposed upon it by law.” FAB 17 (quoting RCW 39.34.030(5)). WC is forced to admit that since 1937, “WSP filed the collision reports and did the analysis and tabulation needed to produce the monthly and annual reports” as required by RCW 46.52.060 (including collision locations). WCAB 15; FAB 12. Thus, WC’s irrelevant assertion that a 1937 statute requires no “searchable computerized collision record database” misses the mark: the MOU, consistent with RCW ch. 46.52, provides that WSP owns the electronic PTCRs, so any attempts to delegate to WSDOT its legal responsibility under the PRA to produce PTCRs, and any attempts to shield PTCRs under § 409, would be void. See FAB at 17-20.

Here too, the Foundation is salient. FAB 5-8. The MOU makes clear that the WSP Collision Records Section is co-located in the WSDOT Transportation Data Office, that the scanned-in PTCRs remain WSP's property and under its authority, that the WSP records personnel remain under the "command and control" of the WSP, that WSDOT is granted only a license to use the PTCRs, and that WSP indexes PTCRs by (among other things) name of roadway and county. *Id.*; CP 205-12. The MOU does not and could not obviate WSP's statutory duties to collect, file, tabulate and analyze its records under RCW 42.52.060, much less its duties to index and produce them under the PRA. FAB at 17-20 & nn. 21 & 24; see also WAC ch. 44-14.

WC also gets the issue, the facts and the law wrong in discussing ***Goza v. Parish of W. Baton Rouge***, 21 So.3d 320 (La. App. 2009), *cert. denied*, 130 S. Ct. 3277 (2010). WCAB 17. While WC admits that ***Goza*** is correct "as long as those collision reports were historically available to plaintiffs from the local sheriff's office," it then restates its incorrect and irrelevant assertions that here, the "collision reports by precise location and collision and road characteristics were not available from WSP before the 1966" FHSA. *Id.* As fully discussed above, police reports have long been

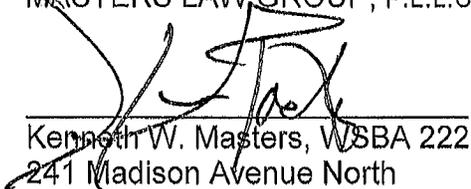
produced by WSP, Gendler did not request reports by precise locations (or by collision and road characteristics), and **Guillen** does not refer to documents available as if the FHSA "never existed." Indeed, since "collision reports were historically available to plaintiffs from the" WSP, WC's concession that **Goza** is correct amounts to a concession that **Gendler** is correct.

CONCLUSION

For the reasons stated above, in all of the prior briefing, and in the trial and appellate court decisions, this Court should affirm.

RESPECTFULLY SUBMITTED this 28th day of
September, 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing
RESPONDENT GENDLER'S REPLY TO AMICUS BRIEFS
postage prepaid, via U.S. mail on the ^{28th} day of September 2011,
to the following counsel of record at the following addresses:

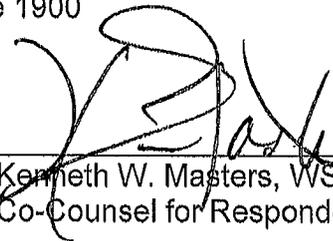
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Washington State Patrol
REQUEST FOR PUBLIC RECORDS

TRACKING NUMBER	DATE OF REQUEST	TIME OF REQUEST
-----------------	-----------------	-----------------

REQUESTED BY: _____

Name: **Keith L. Kessler Stritmatter Kessler Whelan Coluccio**

Address: **413 - 8th Street**

City, State, ZIP: **Hoquiam WA 98550** Phone No.: **360-533-2710**

Your Relationship to Incident: _____

REQUESTED INFORMATION: _____

All police reports relating to collisions involving bicycles on the Montlake Bridge in Seattle (SR 513)

INCIDENT INFORMATION: _____

DATE OF INCIDENT: _____ TIME OF INCIDENT: _____ LOCATION (INCLUDE COUNTY): **Montlake Bridge, Seattle, King County (SR 513)**

PARTIES INVOLVED #1: _____ PARTIES INVOLVED #2: _____

INVESTIGATING OFFICER: _____ BADGE NUMBER: _____ CASE NUMBER: _____ DATAMASTER NUMBER (IF NEEDED): _____

REQUESTER READ AND SIGN:

I understand that if a list of individuals is provided me by the Washington State Patrol, it will neither be used to promote the election of an official or promote or oppose a ballot proposition as prohibited by RCW 42.17.130 nor for commercial purposes or give or provide access to material to others for commercial purposes as prohibited by RCW 42.56.070(9). I further understand that requested records may be redacted in accordance with RCW 42.56.

I understand that I may be charged 15 cents per page for all standard letter size copies I desire and that other publications are available at cost. I understand that records will be mailed and/or available once full payment is received by WSP. Any overpayment will not be applied to future requests and will not be refunded. I understand that in lieu of purchasing the records, I may call ahead and schedule an appointment at the location the records are being collected and inspect them at no charge.

Personal checks, cashier's checks, or money orders are the only accepted payment methods for public disclosure requests. Cash payments will not be accepted under any circumstances.

REQUESTER'S SIGNATURE: _____

COMPLETED BY WSP RECORDS COORDINATOR

NO. OF PAGES: _____ @ \$.15	\$ _____
PHOTOGRAPHS:	\$ _____
AUDIO/VIDEO TAPES:	\$ _____
MANUAL _____	\$ _____
CDs/DISKETTES:	\$ _____
APR 3 2008	\$ _____
WSP Bellevue Public Disclosure	\$ _____
POSTAGE:	\$ _____
TOTAL DUE:	\$ _____

ACKNOWLEDGEMENT OF RELEASE OF RECORDS: _____

DATE OF RELEASE: _____ BILLING DATE: _____

RECIPIENT'S SIGNATURE: _____ PUBLIC RECORDS OFFICER SIGNATURE: _____

3000-372-002 (R 1/04)



STATE OF WASHINGTON
POLICE TRAFFIC
COLLISION REPORT



1601871

REPORT NO. 2617329

1 8

INTERSTATE <input type="checkbox"/>	CITY STREET <input checked="" type="checkbox"/>	FIRE RESULTED <input type="checkbox"/>
STATE ROUTE <input type="checkbox"/>	OTHER <input type="checkbox"/>	STOLEN VEHICLE <input type="checkbox"/>
COUNTY RD <input type="checkbox"/>	PRIVATEWAY <input type="checkbox"/>	IMP & RUN INVOLVED <input type="checkbox"/>

CASE # 06-411283

LOCAL AGENCY CODING 06-27009-0

TOTAL # OF UNITS 01 OBJECT STRUCK

2 1

TRIBAL RESERVATION

3 4

DATE OF COLLISION 09-28-2006 TIME (2400) 194417 COUNTY # MILES CITY #

4

ON (PRIMARY TRAFFIC WAY) INTERSECTION NON-INTERSECTION BLOCK NO. 3000 MILE POST

4a

DISTANCE OF (REFERENCE OR CROSS STREET) E SHELBY ST

5 2

UNIT 01 MOTOR VEHICLE PEDAL-CYCLE DAMAGE THRESHOLD MET YES NO PHONE 361-332-9502

6 1

LAST NAME RACHEVA FIRST NAME TANYA MIDDLE INITIAL

STREET NEW ADDRESS 1029 NW 51 ST

7

CITY SEATTLE BY WA ZIP 98107

8

CDL ENDORSEMENTS RESTRICTIONS

9 9

DRIVER'S LICENSE # STATE SEX F D.O.B. MMDDYYYY

10

ON DUTY STATUS AIRBAG RESTR. EJECT HELMET USE INJURY CLASS 7 NATURE OF INJURIES PAIN IN LEFT SHOULDER, LEFT SIDE OF HEADFACE

11 30

LICENSE PLATE # STATE VIN

12

TRAILER PLATE # STATE TRAILER PLATE # STATE

13 4

VEH. YEAR MAKE MODEL STYLE VEHICLE TOWED YES NO TOWED BY GOV. VEHICLE YES NO

14 6

REGISTERED OWNER INFO. VEHICLE NO. 1 SHAPE IN DAMAGED AREA

15 6

LIABILITY INSURANCE EFFECTIVE INSURANCE CO. & POLICY # VEHICLE LICENSES YES NO CITATION # CHARGE

16

UNIT 02 MOTOR VEHICLE PEDAL-CYCLE PEDESTRIAN PROPERTY OWNER DAMAGE THRESHOLD MET YES NO PHONE

17

LAST NAME FIRST NAME MIDDLE INITIAL

18

STREET NEW ADDRESS

19 B

CITY ST ZIP

20

CDL ENDORSEMENTS RESTRICTIONS

21 5

DRIVER'S LICENSE # STATE SEX D.O.B. MMDDYYYY

22

ON DUTY STATUS AIRBAG RESTR. EJECT HELMET USE INJURY CLASS NATURE OF INJURIES

23

LICENSE PLATE # STATE VIN

24

TRAILER PLATE # STATE TRAILER PLATE # STATE

25 44

VEH. YEAR MAKE MODEL STYLE VEHICLE TOWED YES NO TOWED BY GOV. VEHICLE YES NO

26

REGISTERED OWNER INFO. VEHICLE NO. 2 SHAPE IN DAMAGED AREA

LIABILITY INSURANCE EFFECTIVE INSURANCE CO. & POLICY # VEHICLE LICENSES YES NO CITATION # CHARGE

OFFICER'S NAME (PRINT) ERIN K. SMITH BADGE OR ID # 69132 AGENCY SEATTLE PD

PAGE 01 OF 3

PART A 3000-345-159 (7/06)

000003

CP 436



STATE OF WASHINGTON
POLICE TRAFFIC
COLLISION REPORT



1001072

CORRECTION

REPORT NO. 2617329

CASE # 00-41283

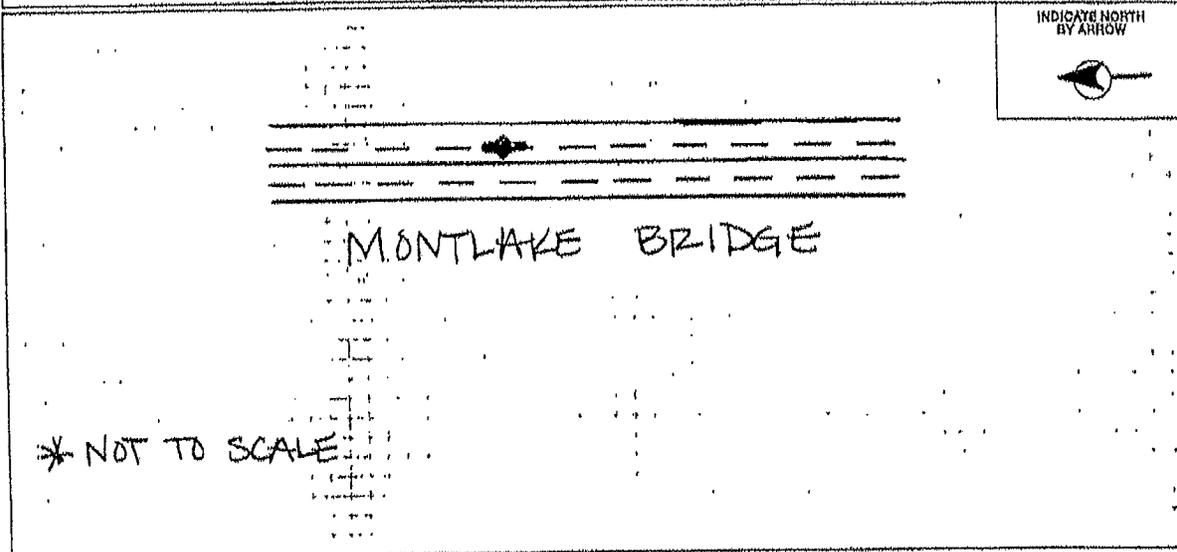
ADDITIONAL PERSONS INVOLVED (PASSENGERS AND/OR WITNESSES ONLY)

NAME (LAST, FIRST, MIDDLE INITIAL) BOLANDER, CHRIS J
 ADDRESS & PHONE # 200-909-5430
14821 223 AV NE WOODINVILLE, WA 98077 SEX M D.O.B. [REDACTED]
 PASSENGER WITNESS UNIT # SEAT POS. AIRBAG RESTR. EJECT HELMET USE INJURY CLASS NATURE OF INJURES

NAME (LAST, FIRST, MIDDLE INITIAL) ODLE, ALEX W
 ADDRESS & PHONE # 200-606-2245
18312 NE 153 ST WOODINVILLE, WA 98072 SEX M D.O.B. [REDACTED]
 PASSENGER WITNESS UNIT # SEAT POS. AIRBAG RESTR. EJECT HELMET USE INJURY CLASS NATURE OF INJURES

NAME (LAST, FIRST, MIDDLE INITIAL)
 ADDRESS & PHONE # SEX D.O.B.
 PASSENGER WITNESS UNIT # SEAT POS. AIRBAG RESTR. EJECT HELMET USE INJURY CLASS NATURE OF INJURES

DIAGRAM



NARRATIVE

W/ BOLANDER AND W/ ODLE SAID THAT V/ RACHEVA WAS TRAVELING NB IN THE CENTER LANE OF MONTLAKE BVE OVER THE MONTLAKE BRIDGE. W/ BOLANDER AND W/ ODLE SAW V/ RACHEVA'S FRONT BICYCLE TIRE CATCH IN THE BRIDGE GRADING AND FLIP OVER. THE REPORTED INJURIES WERE PAIN IN V/ RACHEVA'S LEFT SHOULDER, THE LEFT SIDE OF HER HEAD, AND THE LEFT SIDE OF HER FACE. ENGINE 17 OF THE SEATTLE FIRE DEPT RESPONDED TO THE SCENE.

I CERTIFY (DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. (RCW 9A.72.089)

INVESTIGATING OFFICER'S SIGNATURE [Signature] UNIT OR DIST. OFF W03 DATED 9-28-06 PLACE SIGNED SEATTLE

APPROVED BY [Signature] DATE 09/28/06

BADGE OR ID # 6952 ORI # WASPD0000 TIME POLICE DISPATCHED 1945 TIME POLICE ARRIVED 1954



SEATTLE
POLICE
DEPARTMENT

CONTINUATION SHEET

2617329

INCIDENT NUMBER
00-411283
UNIT FILE NUMBER

ITEM OR ENTRY	<input type="checkbox"/> INCIDENT	<input type="checkbox"/> FOLLOW-UP	<input type="checkbox"/> OTHER: (specify)
	<input type="checkbox"/> INCIDENT AND ARREST	<input checked="" type="checkbox"/> TRAFFIC / COLLISION	
	<input type="checkbox"/> ARREST ONLY	<input type="checkbox"/> SUPERFORM	

AMR 983 TRANSPORTED V/ RACHEVA TO UW MEDICAL CENTER TO BE EXAMINED AND TREATED.

THE MONTLAKE BRIDGE ROAD SURFACE IS A BRIDGE GRATING. THE MONTLAKE BRIDGE IS A DRAW BRIDGE. THE DRAW BRIDGE WAS DOWN AT THE TIME OF THE BICYCLE COLLISION. THE BRIDGE GRATING SURFACE WAS SLIPPERY.

V/ RACHEVA'S BOYFRIEND STATED THAT THE FRONT WHEEL OF V/ RACHEVA'S BICYCLE WAS BENT. V/ RACHEVA'S BOYFRIEND TRANSPORTED V/ RACHEVA'S BIKE TO ANOTHER LOCATION.

3/3

PRIMARY OFFICER	SERIAL	UNIT	SECONDARY OFFICER	SERIAL	UNIT	APPROVING OFFICER	SERIAL
E. SMITH	0952	6003	L. PEASE	3313	6008	Sam [Signature]	5060

Form 5.7 CB 21,318 Rev. 4/97

000005