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DIVISION II
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STATE OF WASHINGTON
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NO. 39333-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL W. GENDLER,

Respondent,

v.

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

Appellants.

BRIEF OF RESPONDENT

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INTRODUCTION

In 2003, the United States Supreme Court interpreted 23 U.S.C. § 409 adversely to the State's position in this appeal, holding that § 409 does not prevent disclosure of accident reports held by law enforcement agencies if the reports are held for purposes other than obtaining federal funds for elimination of highway safety hazards. *Pierce County v. Guillen*, 537 U.S. 129, 145-46, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003). Since 1937, the Washington State Patrol ("WSP") has collected accident reports pursuant to statutory mandate. RCW 46.52.060. After the *Guillen* decision, the Washington State Department of Transportation ("WSDOT") attempted to have the Legislature change Washington law to make WSDOT—instead of WSP—the official repository of all accident reports. The Legislature refused. So WSDOT and WSP tried to accomplish by agreement what the Legislature refused to adopt as law—transfer accident reports from WSP to WSDOT to frustrate citizens' rights under the Public Records Act to obtain accident reports.

The trial court correctly rejected the State's argument that WSP could refuse to produce the accident reports, perceiving that the reports remain the property of WSP and that WSP could

respond to Public Records Act requests without WSDOT. The court appropriately ordered disclosure and imposed an award of fees and a penalty on WSDOT and WSP to encourage future compliance with the Public Records Act. This Court should affirm.

RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is WSP an agency collecting and compiling accident reports pursuant to 23 U.S.C. § 152, where the facts are as follows:

- ◆ Since 1937 WSP has been required by state statute to “file, tabulate, and analyze” automobile accident reports. (RCW 46.52.060);
- ◆ In 1973, Congress enacted 23 U.S.C. § 152 (later recodified as § 148), which authorized federal funds for the elimination of highway hazards if the state agreed to survey all high-hazard locations, prioritize them for correction, and schedule improvements;
- ◆ In 1987, Congress enacted 23 U.S.C. § 409, prohibiting discovery or admission into evidence of documents or data collected or compiled “pursuant to” § 152;
- ◆ The U.S. Supreme Court held in *Guillen III*¹ that § 409 does not prevent disclosure of “information compiled or collected for purposes unrelated to [23 U.S.C.] § 152 and held by agencies that are not pursuing § 152 objectives,” 537 U.S. at 145-46;
- ◆ WSP owns the reports, enters them into a database, and forwards a set of scanned reports over to WSDOT to be entered into a WSDOT database?

¹ This brief refers to the Court of Appeals decision as *Guillen I*, the Washington Supreme Court decision as *Guillen II*, and the U.S. Supreme Court decision as *Guillen III*. *Guillen v. Pierce County*, 96 Wn. App. 862, 873, 982 P.2d 123 (1999), *rev'd*, 144 Wn.2d 696, 31 P.3d 628 (2001), *rev'd*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003).

2. The Public Records Act (“PRA”) provides that a prevailing party “shall be awarded all costs, including reasonable attorney fees” and a penalty for denial of access to public records. Where Gendler prevailed in this action to obtain public records/accident reports, is Gendler a prevailing party entitled to fees and penalties under the clear language of the PRA?

3. Is the confidentiality of accident reports at issue in this appeal where the defendants admitted that the reports are public records and did not argue confidentiality to the trial court?

4. Is Gendler entitled to attorney fees as a prevailing party on appeal?

RESTATEMENT OF THE FACTS

A. Plaintiff Gendler’s bicycle wheel became wedged in an improper gap in the Montlake Bridge deck, vaulting him forward and rendering him an incomplete quadraplegic.

Mickey Gendler’s purpose in asking WSP for copies of records of bicycle accidents on the Montlake Bridge in Seattle is irrelevant to this appeal. But since WSDOT repeatedly refers to Gendler’s purported purpose in seeking the records, BA 1, 4, 6, 7, 24, 26, Gendler offers this brief explanation.

Gendler was an avid bicyclist. CP 20. The Montlake Bridge is commonly used by bicyclists. CP 20-21. Indeed, the Bridge is

part of a State Highway and is open to bicycle traffic. *Id.* Gendler was riding his bicycle across the Bridge on October 28, 2007, when his wheel suddenly became wedged in a seam in the bridge deck grating. CP 20. Gendler was flung forward onto the roadway, injuring his spine and causing incomplete quadriplegia. CP 23. He is no longer able to practice law full-time or to live independently. *Id.*

Gendler subsequently learned of other bicycle accidents on the Bridge in which bicycle wheels were trapped in the bridge deck, similarly throwing other cyclists to the deck and injuring them. CP 23. Gendler was contacted about one such accident after the injured cyclist read the Seattle Times account of Gendler's injury. *Id.*

Gendler knew that accident reports would show the extent of WSDOT's knowledge about the dangerous condition of the Montlake Bridge before Gendler's accident. CP 23. But he learned that he could not obtain accident reports unless he agreed in writing not to use the reports in a lawsuit against the State. CP 22. Gendler explained his dual motivation for seeking accident reports (CP 24):

Because I do not want to waive my right to use public records including reports of bicycle accidents on the Montlake Bridge in a civil lawsuit to hold the State accountable for its negligence, I cannot sign the public record request form. But I also do not want to waive my right as a citizen to have access to these public records to promote my ability to become fully informed about the history of this bridge and about the conduct of the governmental agency or agencies responsible for providing a reasonably safe road.

The State gratuitously insults Gendler when it says that he “was injured when he fell from his bicycle while crossing the Montlake Bridge” and that “Mr. Gendler blames the bridge for his accident” BA 1. Gendler did not fall from his bicycle; he was flung head over heels when his front wheel wedged in the bridge deck. And Gendler certainly does not “blame[] the bridge”; it would be irrational to blame an inanimate manmade steel bridge for inflicting injury. Rather, he “blames” the negligence of the state agency that installed this hazardous bridge deck.

B. The Chief of the Washington State Patrol has by law been responsible for filing, tabulating and analyzing all vehicular accident reports since 1937.

In 1937, our Legislature enacted the Washington Motor Vehicle Act, a comprehensive bill regulating the operation of motor vehicles and many other aspects of motor vehicles. Laws 1937, ch. 189. Section 135 of the law requires law enforcement officers to

prepare accident reports for accidents on state highways, which would then be forwarded to the Chief of the WSP. Section 138 of the law requires the Chief of the WSP to file, analyze and tabulate all accident reports:

SEC. 138. It shall be the duty of the chief of the Washington state patrol to file, tabulate and analyze all accident reports and to publish annually, immediately following the close of each calendar year, and monthly during the course of the calendar year, statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof and other statistical information which may prove of assistance in determining the cause of vehicular accidents.

Such accident reports and analysis or reports thereof shall be available to the directors of the departments of highways, licenses, public service or their duly authorized representatives, for further tabulation and analysis for pertinent data relating to the regulation of highway traffic, highway construction, vehicle operators and all other purposes, and to publish information so derived as may be deemed of publication value.

Laws 1937 ch. 189 sec. 138 (now codified as RCW 46.52.060).

Significantly the reports are to be made available to the directors of highways (now transportation), licenses, and public service (now utilities and transportation) “for further tabulation and analysis”

Over the past seven decades, the legislature has fine-tuned the statute to add elements that must be included in the accident reports, but it remains basically the same.

For many years, the WSP provided accident reports on request, including not only reports for a specific accident, but also all accidents occurring at the same location. CP 295. The WSP and other agencies provided accident histories at particular locations, photographs, complaints, traffic counts, road maintenance records, and many other types of information. *Id.*

Until 2003, the WSP Collision Records Section received paper reports and sorted the collision report reference numbers by city street names and five-digit county road reference numbers. CP 305. If a citizen requested reports for a specific location, then WSP would need the city street name or the county road reference number (available through county engineers, CP 304). CP 305. With the correct street or road reference, the WSP would search the paper reports to obtain the collision report numbers responsive to the location request. *Id.*

WSDOT and WSP assert repeatedly that under the old WSP system, it was not possible to generate an “accurate” list of accidents at a particular location. *E.g.*, BA 8, 9, 12, 13. This claim ignores the undisputed facts that WSP formerly was able to and did search its database to produce a list of accidents at a particular location, CP 295, 305, and has admitted that it could still develop a

computer program to do so. CP 309. This assertion must also be evaluated in light of WSDOT's definition of "accuracy," which is "down to 1/100th of a mile", BA 10, or 50 feet. In other words, it is undisputed that WSP could produce a list of accidents at any location on any state highway, although perhaps not within 50 feet.

C. In 2003, WSP and WSDOT entered into a Memorandum of Understanding in an attempt to shield accident reports from being used in litigation.

In January, 2003, the U.S. Supreme Court decided *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003) ("*Guillen III*"). As discussed more fully in the Argument, *infra*, the Supreme Court held that 23 U.S.C. § 409 protects only materials compiled or collected to comply with 23 U.S.C. § 152, which provided federal funds for elimination of highway hazards and required states to survey hazardous conditions. But § 409 "does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point 'collected' by another agency for § 152 purposes." 537 U.S. at 144.

Within two weeks after *Guillen III*, WSDOT asked the Legislature to pass a bill that would transfer the responsibility for

filing, tabulating and analyzing accident reports from WSP to WSDOT. 2003 S.B. 5499 (reproduced at CP 314-17). Apparently the agencies believed that this change would have shielded accident reports from discovery and disclosure . The bill died. CP 312.

Two months after *Guillen III*, an administrator in the Federal Highway Administration issued a memo stating, “we believe” that a state agency could avoid producing accident reports if all agencies pooled accident reports into one “integrated” database (CP 200):

[W]e 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.

Having failed to obtain passage of its proposal to transfer all accident reports from WSP to itself, WSDOT apparently seized upon the FHWA suggestion of “integrating” the accident report database. WSP and WSDOT entered into a Memorandum of Understanding (“MOU”) that as of July 1, 2003, WSDOT would store all accident reports on a WSDOT computer. CP 205-06. The reports would be scanned by WSP, stored on the WSDOT

computer, and the paper originals would then be destroyed. CP 206.

An integral part of the MOU was that any request for an accident report must be submitted to WSDOT, not to WSP, on the form created by WSDOT. CP 205, 208. In addition, “[a]ny request for multiple reports based solely on a location will be treated as a request for collision data, and the request will be referred to the WSDOT’s Collision Data and Analysis Branch.” CP 209. The WSDOT form requires the requester to confirm that the accident reports will not be used in any current or anticipated lawsuits against any governmental entity. CP 27.

The MOU also provides that the accident reports themselves remain the property of WSP (CP 206):

[T]he original PTCR [Police Traffic Collision Report] and VCR/Citizen Reports and scanned images of those reports are the property of WSP Data collected and tabulated by WSDOT from those reports is the property and responsibility of WSDOT.

WSDOT built a separate database for its purposes. CP 302. Collision reports prepared by local law enforcement agencies are still sent to WSP (as required by the 1937 statute, RCW 46.52.060), which scans the reports to create electronic images. CP 202. WSP staff enters the following data into fields: name of roadway,

collision report number, name of driver/pedestrian/property owner/bicyclist/passenger, date of collision, date of birth, and the county. CP 307.

Pursuant to the agreement between WSP and WSDOT, WSP refuses to respond to requests by location notwithstanding the searching capability of its index. CP 209. Despite the MOU, the WSP's Chief Information Officer (CIO), Dan Parsons, testified that were he tasked with creating a database of collision records searchable by location, his division is capable of completing the task. CP 309.

D. Gendler brought this action to obtain copies of Montlake Bridge bicycle accident reports from the State Patrol, but the Washington State Department of Transportation intervened and refused to provide the reports.

Gendler's attorney, Keith Kessler, sent a request to the WSP on April 2, 2008, asking for copies of "[a]ll police reports relating to collisions involving bicycles on the Montlake Bridge in Seattle (SR 513)." CP 37. Kessler used the form provided by the WSP for this request. CP 36. The WSP received the request the next day. CP 37.

The WSP rejected Kessler's request, checking a box on a form stating, "[w]e cannot retrieve collision Reports using a specific

location only.”² CP 37. A WSP employee checked another box advising Kessler to contact the Collision Data and Analysis Branch, which is a branch of WSDOT, not of WSP. *Id.* Kessler had previously contacted WSDOT and had been denied access to accident reports based on 23 U.S.C. § 409. CP 38.

Gendler followed up with WSDOT and was told WSP, not WSDOT, provides copies of accident reports. CP 22. Gendler was directed to a request form that recited that WSP would only provide him with copies of accident reports if he certified that the records would not be used in a lawsuit against any governmental agency. *Id.* Gendler then called WSP and was told that WSP could not retrieve accident reports by location. *Id.*

In short, WSP refuses to provide accident reports by location because it claims it is too burdensome to index them (despite its long-standing statutory responsibility to do so) and WSDOT will not provide it unless the requesting party certifies that the reports will not be used in a lawsuit against any governmental agency. CP 24.

Gendler then filed this lawsuit against John Batiste, Chief of the Washington State Patrol, complaining that the WSP had

² WSP’s response is contrary to the statutory mandate that WSP analyze accident reports “by location,” RCW 46.52.060, and the undisputed fact that WSP routinely did just that for many years. CP 295, 305.

violated the Public Records Act and asking the Court to order WSP to disclose the records and to order payment of statutory penalties and Gendler's costs and fees. CP 7-11.

Gendler did not sue WSDOT, but WSDOT filed a motion to intervene as a party defendant, claiming to be the owner of the requested reports: "The request for location specific records being sought by plaintiff in this case is in the portion of the CRS database that is owned and maintained by WSDOT, not by the Washington State Patrol." CP 135. WSDOT relied on the MOU discussed above. *Id.*

Gendler opposed intervention: "Plaintiff Gendler is not seeking WSDOT's analyses, he is requesting accident reports from WSP that **WSP** has a statutory duty to collect and analyze by location." CP 144 (emphasis in original). Judge Wickham allowed WSDOT to intervene, CP 167, reasoning that its arguments might assist the Court (RP 14 (10/3/08)):

I don't see a downside to joining the Department of Transportation. It seems to me that it would assist the Court in better understanding the rights and responsibilities of the different agencies.

- E. **Relying on the United States Supreme Court decision in *Pierce County v. Guillen*, the trial court ruled that accident reports in the custody of the WSP for law enforcement purposes are subject to the Public Records Act.**

WSP had admitted in its answer that the accident reports were public records, CP 13, and Gendler had moved for summary judgment even before WSDOT intervened. CP 18. After WSDOT's intervention, WSDOT and WSP answered and filed a cross-motion for summary judgment. CP 255. The agencies relied on declarations from several state employees. CP 192-254. Gendler deposed these and other employees and then replied. CP 273-310.

After hearing argument, the trial court, Hon. Chris Wickham, issued a 4-page memorandum decision granting summary judgment to Gendler. CP 320. Judge Wickham relied on the decision of the United States Supreme Court in *Guillen III* interpreting 23 U.S.C. § 409:

Sec. 409 protects only information compiled or collected for Sec. 152 purposes, and does not protect information compiled or collected for purposes unrelated to Sec. 152, as held by the agencies that compiled or collected that information

Guillen III, 527 U.S. at 146 (as quoted by Judge Wickham at CP 321). Judge Wickham reasoned (CP 321-22):

Applying that standard to the facts of this case, the Police Traffic Collision Reports collected by Defendant Washington State Patrol are compiled or collected for purposes unrelated to Sec. 152. They are compiled and collected pursuant to the long-standing statutory duty of the Washington State Patrol to ... file, tabulate, and analyze all accident reports RCW 42.52.060.

Since the creation of the joint Washington State Patrol/Department of Transportation database, both agencies have been able to review these reports. But as the Memorandum of Understanding between Defendants confirms, the reports remain the property of the Washington State Patrol. [citation omitted] They continue to be held by that agency within the database. *Id.* The fact that the Department of Transportation now also has immediate access to the records and reports does not change their character and does not transform them into information “compiled or collected for Sec. 152 purposes.”

Judge Wickham reasoned that the WSP’s decision not to develop the software to search its database to locate records responsive to a request does not relieve the WSP of its obligation to provide the records upon request. CP 322. “The placement of public records in an electronic database alone cannot prevent the public from reviewing them under the Public Records Act. . . . If anything, these documents currently should be more available to the public, just as they are more available to the agencies who manage the database.” *Id.*

Judge Wickham entered findings, conclusions and a final judgment including an award of penalties, costs and attorney fees. CP 486, 489.

SUMMARY OF ARGUMENT

The issue in this appeal is whether Washington State's fundamental public policy of disclosure of public records—specifically, accident reports required by state law since 1937—was overridden by a federal statute adopted in 1987 to prohibit discovery of documents collected or compiled pursuant to a federal statute providing funds for highway safety. The trial court correctly ruled that the Washington-required accident reports were not shielded from discovery and this Court should affirm.

The Public Records Act is liberally construed (RCW 42.56.030) while the federal § 409 restriction is narrowly construed. *Guillen III*, 537 U.S. at 144. The U.S. Supreme Court held in *Guillen III* that the protection of § 409 is “inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives.” 537 U.S. at 146. It is undisputed that WSP collects accident reports for purposes unrelated to § 152 because WSP was charged with collecting the reports decades before § 152 was enacted. Persons injured in

highway accidents were able to obtain the accident reports before § 409 and nothing about § 409 changed that right.

The Legislature rebuffed WSDOT's effort to transfer WSP's statutory duties to WSDOT, instead leaving the duties to compile and analyze the reports in the hands of WSP. This lawsuit arises from WSDOT's effort to frustrate the will of the Legislature by entering into an agreement under which WSP would shirk its statutory duty to collect and analyze all accident reports allowing WSDOT to arrogate to itself the analysis of accident reports. The Court should affirm the trial court, preventing this usurpation of the legislative mandate and hold that WSP is required to review the accident reports in its files and make them available to citizens who request the reports under the strong mandate of the Public Records Act.

ARGUMENT

A. The Public Records Act is a broadly worded mandate for full disclosure of public documents.

The Public Records Act was adopted by the people of the State through popular initiative. Laws of 1973, ch. 1, p. 1 (Initiative

276, approved Nov. 7, 1972).³ It is founded on the principle that the people, not government agencies, reserve to themselves the right to determine what they need to know and should know:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030. As section 030 states, the Act "shall be liberally construed and its exemptions narrowly construed to promote this public policy" The Act "is a strongly worded mandate for broad disclosure of public records". *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

Our Supreme Court has eloquently expressed the underlying purpose of the Act:

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the

³ Initiative 276 was initially codified as Chapter 42.17 RCW. In 2005, the Legislature divided the Act into three discrete subject areas. Laws 2005, Ch. 274. The public records laws were re-codified as Chapter 42.56 RCW, the Public Records Act.

people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910).

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

These fundamental principles govern this case. Here we have an agency—WSP—that has the ability to identify and produce public records in its possession and control. But WSP has simply decided not to produce the records, deferring to the wishes of WSDOT. In turn, WSDOT has exempted itself from the Public Records Act by hiding accident records in its “integrated” computer system. WSP and WSDOT have forgotten, or ignored, that the people of this State “do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” RCW 42.56.030.

WSP and WSDOT rely on 23 U.S.C. § 409, which, in contrast to the liberal interpretation of the Public Records Act, is

narrowly construed. *Guillen III*, 537 U.S. at 144. We now show why § 409 does not shield these reports.

B. Accident reports in the hands of WSP are not subject to the protection of § 409 where WSP has a statutory duty to file, tabulate and analyze accident reports for purposes unrelated to § 152, and continues to own the reports after turning over scanned images to WSDOT.

The Court does not write on a blank slate when it interprets 23 U.S.C. § 409, but is guided by the decisions in *Guillen I, II, and III*. Two principles emerge from the *Guillen* trilogy. First, accident reports in the hands of a law enforcement agency—here the WSP—for law enforcement purposes—here “the regulation of highway traffic, . . . vehicle operators and all other purposes,” RCW 46.52.060—are subject to public disclosure, discovery, and admission as evidence in lawsuits because they are not protected by § 409. Section 409 does not shield the reports. Second, an unduly expansive interpretation of § 409 would be unconstitutional.

1. *Guillen I*

Guillen I arose from Ignacio Guillen’s request for accident reports at the location of the death of his wife in an automobile accident in Pierce County. 96 Wn. App. at 864. Pierce County denied Guillen’s request and Guillen brought the action under the Public Records Act. Guillen also filed a separate negligence action

against the County. *Id.* at 867. Pierce County relied on § 409 to justify its refusal to produce accident reports, arguing that “once the road department ‘collects’ reports ‘pursuant to’ Section 152, the public may no longer have access to them in any form.” *Id.* at 872.

Writing for the Court, Judge Morgan rejected this argument:

To apply Section 409 properly, a court must distinguish between (a) the agency (e.g., a law enforcement agency) that collects or compiles information for purposes unrelated to Section 152, and (b) the agency (e.g., a public works department or road department) that collects and compiles information pursuant to Section 152. Section 409 does not protect reports or data collected by the former, because the former was not acting pursuant to Section 152. Section 409 does protect reports or data collected by the latter, provided that the latter was acting “for the purpose of identifying, evaluating, or planning the safety enhancement of . . . hazardous roadway conditions . . . pursuant to” Section 152.

Id. at 871. We could call this the “custodial purpose” interpretation—the application of § 409 depends on the purpose for which the custodian took possession of the documents. The Court of Appeals ordered disclosure and discovery.

2. *Guillen II*

The Washington Supreme Court rejected the custodial purpose interpretation and adopted a “black hole” interpretation in ***Guillen II***. The Court recognized that the Public Records Act is a “strongly worded mandate for broad disclosure of public records.”

Guillen II, 144 Wn.2d at 711 (quoting **Spokane Police Guild v. Liquor Control Bd.**, 112 Wn.2d 30, 33-36, 769 P.2d 283 (1989)).

Turning to § 409, after tracing the history of the federal law, the Court recognized that many state courts have been

reluctant to construe § 409 in a manner that effectively creates a legal black hole into which state and local governments can drop virtually all accident materials and facts, simply by showing that such materials and “raw data” are also “collected” and used to identify and rank candidates for federal safety improvement projects statewide, pursuant to §§ 130, 144, or 152.

Id. at 723-24. Despite this statement, the Court adopted the black hole interpretation, holding that any accident reports that are collected or compiled by any government agency automatically become subject to § 409 if the reports are also used by WSDOT to comply with requirements for federal safety and program projects.

Id. at 726.

Guillen II rejected the custodial purpose interpretation of the appellate court, considering it “unsound in principle and unworkable in practice.” *Id.* at 726-27. Foreshadowing the database created by WSDOT, the Court noted that the march of technology pointed toward unified databases shared by multiple agencies, rendering the custodial purpose interpretation obsolete (*id.* at 728):

Under the Court of Appeals' approach, such an electronic database of accident reports would be covered by the § 409 privilege as amended in 1995, even if it were the only existing collection of accident reports and data, without which state and local courts could not properly adjudicate a variety of claims brought under state and local law. Were we to rely on the Court of Appeals' distinctions in applying the § 409 privilege, information technology would soon create a situation that the Court of Appeals itself recognized as "absurd," namely, "giv[ing] the County carte blanche to render immune from discovery every accident report related to a public road within its territory." **Guillen**, 96 Wn. App. at 872.

Having adopted this expansive black hole interpretation, the Court then held the 1995 amendment to § 409 unconstitutional. *Id.* at 744. Prior to 1995, § 409 protected data and documents "compiled" for § 152 purposes. P.L. 100-17, Title I, § 132(a), 101 Stat. 170. The 1995 amendment added protection for data and documents "collected" for § 152 purposes. P.L. 105-59, Title III, § 323, 109 Stat. 591. **Guillen II** found this addition unconstitutional (144 Wn.2d at 737):

We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected" for, among other reasons, federal purposes pursuant to a federal statute.

The Court concluded that the 1995 amendment to § 409 could not be upheld under the Spending Clause because no valid

federal interest is reasonably served by shielding from state courts accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected" for, among other reasons, federal purposes pursuant to a federal statute. *Id.* at 737.

The Court held that the 1995 Amendment cannot be justified under the Commerce Clause because the black hole interpretation of § 409 "lacks the requisite nexus to § 409's raison d'être and cannot reasonably be characterized as an 'integral part' of the Federal-aid highway system's regulation." *Id.* at 742.

Nor could the 1995 Amendment be justified under the Necessary and Proper Clause because "it was neither 'necessary' nor 'proper' for Congress in 1995 to extend that privilege to traffic and accident materials and raw data created and collected for state and local purposes, simply because they are also collected and used for federal purposes." *Id.* at 743. The Court remanded for production of the accident reports under these principles.

3. *Guillen III*

The U.S. Supreme Court granted *certiorari* of *Guillen II* and rejected the black hole interpretation, returning to the custodial purpose doctrine articulated in *Guillen I*. The Court noted that,

“statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.” 537 U.S. at 144. The Court contrasted the positions of the parties: Pierce County’s position was that any document held by an agency for purposes unrelated to the federal highway safety program under § 152 automatically becomes protected if it is collected by any other agency for §152 purposes (the Washington Supreme Court’s black hole interpretation); Guillen’s position was that § 409 only protected documents generated pursuant to the highway safety program. *Id.* at 143-44.

Pierce County’s black hole interpretation incorrectly construed § 409 broadly, contrary to the narrow construction of evidentiary privileges. 537 U.S. at 145 (“Here, § 409 establishes a privilege; accordingly, to the extent the text of the statute permits, we must construe it narrowly.”). But Guillen’s narrow interpretation failed to give effect to the language of the statute protecting documents “compiled or collected.” *Id.* (emphasis supplied). The U.S. Supreme Court adopted the middle-ground custodial purpose interpretation that had been adopted in ***Guillen I*** (537 U.S. at 145-46):

§ 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. . . . [The § 409 privilege is] inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives.

Having given § 409 this custodial purpose interpretation, the Supreme Court found the statute constitutional. *Id.* at 752-53. The Court remanded for production of documents held by agencies not pursuing § 152 objectives.

4. The State's interpretation of § 409 is contrary to the *Guillen* trilogy.

The heart of the analysis of *Guillen III* is that the privilege of § 409 applies only to an agency such as the WSDOT that collects information from other sources for § 152 purposes, making the privilege “inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives.” *Guillen III*, 537 U.S. at 145-46 (quoted *supra*). Just as the United States Supreme Court held that the Pierce County Sheriff's office does not compile or hold accident reports for section 152 objectives, the trial court here correctly held that WSP does not do so and therefore its accident reports are subject to public disclosure.

It is undisputed that WSP collects accident reports for purposes unrelated to § 152; WSP has been charged with responsibility for collecting accident reports since at least 1937. Restatement of Facts § B, *supra*. WSP obviously collects these accident reports for purposes unrelated to § 152, since § 152 was not enacted until 1973, BA 16, and WSP had already been collecting accident reports for purposes unrelated to § 152 since 1937, 36 years earlier.

Congress enacted § 409 for the sole purpose of insuring that the documents collected and compiled for federal purposes under § 152 would not be used as an “additional, virtually no-work, tool for direct use in private litigation.” *Light v. State*, 560 N.Y.S.2d 962, 965, 149 Misc. 2d 75 (Ct. Cl. 1990) (quoted at *Guillen II* at 751 (Madsen, J., concurring)). But the State seeks to use § 409 to prevent private litigants from gaining access to accident reports that have been available from WSP since 1937, making private litigants worse off than they were before the adoption of § 152 (*id.* at 751, Madsen, J., concurring):

By preventing a litigant from gaining access to information that has been “collected” for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program, which is the obvious

goal of § 409. However, if, as the majority suggests, Congress has prevented a litigant from having access to original reports from their original sources, prepared for purposes unrelated to securing federal funding, then a litigant would be in a far worse position than if the State did not participate in the funding program. I do not believe that was the result intended by Congress, nor do I believe it is dictated by the language of § 409.

The United States Supreme Court reached the same conclusion in *Guillen III* (537 U.S. at 146):

[T]he text of § 409 evinces no intent to make plaintiffs worse off than they would have been had § 152 funding never existed. Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted, plaintiffs would have been free to obtain such information from those very agencies.

Contrary to *Guillen III*, WSDOT seeks to turn § 409 upside down: instead of making litigants no better off, WSDOT attempts to make their situation worse. But as Justice Madsen noted, Congress never intended to make the plaintiff worse off by enacting § 409. *Id.* See also *Guillen III*, 537 U.S. at 146 (“[Section] 409’s text evinces no intent to make plaintiffs worse off than they would have been had § 152 funding never existed.”)

Nor does the MOU between WSP and WSDOT change the analysis. Judge Wickham pointed out that the MOU confirms that “the reports remain the property of the Washington State Patrol.”

CP 322. See also CP 206. WSDOT has a right to “publish, translate, reproduce, deliver, perform, display and dispose of copies of the scanned images,” but the reports belong to WSP. *Id.* WSDOT owns only the data it has collected and tabulated from the reports, not the reports themselves. *Id.* The MOU includes these provisions because WSP has a statutory duty that cannot be delegated to another agency. Section 409 simply does not apply to accident reports that belong to and are in the custody of the WSP.

The State seems to make two arguments, neither of which is correct. The State argues that, “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.” BA 21. (emphasis in original). The State seems to be arguing that if the accident data is used for any §152 purpose by WSDOT, then the reports are protected by the § 409 privilege in the hands of any agency holding the reports. *Id.* **Guillen III** rejected this black hole interpretation – so long as the reports are held by a law enforcement agency for law enforcement purposes, they are not subject to § 409. 537 U.S. 145-46. In the hands of the WSP, the reports are clearly not collected for § 152 purposes, but for law

enforcement purposes pursuant to the 1937 statute codified as RCW 46.52.060.

The State also argues incorrectly that any request for traffic accident reports at a particular location is necessarily a request for “analysis performed on the raw [accident reports] by WSDOT for §152 purposes.” BA 21. This argument is factually false. Gendler did not ask for an analysis or anything else from WSDOT. Rather, he requested accident reports from WSP, the agency charged by statute with compiling, tabulating, and analyzing the reports “by location.” CP 36-37. Gendler did not bring this lawsuit against WSDOT, but against WSP. WSDOT was allowed to intervene over Gendler’s objection because Judge Wickham felt that hearing WSDOT’s arguments might be helpful to the Court. RP 14 (10/3/08) (quoted in Restatement of Facts § D).

The State’s argument that WSP cannot identify accident reports by location avails nothing. As Judge Wickham recognized, the premise of this argument is simply false (CP 322):

Defendants further argue that it is only with the coding employed by Department of Transportation that Washington State Patrol is able to determine the location of a particular accident. However, the record establishes that long before the creation of the database Defendant Washington State Patrol was searching its reports and finding the information requested in this case by Plaintiff. (see Declaration of John

L. Messina). The fact that Washington State Patrol has elected not to develop the software to search its own records now in electronic format does not relieve it of the obligation to provide such records upon request.

In any event, WSP is required to maintain and make available a current index of its files, as well as all public records in those indexes. RCW 42.56.070. WSP cannot unilaterally abrogate its statutory responsibility by handing it over to a different agency. The State argues that the responsibilities of WSP were “transferred from the WSP to WSDOT in 2003” through the MOU. BA 22. This argument is fundamentally flawed. An agency cannot unilaterally stop fulfilling the functions imposed on it by the Legislature. The State offers no authority for its claim that one state agency can “transfer” to another agency a statutory responsibility imposed by the Legislature.⁴

An agency wishing to assume another agency’s duties can petition the Legislature. In 2003, WSDOT did so, asking the legislature to transfer all responsibilities for dealing with accident reports from WSP to WSDOT. 2003 Senate Bill 5499 (copy at CP 439-42). When the bill failed of passage, WSDOT attempted to

⁴ WSDOT has apparently abandoned its reliance before the trial court on cases that decide when a private party can delegate duties to another party, CP 186-87, refuted by Gendler at CP 282.

circumvent the Legislature by entering into the MOU in November and December 2003. CP 128. If the Court were to accept the State's argument, the Court would be ratifying WSDOT's change in the law in defiance of the Legislature's rejection of that proposed change. The Legislature makes the law, not bureaucrats.

Having failed in its attempt to change the law in 2003, in 2009 WSDOT again asked the Legislature to change the law, this time in response to Judge Wickham's decision in this case. WSDOT proposed 2009 SB 6020, which would have prohibited the release of traffic accident information. (Copy of the Senate Bill Report at CP 446-47). SB 6020 died.

The State cannot argue inconvenience or economy. Inconvenience is no excuse for failing to comply with the Public Records Act, as several provisions of the Act make clear. "Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad." RCW 46.52.080. An agency is allowed a reasonable amount of additional time "to locate and assemble the information requested" RCW 46.52.520. "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).

Washington courts have long recognized that compliance with the Public Records Act may impose an administrative burden on an agency entrusted with public records. See **Zink v. City of Mesa**, 140 Wn. App. 328, 337, 166 P.3d 738 (2007). Yet, administrative inconvenience or difficulty does not excuse strict compliance with the Act. **Hearst Corp. v. Hoppe**, 90 Wn.2d 123, 130, 580 P.2d 246 (1978); **Zink v. City of Mesa**, *supra*.⁵

In **Hearst Corporation**, the appellant, a county assessor, argued that “the cost and excessive disruption to the department of assessments clearly outweigh[ed] the public benefit of disclosing [documents].” *Id.* at 130. The court quoted the provision of the Act, which was codified at that time in former RCW 42.17.340(2), that judicial review “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 ... to

⁵ Washington courts have also recognized that the Act includes a penalty provision that is intended to “discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.” **Yousoufian v. Office of Ron Sims**, 152 Wn.2d 421, 429-430, 98 P.3d 463 (2004) (quoting **Hearst Corp. v. Hoppe**, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)).

public officials.” *Id.* at 132. The court concluded that “[t]he act’s provisions would appear to have specifically addressed appellant’s arguments and declared them to be of insignificant impact compared with the stated public purpose of the act.” *Ibid.* Further, “[t]he fact that the material may be available in other records is not a reason stated in the act for failure to disclose.” *Ibid.* See also ***Olsen v. King County***, 106 Wn. App. 616, 24 P.3d 467 (2001) (availability from another agency of developer’s memorandum used by County in its decision did not relieve County of PRA duty to disclose the memorandum).

The State relies somewhat desperately on a memorandum in which a federal bureaucrat states, “we believe” that accident reports would be protected under § 409 if the data were to be inserted into an integrated database. BA 20-21. This bureaucratic integrated database argument is merely a reincarnation of the black hole interpretation found unconstitutional by our Supreme Court in ***Guillen II***. As ***Guillen II*** held, there is no legitimate federal interest in creating an evidentiary privilege for documents that are otherwise collected and compiled under state law without regard to § 152 purposes, and the black hole interpretation is accordingly unconstitutional. ***Guillen III*** did not find it necessary to address the

unconstitutionality of the black hole interpretation because *Guillen III* adopted the narrower custodial purpose interpretation. But the reasoning of our Supreme Court in *Guillen II* still holds true – there is no federal purpose or interest in restricting discovery and admission of accident reports held by the WSP for non-§ 152 purposes.

The State offers the far-fetched argument that accident reports are protected by Section 409 because the report forms were revised in the late 1960s and early 1970s “to capture and collect the data that was necessary for WSDOT to satisfy federal reporting requirements.” BA 8, 21. The State claims that the accident reports were revised pursuant to a federal directive in 1968. BA 15-16. But § 409 does not apply to all data collected under highway statutes, only to data collected pursuant to § 152 (now § 148), and two other sections not relevant here, 23 USC §§ 130 and 144. Congress did not enact § 152 until 1973. BA 16. Clearly, revisions to the accident report format adopted prior to the enactment of §152 were not caused by or pursuant to § 152. Furthermore, even when adopted, nothing in § 152 required the state to adopt a uniform accident report form. PL 93-87, § 502 (1973).

Even if the State's chronology were not flawed, the State's argument about the format of the accident report would have no merit. RCW 46.52.010(2) provides, "'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." Accordingly, the "physical form or characteristics" of the document—such as the format of the accident report—are irrelevant to the obligation to produce the record under the PRA.

In summary, Gendler seeks accident records in the possession of and owned by the WSP, WSP admits the reports are public records, the Public Records Act requires the WSP to index and produce copies of accident reports, and *Guillen III* holds that such records are not protected by § 409. Judge Wickham's careful decision should be affirmed.

5. The exception to public disclosure provided by RCW 42.56.290 does not apply because § 409 does not apply to the accident reports.

The State argues that the accident reports are exempt from public disclosure under RCW 42.56.070(1) and 42.56.290 because the reports are protected against discovery by § 409. BA 23-24.

This argument collapses because, as discussed above, the accident reports are admittedly public records and not subject to § 409. Thus, there is no “statute which exempts or prohibits disclosure of specific information or records” within the meaning of RCW 42.56.070(1). Nor does RCW 42.56.290 exclude the accident reports from disclosure because § 409 does not protect the accident reports from pretrial discovery in superior court.

C. Gendler is a prevailing party entitled to fees and penalties under the clear language of the Public Records Act because he was forced to bring this action to obtain accident reports without waiving his right to use the reports in an action against the State.

The Public Records Act provides for attorney fees and penalties in the clearest possible language (RCW 46.52.550):

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

The fee and penalty provisions of the Act are to be liberally construed to promote the public policy that the “people insist on

remaining informed so that they may maintain control over the instruments that they have created.” RCW 42.56.030.

The Supreme Court has clearly stated that “strict enforcement’ of fees and fines will discourage improper denial of access to public records.” ***Amren v. City of Kalama***, 131 Wn.2d 25, 36, 929 P.2d 389 (1997); ***Progressive Animal Welfare Soc’y v. UW***, 114 Wn.2d 677, 686, 790 P.2d 604 (1990) (quoting ***Hearst Corp. v. Hoppe***, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)).

The State argues that Gendler’s action was “not reasonably necessary to obtain records,” urging the Court to accordingly decline to apply the penalty and fee provisions of the PRA. BA 24-26. The only authority cited by the State is a case in which the plaintiff already had the documents before filing a public records request. ***Daines v. Spokane County***, 111 Wn. App. 342, 44 P.3d 909 (2002). The ***Daines*** court held that the PRA action was not reasonably necessary because the plaintiff already had the records. *Id.* at 348.

This case is readily distinguishable from ***Daines***. Gendler did not have the records. Rather, the agencies refused to release the records unless Gendler waived his rights to unqualified disclosure. As discussed above, the agencies were wrong in

insisting on the waiver because § 409 does not protect these accident reports. Even the *Daines* court acknowledged that the legislative purpose of the penalty and fee provision is “to empower citizens to extract information from reluctant agencies.” 111 Wn. App. at 348. That is exactly what happened here. WSDOT and WSP were “reluctant agencies” refusing to provide the information unless Gendler signed an unjustifiable waiver. Liberally construing the PRA, § 550 of the PRA clearly provides for penalties and fees in the circumstances of this case.

D. The confidentiality of the accident reports is not at issue on this appeal where the defendants admitted that the reports are public records and did not argue confidentiality to the trial court.

The State concludes its brief by attempting to “preserve” for Supreme Court review the argument that the accident reports are confidential and not subject to the PRA. BA 27-28. This issue is not present in this case. WSP admitted in its answer that, “police traffic collision reports are public records.” CP 13. When WSDOT moved to intervene, it did not raise any issue about the confidentiality of the records under the statutory scheme. CP 134-38. In any event, “intervenors must accept the pleadings as they

find them.” ***Casebere v. Clark County Civil Serv. Comm'n***, 21 Wn. App. 73, 77, 584 P.2d 416 (1978).

Not only did WSP admit that the records were public records, neither WSP nor WSDOT ever raised this issue in the summary judgment pleadings. The issue is not preserved for review.

E. Gendler is entitled to fees on appeal.

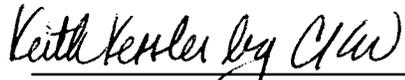
As discussed above, the prevailing party in an action against an agency to obtain access to a public record is entitled to costs and attorney fees. RCW 42.56.550(4). “Attorney fees incurred on appeal are included.” ***Progressive Animal Welfare Soc’y v. Univ. of Wash.***, *supra*, 125 Wn.2d at 271. The Court should order the State to pay attorney fees.

CONCLUSION

WSDOT and WSP wrongly withheld accident reports when Gendler refused to agree that the accident reports were protected by § 409. The trial court correctly concluded that under the ***Guillen*** trilogy these accident reports are subject to disclosure under the Public Records Act. The Court appropriately awarded penalties and fees. This Court should affirm and award fees on appeal.

RESPECTFULLY SUBMITTED this 18 day of November,
2009.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 18 day of November 2009, to the following counsel of record at the following addresses:

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