No. 85408-4

K. SEINFELD, J. [*] (dissenting)—The plain language of RCW 46.52.060 does not require the Washington State Patrol (WSP) or Washington State Department of Transportation (WSDOT) to include the level of detail regarding traffic accident locales that Michael Gendler seeks in his public disclosure request. Nonetheless, the majority holds that the WSP does have a duty under that statute to compile reports showing the precise locations of all accidents in this state. The majority supports this holding by looking to the WSP's historical practices and its internal need for this detailed information. Absent evidence in the record to support this holding, this court should conclude that the WSP compiled this data in order to comply with federal law, which includes a privilege from disclosure (23 U.S.C. § 409), and not as part of a state statutory duty.

This case turns on the critical *factual* question of the purpose for which the WSP or WSDOT compiled the data in question. Did it do so to satisfy the mandate in RCW 46.52.060, or did it do so to comply with 23 U.S.C. § 409? A close examination of the factual evidence in the record is necessary to answer

[*] Judge Karen G. Seinfeld is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

this question. Here, there is a paucity of factual support for the majority's holding. Therefore, I would vacate the trial court's order granting summary judgment to Gendler and remand this matter to the trial court for the taking of further evidence establishing either that (1) the WSP has historically maintained records with this detailed information and supplied it to the public or (2) the WSP requires this level of detail to properly meet its other statutory duties. Without this evidence, the detailed reports that Gendler seeks "shall not be subject to discovery or admitted into evidence in a . . . State court proceeding." 23 U.S.C. § 409. Thus, I respectfully dissent from the majority's opinion that the record is sufficient to show that the WSP violated the Public Records Act, chapter 42.56 RCW, by failing to provide the requested information.

DISCUSSION

In a public records case, "[a]gencies are required to disclose any public record on request unless it falls within a specific, enumerated exemption." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011) (citing RCW 42.56.070(1)). "The burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request." *Id.* (citing RCW 42.56.550(1)). On summary judgment, however, "the appellate court determines whether genuine issues of material fact exist and whether the moving party is entitled to judgment

as a matter of law." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 295, 996 P.2d 582 (2000). "Facts are reviewed in the light most favorable to the nonmoving party." *Id.*

This case involves the interplay of 23 U.S.C. § 409 and the Public Records Act. According to the United States Supreme Court, § 409 "protects . . . information compiled or collected for [23 U.S.C.] § 152 purposes." *Pierce County v. Guillen*, 537 U.S. 129, 146, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003) (*Guillen* II). Section 152 specifically requires a state or local government to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations." 23 U.S.C. § 152(a)(1). And § 409 explicitly protects information gathered "for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds" from discovery or use in tort litigation. 23 U.S.C. § 409.

Here, the evidence suggests that the information sought by Gendler was gathered under § 152. In his declaration, Brian Limotti, the WSDOT assistant manager of collision data, stated, "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." Clerk's Papers (CP) at 196. Instead, "[a]n accurate list of collisions at a specific location can only be generated after the collection of the data embedded in the [police traffic collision report], compilation of that data, and analysis of the raw collision reports that is

performed by WSDOT for federal § 152 purposes." CP at 196-97.

The only other factual evidence in the record regarding WSDOT's record keeping is in the deposition of Kip Johnson, the WSP collision records supervisor, and John Messina, a Washington State trial attorney who filed a declaration at the plaintiff's request. Johnson explained in his deposition that the WSP did not have the resources or knowledge to index collisions by location. CP at 202, 329. Messina's declaration is vague and nonspecific; he states without a specific reference to the WSP or WSDOT that "governmental entities with whom I have dealt . . . provid[ed] [accident reports, photos, and other information]." CP at 295. He also states, "I have also accessed accident history data in various ways from the Patrol." CP at 296. But he fails to state the time period or nature of this "accident history data." *Id.* These omissions in an otherwise very carefully crafted declaration suggest that the critical information simply does not exist.

Viewing these statements in the light most favorable to the nonmoving party (the WSP), the Limotti declaration indicates that the WSP or WSDOT compiled the precise detailed site information sought by Gendler in order to comply with federal law § 152, and not pursuant to a duty to maintain these records under RCW 46.52.060 or other state law. *See Guillen* II, 537 U.S. at 146 (explaining that the court should look to the purpose for which the information is compiled in determining whether it was compiled to meet a

statutory duty). The Johnson declaration supports Limotti's testimony as to the purpose for which the information was compiled. Further, the Messina declaration lacks the specificity needed to challenge Limotti's testimony. Without further evidence that the State was maintaining these records to comply with state rather than federal highway law standards, the federal privilege from discovery should control the outcome of this case.

CONCLUSION

I would reverse the Court of Appeals, vacate the order granting summary judgment to Michael Gendler, and remand for the taking of further evidence. To grant relief to Gendler, the evidence must be sufficient to establish that (1) the WSP or WSDOT needs precise accident location information to perform their statutory duty under RCW 46.52.060 or (2) there is a pattern or practice of the WSP compiling these reports in the past for its own internal purposes. Thus, I respectfully dissent.

AUTHOR:

Karen G. Seinfeld, Justice Pro Tem.

WE CONCUR:

Justice James M. Johnson