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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: I Planning, Administration, Environment; IIIC Maintenance; IV Operations and Safety

Freedom of Information Acts, Federal Data Collections, and Disclosure Statutes Applicable to Highway Projects and the Discovery Process

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Orrin F. Finch and Gary A. Geren. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to *Selected Studies in Highway Law* (SSHL). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency.

APPLICATIONS

The Project Committee determined that there was a need to assess the effects of federal and state public information acts on highway and transportation agencies. Thirteen years of extremely heavy litigation have occurred since this project issued *Research Results Digest No. 137*, "The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities" (1982). Two factors are pertinent: 1) states have increasingly enacted freedom of information acts, and 2) federal statutes require the collection of certain data pertaining to potentially hazardous or unsafe locations on highways. The 23 U.S.C. §409 restricts the discovery and admissibility of data gathered and compiled to evaluate potential accident or hazardous highway sites.

This report assesses these federal and state statutes and the impact of each type of statute in selected jurisdictions. It should be useful to attorneys, administrators, safety officials, freedom of information officials, risk-management officers, maintenance engineers, budget personnel, and legislators.

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Freedom of Information Acts, Federal Data Collection, and Disclosure Statutes Applicable to Highway Projects and the Discovery Process

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PREFACE

This paper is an outgrowth of an earlier article first published by the Transportation Research Board in December 1982, titled "The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities."[1] (That article now appears in volume 4 of *Selective Studies on Highway Law*.)

The 1982 article concentrated on the historical development of the federal Freedom of Information Act (FOIA) and how it has been used and abused by private litigants and potential claimants as a discovery device to develop unfair advantage in litigation over state highway and transportation agencies. This paper relies heavily on that earlier work and should not be considered a supplement or a replacement, but rather as an additional resource.

This paper first examines the U.S. Supreme Court's more recent pronouncements on federal FOIA cases and then concentrates on state disclosure requirements as compared with the federal statute. This presents a rather broad, yet specific, study of the use and availability of government records in discovery. At the same time, the conclusions of the 1982 article are analyzed in light of significant changes in the law.

In particular, Congress added Section 409 to Title 23 of the U.S. Code in 1987 and amended it in 1991, excluding from discovery and evidence state reports and accident data compiled in response to federally mandated highway safety construction improvement programs. Specifically, accident data compiled in response to Sections 130, 144, and 152 of Title 23, to identify and evaluate safety enhancements of potential accident sites, were excluded from discovery and admission into evidence in federal and state courts. This paper examines the background leading up to the enactment of Section 409, reviews the existing case law nationwide on this subject, and addresses the implications of this provision for state transportation agencies in tort litigation.

In addition, the 1982 article only superficially addressed the various state public record acts, which for the most part are patterned after the federal FOIA but vary widely in their language, provisions, exemptions, and case law interpretations. For representative purposes, several states were selected for a more in-depth examination of their specific record disclosure statutes.

As part of this project, a survey was mailed to the chief transportation attorneys in one-half of the states. The survey asked about their policies and practices in dealing with requests for information or records under their local disclosure statutes in cases in which litigation or claims are potential or pending. This paper analyzes the responses received, which exhibited consistent attitudes in many respects, but at the same time revealed divergent practices in dealing with similar issues. These practices will be reviewed in light of the existing case law regarding the requirements for public disclosure. A copy of the survey questions is attached in Appendix A.

DISCLOSURE UNDER FOIA

Introduction

The core issue of this discussion is the conflict generated by two important and basic, yet competing, public policy concerns: The right of the individual to have access to public documents as a check on government (the so-called "government in the sunshine" concept), versus the government's right, as a litigant or potential litigant and as a representative of all the people, to mutuality of process so as not to provide an adversarial claimant against government with a one-sided advantage that could result in an unfair and costly charge to the public fisc.

For example, should the right or ability of the media or an individual to gain access to a public record that analyzes contract performance, as a check on government, entitle the involved contractor to the same record for use in preparing a claim against the public agency that could be viewed as potentially detrimental to the financial interests of the public? Similarly, where accident data are compiled and analyzed to identify, evaluate, and prioritize needed traffic safety improvements, are accident victims entitled to this information in preparing and presenting their claims and lawsuits? Certainly, Congress recognized the impact of this problem in enacting Section 409, denying discovery and admissibility of data compiled under federal mandate.

The need to balance competing policy interests is reflected in the analysis of several legislative exemptions from public disclosure. But it is not just the concept that government should not be required to make its opponent's case. Also involved is the realistic concern that, in the long run, compelled disclosure will discourage meaningful analysis and frank discussion within the agency. This ultimately can lead to the preparation of useless analyses and frustrate the need to create documentation in the first place.

Coupled with this is the question whether disclosure statutes are available as a substitute or supplement to discovery. The report examines what the U.S. Supreme Court has ruled on this issue within the context of FOIA. It also reviews how state transportation agencies approach these issues and, in the process, examines how various state disclosure statutes compare with one another and with the federal FOIA. The report concludes with a discussion of how all this has been affected by the recent enactment of Section 409.

FOIA and the Supreme Court

The U.S. Supreme Court, from its very first FOIA decision in *EPA v. Mink*[2] to its most recent decisions,[3] has taken a careful, cautious, and pragmatic approach toward FOIA. This is particularly true where FOIA is being used as a substitute for discovery in other litigation. In nearly every decision the Supreme Court has selected to review, it has proceeded to overrule liberal statutory interpretations by lower courts that allow FOIA requests to support other litigation. In *EPA v. Mink*, FOIA requests were made to sidestep an injunction in a pending case precluding discovery awaiting a summary judgment motion and ruling. The Supreme Court, in reversing the court of appeals, held that the documents requested were either classified as "secret" or were exempt under Exemption 5 (5 U.S.C. 552(b)(5)) as intraagency advisory opinions not otherwise available against the agency in litigation.[4]

Likewise, in the two "renegotiation" cases, *Renegotiation Board v. Bannercraft Clothing Co.* and *Renegotiation Board v. Grumman Aircraft Eng. Corp.*,[5] the Su-

preme Court expressed the view that providing the requested FOIA documents that were not available in the administrative proceedings would provide the contractor with an unfair negotiating advantage.[6] The opinion in the first of these two cases did not go so far as to hold that FOIA was not available for discovery purposes, but states: "Discovery for litigation purposes is not an *expressly indicated* purpose of the [FOIA] Act."[7]

In *NLRB v. Robbins Tire & Rubber Co.*,[8] the Supreme Court acknowledged that the purpose of the act was not to provide discovery in administrative proceedings established by Congress:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. [Citations.] Respondent concedes that it seeks these statements solely for litigation discovery purposes, and that FOIA was not intended to function as a private discovery tool....[9]

FOIA Exemption 5 excludes from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency." The earlier Supreme Court decisions indicated that this exemption did not necessarily incorporate all of the privileges of Federal Rules of Civil Procedure Section 26(b). Attorney privilege and executive or official information privilege were recognized as included.[10] In more recent cases, the Supreme Court appears willing to reject an FOIA request upon a showing that the documents or information would not be available under the federal rules of discovery.

Privileged from Disclosure by Statute or Case Law

The Census Decision in the Baldrige Cases

The unanimous decision of the Supreme Court in *Baldrige v. Shapiro*[11] denied access to census data based on the Census Act, in which Congress expressly provided in 13 U.S.C. §§ 8 and 9 for nondisclosure of all but the final results. This case strongly suggests that any FOIA request for data excluded by Section 409 would be excluded.

The *Baldrige* opinion consolidated for decision two cases to compel disclosure of portions of the census data where the communities disputed the population figures of the Department of Commerce's Bureau of the Census and needed this information to challenge the accuracy of the population counts. One case was an FOIA request by Essex County, New Jersey. The other involved a discovery demand by the City of Denver in a civil action filed to compel the Census Bureau to verify certain census data. The federal district courts ordered disclosure in both cases. The Tenth Circuit, however, reversed the Denver action, and the Third Circuit affirmed the Essex case, resulting in a conflict between the circuit courts.

The Supreme Court ruled that the raw data were exempt from disclosure, either by way of civil discovery or by FOIA. It was not relevant that the information was to be used only for statistical purposes and that there would be no invasion of privacy or revelation of private information. The Court recognized that the census results were critical to the communities in the apportionment of representatives to Congress and in the allocation of federal funds. However, Congress had determined that confidentiality was essential for public cooperation, and it was up to Congress and not the courts to decide on any exceptions.

FOIA Exemption 3 excludes from disclosure documents and information "specifically exempted from disclosure by statute...provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[12]

Likewise, Federal Rule of Civil Procedure Rule 26(b)(1) provides for pretrial discovery of all information "relevant to the subject matter involved in the pending action" unless the information is privileged. Privileged material may be withheld from discovery in civil actions, including information privileged by an act of Congress.

Thus, the Court concluded "that whether sought by way of requests under the FOIA or by way of discovery rules, raw data reported by or on behalf of individuals need not be disclosed.... [U]ntil Congress alters its clear provisions...of the Census Act, its mandate is to be followed by the courts."[13]

Judicially Created Privileges: United States v. Weber Aircraft Corp.

FOIA Exemption 3 allows for the withholding of documents and information where exempt by statute. However, not every statutory exemption is included. The agency asserting a statutory privilege must demonstrate that the particular statute affords the agency no discretion regarding disclosure or that nondisclosure is qualified within specific criteria set forth in the statute or that particular types of material privileged by the statute are involved.

Significantly, there are no similar limitations relating to nondisclosure based on judicially established privileges, including attorney privileges. FOIA Exemption 5 exempts from disclosure privileged materials in the form of "inter-agency or intra-agency memorandums or letters which would not be available to a party...in litigation with the agency."[14] Thus, unlike statutory exemptions, an Exemption 5 privilege is not lost or waived because the agency has discretion in exercising that privilege.

In early FOIA litigation, as evidenced in *NLRB v. Sears, Roebuck & Co.*,[15] Exemption 5 was viewed as limited to attorney privileges (attorney-client and work product) and to the executive or official information privilege for predecisional deliberations. As stated by the Supreme Court in *Federal Open Market Committee v. Merrill*:

> Preliminarily, we note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery.... There are, to be sure, statements in our cases construing Exemption 5 that imply as much.... Heretofore, however, this Court has recognized only two privileges in Exemption 5, and,...both these privileges are expressly mentioned in the legislative history of that Exemption.... Given that Congress specifically recognized that certain discovery privileges were incorporated in Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.[16]

However, in *United States v. Weber Aircraft Corp.*[17] this caution was thrown to the wind in deciding that judicially recognized privileges were also included. In this case, an Air Force pilot sued various entities responsible for the design and manufacture of his aircraft's ejection equipment for injuries he sustained upon ejecting from the aircraft following engine failure.

In discovery, defendants sought all pertinent Air Force investigative reports. The agency released the entire record of the "collateral investigation" conducted

to preserve evidence for future proceedings. However, the Air Force refused to release confidential statements made to air crash safety investigators as part of a separate investigation. Discovery of these statements was denied under the authority of the *Machin* doctrine set forth in *Machin v. Zukert*.[18]

Thereafter, FOIA requests were filed for the same statements. The Ninth Circuit, in reversing the district court's denial based on Exemption 5 and *Machin*, ruled that Exemption 5 did not encompass every civil discovery privilege, but incorporated only those recognized as part of the legislative history of FOIA.[19]

The Supreme Court reversed the circuit court decision in a unanimous decision, interpreting Exemption 5 "to mean what it says."[20] The long-standing rule in *Machin* is that confidential statements made to crash safety investigators are privileged from pretrial discovery. The Supreme Court ruled that Exemption 5 "simply incorporates civil discovery privileges" and that the statements are covered by the "well recognized" *Machin* privilege included within Exemption 5.[21]

The Court rejected the notion that FOIA is available as a supplement to civil discovery:

> [The] contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. [citations omitted.] We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.[22]

The Conditional Attorney Work Product Privilege

Unlike the attorney-client privilege, the attorney work product privilege is in part conditional and not absolute. Under Federal Rules of Civil Procedure, Rule 26(b)(3), and as applied in most states, work product generated by an attorney can be obtained under certain circumstances with a showing of substantial need. There is also some question whether the conditional work product privilege survives the litigation for which it was prepared. However, writings that reflect an attorney's impressions, conclusions, opinions, or legal research or theories remain immune from discovery under all circumstances.

In *F.T.C. v. Grolier Inc.*,[23] a civil penalty action by the Federal Trade Commission against Grolier's subsidiary corporation had been dismissed with prejudice by the government rather than comply with a discovery order to produce attorney work product records on a showing of necessity. Following dismissal of this action, Grolier requested these same documents from the Federal Trade Commission under FOIA.

The circuit court of appeals in this case concluded that the work product privilege encompassed by Exemption 5 was coextensive with Rule 26(b)(3). From this, it reasoned that because litigation for which the material was prepared no longer existed, then the privilege did not exist either. Therefore, the work product was ordered to be disclosed in response to the FOIA request. The Supreme Court reversed this decision.

The Supreme Court reviewed the relationship between the conditional privilege of Rule 26(b)(3) and FOIA Exemption 5 and ruled that the material was exempt from disclosure. It was immaterial to the Court whether the work product privilege survives the litigation for which it was prepared or not[24] or whether the court found substantial need for disclosure of the records. The Court chose to apply the language of Exemption 5 literally:

> Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5. This result, by establishing a discrete category of exempt information, implements the congressional intent to provide "workable" rules.[25]

Five years later, in *United States Department of Justice v. Julian*,[26] a majority of the Court took a somewhat different position regarding the government's claim of privilege. In two separate FOIA requests consolidated for review, the government had refused to release to a prison inmate and to a defendant awaiting sentencing in a criminal action copies of their presentence probation officer's reports.

Federal Rules of Criminal Procedure, Rule 32(c)(1), and the federal Parole Act allow convicted criminals and inmates, prior to a parole hearing, limited access to view, but not copy, most, but not all, of the report. Three categories of information were excluded from view: diagnostic opinions, information obtained with a promise of confidentiality, and other information that if disclosed might be harmful to the defendant or inmate.

The government contended that release of copies of the reports would be in violation of Exemption 3 (exempted by statute) and Exemption 5 (privileged report). The Supreme Court agreed that both Rule 32(c)(1) and the Parole Act specifically exempt from disclosure information in the report relating to the three categories; but beyond this, the balance of the report was not exempted by statute.

As to Exemption 5, the government argued that, as in *Grolier*, the report is not normally available in litigation with the agency and is routinely denied to third parties requesting to view or copy someone else's parole report. But the Supreme Court concluded otherwise. Initially, the Court noted that no reported decision has found this to be a judicially recognized privilege. But that in itself would not necessarily decide the issue. Yet the Court concluded that even if such a privilege exists as to third parties, that would not control the outcome of this case:

> ...By itself, of course, the fact that there are no cases directly on point with respect to this particular category of requests for information is not conclusive evidence that no discovery privilege should be recognized in this situation. From our perspective, however, it appears that the reasoning of the cases denying disclosure to third party requesters would have little applicability to a request by a defendant to examine his own report, particularly in light of Rule 32(c)'s specific mandate that the report be disclosed to the defendant during sentencing....[27]

In ordering the government to release copies of the reports, the Court distinguished this case from *Grolier* by differentiating the privilege between classes of requesters, limiting disclosure here to only the individual who was the subject of the report. The majority did not view this pragmatic differentiation as contrary to the precepts of FOIA:

> ...The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class. In this case, it seems clear that there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report.... Even under our ruling in *Grolier*, therefore, discovery of the reports by the defendants themselves can be said to be "routine."[28]

The three dissenters viewed this as both an abandonment of the Court's prior decisions, particularly *Grolier*, and contrary to the concept that FOIA was established to inform the public about agency action and not to benefit private litigants, citing *NLRB v. Sears, Roebuck & Co.*[29]

The dissent overlooks the pragmatic approach adopted by the majority to preserve the right of defendants and inmates to have access to most of their reports and at the same time protect the confidentiality of the reports from third parties. Perhaps the court could have justified the apparent inconsistency with *Grolier* had the issue been presented by a third party and had access been denied as an unwarranted invasion of privacy under Exemption 6, or the Privacy Act.

Law Enforcement and Privacy Under FOIA

The other Supreme Court FOIA cases also reversed or remanded decisions of the lower courts ordering disclosure of information or documents relating to criminal activities. Again, the common thread throughout is that FOIA was designed as a check on government and is not favored as a private right to obtain personal advantage over government or others.

In *John Doe Agency v. John Doe Corporation*,[30] a defense contractor under investigation for possible government fraud was subpoenaed for documents relating to an earlier Department of Defense audit dispute. The contractor in turn submitted an FOIA request for Defense Department documents relating to the earlier dispute. The government opposed disclosure under Exemption 7 (law enforcement investigatory records) on the grounds that disclosure would interfere with the grand jury proceeding and would provide the contractor with information ordinarily beyond the scope of discovery in a criminal investigation or in the anticipated criminal proceedings. The court of appeals ruled that because the records were not "compiled for law enforcement purposes," they were not excluded by FOIA.

In reversing this decision, the Supreme Court cited its prior decisions and reiterated that "[i]n deciding whether Exemption 7 applies, moreover, a court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery."[31] It concluded that, in applying the plain meaning of Exemption 7, the records had been compiled for law enforcement purposes, and it refused to read the exemption in terms of "originally compiled" for law enforcement purposes.

In *Federal Bureau of Investigation v. Abramson*,[32] the Court faced the opposite contention regarding records originally compiled for law enforcement purposes that were later summarized in a new document transmitted to the White House. The Court held that the information, even though summarized in a new document, retained its Exemption 7 status.

The Court observed that FOIA does not define the term "record." The terms "documents," "records," "matters," and "information" are used interchangeably throughout FOIA. The Court concluded that FOIA focuses more on the nature of the information and the effects of disclosure. Viewed as "information," its nature does not change even though it may be summarized elsewhere or cast in some other documentary form.

In *United State Department of Justice v. Reporters Committee for Freedom of the Press*,[33] a news correspondent and an association of journalists filed FOIA requests with the Federal Bureau of Investigation (FBI) for "rap sheets" on members of an identified organized crime family that secured defense contracts through a corrupt congressman. The FBI and the district court denied the request based on Exemption 3 (statutory prohibition), Exemption 6 (unwarranted invasion of privacy), and Exemption 7C (law enforcement records resulting in a "clearly unwarranted" invasion of privacy interest).

The court of appeals concluded otherwise, holding that Exemption 3 did not apply because the statute did not "specifically" exempt rap sheets from disclosure and that an individual's privacy interest in a criminal historical record, which is a matter of public record, is minimal at best.

The Supreme Court reversed the court of appeals' decision, concluding that "although perhaps not specific enough to constitute a statutory Exemption under the FOIA Exemption 3, 5 U.S.C. § 552(b)(3), these statutes and regulations, taken as a whole, evidence a congressional intent to protect the privacy of rap-sheet subjects...."[34] Thus, the Court held rap sheets exempt under Exemption 7(C). It also noted that disclosure would be prohibited by the 1974 Privacy Act.[35] The Court concluded that "Congress' basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer."[36]

It is significant to note that the standard for evaluating a threatened invasion of privacy under FOIA Exemption 7(C) is broader than the standard applicable to Exemption 6 regarding personnel, medical, and similar files. The Court points out that the evaluation called for requires balancing the public interest in disclosure against the individual's right to privacy:

> Both the general requirement that a court "shall determine the matter de novo" and the specific reference to an "unwarranted" invasion of privacy in Exemption 7(C) indicate that a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect.[37]

But here, the Court applied a categorical determination regarding nondisclosure of rap sheets:

> Finally: The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.... Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided.[38]

The high court noted that determining whether disclosure under Exemption 7(C) is warranted turns on the nature of the requested document and its relationship to the basic purpose of FOIA to open agency action to the light of public scrutiny:[39]

> [FOIA's] basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language," [citation omitted] indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.... Indeed, response to this request would not shed any light on the conduct of any Government agency or official.[40]

Again, in *United States Department of Defense v. Federal Labor Relations Authority*,[41] the Supreme Court denied the request of two local unions represent-

ing federal employees for access to home addresses of agency employees in the bargaining units they represented. Although this was a request made under the employees' collective bargaining statute and not an FOIA request, it was decided under the principles of FOIA and the rationale of *Reporters Committee*.

The agencies had been denied access to home addresses based on the Privacy Act of 1974, which does not bar disclosure of personal information provided disclosure would be "required under section 552 of [FOIA]." Thus, the Court was required to ascertain whether disclosure of home addresses would constitute a clearly unwarranted invasion of the personal privacy of bargaining unit employees within the meaning of FOIA. As the Court stated: "For guidance in answering this question, we need look no further than to our decision in *[Reporters Committee]*."[42] As the Court observed:

> Disclosure of the addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further "the citizens' right to be informed about what their government is up to." [quoting from *Reporters Committee*, at 773].[43]

The Court acknowledged that disclosure would be in furtherance of the policies of the applicable labor statute and that FOIA is implicated only incidentally by cross-references. Yet, disclosure is prohibited by the Privacy Statute, with no exception provided for collective bargaining purposes.

In *United States Department of State v. Washington Post Company*,[44] the Court concluded that an FOIA request for U.S. passport information on certain individuals constituted "similar files" to personnel or medical files retained by the government as set forth in Exemption 6. In reversing the lower courts, the matter was remanded to permit the government to establish that release of the information would constitute a clearly unwarranted invasion of personal privacy of the individuals involved.

Another recent Supreme Court FOIA decision is *United States Department of Justice v. Landano*,[45] in which the Court addressed the question of how the government can meet its burden of showing that, in an FBI criminal investigation, the government's informant received an implied assurance of confidentiality under Exemption 7(D).

Landano was convicted of murdering a police officer in the course of a motorcycle gang robbery. He was not a member of the gang and maintained that he did not participate in either the robbery or the murder. In post-conviction proceedings, he contended that the prosecution withheld material exculpatory evidence. To support this claim, he filed an FOIA request with the FBI for documents compiled in its investigation of the crime.

The FBI released some documents, redacted some, and withheld others. The government withheld the information based on Exemption 7(D), saying that "the production of such law enforcement records or information...could reasonably be expected to disclose the identity of a confidential source...."[46]

The government bears the burden of establishing application of the exemption, but several of the federal circuit courts have recognized a presumption of confidentiality resulting from a criminal investigation. In this case, however, both the federal district court and the appellate court found no presumption.

In resolving this conflict, the Supreme Court adopted a middle ground: There will be no presumption of confidentiality, but the government can present "generic circumstances in which an implied assurance of confidentiality fairly can be inferred." Again, the pragmatic solution by the Court was in recognition of the realities of the situation. On the one hand, "it is unreasonable to infer that all FBI criminal investigative sources are confidential...."[47] At the same time, the Court recognized the realities of such investigations where confidentiality is often assumed.

Confidentiality often is not discussed with the informant, but is implied by the nature of the crime, the circumstances, and the relationship of the informant to the crime or the perpetrators. Even when confidentiality is discussed, it often is not documented. The government was given no presumption of confidentiality, but an inference of confidentiality can be established from the circumstances of each case.

Summary of Supreme Court FOIA Decisions

The selection of FOIA cases by the Supreme Court for review clearly discloses that the Court is aware that FOIA is being used more and more as a tool by litigants and potential litigants for private gain and not as a check on the operations of government. Recent decisions of the Court have included the use of FOIA in criminal-related proceedings for individual or private gain. The results of these FOIA decisions reflect a judicial attitude that FOIA requests will be examined in light of the purpose of the request and the intended use of the information.

These same opinions recognize that, under FOIA, it is immaterial as to who makes the request, the purpose for the request, and how the information is to be used. At the same time, one cannot read these opinions without concluding that those who seek government information not as a check on government, but to gather information otherwise denied to them for their own beneficial use, cannot anticipate favorable treatment from the U.S. Supreme Court.

STATE DISCLOSURE STATUTES

The Survey

Most current state disclosure statutes were enacted following congressional adoption of FOIA and were patterned after that statute. As a result, state court decisions often refer to federal FOIA decisions for interpreting similar provisions or exemptions. In at least four states (Montana, Louisiana, Florida, and North Dakota), public disclosure is governed by state constitutional provisions.

All share a similar purpose: To provide a check on government operations, promote government accountability, and prevent secrecy in government. To this end, disclosure statutes are to be liberally construed, and many disclosure statutes, like the Kansas statute, expressly provide for this:

> It is declared to be the public policy of this state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.[48]

At the same time, the right of public inspection is not absolute and is subject to exceptions and exemptions that are generally the same in most states but are expressed in many different ways.

Likewise, disclosure statutes are locally known under a wide variety of subject matter titles referencing their respective acts. In Pennsylvania, it is the Right to Know Law. Maine calls it the Freedom of Access Act, and in Washington, it is the Public Disclosure Act. In Vermont it is known as the Access to Public Records Act. Iowa refers to the statute as the Examination of Public Records Act or Open Records Act. In South Dakota, it is known as Public Records and Files or the

Public Records Law. Wyoming, Ohio, and California have Public Records acts. In Arizona, it is the Public Records Law. Missouri calls it the "Sunshine" or Open Records Law. It's the Data Practices Act in Minnesota and the Freedom of Information Act or state FOIA in Michigan and Delaware.

A questionnaire (see Appendix A) was mailed to the legal offices of 25 state transportation or highway agencies. Sixteen responses were received. The survey revealed a lack of uniformity in handling the same type of document request, where differences do not appear to be justified by differences in statutory structure or in exemptions.

For example, one response was that "our Public Disclosure Law is often used as an effective pre-filing discovery tool. We have provided thousands of pages of contract records...knowing that a claim will soon follow." Others said they withhold documents prepared in anticipation of litigation, without indicating if this is based on attorney work product, attorney-client, or official information privilege. Two states indicated a policy of negotiating a mutual exchange of records in response to a prelitigation disclosure request.

Overall, the survey responses reflected a desire to comply with each document request unless it clearly falls within a specific exemption. This reflects a more liberal practice in releasing documents than one might have anticipated in light of the conservative approach of the U.S. Supreme Court in restricting FOIA as a discovery tool. One reason for this difference might be agencies' desire to avoid liability for attorney fees for a wrongful refusal to comply with state disclosure laws.

Surprisingly, very few of the responding states routinely exclude accident data from disclosure based on Section 409.

Survey Responses

General Analysis

Every state responding to the survey had a statutory or constitutional public disclosure requirement. Yet one-third of those responding indicated they have no written policy statement to guide employees. Fewer still provide the public with published information on the process and procedures for making a document request. Those departments of transportation (DOTs) that have written policies approach the subject in widely divergent ways.

States that wish to adopt a written policy or review existing policies can learn from the various products developed by other states and select what best suits their statutory scheme and practices. DOT chief counsels are likely to make their policy documents available as a matter of courtesy, if not by way of obligation under the requirements of their own disclosure act. All the state DOTs with policy statements who responded to the survey agreed that the request for such policy statements qualified as a proper request under their disclosure statute.

Every state agency avails itself of the same general exemptions for privileged documents, such as attorney-client and work product privileges. Beyond this, many specific exemptions, some unique, are set forth in almost all the state statutes. Annotations to similar statutory exemptions in other states can be cited as persuasive authority.

All state DOTs responding indicated that they attempt to review document requests for potential litigation. Beyond this, every state seems to respond to document requests in a different manner. Most provide the requested information, unless a specific statutory exemption can be clearly identified. The Delaware DOT (DelDOT) appears to have the best of all worlds in this regard. It is one of the few states, and the only one responding to the survey, that still enjoys sovereign immunity as to tort litigation and favors complete disclosure of everything to dispel thoughts that the agency might be at fault in any way. DelDOT includes in its contracts a provision allowing state access to contractors' records to ensure mutuality of access, a practice other states should consider.

For the most part, all the responding DOTs treat contract, tort, and environmental record requests much the same, except for those states where tort litigation is handled by the Attorney General's Office, separate from DOT attorneys. In these instances, all document requests relating to potential and existing litigation are referred to the Attorney General for an appropriate response. As previously noted, very few states indicated an awareness of the statutory exemption provided by Congress in Section 409, excluding certain accident data from disclosure.

The chief counsels of each of the 16 state DOTs that responded offered to supply additional information if needed and are likely to cooperate with other state DOTs and agencies who may wish to review or adopt a particular state's policy statement or directive. No one statute, process, or policy can satisfy all states. Yet the statements in place in some states provide many ideas that should be considered and even adapted to the statutory framework of other states. The following are some of the ideas revealed by survey respondents that may be considered for use in other states.

Exemptions

The exemptions available in the various states are difficult to categorize. First of all, one must carefully examine what the particular state disclosure statute defines as a record to be disclosed, and then look to the express exemptions, as well as court-established exemptions, exclusions, and interpretations. For example, in Pennsylvania the definition of "public record" excludes any record otherwise protected by law or order of a court and any record that would disclose the institution, progress, or results of an investigation being conducted by a state agency.

Arizona's Public Records Law simply sets forth the general policy of the state without defining what is a public record or what is excluded: "Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."[49] The definition of a public record and what is exempt are derived exclusively from case authority. Generally, confidentiality, privacy, and "not in the best interests of the State" justify refusing disclosure.[50]

Some statutes, like Maine's Freedom of Access Act,[51] define "public records" broadly in terms of "...any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of any agency or public official...."

Its listed exemptions are few, though broad in scope, and includes records designated as confidential by statute, privileged against discovery in litigation, negotiation papers, inter- and intra-office memoranda, and working papers.

This can be contrasted with the Kansas Open Records Act,[52] which enumerates 38 detailed exemptions.[53] These exemptions include restrictions imposed by federal or state law, including rules of the Kansas Supreme Court, privileges under the rules of evidence, personnel records, letters of recommendation, appraisals, estimates, specifications until approved, bids until accepted or rejected, lists of bidders requesting proposals, and contractors' financial qualification statements.

Notes, preliminary drafts, and attorney work product are also expressly excluded. Many more are set forth, including the curious exclusion of "[c]orrespondence between a public agency and a private individual" other than notice of an action or determination "...not specifically in response to communications from such a private individual."[54]

Most state statutes list specific exemptions similar in scope to the nine enumerated exemptions set forth in the federal FOIA. Pennsylvania, however, does not expressly set forth exemptions, but accomplishes the same thing by excluding what would otherwise be exemptions in other states from its definition of "public record." Excluded from the definition are investigative reports, disclosures prohibited or restricted by some other statute, disclosures that would operate to the prejudice of a person's reputation or personal security, and disclosures that would result in the loss of federal funds.[55]

In Vermont, a "public record" is defined as "all papers...or recorded matters produced or acquired in the course of agency business" except for 20 enumerated exceptions.[56] These exceptions include records declared confidential by law or that may be disclosed only to specifically designated persons, disclosures that would result in a violation of "duly adopted standards of ethics," and a statutory and common law privilege. Also not to be disclosed are lists of names that would violate privacy rights or produce public or private gain, student records, records concerning the formulation of policy, information concerning the location of real or personal property prior to announcement of a project, and information pertaining to appraisals of property prior to purchase or award of contract.

One puzzling exclusion is "voluntary information" provided by an individual or organization "gathered prior to the enactment of this subchapter...."[57] Another exemption with specialized application was added in 1989 and excludes from public view "records relating to the identity of library patrons."[58] Also excluded are "inter-departmental and intra-departmental communications...to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action...."[59]

Vermont specifically excludes from disclosure records "which are relevant to litigation to which the public agency is a party of record...," but such records are available to the public once ruled discoverable in the action or upon final termination of the litigation.[60]

The Ohio statute has very few exemptions but does exempt trial preparation records defined as follows:

> (4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.[61]

This may provide no additional protection from disclosure than does the common law lawyer's privileges of attorney-client and work product.[62]

Delaware's statute sets forth 13 express exemptions relating to pending or potential litigation, involving an invasion of personal privacy, investigative files, trade secrets, criminal and intelligence files, the identity of the contributor of a "charitable contribution to the public body," and the identity of a user of library materials.[63]

Perhaps unique to California is the "conditional exemption" or "conditional privilege," allowing the agency to balance the interests of the public favoring disclosure against the interests of the agency for not disclosing:

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.[64]

Here the agency cannot merely exercise its discretion to withhold documents. The agency has the burden of proof to establish that an exemption applies. It can rely on the conditional or "catch-all" exemption only by establishing at some higher standard of proof that the public interest in nondisclosure "clearly outweighs" the public interest for disclosure of the record.[65]

An exemption similar to the pending litigation provision in the Vermont statute discussed earlier is also available in California, except that public disclosure is not dependent upon discoverability in the pending action. In California, no disclosure is required of records "pertaining to pending litigation to which the public agency is a party,...until such litigation...has been finally adjudicated or otherwise settled."[66] This is not limited to attorney-client and work product privileges covered by another subsection excluding privileges under the Evidence Code.[67] This means that all the documents and records pertaining to the litigation are available only through discovery by a party to that litigation and are not available to the general public until the litigation is concluded.

Another privilege expressly available in California under the Evidence Code, which is expressly incorporated into the Public Records Act's list of exemptions, is the "official information privilege," which provides the following:[68]

> (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the claim of privilege is made.
>
> (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
>
> (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice....

This represents a codification of common law privilege[69] and thus should be available in other states, even if not codified. Of course, it could be contended in other states that the common law privilege was repealed by implication upon enactment of the disclosure act setting forth specific exemptions. In California, the balancing of the interests test to establish the official information privilege does not include the "clearly outweighs" test called for in the conditional privilege section of the act discussed here. Official information can fall under either section but, in theory, carries a lesser burden of proof under the official information privilege. A more complete discussion of this privilege in federal law is covered in the 1982 paper on this subject.[70]

Like most other states, California's Public Records Act[71] was modeled after the federal FOIA and declares that access to public records is a fundamental right. It establishes a general policy of disclosure of public documents with an expansive definition of "public record." It applies to nearly every agency and local government entity within the state, including the Governor's Office,[72] with only the legislature and the judiciary exempt. There are more than 30 specific exemptions

listed apart from the so-called conditional privilege quoted earlier. The exempt categories covered include most found in other state disclosure statutes, including information relating to law enforcement, voter information, certain financial and banking records, trade secrets, library circulation records, and information revealing the state agency's internal deliberative process.

Policy Statements

Nearly all disclosure statutes require an agency to respond to a record request within a stated limited time and require that if denied, the specific exemption or exemptions relied upon must be identified. State transportation agencies with many district and satellite offices need to be certain that record requests received at any of these offices are handled properly and promptly. Thus, it is necessary to establish comprehensive guidelines for DOT employees.

Agencies desiring to draft or review policy statements should consider some of the approaches and techniques successfully used in other states to provide uniform guidance to its employees and to provide procedural guidance to the public as well. No two states have approached this issue in the same manner; thus this discussion is meant to expose features that may be useful for consideration by others. Existing policies and directives are available on request from the state DOTs herein identified.

Eight of the responding state DOTs (one-half of the respondents) indicated that they have a written policy statement covering the disclosure of documents under their statute. Most policy statements consist of guidelines for use by state or agency personnel so that they can be better equipped to handle document and information requests. Two states, Washington and Michigan, go further and offer written guidance to the public on how to make a record request and generally what can and cannot be obtained.

Washington offers a four-page glossy brochure prepared by the Attorney General's Office. Its stated purpose is "to assist you [members of the public] in understanding Washington law governing access to public records, and obtaining those records. This pamphlet is a guide; it is not a legal document." It describes "What Records are 'Public,'" what records are available, "How to Request Records," fees, and "Your Options if a Request Is Denied."

The Attorney General of Michigan has made available a comprehensive and detailed 65-page pamphlet for Michigan citizens "to help you know your rights under the [Michigan] Freedom of Information Act and Open Meetings Act." It summarizes the main provisions as to what is a public record, exemptions, fees, and the rights of a citizen to judicial review of a denial. It also sets forth the full text of the Information Act and Michigan's Open Meetings Law, together with case digests and annotations to pertinent Attorney General opinions.

Michigan DOT has also issued Regulation DR 8150.00, to provide guidance covering responsibility for providing and coordinating the department's response to information requests. Appendix A to this regulation lists 24 specific categories of documents excluded from disclosure. Included among these are "[c]ommunications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action" provided "the public body shows that...the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure."[73] Appendix C to the pamphlet sets forth guidelines regarding record requests to be reviewed by the Attorney General's Office prior to release. Items placed on the "critical list" include requests from attorneys, references to an accident, items in litigation, requests from print or electronic media, and requests from "engineer/consultant/expert" witnesses. The regulation also includes a three-page detailed fee schedule.

Almost all states charge a standard fee for photocopying records. Some, like Missouri, charge for employee time spent searching and duplicating records. Michigan's directive to all divisions, districts, and sections dated September 7, 1988, requires that a fee of $0.50 per copy be charged for letter-size records and $1 be charged for plan sheets. "Higher fees may be charged when necessary to cover the actual cost of document search and duplication."

DelDOT provides a small five-page pamphlet setting forth detailed prices for copying various specific documents, such as "traffic summaries" and "standard spec book," and copying with specific types of equipment. It also includes DelDOT's "Policy Implement" A-17, designating the records officer responsible for FOIA requests. Although this policy statement is made available to the public with the fee schedule, it does not purport to assist the public in making document requests under Delaware's FOIA.

California's Public Records Act mandates that each state agency establish guidelines for public access to its governmental records. The California DOT (Caltrans) has issued its own internal 14-page directive covering the responsibilities of all its employees and its designated coordinators with respect to record and information requests.[74] A good portion of the directive covers the California Information Practices Act[75] governing the privacy of individuals and employees and controlling the confidentiality of certain documents and to whom they may be disclosed. Deputy district directors for administration and headquarters' division chiefs or their designees are designated as public records officers and information practices coordinators, who work in conjunction with district claims officers and attorneys in the Legal Division.[76]

In Missouri, requests must be acted upon within a particularly short time period—within the third business day after receipt. Its interdepartment memorandum dated September 7, 1988, defines the document requests that can be responded to by district offices. Other requests are to be directed to the Highway and Transportation Commission Secretary. "In the event that a controversial or questionable request from any attorney or insurance company is received by a district or division, contact should be made with Risk Management for guidance prior to responding to the request." Attachments A through E to the memorandum provide form letters that are helpful in preparing different responses to requests for access to records.

Arizona maintains an *Agency Handbook*, which devotes an entire chapter to guidelines agencies should use in determining which documents are subject to disclosure. Because the Arizona statute does not define what is a public record or what is excluded, much of the 20 pages are devoted to a discussion of the cases and Attorney General opinions, as well as the federal FOIA. "Although the Federal [FOIA] does not apply to Arizona agencies, the Arizona Supreme Court has held that federal cases interpreting that law guide Arizona courts in construing Arizona's public records statute. *Church of Scientology v. City of Phoenix Police Dept.*, 122 Ariz. 338, 340, 594 P.2d 1034, 1036 (app. 1979)."

Chapter 4 of the Iowa Administrative Code of the Iowa DOT, titled "Public Records and Fair Information Practices," describes the provisions of its Open Records Act. This includes the following statement:

> This chapter does not make available records compiled by the department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of these records...shall be governed by applicable legal and constitutional principles, statutes, rules of discovery, evidentiary privileges, and applicable regulations of the department.[77]

It also includes a provision requiring that any request relating to a potential or actual tort liability claim or other litigation be directed to the General Counsel Division of the agency.[78]

For guidance regarding Vermont's Access to Public Records Act, the departments and agencies use an analysis prepared by the Attorney General's Office immediately prior to the effective date of the act. This goes into great detail as to each of the 16 specified exemptions. Exemption 14 protects records that are relevant to litigation to which the agency is a party. It raises a pertinent question whether there must be disclosure where litigation is anticipated and before the agency formally becomes a party. The Attorney General opined on this subject as follows:

> ...To rule such records subject to disclosure before the agency formally becomes a party, when suit is imminent, would make the exception itself meaningless. On the other hand, if the exemption is construed so broadly as to exclude records relevant to litigation to which the agency might become a party at some undetermined future date, it would be so broad as to exclude large amounts of information which the Legislature clearly intended to be subject to public disclosure. Between these two extremes, it seems that the most reasonable approach is to read the exemption to mean that if the agency is reasonably certain that it will become a party to litigation within a reasonably short period of time—for example, when the agency is planning to bring suit to enforce a regulation—then the records would fall under Exemption 14 and would not be subject to disclosure. If, however, litigation is a mere possibility at some undetermined future time, the records would not be protected.[79]

The Pennsylvania DOT (PennDOT) recently issued a detailed directive regarding its procedure in handling requests for information and data relating to accidents, including accident reports, to comply with Pennsylvania law and Section 409.[80] Generally, accident reports and police reports will be made available only to the driver or occupant involved in the accident who made the report or their attorney and government agencies and persons determined to be engaged in accident-prevention work.

Access to compilations of data taken from accident reports is also restricted to governmental agencies and legitimate researchers, with the following caveat included with the materials:

> ...The enclosed materials are confidential under 75 Pa. C.S. Section 3754 and 23 U.S.C. Section 409. They are only provided to official agencies that have responsibility in the highway transportation system and can only be used by those agencies for traffic safety-related planning or research. Publication, reproduction, release or discussion of these materials, as well as the use of or reliance upon these materials for any purpose other than stated above, is expressly prohibited without the specific written consent of the Pennsylvania Department of Transportation.[81]

Accident frequency histories compiled at specific locations are similarly restricted and available only upon a determination that the data are not to be used in a tort action against the department. Requests for statewide, countywide, or municipalitywide statistical distributions of accident data, not related to specific locations, are generally made available upon receipt of a statement of purpose. The department's annual "Traffic Accident Facts and Statistics" report is made available to anyone upon request. Comparative accident data are made available only in those cases where it is determined that the data are not to be used in tort litigation against the department and that supplying the information will serve the public interest.

A number of form letters covering different types of requests for traffic accident data are attached to the circular to aid in responding to each situation.

The Appeal Process

In nearly all the responding states, no administrative appeal process is available or mandated. A denial of access to documents is taken directly to court in the form of a petition for writ of mandate or declaratory judgment. Most statutes provide for possible liability for attorneys fees or penalty for a wrongful denial. A few provide for personal liability of a public official.

In the state of Washington, appeal can be made to the Attorney General for review and opinion. This review, however, is not binding on the agency or the requestor. If the court reverses the agency's denial, it may require the agency to pay costs and attorney fees and award an amount between $5 and $100 per day for each day that inspection was wrongfully denied.

In Vermont, appeal can be made to the head of the agency, although this does not appear to be a prerequisite to seeking judicial review. Any denial of access to records must set forth the names and title of each person responsible for the denial. At trial, in a *de novo* hearing, the burden is on the agency to sustain the action it took. In a decision adverse to the agency, the court may assess reasonable attorneys' fees and costs, and penalties may also be assessed against agency personnel for arbitrary or capricious denial of the request.

The Public Records Act in Wyoming requires that complaints from persons denied access to records be filed in court, and these persons must bear the burden of proof, rather than requiring the agency to justify its denial. In most states, it would appear that the agency has the burden of proof in court to justify its action in denying access to public records.

Review for Potential Litigation

In varying ways, each state indicated that it at least attempts to review record requests for potential litigation. Caltrans requires that a request form be prepared; the form is designed to elicit information that would indicate the possibility of litigation as motivation for the request. In Missouri, all requests go to the Risk Management Division and then to the chief counsel's office. Each division checks its records for existing or potential claims and litigation.

In Maine and Kansas, all document requests are reviewed by an attorney. Washington has paralegals review all document requests. Others, like PennDot, routinely route all requests through a coordinator or liaison trained to look for requests relating to pending or potential claims. In some states, all requests by attorneys are routinely reviewed by the legal office.

A number of states, like Montana and Pennsylvania, indicate that no formal review process has been established because there is no exemption to producing records in the face of a potential claim or potential litigation.

Information versus Document Requests

Question 7 in the survey (see Appendix A) asked: "Does your agency treat requests for information on a general but identified subject matter differently from

requests for specific documents? If so please elaborate on how specific the disclosure request must be."

The objective of this inquiry was to ascertain whether any of the DOT's treated their disclosure statute as an information vehicle or strictly as a document retrieval and disclosure statute.

Most, but not all, of the responding DOTs viewed their statutory obligation as requiring disclosure of documents that were sufficiently identified so as to be readily located. Requests that require broad searches are returned with a request for specific information to aid in a quick and efficient search, often with the admonition that fees would be incurred for locating and copying documents. Most of the survey responses indicated that each request is handled on an *ad hoc*, case-by-case basis.

The Delaware statute actually defines a public record in terms of "information":

> "Public record" is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced....[82]

Still, it appears from DelDOT's response that it does not read into this definition anything more than an obligation to produce specific, identified documents and not supply information:

> We usually ask for as specific a request as possible, tied to the subject matter. For accident cases, we ask for date, location, time of day, and any other specific information the requester might have so as to make the response as accurate as possible. We typically ask the requester to state in writing that these requests are not made with litigation against DelDOT in mind, even though we almost always are covered by sovereign immunity for tort cases.

The Michigan statute specifically provides that a public record must be described "sufficiently to enable the public body to find" it.[83] With certain exceptions, the act does not require a public body to make a compilation, summary, or report of information.[84] Also, the Washington statute requires that the document requested be "identifiable,"[85] and the Attorney General's public information brochure expressly points out that an agency must provide access only to existing public records. It is not required to collect information or organize data to create a record.

Montana's response reflected a pragmatic observation that it is not required to generate documents in order to supply information, but if the information is readily available in existing documents, it will be supplied. Missouri indicates that if the request is too general, it will provide a questionnaire to be completed to help identify the needed information.

Requests for Documents in Anticipation of Litigation

Survey question 8 inquired as to contractor requests for information to be used in claims preparation: "How does your agency handle information requests from contractors on state projects for information or records that will be used in preparing or evaluating claims against your agency? If this situation has not yet arisen in your state, hypothetically how would you propose to handle such requests?"

Almost all the states that responded to the question indicated that they would not treat it differently from any other record request. They would provide them with what is requested, excluding exempt materials, such as documents protected by attorney privilege. Two states, Pennsylvania and California, stated that they would negotiate with the contractor regarding the request to restrict what would be disclosed and require a similar disclosure from the contractor.

DelDOT has taken a similar, but better, approach by including in its contracts a provision allowing access to the contractor's records, to ensure mutual access. This approach would appear to have great merit and should be considered by other states where contractors traditionally rely on state documents to build their claims. As stated by DelDOT: "Our contract specifications permit our access to the contractors' documents in such cases, so my usual advice is to have DelDOT make the equivalent demand on the contractor and have the 'discovery' take place on the same schedule. Sometimes this has the effect of cooling the ardor of the contractor for DelDOT's documents."

Without elaboration, Missouri stated: "In the event of potential litigation, we recommend denial of any request for information."

PennDOT states: "Such requests are initially refused. The parameters of an exchange of documents relating to a pending claim are generally negotiated by the attorneys in the Claims Section of the Office of Chief Counsel. It is rare that a request for such documents would be made under the 'Right To Know Law.'" Pennsylvania does not provide authority for this position, but certainly the rationale of many of the U.S. Supreme Court's decisions would strongly support a philosophy or legal policy that disclosure statutes are for the benefit of the public generally and not for the benefit of individuals with interests or motives potentially at odds with the interests of other members of the public.

California, of course, has the benefit of its so-called "conditional privilege" or "balancing privilege." This affords the agency the ability to withhold disclosure when it determines that "the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."[86]

Wyoming DOT takes an opposite stance:

> ...WDT does not "play games" with those persons contemplating filing suit or filing claims against the department. If the information is not confidential as a matter of law or policy it will be provided. If information may be obtained pursuant to discovery in litigation, it is generally provided [in advance of litigation].

Ohio DOT responded that the situation described in question 8 has not yet arisen, but that it would not release such information if it were "compiled in anticipation of trial." It is not clear on which exemption Ohio would be relying. The question was intended to include project-generated documents of all types, including daily inspector diaries and analyses of claims presented during the course of construction.

Iowa DOT has adopted regulations that exempt from disclosure records compiled in reasonable anticipation of litigation. These regulations, which have the force of law, provide that requests for such records are governed by the rules of discovery even though litigation has not been filed:

> This chapter does not make available records compiled by the department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of these records to the public or to any subject individual or party to such litigation or proceedings shall be governed by applicable legal and constitutional principles, statutes,

rules of discovery, evidentiary privileges, and applicable regulations of the department.[87]

Question 9 of the survey asked: "How does your agency handle information or document requests from attorneys or others that pertain to an accident where claims or litigation is anticipated?"

PennDOT treats these different than potential contract claims because they are handled by its Attorney General's Office:

> This varies. Often the attorney or potential litigant is asked whether litigation is contemplated. If it is clear that litigation is imminent, the requestor will be directed to make his/her request through the Office of Attorney General (whose attorneys defend the Department in tort matters).

Caltrans's response also indicates a different procedure in light of Section 409:

> The requested documents are gathered and reviewed. After discussion with the engineer assisting on the case, a decision is made by the attorney as to whether or not the case should proceed with the requested documents as evidence or whether or not said documents should be excluded by virtue of raising the Section 409 objection.

Although Kansas "does not differentiate a contractor from any other member of the public" regarding potential contract claims, it indicates a case-by-case analysis as to potential tort claims:

> This is done on a case-by-case basis. If a claim has been sent to KDOT, then the request is typically denied on that basis, the same is true as to any pending lawsuits. Prior to a claim being received, if a claim or litigation is reasonably anticipated, access may be denied.

South Dakota indicates that as to contracts, the engineer's estimates are considered confidential "as a matter of operational policy." This is also the case for lists of contract plan holders and subcontractors, as a result of the state's experience with bid rigging. As to potential tort claims, "all requests are referred to [the] office of legal counsel or to the State's office of risk management (captive self-insurance program). Information may be denied."

In a number of states, tort claims and personal injury litigation are handled outside the transportation agency's legal office. This can be by the state's attorney general, private counsel, or insurance company or by a state-operated self-insurance agency. This, as well as Section 409, may account for the apparent different policies in reviewing and responding to document requests relating to accidents.

Ohio classifies such requests as seeking "trial preparation records," even though litigation is not pending and presumably before any attorney privilege has attached. This is the same answer given to questions 8 and 10, indicating that reliance is on something other than Section 409. Missouri also states that "[g]enerally, all requests are denied" without elaborating on the basis for the denial. Similarly, Minnesota refers all such requests "to the State Tort Claims Officer who will investigate the matter and consult with counsel regarding an appropriate response." This indicates a policy of handling these requests on a case-by-case basis.

Not surprisingly, DelDOT, which enjoys the luxury of sovereign immunity, indicated a much more cavalier attitude regarding record disclosure in the face of potential litigation:

> ...I have normally advised my client to waive the privilege that would otherwise block access to the documents. The Delaware AG's office generally believes that full disclosure early on may reduce litigation issues, gain some goodwill, and retard claims that might otherwise be made on an erroneous assumption of what the facts really are....

Those responding to survey question 10, which concerns information requests relating to environmental and planning matters where litigation is anticipated but not filed, gave, for the most part, the same answers they provided to questions 8 and 9. One notable exception was the Kansas DOT, which provided the following response:

> This is dependent upon what information is being sought. Much of the information as to planning matters and environmental matters is internal memoranda, etc. in which opinions, conclusions or recommendations of KDOT staff are expressed. Such documentation is exempt from disclosure. Such documentation is also handled in accordance with [survey question] #9 above.

The answers to the questions relating to disclosure requests made in anticipation of claims or litigation indicate that the request would be routinely reviewed by an agency attorney. Even though the material is disclosed, careful records are also made of who requested information and what information was obtained. As Montana reported:

> The MDT would provide documents to the person making a request even though litigation was anticipated. The only thing that would be different is that a careful record would be made so that MDT attorneys and other personnel would be aware of the documents that were provided.

Disclosure While Action Pending

Question 11 expanded on the three preceding questions and inquired as to whether the state DOT would insist that the request comply with its state's discovery statute if litigation were actually pending at the time of the request and what would be the response if the documents requested were otherwise not available through discovery.

Just about every state answered that if litigation were pending between the requestor and the state, the documents would be made available only as required by the discovery process. California's Public Records Act specifically exempts certain documents while litigation or claims filed with its Board of Control are pending.[88] Caltrans's response goes further and points out an important consideration where release of the exempted document or information could be beneficial to the state:

> The response to this question, again, is dependent upon the nature of the specific document that has been requested. If the document is something that contains evidence which is beneficial to one's client, then naturally an objection would not be made. However, if the contrary is true, all appropriate objections, including those based on the State's discovery rules, would be interposed.

Wyoming DOT honors a document request while litigation is pending and does not require that the document request comply with its discovery procedures. At the same time, it will not release privileged or confidential information without a court order.

PennDOT's response epitomized most of the responses:

> Once litigation is initiated, strict compliance with discovery rules is demanded, subject to the discretion of the attorney handling the case to be flexible in the exchange of information and documents.

> Even documents otherwise available under the "Right To Know Law" are produced only pursuant to proper discovery once litigation has begun.
>
> Non discoverable information and documents are released only if appropriate in the context of the individual case or pursuant to court order.

FOIA Requests to a Federal Agency for State Documents

Question 12 asked: "Has your agency experienced a situation where state records or information have been requested of a federal agency by a private individual or attorney relating to a state claim or pending litigation? If so please elaborate."

Most of the responding state DOTs stated that this has never occurred; a few could recall only a single instance in the past. This suggests that this situation has not been a problem for most states. For example, Vermont stated:

> Yes, but not significant. Federal file (FHWA) did not contain any significant documents other than those in State files. Case involved "superfund" litigation, not torts or contracts.

Pennsylvania, Maine, and a few other states indicated only occasional experiences, and these mostly involved environmental litigation. In stark contrast, however, three DOTs (Washington, Montana, and Iowa), stated this device is routinely employed in a wide variety of cases. For example, Washington responded:

> Yes. It is fairly common for contractors or their attorneys to request project documents from FHWA. This often occurs after the case has been filed. FHWA reviews the request to determine whether the documents requested are disclosable under the Federal Freedom of Information Act.

Iowa states that "[r]ecords are routinely sought in a wide variety of cases: contract disputes, Title VII litigation, condemnation, tort claims, and workers' compensation cases, just to name a few." It is something of an anomaly where most states have never experienced requests for their records through federal agencies, or at most can recall only a single instance, and a few states experience it on a routine basis. The reason for this may be that private attorneys in some states have been made aware of this alternative avenue for obtaining records. If this situation is experienced frequently in some states, it is only a matter of time until the situation becomes commonplace for other state DOTs.

Questionnaire as a Proper Request

The final survey question asked whether the survey would qualify under each state's public records statute as a proper request for information. Most states responding categorically stated no, except for the request for policy statements. Michigan answered no, "[b]ecause 13 of the 14 questions in your letter ask for information but do not specifically request a public record." Washington gave the type of answer that was expected from all the states:

> The Act requires disclosure of public records. It does not require the agency to create information to answer questions. The request would apply to the [policy] attachment however as it is an existing public record.

A similar response came from PennDOT:

> ...The "Right To Know Law" relates to the inspection and copying of public *records*, not to any right to have questions answered by an agency. To the extent that your inquiry asks for policy *documents*, it is appropriately specific so as to be a proper request. Those documents, however, do not fall within the relatively narrow scope of records made available under the "Right to Know Law." [Emphasis in original]

Arizona would have rejected the survey in its entirety as an improper request under its disclosure statute on technical grounds:

> This would not qualify as a proper request for documents, because the agency was not identified, the documents were not described with sufficient particularity and there was no statement indicating the documents were requested for a non-commercial purpose.

Survey Conclusions

Surprisingly, the survey results indicate that only a few states attempt to negotiate document requests where litigation is expected or pending. Where the disclosure statute is employed as a discovery vehicle, the agency should be able to object, relying on the language used in many U.S. Supreme Court cases that deny use of FOIA as a discovery substitute. Admittedly, the agency is bargaining against a risk of attorneys' fee liability for a wrongful withholding of records. At the same time, offering to produce documents in return for equal production of records by the other side appears reasonable under the circumstances. Experience has shown that the demand in lieu of discovery often is dropped because of the requestor's reluctance to reveal its hand in advance and the apparent reasonableness of the mutuality of exchange. DelDOT adds a contract provision giving the agency an equal right to demand documents from the contractor. As observed, "this has the effect of cooling the ardor of the contractor for DelDOT's documents."

STATUTORY PRIVILEGE FOR HIGHWAY SAFETY IMPROVEMENT DOCUMENTS AND DATA

Background of Section 409

With the advent of the mass-produced automobile, deaths and injuries associated with highway accidents have become a major national health problem. For example, in 1924, 22,000 people died on U.S. highways.[89] By 1973, the number of deaths on U.S. highways had risen to more than 55,000.[90] Nonfatal injuries in the late 1960s and early 1970s consistently exceeded 2.5 million per year.[91]

In the early 1960s, the federal government concluded that a significant reduction in fatalities and injuries could be achieved by establishing in each state a systematic and continuing process of identifying, selecting, scheduling, constructing, and evaluating highway safety improvements.[92] In 1964, the federal government urged the states to implement safety improvements intended to reduce the number and severity of accidents through engineering improvements to hazardous highway locations and elements. This voluntary approach to federal-aid funding of highway safety improvements met with limited success. As a consequence, Congress gave impetus to the safety improvement program by enacting the Highway Safety Act of 1973,[93] which for the first time provided federal-aid highway funds to be used exclusively for safety improvement projects.[94] Part of this act was the Highway Safety Improvement Program (HSIP).

The type of projects that could be constructed under HSIP varied widely and included providing traffic signals and channelization at intersections; erecting guardrails, median barriers, and impact attenuators; widening the traveled way

and/or shoulders; improving pavement skid resistance, placement of pavement markings, and placement of signs; and installing flashing light signals, automatic gates, and crossing surface improvements at rail-highway crossings.

HSIP has proven successful. The Federal Highway Administration (FHWA) estimates that highway safety improvement projects constructed since 1974 have saved 29,000 lives and have prevented more than 600,000 serious injuries.[95]

HSIP did, however, result in an unintended consequence: large judgments in civil actions against public entities for highway accidents. The risk of exposure to a governmental entity for tort liability in connection with highway conditions increased dramatically with the growing expertise of plaintiffs' attorneys and their experts in the use (and some might say misuse) of the reports, surveys, schedules, lists, and data compiled by the public entity as part of its attempt to improve highway safety. In short, the documentation generated by the federally mandated HSIP became a veritable wellspring of proofs for the plaintiffs' bar in pursuit of large judgments against public entities. As a natural consequence, the participants in HSIP (public entities and railroads) became reluctant to gather the extensive array of self-critical material that HSIP required.

On February 2, 1984, William H. Dempsey, president of the American Association of Railroads, presented this concern in a letter to the chairman of the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation. In the letter, Dempsey referred to this inhibiting influence on HSIP and the potential threat to its effectiveness. The letter read in part:

> In order to justify the expenditure of funds for highway-rail grade crossing projects, the states and railroads are required to compile information to identify potentially hazardous crossings. The states have been reluctant to identify hazardous situations on a priority basis because of exposure to potential liability. The railroads are understandably cautious in responding to state requests for the identification of hazardous highway grade crossings, which should be candidates for the installation of active warning devices. This concern arises from attempts by plaintiff's attorneys to obtain the surveys and reports in pre-trial discovery and to ultimately introduce them in evidence in trials involving railroad grade crossing accidents. These reports and surveys are developed in good faith to aid in the Federal Highway Safety Program. Such documents should not be used against states or railroads in personal injury or property damage litigation.
>
> ...[W]e, therefore, commend that the Committee consider the following language to be included in the Highway Safety Act of 1973:
>
> "Notwithstanding any other provision of law, no report, list, schedule or survey compiled by or for a State for the purposes of complying with any requirement of Title 23, United States Code, or the Highway Safety Act of 1973 concerning the evaluation of hazardous roadway conditions or rail-highway crossings in order to plan and prioritize projects to enhance safety, shall be required to be admitted into evidence or used for any other purpose in any suit or action in any Federal or state court...."
>
> We have been advised that the Department of Transportation legislative program for the 97th Congress included a recommendation to protect from disclosure information compiled to identify and establish priorities for roadway hazards.

In 1985 hearings before the Subcommittee on Transportation of the Senate Committee on Environment and Public Works, concerning reauthorization of the Surface Transportation Assistance Act, Dempsey testified as follows:

> Finally, there is a problem that has arisen that has interfered, to some extent, with the States' and the railroads' efforts to do their best to administer the 203 program. It has come to our attention that the information that the States and the railroads collect with respect to the hazards of particular grade crossings has been used by plaintiffs' attorneys in court actions against the States and against the railroads.
>
> This is a deterrent to the most efficient kind of work that we could all do in this program, and we would strongly recommend that a provision be inserted in the bill that would keep this data confidential and not permit it to be introduced as evidence in court litigation.[96]

In these same hearings, Patrick H. Halstead, associate director of the Washington Railroad Association, stated:

> Finally, let me address another issue of concern to the railroads and state transportation agencies in their implementation of the Section 203 Program. States and railroads presently compile information on individual highway-railroad crossings in order to identify potentially hazardous crossing locations. This information is then used by the states to plan and program Section 203 Program improvements projects. Frequently such information, in the form of surveys and reports, has been used by attorneys representing plaintiffs in trials involving highway-railroad crossing accidents. As a result of this practice, states have understandably been reluctant to identify hazardous situations on a priority basis because of exposure to potential liability. Railroads, as well, have been cautious in supplying information to the states to be used in identifying hazardous crossings. These reports and surveys are developed in good faith to aid in the effective implementation of the Section 203 Program and should not be permitted to be used against states or railroads in personal injury or property damage litigation.
>
> In order to remedy this serious situation and its adverse consequence on the effective implementation of the Section 203 Program, we believe it is important that the Congress adopt appropriate provisions prohibiting the use of any such highway-railroad crossing information, survey, or report as evidence or for any other purpose in any action in federal or state court.[97]

The expressed reluctance of the states and railroads to generate proofs for plaintiff's attorneys in civil actions was again noted in a May 4, 1983, U.S. DOT-FHWA memorandum.[98] The following are pertinent portions of that memorandum:

> For the past several years, we have attempted to include in the Department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152, for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability. The issue has once more been raised, this time by the American Association of Railroads, in connection with requirements placed on them by States in identifying hazardous rail-highway crossings pursuant to Sec. 203(a) of the Highway Safety Act of 1973.
>
> It is noted that our suggestion was included in DOT's Legislative Program for the 97th Congress, 2nd Session, in the second category. We also note that highway safety legislation is being introduced in this legislative session. In the event such safety legislation receives serious consideration, it is recommended that an amendment be included to protect information compiled for purposes of safety enhancement. The following language is suggested:
>
> "Notwithstanding any other provision of law, no report, list, schedule or survey compiled by or for a State for the purpose of complying with any requirement of Title 23, United States Code, or the Highway Safety Act of 1973 concerning the evaluation of hazardous roadway conditions or rail-highway crossings in order to plan and prioritize projects to enhance safety, shall be required to be made available under 5 USC 552 (Freedom of Information Act), or admitted to evidence or used for any other purpose in

any suit or action for damages arising out of any matter mentioned in such report, list, schedule or survey."

It is the intent of this provision to prevent the unauthorized disclosure of information that States compile in good faith to meet the purpose of Federal-aid highway programs to eliminate or reduce hazardous roadway conditions. (e.g. 23 USC 152 and Sec. 203 of the Highway Safety Act of 1973). It is also the intent to protect information that may be compiled by railroads or utility companies for States in identifying hazards in connection with these programs.

The precursor to Section 409 was contained in a 1986 U.S. DOT recommendation to Congress to provide protection for materials and data compiled in connection with the Federal Highway Safety Programs.[99] As a consequence, Congress passed 23 U.S. Code Section 409[100] in 1987. In 1991, Congress amended Section 409[101] to preclude not only admissibility, but the discoverability of Section 409 material as well. As amended, Section 409 reads as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled 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 152 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.

The Two Prongs of Section 409

Significantly, Section 409 was written in the disjunctive. Protection is therefore accorded to reports, surveys, schedules, lists, or data compiled pursuant to Sections 130, 144, and 152 of Title 23 (the HSIP prong) or to reports, surveys, schedules, lists, or data compiled for the purpose of developing any highway safety construction improvement project that may be implemented using federal-aid highway funds (the federal funding prong).

The HSIP Prong of Section 409

The Highway Safety Act of 1973 established five categorical highway safety construction programs intended to reduce the number and severity of highway accidents through engineering improvements of hazardous locations, sections, and elements. Since 1973, these five programs have been combined into two programs. The first is the Rail-Highway Crossings Program, which evolved from Section 203 of Public Law No. 93-87 and subsequent amendments and is now codified at Section 130 of Title 23. The second program is the Hazard Elimination Program, codified at Section 152 of Title 23. Section 144 of Title 23 sets forth the Highway Bridge Replacement and Rehabilitation Program and will be treated separately in this paper because it is not part of HSIP.

Section 130(d)[102] provides, *inter alia*:

(d) Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose....

Section 152(a)[103] provides:

(a) 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 and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

In Section 315 of Title 23,[104] Congress authorized the Secretary of Transportation to prescribe and promulgate the rules and regulations for carrying out the provisions of Title 23. The rules and regulations for carrying out the provisions of Sections 130 and 152 are contained in Title 23 of the *Code of Federal Regulations*, Part 924 (1993). The Rail-Highway Crossings Program and the Hazard Elimination Program, as combined in Part 924, are referred to as HSIP.

Part 924 is a codification of the general and permanent rules governing HSIP. It is published in the *Federal Register* by the U.S. DOT. The contents of the *Federal Register* are required to be judicially noticed by the courts,[105] and the *Code of Federal Regulations* is *prima facie* evidence of the text of the original documents.[106]

To carry out its obligations pursuant to Sections 130 and 152, each state's HSIP must include the following processes as required by Part 924:

1. A process for collecting and maintaining traffic, accident, and highway data (23 C.F.R. § 924.9(a)(1)).
2. A process for analyzing these data to identify hazardous highway locations, sections, and elements (23 C.F.R. § 924.9(a)(2)).
3. A process for conducting engineering studies of hazardous locations, sections, and elements in order to develop a Highway Safety Improvement Project (23 C.F.R. § 924.9(a)(3)).
4. A process for establishing priorities for implementing Highway Safety Improvement Projects (23 C.F.R. § 924.9(a)(4)).
5. A process for scheduling and implementing Highway Safety Improvement Projects (23 C.F.R. § 924.11(a)).
6. A process for evaluating the effectiveness of Highway Safety Improvement Projects (23 C.F.R. § 924.13).

All the reports, surveys, schedules, lists, or data generated by these processes are pursuant to Sections 130 and 152 and therefore fall within the purview of Section 409. Stated differently, all the reports, surveys, schedules, lists, or data generated pursuant to HSIP are Section 409 material. Because the processes set forth in Part 924 constitute the lion's share of that material that is protected by Section 409, a better understanding of the history behind Part 924 is helpful.

Background of Part 924.—The effective date of Part 924 was March 1, 1979.[107] Prior to that date, the rules and regulations setting forth the states' responsibilities under the Rail-Highway Crossing Program (Section 203 of the Highway Safety Act of 1973), High-Hazard Location (23 U.S.C. § 152), Elimination of Roadside Obstacles (23 U.S.C. § 153), and the Federal-Aid Safer Roads Demonstration Program (23 U.S.C. § 405) were contained in Section 655.501 of Title 23 of the *Code of Federal Regulations*, *et seq.*, and are set forth at Appendix B.

A historical perspective as to the development of Section 152 is also valuable in understanding the HSIP prong of Section 409.

The History of Section 152.—Under the historical and statutory notes following Section 152 in annotations to the U.S. Code, there exists the following incorrect statement:

1978 Amendment. Subsec. (a). Pub. L. 95-599 substituted "public roads" for "highways" and added provisions relating to identification of hazardous locations.

This language mistakenly implies that Section 152, prior to 1978, had no provisions relating to the identification of hazardous locations. Both the statement and its implication are misleading and incorrect.

Section 152(a) in 1978 read as follows:[108]

> (a) 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 and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

In 1973, Section 152(a) read as follows:[109]

> (a) Each State shall conduct and systematically maintain an engineering survey of all highways to identify high-hazard locations which may constitute a danger to vehicles and to pedestrians, assign priorities for the correction of such locations, and establish and implement a schedule of projects for their improvement.

The Highway Safety Act of 1973 created various categorical safety improvement programs that were consolidated over time. In 1973, Section 152 was then titled Projects for High-Hazard Locations. The Highway Safety Act of 1978 amended Section 152 to reflect the consolidation of the High-Hazard Locations and Elimination of Roadside Obstacles Program (formerly Section 153). At this time, Section 152 was retitled the Hazard Elimination Program.[110] From its inception in 1973, Section 152 has required states to conduct and maintain an engineering survey for the purpose of detecting specific locations, elements, or sections of all public roads that are potentially hazardous. It has also called for the prioritization of Highway Safety Improvement Projects and for procedures for their implementation. In effect, the only change in Section 152, as originally conceived in 1973, was the additional requirement of identifying not only hazardous locations, elements, and sections, but also roadside obstacles and unmarked or poorly marked roads.

What is obvious from a reading of these statutes and regulations is that HSIP has historically required that the states and railroads compile, in self-critical fashion, the extensive data necessary to identify, as well as justify, worthy safety improvements.

The Federal Funding Prong of Section 409

With respect to the application of the federal funding prong of Section 409, the threshold requirements are twofold. The first is whether the reports, etc., have been compiled for the purpose of developing a highway safety improvement construction project. The second is whether the highway safety improvement construction project is of a type that could conceivably be funded with federal-aid money. A thorough understanding of HSIP leads to the conclusion that if a document is eligible for protection under the federal funding prong of Section 409, it will probably be eligible for protection under the HSIP prong as well.

The primary difficulty courts have had with the federal funding prong of Section 409 arises from a failure to note the use of two key words in Section 409. The first word is "or," as in, "or for the purpose of developing any Highway Safety Construction Improvement Project." The second is the word "may," as in, "which may be implemented utilizing Federal-aid Highway Funds."

The following is a partial list of assertions that have been made by plaintiffs' attorneys with respect to Section 409 that are predicated upon either an erroneous understanding of the federal funding prong or a simple misreading of the statute.

1. The subject roadway must have been built with federal funds.
2. The subject roadway must be eligible for federal funds.
3. The project must be under construction or already built.
4. The project must have received federal funds.
5. The project must be fully, and not partially, implemented with federal funds.
6. Federal funds must have been requested by the highway agency.
7. The project, although of the type that is eligible for federal-aid highway funds, was denied federal-aid funding because of a disagreement that arose between the local highway department and FHWA over some feature of the project.

Of course, under the simple twofold analysis offered above, none of these contentions passes the test. However, given the frequency with which these contentions arise, they need to be noted.

A good example of the confusion that can occur with respect to the federal funding prong is found in the error of the trial court in *Miller v. Bailey*,[111] where the appeals court stated:

> First, we have noted DOTD's arguments as to the admission of Trooper Meyer's February 1988 letter to the DOTD, notifying it of the need for "No Parking" signs on Hwy. 13 and of Trooper Meyer's testimony concerning the letter. DOTD filed a pretrial motion in limine to exclude the letter under 23 U.S.C. § 409. *The trial judge admitted the evidence because the DOTD failed to show Hwy. 13 was part of a federally funded project or program, though it is part of the federal highway system.* We find the trial judge erred as a matter of law in admitting the evidence and do not consider it in this appeal. [Emphasis added.]

The trial judge concluded that, in order to exclude the evidence, the highway where the accident occurred had to be part of a federally funded project or program. Such is simply not the case. The trial court judge, in focusing on the federal funding prong of Section 409, overlooked the fact that such reports are routinely compiled as part of the HSIP prong of Section 409, where the eligibility for federal funding is immaterial.

Judicial Interpretation of Section 409

Summarized below are some of the more important decisions discussing Section 409. The cases are analyzed by looking at several of the common threads that run through the cases: The purpose of Section 409 as recognized by the courts, the constitutionality of Section 409, the scope of Section 409 protection, and the retroactive application of Section 409.

The Purpose of Section 409

Although no court has discussed the legislative history leading up to the enactment of Section 409, as is done in this paper, the courts have nevertheless been highly perceptive in discerning its purpose.

In *Sawyer v. Illinois Central Gulf Railroad Co.*,[112] the court noted as follows:

> ...Federal law and regulations directed the states to survey their circumstances and prepare data on crossings where safety improvements may be needed. To the end that candor might obtain regarding hazards that exist, the Congress acted to protect information developed in connection with the program from use in any civil litigation arising out of railroad crossing accidents.

In agreement with *Sawyer* is *Perkins v. Ohio Dept. of Transportation*.[113] The court states:

> ...The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.

The court in *Light v. State of New York*[114] saw no reason to disagree with the purpose as set forth above and recognized an additional purpose:

> ...In our view, the purpose of the statutory protection was merely to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work, tool for direct use in private litigation.

The court in *Robertson v. Union Pacific Railroad Co.*[115] cited the *Light* opinion in finding that the underlying intent was to facilitate candor and to keep federally required recordkeeping from being used as a tool in private litigation.

The court in *Harrison v. Burlington Northern Railroad Co.*[116] cites *Robertson*, for the proposition that the purpose of Section 409 is the facilitation of candor and relies on the *Light* decision in ruling that the purpose is to prevent federally required recordkeeping from providing an additional "no work" tool for use in litigation.

Constitutionality of Section 409

The first court to rule on Section 409 was the Louisiana Court of Appeal in *Martinolich v. Southern Pacific Transportation*.[117] Numerous courts have relied on *Martinolich* in holding Section 409 constitutional. (See *Light v. The State of New York* and *Claspill v. Missouri Pacific Railroad*.[118]) No contrary decision is reported.

In *Martinolich*, the court found that the congressional intervention in enacting Section 409 was constitutionally permissible on four separate and distinct legal grounds. These grounds can be paraphrased as follows:[119] (1) Louisiana's participation in the federal funding scheme is voluntary; (2) the improvement of state highways with federal funds is in pursuit of "providing for the general welfare" as provided in U. S. Constitution article I, section 8, clause 1 ("spending power"); (3) it is clear that participation in the funding program requires acquiescence to the intrusion; and (4) the intrusion is related to a valid federal interest inasmuch as Section 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

It should be noted that as to the issue of voluntary participation by the states in the federally funded scheme set forth in Title 23, many, if not most, states statutorily acquiesce in this federal intrusion. For example, by virtue of California's Streets and Highways Code, Section 820, the State of California assents to the provisions of Title 23 or other acts of Congress relative to highway work, and the rules and regulations promulgated thereunder.

Martinolich also held that the U.S. Constitution provides for preemption in the case of Section 409 under the Supremacy Clause, which empowers Congress to supersede state law in this situation.[120] Also, *Perkins v. Ohio Department of Transportation* states that the language of Section 409 mandates a finding of congressionally expressed intent to preempt conflicting federal or state law.[121]

In *Claspill v. Missouri Pacific Railway Company*, the constitutionality of Section 409 was challenged on Tenth Amendment grounds. The *Claspill* court found that the statute did not violate the Tenth Amendment, stating that the Supreme Court, in *Garcia v. San Antonio Metropolitan Transit Authority*,[122] delineated Congress's authority to regulate the states under the Tenth Amendment. The court held that states must depend on the national political process for their Tenth Amendment protection and not a "judicially defined sphere of nonregulable state activity."[123]

Sawyer held that Section 409's regulation of evidence in state courts is constitutionally permissible in light of the Supremacy Clause and rejected plaintiff's "all-out assault" on Section 409's enforceability, holding that plaintiff's Tenth Amendment argument was without merit. The court stated, "Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution and laws of this state...."[124]

In addressing the plaintiff's resort to the Tenth Amendment argument, the *Sawyer* court noted that plaintiff overlooked the Supremacy Clause of the U.S. Constitution, Article VI, Section 2, which provides:

> ...This constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The court goes on to note:

> [B]esides, nobody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program—in exchange for 90 percent federal funding—and it does not strike us as outrageous that we should accede to the federal government's rules and regulations appertaining thereto.[125]

Scope of the Section 409 Exclusion

A majority of courts that have ruled on Section 409 have done so in a manner that effectuates its purpose with respect to the scope of documents and data that should receive protection. The result has been that Section 409 has received expansive application. It is noteworthy that Section 409 has been applied with full protective force in excluding information more often in the federal courts, particularly in the circuit courts. This is not surprising because state judges tend to jealously guard their authority over admissibility of evidence and what they believe should be discoverable in their own courts.

This view, however, seems misplaced where Congress has defined the permissible uses of documents and data that it requires to be developed, or compiled, pursuant to what is clearly a proper federal purpose—to see that the states spend federal safety dollars in the most deliberative, cost-effective manner possible.

Failure of state court judges to read the requirements of Section 409 expansively results in having these documents and data used in litigation against state

agencies or railroads. This undermines the effectiveness of the congressional aim of achieving safer roadways as determined by Congress.

Furthermore, the detailed processes mandated as a condition for participation in HSIP are vital to the program's success. U.S. DOT regulations promulgated to carry out HSIP ensure safety evaluations based on candid engineering analysis and priorities.

Congress requires an annual report on the effectiveness of HSIP. This in itself strongly suggests that Congress has a continuing interest in funding a transportation system that results in safer roads, the saving of human lives, and the prevention of injuries. The balance between the private litigant's access to HSIP information versus the continued effectiveness of the program has already been struck by the legislative body empowered to make such decisions. It follows that the propriety of that decision need not be revisited in each case where Section 409 is an issue.

The great weight of case authority supports the broad application of Section 409 protection. The factual and legal fallacies of cases that rule to the contrary are discussed below.

Circuit Court Cases.—The following federal circuit court cases shed light on the scope of Section 409 protection.

Robertson v. Union Pacific Railroad Company[126] held that Section 409 provides a fairly broad exclusion and that the trial court did not give an overly broad interpretation to the statute in excluding a newspaper article that identified a railroad crossing as the most hazardous railroad crossing in the state because the article was written using data compiled by the Highway Department for the purpose of highway and railroad crossing safety enhancement and for qualifying for federally funded construction projects. Additionally, the *Robertson* court affirmed the trial court's ruling that the plaintiff's expert witness was properly instructed to disregard information compiled or utilized by the Highway Department in formulating his opinion.

In *Harrison v. Burlington Northern Railroad Company*,[127] the trial court granted the railroad's motion *in limine*, excluding an Illinois Commerce Commission report and a letter that contained data collected for HSIP concerning the crossing that was the subject of the litigation. This was upheld, as well as the trial court's prohibition of testimony by the preparer of the report and the letter. The circuit court noted that plaintiff could not "duck the statute" by presenting testimony, as opposed to submitting the documents themselves.

The *Harrison* court also noted that "...§ 409 withdraws the broad latitude of discretion ordinarily allowed judges in evidentiary matters...."[128]

In *Lusby v. Union Pacific Railroad Co.*,[129] the court found that Section 409 precluded a plaintiff's retained expert from rendering an opinion based on Section 409 materials that state authorities compiled for the purpose of complying with Section 130. The court stated that "although the expert might have been able to generate similar data himself, see *Robertson*,...he nevertheless impermissibly based his opinion on AHDT data."[130]

Federal District Court Cases.—The following federal district court decisions provide insight as to the proper scope of Section 409 protection.

Hagerty v. Southern Railway Company[131] treated plaintiff's request that defendant produce "any and all letters, correspondence, or internal memoranda relating to proposed, considered or undertaken improvements, changes, or modifications to a railroad grade crossing" as being within the scope of Section 409. The court, however, found the documents discoverable on the grounds that they would lead to admissible evidence, even though the documents themselves were not admissible as evidence.

The district court in *Southern Pacific Transportation Co. v. Builders Transport, Inc.*[132] excluded from evidence "reports, surveys, schedules, lists, or data" compiled for the purpose of identifying, evaluating, or planning safety enhancement of a railroad crossing.

Similarly, in *Taylor v. St. Louis Southwestern Railway Co.*[133] the court found such safety data inadmissible:

> ...Given the clear mandate of Section 409, the court finds that any "reports, surveys, schedules, lists or data" pertaining to the evaluation of crossings, including the crossing at issue here, undertaken pursuant to the safety enhancement-related purposes discussed in the statute, whether obtained from the Kansas Department of Transportation ("KDOT"), the Kansas Corporation Commission ("KCC"), Jefferson County or Union Pacific, are inadmissible.

State Supreme Court Cases.—As reflected in the discussion of the following state supreme court cases, all have recognized the broad scope of Section 409.

Beecher v. Keel[134] set aside the ruling of the trial court that the DOT's highway accident data were admissible. The court held that the trial court must address the admissibility of each item of evidence as it is offered in accordance with the criteria of Section 409. If the trial court finds that the data were compiled pursuant to Section 152 or for the purpose of developing any highway safety construction project that may be implemented utilizing federal-aid highway funds, the data should not be admitted into evidence.

In *Claspill v. Missouri Pacific Railroad Company*,[135] the Missouri Supreme Court upheld the trial court's granting of the railroad's *in limine* motion to exclude the testimony of a plaintiff's witness, who was prepared to testify that a priority list used by the railroad was developed in connection with the use of federal funds. In addition, the court excluded plaintiff's exhibits relating to the alleged dangerous condition at the crossing. The exhibits listed the most dangerous railroad crossings in Missouri and included a field inspection report proposing to add flashing signal lights at the subject crossing. The railroad established that this information was compiled for safety and federal funding purposes.

In *Sawyer v. Illinois Central Gulf Railroad Co.*,[136] the court excluded a "hazard rank inventory" that established that the subject rail crossing was ranked in the top 1 percent of the most dangerous crossings in the State of Mississippi. Also excluded was a letter from the DOT advising of the hazard rank inventory and recommending that an active flashing warning device be installed.[137]

State Intermediate-Level Appellate Decisions.—Various intermediate-level appellate state court decisions have recognized the broad scope of Section 409 as well.

In *Miller v. Baily*,[138] the Louisiana Court of Appeal ruled that the trial court erred as a matter of law in admitting into evidence a letter written by a patrol officer to the DOT notifying it of the need for certain signs at the accident location and by allowing the officer to testify concerning the letter.

Light v. State of New York[139] is a case where the plaintiff's allegation was based on the absence of a median barrier. The New York Court of Claims held that DOT's data, including (1) accident records, (2) high accident locator, and (3) statewide accident rates for four-lane highways were "§ 409 material" and thus excluded.

Anomalous Cases.—A few courts have not interpreted Section 409 as broadly as the preceding cases. Most of these cases, reducing the protection afforded by Section 409, are from Louisiana.

The first is the case of *Martinolich v. Southern Pacific Transportation Co.*,[140] discussed previously as upholding the constitutionality of Section 409. In *Martinolich*, the trial court had concluded that "all information gathered pursuant to the federal programs covered by the statute" was protected.[141] The appellate court disagreed. It found that Section 409 did not protect "all information gathered" but only "reports, surveys, schedules, lists, or data compiled...." The court opined that "[t]his enumeration suggests something more than simple factual information that DOT has gathered. These documents may reflect mental impressions, conclusions and opinions of DOTD representatives...."

It is, of course, true that many of these documents "may" reflect mental impressions, conclusions, and opinions of the Louisiana Department of Transportation and Development (DOTD) representatives. It is equally true that they may not. No explanation is offered by the court as to why the enumeration of reports, surveys, schedules, lists, or data as set forth in Section 409 is to be limited to only protection for mental impressions, conclusions, or opinions or why the word "data" suggests something more than raw factual information. The only rationale offered by the court is based on the usual rules of civil procedure:

> ...This is similar to the kind of documentary evidence assembled by expert witnesses that is not subject to discovery under Rule 26 of the Federal Rules of Civil Procedure or under our Code of Civil Procedure. Fed.R.Civ.Pro.26; See also LSA-C.C.P. art. 1424; *Louisiana Department of Transportation and Development v. Stumpf* 458 So.2d 448 (La. 1984).[142]

Federal Rule 26 allows the discovery of "facts known or opinions held by an expert" who is not expected to testify at trial "only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means" (Fed. Rules Civ. Proc., § 26(b)(3)).

LSA-C.C.P. Article 1424 permits the discovery of "any writing obtained or prepared" by an adverse party's expert in anticipation of litigation or preparation for trial upon a showing of unfair prejudice, hardship, or injustice. This section disallows production of a writing that "reflects the mental impressions, conclusions, opinions or theories of an attorney or an expert."

The *Stumpf* case, cited in *Martinolich*, states:[143]

> An expert's written opinion is clearly not subject to production or inspection under any circumstances. To obtain non-opinion writings or parts of writings, a showing of unfair prejudice or undue hardship is required. This showing does not substantially differ from the burden under Rule 26(b)(3) of the Federal Rules of Civil Procedure...
>
> "A mere showing of relevance is insufficient. To justify disclosure, a party must show the importance of the information to the preparation of his case, and the difficulty he will face in obtaining substantially equivalent information from other sources if production is denied. The clearest case for ordering production is when information is in the exclusive control of the opposing party...."

Louisiana courts looking to *Martinolich* for the proper scope of Section 409 protection are thus directed away from Section 409 to discovery rules that require production of the materials if a sufficient showing of hardship can be made. A showing of hardship would not be difficult in the case of Section 409 data, because the information collected pursuant to HSIP is of a type that is not generally available, except from a public entity. Therefore, as a practical matter, *Martinolich* would allow the discovery and admissibility of most, if not all, the information gathered pursuant to the HSIP process.

The *Martinolich* opinion compounds what the authors believe to be an erroneous analysis by comparing Section 409 with a case arising out of Nebraska that actually dealt with retroactivity of the statute rather than its application:

> Our interpretation of the scope of 23 U.S.C. § 409 is analogous to the interpretation by the Eighth Circuit of a Nebraska statute requiring the county coroners to submit a report to the state Department of Motor Vehicles where the driver of a vehicle dies within four hours of a motor vehicle accident. NEB. REV. STAT. § 39-6, 104.07; *Blackledge v. Martin K. Eby Construction Co., Inc.*, 542 F.2d 474, 475 (8th Cir. 1976).[144]

The Nebraska statutes in question require the coroner to submit a report to the Department of Motor Vehicles when a driver is killed in a motor vehicle accident. The coroner must examine the body for the presence of alcohol and include such findings in the report. The statutes make the report and its contents inadmissible in court proceedings.

In *Blackledge*, cited in the *Martinolich* opinion, the medical testimony concerning a deceased driver's blood alcohol was admitted at trial. On appeal, it was contended that the Nebraska statutes should have blocked the admissibility of the testimony. The *Blackledge* court stated:[145]

> ...In the instant case, the accident and resulting autopsy occurred prior to the effective date of the statutes. It does not appear that any report of the type contemplated by the statutes was submitted to the Department of Motor Vehicles. The analysis of Blackledge's blood alcohol content was made in the ordinary course of an autopsy ordered by the Acting Coroner of Douglas County and not for purposes of any report to be submitted to the Department of Motor Vehicles. The doctor who testified as to Blackledge's blood alcohol content did so from his original notes compiled at the time of the autopsy. No report of any kind was introduced into evidence. On this basis, we hold that the evidence here in question did not represent information compiled in accordance with the statutory scheme relied on by appellant, and that it was, therefore, not rendered inadmissible by those provisions.

The *Blackledge* court did not "interpret" the Nebraska statutes. It simply found that the evidence presented at trial predated the Nebraska statutes, and thus the Nebraska statutes had no application. The *Martinolich* court's interpretation of Section 409 is in no way analogous to either the reasoning or the conclusion in the *Blackledge* case. If the *Martinolich* court's interpretation of Section 409 were analogous to the reasoning of the *Blackledge* court, then the only inquiry would be whether the data were compiled pursuant to HSIP or a potentially federally fundable safety project.

Martinolich stands alone in finding that Section 409 protects only "mental expressions, conclusions, and opinions."

Lusby v. Union Pacific Railroad Company[146] took a position precisely contrary to *Martinolich*. The court stated:

> ...Here, the district court permitted Lusby's expert to testify based on records and data that the AHTD uses to comply with the federal program under § 130(d). Thus, the district court erroneously admitted the expert's opinion testimony.[147]

Robertson v. Union Pacific Railroad Co.[148] found that railroad crossing safety data and a newspaper article based on that data, as well as the plaintiff's expert's opinion based on the same information, were not admissible because the data themselves were not admissible. This holding was based on the "plain language of the statute." The secondary sources were also inadmissible because "to allow the introduction of the data through the newspaper article would circumvent the purpose of the statute."

The federal circuit courts of appeal that have ruled on Section 409 therefore have not restricted the scope of protection as the *Martinolich* court did by drawing analogy to other statutes. Rather, the circuit courts simply applied the language of the statute to the facts of the particular case.

In *Rick v. State of Louisiana*,[149] the court ruled that the DOTD's rating index for evaluating railroad crossings, including a project priority list, accident history, traffic collision reports, and traffic volumes, was not protected by Section 409. This was because the material was not compiled specifically for the purpose of obtaining federal funding for safety improvements, and the information was used for other purposes as well.

Rick is to be contrasted with another Louisiana Court of Appeal opinion, *Miller v. Bailey*,[150] where a plaintiff's verdict against the DOTD was overturned in part because Section 409 material was improperly admitted. Specifically, the trial court should have excluded a letter and testimony from a state trooper regarding the need for "No Parking" signs at the location that was the subject of the lawsuit.

Still another Louisiana case that gave a highly restrictive reading to the scope of Section 409 is *Weideman v. Dixie Electric Membership Corporation*.[151] Ironically, the *Weideman* court began by noting the broad scope of Section 409, stating that Section 409 "...by its literal wording protects information *compiled* for certain purposes...." (emphasis in original). The court then concluded in the same paragraph that information compiled for Section 409 purposes is not protected after all: Only a "compilation" of such information is protected. The court stated:

> Section 409 creates a privilege for compilations enumerated in the statutes, but the privilege does not extend to reports and data gathered for or incorporated into such compilations.[152]

Thus, this court concluded that Section 409 does not protect the actual reports, surveys, schedules, lists, or data but only the compilations therefrom. The court concluded that compilations can exist separate and apart from the data upon which they are based. Traffic count books serve as an example. A traffic count book is a compilation of the individual traffic counts at various locations throughout the state. This court would protect the compilation, but not one traffic count on the basis that "reports and data gathered for or incorporated into such a compilation" are not privileged. This is like asserting that a book is protected from discovery, but each individual page is not.

To reach its conclusion, the *Weideman* court ignored the plain words and grammatical construction of Section 409. The court took a sentence that reads, in effect, "data compiled for...[highway safety improvement purposes] shall not be subject to discovery" and read it as "a compilation of data for highway safety improvement purposes is not subject to discovery." The court characterized this reading as not "expansively" construing the statute. However, this reading appears to be in direct conflict with the U.S. Supreme Court's interpretation of the word "compiled" in *John Doe Agency v. John Doe Corp.*,[153] discussed earlier.

The court's rationale was further undermined by its assertion that the transportation agency was seeking to use the federal statute to protect all information in its possession. The court stated:[154]

> ...DOTD essentially asks this Court to transform a statute, which by its literal wording protects information compiled for certain purposes, into one which protects all information in DOTD's possession. We refuse....

The authors have reviewed the briefs filed by DOTD and nowhere was it asserted that Section 409 protects "all information in the DOTD's possession" or anything suggesting this. DOTD claimed Section 409 protection only for data compiled pursuant to Section 152. Thus, the *Weideman* court vigorously refused to do what no one asked.

The court's very specific holding as to what is protected is quite narrow. According to the *Weideman* court, the only material protected under Section 130 are surveys to identify hazardous railroad crossings and improve them and, under Section 152, studies assigning priorities and schedules of projects for highway improvements. Under the federal funding prong, all that is protected are other compilations made for developing highway safety construction projects that "would" (not could) utilize federal-aid funds.

If Congress intended only these specific documents to be protected, it could easily have said just that, but it did not. Had Congress sought to limit exclusion of Section 152 documents to studies assigning priorities and schedules of projects for highway improvements there would be no need for it to specifically include reports, surveys, schedules, lists, or data compiled for the purpose of "identifying, evaluating or planning" as set forth in Section 409.

Practically speaking, studies assigning priorities and schedules of projects for highway safety improvements occur after a location has been first identified and then evaluated as a potential accident site or hazardous roadway condition. This identification and planning of the specific improvement would also occur before studies assigning priorities come into operation. Thus, the language "identifying, evaluating or planning" simply has no meaning as viewed by this court.

More specifically, if this opinion is widely followed, then protection afforded the collection and maintenance of accident, traffic, and highway data pursuant to Section 924 would be eroded. Further, the analysis of data to identify highway locations, sections, and elements determined to be hazardous on the basis of accident experience or accident potential would not be protected. Engineering studies of hazardous locations, sections, and elements conducted to develop safety improvement projects also would not be protected. No protection whatsoever is afforded under the *Weideman* decision until all of the above processes have occurred and the highway agency begins the prioritization process.

The court's holding is also internally inconsistent in that it finds surveys required by Section 130 are protected from discovery, but surveys required by Section 152 are not.[155] If the surveys required by Section 130 are protected, it would seem to follow that the surveys required by Section 152 should also be protected from discovery and admissibility. It could be that the court was not aware of the specific requirements established by Section 924. Even so, it is difficult to reconcile the court's protection of surveys pursuant to Section 130, but not those pursuant to Section 152.

The court attempts to justify its avoidance of the plain language of Section 409 by stating that its reading of the statute is supported by the purpose underlying it. The court states:[156]

> A rule which requires DOTD to divulge source data but not the end product fosters candor by shielding the State's self-critical evaluations and conclusions from outside scrutiny.

It seems highly unlikely that self-critical evaluations or conclusions do not occur in the HSIP process prior to the prioritization stage. Furthermore, the rule in *Weideman*, "which requires DOTD to divulge source data but not the end prod-

uct,..." places the agency in an untenable position at trial. If all of the "source data" (accident histories, safety investigations, project reports detailing a facility's deficiencies, etc.) are allowed into evidence, then the agency will be compelled to respond by putting into evidence the agency response (the "end product"). Not to do so runs the risk that, in the eyes of the jury, the agency did nothing to remedy the situation described in the "source data."

Previously, in *Beecher v. Keel*,[157] the same court that decided the *Weideman* case arrived at a contrary conclusion:

> If the trial court finds that the data were compiled pursuant to 23 U.S.C. Section 152, "or for the purpose of developing any highway safety construction project which may be implemented utilizing Federal-aid highway funds," they shall not be admitted into evidence.

This language indicates that data (not compilations) are protected. This was totally ignored in the subsequent *Weideman* decision.

The focus on the word "compile" at least partially accounts for the *Weideman* court's opinion. Reports, surveys, schedules, lists, or data generated solely because of HSIP are clearly Section 409 documents. But what of other reports, schedules, lists, or data that were compiled by a public entity to carry out HSIP, but that were initially created apart from HSIP? The argument has been advanced that only those documents actually created exclusively by and for HSIP are entitled to Section 409 protection.

The response to this assertion is found in the meaning of the word "compiled." Section 409 is not limited to documents that are "created" (or some other similar term) in response to the federal requirements. The word used by Congress was "compiled," which has a meaning broader than created or generated. In *John Doe Agency v. John Doe Corp.*,[158] the U.S. Supreme Court discussed the meaning of "compiled" with respect to a federal statute in a context analogous to the situation presented by Section 409.

As discussed in an earlier section of this paper, the issue in *Doe* was whether or not Exemption 7(A) of FOIA could be invoked by the federal government to prevent the disclosure of documents not originally created for, but later compiled for, law enforcement purposes. Exemption 7(A) of FOIA exempts from disclosure "records or information compiled for law enforcement purposes." The subject matter of this case concerned correspondence that was exchanged between a corporation and the Defense Contract Auditing Agency approximately 7 years before the commencement of a criminal investigation. After the investigation of the corporation was initiated, the correspondence was transferred from the files of the Auditing Agency, to the FBI. The corporation made an FOIA request, which the FBI denied, citing Exemption 7(A). The specific issue before the Court was whether or not those documents that originally had nothing to do with a criminal investigation, but were later gathered for law enforcement purposes, were exempt under 7(A).

The Court began its analysis by stating that FOIA exemptions "must be narrowly construed" and that the "burden is on the agency to sustain its action."[159] The crux of the Court's analysis was stated as follows:

> As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specified time. The objects sought merely must have been "compiled" when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster's Third New International Dictionary 464 (1961); Webster's Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. [Citations omitted]

The Court further noted:

> The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." ...We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or for that matter, of its adjectival form, "compiled" does not permit such refinement. This Court itself has used the word "compile" naturally to refer even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. [Citations and footnotes omitted][160]

Justice Stevens, in a dissenting opinion, addressed the necessary showing for the protection of compiled materials:

> The Government can sustain that burden in either of two ways: 1) by demonstrating that the requested records and information were originally compiled for law-enforcement purposes, or 2) by demonstrating that even though they had been generated for other purposes, they were subsequently recompiled for law enforcement purposes.[161]

The authors contend that this case is authority for the proposition that Section 409 protection obtains regardless of whether the material was originally created pursuant to the HSIP prong or the federal funding prong, as long as the agency can show that the material was, at some time, compiled (i.e., gathered, assembled, etc.) for a Section 409 purpose. There is no rational basis to argue that the word "compiled" in Exemption 7(A) has a meaning different from the word "compiled" in Section 409.

Another argument used to persuade courts to find admissible what Section 409 makes inadmissible is the contention that Section 409 does not apply unless the particular material was compiled "exclusively" for and thereafter "exclusively used" for HSIP purposes. Except for the Louisiana case, there is no authority for this proposition. The idea of "exclusive use" for HSIP purposes is found nowhere in the language of Section 409.

Accordingly, in *Robertson v. Union Pacific Railroad Co.*,[162] the court dispelled this argument when it stated:

> ...Appellants' assertion that the formula and automobile count were admissible because such information was not collected or utilized solely for federal funding projects is without merit. Although such information was available for other uses and purposes, the statutes mandatory language requires exclusion of such evidence at trial. 23 U.S.C. § 409.

Similarly, in *Lusby v. Union Pacific Railroad Co.*,[163] the court stated:

> ...Contrary to Lusby's assertion, state materials do not fall outside the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other uses.

Perkins v. Ohio Dept. of Transportation[164] might be cited for the proposition that Section 409 data must be used exclusively for HSIP or potentially federal fundable safety projects in order to receive Section 409 protection. This stems from the following language of the opinion:

> ...We next address the trial court's decision granting defendant's motion to prohibit at trial the admission of evidence of any accidents which came to attention of defendant solely as a result of its programs operated pursuant to the federal hazard elimination program.

This is a recitation of the record before the court, e.g., evidence of accidents that came to the attention of the DOT solely as a result of its HSIP. It is not a holding, nor a suggestion by way of dicta, that Section 409 data must be derived solely from HSIP.

To summarize, no case law exists apart from Louisiana that supports the proposition of "exclusive use." The federal circuit courts of appeal have specifically rejected it. Moreover, any argument to the contrary would disregard the practical application of the safety processes mandated by Congress. It would mean that data clearly covered by Section 409 would lose its protection if it could be shown that they were used to support a purely operational improvement for which Section 409 does not apply. To retain Section 409 protection, agency engineers would need to independently replicate the data. As demonstrated by the legislative history and the rationale of the U.S. Supreme Court in the *John Doe* case, this is clearly not the intended result.

Retroactivity of Section 409

The effective date of Section 409 was April 2, 1987. It has been argued that Section 409 should not apply retroactively. This question was first addressed in *Martinolich v. Southern Pacific Transportation Co.* In that case, the accident occurred in 1980. The lawsuits were filed in 1981 and 1982. The court's retroactivity analysis began by citing *Bradley v. School Board of City of Richmond* (416 U.S. 696 (1974)) as requiring "...retroactive application of a change in the law in the absence of legislative mandate to the contrary or unless such application would cause manifest injustice."[165]

The *Martinolich* court held: "There is no congressional mandate that 23 U.S.C. § 409 apply prospectively only. Under the construction we give 23 U.S.C. § 409, private litigants will be deprived of certain evidence but not a cause of action."[166] Therefore, the court found no "manifest injustice" limiting it to prospective application.

Martinolich was cited favorably on this point in *Claspill v. Missouri Pacific Railroad Company*: "In the absence of specific congressional direction to the contrary, section 409 is subject to retroactive application."[167]

In *Perkins v. Ohio Dept. of Transportation*, the court addressed the issue of retroactivity in a case where the accident occurred in 1983, and the legal action was filed in 1985. The court initially observed that under the reasoning of *Bradley*, when a legislative change is procedural, such change is to be given retroactive effect unless a contrary legislative intent appears or unless doing so would result in manifest injustice. The court went on to state:

> In addition, it is important to point out that under federal law a presumption of retroactivity exists. [*Id.*, ¶] In the present case, Congress has not indicated that Section 409, Title 23, U.S. Code, receive only prospective application. Therefore, this court presumes that Section 409 was intended to apply retrospectively unless this would cause manifest injustice. We believe that such a presumption is appropriate since we find that the limitation on the admission of certain evidence at trial imposed by Section 409 is a procedural change.[168]

The only appeals court decision refusing to apply Section 409 retroactively is *Martin v. Illinois Central Gulf Railroad.*[169] This case, however, provides no guidance on this issue because the evidence of safety problems at a railroad crossing was admitted at a trial that occurred prior to the enactment of Section 409.

The Highway Bridge Replacement and Rehabilitation Program

The protection of Section 409 by express statutory provision includes documents and data compiled pursuant to Section 144, the Highway Bridge Replacement and Rehabilitation Program. To date there have been no cases dealing with Section 409 protection for materials compiled pursuant to Section 144. However, there appears to be no reason why the same principles that govern the HSIP or federal funding prong of Section 409 should not apply to Section 144.

Section 409 as a Privilege

A final issue raised by the language of Section 409 is whether a transportation agency or a railroad is prevented from using "§ 409 data" in its *defense* of a lawsuit. The answer would seem to pivot on the statutory interpretation of Section 409.

Clearly, the intent of Section 409, as discussed earlier, was to prevent the compiled data from being used *against* transportation agencies and railroads in litigation. To read Section 409 so as to prevent the compiled information from being used defensively, in essence, turns Section 409 on its head. Viewed as a privilege, Section 409 can be waived by transportation officials. (See generally, WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE, § 5724).

In deciding whether a given statute creates a privilege, the courts look to whether the statute prohibits both the discovery and the admissibility of the protected materials, as well as the legislative policy behind the statute. Those statutes that preclude both discovery and admissibility, such as Section 409, contain the two criteria that are the "customary indicia of a privilege." (*Somer v. Johnson*,[170] citing 4 J. MOORE, FEDERAL PRACTICE AND PROCEDURE, § 26.60 (2d ed. 1982)).

The Eleventh Circuit Court of Appeals in *Somer*, furthermore, held that of "greater significance" was the legislative policy embodied in the statute and whether that policy is one that is the "customary concern underlying most privileges." In *Somer*, the statute at issue was Florida's Statutes Annotated, Section 768.40(4), which provided that proceedings and records of committees "formed to evaluate and improve the quality of health care" are protected. As in Section 409, the statute specifically provided that the information was not subject to discovery or admissible in evidence:

> The proceedings and records of committees as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee....[171]

The *Somer* court held that such a statute created a "substantive privilege" because the statute reflected a legislative intent to encourage effective "self-policing" within the medical community by removing the inhibitions that would necessarily follow if those efforts could later be used in medical malpractice cases.[172]

As set forth previously in this paper, that same legislative purpose was the very cornerstone of the enactment of Section 409. As such, Section 409 "has all the characteristic attributes of a privilege,"[173] and therefore should be treated as such.

An important consideration for each transportation agency is to determine as early as possible whether release of the information as a whole is favorable to its position or not. Once a decision is made to waive a privilege, the agency must consider application of the general rule that once waived, a privilege cannot be reasserted.

CONCLUSION

This report discussed first the Supreme Court precedents regarding the use or misuse of the federal FOIA as a discovery tool rather than its intended use as a check on government performance. Based on the authors' survey responses, this was then compared with how state transportation agencies react to document disclosure demands in various situations. Finally, the report discussed recent federal legislation specifically exempting highway safety improvement documentation from discovery and from evidence.

If there is a single thread woven through each of the high court decisions it is that it will not tolerate the use of FOIA as a substitute for the rules of discovery. These decisions acknowledge that the use and purpose of a document request is immaterial under FOIA. Yet, where other litigation is pending, or where FOIA is being employed as a litigation discovery device, the Supreme Court each time has reversed the more expansive decision below, thereby denying access to the information based on the overriding objective of the act to function as a check on government and not to benefit private litigants.

Even though state public disclosure statutes were patterned after the federal FOIA, state transportation agencies appear to be much more generous in turning over documents in the face of potential or even existing litigation. Of course, this review of FOIA was at the U.S. Supreme Court level, and it may be unfair to compare this against state agency practice. Federal agency responses are more likely to be similar to what is seen at the state agency level. The fact that agencies at both the federal and state level are more willing to produce documentation in the face of litigation may be more reflective of the potential threat of penalties that can be assessed, usually in the form of attorneys fees for what may later be determined by a lower court to be a wrongful withholding of records.

It was also surprising that more states do not attempt to negotiate document requests where litigation is expected, offering to supply records in return for comparable documents from the other side. This is an adversarial situation, where one side is attempting to gain a litigation advantage on the pretext that the information is needed as a check on government integrity. There is the risk of attorney fees liability, but usually where the record request comes before a court and there has been an offer of mutual exchange, the judge will encourage a settlement based on some kind of reciprocity without penalty to the agency. Also, transportation agencies are encouraged to explore the possibility of including provisions in their contracts for mutual exchange of records as a means toward achieving a level playing field.

It is also surprising that many states apparently are not aware of the preemptive value of Section 409 in excluding highway safety improvement documents from disclosure, discovery, and being introduced into evidence. Congress specifically enacted this section in recognition of the increased costs and increased liability exposure that can result from the compilation and analysis of traffic safety data mandated by the federal government. The information needed to improve safety, save lives, and reduce injuries was being seized by tort lawyers to prove their cases against the very agency mandated by the federal government to create the documentation. In effect, Congress recognized that the federal government, concerned with improving traffic safety, was forcing the states to generate, compile, and analyze traffic data for use by personal injury lawyers and that such use threatened to undermine an effective program.

For the most part, state courts have followed the mandates of Section 409 as it relates to providing the necessary protection for state DOTs and railroads. With the exception of Louisiana, all case authority accedes to the exclusionary dictates of Section 409.

Currently, no case authority exists to support the contention that Section 409 may be used to prevent a state DOT or railroad from using Section 409 data in its own defense. The legislative history and intent of Section 409, as well as the law regarding privileges, indicate, however, that Section 409 is to be viewed as a privilege held by the state or the railroad, and that it is for the holder of the privilege and not the claimant to decide and determine whether Section 409 is to be applied in a given case.

APPENDIX A—SURVEY QUESTIONNAIRE

The purpose of the following questions is to elicit information regarding disclosure statutes in your state for the preparation of an article for the Transportation Research Board. Your response need not be structured to each question. It is sufficient that a letter be provided covering the points generally.

1. Please provide the statutory citation to your state's freedom of information or disclosure statute, and refer to any recent cases or significant publications dealing with your statute.

2. Is your statute commonly known or referred to as a public records act, information act, disclosure act, sunshine statute, or something else?

3. What exemptions exist that are pertinent to the operations of your agency?

4. Does your state or agency have a written policy regarding information or document requests? If so, a copy would be appreciated.

5. What is the appeal process for requests that are denied by your agency?

6. Are disclosure, information, or document requests reviewed for related pending or potential litigation, and if so, how is this accomplished?

7. Does your agency treat requests for information on a general but identified subject matter differently from requests for specific documents? If so, please elaborate on how specific the disclosure request must be.

8. How does your agency handle information requests from contractors on state projects for information or records that will be used in preparing or evaluating claims against your agency? If this situation has not yet arisen in your state, hypothetically how would you propose to handle such requests?

9. How does your agency handle information or document requests from attorneys or others that pertain to an accident where claims or litigation is anticipated?

10. How does your agency handle information requests relating to environmental and planning matters where litigation challenging the project is anticipated?

11. Would the answers to questions 8, 9, and 10 above be any different if litigation was pending involving your agency? If the request were by or on behalf of the litigant would you insist that the request comply with your state's discovery rules? Suppose the particular documents were otherwise unavailable to the requestor through discovery?

12. Has your agency experienced a situation where state records or information have been requested of a federal agency by a private individual or attorney relating to a state claim or pending litigation? If so, please elaborate.

13. This is NOT a request for information or disclosure under your public records statute, but would this qualify as a proper request for information? If not, please explain.

14. Please provide any further discussion or information you believe would be useful in preparation of this paper.

APPENDIX B—THE HISTORY OF SECTION 924 AS SET FORTH IN THE *CODE OF FEDERAL REGULATIONS*

Subpart E–Highway Safety Improvement Program

"AUTHORITY: The provisions of this subpart E are issued under 23 U.S.C. 105(f), 152, 153, 315, and 405, section 203 of the Highway Safety Act of 1973 and delegation of authority at 49 CFR 1.48.

"SOURCE: 39 FR 27434, July 29, 1974, unless otherwise noted.

"§ 605.501 Purpose.

"The rules in this subpart prescribe the policies, procedures and guidelines for the development of a program for the detection, through accident analysis, of specific locations, elements or sections of all highways that are hazardous or potentially hazardous and for implementing corrective measures for the identified hazards.

"§ 655.502 Definitions.

"(a) 'Highway' means any public road under the jurisdiction of and maintained by a public authority and open to public travel.

"(b)....

"(c) 'High hazard location' means any location which has a greater than average accident experience and any location with like characteristics to a location having greater than average accident experience.

"§ 655.503 Policy.

"Each State shall develop and implement on a continuing basis a highway safety improvement program including logical and comprehensive procedures for the selection, scheduling, construction and evaluation of highway safety improvement projects, on all highways, with the specific objective of reducing the number and severity of accidents."

"§ 655.504 Program elements.

"Each State highway safety improvement program shall include the following elements covering all highways:

"(a) A process for the identification of safety needs, including:

"(1) A reference system to determine accurately the location of individual accidents.

"(2) A traffic records system which correlates accident experience with highway data, with the ultimate objective of identifying highway causative factors of accidents and accident severity.

"(3) A procedure for identifying and reporting hazardous locations, elements, and sections of highways based on a review of:

"(i) Accident experience at specific locations.

"(ii) Accidents related to specific elements of the roadway environment.

(iii) Sites with like characteristics to locations having a greater than average accident experience.

"(4) An engineering survey, systematically maintained, of all railroad-highway crossings to identify those crossings which may require separation, relocation, or warning devices."

"(5)...

"(6) The identification of locations with low skid resistance.

"(7) The identification of locations with hazardous conditions associated with narrow bridges.

"(b) A process for the systematic correction of identified safety needs including:

"(1) The establishment of, and assignment of priorities to, a schedule of safety improvements.

"(2) The implementation of the systematic correction of identified hazards.

"(c) An evaluation of the program, including:

"(1) A process to determine the effects the improvements have in reducing accidents and accident severity.

"(2) An annual evaluation and report of the State's overall safety improvement program and the State's progress in implementing the individual programs established by the Highway Safety Act of 1973."

"§ 655.605 Program procedures.

"(a) Establishment of priorities—(1) Railroad-highway grade crossings (section 103 of the Highway Safety Act of 1973). (1) Section 203(a) of the Highway Safety Act of 1973 requires as a minimum that each State's schedule of improvements shall provide signs at all crossings. As a first priority, each State, in cooperation with the involved railroad and any other agency having jurisdiction, shall identify those grade crossings at which there are either no signs or nonstandard signs and institute an improvement program to provide signing and pavement markings in compliance with the Manual on Uniform Traffic Control Devices at all grade crossings."

"...

"(iii) The priority schedule of crossing improvements should be based on:

"(A) The ranking of crossings using the State's current hazard index.

"(B) An onsite inspection.

"(C) Accident history.

"(2) High-hazard locations (23 U.S.C. 152). Using the accident data and information developed under § 655.504(a)(3), (6) and (7), project priorities for high-hazard locations shall be established, giving primary consideration to the anticipated reduction in number of accidents and accident severity, the cost of corrective measures and the feasibility of implementing the improvements."

"...

"(i) Railroad-highway grade crossing improvements. Projects for railroad-highway grade crossing improvements shall be selected from the priority listing developed in accordance with paragraph (a)(1) of this section. First priority shall be given to those grade crossings at which there are no warning signs or nonstandard signs.

"(ii) High-hazard locations. Projects for the improvement of identified high-hazard locations on the Federal-aid system shall be reelected from a priority listing developed by the procedures set forth in § 655.504(a)(3), (6) and (7), § 655.504(b), and paragraph (a)(2) of this section."

In the Federal-Aid Highway Program Manual, Volume 6, Chapter 8, Section 2, Subsection 1, Highway Safety Improvement Program, Dated July 3, 1974, the Federal Highway Administration stated as follows:

"6.a.(1) Rail-Highway Crossings (Section 203 of the Highway Safety Act of 1973).... Where States have an existing inventory of all railroad-highway crossings in the State this inventory may also satisfy the survey requirements.

"6.a.(2) High Hazard Location (23 U.S.C. 152).—The procedures and methods developed for the identification and surveillance of high hazard locations under paragraphs 5a(1),(2), (2), and (3) constitute a continuing engineering survey required by 23 U.S.C. 152...."

ENDNOTES

[1]Orrin F. Finch, *The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities, in* RESEARCH RESULTS DIGEST 137 (December 1982).

[2]410 U.S. 73 (1973).

[3]Department of Justice v. Landano, 508 U.S. ___, 124 L. Ed. 2d 84 (1993) and United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. ___, 62 U.S.L.W. 4143, 127 L. Ed. 2d 325 (decided Feb. 23, 1994) discussed *infra*.

[4]See Orrin F. Finch, *The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities, in* 4 SELECTIVE STUDIES ON HIGHWAY LAW (1982), at 2018-N37 to N38 enumerating the nine FOIA Exemptions, and 2018-N42 to N49 for a discussion of *EPA v. Mink* and Supreme Court cases that followed up to 1982.

[5]415 U.S. 1 (1974) and 421 U.S. 168 (1975), respectively.

[6]See discussion of the Renegotiation cases in *supra* note 4, at 2018-N43 to N46.

[7]415 U.S. at 24 (emphases added).

[8]437 U.S. 214 (1978).

[9]*Id.* at 242.

[10]See discussion in *supra* note 4, at 2018-N52 to N61.

[11]455 U.S. 345 (1982).

[12]5 U.S.C. § 502(b)(3).

[13]455 U.S. at 362.

[14]5 U.S.C. § 552(b)(5).

[15]421 U.S. 132, 154-55 (1975).

[16]443 U.S. 340, 354-55 (1979).

[17]465 U.S. 792 (1984).

[18]316 F. 2d 336 (D.C. Cir. 1963).

[19]688 F. 2d 638 (9th Cir. 1982).

[20]465 U.S. at 804.

[21]*Id.* at 799.

[22]*Id.* at 801-802 (citations and footnote omitted).

[23]462 U.S. 19 (1983).

[24]The opinion seriously questions this conclusion of the court of appeals:

> At the time this case came to the Court of Appeals, all of the courts of appeals that had decided the issue under Rule 26(b)(3) had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated. (footnote omitted) 462 U.S. at 28.

[25]*Id.* at 27 (reference omitted).

[26]486 U.S. 1 (1988).

[27]486 U.S. at 12-13.

[28]*Id.* at 14.

[29]421 U.S. 132, 143, n. 10. Justice Scalia in his dissent went on to predict that "today's decision will be a bombshell in the area of FOIA law." *Id.* at 22.

[30]493 U.S. 146 (1989).

[31]*Id.* at 153.

[32]456 U.S. 615 (1982).

[33]489 U.S. 749 (1989).

[34]*Id.* at 765 (footnote omitted).

[35]*See* 5 U.S.C. § 552a(b)(2).

[36]489 U.S. at 767.

[37]*Id.* at 776.

[38]*Id.* at 780.

[39]*Id.* at 772.

[40]*Id.* at 773.

[41]510 U.S. ___, 62 U.S.L.W. 4143, 127 L. Ed. 2d 325 (1994)

[42]62 U.S.L.W. at 4145.

[43]*Id.* at 4146.

[44]456 U.S. 595 (1982).

[45]508 U.S. ___, 124 L. Ed. 2d 84 (1993).

[46]5 U.S.C. § 552(b)(7)(D).

[47]124 L. Ed. 2d at 98.

[48]KAN. STAT. ANN. 45-216(a).

[49]ARIZ. REV. STAT. ANN. § 39-121.

[50]*See*, Carlson v. Pima County, 687 P. 2d 1242 (1984).

[51]ME. REV. STAT. ANN. tit. 1, §§ 401-410.

[52]KAN. STAT. ANN. 45-215, *et. seq.*

[53]*Id.* § 45-221.

[54]*Id.* § 45-221(14).

[55]65 Pa C.S. § 66.1, as amended June 17, 1971.

[56]VT. STAT. ANN., tit. 1, §§ 315 and 317.

[57]*Id.* § 317(b)(16). The subchapter was enacted July 1, 1976.

[58]*Id.* § 317(b)(19).

[59]*Id.* § 317(b)(17).

[60]*Id.* §317(14).

[61]OHIO REV. CODE ANN. § 149.43(A)(4).

[62]Sanford v. Kelly, 541 N. E. 2d 124 (1989).

[63]29 Del. Ch. Chapt. 100, § 10002(d).

[64]CAL. GOV'T CODE § 6255.

[65]*See*, CBS, Inc. v. Block, 42 Cal. 3d 646, 725 P. 2d 470 (1986) and Shepherd v. Superior Court, 17 Cal. 3d 107, 123, 550 P. 2d 161 (1976).

[66]CAL. GOV'T CODE § 6254(b).

[67]*Id.* § 6254(k); *see also*, Roberts v. City of Palmdale, 5 Cal. 4th 363, 371-2, 853 P. 2d 496 (1993).

[68]CAL. EVID. CODE § 1040.

[69]*See*, Pitchess v. Superior Court, 11 Cal. 3d 531, 522 P. 2d 305 (1974).

[70]*Supra* note 4 at 2018-N57-N61.

[71]CAL. GOV'T CODE §§ 6250 *et seq.*

[72]American Civil Liberties Union v. Deukmejian, 32 Cal. 3d 440, 651 P. 2d 822 (1982).

[73]Michigan DOT Regulation DR 8150.00, effective Apr. 10, 1991, Appendix A, Section 13 (1)(n).

[74]Policy & Procedure memorandum P75-5, revised Sept. 25, 1987.

[75]CAL. CIV. CODE §§ 1798 et seq.

[76]Copies of Policy and Procedure memorandum No. P75-5 issued Sept. 25, 1987, can be obtained by writing to the Legal Division, Department of Transportation, P.O. Box 1438, Sacramento, CA 95812-1438.

[77]IOWA ADMIN. CODE, (Trans. Dept.) § 761-4.1 (22, 304).

[78]*Id.* at § 761-4.3(1)b.

[79]Vermont Office of the Attorney General memorandum to all agency and department heads; subject: Act No. 231—Access to Public Records and Documents, at p. 5 (undated).

[80]Commonwealth of Pennsylvania, DOT, circular letter No. RM93-05, dated Aug. 9, 1993.

[81]*Id.* at 3.

[82]29 Del. Ch. Chapter 100, § 10002(d).

[83]MICH. COMP. LAWS § 15.233(1).

[84]*Id.* at §§ 15.233(3) and 15.241(1).

[85]WASH. REV. CODE § 42.17.270.

[86]CAL. GOV'T CODE § 6255.

[87]IOWA ADMIN. CODE § 761-4.1(1)c.

[88]CAL. GOV'T CODE § 6254(b).

[89]SECRETARY OF TRANSPORTATION, AN EVALUATION OF THE HIGHWAY SAFETY PROGRAM, REPORT TO CONGRESS (July 19, 1977), p. I-3.

[90]SECRETARY OF TRANSPORTATION, THE 1979 ANNUAL REPORT ON HIGHWAY SAFETY IMPROVEMENT PROGRAMS, REPORT TO CONGRESS (Sept. 19, 1979), p. 5.

[91]*Id.*, n.74 at 5.

[92]SECRETARY OF TRANSPORTATION, THE 1977 ANNUAL REPORT ON HIGHWAY SAFETY IMPROVEMENT PROGRAMS, REPORT TO CONGRESS (Dec. 19, 1976), p. 1.

[93]Pub. L. No. 93-87, Title II, Aug. 13, 1973, 87 Stat. 282.

[94]*Id.*, n.92, at 1.

[95]SECRETARY OF TRANSPORTATION, THE 1993 ANNUAL REPORT ON HIGHWAY SAFETY IMPROVEMENT PROGRAMS, REPORT TO CONGRESS (April 1993), p. IV-5.

[96]*Federal-Aid Highway Program, Part I: Hearings before the Subcomm. on Transportation, Senate Comm. on Environment and Public Works* (July 11, 1985), pp. 173, 179.

[97]*Federal-Aid Highway Program, Part II: Hearings before the Subcomm. on Transportation, Senate Comm. on Environment and Public Works* (Sept. 28, 1985) (Coeur d'Alene, ID) pp. 215, 216.

[98]U.S. DOT, FHWA, memorandum, concerning proposed amendment to highway safety legislation from Marshall Jacks, Jr., associate administrator of Safety, Traffic Engineering, and Motor Carriers, 2.D.L. Ivers, Chief Counsel, FHA (May 4, 1983).

[99]DOT draft bill, *Surface Transportation Reauthorization Act of 1986*, § 130 at 55-65 (Feb. 5, 1986).

[100]Pub. L. No. 100-17, Title I, sec. 132(a), Apr. 2, 1987, 101 Stat. 170.

[101]Pub. L. No. 102-240, Title I, sec. 1035(a), Dec. 18, 1991, 105 Stat. 1978.

[102]23 U.S.C. 130(d) (1988 ed.).

[103]23 U.S.C. 152(a) (1988 ed.).

[104]Pub. L. No. 85-767, Aug. 27, 1958, 72 Stat. 915; Pub. L. No. 100-17, Title I, sec. 133(b)(18), Apr. 2, 1987, 101 Stat. 172.

[105]44 U.S.C. 1507 (1988 ed.).

[106]44 U.S.C. 1510(e) (1988 ed.).

[107]44 Fed. Reg. 11544, Mar. 1, 1979.

[108]See Pub. L. No. 95-599, Title I, sec. 168(a), Nov. 6, 1978, 92 Stat. 2722.

[109]See Pub. L. No. 93-87, Title II, sec. 209(a), Aug. 13, 1973, 87 Stat. 286.

[110]SECRETARY OF TRANSPORTATION, THE 1981 HIGHWAY SAFETY STEWARDSHIP REPORT, REPORT TO CONGRESS (April 1981), p. 2.

[111]621 So. 2d 1174, 1182 (La. App. 3d Cir. 1993).

[112]606 So. 2d. 1069, 1073 (Miss. 1992).

[113]584 N. E. 2d 794, 802 (Ohio App. 10th Dist. 1989).

[114]560 N.Y.S. 2d 962, 965 (Ct. Cl. 1990).

[115]954 F. 2d 1433, 1435 (8th Cir. 1992).

[116]965 F. 2d 155, 160, (7th Cir. 1992).

[117]532 So. 2d 435 (La. App. 1st Cir. 1988).

[118]793 S.W. 2d 139 (Mo. En bank 1990).

[119]532 So. 2d at 438.

[120]*Id.* at 437, citing Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985).

[121]584 N.E. 2d at 803.

[122]469 U.S. 528 (1985).

[123]739 S.W. 2d 139, 141.

[124]606 So. 2d 1069, 1073.

[125]*Id.* at 1074.

[126]954 F. 2d 1433, 1435 (8th Cir. 1992).

[127]965 F. 2d 155 (7th Cir. 1992).

[128]*Id.* at 159, 160.

[129]4 F. 3d 639 (8th Cir. 1993).

[130]*Id.* at 641.

[131]133 F.R.D. 34 (E.D. Mo. 1990).

[132]1993 WL 185620 (D.C.E.D. La. 1993).

[133]746 F. Supp. 50, 54 (D. Kan. 1990).

[134]607 So. 2d 549 (La. S. Ct. 1992).

[135]*Supra* note 118.

[136]*Supra* note 124.

[137]*Id.* at 1073.

[138]*Supra* note 111.

[139]*Supra* note 114.

[140]*Supra* note 117.

[141]*Id.* at 437.

[142]*Id.* at 439 (footnote omitted).

[143]458 So. 2d 448, 452 (La. 1984).

[144]532 So. 2d at 439.

[145]542 F. 2d at 476.

[146]*Supra* note 129.

[147]*Id.* at 641.

[148]*Supra* note 126.

[149]619 So. 2d 1149, 1158 (La. App., 1st Cir. 1993).

[150]*Supra* note 111.

[151]627 So. 2d 170 (La. 1993).

[152]*Id.* at 173.

[153]493 U.S. 146, (1989).

[154]627 So. 2d at 173.

[155]*Id.*

[156]*Id.*

[157]607 So. 2d 549 (La. 1992).

[158]*Supra* note 153.

[159]493 U.S. at 152.

[160]*Id.* at 153, 154.

[161]*Id.* at 159.

[162]*Supra* note 115.

[163]*Supra* note 129.

[164]584 N.E. 2d 794, 802.

[165]532 So. 2d at 440.

[166]*Id.*

[167]793 S.W. 2d at 140.

[168]584 N.E. 2d at 803.

[169]606 N.E. 2d 9 (Ill. App. 1st Dist. 1991).

[170]704 F. 2d 1473, 1479 (11th Cir. 1983).

[171]*Id.* at 1479.

[172]*Id.*

[173]*Id.*

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