

TRANSPORTATION RESEARCH BOARD

Straight to Recording for All:  
Practical Applications of 23 U.S.C. Section 409



# **NCHRP Legal Research Digest 72: Summary of Federal Law Restricting Use of Highway Safety Data in Tort Litigation**

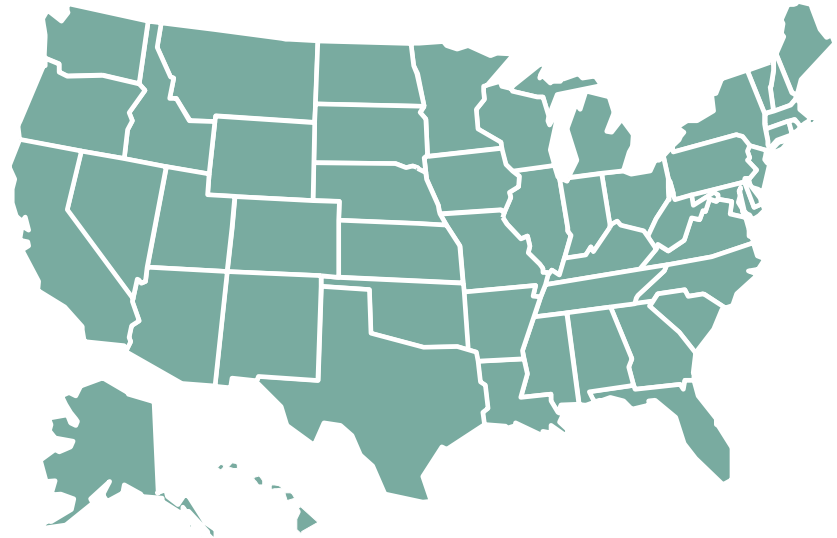
## **NCHRP Project 20-04**



# NCHRP is a State-Driven Program

- Sponsored by individual state DOTs who

- Suggest research of national interest
- Serve on oversight panels that guide the research.

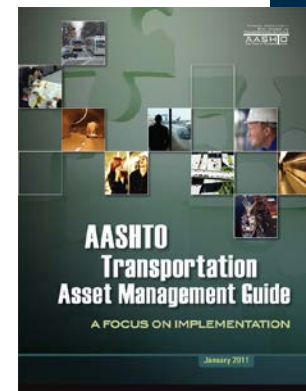
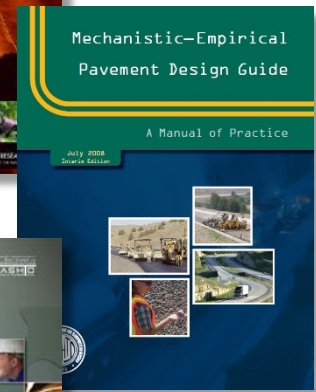
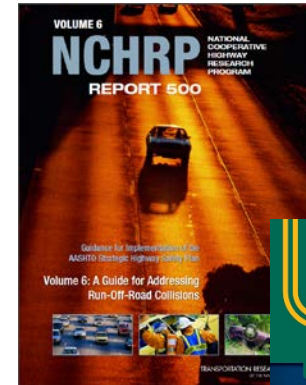


- Administered by TRB in cooperation with the Federal Highway Administration.



# Practical, ready-to-use results

- Applied research aimed at state DOT practitioners
- Often become AASHTO standards, specifications, guides, syntheses
- Can be applied in planning, design, construction, operations, maintenance, safety, environment



# Today's Speaker

- *Terri Parker, Esq.,: Summary of Federal Law Restricting Use of Highway Safety Data in Tort Litigation*



# Summary of Federal Law Restricting Use of Highway Safety Data in Tort Litigation

Terri Parker



# Practical Application of 23 U.S.C. § 409

Legislative History

Examination of Existing Case Law

Results of the Survey

Tips for Practitioners

- How to Apply Law

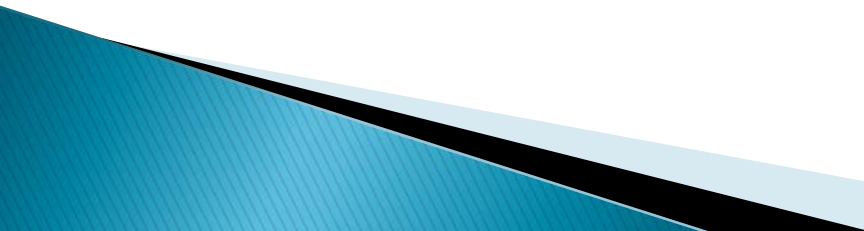
- Documents Typically Protected

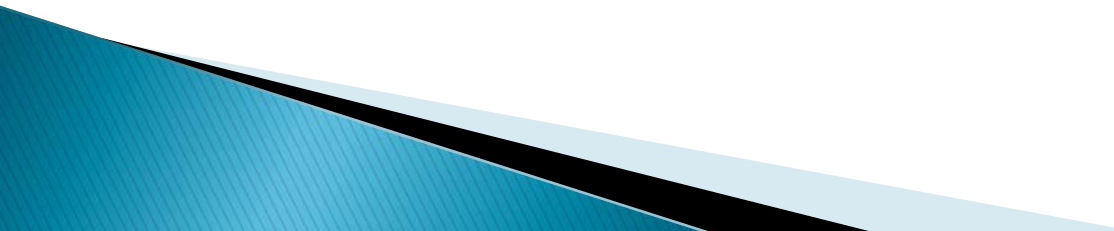
- How to Protect Documents

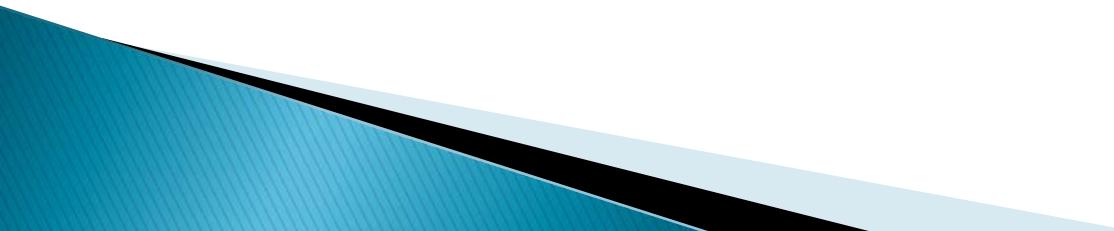
# Legislative History:

- Congress enacted 23 U.S.C. §409, Discovery and Admission as Evidence of Certain Reports and Surveys in 1987
  - 23 U.S.C. §409 prohibits the use of highway safety data created for the purposes related to safety improvements on roads qualifying for federal safety improvement funding in tort litigation



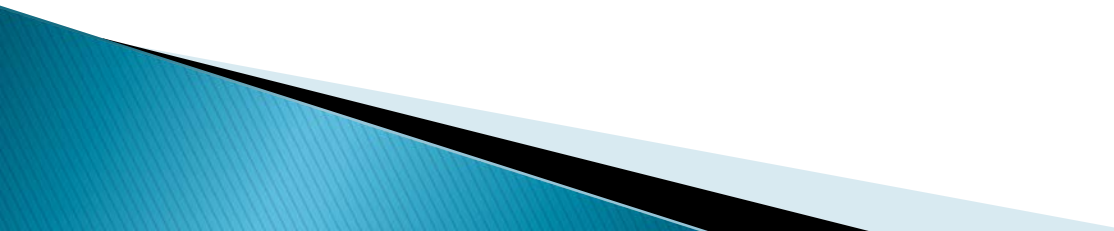
- Transportation agencies must continuously work to improve safety of their roadway systems
  - MAP-21 was enacted in 2012  
(Moving Ahead for Progress in the 21<sup>st</sup> Century)
    - Purpose was to “achieve a significant reduction in fatalities and serious injuries on all public roads”
    - States were to development, implement, and update strategic plans to identify problems on highways and strategies to reduce safety issues.
    - Projects were chosen based on crash experience, crash potential, and crash rate data
    - To qualify for funding states must compile massive amounts of data related to crashes
      - If this data got into the hands of the public millions of dollars in litigation costs for agencies could result
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- In an effort to protect agencies from these lawsuits Congress enacted 23 U.S.C. § 409, protecting documents that were produced as part of the Hazard Elimination Program (enacted in 1973 which required states to identify hazardous locations within their system) from litigation
  - Courts have generally decided that “protected” documents include:
    - Reports
    - Schedules
    - Surveys
    - Lists
    - Other related data
    - Including but not limited to accident reports, notes from site investigations, engineering studies, accident summaries, charts identifying “high hazard” locations.
  - Section 409 has been amended twice in accordance with court rulings
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- 23 U.S.C. § 152, Hazard Elimination Program, enacted in 1973 provided funding to state and local governments for use in improving their most dangerous sections of roads
    - In order to receive funds recipients had to evaluate their roads, identify hazardous locations, assign priorities for the improvements and implement the improvements
    - Some states refused to comply with the requirements because they believed it would expose them to liability
    - Large judgments in civil actions against public entities resulted as the documents generated proof for plaintiffs in pursuit of large judgments
    - Congress responded with 23 U.S.C. § 409 in 1987
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## 23 U.S.C. § 409:

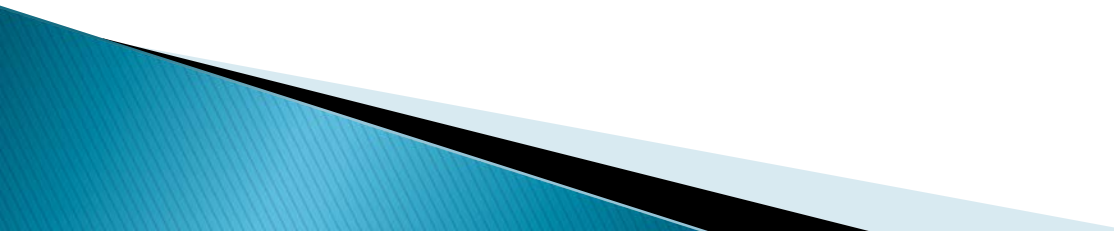
Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway–highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal –aid highway funds shall not be admitted into evidence in Federal or State court 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 original text of the law didn't specifically prohibit discovery of protected safety-related documents resulting in an amendment in 1991 that specifically prohibited the discovery of data
- Another amendment in 1995 was in response to courts continuing to inconsistently apply § 409. Congress believed courts were misinterpreting "data compiled" as applying to only raw data, they failed to look at the purpose of the compilation of that data.
  - Cases of courts misinterpretation include:
    - *Wiedeman v. Dixie Elec. Membership Corp, Ex Parte Alabama Highway Department, and Indiana Department of Transportation v. Overton*

## Present form of 23 U.S.C. § 409:

Notwithstanding any other provisions of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway–highway crossings, pursuant to 23 U.S.C. §§ 130, 144, or 148 of this title or for 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 such other purposes in any action for damages arising from any occurrence at a location mentioned in such reports, surveys, schedules, lists, or data.



The revamped version of 23 U.S.C. § 409 protects the data collected or compiled if either

(1) for the safety enhancement purposes identified in the law

**or**

(2) for the development of any highway safety construction improvement project that could be implemented utilizing federal safety funds, the information is protected under § 409

# Existing Case Law

- *Coniker v. State of New York*
  - Court aware of potential for injustice to individuals pursuing claims against the state

## A. Preemption of State Law

- *Martinolich v. Southern Pacific Transportation Co.*

## B. Raw Data

- *Pierce County v. Guillen*
  - Supreme court overruled multiple inconsistent lower court interpretations of the law, setting out guidelines consistent with the plain language of § 409



## C. Typically Protected Documents

- Language of the law states “reports, surveys, schedules, lists, or data” compiled or collected to evaluate roadway locations and plan for safety improvements are protected from disclosure
- Includes documents that may reflect mental impressions, conclusions, and opinions of [state transportation department]...
- **Hazard Rankings**
  - *Sawyer v. Illinois , Claspill v. Mo. Pacific, Dickerson v. CSX Transportation, Dugle v. Norfolk Southern R. Co.*
- **Surveys and Studies Used to Identify Potentially Hazardous Locations**
  - *Robertson v. Union Pacific, Boyd v. National RR Passenger Corp., Carso v. CSX Transportation, Illinois Central Railroad Company v. Cryogenic Transportation Inc.*
- **Applications for Federal Funding**
  - *Van Osdol v. DOT*

- **Formulas Used to Determine Hazardousness**
  - *Robertson v. Union Pacific*
- **Correspondence by Officials and Others Requesting Safety Improvements**
  - *Reichert v. State Department of Transportation and Development, Miller v. Bailey, Estate of Bloodworth v. Illinois Central R.R. Co.*
- **Reports of Routine Investigations**
  - *Coniker v. State of New York*

#### **D. Protected Data Available from Other Sources**

- While it has been established that safety documentation and raw data are protected in the files or “hands” of a public agency that has collected that information for § 409 purposes that information in the hands of another agency may NOT be protected
  - *Lockett v. State of Louisiana Dept. of Transportation and Development, Long v. Department of Transportation and Development, Reichert v. Louisiana Dept. of Transportation, Goza v. Parish of West Baton Rouge, Gendler v. Batiste*

## E. Waiver of Privilege

- *Walden v. DOT, Vega v. State of New York, Renfro v. Burlington Northern and Santa Fe R.R., Dugle v. Norfolk Southern R. Co.*

## F. Public Records Requests

- State and Local agencies occasionally receive requests for protected documents from newspapers and other media for protected documents, although a public agency may be able to lawfully deny such a request for litigation purposes, the information usually must be produced pursuant to an appropriate public records request by the media or a member of the public
- *Telegram Publishing Co. V. Kansas Department of Transportation, Newsday Inc. v. State Department of Transportation, Van Osdol v. DOT*

## G. Influence of Railroad Cases

- Congress enacted the Railroad Safety Act in 1970, granting comprehensive authority to the U.S. Dept. of Transportation to oversee the safety practices and equipment of railroad carriers.
  - Amended in 1973 mandating states develop program for improving safety of roadway/railway crossings based on Federal Requirements and report that progress to the Secretary of Transportation annually
  - Railroads, state, and local agencies have similar interests in protecting sensitive data, but do not share the same statutory protections
    - States obligated to submit crossing reports under 23 U.S.C. § 130 which is referenced in § 409, however railroads submit their crossing reports pursuant to 23 U.S.C. § 20160 which is not referenced in § 409
    - Some courts do not believe railroad submittals are protected as they are not referenced in § 409
  - *Zimmerman v. Norfolk Southern Corp.*

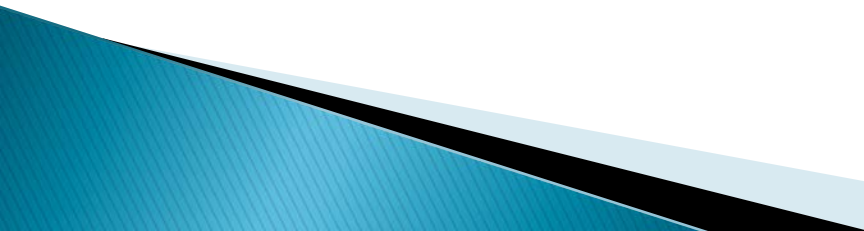
## H. Foundation to Establish State's Protection

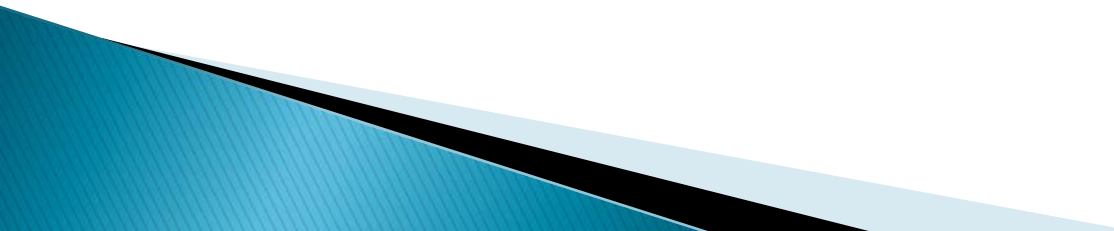
- Agencies must prove elements of § 409 in order to protect internal documents from discovery and admission at trial, in order to do so a proper foundation for the evidence must be established
- *Zimmerman v. Norfolk Southern Corp., Department of Transportation v. Superior Court of Solano County, Carpio v. State of New Jersey, Browne v. State of Louisiana through the DOT, Rodenback v. Norfolk and Western Rwy., Gremillion v. Kansas City Southern Railway Co., Illinois Central Railroad Company v. Cryogenic Transportation, Inc., Zimbovskiy v. Union Pacific R.R. Co., Madden v. Indiana Department of Transportation*

## I. Trial Strategy

- While it is likely the trial court will recognize the preemptive effect of § 409 and protect the internal safety data from admission into trial counsel must be prepared to address the evidence if it is used in court.
- *Carpio v. State of New Jersey, Renfro v. Burlington Northern and Santa Fe R.R., Hussey v. Russell, Miller v. Utah Department of Transportation, Robertson v. Union Pacific, Dickerson v. CSX Transportation, Vega v. State of New York, Corles v. State*

# Results of Survey

- A survey was sent to all 50 states and the District of Columbia in an effort to explore their experiences with the law and provide data and insight not available from published opinions.
  - Responses were received from 28 states
    - Included in those responses were Motions in Limine, Objections to Discovery, trial briefs, and other motions in opposition to the release of protected information
    - Some agencies stamp documents stating the document was compiled for purposes set out in § 409 in an attempt to ensure the data was not later used against them, none of those agencies reported the documents were able to be used against them later
    - Some states require requestor to sign a statement stating the information gathered would not be used against them later, and refused to provide documents unless the statement was signed, one state, Wisconsin said there has been no challenge to the statement
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- Most agencies indicated using § 409 as basis for court filings such as discovery objections, trial briefs, motions to quash, and motions in limine; responses revealed counsel was successful in protecting the safety data – but if they were faced with unfavorable rulings the agencies did not appeal those rulings
  - States use various methods for document requests
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# Tips for Practitioners

Application of the Law

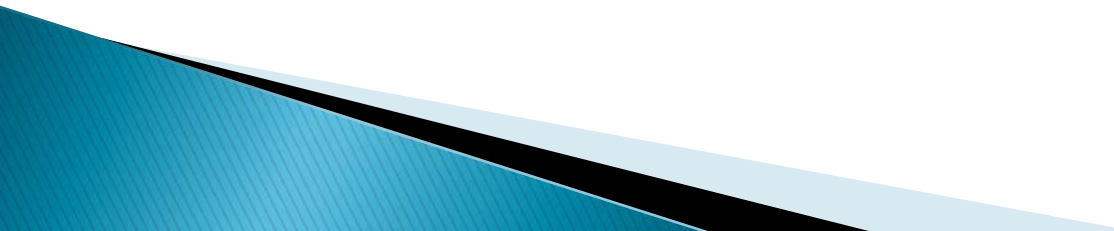
Providing the Foundation for the Protection of Data

Objections used in Discovery

Public Records Requests

Documents Typically Protected

How to Protect those Documents





# CONCLUSION

