“Is our Data Protected? A Discussion of 23 USC 409”

In Memory of James R. Dawson
Presented by Judy Williams, Assistant Attorney General, State of Louisiana, Department of Justice
Why does a state collect safety data?
• To enhance highway safety

• To identify potentially hazardous locations

• To prioritize funds

• To obtain federal funding for highway safety projects

• Federally required to be collected
“...reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites pursuant to sections 130, 144, and 152 or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds

...pursuant to sections 130, 144, and 152

...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...

or considered for other purposes in any action for damages...”
• §409 ensures deliberative spending of federal funds

• Protects the public by ensuring that safety measures are routinely explored

• Fosters the free flow of safety-related information
Important to note

- This does not make the documents private, secret, or non-public.
- It only prohibits their discovery through a suit for damages and their use or admissibility in such a suit.
According to the U.S. Supreme Court in *Pierce County*, 123 S.Ct. at 730-731,

§409 protects

- the information that the governmental agency compiled for §152 purposes
- any information that the agency collects from other sources for §152 purposes
In *Newsday Inc. vs. State DOT*

§409 does not prohibit disclosure of priority intersection and highway location data where

- the information is sought by a newspaper
- that is not engaged in a court proceeding involving an accident occurring at a location mentioned in such data
Long v. DOTD

- Correspondence between local village and DOTD concerning an upgrade to an off-system railroad grade crossing is protected under 23 USC §409
Long v. DOTD

The Court found, “Hence, we find these three letters represent information necessary for the commencement of the upgrade for this roadway/railroad crossing, and thus, the letter effectuate the purpose of the federal safety program. Taken as a whole, and in the context of the framework of the purpose of §409, we find the letters were compiled and collected by the DOTD for purposes related to funding through §130, a federal safety program. Thus, we find the letters are protected from discovery and are inadmissible under 23 U.S.C. §409.” Long at 10.
The purpose is to encourage states to actively and thoroughly investigate the railroad crossings within their borders, free from the fear that data compiled to serve this purpose might be later used to establish tort liability. *Long* at 8.

This Court has instructed courts not to rule on the admissibility of documents in a vacuum, but rather to examine the documents to determine whether the information was amassed pursuant to the federal highway safety evaluation programs. *Id.*
Preemption

The principle that a federal law can supersede or supplant any inconsistent state law or regulation.
The Louisiana Supreme Court in *Wiedeman* found that 23 U.S.C.A. §409 preempts Louisiana state law.
- Additional requirements have been added by Shanklin
- To preempt state law the federal regulation must cover the same subject matter and not merely touch upon or relate to the subject matter,
- thus preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.
So –

Can crash reports be protected under §409?
If so, how?
Proof of the crash report’s §152 purpose:

1. Historical connection of the crash report and improving highway safety

2. Development of the crash report in response to federal requirements

3. Current use of the crash report in improving highway safety

4. On-going development of improved data collection (i.e., FHWA video, on-board computers, etc.)
Suggestions

- Assert the protection afforded by 23 U.S.C. §409
- Begin to assert the protection afforded by 23 U.S.C. §402(k)(1)
- Insure that the attorneys defending the state are made aware of appropriate statutes and case law
- Establish a network of individuals, engineers and attorneys, to keep up to date with changes and new cases
### TOTAL SUMMARY

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### ROAD HAZARDS HISTORY

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