

GUIDELINES FOR USE OF THE 409 FILE STAMP
23 U.S.C. Section 409
November 7, 1999

What is Section 409?

In 1987, Congress determined that Federal record keeping requirements were subjecting state transportation agencies to inappropriate litigation and stifling the open discussion of safety issues. Congress enacted 23 United States Code (U.S.C.) Section 409 to remedy these problems. Section 409 protects from discovery four broad categories of information collected or compiled for safety-related purposes.

Three programs created by 23 U.S.C. are specifically covered by section 409:

- a. Railroad Crossings- Section 130
- b. Bridge Replacement and rehabilitation- Section 144
- c. Hazard elimination- Section 152

All records related to these programs are protected from disclosure.

The fourth category involves information collected for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds[.]⁶ It is not necessary that the project actually be completed with Federal funds, merely that the use of federal funds was a reasonable possibility at the time the records were created. This category requires the record keeper to carefully exercise her or his judgment.

Why are we using a 409 stamp?

Until the state lost sovereign immunity the department did not have the current concerns about disclosure of these records since no one could bring action against us. Now that we are no longer protected by sovereign immunity records are subject to discovery in litigation. It is important for the department to identify records that are protected by 23 U.S.C. Section 409.

Section 409 is not intended to prevent the release of all information about a project. Information about when, where, and how a project was constructed, commonly called as-built or as-planned documents can usually be released unless it is related to section 130, 144, or 152. However, information as to why it was built a certain way, why it was not built other ways, and safety studies of that project or other projects is protected. As a general rule the more general the project, the less likely it would be 409 protected.

The optimum time to determine if a document is 409 protected is at the time of creation and original filing. The DOT employee creating the records is the one most qualified to determine if the document is 409 protected. This is necessary due to the fact that persons creating the file may not be available years later, when the copies of the file are requested.

Guidelines on when to use stamp:

1. If the fundamental purpose for a project is safety improvement, the entire file and all documents related to the project are subject to section 409 and should be appropriately marked.
2. If identifiable portions of a project are developed solely for safety improvement, the corresponding portions of the file and all documents related to those portions are subject to section 409 and should be appropriately marked.
3. If safety is an important motivator for the project or portions of the project, records must be categorized within the project file. Those records concerning safety concerns and the reasons why the department chose certain methods to improve safety are subject to section 409 and should be appropriately marked. Records as to what work is performed, by whom, where, when, how, and at what cost remain open for such projects.
4. Following are records that we currently know will be protected and will require the 409 stamp.
 - a. Safety reviews
 - b. Safety improvement program or project
 - c. HES project
 - d. 90-1 surveys
 - e. Project concept reports
 - f. Railroad, grade crossing, and related safety information
 - g. Traffic signal inventories and inspections
 - h. Skid testing program
 - i. High crash location analysis.
 - j. Crash analysis
 - k. Crash reports
 - l. Crash report database
 - m. Traffic operations studies
 - n. Data involving litigation
 - o. Executive summaries
 - p. Guardrail projects
 - q. Slope flattening
 - r. Pipe extensions

- s. Bridge inventory
- t. Guardrail inventory
- u. Implementation of safety projects
- v. BR projects and design documents
- w. Drive slopes if used for future planning
- x. Incident reports-if planning some safety project
- y. Bridge plans, every sheet
- z. Railroad plans

How do I use it?

Divisions and districts are to identify records falling in the protected category. Such records must be stamped with the following stamp:

23 U.S.C. 409
NDDOT Reserves all Objections

Every division and district should have at least one 409 stamp for use. The stamp was designed to continue to protect the records even if they have been released. By identifying 409 documents at the point of creation with this stamp we have reserved the right to object to having those documents entered as evidence in litigation.

The purple color was chosen to make it distinctive on the paper document and also still microfilm.

We also realize some documents do not have a lot of extra white space so this stamp may be placed in a right or left margin if that is the only place there is room.

- A. Place the stamp on the top of document below the green stamp if room allows.
- B. If there is no room, place it in the right margin, if possible.
- C. Place it on every page of the plan or document that is protected under 409.
- D. If the entire document is protected, place on every page of the document. Once the documents are unbound for filming, each page needs to be identified to ensure protection.
- E. If only select pages are 409 protected, place the stamp on the first page or title page of a document and handwrite below it which pages are protected. This will ensure that if a report is requested, the person copying the entire report will know there are selected pages to protect.

Guidelines on When to Release Records:

Follow procedures outlined in Department Policy Memorandum Section V 2-1 and 2-1.1,
Request for Records

Why do they want it? What is it going to be used for?

Engineering purposes-outside consultant- 409 records can be released.

Newspaper or political purpose- 409 records can be released.

Court action or actions for damages-409 records cannot be released.

If there are questions about releasing 409 documents, you should contact your division or district records coordinator first, and then the Records Management Manager in the Information Technology Division.

Releasing 409 Documents to Other State Agencies

Non-department entities such as political subdivisions or consulting engineers may request our 409 material. If the actions of the non-department entities are furthering a department goal or objective, the information should be provided. Under some circumstances it may be appropriate to obtain an agreement from the requesting party to maintain the 409 protection. Under some circumstances, however, the information may need to be disclosed, in which case the department should pay special attention to limiting the information to that which is absolutely essential for the purposes for which it is compiled or obtained.

It is important that when 409 documents are released to other state or federal agencies, such as the Highway Patrol or the Federal Highway Administration, that they are aware of 23 U.S.C. 409 and continue to protect the record as we would.

Following is an example of a statement that should accompany any 409 records released:

ANDDOT gathers and maintains____(type of record) for purposes of safety improvement. As such, it is exempt from discovery and introduction into evidence pursuant to 23 United States Code, Section 409. Therefore, NDDOT entrusts this information to the _____(name of agency) with the understanding that it be used only for the requested purposes, and not distributed or released outside of the _____(name of agency), unless required by law after thorough research."