

CENTER FOR AUTO SAFETY

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May 29, 2006

VIA FAX AND FIRST CLASS MAIL

Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
West Building, W41-227
Washington, DC 20590

Dear Sir or Madam:

This is an appeal pursuant to 5 U.S.C. § 552(a)(6)(A)(i) and 49 C.F.R. § 7.21. By letter dated March 27, 2008, the Center for Auto Safety ("CAS") filed a Freedom of Information Act ("FOIA") request with the National Highway Traffic Safety Administration ("NHTSA") seeking the following:

The 2003 review referenced in the attached article "Cellphone Law May Not Make Roads Safer," and any documents, including powerpoint presentations, related to the review. The article states, "The letter was based on a lengthy review of worldwide research on driver distraction conducted at the National Highway Traffic Safety Administration, a branch of the Department of Transportation. In that 2003 review, the agency's researchers for the first time estimated fatalities linked to cellphone use by drivers, putting the toll at 955 deaths in 2002." CAS has been unable to locate the referenced study. In addition, CAS requests that the study and all related documents be placed in docket NHTSA-2007-28442.

NHTSA provided CAS with a response by letter dated April 29, 2008. The response indicates that NHTSA found responsive documents including the 2003 review. These documents were withheld pursuant to exemption (b)(5) of the FOIA. NHTSA's rationale for withholding these documents was "because they contain internal, predecisional, deliberative information. The release of this information would reveal advice, opinions or recommendations of agency officials and would have a chilling effect on the decision-making process." This appeal seeks a review of the agency's determination that these materials are protected under the exemption (b)(5), and the public release of the requested records, including the 2003 review in its entirety.

Exemption 5 protects from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an

agency in litigation with the agency." Exemption 5 incorporates the deliberative process privilege. Documents that are commonly encompassed by the deliberative process privilege include "advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

NHTSA's response failed to establish the 2003 review and associated documents were anything more than research and data on a vehicle safety issue that is as hazardous as drinking and driving. Furthermore, NHTSA regularly releases the results of similar driver distraction and cell phone usage surveys to the public. Based on this, we fail to see how the release of a research study would in any way jeopardize the deliberative and/or decision-making process of the agency.

Additionally, Exemption 5 requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative material on the other. Factual material contained in deliberative memoranda is not exempt from disclosure if the factual material is severable. See Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973). See also, e.g., Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 868 (D.C.Cir.1980)(distinguishing factual and predecisional or deliberative documents); Assembly of State of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 923 (9th Cir. 1992)(census records purely factual and in no way divulge the deliberative process).

The CAS FOIA request specifically seeks the "lengthy review of worldwide research on driver distraction conducted at the National Highway Traffic Safety Administration, a branch of the Department of Transportation. In that 2003 review, the agency's researchers for the first time estimated fatalities linked to cellphone use by drivers, putting the toll at 955 deaths in 2002." The data on which the 2002 fatality estimate was based qualifies as the type of factual material contemplated in Mink. The data, along with any other factual material in the review and related materials, should be disclosed.

Additionally, much of the "worldwide research" used to make the fatality estimate did not originate within NHTSA, contains no policy recommendations or deliberative material whatsoever, and therefore can in no way be deemed to be part of the deliberative or policy-making process. Any non-agency research used in the 2003 review should be released, and any portions of the 2003 review that reference this research should be released as well.

Thank you for your time and consideration. Should you have any questions concerning this appeal, please do not hesitate to contact me at (202) 328-7700, Ext. 113. We look forward to your response.

Sincerely,



Michael Brooks
Staff Attorney