

March 31, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

This calls your attention to a violation of the openness policies for federal agencies expressed by your Department and President Barack Obama. As detailed below, the National Highway Traffic Safety Administration (NHTSA) will not release information on Death and Injury Inquiries to vehicle, tire and equipment manufacturers unless a Freedom of Information Act (FOIA) request is made. Even when confronted with a FOIA, NHTSA uses fee requests and delays to frustrate compliance with FOIA.

In the aftermath of the Ford Explorer/Firestone tire safety crisis that resulted in over 300 deaths on the nation's highways, a bipartisan Congress passed the TREAD Act in November 2000 which established an Early Warning Reporting (EWR) System within NHTSA to detect vehicle safety defects before they erupted into national issues.¹ One of the most important features of EWR is a requirement that manufacturers submitted quarterly reports on death and injuries claimed to be caused by defects.² These reports are summaries only submitted in electronic formats with little more than date, make/model/year, location & component associated with the claim. Where NHTSA needs more information on the death or injury claim, it sends a Death/Injury Inquiry (DI) information request to the manufacturer for more information.³

Unlike other information requests sent in defect investigations which are readily available and reported online in NHTSA website, there is no information readily available on DI's. As a result the public cannot tell whether NHTSA is using this most valuable tool given it by Congress to detect and prevent widespread defects in motor vehicles. The fact that there is any information available on EWR submissions by vehicle, tire and component manufacturers is due to a lawsuit filed by Public Citizen, in which the Court of Appeals for the District of Columbia effectively required NHTSA to release some EWR data.⁴ Even though summary Death and Injury claims were released, the agency stubbornly kept DIs secret. When CAS first learned of DIs in the fall of 2009, and asked that they be made public like other information requests, NHTSA told us to file a Freedom of Information Act (FOIA) request.

¹ 49 U.S.C. §§ 30101-30170.

² Id at 30166(m).

³ See p. 4 of <http://www.autosafety.org/sites/default/files/DI%20FOIA%20Request%2011-2-2009.pdf> for an example of a DI information request.

⁴ Public Citizen, Inc. v. Rubber Manufacturers Ass'n, 533 F.3d 810 (D.C. Cir. 2008).

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CAS first filed a FOIA request for information regarding DI's and other EWR-related investigations on November 2, 2009.⁵ NHTSA responded that the search time for this information would be 135 days, and that we would be expected to pay fees of \$55,000 before receiving a response.⁶ After narrowing our request to ask simply for a list of DI inquiries made by NHTSA to vehicle manufacturers, we were provided with a spreadsheet file listing all of the DI inquiries of summary death and injury summary reports which NHTSA has chosen to pursue. The substantive response was not provided until April 15, 2010.⁷

In May 2010, CAS asked NHTSA's Office of Defects Investigation for an updated list of DIs on the mistaken assumption we would not have to file another FOIA for a category of information that had been ruled was not exempt under FOIA. CAS was told it had to file another FOIA. Accordingly, on June 9, 2010, CAS filed another FOIA request seeking any new DI inquiries that had been initiated after our previous request. We were provided with a printed and improperly redacted copy of the files⁸, and were forced to appeal the agency's decision⁹ before receiving the actual unredacted spreadsheet files on September 22.

On February 23, 2011, CAS sent NHTSA's EWR division an email request for an updated version of the DI spreadsheet file. We were again told that all requests for DI information from the agency must be filed as a FOIA and submitted to NHTSA's chief counsel. CAS filed the FOIA request on March 1, and to date have not received a response.¹⁰ CAS has brought this matter to the attention of Office of Chief Counsel of NHTSA and has received no response.

Public access to DI's is the only way that the public can determine whether NHTSA is using this most valuable tool to detect defects given to the agency by Congress in the TREAD Act. We have already seen two DOT Inspector General Reports criticizing the agency's implementation of EWR under the TREAD Act.¹¹

The limited access CAS has had to DI's under EWR through FOIA shows NHTSA does not use the EWR death and injury database. Out of 301 EWR summary reports that could be linked to Toyota SUA through 2009, NHTSA requested records on only 16 cases. In just the first three quarters of 2010, Toyota submitted an additional 1,904 reports of deaths and injuries claims due to Vehicle Speed Control, the category under which SUA complaints should be filed.¹² This is the best available information but NHTSA has not requested it or analyzed it.

⁵ <http://www.autosafety.org/sites/default/files/DI%20FOIA%20Request%2011-2-2009.pdf>

⁶ <http://www.autosafety.org/sites/default/files/NHTSA%20DI%20Response.pdf>

⁷ <http://www.autosafety.org/sites/default/files/EWR%20Response.pdf>

⁸ <http://www.autosafety.org/sites/default/files/DI%20List%20FOIA.pdf>

⁹ <http://www.autosafety.org/sites/default/files/2010%20DI%20Tracking%20Appeal.pdf>

¹⁰ <http://www.autosafety.org/sites/default/files/DI%20Tracking%203-1-11%20REQUEST.pdf>

¹¹ See <http://www.autosafety.org/sites/default/files/ODI%20Review.pdf> and <http://www.autosafety.org/sites/default/files/DOT%20IG%20Audit.pdf>

¹² See <http://www.autosafety.org/sites/default/files/EWR%202010%20Q1%20Toyota.pdf> 2010 Q1, <http://www.autosafety.org/sites/default/files/EWR%202010%20Q2%20Toyota.pdf> 2010 Q2, and <http://www.autosafety.org/sites/default/files/EWR%202010%20Q3%20Toyota.pdf> 2010 Q3

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Even if NHTSA requested this information, you may not get the full picture because Toyota has miscoded some SUA claims and has not put them in the Vehicle Speed Control Category. One of the more prominent SUA cases is that of Bulent Ezal who was about to park his 2005 Toyota Camry for lunch when it was suddenly accelerated over a curb, plowed through two decorative fences and plunged over a 70-foot cliff beside the Pacific Ocean, killing his wife. The picture below is that of the Camry at the bottom of the cliff. Here's how Toyota reported this claim under EWR:

Make: TOYOTA
Deaths: 1
Model: CAMRY
Injuries: 0
Model Year: 2005
VIN: 4T1BF32K75U...
State/Foreign Country: CA
Incident Date: 02/25/2007
Sequence ID: 26
Reported Components: Service Brake, Air Bags, Seat Belts



The Ezal crash also shows the value the public can provide to NHTSA by correcting erroneous and misleading information provided by manufacturers under EWR. The public can supplement the record with new information establishing a defect but only if it knows what information NHTSA has already obtained from the manufacturer. This is not the only time a manufacturer has supplied erroneous EWR information. In the Toyota 4Runner steering rod relay recall, 05V-389, Toyota coded a EWR summary report on a steering rod relay fracture that led to a rollover crash with 3

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injuries as rollover and power train but not steering. Had the public known that NHTSA had not done a DI on this EWR injury report, it could have identified and corrected the miscoding earlier.

One of the seminal defect cases litigated by the Justice Department, *United States v General Motors Corp.*, 417 F.Supp 933 (D.DC 1976), aff'd 565 F2d 754 (DC Cir. 1977), established the value of citizen input. GM alleged that Rochester Quadrajert carburetors popped a plus and leaked fuel only within an early low mileage. After NHTSA closed the investigation, consumer groups surveyed owners whose carburetors had leaked fuel and found that many occurred beyond the mileage that GM said carburetors no longer failed. NHTSA reopened the investigation and obtained a recall. The DC Circuit pointed out:

In this case it is clear, with the gift of hindsight, that this purpose would have been best served had a notification order been issued some seven years ago. At that time NHTSA, relying substantially on information provided by General Motors predicting a substantial decrease in future carburetor failures, decided not to require notification. General Motors' predictions later proved wholly inaccurate, and the order was finally issued in 1974. 556 F.2d at 759.

Only by having full online access to information requests in DIs just as it has full online access to information requests in NHTSA Engineering Analysis and Preliminary Evaluations can the public understand and hold NHTSA accountable for the duties charged to it by Congress under the National Traffic and Motor Vehicle Safety Act of 1966 and its subsequent amendments including the TREAD Act in 2000.

NHTSA's actions are inconsistent with directives issued by the President as well as the office of the Attorney General. On January 21, 2009, President Barack Obama issued two memorandums to the heads of executive departments and agencies, calling for transparency and openness both in the operation of government and in the administration of the Freedom of Information Act. The President's memorandum on Transparency and Open Government¹³ stated, "My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use." Additionally, the memorandum stated:

Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector.

The President's memorandum regarding the Freedom of Information Act¹⁴ stated:

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

Furthermore, in a March 19, 2009 memorandum¹⁵, you state:

Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information

¹³ http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/

¹⁴ http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/

¹⁵ <http://www.justice.gov/ag/foia-memo-march2009.pdf>

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not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

Information of the type contained in the DI spreadsheets we seek is a perfect example of material that can be rapidly disclosed to the public without the burdens imposed on all parties by the FOIA process. The spreadsheets could be emailed directly upon request or placed on the agency's EWR webpage. As it stands, we are forced to file a FOIA request and wait months for information that does not fall within the scope of any FOIA exemption. This is clearly not the standard of efficiency and transparency envisioned by the Administration in its communications with executive agencies.

We ask that the Department of Justice take action to bring the National Highway Traffic Safety Administration into compliance with the directives of President Barack Obama and the Department's own guidelines for implementing that policy. Specifically, we seek that all Death and Injury information requests to manufacturers and responses thereto be placed on NHTSA's website just as are all other information requests in defect and non-compliance investigations.

Sincerely,

Clarence Ditlow
Executive Director

cc: Senator Jay Rockefeller
DOT Inspector General Calvin Scovel
NHTSA Administrator David Strickland