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INVESTIGATIONS**NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION**

Secrecy is the sine qua non of most investigations by the National Highway Traffic Safety Administration and is compromising the agency's mission, says safety expert Sean E. Kane in this BNA Insight. The author offers examples of what he calls the agency's "sub-rosa" activities—unofficial defect investigations, needlessly redacting public documents, and delaying the release of important investigatory material in high-profile cases—and links these actions to "constant industry pressure."

What Doesn't NHTSA Want You to Know About Auto Safety?

BY SEAN E. KANE

A crumpled Chevy Volt bursts into flames in a Wisconsin storage facility. GM's flagship electric vehicle is damaged in a New Car Assessment Program (NCAP) pole impact test.

The fire, apparently caused by intrusion into the lithium ion battery which ruptured the coolant line, con-

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sumed the Volt and burned three other vehicles parked nearby. Five months later, investigators ran three more tests on the battery alone to simulate a crash impact. One of the batteries caught fire; another emitted sparks and smoke.

Just after Thanksgiving in 2011, NHTSA opened a low-level defect investigation—Preliminary Evaluation (PE) 11-037. The agency put no documents in the public file, save for what is called the opening resume—a brief statement of the defect under investigation, a preliminary count of complaints—even though, as it later became apparent, NHTSA and General Motors had been secretly investigating the fire together for five months.

Instead of information, the agency offered an endorsement.

"NHTSA continues to believe that electric vehicles have incredible potential to save consumers money at the pump, help protect the environment, create jobs and strengthen national security by reducing our dependence on oil," the agency assured consumers as it announced the investigation.

The Volt was a high-profile green energy initiative, a marquee car for an American automaker struggling out of bankruptcy with the backing of the U.S. government. And when the news of the under-the-radar probe broke, the GOP pounced. Did the NHTSA coverup what one Fox News anchor called "explosive data" to protect the government's investment in GM? California Congressman Darryl Issa held a hearing on the topic and the Volt

conspiracy story churned through the news cycle for a couple of days.

Secrecy Is Sine Qua Non Of Most NHTSA Investigations

To the unschooled, politics seemed like a plausible interpretation of the events, but those who follow the agency closely were hardly surprised. Secrecy is the sine qua non of most NHTSA investigations.

The National Highway Traffic Safety Administration has a vast and difficult job—researching the latest vehicle technologies, writing new regulations and enforcing the ones on the books, educating the public about safe driving, investigating defects—to name a few. It must execute this complex agenda with inadequate funding and staff. While the public relies on the agency's work without paying much mind to the process, the manufacturers are scrutinizing its every move, with a laser-like focus on influencing the outcome. According to the public records found in dockets and public investigation and recall files, there are no proposed regulations that industry, with its phalanx of lobbyists and corporate deep pockets, does not oppose. And there are no vehicle problems that rise, in the minds of manufacturers to the level of a safety-related defect.

The constant industry pressure, perhaps, best explains why behind those public records lies another layer of communications, negotiations and extensions of professional courtesies that remain private and closely held by the agency. These *sub rosa* activities include unofficial defect investigations, allowing manufacturers to hide information behind a Freedom of Information Act (FOIA) exemption for Confidential Business Information, redacting public documents related to defects and recalls with a heavy hand, delaying the release of important supporting investigatory material in high-profile announcements, until after the mainstream press has moved on, failing to place public documents in the public file and forcing citizens to submit FOIA requests for them. The agency itself resists disclosing anything it had not already released via a FOIA, claiming that such information can be legally withheld because it is “pre-decisional,” meaning it was used to formulate an agency decision. (This interpretation is overly broad—“pre-decisional” documents are meant to cover agency memoranda regarding the debate on the decision itself, not all factual information supporting it.)

Clarence Ditlow, executive director of the Center for Auto Safety, also points to another problem.

“The agency doesn't have the resources it could and should have,” he says. “If you look at the opposition from the auto manufacturers, which is much more intense, it's easier for the agency to go along with manufacturers and see if anyone makes a fuss on the public side. The manufacturers have people whose sole responsibility is to manage NHTSA and contain the scope of recalls.”

In October 2011, the Department of Transportation's Office of the Inspector General took note of the agency's penchant for secrecy. The OIG released an audit, initiated on the eve of a congressional investigation into Toyota Unintended Acceleration, and later expanded, to assess the effectiveness of the agency's Office of Defects Investigation's processes for identifying and addressing safety defects. The OIG specifically found fault with ODI's lack of documentation and transparency:

“Without comprehensive documentation of pre-investigation activities, ODI's decisions are open to interpretation and questions after the fact, potentially undermining public confidence in its actions.” Because NHTSA routinely fails to document meetings with manufacturers, OIG recommended “a complete and transparent record system with documented support for decisions that significantly affect its investigations.”

Secrecy Not a New Problem

In 1982, the Insurance Institute for Highway Safety (IIHS) reported that two subcommittee chairmen of the House Science and Technology Committee accused then-NHTSA Administrator Raymond Peck of holding secret meetings with the Motor Vehicle Manufacturers' Association on an upgrade to the side-impact regulations, which eventually killed a rulemaking.

Janette Fennell, founder and executive director of Kids and Cars, recalls her efforts to read the agency's “research” on trunk entrapment. Fennell's career as a safety advocate began after a harrowing personal experience. In 1995, she and her husband were locked into the trunk of their Lexus by a gunman who left their baby son in his car seat on the front steps of their San Francisco home and stripped the couple of their jewelry and bank cards. Fennell found the trunk latch, and her husband was able to snip the cable, allowing the pair to escape. Their son was unharmed; the robbers were never caught. Fennell turned this experience into a crusade—eventually successful—to require automakers to install trunk releases in all automobiles.

One of the pieces of information she—and later, the investigative news show *Dateline*—sought was the factual underpinning of NHTSA's denial of a 1984 petition to require emergency trunk releases.

“They always hide behind confidentiality,” she says. “I'm not savvy enough to know if they have something or not. I tried to get the study, but they wouldn't give it to me. When *Dateline* pushed them for it, then they said they had lost it.”

In one of the first acts of his presidency, Barack Obama issued, in January 2009, Executive Orders directing all federal agencies to “adopt a presumption in favor” of FOIA requests, and called on the Office of Management and Budget to issue recommendations on making the federal government more transparent.

“The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears,” the memo said.

For NHTSA-watchers, this was welcome news. During the tenure of President George W. Bush, NHTSA appeared to erect odd and unnecessary walls between it and the public it served. Journalists, for example, were puzzled by a policy under former NHTSA Administrator Nicole Nason, which prohibited any agency employee from speaking with the press, even on technical matters which required expert knowledge. In August 2007, Christopher Jensen, who writes the *Wheels* column for *The New York Times* complained: “The agency's new policy effectively means that some of the world's top safety researchers are no longer allowed to talk to reporters or to be freely quoted about automotive safety issues that affect pretty much everybody.”

In the fall of 2006, political appointees to the agency tried to shutter the NHTSA Technical Information Services (TIS) Reading Room, in advance to a move to a new building the following year. The TIS library is often the only resource for access to historical documents related to the agency's regulatory, investigative, and policy history. It was only when a coalition of research, advocacy, and library organizations pressed for its preservation that then-Chief Information Officer Margaret O'Brien agreed the library would stay in operation.

The agency also rejected an offer to publicize its consumer complaint database, even as the numbers of complaints—which the Office of Defects relies upon in monitoring defect trends—began to drop precipitously. When Safety Research & Strategies found that Vehicle Owner Questionnaire reports submitted by motorists to NHTSA had decreased by nearly 40 percent in a two-year period, it pitched the story to a national news producer, who offered to put together a broadcast story. The agency however, refused to provide an agency representative for an on-camera interview, effectively killing the story.

And of course, the agency shielded automakers from public scrutiny—in establishing policy, and even in imposing penalties for what NHTSA determined were bad-faith acts. In July 2004, the agency collected a million-dollar fine from General Motors for failing to recall defective windshield wipers on 600,000 SUVs until early 2004, even though the automaker discovered the defect in late 2002. The fine came to light in January 2005, after The Center for Auto Safety obtained the documents through a FOIA request.

Long Delays in Writing Public Accessibility Provision

But the Bush administration biggest gift to the industry was keeping Early Warning Reports (EWR) from public view. EWRs were the linchpin of the 2000 Transportation Recall Efficiency, Accountability and Documentation (TREAD) Act. Congress enacted the TREAD Act in response to a spate of Ford Explorer Firestone-tire rollover fatalities and the ensuing controversy when Ford Motor Company recalled the Original Equipment tires outside of the United States, but not in the United States. The TREAD Act established a system in which manufacturers and NHTSA could catch defect trends before they developed into full-blown public safety crises.

When then-President Clinton signed the measure, he said:

With this new authority, however, comes the important responsibility to notify the public, as quickly as possible, of any relevant investigative efforts and other safety-related information submitted to the Secretary by the manufacturers or their suppliers. Thus, today I am also directing the Secretary of Transportation to implement the information disclosure requirements of the Act in a manner that assures maximum public availability of information.

Congress passed the TREAD Act in a record 18 hours. But it would take NHTSA seven years to write a Final Rule on the public accessibility provisions that could survive a legal challenge.

Despite Clinton's directive, Public Citizen feared for the public accessibility of TREAD data, even before it officially became law. In a letter to then-Secretary of

Transportation Rodney Slater, Public Citizen expressed concern that the information gathered under TREAD will not be released to the public under Exemption 3 of the Freedom of Information Act. Exemption 3 states that information is not public under FOIA if Congress specifically passes a law preventing its release. In his reply, NHTSA's Chief Counsel and Acting General Counsel agreed that Exemption 3 did not apply to TREAD Act data and the agency would continue to assess the confidentiality of TREAD information under Exemption 4 of the Freedom of Information Act, the Trade Secrets Act and the agency's regulations concerning the treatment of confidential business information.

But what unfolded over the next six years was a systematic narrowing of the EWR categories of information that would be considered public. The rule became embroiled in a legal battle that pitted Public Citizen against the Rubber Manufacturers Association, which represents the tire industry, and the Department of Transportation over the rulemaking process and the rule's substance. Public Citizen won the procedural argument in a federal court, but the Final Confidential Business Rule was a defeat for the advocates of transparency.

The legal challenge forced NHTSA to promulgate the new Confidential Business Rule using the proper process, but it did little to keep EWR public. NHTSA was allowed to determine that entire classes of information were private—warranty claims, consumer complaints and some production numbers. In 2007, when a final confidential business rule was published, only a manufacturer's EWR foreign recall, property damage and death and injury claims remained public.

Henry Jasny, executive director of Advocates for Highway Safety, says that his organization doesn't have as many direct conflicts with the agency as others, still "it seems to be getting worse," he says. "On the early warning information they are very closed-off. They don't want to give out any information."

According to NHTSA, as of October 2011, "NHTSA has used the EWR data in 225 investigations; 68 were launched because of EWR data alone; 157 were prompted by other information but supported by the EWR data. The various categories of EWR data have proven to be a helpful supplement to NHTSA's more traditional sources of information, including consumer complaints submitted directly to the agency."

But, as Jasny noted, the role that EWR plays in the agency's investigatory process remains hidden. In 2009, a researcher noted an off-hand reference in a Ford response to a NHTSA investigation, "DI06 Ford Explorer." This code number was unlike any that the agency used in a public investigation. The Office of Defects Investigation's names for various investigations were Initial Evaluations (IE)s, Preliminary Evaluations (PE); and Engineering Analyses (EA)—DI was unfamiliar.

DI, it turned out, referred to "Death Inquiry," and NHTSA opened up a lot them based on EWR submissions—regarding nearly 2,000 injuries and deaths, but claimed that that they weren't actually investigations, just requests for more information regarding a particular death or injury incident.

Safety Research & Strategies and the Center for Auto Safety both submitted FOIAs for the documents contained within these special, and secret, investigations.

The agency responded to both that the files associated with it were “voluminous” and on paper only. The tab for copying charges and staff time would be upwards of \$55,000.

The Center for Auto Safety has argued that these information requests are, in essence, investigations and that the public has a right to see what exactly the agency is examining. In a March 2011 letter to U.S. Attorney General Eric Holder, Ditlow argued that the lack of access to this information prevents the public from assessing whether NHTSA is using EWR data effectively:

“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,” Ditlow wrote.

While he credits NHTSA with making more information accessible by putting it on its website, Ditlow agrees that less is actually available:

“It’s clear that the agency puts far less information in public record than it used to.”

NHTSA Circles the Wagons

Like President Clinton’s grand rhetorical gesture toward public accessibility, President Obama’s transparency memos would ultimately mean little in practice for the National Highway Traffic Safety Administration.

Eight months after President Obama directed all federal agencies to let the sunshine in, Mark Saylor, a California Highway Patrolman, and his family died in a fiery crash on a highway in Santee, California. Saylor’s Lexus, a dealership loaner, entered a T-intersection and collided with a Ford Explorer, then flew past the end of the intersection, hit an embankment and came to a stop in a dry riverbed. Mark Saylor, his wife Cleofe, their 13-year-old daughter, Mahala, and brother-in-law Chris Lastrella all died in the burning vehicle that resisted Saylor’s frantic attempts to bring it to a stop.

The August 2009 crash and the eerie and widely played 911 call galvanized the public and, in particular, the media, which began to focus on a defect that had been simmering quietly for six years: Toyota Unintended Acceleration (UA). Since 2003, NHTSA’s Office of Defect Investigations (ODI) had opened eight separate UA investigations involving Camry, Lexus ES 350, Sienna, and Tacoma vehicles. The automaker had vigorously fought off any substantive probe, claiming that Toyota vehicles performed as designed and that any electronic abnormality would be detected and recorded by the engine computer.

The NHTSA investigations were brief, and closed with no defect finding. The only causes the agency found were driver error, pedal interference caused by all-weather floor mats or the trim, and sticking accelerator pedals that are slow to return to idle. And yet, there were a number of indicators that these mechanical causes were only a small part of the problem. For one, NHTSA took note of a more than 400-percent increase in the speed control-complaint rate in 2002 and 2003 involving Camry vehicles, just after Toyota began equipping them with Electronic Throttle Control System-intelligent (ETCS-i). Second, drivers were reporting incidents after the recall repairs had been done, or reporting incidents in which no all-weather floor mat was present or scenarios where pedal misapplication was highly unlikely—such as UA events that occurred

on the highway, while the vehicle was already underway.

The crash touched off a cascade of recalls and inspired Congress to hold hearings questioning the safety of Toyota’s vehicles. In the heat of the crisis, Secretary of Transportation Ray LaHood vowed to keep the public in the loop. During the U.S. House of Representative’s Toyota hearings in February 2010, Congressman Ed Markey asked:

“What do you think about the public in terms of them providing—being provided with more information regarding potential safety defects that automakers tell the department about even before an investigation is opened or a recall is announced?”

“Need for transparency,” LaHood replied. “The more information we can give the public, the better.”

But instead, the agency would close ranks more tightly than ever before. NHTSA had spent years accepting Toyota’s explanations of errant floor mats, driver error and sticky pedals. The agency had its own troubled history with Unintended Acceleration, and lacked the expertise in automotive electronics to credibly investigate it as a root cause. Rather than accept outside help, or shore up its electronic expertise, NHTSA decided to double down on the status quo. In the next two years, the agency would make a high-profile play for transparency, while doing everything in its power to keep from the public any information that deviated from the playbook. The agency employed the following tactics to clamp down on dissent: hide relevant data; mischaracterize relevant data; delay the release of critical documents to prevent the press from reporting on their substance; heavily redact scientific reports under the guise of protecting Toyota’s Confidential Business Information and refuse to release relevant data.

NHTSA Employs Secrecy To Keep Data From Public

By the final defect investigation in Defect Petition 09-001, NHTSA was eager to bring this troublesome episode to a close. And their haste to dispatch Defect Petition 09-001, ODI engineers committed two acts against the presumption of transparency.

In April 2009, Jeffrey Pepski, a Lexus ES350 owner from Minnesota, petitioned NHTSA to investigate electronic causes of UA. That meant that the agency would have to look at complaints that did not fit their pet theories. According to an e-mail from a Toyota staffer, NHTSA deliberately chose to forego such an examination. On May 5, one of Toyota’s Washington staffers, Chris Santucci sent an e-mail to colleague Takeharu Nishida updating him on the status of the latest defect investigation. As characterized by Santucci, NHTSA had no appetite for yet another Lexus UA investigation:

I have discussed our rebuttal with them, and they are welcoming of such a letter, They are struggling with sending an [Information Request] letter, because they shouldn’t ask us about floor mat issues because the petitioner contends that NHTSA did not investigate throttle issues other than floor mat-related. So they should ask us for non-floor mat related reports, right? But they are concerned that if they ask for these other reports, they will have many reports that just cannot be explained, and since they do not think that they can explain them, they don’t really want them. Does that make sense? I think it is good news for Toyota.

In October 2009, NHTSA denied the Pepski petition. In its Federal Register Notice explaining the decision, the agency refuted Pepski's contention that there were other complaints in the NHTSA database from Lexus owners alleging Unintended Acceleration incidents that were not related to floor mat interference. In doing so, NHTSA deliberately mischaracterized the contents of consumer complaints. It created a table of 10 consumer complaints that Pepski had submitted as evidence that other Lexus owners were experiencing SUA at high speeds for sustained periods:

"Contrary to the petitioner's contention, six of the VOQs were related to floor mat interference (four of the five that petitioner singled out as unrelated to floor mats were related to floor mats)," the agency wrote.

One of those complaints cited, VOQ 10199857, says in its entirety:

I purchased 2007 Lexus ES 350 in December of 2006. Sometime in last month, when I was driving the vehicle on a highway, its brake stopped working all of a sudden, and started accelerating by itself. I looked at my foot wondering if my foot was on gas pedal, instead of brake pedal, but it was on brake pedal. I was in a total panic, but managed to drive the car away to the shoulder of the highway by putting the car in park mode. I thought I was dead at that moment. I am trying to sue the Lexus. I honestly believe that car will kill someone. Before starting a legal proceeding, my attorney sent a letter to Lexus headquarter, and was told that the vehicle had no problem, and that the cause was the floor mat. But, it was not. As I said earlier, I looked at my foot when the vehicle did not stop, and after I stopped the car, I carefully looked at both gas pedal and brake again. I am not blind. Have you seen any other complaints for similar problems? Please let me know. It will be really helpful for me to win the case. I am not trying to make money by suing Lexus, but trying to have Lexus recall all of its ES350 since it will kill someone. *jb

In ODI's table it appeared as: "Unsecured floor mat discovered and corrected during dealer inspection."

In its entirety, VOQ 10203221 says:

On two prior occasions the vehicle accelerated from speeds between 20-30 mph, to speeds up to 50-60 mph. On 9/11/07, the vehicle accelerated at speeds up to 80-90 mph. *We are aware of the Lexus notification of floor mat interference, so we removed the mats after the first two times, but the last and most frightening, occurrence happened without the mat in the vehicle.* The car had to be forced into park in order to slow it down to a halt. My wife was driving the vehicle at the time and she states she almost had several multiple car accidents while trying to stop the vehicle. I had the vehicle towed to the dealer and they said it's the floor mat, before even driving the car. We won't drive the car again until someone other than Lexus determines what the problem is. *tr

In ODI's table, it appears as: "All-weather accessory floor mat improperly stacked on top of carpet mat."

In its entirety, VOQ 10230929 says:

Reported: 27-may-2008 (incidence Memorial Day weekend 25 may 2008) problem: runaway acceleration: evidence of malfunctioning cruise control car was nearing end of 200 mile trip. Cruise control had been engaged on and off for last hour. Driver stopped at entrance onto old-designed fast-moving highway (rte4) with old-fashioned short access and no breakdown lanes. Cruise control green light on, but system supposedly disengaged. Car began to exhibit strong engine noise and runaway acceleration. Driver shut off cruise control, passenger observed the light go off and then back on several times. Driver firmly stepped on brakes. The brakes smoked and smelled of burning. When car slowed

down, driver pulled to small indentation at side and pressed ignition button for several seconds. Car stopped with jolt. Driver started car in park. Engine made same loud blow-out sound. Re-shut down car. Driver restarted car to move to exit about 50 yds ahead. Car began run-away acceleration again, driver repeated steps pushing hard on brakes (smell and smoke) and shutting car off by pressing ignition button. Off-duty police (chief of force) smelled brakes and said loud engine noise made car a hazard; tow driver would also testify to loud engine noise when car turned on again to be placed on his truck. *Because spill of ice-coffee during incident, mats were inspected by both driver and passenger before car was towed. Both noted that mats were intact and in their proper place. Driver noted clips were in place. (the car was in compliance with Lexus recall of mats having been serviced two months prior to incident.) Improper mats are still Lexus stated cause; however, driver and passenger say this is not case. Cruise control malfunctioning seems likely cause of runaway-acceleration.* While our dealer is responsive, national Lexus has been most neglectful; agent does not return calls; and this is almost three weeks after incident. *tr see also 10228954 & 10229189 *dsy

In ODI's table, it appears as: "All-weather accessory floor mat improperly stacked on top of carpet mat."

In November 2009, Safety Research & Strategies submitted a FOIA request to NHTSA, for any additional documentation the agency might have to establish its conclusions that these were floor mat-related incidents. On January 28, 2010 NHTSA replied, referring SRS to the same information, now currently on its publicly available website:

... we searched for and found no supplementary information regarding the ten complaints you cited on unwanted acceleration. If you want to view these ten complaints, go to the website identified above.

NHTSA Keeps Potential Electronic Causes Of Unintended-Acceleration Cases Secret

Among the many interesting documents released as a result of several congressional investigations was a memo to Toyota from the Benenson Strategy Group, a Washington public relations firm it hired to test the automaker's most effective lines of attack against anyone who might suggest that electronics were to blame in some UA events. Among the pieces of advice Benenson offered to influence a group they called the "Elites," was this:

"Portray transparency, open and honest."

While NHTSA didn't pay for this high-priced, if obvious, admonition, it certainly took it to heart. Once the parade of Toyota executives and DOT luminaries departed the congressional hearing rooms, LaHood got to work. From February to April, the Secretary announced that he had launched no fewer than six new investigations – three against Toyota and three devoted to NHTSA's handling of the crisis.

Two Toyota investigations, called Timeliness Queries, assessed whether Toyota, in recalling the floor mat and sticking accelerator pedals, met its statutory obligation to inform NHTSA of a defect within five days after an automaker determines that a defect exists. The agency initiated Recall Query 10-003 to determine if Toyota had too narrowly defined the scope of those recalls.

On the heels of these February probes, LaHood rolled out three more investigations in March. NHTSA, with help from the National Aeronautics and Space Admin-

istration's Engineering Safety Center (NESC) would conduct a technical review of Toyota Unintended Accelerations—specifically high-speed, long duration events. The National Academy of Sciences was tapped to examine unintended acceleration and electronic vehicle controls “across the entire automotive industry to identify possible sources of unintended acceleration, including electronic vehicle controls, human error, mechanical failure and interference with accelerator systems.” LaHood also enlisted his department's Inspector General to review whether NHTSA's Office of Defect Investigation had “the necessary resources and systems to identify and address safety defects.”

In the ensuing months, the three Toyota investigations would find against the automaker, while the three probes into the agency's actions would affirm the status quo and exonerate their conclusions in past investigations. In all six cases, however, NHTSA would use secrecy, delays, and deliberate mischaracterizations to hide its process and to keep a firm grip on the media narrative. In other words, NHTSA would be allowed to tell the story the way it wanted to tell it, without giving anyone access to the raw elements that might allow the public understanding to stray from NHTSA's preferred line.

In April 2010, Secretary Ray LaHood announced that the government had imposed a maximum civil penalty of \$16.375 million on Toyota for failing to notify the agency of the “sticky pedal” defect for at least four months, instead of the five days required by law. In December of that year, LaHood announced that NHTSA had levied another \$32.4 million against Toyota for failing to launch a timely recall of its floor mats and, unrelated to unintended acceleration, of defective relay rods in Toyota pick-up trucks. These were the largest fines in agency history and NHTSA made a big show of announcing them.

But where were the documents? How exactly did Toyota violate its statutory obligation in each instance? While NHTSA issued two press releases, it did not make any supporting documents immediately available. One year later, NHTSA quietly posted the agency's demand letter in the sticky pedal recall investigation. This letter laid out the agency's rationale and its anger at the automaker for apparently planning to implement the recall fix in North America in October 2009, and then two weeks later rescinding the directive. The agency did not post the Toyota Timeliness Query documents until much later, and they were not in the public investigations database. NHTSA placed them in a separate file, making them hard to find. As of this writing, the agency has not made public any documents related to the Timeliness Query for the defective steering relay rods recall.

The investigations into NHTSA's own practices had opposite conclusions. All three found that the agency had not erred in arriving at earlier conclusions that only floor mats, sticking gas pedals, and driver error could be the causes of Toyota Unintended Acceleration. The National Academy of Sciences concluded that the agency was justified in closing its UA investigations. Even the DOT Office of Inspector General found, in its October audit, that NHTSA's Office of Defect Investigations followed its established procedures in conducting its inquiries into Toyota Unintended Acceleration.

And yet, the public was no more privy to the documentation behind these conclusions than it was to that which supported the Toyota recall fines.

The linchpin of this defense effort was *Technical Assessment of Toyota Electronic Throttle Control (ETC) Systems and Technical Support to the National Highway Traffic Safety Administration on the Reported Toyota Motor Corporation Unintended Acceleration Investigation*. These lengthy and very technical reports were released to the public in February 2011. Reporters got them moments before the press conference, so the media could not question their specific contents. Worse, many areas were redacted or unavailable, making it difficult for any independent expert or organization to determine how NHTSA and its contract agency, the NASA Engineering and Safety Center (NESC), reached its conclusions. Hidden from public view was key technical information in the areas of: the electronic throttle motor controller; power errors, especially those related to feeding of sensors; the cruise control; pedal command learning errors; fault trees; diagnostic error codes; the ECM power system; and power supply to pedal sensors.

Why Is Information Redacted?

Some of this information is not proprietary; some of it regards systems that are obsolete by today's standards, so why was it redacted?

Alice and Randy Whitfield of Quality Control Systems Corporation, who have regularly sought information from NHTSA via the Freedom of Information Act, filed a request for non-redacted versions of the reports and supporting material that was missing from the record. In response, NHTSA publicly released some of the information in the form of less redacted versions of *Technical Assessment of Toyota Electronic Throttle Control (ETC) Systems*, and *Technical Support to the National Highway Traffic Safety Administration on the Reported Toyota Motor Corporation Unintended Acceleration Investigation*, but denied their appeal and continued to withhold other information, based on FOIA Exemption 4, which allows manufacturers to seek confidentiality for information that might be a trade secret.

But the Whitfields found that some of the redacted information, revealed in a Google search, turned to be not a Toyota business secret at all. One sentence of the NASA report's Appendix A about data losses on the Controller Area Network (CAN) stated: “Occurrences of CAN data loss are recorded in SRAM and remain available until the battery is disconnected. According to Toyota Motor Corporation (TMC) 292 instances were reported of CAN data loss by dealers for cars brought in for any problem. **REDACTION.**” The unredacted version added the sentence: “Possible correlation of these incidences with UA cases was not checked.”

When the Whitfields filed a further FOIA request to determine (among other things) the names of the agency officials who had ordered the improper redactions, the agency responded with additional records redacted on the grounds that even these requested documents would also reveal Toyota's trade secrets and commercial or financial information.

NHTSA also failed to reveal that it used Toyota's defense litigation expert to perform a warranty analysis to determine whether there was evidence of any trends suggesting a problem related to the ETC system or components. In its report, NHTSA presents the analysis as its own work. But a June 28, 2010, e-mail to NHTSA's Jeffrey Quandt reveals that Exponent Inc. actually performed the warranty analysis for NHTSA. Toyota en-

gaged Exponent to discredit other scholarly research that showed deficiencies in Toyota's sensor design and fail-safe system.

But even after the agency thought it had settled the Toyota UA question, motorists continued to lodge complaints with the agency, forcing NHTSA to hide data that contradicted its earlier findings. In mid-May, two ODI engineers witnessed a 2003 Prius, owned by a high-ranking government official, accelerate on its own several times while on a test drive with the owner, without interference from the floor mat, without a stuck accelerator pedal or the driver's foot on any pedal. They videotaped these incidents and subsequently downloaded data from the vehicle. At the time, they seemed excited to have witnessed a Toyota engine racing, uncommanded, with a cause that clearly was not mechanical.

The Prius owner Joseph H. McClelland is not your typical Toyota owner. He is the Federal Energy Regulatory Commission's Director of the Office of Electric Reliability. A member of the FERC since 2004 and the agency's first director of the Office of Electric Reliability since 2007, McClelland is an electrical engineer with more than two decades' experience in the electric utility industry and cyber security.

The engineers told McClelland that the agency might want to buy his vehicle for research, and urged him to park and secure it. Three months later, the agency responded. They weren't interested in buying McClelland's Prius. McClelland's complaint was not added to the agency's Vehicle Owner Questionnaire database until September 2011—and only after a request from Safety Research & Strategies—even though he reported it to the agency in early May 2011.

The agency apparently failed to inform the National Academy of Sciences committee of the McClelland incident despite being in the midst of writing its report on the agency's approach to UA. (The Committee Chairman Dr. Louis Lanzerotti and NAS staff Dr. Thomas Menzies refused to answer whether NHTSA shared this information with NAS prior to the issuance of their report.)

If the agency was not pursuing this incident, Safety Research & Strategies, which has been studying the Toyota Unintended Acceleration issue for more than two years, was interested in gathering the details of NHTSA's examination of McClelland's Prius. In September 2011, SRS submitted a Freedom of Information Act (FOIA) request for all documentation associated with McClelland's complaint to the agency. The agency turned over six pages, a few hand-written notes and a couple of heavily redacted emails. It refused to release the videos, photographs and computer data that the Office of Defects Investigation generated that day, claiming the materials were exempt from FOIA because they were part of the agency's deliberative process.

In January 2012, SRS sued NHTSA over the release of these Toyota UA investigation documents. The civil action, filed in U.S. District Court for the District of Columbia alleges that the U.S. Department of Transportation and NHTSA violated the Freedom of Information Act by withholding records involving the McClelland incidents.

Secrecy in Matters Great and Small

The embarrassment, the abstract fears about the errors and the failures that may follow a disclosure to

which President Obama alluded, could certainly motivate officials to hide the facts, or the process, behind their legal prerogatives. But NHTSA also withholds information with no real purpose—simply because it can.

Under the rubric of privacy, NHTSA blacks out the names of crash victims in published news stories and litigation complaints filed in public court dockets. Redactions of public documents are routinely found in the agency's investigative files.

In 2007, the agency denied statistician Randy Whitfield's request for the geographic coordinates used in the Fatality Analysis Reporting System (FARS). FARS is a nationwide census of fatal injury data in motor vehicle traffic crashes, containing a wealth of data, including the vehicle type, weather conditions, time of the crash, an occupant's seating position, blood alcohol levels and the highway mile marker closest to the crash site. In 2004, Whitfield noticed that NHTSA had populated the data fields for the longitude and latitude of the crash site, and thought that having the exact coordinates would give a researcher a more precise snapshot of the crash location, and help identify geographic crash trends.

But the agency's publication of that data turned out to be a mistake. The agency removed the information from the public website, and when Whitfield asked where it had gone, NHTSA told him that the posting was an error and that he should delete the geographic data from his files. Whitfield eventually submitted a FOIA request for the data, but his request was denied, because, the agency said, researchers could use the geographic coordinates to determine the identity of the fatal victim. Whitfield appealed, arguing that points of longitude and latitude were not personal identifiers. On April 25, 2007, NHTSA reversed itself and made the longitude and latitude of fatal crashes public.

"It comes down to this," Whitfield says. "They are always pointing how limited their resources are. And that's true—they are limited. So, they need help, don't they?—from other researchers to help solve the problems. But we need the data. Why hide this? Why hide this?"

As it turns out, having access to the geographic coordinates helps researchers discover fatality patterns such as a particular stretch of Interstate 8 in San Diego County, California, in which a spate of motorists have been killed by "collisions with boulders." Couldn't policymakers use this information to employ a solution—such as barriers on the road's shoulder?, Whitfield asks.

Secrecy Has the Opposite Effect on Safety

"Lack of information is insidious," Jasny says. "It keeps you from knowing there's a problem and you can't ask the right questions. If you keep people in the dark, then you can't figure out what the right response should be."

It also prevents victims from seeking proper redress in civil litigation. When NHTSA elects to quietly close a defect investigation with no finding and to keep what it knows to itself, it effectively hands industry a shield against lawsuits. Not only are whole classes of consumers who could potentially be harmed by a defect at risk, but individual consumers who have suffered the most grievous harm from that defect are forced to scale barriers NHTSA helped to erect in demanding some accountability.

In November 2003, then-Administrator Dr. Jeffrey Runge addressed the annual meeting of the American Public Health Association on the topic of “Public Health and the Epidemic of Motor Vehicle Crashes.” He began by acknowledging how pleased he was to be there “as head of the only designated public health agency in the U.S. Department of Transportation.”

And yet, the communication of threats to health and well-being lie at the heart of public health interventions. Public health agencies don’t worry about protecting hamburger sales during an *E. coli* outbreak. In 2005, the World Health Organization issued guidelines for outbreak communications which made clear the importance of gaining the public’s trust:

“Mechanisms of accountability, involvement and transparency are important to establish and maintain trust, and they are especially important to slowly rebuild trust when it is low. Allowing high-profile critics to watch decisionmaking and even participate, for example, reduces the need for trust and increases trust.”

At the DOT’s only designated public health agency, decisionmaking is a private affair between the agency and the automakers. Critics are dismissed, avoided, shut out. And gaining the public trust? By all accounts, it’s not very high on the National Highway Traffic Safety Administration’s priority list.