

January 20, 2012

**VIA FACSIMILE AND FIRST CLASS MAIL**

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

**RE: Appeal from Denial of Freedom of Information Act Request, NHTSA File # ES11-007070**

Dear Chief Counsel:

This letter is an appeal from the National Highway Traffic Safety Administration's denial of the fee waiver request contained in my November 7, 2011, FOIA request, which I submitted by e-mail through a link on NHTSA's website and by mail. NHTSA's denial of my fee waiver request was dated December 16, 2011, and received by CAS on December 21, 2011.

In its FOIA request, CAS sought access to:

(1) All records constituting or describing an agreement, made between the National Highway Traffic Safety Administration (NHTSA) or its components and any state, for the sharing of: (a) police accident reports that (i) were collected or created by that state between January 1, 1990, and October 31, 2011, and (ii) are used or relied on by NHTSA to compile its State Data System, or (b) data bases composed of police accident reports that (i) were collected or created by that state between January 1, 1990, and October 31, 2011, and (ii) are used or relied on by NHTSA to compile its State Data System, and

(2) All records constituting or describing an agreement, made between NHTSA or its components and any state, that governs or affects NHTSA's right to alter, use, disclose, distribute, dispose of, or rely on (a) the police accident reports or data bases composed of police accident reports described in Request (1), or (b) data in NHTSA's State Data System.

CAS requested a waiver of all fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because it does not seek the records for a commercial purpose and disclosure is in the public interest because it is likely to contribute significantly to public understanding of NHTSA's operations or activities.

In a letter dated December 16, 2011, signed by Andrew J. DiMarsico, NHTSA denied CAS' request for a fee waiver, concluding that "CAS ha[d] [not] demonstrated that it met the public criteria (factors 1-4) of 49 C.F.R. § 7.44(f)." NHTSA stated that (1) CAS did not "demonstrate how this information would contribute to an understanding of NHTSA's activities"; (2) CAS did not "demonstrate how the knowledge of NHTSA's rights in the data would be used to measure benefits" to the public; (3) "CAS state[d] generally that it ha[d] the capacity to passively disseminate information to a segment of the public, but d[id] not demonstrate with particularity that the subject information w[ould] be communicated to the public"; (4) "CAS state[d] generally that it ha[d] the capacity to disseminate information to a small segment of the public—its members, and passively place information on its website, but it ha[d] not established that it w[ould] disseminate information to the public at large"; and (5) CAS did not show "how [the records] w[ould] significantly contribute to the public at large, especially when considering the information that [is] publicly available." NHTSA did conclude, however, that CAS was not seeking the records for a commercial use, and that it met the commercial interest criteria (factors 5-6) of 49 C.F.R. § 7.44(f).

A copy of CAS' November 7, 2011, request (submitted by mail and e-mail) and the agency's response dated December 16, 2011, are enclosed with this letter as Appendix 1.

I am appealing the denial of my FOIA fee waiver request because CAS qualifies for a public interest fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 49 C.F.R. § 7.44(f). CAS routinely receives public interest fee waivers, either in the administrative process, or when necessary, through litigation. *See, e.g., Center for Auto Safety v. U.S. Dep't of Treasury*, No. 11-1048 (D.D.C. Dec. 16, 2011) (stipulation of partial settlement and proposed order for further proceedings) (stipulating to grant of fee waiver and plaintiff's reservation of right to seek attorneys' fees) (attached as Appendix 2). Especially in light of the fact that FOIA must be "liberally construed in favor of [fee] waivers for noncommercial requesters," the denial of CAS' fee waiver was in error. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal quotation marks omitted).

In addition, based on NHTSA's failure to respond timely to CAS' original FOIA request, the agency is now precluded from charging CAS search fees.

## **I. CAS Is Entitled to a Public Interest Fee Waiver.**

Under 49 C.F.R. § 7.44(f), NHTSA considers the following six criteria with respect to public interest fee waivers:

- (1) Whether the subject matter of the requested records concerns the operations or activities of the Federal government;
- (2) Whether the disclosure is likely to contribute to an understanding of Federal government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;

- (4) Whether the contribution to public understanding of Federal government operations or activities will be significant;
- (5) Whether the requestor has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.

As discussed below, CAS' request for a fee waiver meets all six criteria.

**A. The requested records “concern[ ] the operations or activities of” NHTSA.**

As CAS stated in its original request, “[t]he data-sharing agreements [sought by the request] will shed light on whether the federal government obtains rights to alter, use, disclose, distribute, dispose of, or rely on important state traffic safety data in which the federal government and taxpayers have an interest.” Nevertheless, NHTSA stated that CAS “fail[ed] to demonstrate how this information would contribute to an understanding of NHTSA’s activities.”

Records detailing formal contracts and other agreements between NHTSA and states for the sharing and use of data contained in or relied on by the State Data System clearly pertain to NHTSA’s “operations [and] activities.” *See, e.g., Rossotti*, 326 F.3d at 1313 (holding that “a conflict-of-interest waiver executed by” an IRS official pertained to the IRS’s activities and operations); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 107 (D.D.C. 2006) (holding that a plaintiff’s request for “records reflecting contracts HHS, a government agency, formed with public affairs firms” was sufficient to show that the requested records concerned HHS’s operations or activities). What NHTSA agrees to do and whether the agency purports to limit its own powers through such agreements are unquestionably “activities” within the scope of factor 1.

**B. Disclosure of the records is likely to contribute to an “understanding of NHTSA’s operations or activities.”**

As CAS noted in its original request, “the federal government provides states with substantial grant funding to improve state highway and traffic data collection systems.” It further noted that the records sought would “be useful to evaluate the benefit that the public receives from federal expenditures on state traffic data systems.”

NHTSA faulted CAS “for fail[ing] to demonstrate how the knowledge of NHTSA’s rights in the data would be used to measure benefits.” But NHTSA’s rights to the data files, and the public’s related access to the data, *are* the benefits. The State Data System data files at the center of these agreements are not publicly available from NHTSA, even though they “are unique, contain large amounts of information, and are used by NHTSA analysts for a broad range of motor vehicle crash research and reports and in the development of U.S. DOT regulation and policy.” NHTSA, SDS Overview, <http://www.nhtsa.gov/Data/State+Data+Program+&+CODES/SDS+Overview> (last visited Jan. 11, 2012); *see also* NHTSA, How SDS Data Have Been Used, [http://www.nhtsa.gov/DOT/NHTSA/NCSA/Content/PDF/SDS\\_usage.pdf](http://www.nhtsa.gov/DOT/NHTSA/NCSA/Content/PDF/SDS_usage.pdf)

(last visited Jan. 11, 2012) (noting that SDS data are “essential to NHTSA crash research and traffic safety policy development”).

The public has a clear interest in knowing whether, despite substantial federal funding for state data systems, NHTSA signs agreements that purport to limit its rights (and the rights of the public) to these critical data used for the development of U.S. transportation policy. Restrictive agreements between NHTSA and states for the sharing of SDS data might suggest that legislation is necessary to compel states to participate in SDS as a condition of receipt of federal funds and/or to direct NHTSA to affirmatively provide such data for public research and other use. Thus, CAS has demonstrated that the requested agreements would make a meaningful contribution to the public’s understanding of NHTSA’s operations or activities. *See Rossotti*, 326 F.3d at 1313-14 (concluding that requested records would “contribute to the public’s understanding of the agencies’ operations” where the requester stated that “the public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted,” and that “the information requested will be meaningfully informative in increasing public understanding of the IRS commissioner’s involvement and interest in lucrative government contracts”).

**C. Disclosure of the records will contribute to the “understanding of the public at large.”**

With regard to factor 3, NHTSA concluded:

. . . CAS states generally that it has the capacity to disseminate information to a small segment of the public—its members, and passively place information on its website, but it has not established that it will disseminate information to the public at large. Moreover, CAS states generally that it has [the] capacity to passively disseminate information to a segment of the public but does not demonstrate with particularity that the subject information will be communicated to the public.

This reading distorts CAS’ request for a fee waiver, which included more specific information than a reference to its website and membership. In any event, CAS clearly qualifies for a fee waiver under factor 3 because it has an intent to disseminate the requested records and a demonstrated capacity to do so. *See, e.g., Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002) (concluding that plaintiff had shown its FOIA request was likely to contribute to public understanding where “[p]laintiff state[d] that it ha[d] several mechanisms for disseminating information, including allowing reporters to inspect its documents, ‘blast faxing’ press releases, maintaining a website and appearing on radio and television programs” and that “it intend[ed] to use these mechanisms to make the information obtained through this FOIA request available to the public”); *see also Rossotti*, 326 F.3d at 1314 (concluding that plaintiff satisfied this prong of the fee waiver requirements by stating only that its mission was to obtain information under FOIA and describing several ways in which it customarily disseminated information).

CAS plans to disseminate information sought by this request to educate and inform the public. Depending on the nature of the agreements, CAS may disseminate them or information from them on its website, in a press release, in letters or testimony delivered to Congress, or through other statements to the media. CAS already has on its website a campaign page entitled

Missing in FARS aimed at the inadequacies of the federal Fatal Accident (aka Analysis) Reporting System and how State and other data bases must be relied on to fill the gaps. *See* <http://www.autosafety.org/campaigns/24>. This page contains extensive information on not only the flaws in FARS but NHTSA reports regarding how it has to rely on other sources for death information. *See, e.g.*, <http://www.autosafety.org/sites/default/files/NCSANonTraffic.pdf>.

In addition, CAS has a demonstrated capacity to disseminate the information obtained from this request to the public and lawmakers so that they are better informed about motor vehicle safety issues. CAS is a nationwide, nonprofit consumer advocacy organization established in 1970 by Consumers Union and Ralph Nader to provide consumers with a voice for auto safety and quality in Washington, DC. CAS works toward improved safety, environmental responsibility, and fair dealing in the automotive industry and the marketplace. As part of CAS' work, it conducts research relating to motor vehicle safety issues. CAS has approximately 20,000 members across the United States and is nationally recognized as a leader in the areas of automobile safety and consumer protection. A recent Google search for CAS, attached as Appendix 3, yielded approximately 301,000 results.

A key pillar of CAS' mission is actively to disseminate the information it gathers to the public and lawmakers so that they are better informed about motor vehicle safety issues. CAS has a website, [www.autosafety.org](http://www.autosafety.org), to keep members, news media, and the public apprised of developments, including data-related news, concerning motor vehicle safety issues. The website receives more than 25,000 unique visitors per month. CAS has posted agency responses to FOIA requests there, alongside the text of responsive documents, for the public to view.<sup>1</sup> CAS' staff members are recognized as experts in motor vehicle safety issues, so they regularly appear on television, radio, and at conferences, and are quoted in the print media.<sup>2</sup> They also testify before congressional committees.<sup>3</sup> In addition, CAS works in coalitions with other leading

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<sup>1</sup> *See, e.g.*, Center for Auto Safety, FOIA Response Re: Early Warning Reporting (EWR) and Death Inquiries (DI's), <http://www.autosafety.org/foia-response-re-early-warning-reporting-ewr-and-death-inquiries-dis> (last visited Jan. 12, 2012) (posting NHTSA's response letter and documents responsive to CAS' FOIA request regarding Early Warning Reporting and Death Inquiries); Center for Auto Safety, FOIA Response Re: NHTSA Cell Phone Studies, <http://www.autosafety.org/foia-reveals-cell-phone-studies> (last visited Jan. 19, 2012) (posting NHTSA's response letter and documents responsive to CAS' FOIA request regarding NHTSA's driver distraction research).

<sup>2</sup> "Crash Tests Suggest Jeep Fire Risk, Safety Group Says," N.Y. Times, June 15, 2011, *available at* <http://www.nytimes.com/2011/06/19/automobiles/19FIRES.html>; "NHTSA Needs More Reliable Fire Crash Data, Automotive News, Dec. 20, 2010, *available at* <http://www.autosafety.org/nhtsa-needs-more-reliable-fire-crash-data>; "Toyota Repair Document Revealed," CNN, Mar. 22, 2010, <http://www.cnn.com/video/#/video/us/2010/03/22/pkg.cb.griffin.toyota.document.cnn>; "Fuel Tank Investigation," ABC News, June 8, 2011, <http://abcnews.go.com/Nightline/video/jeep-cherokees-recall-1993-2004-fuel-tank-investigation-13798003>.

<sup>3</sup> Statement of Clarence Ditlow, Center for Auto Safety, on Ford Explorer/Firestone Tires, Senate Commerce Committee, Sept. 12, 2000, <http://www.autosafety.org/statement-ford-explorerfirestone-tires-senate-commerce-committee-9-12-00>; Statement of Clarence Ditlow, Center for Auto Safety on S. 3302, The Motor Vehicle Safety Act of 2010, Senate Commerce Committee, May 19, 2010 - <http://www.autosafety.org/sites/default/files/Senate%20Commerce%20S%203302%205-19-10%20Final.pdf>; Statement of Clarence Ditlow, Center for Auto Safety on Proposed Motor Vehicle Safety Act of 2010, House Energy & Commerce Committee, May 6, 2010 - <http://www.autosafety.org/sites/default/files/House%20Commerce%20NHTSA%20Discussion%20Draft%205-6.pdf>; Statement of Clarence Ditlow,

individual and organizational advocates for motor vehicle safety, and it encourages these safety leaders to disseminate the information gathered and produced by CAS to their memberships and contacts.

**D. The records will make a “significant” contribution to public understanding of NHTSA’s operations and activities.**

Finally, CAS qualifies for a fee waiver with respect to factor 4, as the requested records will make a significant contribution to the public’s understanding regarding NHTSA’s right to share or use SDS data files, in which taxpayers and the general public have a vested interest. NHTSA concluded that CAS did not show “how [the records] will significantly contribute to the public at large, especially when considering the information that [is] publicly available.” But NHTSA then listed a series of documents that address federal funding of state data systems and state efforts to improve these systems. NHTSA did not assert, nor could it, that the state agreements sought by this request are already publicly available. They are not.

The release of these state agreements will provide new information unlike anything else available and therefore make a “significant” contribution to the public’s understanding of NHTSA’s agreements with states on data-sharing and data disclosure in which the public has an interest. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 116 (D.D.C. 2006) (stating that the significant contribution “inquiry involves comparing the public understanding with and without the potential disclosure”). No additional showing is required under FOIA. *See id.* at 118 (holding that release of information would significantly contribute to public understanding where the administrative record “contain[ed] no indication that the records of [the agency’s] contracts with public affairs organizations were already publicly available”).

When NHTSA issued its revised Federal Motor Vehicle Safety Standard on Fuel System Integrity (FMVSS 301), it explicitly rejected state data on fires that showed much higher fire deaths than FARS without any explanation.<sup>4</sup> Obtaining the state agreements would improve the public understanding of why NHTSA rejected the state data and issued a weaker standard than

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Center for Auto Safety on Toyota Sudden Unintended Acceleration, Senate Commerce Committee, Mar. 2, 2010 - <http://www.autosafety.org/sites/default/files/Senate%20Commerce%20Toyota%20Acceleration.pdf>; Statement of Clarence Ditlow, Center for Auto Safety on Toyota Sudden Unintended Acceleration, House Oversight & Government Reform Committee, Feb. 24, 2010 - <http://www.autosafety.org/sites/default/files/CAS%20House%20Oversight%20Testimon%202-24-10.pdf>.

<sup>4</sup> A detailed case study of 214 fire related crash cases from 1990 to 1993 FARS data was conducted to help determine the relationship between vehicle crash specifics and fire fatality outcome. Crash records were retrieved from seven states which recorded more complete case histories regarding fire crashes. This study also estimated that there are 143 bum fatalities annually in rear impact crashes (a confidence interval around that estimate was also provided at 95 to 195 burn fatalities annually in rear impact crashes). However, these estimates appear high. . . . Thus, the sample may over represent the importance of rear impacts as part of the fire population. In addition, the 143 *burn* fatalities in rear impacts estimated in the case study is much higher than the 125 fatalities *including trauma-related fatalities* reported in FARS for 2001 in which a passenger car or light truck was struck in the rear and there was a fire. Thus, this estimate was not used in this analysis. “Final Regulatory Evaluation,” NHTSA, pp II-6-7 (Nov. 2003). *See* <http://www.autosafety.org/sites/default/files/FMVSS%20301%20Reg%20Analysis%202003.pdf>.

what it would have issued if it had accepted the state data. State data play a key role in many rulemakings and policy decisions, so obtaining the records sought would shed significant light on how and why NHTSA chooses to rely on such data in areas beyond FMVSS 301.

**E. CAS has no commercial interest that would be furthered by the requested disclosure.**

CAS is a non-profit organization research and advocacy organization that works to promote the public interest. It has no business, trade, or profit interest in the requested records. Thus, as NHTSA has acknowledged, CAS does not seek the records for a commercial use.

**F. Disclosure is not “primarily in the commercial interest of the requester.”**

As NHTSA concluded in its denial of the fee waiver, CAS satisfies factor 6. CAS has no commercial interest in the requested records. In contrast, as described above, there is a substantial public interest in disclosure of NHTSA’s agreements with states regarding data-sharing of data used in or relied on in the State Data System. Those agreements may indicate the extent to which NHTSA has purported to limit its rights to data, the collection of which has been financed in part through federal funds.

In sum, because disclosure of the requested records will contribute significantly to the public’s understanding of the operations or activities of the government and is not primarily in CAS’ commercial interest, CAS qualifies for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii).

**II. NHTSA Is Prohibited from Charging CAS Any Search Fees Because the Agency Did Not Make a Prompt Determination on the FOIA Request.**

In addition to its fee waiver provisions, FOIA prohibits an agency from charging a requester selected fees if the agency has not made a determination on a FOIA request within the appropriate statutory time period. An agency must “determine . . . whether to comply” with a FOIA request within 20 working days of receipt of that request, and “immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency.” 5 U.S.C. § 552(a)(6)(A)(i); *see also Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) (discussing what constitutes a “determination” under FOIA for the purpose of administrative exhaustion). In 2007, Congress passed the OPEN Government Act, amending FOIA to attach financial penalties to an agency’s failure to respond within this time period. Pub. L. No. 110-175, 121 Stat. 2524 (2007); *see also Bensman v. Nat’l Park Serv.*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 3489507, at \*1 (D.D.C. Aug. 10, 2011) (holding that an agency “exceeded its statutory [FOIA] time limit and thus [could] [ ]not assess fees”). So, under current law, an agency that does not comply with the statutory time limit “shall not assess search fees . . . [unless] unusual or exceptional circumstances . . . apply.” 5 U.S.C. § 552(a)(4)(A)(viii).

In this case, CAS submitted its initial FOIA request on November 7, 2011, by e-mail and mail to NHTSA.<sup>5</sup> The agency responded the same day by e-mail that it had “forwarded [CAS’ e-

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<sup>5</sup> The agency’s denial of CAS’ fee waiver request erroneously dates CAS’ request to November 8 instead of November 7. However, the time stamp on the acknowledgement e-mail CAS received clearly shows that the FOIA request was submitted on the earlier date.

mail] to the appropriate NHTSA subject matter expert,” but it did not indicate that it intended to comply with CAS’ FOIA request, nor give reasons to support such a determination. *See* Appendix 1 (NHTSA confirmation of receipt of FOIA request). On November 8, 2011, CAS received an additional unsigned letter (attached as Appendix 4) that referred to a FOIA request submitted on November 7, 2011.<sup>6</sup> That letter again merely acknowledged receipt of CAS’ FOIA request and stated that the “request [wa]s being processed as expeditiously as possible, but actual processing time depends upon the complexity of [the] request.” It noted generally that “[c]omplex or large requests may take significant processing time.” It did not state whether NHTSA would comply with CAS’ FOIA request, give reasons therefor, or advise CAS of its right to appeal.

NHTSA did not otherwise respond to CAS’ request until December 20, 2011 (the postmark date of the denial), 30 working days later. Since NHTSA’s confirmation e-mail indicated that CAS’ FOIA request reached the “appropriate NHTSA subject matter expert” on November 7, the 20-day time period provided by FOIA commenced on that date. 5 U.S.C. § 552(a)(6)(A); *see Bensman*, 2011 WL 3489507, at \*6 (recognizing same). NHTSA missed the statutory time limit to respond because neither the agency’s November 7, 2011, e-mail, nor its November 8, 2011, letter contained a determination on CAS’ FOIA request.

There is no basis for a claim that the statutory time limit was tolled or extended in this case. FOIA permits tolling in only two circumstances:

(I) . . . the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or (II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.

5 U.S.C. § 552(a)(6)(A)(I), (II). Here, the agency neither made a request for information between November 7 and December 20, nor sought to clarify with CAS issues regarding fee assessment. *Id.* Therefore, the deadline was not tolled.

Moreover, there are no unusual circumstances that would excuse the agency’s failure to respond within the statutory limit. As an initial matter, NHTSA has not asserted that unusual circumstances apply to CAS’ request. In addition, NHTSA did not give CAS “written notice” of unusual circumstances requiring an extension, and did not provide “the date on which a determination [was] expected to be dispatched,” as required by law for an “unusual circumstances” extension. *Id.* § 552(a)(6)(B)(i), (ii).

Finally, a review of NHTSA’s FOIA caseload and staff for the past two fiscal years indicates that an exceptional circumstances exception is not warranted here either. “Exceptional circumstances exist when an agency ‘is deluged with a volume of requests for information vastly

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<sup>6</sup> That letter stated that the tracking number for the FOIA request was ES11-006956; however, NHTSA’s denial of a fee waiver for the FOIA request at issue in this appeal used the tracking number ES11-007070. CAS will assume for the purpose of this appeal, but does not concede, that NHTSA’s November 8, 2011, letter to CAS was referring to the FOIA request at issue in this appeal.



in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of . . . [FOIA], and when the agency can show that it ‘is exercising due diligence’ in processing the requests.” *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 259 (D.D.C. 2005) (quoting *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)). Far from a deluge of unexpected requests, NHTSA’s FOIA requests between Fiscal Year 2009 and 2010 remained roughly steady, while the total number of full-time FOIA staff actually increased. See U.S. Department of Transportation, Freedom of Information Act, 2010 Annual Report, *available at* [http://www.dot.gov/foia/reports/2010annualreport\\_part3.html](http://www.dot.gov/foia/reports/2010annualreport_part3.html); [http://www.dot.gov/foia/reports/2010annualreport\\_part5.html](http://www.dot.gov/foia/reports/2010annualreport_part5.html); U.S. Department of Transportation, Freedom of Information Act, 2009 Annual Report, *available at* <http://www.dot.gov/foia/reports/2009annualreport.htm>.

In short, because NHTSA waited 30 working days before denying CAS’ FOIA request for a fee waiver and never indicated its intent to comply with the request or its reasons therefor, the agency is prohibited from charging CAS search fees, irrespective of CAS’ eligibility for a public interest fee waiver. Moreover, the agency has already conceded that CAS’ request was not made for a commercial purpose, so NHTSA cannot charge CAS review fees.

\* \* \*

Thank you for your attention to this matter. Should you have any questions regarding this appeal, please feel free to contact me at (202) 328-7700.

Sincerely,



Clarence Ditlow  
Executive Director

## APPENDIX 1

# CENTER FOR AUTO SAFETY

1825 CONNECTICUT AVENUE NW #330 WASHINGTON DC 20009-5708 202.328.7700

November 7, 2011 (VIA FIRST CLASS MAIL AND ELECTRONIC MAIL)

National Highway Traffic Safety Administration  
Executive Secretariat  
1200 New Jersey Avenue, SE  
West Building, 41-304  
Washington, D.C. 20590

**RE: Freedom of Information Act Request**

Dear Freedom of Information Officer:

On behalf of the Center for Auto Safety (CAS), and pursuant to the Freedom of Information Act, 5 U.S.C. § 552, I request the following records:

(1) All records constituting or describing an agreement, made between the National Highway Traffic Safety Administration (NHTSA) or its components and any state, for the sharing of:

(a) police accident reports that (i) were collected or created by that state between January 1, 1990, and October 31, 2011, and (ii) are used or relied on by NHTSA to compile its State Data System, or

(b) data bases composed of police accident reports that (i) were collected or created by that state between January 1, 1990, and October 31, 2011, and (ii) are used or relied on by NHTSA to compile its State Data System.

(2) All records constituting or describing an agreement, made between NHTSA or its components and any state, that governs or affects NHTSA's right to alter, use, disclose, distribute, dispose of, or rely on:

(a) the police accident reports or data bases composed of police accident reports described in Request (1), or

(b) data in NHTSA's State Data System.

If it is your position that records exist that are responsive to this request, but that those records (or portions of those records) are exempt from disclosure, please identify the records that are being withheld and state the basis for the denial for each record being withheld. In addition, please provide the nonexempt portions of the records.

CAS requests that all fees in connection with this FOIA request be waived in accordance with 5 U.S.C. § 552(a)(4)(A)(iii) because CAS does not seek the records for a commercial purpose and disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." See also 49 C.F.R. § 7.44(f) (describing Department of Transportation fee waiver guidelines). The requested records,

which are not currently available to the public, concern the operations and activities of the federal government. The federal government provides states with substantial grant funding to improve state highway and traffic data collection systems. The data-sharing agreements will shed light on whether the federal government obtains rights to alter, use, disclose, distribute, dispose of, or rely on important state traffic safety data in which the federal government and taxpayers have an interest. This information will be useful to evaluate the benefit that the public receives from federal expenditures on state traffic data systems.

CAS also has the capacity to disseminate the information it gathers to the public and lawmakers so that they are better informed about motor vehicle safety issues. CAS is a nationwide, nonprofit consumer advocacy organization established in 1970 by Consumers Union and Ralph Nader. CAS works toward improved safety, environmental responsibility, and fair dealing in the automotive industry and the marketplace. As part of CAS's work, it conducts research relating to motor vehicle safety issues. CAS regularly distributes safety information to its members, and it has a website to keep members of the public apprised of developments, including data-related news, concerning motor vehicle safety issues. CAS's staff members regularly appear on television, radio, and at conferences, and they have testified before congressional committees. In addition, CAS works in coalitions with other leading individual and organizational advocates for motor vehicle safety, and it encourages these safety leaders to disseminate the information gathered and produced by CAS to their memberships and contacts.

Accordingly, I request that you waive all fees for locating and duplicating the requested records. If, however, a waiver is not granted, then please advise me of the amount of any proposed search, review, and reproduction charges before you conduct those activities.

I expect a response within 20 working days as provided by law. 5 U.S.C. § 552(a)(6)(A). If you have any questions regarding this request, please contact me at (202) 328-7700.

Thank you very much for your attention to this matter.

Sincerely,



Clarence Dillow  
Executive Director

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**From:** [NHTSAHotline@telesishq.com](mailto:NHTSAHotline@telesishq.com) [mailto:NHTSAHotline@telesishq.com]  
**Sent:** Monday, November 07, 2011 5:05 PM  
**To:** Clarence Ditlow  
**Subject:** FOIA Request for CAS 11-7-11 ISSUE=400641 PROJ=12

When replying, type your text above this line.

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**Notification of Case Change (All times are GMT-0500)**

**Project:** NHTSA Hotline Center  
**Case:** FOIA Request for CAS 11-7-11  
**Case Number:**400641

**Date:** 11/07/2011 **Time:** 17:05:07  
**Creation Date:**11/07/2011 **Creation Time:**14:22:48

**Description:**

*Entered on 11/07/2011 at 17:05:06 EST (GMT-0500) by BOL:*

Thank you for contacting the U.S. Department of Transportation's Vehicle Safety Hotline Information Center.

We have received your email and it has been forwarded to the appropriate NHTSA subject matter expert. However, if you need additional information on our services please feel free to contact us at 1-888-327-4236.

Thank you,

NHTSA.dot.gov Response Team

Disclaimer: "This response is for information purposes only and does not constitute an official communication of the U.S. Department of Transportation. For an official response, please write U.S. Department of Transportation, National Highway Traffic Safety Administration, 1200 New Jersey Ave, SE, West Building, Washington, DC 20590.

*Entered on 11/07/2011 at 14:22:48 EST (GMT-0500) by [nhtsa.webmaster@dot.gov](mailto:nhtsa.webmaster@dot.gov):*

Sender Name: Clarence Ditlow Sender Email: [cmdiii@autosafetyorg](mailto:cmdiii@autosafetyorg) Subject: FOIA Request for CAS 11-7-11 Comments: November 7 2011 VIA FIRST CLASS MAIL AND ELECTRONIC MAIL National Highway Traffic Safety Administration Executive Secretariat 1200 New Jersey Avenue SE West Building 41-304 Washington DC 20590 RE Freedom of Information Act Request Dear Freedom of Information Officer On behalf of the Center for Auto Safety CAS and pursuant to the Freedom of Information Act 5 USC 552 I request the following records 1 All records constituting or describing an agreement made between the National Highway Traffic Safety Administration NHTSA or its components and any state for the sharing of a police accident reports that i were collected or created by that state between January 1 1990 and October 31 2011 and ii are used or relied on by NHTSA to compile its State Data System or b data bases composed of police accident reports that i were collected or created by that state between January 1 1990 and October 31 2011 and ii are used or relied on by

NHTSA to compile its State Data System 2 All records constituting or describing an agreement made between NHTSA or its components and any state that governs or affects NHTSA's right to alter use disclose distribute dispose of or rely on a the police accident reports or data bases composed of police accident reports described in Request 1 or b data in NHTSA's State Data System If it is your position that records exist that are responsive to this request but that those records or portions of those records are exempt from disclosure please identify the records that are being withheld and state the basis for the denial for each record being withheld In addition please provide the nonexempt portions of the records CAS requests that all fees in connection with this FOIA request be waived in accordance with 5 USC 552a4Aiii because CAS does not seek the records for a commercial purpose and disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government? See also 49 CFR 744f describing Department of Transportation fee waiver guidelines The requested records which are not currently available to the public concern the operations and activities of the federal government The federal government provides states with substantial grant funding to improve state highway and traffic data collection systems The data-sharing agreements will shed light on whether the federal government obtains rights to alter use disclose distribute dispose of or rely on important state traffic safety data in which the federal government and taxpayers have an interest This information will be useful to evaluate the benefit that the public receives from federal expenditures on state traffic data systems CAS also has the capacity to disseminate the information it gathers to the public and lawmakers so that they are better informed about motor vehicle safety issues CAS is a nationwide nonprofit consumer advocacy organization established in 1970 by Consumers Union and Ralph Nader CAS works toward improved safety environmental responsibility and fair dealing in the automotive industry and the marketplace As part of CAS's work it conducts research relating to motor vehicle safety issues CAS regularly distributes safety information to its members and it has a website to keep members of the public apprised of developments including data-related news concerning motor vehicle safety issues CAS's staff members regularly appear on television radio and at conferences and they have testified before congressional committees In addition CAS works in coalitions with other leading individual and organizational advocates for motor vehicle safety and it encourages these safety leaders to disseminate the information gathered and produced by CAS to their memberships and contacts Accordingly I request that you waive all fees for locating and duplicating the requested records If however a waiver is not granted then please advise me of the amount of any proposed search review and reproduction charges before you conduct those activities I expect a response within 20 working days as provided by law 5 USC 552a6A If you have any questions regarding this request please contact me at 202 328-7700 Thank you very much for your attention to this matter Sincerely Clarence Ditlow Executive Director

**Contact Information:**

**Phone:**202 328-7700 **NHTSA ID:**332766



U.S. Department  
of Transportation  
**National Highway  
Traffic Safety  
Administration**

1200 New Jersey Avenue SE.  
Washington, DC 20590

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

DEC 16 2011

Clarence M. Ditlow  
Center for Auto Safety  
1825 Connecticut Avenue, NW  
Suite 300  
Washington, DC 20009-5708

RE: Freedom of Information Act (FOIA) Request, Our File # ES11-007070

Dear Mr. Ditlow:

This responds to your November 8, 2011 FOIA request submitted by the Center for Auto Safety (CAS) seeking records related to the NHTSA's State Data System. You request:

- 1) All records of an agreement, made between the National Highway Traffic Safety Administration (NHTSA) and any state, for the sharing of police accident reports or databases composed of police accident reports, created by the states that were used or relied upon by NHTSA to compile its State Data System.
- 2) All records of an agreement, made between the NHTSA and any state, that governs NHTSA's right to alter, use, disclose, distribute, dispose or rely upon data in NHTSA's State Data System.

I have interpreted your request for records related only to NHTSA's State Data System.

In connection with your request, you seek a waiver of "all fees" pursuant to 49 C.F.R. 7.44(f). To qualify for a fee waiver, a FOIA requester must satisfy the statutory and regulatory requirements. Under the FOIA, the requestor must establish that the information sought is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and (2) is not primarily in the commercial interest of the requestor. See Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988); Citizens for Responsibility and Ethics in Washington v. Department of Education, 593 F.Supp.2d 261, 268 (D. D.C. 2009); 5 U.S.C. § 552(a)(4)(A)(iv). Under DOT's regulations, the official having initial denial authority considers six factors in determining whether a FOIA requester met FOIA's fee waiver requirements. 49 C.F.R. § 7.44(f). These six factors are: (1) whether the subject matter of the requested records concerns the "operations or activities" of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure will contribute to the understanding of the public at large; (4) whether the contribution to public understanding will be significant; (5) whether the requestor has a commercial interest



that would be furthered by the requested disclosure; and (6) whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor. DOT's regulations require a FOIA requester seeking a fee waiver to address why his or her request meets these six criteria. 49 C.F.R. § 7.14(c)(2).

Your November 7, 2010 letter states generally that you meet the fee waiver criteria in 49 C.F.R. § 7.44(f). With respect to the statutory public interest requirement and the four regulatory criteria that mirror it (factors 1 - 4 of § 7.44(f)), you merely state that the documents concern the operations and activities of the federal government, that the records will inform the public whether NHTSA obtains certain rights in the data and that the records will be useful to evaluate the benefit that the public receives from federal grants on state traffic data systems. You also claim that CAS has the capacity to disseminate information to the public by regularly distributing information to its members, placing information on its website, and making appearances in the media. These vague and general assertions are insufficient to establish that you meet the statutory and regulatory criteria for a fee waiver.

You state that the disclosure of data sharing agreements would be useful to evaluate the benefit that the public receives from federal expenditures to improve state highway and traffic data systems, yet you fail to demonstrate how the knowledge of NHTSA's rights in the data would be used to measure benefits. Moreover, even assuming there were a correlation between the subject records and measuring benefits of the state data system expenditures, you fail to demonstrate how this information would contribute to an understanding of NHTSA's activities or how it will significantly contribute to the public at large, especially when considering the information that is publicly available. NHTSA publishes a considerable amount of information on its website related to state traffic data systems and its efforts to improve them. The traffic records page on NHTSA's website includes a repository with information on traffic safety data system improvement efforts at the federal and state level. There is a Traffic Records System Inventory, which provides information about each of the traffic safety data systems within each state. There is a link to each individual state data resource page, including summary reports of state crash data files. Further, the state data improvement project clearinghouse lists each state's projects to improve its traffic data collection. There are numerous other links and reports available to the public, such as information on grants and each state's highway safety plan to implement grant funds, including data collection improvements. All this information is useful for the public to evaluate the benefit from federal expenditures on state traffic data systems. With all the information available to the public on NHTSA's website related to state traffic data systems, CAS has not demonstrated how the disclosure of individual state data agreements would contribute to NHTSA's operations or that the public's understanding of state data systems will be significant.

Additionally, CAS states generally that it has the capacity to disseminate information to a small segment of the public—its members, and passively place information on its website, but it has not established that it will disseminate information to the public at large. Moreover, CAS states generally that it has capacity to passively disseminate information to a segment of the public, but does not demonstrate with particularity that the subject information will be communicated to the public. Accordingly, I do not agree that CAS has demonstrated that it met the public interest criteria (factors 1-4) of 49 C.F.R. § 7.44(f).



I am satisfied, however, that CAS does not seek the records for a commercial use and, therefore, do not address the commercial interest criteria (factors 5 and 6) of 49 C.F.R. § 7.44(f). Consequently, CAS is entitled to the first two hours of search time, the first 100 pages of duplication, and any review time to determine whether a record is exempt from mandatory disclosure, all without charge in accordance with the provisions of our regulation (49 C.F.R. § 7.44(a), (c), (d)).

You requested an estimate of processing fees should the agency deny your fee waiver request. As per your request, I estimate that the search time required to respond to your request will be approximately 7 hours. This estimate is based on the time that would be expended by several employees to search for and retrieve the responsive documents from various files in the agency. After accounting for allowances under 49 C.F.R. § 7.44(a) and (d), the estimated fees payable by CAS for this search would be \$250.00 (calculated in accordance with 49 C.F.R. § 7.43).

In accordance with the provisions of 49 C.F.R. §§ 7.14(c)(3) and 7.42(c), I will take no further action on your request until CAS agrees to pay the estimated fees identified above. If you still seek a public interest fee waiver, you must follow the requirements of 49 C.F.R. § 7.14(c)(2)(iii), addressing the factors in 49 C.F.R. § 7.44(f).

If I do not hear from you by January 6, 2012, the agency will proceed to close its file.

I am the person responsible for this decision. If you wish to appeal this decision you may do so by writing to the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE, West Building, W41-227, Washington, DC 20590. An appeal must be submitted within 30 days after you receive this determination. It should contain any information and argument upon which you rely. The decision of the Chief Counsel will be administratively final.

Very truly yours,



Andrew J. DiMarsico  
Senior Attorney

## APPENDIX 2

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

CENTER FOR AUTO SAFETY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 11-1048 (BAH)
	)	
U.S. DEPARTMENT OF TREASURY,	)	
	)	
Defendant.	)	

---

**VOLUNTARY STIPULATION OF PARTIAL SETTLEMENT  
AND PROPOSED ORDER FOR FURTHER PROCEEDINGS**

In this Freedom of Information Act ("FOIA") case brought under 5 U.S.C. § 552, the parties Center for Auto Safety ("Plaintiff") and the United States Department of the Treasury ("Defendant") (collectively, the "Parties"), hereby enter into the following Voluntary Stipulation of Partial Settlement and Proposed Order for Further Proceedings ("Stipulation"). In order to resolve the matters currently in dispute in the above-styled action without further expense or delay, Plaintiff and Defendant unconditionally agree to the following terms:

(1) Defendant will grant Plaintiff a waiver of fees associated with Plaintiff's June 8, 2009 request for access to information under the FOIA, as modified by discussions between the parties, which modification is described in paragraph (3)(A) below;

(2) Plaintiff hereby withdraws its motion for summary judgment, filed at Docket No. 7;

(3) Defendant agrees to process for Plaintiff, and release any non-exempt reasonably segregable responsive information, found in:

(A) All 18,446 responsive documents (11,196 emails plus 7,250 attachments), consisting of 153,000 pages, that were responsive to the search performed by Defendant in November 2011, for @chrysler.com and @gm.com within the date range of January 1, 2009 to August 27, 2009; and

(B) Any additional emails to, from, cc, or bcc to Robert Manzo during the relevant date range (through August 27, 2009);

(4) Plaintiff agrees that Defendant may have a total of twelve (12) months to process all of the records, unless completely unforeseen circumstances, which do not include a backlog of FOIA requests, require additional time, in which case the parties will first attempt to resolve the issue without Court intervention and, if unsuccessful, may bring the matter to the Court's attention for resolution. During this period, the agency will produce information on a rolling basis as further described below;

(5) Defendant agrees to produce the records in electronic format in the following order:

a) emails to, from, cc, or bcc to Robert Manzo; b) emails to, from, cc, or bcc @chrysler.com; c) emails to, from, cc, or bcc @gm.com; and d) any attachments.

(6) Defendant agrees to make monthly releases to Plaintiff, with the first production at the end of January 2012, of all non-exempt responsive information, accompanied by a letter informing Plaintiff of the exemptions that have been applied to the information processed during that month. Each production will make substantial progress toward completing all processing within 12 months, unless completely unforeseen circumstances, which do not include a backlog of FOIA requests, require additional time.

(7) Within six months of the date of this stipulation, Defendant agrees to produce to plaintiff a Vaughn index describing all information that has been withheld from Plaintiff under the FOIA and the basis for the FOIA exemptions asserted;

(8) At the conclusion of the processing Defendant will produce a second Vaughn index to Plaintiff describing all additional information that has been withheld from Plaintiff under the FOIA since the six-month Vaughn index and the basis for the FOIA exemptions asserted;

(9) Within ten days of Defendant producing its final Vaughn index the parties will file with the Court a proposed schedule for further proceedings.

(10) The Parties understand that this Stipulation contains the entire agreement between Plaintiff and Defendant; that no other promise or inducement has been made; and that no other representations, oral or otherwise, between Plaintiff and Defendant, or their respective counsel, not included herein shall be of any force and effect.

(11) Plaintiff reserves the right to seek attorney's fees, both on the issue of its entitlement to a fee waiver and/or its position that the "actual cost" of producing records electronically is de minimis, and with respect to any claim that the agency is withholding non-exempt records under FOIA. Defendant reserves the right to oppose any such request.

(12) This Stipulation of Settlement may not be altered, modified, withdrawn, waived, rescinded or supplemented except by written instrument executed by duly authorized representatives of both parties.

Executed this 16th day of December 2011.




JESSICA ALMY  
D.C. BAR # 996921  
KATHERINE MEYER  
D.C. BAR # 244301.  
Meyer, Glitzenstein & Crystal  
1601 Connecticut Ave., N.W.  
Suite 700  
Washington, D.C. 20009  
(202) 588-5206  
(202) 588-5049 (fax)


Counsel for Plaintiff

SO ORDERED:

\_\_\_\_\_  
DATE

Respectfully submitted,

RONALD C. MACHEN JR.  
D.C. BAR # 447880   
United States Attorney for D.C.

RUDOLPH CONTRERAS  
D.C. BAR #434120   
Assistant United States Attorney



MARINA UTGOFF BRASWELL  
D.C. BAR #416587  
Assistant U.S. Attorney  
U.S. Attorney's Office  
555 4<sup>th</sup> Street, N.W. - Civil Div.  
Washington, D.C. 20530  
(202) 514-7226  
(202) 514-8780 (fax)

Counsel for Defendant

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

## APPENDIX 3



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**Center for Auto Safety**

[www.autosafety.org/](http://www.autosafety.org/)

Organization that informs consumers about auto safety issues.

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Center for Auto Safety - Wikipedia, the free encyclopedia

[en.wikipedia.org/wiki/Center\\_for\\_Auto\\_Safety](http://en.wikipedia.org/wiki/Center_for_Auto_Safety)

The **Center for Auto Safety** (CAS) was founded in 1970 by Consumers Union and  
Ralph Nader as a Washington, D.C.-based lobbying group focused on the ...

Welcome to C.A.R.S.

[www.carconsumers.org/](http://www.carconsumers.org/)

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Center for Auto Safety pushes for recall of 2.2 million Jeep Grand ...

[www.autoblog.com/.../center-for-auto-safety-pushes-for-recall-of-2-...](http://www.autoblog.com/.../center-for-auto-safety-pushes-for-recall-of-2-...)

Jun 10, 2011 - The **Center for Auto Safety** doesn't often make national news, but  
demanding that the National Highway Traffic Safety Administration recall 2.2 ...

[PDF] Center for Auto Safety v. - Public Citizen

[www.citizen.org/documents/CenterAutoSafetyComplaint.pdf](http://www.citizen.org/documents/CenterAutoSafetyComplaint.pdf)

File Format: PDF/Adobe Acrobat - Quick View

UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF COLUMBIA, **CENTER  
FOR AUTO SAFETY**, ) 1825 Connecticut Avenue, NW, ) Suite 330 ...

Charity Review of Center for Auto Safety

[www.bbb.org/charity.../center-for-auto-safety-in-washington-dc-246...](http://www.bbb.org/charity.../center-for-auto-safety-in-washington-dc-246...)

Charity Reports Index; **Center for Auto Safety** ... Name: **Center for Auto Safety**.

Address: 1825 Connecticut Ave NW, Suite 330, Washington, DC 20009, Phone ...

Show map of 1825 Connecticut Ave NW # 330, Washington, DC 20009-5725

CENTER FOR AUTO SAFETY - Wheels Blog - NYTimes.com

[wheels.blogs.nytimes.com/tag/center-for-auto-safety/](http://wheels.blogs.nytimes.com/tag/center-for-auto-safety/)

In October 2009, the **Center for Auto Safety**, a nonprofit safety advocacy group  
founded in 1970 by Ralph Nader, filed a defect petition with N.H.T.S.A. asking it to ...

Center for Auto Safety | New Media Mill

[www.newmediamill.com/center-auto-safety](http://www.newmediamill.com/center-auto-safety)

**Center for Auto Safety**. It is easily the most comprehensive automotive website in  
existence. Visit [www.autosafety.org](http://www.autosafety.org) and find out why! The **Center for Auto** ...

Center For Auto Safety v. Federal Highway Administration | Casebriefs

[www.casebriefs.com/.../center-for-auto-safety-v-federal-highway-...](http://www.casebriefs.com/.../center-for-auto-safety-v-federal-highway-...)

Citation, 956 F.2d 309, 294 U.S. App, D.C. 23; 1992 U.S. App. click the citation to view  
the entire case on Brief Fact Summary. Prior to 1988, States were...

Directory Information for Center for Auto Safety (CAS) | USA.gov

[www.usa.gov/directory/consumerorgs/center-for-auto-safety.shtml](http://www.usa.gov/directory/consumerorgs/center-for-auto-safety.shtml)

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## APPENDIX 4



U.S. Department  
of Transportation  
**National Highway  
Traffic Safety  
Administration**

1200 New Jersey Avenue SE.  
Washington, DC 20590

November 8, 2011

Request Date: November 7, 2011

Request Tracking No.: ES11-006956

Date of Receipt: November 7, 2011

Mr. Clarence M. Ditlow  
Executive Director  
Center for Auto Safety  
1825 Connecticut Avenue, NW, Suite 330  
Washington, DC 20009

Dear Mr. Ditlow:

This acknowledges receipt of your Freedom of Information Act request, received by the National Highway Traffic Safety Administration. Requests are processed on a first in, first out basis. Your request is being processed as expeditiously as possible, but actual processing time depends upon the complexity of your request. Complex or large requests may take significant processing time. If you wish to narrow your request or have any questions, please call (202) 366-1834.

\*\*\*\*\*  
**NHTSA**  
[www.nhtsa.gov](http://www.nhtsa.gov)