

## **NHTSA Document and Data Secrecy and Accessibility**

Withholding critical data, the erosion of public accessibility to public information, the neglect of government documents—these have been the hallmarks of the Bush administration. Secrecy—in all of its forms—has been a prominent feature of the continuing stream of scandals out of Washington, D.C. Most have centered on national security, but lately, administration appointees have thrown a cloak of secrecy over motor vehicle safety information. The effect will likely be felt for many years to come.

In the following three stories, which were published in SRS' *The Safety Record* (V2, Issue 4 March / April 2007), Safety Research & Strategies examines data secrecy, the new limits on public accessibility to important NHTSA documents, and the neglect of historical data sources. Alone, these issues are significant. Combined, they have potentially devastating effect on the future of safety regulation and defect trend detection and remediation.

### **Statistician Sues for Release of TREAD Information; Six Years After TREAD Act Passes, Data Still Secret**

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WASHINGTON D.C. – Randy A. Whitfield, president of QCS Corporation, has filed a Freedom of Information Act lawsuit against the National Highway Traffic Safety Administration for the release of Early Warning Reports collected under the TREAD Act. The data are needed to complete a project commissioned by Safety Research & Strategies in an effort to understand the increase in Ford Explorer tire-related fatal crashes post-Firestone.

For more than a year, Whitfield has been requesting death and injury data submitted by the Ford Motor Company on Ford Explorers to better analyze the rise in tire-related Explorer fatalities. Between July 1994 and January 15, 2007 at least 420 persons have been killed in tire-related, Ford Explorer, Mercury Mountaineer, and Mazda Navajo crashes, including 396 deaths found in NHTSA's Fatality Analysis Reporting System and 24 recent deaths found in news accounts.

“A small part of these data would help us understand the continuing incidence of deaths and injuries associated with tire failures in Explorers,” Whitfield said. “They have continued long after the well-known tire recalls in 2000 and 2001. In fact, the FARS data show that more deaths have occurred in tire-related, Explorer crashes *after* the recalls were first announced than had been killed before the recalls.”

NHTSA has argued that the data should remain confidential while the Rubber Manufacturers Association continues a legal fight to keep it out of the public realm. But NHTSA's refusal to release the Early Warning Reporting (EWR) data is not a recent phenomenon. The brief history of this regulation has been characterized by the agency's persistent efforts to diminish the availability of EWR data. It is, perhaps, the most disturbing example of the agency trend toward data secrecy.

Early Warning Reporting (EWR) data submission requirements are a provision of the Transportation Recall Enhancement Accountability and Documentation Act. It was passed in October 2001 in response to Ford Explorer-Firestone tire-related rollover deaths in the U.S. and Ford's secret overseas recalls. TREAD amended federal transportation law to require vehicle and

equipment manufacturers to report safety recalls or campaigns on vehicles and components in a foreign country if they also sold substantially similar products in the U.S. It also mandated the National Highway Traffic Safety Administration to create regulations governing quarterly Early Warning Reports – information on property damage and warranty claims, consumer, dealer and field reports and deaths and injuries collected by manufacturers – with the intent of using the data to spot defect trends.

In November 2000, when President Bill Clinton signed the TREAD Act into law, he directed NHTSA “to implement the information disclosure requirements of the [TREAD] Act in a manner that assures maximum public availability of information.” But after six years of crafting regulations, and after three years worth of data, the public has consistently been denied access to important safety information.

### **From Maximum to Minimum Accessibility**

Concerns about the public accessibility of TREAD data go back to October 2000, 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.

In January 2001, NHTSA began the process of establishing the EWR provision of the TREAD Act. NHTSA reiterated its position that the disclosure section of the rule would not change the agency’s current information release policies. According to the notice announcing that NHTSA would soon move to create a rule, “the primary differences between pre-TREAD Act and post-TREAD Act reporting are likely to be in the mechanisms for reporting and amount of information reported.”

After accepting a year’s worth of public comments, NHTSA published a Notice of Proposed Rulemaking (NPRM) for EWR data. On the subject of public disclosure, the rule gave manufacturers the right to petition the agency to grant confidentiality for some information under the Confidential Business Information regulation. However, the rule made clear that most of the information submitted would be public, and that the agency didn’t expect to receive many requests for confidentiality:

“It is expected that the types of information that manufacturers would be required to submit to the agency under this NPRM would include information about claims and notices that allege death or injury; numbers of property damage claims, consumer complaints, warranty claims, and field reports. They would also have to submit documents related to customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement of motor vehicles or equipment, as well as certain field reports. Historically, these types of information generally have not been considered by the agency to be entitled to confidential treatment...”

In April 2001 notice, in response to changes in case law and the TREAD Act, NHTSA proposed to amend its Confidential Business Information regulation. The original rule was crafted in 1981 and underwent revisions in 1982 and 1989. This new version would designate certain types of

information collected under TREAD as presumed not to cause competitive harm if disclosed, and would therefore be public: consumer complaints, warranty claims, property damage reports.

“Although the agency routinely protects the name and other identifying information about individuals who may be identified in these documents, the agency has consistently not granted confidential treatment for this type of information. The agency frequently receives requests for confidential treatment for these types of materials, and consistently denies such requests,” the agency said in its proposed rulemaking.

On July 10, 2002, NHTSA published a final rule for EWR data, leaving the disclosure provision unchanged from the proposed rule. A year later, NHTSA issued a Final Rule on Confidential Business Information. Once again, the agency said that data collected under TREAD was not confidential under the Exemption 3 statute. Instead, the agency said it would consider the confidentiality of EWR information under Exemption 4 to FOIA— information that may cause competitive harm.

But using Exemption 4, NHTSA did an about-face on the types of information that would automatically be presumed confidential because their public release would allegedly cause competitive harm. It determined that warranty claims information and consumer complaints collected under TREAD were confidential, as well as field and dealer reports and production numbers of child restraint systems, tires and vehicles other than light vehicles. Death, injury and property damage information, under the Final Rule, would be considered public.

### **The Data Fight Moves to the Courts**

On March 22, 2004, Public Citizen sued Secretary of Transportation Norman Mineta over the Confidential Business Information regulations, claiming that NHTSA’s final rule deviated substantially from its initial proposal by broadly determining that whole classes of tire data are confidential. The Rubber Manufacturers Association filed a cross claim that all of the EWR data should be confidential under Exemption 3.

Bridgestone/Firestone, which had already lost one agency battle to keep its EWR injury and death data confidential, decided to use the lawsuit to keep its data from public view. In a June 3, 2004 letter, the tire giant appealed NHTSA’s denial. Bridgestone/Firestone continued to argue that all EWR data should be confidential under Exemption 3, and asked that NHTSA withhold the data pending the outcome of Public Citizen v. Mineta.

In October that year, NHTSA granted Bridgestone/Firestone an “administrative stay” on releasing any Early Warning Reporting death and injury data that the company has submitted and is expecting to submit pending the outcome of Public Citizen’s lawsuit.

In March 2006, the court finally ruled. U.S. District Court Judge Robert Leon found that that NHTSA did have the right to designate certain classes of information as confidential. But he also found that the agency “pulled a switcheroo” when it published its final rule, by designating as confidential certain types of information that were never mentioned in the proposal, without allowing adequate opportunity for public comment. Leon kicked NHTSA’s final Confidential Business Rule back to the agency. In July 2006, Judge Leon ruled against the RMA on the Exemption 3 issue. He found that the TREAD Act does not qualify as a withholding statute under FOIA Exemption 3.

The Rubber Manufacturers Association has appealed the ruling.

### **Quality Control Stymied in its Attempts to Understand the Explorer Fatality Trend**

In the meantime, QCS Corp., contemplating a research project using the EWR death and injury data, contacted NHTSA in March 2004 about their availability. Initially, NHTSA spokesman Rae Tyson told Whitfield that the data were available on the Internet. But a week later, NHTSA's Defects Assessment Chief, Jonathan White, told Whitfield that the data would remain confidential until the agency responded to several petitions for reconsideration on the confidentiality rules.

On April 21, 2004, NHTSA responded to those petitions for reconsideration. The agency reaffirmed that the TREAD statute did not make the EWR data automatically exempt from the scope of FOIA. But NHTSA added another class of information that would be considered confidential under Exemption 4: lists of common green tire identifiers.

Now that a final rule had established public access to EWR death and injury data, Whitfield renewed his pursuit of the information. In December 2005, he sent NHTSA a FOIA request for deaths and injuries claims data related to Explorer/tire incidents and asked for expedited treatment based on imminent threat to life and safety. In February 2006, NHTSA denied QCS Corp.'s FOIA request, citing Public Citizen's pending lawsuit.

QCS Corp. wrote to NHTSA again, requesting an expedited appeal. He argued that there was no legal basis for NHTSA to issue a stay of its obligation to comply with FOIA. He also argued for access because QCS was asking for Ford deaths and injuries, which had been deemed public by NHTSA and because the Ford Motor Company was not a party in the lawsuit.

NHTSA never responded. Following Judge Leon's decision, QCS again pressed its FOIA request for the Ford EWR death and injuries data. NHTSA turned Whitfield down again, this time citing RMA's appeal.

### **Rulemaking Continues; Data Kept Secret**

Last fall, the agency resumed rulemakings on EWR data. Despite Public Citizen's successful lawsuit and despite the spirit of openness that heralded the passage of TREAD, NHTSA continued to whittle away its worth and diminish public access to it.

In September 2006—even though in the last three years the public had only seen some summaries of TREAD Early Warning Reports in connection with defect investigations—NHTSA asked the public to comment on a proposal to eliminate the requirement that manufacturers submit records known as product evaluation reports – reports by non-technical employees of an automaker who lease or use a new vehicle for personal use subject to the condition that they provide written evaluations of the vehicles. The agency also proposed to reduce the categories from the list of fire precursors that manufacturers are required to report and to add an unknown category to fuel type for manufacturers of medium and heavy trucks.

In October, following Judge Leon's order, NHTSA published another Notice of Proposed Rulemaking. This time, the agency notified the public that it intended to make EWR warranty claims, field reports, consumer complaints and some production numbers confidential under

FOIA Exemption 4. The public comment docket closed in January. The agency has not yet published a final rule.

The Department of Justice has until May 23 to respond to Whitfield's FOIA lawsuit.

## **VOQ Consumer Complaints Drop Sharply; NHTSA Refuses News Story to Reverse Trend**

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Safety Research & Strategies has found that Vehicle Owner Questionnaire reports submitted by motorists to NHTSA have decreased by nearly 40 percent in the last two years. But the agency has rejected an opportunity to use the media to boost its numbers by informing consumers about the importance of filing complaints.

Annual complaint rates, which peaked during the Firestone / Ford debacle at 50,000 in 2000 dropped to about 42,000 by 2002. In 2004, the numbers rebounded to nearly 50,000. But in the last two years, complaints have taken a nosedive to 40,000 in 2005. In 2006, only 30,000 complaints were logged.

"This trend is particularly troubling at a time when all other complaint data are held secret by NHTSA" said SRS president Sean Kane.

A review of NHTSA defect investigations will quickly show how reliant the Office of Defects Investigation (ODI) is on consumer complaints voluntarily reported to the agency. The number and type of complaints—which run the gamut from serious safety issues to mere annoyances—can determine whether an investigation is opened, upgraded, or closed and the likelihood of a recall.

Consumer complaints, referred to as Vehicle Owner Questionnaires or VOQs, which the agency has collected since the 1970s, make up the only publicly accessible database of this type of information. Despite the importance of the VOQs, the public is still largely unaware of the existence of the database, its reporting mechanisms and how NHTSA, the safety community, and consumers use them to remedy problems.

Although SRS's investigation into the complaint rate reduction is still underway, the company offered to help the agency reverse the trend by working with media to report on the importance of consumer participation.

"One of the best ways to increase consumer complaints is to continually publicize the VOQ reporting mechanisms and show how NHTSA uses these reports to investigate and push manufacturers to recall defective vehicles, tires and equipment," Kane says. Consumers have no shortage of outlets to complain about their vehicles, but the one place that it matters most is probably one of least known, Kane says.

SRS shopped the story to broadcast media looking for a large national audience and maximum airtime to tell the story. In February, Kane brokered a deal with a broadcast media company that provides special news reports to more than 120 local and regional broadcast news stations nationwide.

The freelance producer assigned to the story was anxious to film and ready it for airing in March. While not a complicated story to tell, the usual material was needed: an expert, consumers, and, of course, the government. Kane notified the Office of Defect Investigation that the story was a go and requested that they notify the public affairs office and prepare examples of how the data are used, along with some success stories. The producer let the public affairs office know they were planning to air a story on the importance of the VOQ database and to provide consumers with the 800 hotline and website information. She requested an on-camera interview with agency personnel.

In Kane's interview for the story, he described how SRS, other safety organizations, and consumers themselves reviewed and used the data for purposes ranging from addressing a lemon to supporting requests for investigations and recalls into safety-related defects. The producer began chasing leads to locate consumers who reported complaints and used the data but began to worry that she hadn't received confirmation for an interview date with a NHTSA spokesperson. After several calls to NHTSA public affairs, the producer reached Eric Bolton. But Bolton seemed unenthusiastic about providing an agency source.

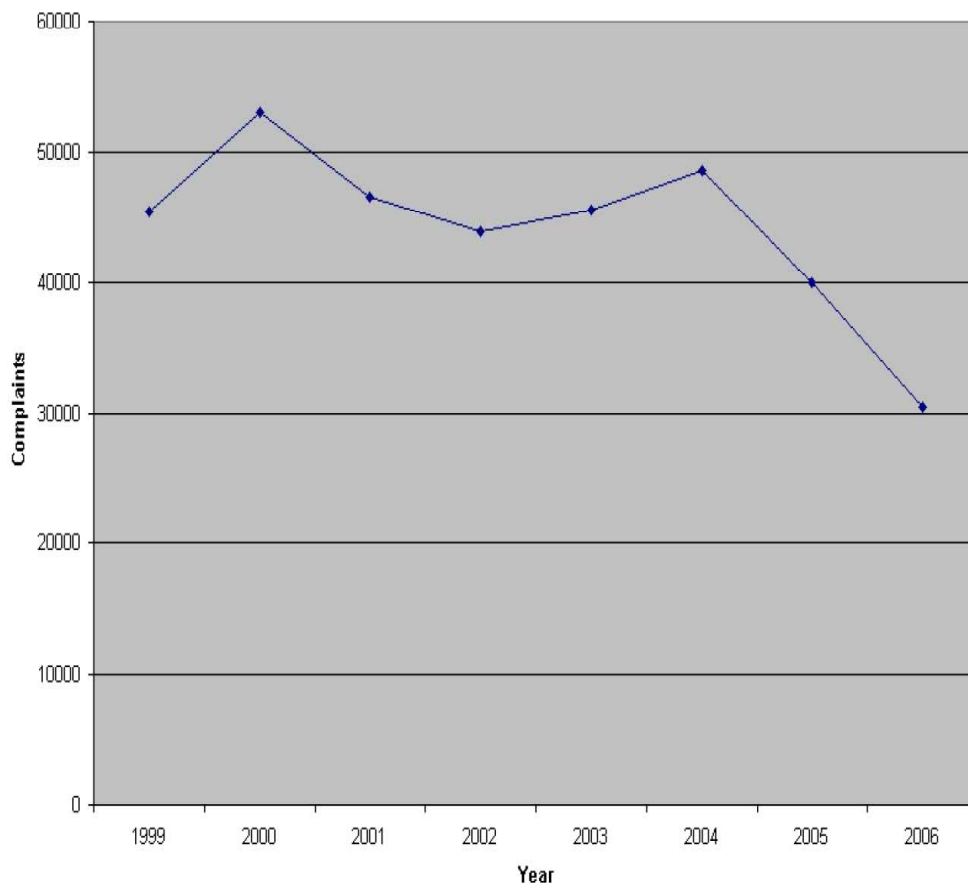
Kane tried to help by calling Bolton to reiterate the need for an agency spokesperson and the positive effect the story was likely to have on consumer outreach. Bolton said that the agency would provide materials about successes but could not provide an on-camera interview. Knowing this would kill the story, Kane pressed Bolton to answer why. Bolton referred Kane to Heather Hopkins, a political appointee overseeing public affairs.

When Kane called Hopkins to encourage her to allow an agency person for on-camera interview, she explained that she should have been notified sooner. It simply wasn't possible to provide someone on camera at this time, she said. Kane offered to get the story delayed to accommodate the agency, but Hopkins refused to say how much time they would need. It became increasingly clear to him that regardless of what he offered, Ms. Hopkins would refuse to authorize an on-camera interview—even if the report was positive and even if it provided the much-needed outreach for the complaint database.

“Frankly, I was exasperated—we went out of our way to support the agency and its enforcement efforts by getting them great exposure in a news report—and they wanted to kill the story, it didn't make any sense,” said Kane. “I began to wonder why didn't they want the story, what was behind this?”

The only explanation, says Kane, is that the agency really didn't want the complaints. “It's the classic scenario, no data, no problem.”

NHTSA Complaint Database Reports by Year 1999 - 2006



**Activists Fight to Keep NHTSA Library Open and Documents Safe  
A unique and critical source of public safety information threatened**

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WASHINGTON, D.C. – A consortium of auto safety, public interest advocates, librarians and researchers are fighting to keep NHTSA’s Technical Information Services Reading Room open and to prevent the further destruction of historical documents and resources when the agency moves to new quarters.

The TIS Reading Room, open since the 1970s, serves a vast community of users, from public interest organizations to researchers, lawyers, reporters, the general public, and NHTSA itself. They go there to access important bibliographies, indices, databases and reference tools and agency and non-agency generated materials related to motor vehicle safety issues.

For six months, Safety Research & Strategies had been trying to find out the agency’s plans for reading room. In the meantime, documents and indices began to disappear and rumors circulated that the reading room would be shuttered in June, when NHTSA began its phased move to a new building in a revitalized area on the southern outskirts of the city. After fruitless, repeated efforts to voice its concerns to NHTSA’s Chief Information Officer, Margaret O’Brien, and to pin her

down on the reading room's fate, SRS formed a coalition of auto safety groups and information specialists. The group included major advocacy and library organizations: Public Citizen, Center for Auto Safety, Advocates for Auto and Highway Safety, Consumer Federation of America, the American Library Association, Special Libraries Association and American Association of Law Libraries. In concert, the group mounted an organized opposition to scuttle any plans to close the Reading Room or to move large amounts of source materials to other archives.

"We got involved because a federal agency has removed critical information on public safety from public access," said Tara Olivero, assistant director for government relations for the American Library Association, which represents 66,000 members and 4,000 member institutions.

As the calls for preservation and continued public access mounted, O'Brien finally granted the group a meeting. During the April 2 meeting the group argued that the plan to move TIS documents into other libraries or archives was neither practicable nor cost-effective, and ultimately, would hamper the agency's mission to develop sound motor vehicle safety policies.

The TIS, they said, is the repository of a network of systems that allows research on a wide array of motor vehicle safety materials. Advocates argued that eliminating components of this system would make it extremely difficult to identify and locate many important materials. While the total number of TIS visitors may appear small, those users represent thousands of organizations and individuals who rely on the materials maintained there. The loss of the Reading Room would leave no other direct access to many important materials and represented the further erosion of public access, they argued.

Advocates also pointed out that closing the TIS Reading Room would not save NHTSA any money, because the loss of once-accessible information would boost FOIA requests and require additional staff to handle them. Further, the costs of operating the Reading Room and maintaining its important resources paled compared to cost to the public of loss of the agency regulatory and enforcement history. In fact, the value of past regulations and enforcement activities is immeasurable, because policy mistakes are costly and tend to have long legacies, they said.

At the meeting, O'Brien expressed little concern for the role of history in crafting current policy. She told the group that there were no guarantees that the reading room would remain open. If it did, she said, the space allocated would be significantly less than the tiny run-down office it currently occupied – especially since the facility only serves a trickle of daily visitors.

Information advocates say that they are fighting a wave of federal government library closures – primarily due to budget constraints. Nonetheless, public access to the NHTSA Reading Room and its contents remains important -- even if the room draws few researchers, because the information researchers use is important in safety research and in saving lives, says Doug Newcomb, Chief Policy Officer with the Special Libraries Association (SLA).

"With so much content being transferred to digital format today, SLA is less concerned about the presence of a reading room than timely ease of access to critical information housed at NHTSA by researchers and the general public," Newcomb said. "As is the case with the proposed closure or EPA regional libraries, and its effect on public access, we do not feel the NHTSA closure/transition to a new space has been transparent or collaborative."

The group left the meeting determined to increase the pressure on O'Brien to save the reading room. They alerted the *Washington Post* and have lobbied members of Congress on behalf of public access to the repository. SRS has unofficially learned that NHTSA has responded to the campaign with plans to keep the Reading Room open and will move much of its inventory to the new building. But SRS was unable to confirm the details, such as what resources plan to be maintained.

“It’s very disturbing they would remove this information without investigating its value to the public,” Olivero added.

“They didn’t seem to understand the importance of historical information. The value of studying [policy] history is to understand it and improve it. Hopefully by partnering we can make a change to ensure that the reading room is there and that its valuable resources are placed back into public access.”