

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION**

SAFETY RESEARCH &
STRATEGIES, INC., a
foreign corporation,

CASE NO.: _____

Plaintiff,

v.

**EXPEDITED HEARING
REQUIRED BY LAW**

FLORIDA DEPARTMENT
OF TRANSPORTATION, an
agency of the State of Florida,

Defendant.

_____ /

COMPLAINT

Plaintiff, Safety Research & Strategies, Inc. ("Safety Research"), brings this lawsuit against the Florida Department of Transportation ("FDOT") to compel compliance with Florida's celebrated Public Records Act, codified in chapter 119, *Florida Statutes*, and in support states as follows:

SUMMARY

1. Florida's Public Records Act is to be broadly construed in favor of transparent, open and honest government. Compelling compliance with the Public Records Act is of critical public importance to preserve public confidence in government, and, at times, to ensure that the public is fully aware of safety threats.

2. This is a lawsuit to force FDOT to produce public records which were lawfully requested by Safety Research on February 10, 2014, and which have not been produced.

3. Rather than timely producing the requested records to Safety Research in good faith, FDOT has unlawfully sent a CD of responsive emails to Trinity Industries, Inc. ("Trinity") for Trinity's review.

4. Trinity is a private company which manufactures ET-plus guardrail systems.

5. Trinity has previously sought and obtained a protective order prohibiting FDOT's release of "trade secret" records. However, that protective order was narrowly-applied to just two documents. Now, FDOT is withholding, at a minimum, over one-thousand documents, including emails between FDOT and Trinity, which Trinity has never maintained as trade secrets.

6. Either (1) FDOT is allowing Trinity, a for-profit, third party to determine which records FDOT will produce to Safety Research, or (2) FDOT is delaying its response to Safety Research until a review of the requested records is conducted by Trinity. Under either scenario, FDOT is violating its obligation to promptly produce public records in good faith.

PARTIES, JURISDICTION AND VENUE

7. Plaintiff Safety Research & Strategies, Inc. is a Massachusetts company specializing in motor vehicle and product safety research, investigation and advocacy. SRS's clients include attorneys, engineering firms, supplier companies, media and government. SRS works with organizations and entities interested in improving vehicle and product safety. The company's advocacy mission includes the publication of special reports, articles and investigations and submissions to safety agencies and

policymakers on matters of public interest. Much of Safety Research's advocacy work is performed on a *pro bono* basis.

8. FDOT is a state agency headquartered in Leon County, and is an "agency" of government pursuant to section 119.011(2), *Florida Statutes*, over which this Court has jurisdiction.

9. Providing prompt access to public records absent unnecessary delay is a duty of FDOT.

10. This Court has subject matter jurisdiction over this lawsuit.

GENERAL ALLEGATIONS

11. On February 10, 2014, Safety Research submitted a lawful public records request to FDOT requesting, in essence, public records related to FDOT's use of guardrail systems manufactured by Trinity ("the Safety Research Request"). A copy of the Safety Research Request is attached as Exhibit "A."

12. The Safety Research Request sought production of documents made or received in connection with the transaction of official business.

13. At no point has FDOT maintained that compliance with the Safety Research Request would require a substantial amount of manipulation, programming, extensive use of information technology resources, or extensive clerical or supervisory assistance.

14. Safety concerns surround Trinity Industries' Guardrail Systems. Trinity is a Dallas, Texas-based company which dominates the global highway guardrail market. Its guardrail end-terminals are installed on highways across the United States. In the late 1990s, Trinity launched the ET-Plus, a guardrail end-terminal system, also known

as an Energy Absorbing Terminal, that is designed to absorb the kinetic energy of the striking vehicle in an impact. Once the end-terminal head is impacted, it is designed to extrude through a feeder chute, flattening the rail, or W-beam, which exits through the terminal head like a metal ribbon, dissipating the crash energy and bringing the vehicle safely to a halt. FHWA first approved the ET-Plus in 1999. In 2005, Trinity made a design change to the ET-Plus terminal extruder head (from 5" to 4"), likely to save material and manufacturing costs. The newer version of the ET-Plus, manufactured in 2005, also has a dimensional change to the height of the extruder head, through which the rail is extruded. This change may cause the rails to hang or lock up in the extruder head, feeder chute or channel. Instead of ribboning out, as originally designed, the rail allegedly folds back to form a spear, intruding into the vehicle and potentially impaling its occupants. While the alleged failures of the 4" extruder head terminal system have been the subject of media and state government agency inquiries, there are other performance anomalies associated with both the 5" and 4" terminal head designs of the ET-Plus, raising potential concerns about overall design of this product, from its inception. Further, Trinity changed the design of the end terminal without specifically notifying FHWA, as required by federal law, until seven years later, when a patent dispute between Trinity and SPIG Industries, of Bristol, Virginia brought this modification to light. In the last two years, questions about the safety and field performance of the ET-Plus have been raised by state departments of transportation individually and via the American Association of State Highway and Transportation Officials ("AASHTO"). In the fall of 2012, three of its 21 members responded to a survey about the field performance of guardrail terminals indicating that the end terminals were involved in three severe

vehicle crashes that resulted in serious injuries and deaths; two of the three agencies specifically referenced the ET-Plus. AASHTO asked FHWA to re-review its approval of the ET-Plus and document the modified barrier system's crashworthiness under the federal criteria, NCHRP 350. More recently, in January 2014, the Nevada Department of Transportation informed Trinity that its ET-Plus terminal would no longer be considered approved equipment because of the 2005 modification that was not disclosed. Trinity was required to inform the state of the product modifications and failed to do so. Safety questions concerning Trinity guardrails have been the subject of numerous news stories in the U.S. and abroad, giving the issue a high profile. To journalists, FHWA has claimed that the controversy is a business dispute between competitors. Internally, however, documents suggest that officials within the agency have admitted that there are valid field.

15. The Safety Research Request is intended, in part, to determine whether millions of drivers in Florida are currently at risk of injury or death due to FDOT's use of Trinity's likely defective guardrail systems.

16. Trinity is not a "contractor" acting on behalf of FDOT pursuant to section 119.0701, *Florida Statutes*.

17. FDOT initially responded to the Safety Research Request by providing a mere thirteen files. When Safety Research questioned the completeness and validity of this production, FDOT admitted that over one-thousand emails were responsive to the request, but were withheld.

18. FDOT then offered to mail a CD containing these emails to Safety Research on April 24, 2014. A copy of this correspondence, including FDOT's admission, is attached as Exhibit "B."

19. On May 8, 2014, Safety Research still had not received a CD containing FDOT's emails and asked FDOT whether the CD had been mailed.

20. On May 12, 2014, FDOT responded that it was allowing Trinity to review the requested records prior to any further production to Safety Research. A copy of this response is attached as Exhibit "C."

21. Absent action by this Court, FDOT will allow Trinity, a private company, to perform the government function of reviewing records to determine if requested records are confidential or exempt.

22. It is unknown why, after agreeing to promptly mail the CD containing emails directly to Safety Research, FDOT changed its position and instead is determined to allow Trinity to review the emails prior to their production.

23. Trinity is a foreign corporation with no core competency or training in interpreting or applying Florida's laws addressing which records would legally qualify as confidential or exempt.

24. By allowing Trinity to be the sole arbiter of what constitutes an exempt or confidential record, FDOT is violating section 119.01, *Florida Statutes*, by allowing a private company to, "[impair] the ability of the public to inspect or copy the public records of the agency." *Id.*

AUGUST PROTECTIVE ORDER

25. On August 23, 1013, Trinity sought and obtained from Judge Terry Lewis a protective order limiting access to just two documents as trade secrets. They are: (1) the "Quality Management System Manual" for Trinity and; (2) the "Facilities Manual." A Copy of the Protective Order is attached as Exhibit "D."

26. The protective order neither calls for nor justifies FDOT's apparent current practice of "pre-clearing" the release of any Trinity-related public records through Trinity.

27. The protective order is clear that only the above-referenced two documents are precluded from production. Thus, FDOT could easily ascertain whether these documents were included in the "over one-thousand" emails without sending those emails to Trinity for further review.

28. Safety Research has retained the law firm of Keefe, Anchors & Gordon, P.A., to prosecute this matter and is obligated to pay reasonable fees and costs for the litigation.

29. Safety Research is entitled to recover its legal fees and costs for bringing this lawsuit pursuant to section 119.12, *Florida Statutes*.

30. Pursuant to section 119.11, Safety Research requests an accelerated hearing to resolve this lawsuit and to compel immediate compliance with its request for public records.

COUNT I – PRODUCTION OF REQUESTED PUBLIC RECORDS

31. Paragraphs 1-30 are re-alleged as if fully stated herein.

32. The Safety Research Request was lawfully submitted on February 10, 2014.

33. Records exist which are responsive to the Safety Research Request.

34. Not all records responsive to the Safety Research Request have been produced to Safety Research, including a CD with over 1,000 emails.

35. Despite a legal requirement to do so, FDOT has not cited a statutory exemption to the Public Records Act which justifies either: (1) withholding the requested public records for nearly 100 days; or (2) allowing Trinity to review the requested records prior to their production.

36. All exemptions to the Public Records Act are to be narrowly construed.

37. On information and belief, none of the emails responsive to the Safety Research Request have been stamped or otherwise labeled by Trinity as trade secrets prior to the Safety Research Request.

38. Had Trinity labeled documents as trade secrets, those documents would have been easily identifiable by FDOT for redaction in a cursory review of the requested records. There would *never* be legal justification allowing Trinity to review emails following the Safety Research Request prior to their production.

39. Thus, FDOT lacks even an imaginable basis for the claim that public records, including correspondence regarding customer complaints, injuries, guardrail failures, accidents, design, purchases, testing, manufacturing and the like would qualify as exempt or confidential.

40. By allowing Trinity to review and redact public records prior to their production, and by delaying production of the requested records for the sole purpose of allowing Trinity to review the records, FDOT has violated its legal duty to promptly respond to the Safety Research Request in good faith.

41. Given FDOT's fumbling of the Safety Research Request, a special master is necessary to review FDOT's electronically stored information, at FDOT's expense, to ensure full compliance with the Public Records Act.

WHEREFORE, Safety Research requests an order from this Court:

- (1) Declaring that FDOT has violated the Public Records Act by failing to lawfully comply with the Safety Research Request;
- (2) Demanding that FDOT produce the requested public records to Safety Research within 48 hours;
- (3) Awarding Safety Research its reasonably incurred attorneys' fees and costs;
- (4) Appointing a special master to monitor FDOT's compliance at FDOT's expense; and
- (5) Any other relief this Court deems just and proper.

Dated this 19th day of May, 2014



Matthew L. Gaetz, II
Florida Bar No. 0048962
Keefe, Anchors & Gordon
2113 Lewis Turner Blvd, Ste 100
Fort Walton Beach, FL 32547
Phone: 850-863-1974
Fax: 850-863-1591
E-mail: mgaetz@kaglaw.com
Attorney for Plaintiff

From: Melanie MacDonald
Sent: Monday, February 10, 2014 2:18 PM
To: 'robert.burdick@dot.state.fl.us'
Subject: Access to Public Records
Importance: High

Dear Mr. Burdick:

Pursuant to the open records procedures of Florida, I'd like to request access to and/or copies of any and all documents associated with inquiries, investigations, and/or communications between your agency and/or any division of your agency and Trinity Industries, Inc. and/or their subsidiaries related to the design, manufacture, failure, purchase, testing, motor vehicle accidents, consumer complaints and/or safety of ET-Plus guardrail systems from 2004 to the present.

Please let me know if my request is proper and if so the fees and/or costs associated with complying with my request. Also, if you'd keep me apprised of your time frame to gather responsive documents I'd appreciate that as well.

Thank you so much for your time and consideration. I look forward to hearing from you.

Kind regards,

Melanie J. MacDonald
Senior Research Associate

Exhibit "A"

Safety Research & Strategies, Inc.
340 Anawan Street, Suite 200
Rehoboth, Massachusetts 02769
(508) 252-2333 Main Office
(407) 902-1230 Cellular
Email: melanie@safetyresearch.net

Check out: www.thesafetyinstitute.org

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From: [Menchion, Kimberly](#)
To: [Melanie MacDonald](#)
Cc: [Parsons, Trish](#)
Subject: RE: Access to Public Records
Date: Thursday, April 24, 2014 3:11:06 PM

Ms. MacDonald,

You received a File Transfer with approximately 13 files. You stated that you did not received any e-mails. I have a CD with over 1,000 e-mails. We will mail it to you.

Thanks,

Sincerely,

Kimberly Clark Menchion, Esq.
Assistant General Counsel
Florida Department of Transportation
Office of the General Counsel
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458
Phone: (850) 414-5293
Fax: (850) 414-5264

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Exhibit "B"

From: [Melanie MacDonald](#)
To: "[Menchion, Kimberly](#)"
Cc: [Sean Kane](#)
Bcc:
Subject: RE: Access to Public Records
Date: Monday, May 12, 2014 12:20:31 PM

Hi Kimberly –

Please provide me with a citation(s) to your state's open records law that supports FDOT's decision to allow a manufacture to review emails in your possession prior to compliance with my open records request that has been pending since February 10, 2014 at your earliest convenience. Further, my open records request was specific to a product manufactured by Trinity Industries, Inc. and/or Trinity Highway Products. You state, ... "*a review by one of the manufactures [sic] has been requested.*" Who is person(s), on behalf of the manufacturer(s), that is reviewing the emails/documents that you reference prior to their release?

I look forward to your reply.

Thank you.

Kind regards,

Melanie J. MacDonald
Safety Research & Strategies, Inc.
340 Anawan Street, Ste. 200
Rehoboth, MA 02769
(508) 252-2333 – Ofc. Phone
(407) 902-1230 – Cellular
Email: melanie@safetyresearch.net
Web: www.safetyresearch.net

Check out: www.thesafetyinstitute.org

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From: Menchion, Kimberly [<mailto:Kimberly.Menchion@dot.state.fl.us>]
Sent: Monday, May 12, 2014 11:22 AM
To: Melanie MacDonald
Subject: RE: Access to Public Records

Exhibit "C"

Hello Ms. MacDonald,

Thank you for following up. After hearing your concern, due diligence has been taken to make sure that you receive all the e-mails that were requested. Due to these emails including possible confidential and exempt information, a review by one of the manufactures has been requested.

Once the review is completed, we will send you the CD with the e-mails.

Sincerely,

Kimberly Clark Menchion, Esq.
Assistant General Counsel
Florida Department of Transportation
Office of the General Counsel
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458
Phone: (850) 414-5293
Fax: (850) 414-5264

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From: Melanie MacDonald [<mailto:melanie@safetyresearch.net>]

Sent: Thursday, May 08, 2014 1:21 PM

To: Menchion, Kimberly

Cc: Parsons, Trish

Subject: RE: Access to Public Records

Hi Kim –

Still no CD. Was it mailed?

Melanie J. MacDonald
Safety Research & Strategies, Inc.
340 Anawan Street, Ste. 200
Rehoboth, MA 02769
(508) 252-2333 – Ofc. Phone
(407) 902-1230 – Cellular
Email: melanie@safetyresearch.net
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From: Menchion, Kimberly [<mailto:Kimberly.Menchion@dot.state.fl.us>]
Sent: Thursday, April 24, 2014 3:11 PM
To: Melanie MacDonald
Cc: Parsons, Trish
Subject: RE: Access to Public Records

Ms. MacDonald,

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Thanks,

Sincerely,

Kimberly Clark Menchion, Esq.
Assistant General Counsel
Florida Department of Transportation
Office of the General Counsel
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458
Phone: (850) 414-5293
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From: Melanie MacDonald [<mailto:melanie@safetyresearch.net>]
Sent: Monday, April 14, 2014 12:42 PM
To: Menchion, Kimberly
Subject: FW: Access to Public Records
Importance: High

Hi Kimberly –

I received your agency's response today to my open records request dated February 10, 2014. While I appreciate the response, I am very concerned that the your search criteria may be inadequate. Please let me know a good time to discuss this and at your convenience. I look forward to your response.

Kind regards,

Melanie J. MacDonald
Safety Research & Strategies, Inc.
340 Anawan Street, Ste. 200
Rehoboth, MA 02769
(508) 252-2333 – Ofc. Phone
(407) 902-1230 – Cellular
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From: Melanie MacDonald
Sent: Monday, February 10, 2014 2:18 PM
To: 'robert.burdick@dot.state.fl.us'
Subject: Access to Public Records
Importance: High

Dear Mr. Burdick:

Pursuant to the open records procedures of Florida, I'd like to request access to and/or copies of any and all documents associated with inquiries, investigations, and/or communications between your agency and/or any division of your agency and Trinity Industries, Inc. and/or their subsidiaries related to the design, manufacture, failure, purchase, testing, motor vehicle accidents, consumer complaints and/or safety of ET-Plus guardrail systems from 2004 to the present.

Please let me know if my request is proper and if so the fees and/or costs associated with complying with my request. Also, if you'd keep me apprised of your time frame to gather responsive documents I'd appreciate that as well.

Thank you so much for your time and consideration. I look forward to hearing from you.

Kind regards,

Melanie J. MacDonald
Senior Research Associate
Safety Research & Strategies, Inc.
340 Anawan Street, Suite 200
Rehoboth, Massachusetts 02769
(508) 252-2333 Main Office
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DOT GENERAL COUNSEL
REC'D LEGAL
13 AUG 23 PM 12:08

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY,
FLORIDA.

CASE NO. 2013 CA 002021

In re: Public Records Request Served Upon
State of Florida, Department of Transportation,
Trinity Highway Products, LLC, Seeking Trade
Secret Materials

PROTECTIVE ORDER

This matter, having come before the Court on the Petition and Motion for Protective Order filed by Trinity Highway Products, LLC ("THP"), seeking a declaration that certain materials produced by THP to the State of Florida, Department of Transportation ("FDOT") constitute trade secrets, and further prohibiting FDOT from producing those trade secret materials in response to a public records request submitted by Ms. Lynn Walsh ("Ms. Walsh"), or otherwise. Present at the hearing, either in person or telephonically, were counsel for THP and counsel for FDOT.¹

Being fully advised in the premises, having reviewed the affidavit submitted in support of the Petition and Motion, having heard the arguments of counsel, and having performed an *in camera* inspection of the records at issue, the Court makes the following findings and rulings:

1. The public records request submitted by Ms. Walsh to FDOT sought the "Accepted Quality Control Plans" for THP. The two documents responsive to the public records request were presented to the Court for *in camera* inspection. Those documents were entitled:

¹ Based on documents presented at the hearing, Ms. Walsh was provided with a copy of THP's petition and supporting affidavit by not later than July 25, 2013, and was advised that THP would not object to Ms. Walsh intervening in the matter. Further, counsel for FDOT provided Ms. Walsh with a copy of the Notice of Hearing. As of the date of the hearing, Ms. Walsh had not sought to intervene in this matter, and she did not appear at the hearing.

(a) Quality Management System Manual (bates stamped Trinity 0001 to 0037); and (b) Facilities Manual (bates stamped Trinity 0038 to 0127).

2. These documents were produced by THP to FDOT in connection with THP's application to be included on FDOT's Accepted Quality Control Program list. Prior to producing the documents to FDOT, THP marked each page of the documents with the following language: "Contains confidential and proprietary information. Not to be copied or released without written authorization."

3. THP asserts that the Quality Management System Manual and Facilities Manual contain the kind of confidential, proprietary information that meet the definition of the term "trade secret" as set forth in section 812.081(1)(c), Florida Statutes. Based on its inspection of the documents, the Court agrees. These documents set out THP's quality control processes, including key personnel, plant equipment, manufacturing facility designs, and customer lists. As verified in THP's supporting affidavit, this information is kept confidential, and access to the documents is limited to those within the company with need to know. Under these circumstances, courts have recognized that quality control plans are entitled to protection under the Uniform Trade Secret Act. *See, 3M v. Pribyl*, 259 F.3d 587, 595-96 (7th Cir. 2001) (holding that 3M was entitled to trade secret protection for its quality manuals under the Wisconsin UTSA); *Pharmerica, Inc. v. Arledge*, 2007 WL 865510, * 6 (M.D. Fla. 2007) (holding that information pertaining to company's Quality Management Program constituted trade secrets as defined in Florida's UTSA).

5. The Quality Management System Manual and Facilities Manual are, in their entirety, trade secret.