

ORAL ARGUMENT SCHEDULED

February 6, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5128

CENTER FOR AUTO SAFETY,

Appellant,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Appellees.

Appeal from the United States District Court
for the District of Columbia

FINAL REPLY BRIEF FOR APPELLANT

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CAS Br. Brief for Appellant CAS

Decl. Declaration

FOIA Freedom of Information Act

Interv. Br. Joint Brief of Intervenor-Defendant Appellees

NHTSA Br. Brief of Appellee National Highway Traffic Safety Administration

PRA Paperwork Reduction Act

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REPLY BRIEF FOR APPELLANT

INTRODUCTION

Defendants strive to depict the airbag information at issue in this Freedom of Information Act (“FOIA”) case as detailed design specifications or production formulas, the disclosure of which would compromise critical engineering innovations. Careful scrutiny of what was actually requested in the 33 items at issue shows that this characterization is misleading and inaccurate.

The information sought does not contain trade secrets. Rather, it consists of descriptions of readily observable characteristics of airbags (such as the number of tethers or the mass of the bag), characteristics that fall into standard categories (such as the number of inflation stages, the tear

pattern, or the chemical used to inflate bags), and performance measurements (such as tank test performance). This information describes the final product, not a production process or manufacturing formula and, therefore, does not qualify as trade secret. Defendants' arguments that more is at stake rest on hyperbole and a failure to distinguish the information that can be disclosed from the additional details that the manufacturers claim to have submitted.

In addition, defendants have not met their burden of proving that the information is confidential. Much of the information is readily available to competitors from inspection of airbags and from prior disclosures of this information by the manufacturers themselves. Moreover, the contention that product descriptions that are not confidential by themselves become confidential when collected for submission to a government agency is without merit.

Finally, defendants' claim that the submissions at issue here should be treated as voluntary under *Critical Mass*, despite the agency's express invocation of its statutory authority to compel submission of this information, also should be rejected. The argument that the agency's Information Request was unenforceable under the Paperwork Reduction Act ("PRA") because the nine entities to which NHTSA posed its demand should be counted as ten or more misconstrues the agency's statute for service of process and ignores the language of the agency's demand—a demand that expressly limits the obligation to respond to the nine addressees. In addition, allowing PRA defenses to be considered in post hoc FOIA litigation would disserve the purposes of both the PRA and FOIA.

Accordingly, this Court should reverse the district court's holdings (1) that ten items of information constitute trade secrets, (2) that defendants have proved that 23 items are confidential, and (3) that the manufacturers voluntarily submitted the items at issue. The Court should then

remand this case for consideration of whether any of the 33 items contain confidential information under the proper tests and, if so, whether any such items satisfy the *National Parks* test.

ARGUMENT

I. THE MANUFACTURERS' CLAIM TO TRADE SECRET STATUS FAILS TO SATISFY THE *PUBLIC CITIZEN* STANDARD.

A "trade secret" under FOIA exemption 4 is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Citing this definition, the district court held that ten items of airbag information contained trade secrets. NHTSA does not contend that any of the information qualifies as "trade secret." *See* NHTSA Br. 28 n.10. The manufacturers, however, argue that the district court's interpretation of this Court's restrictive definition should be upheld. Because the ten items at issue are *not* (A) related to the productive process, (B) secret, and (C) commercially valuable, the district court's holding should be reversed.

A. Productive Process: The "narrow" definition of an exemption 4 trade secret "incorporates a direct relationship between the information at issue and the productive process." *Public Citizen*, 704 F.2d at 1288. The ten items at issue here have no such relationship to the production of airbags. Indeed, the manufacturers' cursory discussion of this aspect of the trade secret test does not offer a single example of how any item relates to the "productive process." Instead, the manufacturers assert that their declarations explain that disclosure would allow competitors to duplicate individual components of their airbag systems. None of the statements they cite, however, Interv. Br. 29, ties the withheld information to the productive process. Several of the declarants assert that the

information is related to performance or design development. *See, e.g.*, Alfredsson Decl. ¶ 10 (JA 526); Loersch Decl. ¶ 10 (JA 551). Several assert that the release of certain categories of information would save their competitors time and resources. *See, e.g.*, Arakawa Decl. ¶¶ 12-16 (JA 118-20); Higuchi Decl. ¶¶ 12, 24 (JA 198, 202-03). Notwithstanding the rather lengthy list of citations, none of the declarations controverts CAS' showing that information such as the tank test conditions for testing inflators and the engineering specifications for crash conditions are not used in the production of airbags. *See* CAS Br. 16-17, 21-22.

Because the ten categories of information are not related to the productive process, the manufacturers seek to expand the *Public Citizen* definition that this Court has described as "restrictive" and "narrow." 704 F.2d at 1286, 1288. The manufacturers assert that trade secrets include "the *entirety* of the 'plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities.'" Interv. Br. 28 (emphasis in original). The gist of their argument, in combination with the declarations they cite as support, seems to be that any information that in any way describes a product's characteristics qualifies as a trade secret. *Id.* at 28, 29.¹

Under the manufacturers' theory, the number and location of spark plugs in a car and the number of cylinders would qualify as "trade secrets" because they are "design specifications for the manufacturers'" vehicles. *Id.* at 29. However, just as the number of cylinders does not qualify as a trade secret, the number of airbag tethers does not qualify under the *Public Citizen* definition.

¹ *See also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995) (cautioning against taking "relate to" "to the furthest stretch of its indeterminacy" because "[r]eally, universally, relations stop nowhere" and deriding "an uncritical literalism" in interpreting the terms "connection with" and "relate to") (citation omitted).

Equally implausible, Request Items C.2.c.(1)-(3) do not even relate to features of an airbag; they describe the apparatus used to test the inflator: the size of the test tank, the pre-firing temperature in the tank, and the pre-firing pressure in the tank. Yet the manufacturers are unwilling to concede even that this information does not relate to the productive process for making airbags. Because the characteristics of the inflator apparatus, the tear pattern, the number of tethers, and the other items labeled trade secrets by the ruling below are not used in the productive process, the district court's decision should be reversed.

B. Secret: The district court's ruling also misapplied *Public Citizen* by concluding that information qualifies as a trade secret even if, as with the number of tethers and the number of inflation stages, a competitor can obtain the information by examining the product. In defending the district court, the manufacturers first claim that whether information is observable "is relevant only if the information is merely 'commercial or financial and not if it constitutes 'trade secrets.'" Interv. Br. 23. This argument is without merit. Information that is readily available to competitors cannot reasonably be characterized as "secret." Cf. NHTSA Br. 29 (exemption 4 "secrecy" and "confidentiality" are related concepts). Thus, the fact that much of the information withheld as trade secrets can be ascertained through inspection or testing bears *both* on whether it is "confidential" commercial information *and* on whether it is a trade "secret."

The manufacturers also argue that the cost of the inspection and testing necessary to derive the information in all ten categories would be prohibitive. Interv. Br. 24-25. The manufacturers nowhere dispute, however, that ascertaining any one piece of information is feasible and not prohibitively expensive. The fact that the submissions to NHTSA are in the form of compilations, which themselves would be costly to replicate, cannot transform non-secret information into secret

information. For example, one could not reasonably claim that the number of cylinders of a transmission was not secret when considered in isolation but became secret when put on a list including the number of cylinders in numerous models over numerous years. Yet that argument is in essence the one that the manufacturers make here. The compilations were created solely for the purpose of submitting information to NHTSA, and the manufacturers do not claim that the compilations are organized in an innovative way that constitutes commercial secrets. *Cf. Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350-51 (1991) (compilation of non-copyrightable facts is copyrightable if compilation demonstrates "originality," although even then facts themselves not copyrightable). If the information listed in the material is not secret, the compilations are not secret.

Addressing the engineering specifications, the manufacturers assert that "uncontroverted declarations" showed that "the manufacturers guard these specifications carefully and do not release them in litigation except pursuant to protective orders." Interv. Br. 24. To the contrary, CAS showed that eight of the nine submitters disclosed engineering specifications, including crash conditions and deployment thresholds, in publicly-available documents, such as service manuals and publicly-available submissions to NHTSA. *See* Appendix A to Memorandum In Opposition To Defendant's And Intervenor-Defendants' Cross-Motions For Summary Judgment (JA 334) ("CAS Appendix A"). Below, the manufacturers did not dispute that they had disclosed engineering specifications in these public documents. Rather, they asserted that those disclosures were not as detailed as the records at issue here. *See* Interv. Br. 24 (citing declarations). However, the manufacturers did not demonstrate either that the additional details add substantial commercial value

to the information, or that the details could not be segregated and the remainder of the specifications released.

Similarly, the manufacturers' brief contests CAS's evidence that the tear pattern information is visible from physical inspection on the ground that the Information Request asked for the tear pattern "during deployment." Interv. Br. 27. The declarations that the manufacturers cite, however, do not support the assertion that the tear pattern during deployment is "fundamentally different," *id.*, from the tear patterns visible from inspection. And none draws into question CAS's evidence that tear patterns are standard features, known within the industry, and visible from inspection of the airbag cover into which the pattern is cut. The first cited declaration states that tear pattern design and geometry may affect trajectory and speed of deployment. Two other cited declarations state that the submissions to NHTSA by two manufacturers included information about where the tear pattern initiates during deployment. The last declaration cited states that Volkswagen of America's submission included descriptions of the number, size, and opening directions of various sections of the cover during deployment. At most, the declarations support an argument for segregation of the portion of the submissions that is not evident from inspection or knowledge of standard tear patterns (assuming that the secret information were also related to the productive process and commercially valuable). Withholding of the entire item, however, cannot be justified on the ground that a piece is secret. *See* 5 USC § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

The manufacturers further assert that "anyone who drives a modern motor vehicle would know" that airbags are not in public view. Interv. Br. 24. The question here, however, is not

whether "anyone who drives" can see the tear pattern or count the tethers in an airbag. The question is whether competitors can see them. Given that the manufacturers dismantle and test their own airbags, it is no stretch to conclude that they are able to dismantle and test their competitors' airbags. As pointed out in the opening brief, the manufacturers do not deny that they do so. *See* CAS Br. 19-20 & citations to record cited therein; CAS Appendix A at A-viii (JA 341) (letter from DaimlerChrysler to NHTSA stated that "inflators in Chrysler vehicles do not differ appreciably from those in similar vehicles produced by other manufacturers"). Thus, readily observable characteristics of airbags are not "secrets" that manufacturers keep from competitors.²

C. Commercially Valuable: The information at issue relates to pre-1998 model vehicles, some of which is more than ten years old and some of which describes features standard throughout the industry. Although the manufacturers have the burden of proving that all of this information is still "commercially valuable," and although they concede that some items (such as the tear pattern and inflator) are standardized, the manufacturers assert that there are "significant variations between manufacturers within the general categories." Interv. Br. 27 (emphasis omitted). Here again, the manufacturers have not offered any evidence to show that the information submitted to NHTSA revealed those variations or that disclosure of the variations is commercially valuable to competitors, even for models from the early 1990s. For example, disclosure that a manufacturer used an I-shaped tear pattern in 1995 would not reveal that company's plans or innovations for 2001 and beyond.

² The manufacturers themselves submitted evidence that the tear pattern is "easily ascertainable based upon a simple visual inspection of the tear seams of the airbag mounted in the steering wheel or dashboard." Haenchen Addit. Decl. ¶ 4 (JA 168); *see* Nusholtz Aff. ¶ 14 (JA 213-14) ("The general tear pattern of the airbags on most DaimlerChrysler Corporation model vehicles may be discernable by visual inspection."). The manufacturers also submitted evidence that fold patterns and the number and location of tethers "may be discernable by visual inspection." *Id.* ¶¶ 15-16 (JA 214-15).

Similarly, the manufacturers suggest that, even if the features are standardized, airbag designs vary from model to model. Again, the manufacturers offer no evidence that it is commercially valuable to know which model used which standard feature.

More generally, the manufacturers have not carried their burden of providing specific evidence that pre-1998 information still has competitive value. They assert that the compilations would give competitors insight into manufacturers' goals and priorities and allow them to anticipate marketing plans and innovations. They have not showed, however, nor could they show, that discrete items of information for model years up to 11 years old would reveal marketing priorities or plans or future innovations. Because they have failed to show that the items of information are individually commercially valuable, the manufacturers' claim that the information qualifies as "trade secrets" fails.

II. THE INFORMATION IS NOT "CONFIDENTIAL" FOR PURPOSES OF FOIA EXEMPTION 4.

Whether submitted voluntarily or under compulsion, information falls within the scope of exemption 4 only if it is "confidential." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992); *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979). The party opposing release bears the burden of proving confidentiality. *Critical Mass*, 975 F.2d at 879. Information is considered confidential if it is "of the type which would customarily not be released to the public by the person from whom it was obtained." *Id.* (emphasis added); see *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 677 (D.C. Cir. 1976).

In this case, many of the manufacturers' declarations fail to sustain defendants' burden of proving confidentiality because they are too conclusory. See, e.g., Clark Decl. ¶¶ 8-9 (JA 151); Eugensson Aff. at 2 (JA 159); Higuchi Decl. ¶ 12 (JA 198). In addition, CAS has pointed to two

reasons why defendants' assertions that the manufacturers hold the type of information at issue in confidence do not provide the undisputed facts necessary to sustain defendants' position: (1) evidence that, as to 18 categories, one or more manufacturers have disclosed the type of information that defendants assert is held in confidence; and (2) evidence that most of the categories of information can be ascertained by examining an airbag, watching a publicly-available videotape, or performing a routine test.

First, the manufacturers assert that they offered "particularized, specific declarations" to show that the evidence of prior disclosures differed in kind from the information at issue.³ Interv. Br. 12. The declarations cited do not make that showing. Most of the declarations cited state only that the submissions were more detailed than the evidence cited by CAS, *see, e.g.*, Boehly Decl. ¶ 52 (JA 389); Selke Supp. Aff. ¶ 9 (JA 499); Terry Supp. Decl. ¶ 18 (JA 508); and a few state that the submissions provided information for different reference points. *See, e.g.*, Arakawa Supp. ¶ 8 (JA 574-75) (deployment threshold information for more types of collisions); Clark Supp. ¶ 15 (JA 475) (deployment distances for different reference points). Similarly, NHTSA asserts that the declarations met the government's burden because they showed that the records submitted contained more specific information than the evidence offered by CAS. NHTSA Br. 23; *see also id.* 27 ("compilations at issue here contain extensive amounts of material that has never been released publicly, along with minimal amounts of general information that has been released to the public").

³ CAS's Appendix A, which is included in the Joint Appendix, lists CAS's evidence of prior disclosures of the type of information at issue for each manufacturer. JA 334. The manufacturers' list of items as to which CAS did not provide evidence of customary disclosure, Interv. Br. 20, is accurate with one exception. The manufacturers list Item C.2.b. (number of inflation stages) as one for which CAS did not present evidence in regard to Mercedes-Benz. However, Mercedes-Benz did not claim exemption 4 status for that item. *See* Joint Report for Which Exemption 4 is Being Claimed (JA 584).

The assertions that the withheld records contain the kind of information that has not been held in confidence *plus* additional details that have been does not show that all of the information is confidential. For example, DaimlerChrysler submitted a declaration saying that the submission regarding the number and location of tethers *included* "detailed design information" sufficient to enable a competitor "to design and build the airbag module." Nusholtz Aff. ¶ 16 (JA 215). Even if the "detailed design information" is protected by exemption 4, the remainder of the submission is not and should be segregated and released. *See* 5 U.S.C. § 552(b); *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). In addition, as discussed in CAS's opening brief, placing non-confidential material into a compilation does not render that material confidential. CAS Br. 25-26.

Moreover, neither NHTSA nor the manufacturers respond to CAS's point, CAS Br. 26, that the manufacturers did not adequately explain how the prior disclosures, the authenticity of which they did not contest, can be reconciled with their assertions that the manufacturers have blanket policies against disclosure of this type of information. *See, e.g.*, Supp. Clark Decl. ¶¶ 9-13 (JA 474); Rapaport Decl. ¶ 9 (495). Thus, although "[d]eclarants for every manufacturer stated that the withheld information is maintained in secret," NHTSA Br. 23, it is telling that after CAS presented its evidence, some of the manufacturers disclosed addition information, implicitly conceding the inaccuracy of their original broad assertions of non-disclosure; but none explained how the prior disclosures were consistent with their stated policies. *See* Supp. Clark Decl. ¶ 6 (JA 473); Reply of Intervenor-Defendant Submitters in Support of Cross-Motion for Summary Judgment at 12 n.13; *see also* Supp. Terry Decl. ¶ 4 (505). Because the manufacturers' summary assertions that they maintain the confidentiality of the type of information at issue are already contradicted by specific evidence of disclosure, the declarations cannot satisfy defendants' burden.

NHTSA asserts that CAS misunderstood that customary disclosure is evaluated on a manufacturer-by-manufacturer basis, that is, that customary disclosure by one manufacturer does not preclude a showing of non-disclosure by another manufacturer. NHTSA Br. 19. CAS did not misunderstand this point and did not argue to the contrary. Furthermore, since the district court did not make rulings specific to each manufacturer, that point does not affect the analysis here.

NHTSA also asserts that this Court in *Critical Mass* held that information was confidential even though it had been disclosed "to a number of people who were not legally or ethically bound to keep [it] confidential." NHTSA Br. 22. That assertion is simply not true, as the opinion in *Critical Mass* makes clear. *See* 975 F.2d at 874 (report distributed to certain entities "pursuant to explicit understanding that they are not to be disclosed to additional persons without [submitter's] consent").

In touting the detail of the declarations, NHTSA also relies on its own declarant, William Boehly, for the broad statement that "the manufacturers' custom was not to disclose the submitted information in litigation except if it was accompanied by a confidentiality agreement or protective order." NHTSA Br. 23. Putting aside the questions of whether this declarant was speaking from personal knowledge and whether litigation practices are a valid proxy for disclosure practices, NHTSA's use of this declaration is misleading. In the paragraphs cited by NHTSA, Mr. Boehly was not addressing "the submitted information" in general but only a single item: engineering specifications.⁴

⁴ Mr. Boehly's statement that, in his opinion, CAS's examples of prior disclosures were too few to demonstrate customary disclosure, *see* NHTSA Br. 24, was a legal conclusion to which the Court should afford no weight.

Second, NHTSA and the manufacturers contend that the district court did not reject CAS's showing of prior disclosures on the ground that they were not "identical" to the information withheld. NHTSA Br. 20-21; Interv. Br. 13-15. Although laced with criticism of CAS, the manufacturers' brief in fact agrees with CAS's point that, for purposes of determining "customary disclosure" under exemption 4, the relevant inquiry is whether prior disclosures were "of the kind" or "type" withheld, not whether they were "identical" to that information. NHTSA's point seems to be that "identity" is relevant because exemption 4 does not apply to information identical to that in the public domain. CAS also agrees with that point, although it is of no moment here.

CAS very much disagrees, however, that the court below did not reject CAS's evidence of customary disclosure on the ground that the evidence was not identical to the material submitted to NHTSA. NHTSA and the manufacturers claim that the court first discussed the proper test for assessing customary disclosure and then turned to the separate question of whether the information was in the public domain. This characterization of the district court's reasoning is inconsistent with the court's opinion, which does not distinguish between customary disclosure and whether CAS has shown that identical information is in the public domain. In a section entitled "Is the Information Customarily Disclosed to the Public?," the court accepted the manufacturers' statements that they do not disclose the information sought and rejected CAS's showing of prior disclosures. One reason the court gave for its decision was that "Plaintiff has been unable to prove that the information it has uncovered is identical to the information" submitted by the manufacturers. Mem. Op. 39 (JA 633). Furthermore, the court never once stated the applicable test, which looks to the manufacturers' treatment of information "of the kind" or "type" at issue.

Put simply, CAS, NHTSA, and the manufacturers apparently agree that the records at issue need not be "identical" to the prior disclosures, but only "of the kind," to fall outside the scope of exemption 4. The district court, however, quite clearly and improperly rejected CAS's evidence that the manufacturers' declarations were inconsistent with prior disclosures because those disclosures were not "identical" to the information at issue.

Third, CAS offered evidence that all items other than the tank test information (Items C.2.c.(1)-(4)), the engineering specifications (Item E.5.), and crash test results (Items G.1.c., G.2., and G.3.) can be ascertained by competitors through physical inspection, routine testing, or publicly-available videotapes. NHTSA's and the manufacturers' response—that the information cannot be ascertained "simply by looking at the inside of a passenger car" or by disassembling the steering column or dashboard, NHTSA Br. 26 (citing Boehly Decl. (JA 369) & Supp. Boehly Decl. (JA 369)), Interv. Br. 18 (citing Boehly Decl. (JA 369)—belittles CAS's point but does not really come to grips with it. Whether or not an untrained person can see an airbag system by looking inside a car is not the issue. It is undisputed that many of the items at issue can be ascertained by inspecting an airbag. *See* Zinke Decl. ¶¶ 6-7 (JA 107); Haenchen Addit. Decl. ¶ 4 (JA 479-80) (tear pattern "easily ascertainable based upon a simple visual inspection of the tear seams of the airbag mounted in the steering wheel or dashboard"); Terry Decl. ¶¶ 22, 29-30, 32, 33, 35-36 (JA 263, 265-69) (tear pattern, fold pattern, number and location of tethers, and numbers of inflation stages "relatively easy to discern"); Yakushi Decl. ¶¶ 22, 29-30, 32,-33, 35-36 (JA 280, 283-87) (same); Higuchi Decl. ¶¶ 17-18, 21-22 (JA 199-202) (tear pattern, fold pattern, number and location of tethers, and numbers of inflation stages "fairly easy to determine"). And CAS has offered evidence that some items of information can be ascertained through publicly-available videotapes or videotapes of static

deployments. *See* Zinke Decl. ¶¶ 18-19, 21-24 (JA 110-12). The suggestion that information that competitors can ascertain through physical inspection, routine testing, or publicly-available videotapes can properly be labeled "confidential" is ludicrous.

III. BECAUSE NHTSA MANDATED SUBMISSION OF THE RECORDS AT ISSUE, THE *NATIONAL PARKS* STANDARD APPLIES.

If defendants can establish that any item is confidential, the evaluation of that item under exemption 4 then turns on whether the manufacturers made their submissions voluntarily or under compulsion. In this regard, the parties agree that the issue is not whether the agency could have compelled the submissions, but whether the agency did compel them. Indeed, in *Critical Mass* itself, the agency could have but chose not to compel submission of the information at issue. *See* 975 F.2d at 880.

Strikingly absent from the manufacturers' and from NHTSA's discussions of this issue is any reference to the language of the Information Request. That language bears repeating:

In support of these various activities, NHTSA hereby **requires** [recipient manufacturer] **to respond** to the enclosed Information Request, issued **pursuant to 15 U.S.C. § 30117 (a)**.

Subsection (a) of Section 30117 authorizes the Secretary of Transportation to "**require** that each manufacturer of a motor vehicle . . . provide technical information related to performance and safety required to carry out [Chapter 301 of Title 49, United States Code]." These functions have been delegated to NHTSA. 49 CFR 1.50.

[Recipient]] **must respond** to the enclosed Information Request, in accordance with the instructions contained therein, by February 17, 1998. **Failure to respond promptly and fully** to this Information Request **could subject [manufacturer] to civil penalties pursuant to 49 U.S.C. § 30165 or lead to an action for injunctive relief pursuant to 49 U.S.C. § 30163**.

Exhibit 1 to Memorandum of NHTSA In Support Of Cross-Motion For Summary Judgment (JA 323) ("Information Request") (emphasis added).

The manufacturers correctly recognize that the relevant question here is "[d]id the government in fact exercise its authority to compel the information in question." Interv. Br. 11. NHTSA responds to this question affirmatively: "It is undisputed that NHTSA is authorized to require the submission of the subject information (see 49 USC § 30117(a)) and that NHTSA invoked this authority in issuing the [Information Requests]." NHTSA Br. 12.

Nonetheless, defendants contend that the submissions should be considered voluntary. They argue that (1) the agency did not comply with the PRA and (2) as a result, the submissions should be deemed voluntary for purposes of *Critical Mass*. Defendants are wrong on both points.

A. The Information Request Complied With The PRA.

Without dispute, NHTSA addressed and sent the Information Request to nine entities. The Request does not ask recipients to gather information from others, and it states expressly that it seeks information "known to, or in the possession of" the addressee. *See* Information Request at 3 (JA 325) (asking recipient to state reason why it could not respond to any portion of Request). The plain language of the Request unambiguously imposes no obligation to obtain information in the possession of others.

Although NHTSA deliberately "posed" the Request to nine entities, NHTSA and the manufacturers assert that those nine should be counted as ten or more for purposes of the PRA. None of the three reasons offered for counting entities to which NHTSA did not pose the Request withstands scrutiny.

1. The manufacturers, but not NHTSA, argue that the recipient Volkswagen of America is the agent for two foreign manufacturers and that service on the agent was deemed service on both of those manufacturers pursuant to 49 USC § 30164(b). Interv. Br. 9. Under section 30164(b),

"service on the agent is deemed to be service on the manufacturer." Subsection (a) requires manufacturers to "designate an agent on whom service of notices and process in administrative and judicial proceedings may be made" so that a manufacturer cannot evade service by being out of the country or difficult to locate. As a result, when a document addressed to a particular manufacturer is served on that manufacturer's agent, the document is "deemed" to be served on the manufacturer itself. The statute does not provide that a document served on an agent is automatically deemed to be addressed to *all* manufacturers represented by the agent. In other words, nothing in the statute provides that service on an agent is "deemed" to demand information not only from the person named, but also from *every other person* who designated that agent to accept service on its behalf.

Moreover, nothing in the Information Requests suggests that NHTSA was serving Volkswagen of America in its capacity as agent, rather than in its personal capacity as an importer. The request to Volkswagen of America states: "NHTSA hereby requires Volkswagen of America, Inc. (VWoA) to respond to the enclosed Information Request." Cover letter from NHTSA to Volkswagen of America, dated Dec. 17, 1997, enclosing Information Request, at 1 (JA 323). The Request neither mentions Volkswagen AG or Audi AG, nor suggests that it should be forwarded to those entities to obtain information.

2. Both NHTSA and the manufacturers argue that the Request was "posed to" ten or more persons because, according to a declaration attached to NHTSA's reply brief below, NHTSA "expected" foreign parents and affiliates to provide information in response to this request. *See* NHTSA Br. 12 (citing Shelton Decl. ¶ 5 (JA 464-65)).⁵ The declaration upon which this argument

⁵ NHTSA submitted the Shelton Declaration only after all of CAS's summary judgment papers had been filed, and it was never tested in discovery.

depends, however, is not based on the language of the Information Request but upon subjective expectations that are inconsistent with the plain text of the Request. The declarant, Mr. Shelton, never reconciles his expectation that entities other than the nine addressees will provide information with the fact that the Request expressly states that it only requires the submission of information known to or in the possession of the addressees. Moreover, Mr. Shelton's assertion that he expected that addressees with foreign parent companies would send the Request to their parents is inconsistent with NHTSA's decision to include language in the Request that defines the addressee to include "divisions, subsidiaries, and joint ventures," but not parents or foreign affiliates. Information Request at 4 (JA 326). In any event, for purposes of determining whether the PRA applies, the relevant inquiry is not one individual's subjective expectations about who would provide information, but whether the Request was "posed to" ten or more persons. The language of the Request unambiguously shows that it was posed to nine addressees and that it did not require the nine addressees to obtain responses from anyone else.

Moreover, NHTSA's litigating position—that the Request was not enforceable—is not entitled to deference. NHTSA took a contrary view when it sent the Request and until the midst of this litigation. *Compare* NHTSA's Statement of the Case (dated Sept. 27, 1999) (submissions compelled), *with* Notice of Amendment to NHTSA's Statement of the Case (dated Nov. 22, 1999) (submissions not compelled). NHTSA does not administer the PRA. *See Salleh v. Christopher*, 85 F.3d 689, 691 (D.C. Cir. 1996) (*Chevron* deference premised on delegation of authority to administer statute). And statutory interpretations that appear only in litigation declarations, in contrast to formal agency pronouncements, are not entitled to deference. *See Christenson v. Harris County*, ___ U.S. ___, 120 S. Ct. 1655, 1662-63 (2000) (interpretations such as those in opinion letters,

as opposed to those arrived at after formal or informal rulemaking procedures, do not warrant *Chevron*-style deference); *Allied Local & Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 73 (D.C. Cir. 2000) (noting "deference given to agency expertise").

In a related argument, the manufacturers do not contest that the nine recipients were not obligated to gather information from their parents and other entities. Instead, they assert that because they chose to gather information from others, the resulting submissions were “voluntary” and “entitled to categorical protection from public release under *Critical Mass*.” Interv. Br. at 8. That conclusion is a non-sequitur. A submitter's entire response to a mandatory agency request does not become “voluntary” for purposes of *Critical Mass* simply because the submitter has provided more information than that required by the agency. Furthermore, the manufacturers have never identified which, if any, of the 33 items of information were not covered by the Request because the information was not in the manufacturers’ possession or knowledge when they responded to NHTSA. Because NHTSA directed the nine manufacturers to provide all responsive information in their possession, the submissions were “mandatory” insofar as they contained information responsive to the Request.

3. NHTSA and the manufacturers also ask the Court to defer to OMB's regulation, 5 CFR § 1320.3(c)(4), interpreting the PRA's "ten or more" language. However, as noted in CAS's opening brief, CAS Br. 30 n.5, if the regulation is construed to include anyone to whom an addressee might transmit the request, the regulation would improperly extend OMB's power under the PRA and thus be invalid. The less problematic reading of the regulation is that the number of people to whom a request is "posed" includes both the addressees and anyone to whom the request directs the addressees to transmit the questions. Neither NHTSA nor the manufacturers offer any reason to

assume that OMB intended to change the PRA by defining "ten or more" to include, not only those persons asked to respond, but anyone to whom the recipient of an information request might transmit the request.⁶

B. Under *Critical Mass*, The Submissions Were Compelled.

Whether or not the Request violated the PRA, the submissions were not voluntary for purposes of *Critical Mass*. Defendants do not respond to CAS's discussion of the theory and reasoning behind *Critical Mass* but merely repeat that the case established a categorical rule that asks only whether the government exercised its authority to compel information. They never address the question, raised here, of what rule applies when the government does exercise its authority, but its action is later found to have been unenforceable. As discussed in CAS's opening brief, CAS's formulation—if a party delivers materials to an agency in response to a mandatory request, the submission is compelled—is true both to the rule of *Critical Mass* and to the Court's reasoning in adopting it. In addition, CAS's view avoids after-the-fact litigation of the status of submissions.

Neither *Critical Mass* nor the PRA is served by allowing post hoc adjudications of PRA compliance in the context of FOIA litigation. The manufacturers assert that applying *Critical Mass* to the material at issue here serves the government's interest in "industry cooperation." Interv. Br. 10. That assertion begs the question. As *Critical Mass* recognizes, the government's interest in

⁶ Defendants' interpretation would lead to absurd results. Under their view, an agency trying to determine whether PRA review is required must count the addressees and also "those whom the agency reasonably expects the recipients of requests to consult in the course of providing" the information. NHTSA Br. 14; *see id.* at 12. Yet even when an agency poses an information request to only two or three entities, it might reasonably expect those entities "to consult" with suppliers, joint venturers, or business partners before submitting a response. There is no indication that Congress contemplated requiring PRA review in such situations.

obtaining voluntary submissions is not relevant where the agency obtained records in response to a mandatory information request. *See Critical Mass*, 975 F.2d at 879 (" . . . we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion. . ."). Thus, the government's interest in applying *Critical Mass* to voluntary submissions does not justify applying *Critical Mass* when an agency mandates submissions and the submitters respond without challenging that mandate.

Furthermore, although defendants call for an objective standard, the standard they propose is not objective. NHTSA and the manufacturers would allow submitters to comply with mandatory requests, knowing full well that the agency considers the submission compelled, and then to challenge the agency's authority for the first time in the context of FOIA litigation, in which an agency official's previously unstated "expectation" regarding whom the submitters might call on to help them respond would determine the result. This procedure, they claim, will avoid "protracted litigation." Interv. Br. 10. This case proves otherwise.

On the other hand, the procedure suggested by CAS—that *Critical Mass* does not apply where an agency has invoked its authority to compel submissions and the submitters comply without putting the agency on notice that the demand violates the PRA—is an objective standard that can be readily applied in FOIA litigation. When submitters challenge the agency's exercise of authority prior to complying with a request, the issue of voluntariness can often be resolved in advance of litigation. Even if it were not resolved in advance, the submitter would have created a record on which the court could base a decision. Moreover, the procedure would preclude submitters from providing information under compulsion and only later thinking up a challenge to the agency's

authority. This outcome makes sense, since applying *Critical Mass* to submissions considered compulsory when made in no way serves the concerns identified in that opinion.

Both NHTSA and the manufacturers take issue with CAS's statement, CAS Br. 35, that the PRA contemplates that submitters will raise PRA-based defenses before they submit their paperwork. Neither ties their argument to the purposes of the PRA. Rather, they rely on *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir), *cert. denied*, 525 U.S. 813 (1998), for the proposition that PRA defenses may be raised after submission. That case is inapposite here. In *Saco River*, an applicant challenged the FCC's refusal to accept a license application in which the applicant did *not* submit certain required information. The applicant argued that the agency had adopted the requirement at issue without obtaining OMB approval, as required by the PRA. The PRA defense raised in *Saco River* was not post-submission, since the submitter had never provided the information at issue. Moreover, the PRA defense was raised in the context of the "agency administrative process" and "judicial action applicable thereto," PRA, 44 USC § 3512(b), in which the submitter had been penalized for not submitting certain information, not in a collateral proceeding.

Whether or not a manufacturer could assert a PRA defense if the agency tomorrow informed it that the company had failed to provide some information required by NHTSA's Information Request is simply irrelevant to the question here: whether *Critical Mass* supports "voluntary" treatment of information an agency obtained through exercise of its statutory authority to compel submissions, where no submitter questioned the agency's authority prior to providing the information. As discussed in CAS's opening brief (at 31-35), the answer to that question is no.

CONCLUSION

For the foregoing reasons and the reasons set forth in CAS's Opening Brief, the decision below should be reversed and remanded with instructions (1) to order NHTSA to release withheld records as to which a manufacturer has failed to prove confidentiality, and (2) to apply the *National Parks* test to all other withheld records.

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Respectfully submitted,

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CIRCUIT RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief contains no more than 7,000 words.

Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2000, I served the foregoing FINAL REPLY BRIEF FOR APPELLANT on the parties listed below, by causing two true and correct copies thereof to be served by mail on counsel at the following addresses:

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