

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., )  
1600 20th Street, NW )  
Washington, DC 20009, )  
Plaintiff, ) Civil Action No. \_\_\_\_  
v. )  
NORMAN Y. MINETA )  
Secretary, )  
U.S. Department of Transportation )  
400 7<sup>th</sup> Street, SW )  
Washington, D.C. 20590 )  
Defendant. )  
\_\_\_\_\_ )

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought under the Administrative Procedure Act, 5 U.S.C. § 706, and arises from Defendant's promulgation of regulations stating that warranty claim information, field reports, consumer complaints, and certain production numbers submitted by manufacturers to the National Highway Traffic Safety Administration ("NHTSA") are categorically exempt from disclosure under Exemption 4 of the Freedom of Information Act ("FOIA"). *See* 68 Fed. Reg. 44209, 44232 (July 28, 2003).

Jurisdiction

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

Parties

3. Plaintiff Public Citizen, Inc. ("Public Citizen") is a non-profit public interest organization organized under the laws of the District of Columbia, with its principal office in the District of Columbia. Public Citizen advocates before Congress, administrative agencies, and

the courts for strong and effective health and safety regulation, and has a long history of advocacy on matters related to auto safety. Public Citizen’s objectives include promoting highway safety by ensuring that motor vehicles are equipped with safety features and are designed and constructed so as to provide for the safety of passengers and other travelers who share the roads with these vehicles. Public Citizen and its members regularly seek and use information under FOIA from Department of Transportation (“DOT”) and from NHTSA, a sub-agency within the DOT. Public Citizen brings this action on behalf of itself and its approximately 160,000 members throughout the United States.

4. Defendant is the Secretary of DOT, and has responsibility for carrying out the operations of DOT and its subagencies. NHTSA was established by the Highway Safety Act of 1970 as the successor to the National Highway Safety Bureau to carry out safety programs under the National Traffic and Motor Vehicle Safety Act of 1966 and the Highway Safety Act of 1966. NHTSA is charged with setting and enforcing safety performance standards for motor vehicles and motor vehicle equipment and recalling vehicles with safety defects. Defendant promulgated the regulations challenged in this suit.

#### Statutory and Regulatory Background

5. Under the Transportation Recall Enhancement, Accountability and Documentation (“TREAD”) Act, Defendant is required to “initiate a rulemaking to establish early warning reporting requirements for manufacturers of motor vehicles and motor vehicle equipment to enhance the Secretary’s ability to carry out the provisions of this chapter.” 49 U.S.C. § 30166(m)(1).

6. Defendant has promulgated regulations requiring manufacturers to provide

NHTSA with reports and data relating to warranty claim information, reports and data relating to field reports, including dealer reports and hard copy reports; reports and data relating to consumer complaints, and reports of production numbers of child restraint systems, tires, and vehicles other than light vehicles. 49 C.F.R. Part 579.

7. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., states that all records held by an agency are disclosable to the public unless they fall within one of FOIA’s enumerated exemptions from disclosure. One of the enumerated exemptions, Exemption 4, provides that commercial information submitted to an agency by a third party is exempt from disclosure if its release would be likely to cause substantial competitive harm to the submitter of the information or if its disclosure would impair the government’s ability to obtain that information in the future. 5 U.S.C. § 552(b)(4).

8. In Appendix C to 49 C.F.R. Part 512, Defendant has promulgated a rule establishing that the categories of records described in paragraph 6 of this Complaint cannot be disclosed to the public on the ground that all such information falls within Exemption 4. 68 Fed. Reg. 44209, 44232 (July 28, 2003). In its entirety, the rule states:

Appendix C -- Early Warning Reporting Class Determinations

(a) The Chief Counsel has determined that the following information required to be submitted to the agency under 49 C.F.R. § 579, subpart C, will cause substantial competitive harm and will impair the government’s ability to obtain this information in the future if released:

- (1) Reports and data relating to warranty claim information;
- (2) Reports and data relating to field reports, including dealer reports and hard copy reports; and
- (3) Reports and data relating to consumer complaints.

(b) In addition, the Chief Counsel has determined that the following information required to be submitted to the agency under 49 C.F.R. § 579, subpart C, will cause substantial competitive harm if released: Reports of production numbers of child restraint systems, tires, and vehicles other than light vehicles, as defined in 49 C.F.R. § 579.4(c).

#### Factual Background

9. Defendant first published 49 C.F.R. Part 512, the regulations concerning confidential business information, as a final rule on January 8, 1981. In Part 512, Defendant issued “class determinations” that established a presumption that manufacturers would suffer competitive harm if certain categories of information that manufacturers were required to submit to NHTSA were publicly disclosed. The rule contained three categories of presumptively non-disclosable information: blueprints and engineering drawings (but only under certain circumstances), future specific model plans, and future vehicle or equipment production sales or figures (but only in some cases and, even then, only for limited periods of time).

10. On April 30, 2002, Defendant issued a Notice of Proposed Rulemaking (“NPRM”) to amend 49 C.F.R. Part 512. *See* 67 Fed. Reg. 21198 (April 30, 2002)

11. In the NPRM, Defendant stated that “the proposal would retain these three classes of information presumed to cause competitive harm if released and would not add any others.” *Id.* at 21200.

12. In addition, the NPRM stated that, based on both case law and NHTSA’s experience with the information typically submitted in rulemakings and defect investigations, Defendant was proposing to adopt a regulatory presumption that disclosure of information concerning consumer complaints and warranty claims would not cause competitive injury if released. *Id.* at 211200, 21206.

13. The NPRM did not indicate that Defendant might create categorical exemptions based on impairment of the government's ability to obtain information. *See id.* at 21200 (soliciting comment only on whether agency should make presumptive determinations on competitive harm to the submitter).

14. The NPRM did not give any warning that Defendant was considering changing the language of the regulations on class determinations to remove the term "presumptively" and adopt regulations that state that the Chief Counsel "has determined" that disclosure of classes of information "will cause competitive harm and will impair the government's ability to obtain this information in the future." 49 C.F.R. Part 512, Appendix C (emphasis added).

15. Despite the failure to describe the change in the NPRM, Defendant's final rule provided that certain categories of early warning information would automatically be exempt from disclosure. The rule did not merely create a presumption that records should be exempt from disclosure, as NHTSA had done previously, but rather completely prohibited disclosure of this information. *See* 49 C.F.R. Part 512, Appendix C.

16. Consequently, the NPRM did not give the public fair warning that Defendant was contemplating the expanded class determinations adopted in the final rule, and the public did not have the opportunity to comment on the legality or wisdom of these changes.

17. Defendant provided no factual basis for the determination that records that had not yet been submitted to NHTSA would satisfy all the elements for withholding under Exemption 4 of FOIA. There is no history of case-by-case determinations that early warning data categorically satisfy the requirements of Exemption 4. No prior judicial decisions hold that this information is categorically exempt. To the contrary, NHTSA has generally disclosed

information in these categories in the context of safety defect investigations, and the automobile industry has not contested this practice. *See* 67 Fed. Reg. at 21200; 68 Fed. Reg. at 44219 (“The Alliance recognized and did not take issue with NHTSA’s current practice of releasing similar types of information submitted during specific defect investigations.”); 66 Fed. Reg. 66190, 66213 (Dec. 21, 2001) (“Historically, these types of information generally have not been considered by the agency to be entitled to confidential treatment, unless the disclosure of the information would reveal other proprietary business information.”))

#### First Claim for Relief

18. Plaintiff Public Citizen reasserts and incorporates herein by reference the allegations contained in paragraphs 1-17 above, as though fully set forth herein.

19. Defendant’s promulgation of regulations that create categories of exempt records is arbitrary and capricious and contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because the information that Defendant has purported to exempt from disclosure is not entitled to exemption under the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and because Congress has not delegated to Defendant any authority to create categorical exemptions for information not exempt under FOIA.

#### Second Claim for Relief

20. Plaintiff Public Citizen reasserts and incorporates herein by reference the allegations contained in paragraphs 1-17 above, as though fully set forth herein.

21. Defendant’s conduct violates the Administrative Procedure Act, which requires that an NPRM accurately describe the rule changes under consideration so that the public has adequate notice and a chance to comment on those proposed changes, and so the

agency has a chance to consider those comments before taking final action. 5 U.S.C. § 553(b)-(c).

WHEREFORE, plaintiff prays for an order:

(1) Declaring that the regulations prohibiting disclosure of early warning information, 49 C.F.R. Part 512, Appendix C, are arbitrary and capricious and contrary to law pursuant to 5 U.S.C. § 706(2)(a) and thus cannot be enforced;

(2) Declaring that the regulations prohibiting disclosure of early warning information, 49 C.F.R. Part 512, Appendix C, violate FOIA, 5 U.S.C. § 552 et seq.;

(3) Declaring that regulations prohibiting disclosure of early warning information, 49 C.F.R. Part 512, Appendix C, were promulgated without adequate notice and an opportunity to comment, in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b)-(c).

(4) Granting plaintiffs their reasonable attorney's fees and costs under 28 U.S.C. § 2412; and

(5) Granting plaintiffs such other relief as may be just and proper.

Dated: March 22, 2004

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Amanda Frost (D.C. Bar. No. 467425)  
Scott Nelson (D.C. Bar No. 413548)  
Public Citizen Litigation Group  
1600 20th Street, NW  
Washington, DC 20009  
(202) 588-1000

Counsel for Plaintiff Public Citizen