No. 06-5304

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

PUBLIC CITIZEN, INC.,

Plaintiff/Appellee,

v.

MARY E. PETERS, SECRETARY OF TRANSPORTATION,

Defendant/Appellee,

and

RUBBER MANUFACTURERS ASSOCIATION,

Intervenor-Defendant-Cross Claimant/Appellant.

On Appeal From the United States District Court
For the District of Columbia
No. 04-CV-463 (Leon, J.)

BRIEF FOR APPELLEE PUBLIC CITIZEN

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CERTIFICATE OF COUNSEL FOR PLAINTIFF-APPELLEE PUBLIC CITIZEN, INC., AS TO PARTIES, RULINGS AND RELATED CASES UNDER CIRCUIT RULE 28(a)(1)

Pursuant to Rules 28(a)(1) and 26.1 of this Court as well as FRAP 26.1, the undersigned counsel for plaintiff-appellee Public Citizen, Inc., certifies as follows:

A. Parties and Amici

1. Public Citizen, Inc., was the plaintiff below and is an appellee in this Court. Public Citizen is a non-profit corporation engaged in advocacy efforts on a range of issues including both openness in government and federal regulation of automobile safety. Pursuant to FRAP 26.1 and Circuit Rule 26.1, Public Citizen states that it has no parent company and no subsidiaries or affiliates that have issued shares to the public. No publicly held company has an ownership interest in Public Citizen.

2. Norman Y. Mineta, in his official capacity as Secretary of Transportation, was the defendant below. Following Secretary Mineta's resignation on July 7, 2006, Acting Secretary of Transportation Maria Cino was automatically substituted as the defendant under Fed. R. Civ. P. 25(d)(1), and was designated as an appellee in the Notice of Appeal filed on September 28, 2006. Upon being sworn in as Secretary of Transportation on October 17, 2006, Mary E. Peters in turn was automatically substituted for Ms. Cino as the defendant/appellee in this Court.

3. The Alliance of Automobile Manufacturers, Inc., (AAM) intervened as a defendant in the court below. AAM has not appealed the district court's judgment and is not participating as a party before this Court.

4. The Rubber Manufacturers Association (RMA) interevened as a defendant and filed a cross-claim against the Secretary of Transportation in the court below. The RMA is the appellant in this Court.

5. The Truck Manufacturers Association appeared as amicus curiae in the court below. As of the date of this Certificate, no amicus curiae had sought leave to participate in this Court.

B. Rulings Under Review

The rulings under review are Judge Richard J. Leon's supplemental memorandum opinion dated July 30, 2006 (which is reported at 444 F. Supp. 2d 12 (D.D.C. 2006)), and the final judgment that was first entered in accordance with that memorandum opinion on July 31, 2006, and subsequently entered again as a separate final judgment under Fed. R. Civ. P. 54(b) on September 6, 2006. The rulings granted judgment against the RMA and in favor of defendant Mineta on the RMA's cross-claim.

Judge Leon's earlier ruling granting partial summary judgment to Public Citizen and partial summary judgment to defendant Mineta and the intervenor-

defendants on Public Citizen's claims, which is reported at 427 F. Supp. 2d 7 (D.D.C. 2006), is not at issue in this appeal.

C. Related Cases

This case has not previously been before this Court or any other court aside from the district court. With the exception of *Quality Control Systems Corp. v. U.S. Department of Transportation*, No. 07-CV-590 (D.D.C.), Public Citizen is not aware of any related cases pending before this Court or any other court. That case concerns a FOIA request for the same type of TREAD Act "early warning data" that is at issue in this case, and its outcome will depend in part on this Court's resolution of the Exemption 3 issue that is the subject of this appeal.

Respectfully submitted,

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GLOSSARY

APA	The Administrative Procedure Act, 5 U.S.C. chs. 5 & 7.
EWR data	"Early warning response" data submitted to NHTSA by automobile and tire manufacturers (and others) under the TREAD Act.
Exemption 3	FOIA's exemption for records "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3).
FOIA	The Freedom of Information Act, 5 U.S.C. § 552.
NHTSA	The National Highway Traffic Safety Administration, an agency within the Department of Transportation and an appellee in this case.
RMA	The Rubber Manufacturers Association, an industry group representing tire manufacturers and the appellant in this case.
The Secretary	The Secretary of Transportation, the defendant/appellee in this action (currently Mary E. Peters).
TREAD Act	The Transportation Recall Enhancement, Accountability, and Documentation Act of 2000. Pub. L. No. 106-414, 114 Stat. 1800 (Oct. 11, 2000). The TREAD Act provision at issue in this case is codified at 49 U.S.C. § 30166(m)(4)(C).

STATEMENT OF THE CASE

Exemption 3 to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3), allows agencies to withhold requested records only if the information is specifically exempted from disclosure by statute. In this appeal, the RMA argues that Exemption 3 protects Early Warning Response (EWR) data, which automotive manufacturers must submit to the National Highway Traffic Safety Administration (NHTSA) under the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 (TREAD Act). *See* 49 U.S.C. § 30166. The statutory provision on which the RMA relies, 49 U.S.C. § 30166(m)(4)(C), entitled "Disclosure," obligates NHTSA to disclose EWR data to the public if the Secretary of Transportation finds that so doing would assist the agency in carrying out other statutory obligations. Although the disclosure provision only defines the circumstances when NHTSA must disclose EWR data *in the absence of a FOIA request*, the RMA argues that the TREAD Act prohibits the agency from disclosing EWR data generally, and thus concludes that the Act creates a statutory exemption from FOIA. The RMA's position disregards the plain language of § 30166(m)(4)(C) in favor of strained arguments based on an incomplete account of the Act's legislative history.

Under the TREAD Act, manufacturers in the automotive industry are required to submit several categories of EWR data to NHTSA, including (1) claims

data submitted to manufacturers regarding serious injury and death; (2) aggregate statistical data on property damage from alleged defects; and (3) information on manufacturers' customer satisfaction campaigns, consumer advisories, recalls, and other repair or replacement programs for defective equipment. 49 U.S.C. § 30166(m)(3)(A). The Act further authorizes the Secretary of Transportation to promulgate regulations requiring submission of any other data that NHTSA requires to assist it in detecting auto safety defects. 49 U.S.C. § 30166(m)(3)(B).

The Secretary is required by law to disclose certain information NHTSA receives to the public without regard to whether she has received a FOIA request. Specifically, 49 U.S.C. § 30167(b) requires the Secretary to "disclose information obtained under this chapter related to a defect or noncompliance that the Secretary decides will assist in carrying out sections 30117(b) and 30118-30121 of this title or that is required to be disclosed under section 30118(a) of this title." Significantly, the "requirement to disclose information under this subsection is in addition to the requirements of section 552 of title 5." *Id*.

The TREAD Act, in turn, limits the Secretary's affirmative obligation to disclose EWR data under §30167(b). It provides: "None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b)

and 30118 through 30121." No other provision, either in the TREAD Act or elsewhere, specifically governs the disclosure of EWR data.

In 2002, NHTSA announced a rulemaking that proposed to codify the long-standing presumption that three categories of information included in the EWR data—consumer complaints, property damage, and warranty claims—do not qualify for the Freedom of Information Act's (FOIA) confidential business information exemption (Exemption 4, 5 U.S.C. § 552(b)(4)). *See* Notice of Proposed Rulemaking (NPRM), 67 Fed. Reg. 21,198, 21,199-200 (April 30, 2002). Although Public Citizen and other consumer advocacy and safety groups did not perceive the proposed rulemaking as controversial, auto-industry manufacturers took the NPRM as an opportunity to argue that EWR data should be exempt from disclosure pursuant to FOIA Exemption 3 or, alternatively, Exemption 4. NHTSA's final rule, published on July 28, 2003, rejected the manufacturers' argument that the TREAD Act is an Exemption 3 statute, but it went further than even industry groups had proposed by declaring broad swaths of EWR data—including vehicle production numbers, warranty claims, customer complaints, and field reports—categorically exempt from release under FOIA's Exemption 4. 68 Fed. Reg. 44,209 (July 28, 2003). NHTSA later expanded the categorical exemptions to include lists of certain generic tires (referred to as "common green

tires") and the vehicle identification numbers of vehicles involved in accidents resulting in fatalities and bodily injuries. 69 Fed. Reg. 21,409 (April 21, 2004).

Public Citizen filed this action against NHTSA on March 22, 2004. Public Citizen's complaint claimed that the agency violated the Administrative Procedure Act's (APA) notice-and-comment rulemaking requirements by failing to provide any notice that it was considering issuing rules categorically exempting classes of EWR data from disclosure under FOIA; that NHTSA lacked authority to issue a rule exempting information from FOIA; and that the exemption rules were substantively invalid under FOIA. The RMA and the Alliance of Automobile Manufacturers intervened in Public Citizen's action, and the RMA filed a cross-claim seeking a declaration that all EWR data is subject to Exemption 3 and an injunction against release of particular data that the RMA's members had submitted to NHTSA and that was already subject to pending FOIA requests.

Public Citizen, the Secretary, the Alliance, and the RMA each filed motions for summary judgment and oppositions to one another's motions. On March 30, 2006, the district court granted Public Citizen's motion for summary judgment in part, agreeing with Public Citizen that the NPRM did not provide adequate notice and an opportunity to comment. The court remanded the rule for notice-and-comment proceedings under the APA without deciding the RMA's cross-claim that all the EWR data is exempt from release under FOIA Exemption 3. *See Public*

Citizen, Inc. v. Mineta, 427 F. Supp. 2d 7 (D.D.C. 2006). The RMA filed a Motion to Alter or Amend the Judgment Pursuant to Fed. R. Civ. P. 59(e) requesting that the court address the Exemption 3 issue. Public Citizen supported the RMA's request that the district court decide the RMA's Exemption 3 claim, though it continued to disagree with the RMA on the merits of that claim.

In its Supplemental Memorandum Opinion issued on July 30, 2006, the district court granted the RMA's motion to alter or amend the judgment and ruled against the RMA on the merits. The court rejected the RMA's argument that § 30166(m)(4)(C) prohibits the disclosure of EWR data, and therefore held Exemption 3 inapplicable. The RMA filed a motion for designation of the ruling on its claim as a separate final judgment under Fed. R. Civ. P. 54(b), which the district court granted in an order entered September 6, 2006. The RMA filed its Notice of Appeal on September 29, 2006.

SUMMARY OF ARGUMENT

The scope of the TREAD Act's disclosure provision is modest. Rather than requiring that records be withheld, the provision limits the kind of EWR data that NHTSA is compelled to disclose pursuant to its mandatory reporting obligation, as set forth in 49 U.S.C. § 30167(b). The statute does not, then, authorize NHTSA to withhold EWR data, but rather only prevents the application of § 30167(b)'s disclosure obligation to EWR data in the absence of specific findings by the

Secretary. Section 30167(b), in turn, expressly imposes a disclosure requirement on the Secretary that is in addition to, and thus has no effect on, the disclosure obligations imposed by FOIA. *See* § 30167(b) ("A requirement to disclose information under this subsection is in addition to the requirements of section 552 of title 5."). Neither § 30166(m)(4)(C) nor § 30167(b) authorizes NHTSA to withhold EWR data in response to a FOIA request or in other circumstances not addressed by § 30167(b). Taken together, the two statutes do no more than define the circumstances under which NHTSA must release data to the public outside of FOIA.

Because § 30166(m)(4)(C) only limits the application of the Secretary's disclosure obligations under § 30167(b) to EWR data, the TREAD Act falls far short of satisfying the stringent requirements of Exemption 3. For a statute to create an exemption to FOIA, the requested information must be "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Only statutes that "evidence a congressional determination that certain materials ought to be kept in confidence" qualify as withholding statutes. *Iron & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979). Thus, an Exemption 3 statute "must *on its face* exempt matters from disclosure." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citing *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749

(1989)) (emphasis in original). The narrow language of § 30166(m)(4)(C) does nothing to exempt EWR from disclosure generally and, indeed, affirmatively indicates that it does not limit disclosure under FOIA at all.

The RMA's argument that § 30166(m)(4)(C)'s legislative history indicates that the statute was intended to exempt EWR from disclosure under FOIA is irrelevant. This Court has repeatedly recognized that the legislative history of an alleged exemption statute is immaterial to whether the statute exempts information from disclosure under FOIA. "[This Court] must find a congressional purpose to exempt matters from disclosure in the actual words of the statute . . . not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute." *Reporters Comm.*, 816 F.2d at 735; *Norton*, 309 F.3d at 38. For similar reasons, the RMA's arguments attempting to impugn NHTSA's interpretation of the TREAD Act should be dismissed. Whether a statute creates an exemption from FOIA is a purely legal determination that this Court must review *de novo*. *Iron & Sears*, 606 F.2d at 1220. NHTSA's interpretation, whether consistent or not, can therefore have no effect on this Court's reading of the TREAD Act. Because the actual language of § 30166(m)(4)(C) does not exempt EWR data from disclosure under FOIA, this Court should affirm the district court's judgment on the RMA's cross-claim.

ARGUMENT

I. Section 30166(m)(4)(C) Does Not Exempt EWR Data From Disclosure Under FOIA.

FOIA requires that agencies disclose requested records unless they are specifically exempted from disclosure under one of nine enumerated exemptions set forth in 5 U.S.C. § 552(b). *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988). Because "'the mandate of the FOIA calls for broad disclosure of Government records,'" FOIA's exemptions must be construed narrowly. *Id*. (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985)). Exemption 3 allows an agency to withhold certain information only if "specifically exempted from disclosure by statute." § 552(b)(3). To create a statutory exemption, the statute must either "require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue," or "establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld." *Id*. As this Court has explained, FOIA "and its legislative history make clear that Congress did not want [exemption 3] to be triggered by every statute that in any way gives the administrators discretion to withhold documents from the public." *Iron & Sears*, 606 F.2d at 1219-20.

The RMA's argument that § 30166(m)(4)(C) is an Exemption 3 statute flies in the face of FOIA's disclosure mandate and its requirement that exemptions be construed narrowly. Section 30166(m)(4)(C) does nothing more than state that

EWR data shall not be disclosed "*pursuant to section 30167(b)* unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121." 49 U.S.C. § 30166(m)(4)(C) (emphasis added). Section 30167(b) sets forth affirmative disclosure obligations that are "in addition to" the obligations imposed by FOIA. Thus, Congress did not intend to exempt EWR data from disclosure under FOIA.[1]

A. An Exemption 3 Statute Must on Its Face Exempt Information from Disclosure.

Because Exemption 3 statutes allow federal agencies to refuse to disclose records under FOIA, Congress must clearly manifest its intent that a claimed withholding statute override FOIA's disclosure mandate. Thus, the plain language of the statute must unambiguously exempt the requested information from disclosure. *Norton*, 309 F.3d at 38. Although the effect of an ambiguous statute may depend on factors like legislative history in other contexts, this principle does not extend to Exemption 3 statutes. A statute open to more than one interpretation cannot exempt the disclosure of information under FOIA. *Reporters Comm.*, 816 F.2d at 735. Accordingly, courts consider only the language actually enacted by Congress, rather than legislative history or administrative interpretation, and may only find an exemption when the plain language of the statute states that the

[1]Public Citizen agrees with the RMA that the standard of review is *de novo*. *See Norton*, 309 F.3d at 32.

information is to be exempt. *Norton*, 309 F.3d at 38. To the extent legislative history may reveal Congressional intent, courts consider only the legislative history of FOIA—not the history of the claimed withholding statute. *Id*.

B. The Plain Language of § 30166(m)(4)(C) Does Not Exempt EWR Data.

The TREAD Act's disclosure provision does not qualify as an Exemption 3 statute because the statute does not authorize NHTSA to *withhold* EWR data under any circumstance. Rather, § 30166(m)(4)(C) limits the application of NHTSA's affirmative disclosure obligations under § 30167(b) to EWR data. Section 30166(m)(4)(C) states that "[n]one of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed *pursuant to section 30167(b)* unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121." § 30166(m)(4)(C) (emphasis added). Section 30167(b), in turn, sets forth the Secretary of Transportation's affirmative obligation to disclose to the public, without request, certain information relating to auto safety. *See* § 30167(b) ("[T]he Secretary shall disclose information obtained under this chapter related to a defect or noncompliance . . . .").

To avoid the very dispute before this Court, Congress stated that NHTSA's mandatory reporting requirement is distinct from the agency's obligations under FOIA. Section 30167(b) states that the "requirement to disclose information under

this subsection is in addition to the requirements of section 552 of title 5." § 30167(b). When §30166(m)(4)(C) is read in conjunction with § 30167(b), it is clear that when Congress enacted the TREAD Act it did not intend that EWR data be treated as confidential. In incorporating § 30167(b), the TREAD Act references that crucial language: The Secretary's obligation (or not) to disclose EWR data under § 30167(b) does not limit or affect her independent obligations under FOIA. It would be difficult to find a clearer manifestation of congressional intent than the final clause of § 30167(b). Not only is plain language exempting EWR data from FOIA missing from § 30166(m)(4)(C) and § 30167(b), but Congress went out of its way to emphasize that EWR data is subject to FOIA.

That § 30166(m)(4)(C) is not an Exemption 3 statute becomes even clearer when the language of that statute is compared to those statutes that this Court and the Supreme Court have recognized as creating statutory exemptions to FOIA. For example, this Court has held that 26 U.S.C. § 6103, which governs the disclosure of tax return information, falls under Exemption 3. *See, e.g., Tax Analysts v. IRS*, 410 F.3d 715 (D.C. Cir. 2005). Unlike § 30166(m)(4)(C), which by its terms applies only to the disclosure of information pursuant to a single statute, § 6103 generally prohibits the disclosure of tax return information. *See* 26 U.S.C. § 6103(a) ("Returns and return information shall be confidential . . . ."). *See also Lopez v. Dep't of Justice*, 393 F.3d 1345 (D.C. Cir. 2005) (holding that Exemption

3 protects information regarding grand jury investigation because Fed. R. Crim. P. 6(e) prohibits government attorneys from "disclos[ing] a matter occurring before the grand jury"). Similarly, the Supreme Court has only found a Congressional intent to create an exemption when the claimed withholding statute expressly prohibits the disclosure of information generally. *See, e.g.*, *Sims*, 471 U.S. 159 (statute requiring CIA Director to prevent disclosure of intelligence sources and methods); *Baldrige v. Shapiro*, 455 U.S. 345 (1982) (statute expressly forbidding disclosure of census information); *Consumer Protection Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) (statute providing that trade secret information obtained by the agency shall not be disclosed). Neither this Court nor the Supreme Court has ever found a statutory exemption where, as here, the claimed withholding statute only limits an agency's disclosure obligations under a single statute.

C. Section 30166(m)(4)(C) Does Not Satisfy Either Prong of § 552(b)(3).

Section 30166(m)(4)(C) does not authorize NHTSA to withhold EWR data from disclosure under FOIA and thus does not create a statutory exemption to FOIA. Nonetheless, the RMA argues that § 30166(m)(4)(C) is an Exemption 3 statute because it both "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" and "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5

U.S.C. § 552(b)(3). Because § 30166(m)(4)(C) does not either require that EWR data be *withheld* or establish any criteria for *withholding* EWR data, the RMA's arguments must fail.

First, the RMA argues that § 30166(m)(4)(C) refers to particular matters to be withheld. RMA Br. 21. But § 30166(m)(4)(C) does not declare EWR data to be confidential as a general matter or under certain circumstances. Instead, it sets forth the circumstances under which EWR data is subject to the Secretary's mandatory disclosure requirement. Taken together, §§ 30166(m)(4)(C) and 30167(b) have the opposite effect of an Exemption 3 statute: Rather than referring to particular matters to be withheld, they require that the Secretary disclose EWR data without a FOIA request, but only if she finds that doing so would aid in the execution of NHTSA's obligations. Because § 30166(m)(4)(C) does not require that EWR data be withheld, it does not create a statutory exemption under § 552(b)(3)(B).

Second, the RMA argues that the TREAD Act satisfies the second prong of Exemption 3 because it "narrowly circumscribes the agency's discretion." RMA Br. 21. Again, § 30166(m)(4)(C) only dictates what can be disclosed pursuant to NHTSA's mandatory reporting obligation. The statute does not "establis[h] particular criteria for withholding or refe[r] to particular types of matters to be withheld" because it does not require that EWR data be withheld. Instead,

§ 30166(m)(4)(C) only establishes when EWR data must be disclosed outside of FOIA, and thus does not satisfy § 552(b)(3)(A). The statute circumscribes the agency's discretion, but not its discretion with respect to *withholding* of records.

Despite § 30166(m)(4)(C)'s unambiguous language, the RMA maintains that it can be construed as prohibiting disclosure of EWR data. The RMA's argument has three bases, each of which should be rejected by this Court: an incomplete reading of § 30166(m)(4)(C), a misreading of the statute, and a misconstruction of this Court's opinion in *Norton*. For the reasons explained below, each of the RMA's arguments must fail.

1. The RMA's reading of § 30166(m)(4)(C) is incomplete.

The RMA's first argument supporting its position that § 30166(m)(4)(C) exempts EWR data from disclosure under FOIA literally ignores the words that limit the statute's scope. The RMA argues that the section "provides that '[n]one of the information collected pursuant to final rule promulgated under paragraph (1) shall be disclosed' unless certain findings are made." RMA Br. 21 (emphasis omitted). Comparing the RMA's selective quotation with the language of the statute itself quickly reveals the RMA's trick. Section 30166(m)(4)(C) does not require that the Secretary make certain findings before disclosing EWR data as a general matter, but rather only that the Secretary make certain findings before disclosing EWR data "pursuant to section 30167(b)." § 30166(m)(4)(C).

This Court must reject the RMA's argument because it concludes that § 30166(m)(4)(C) is an Exemption 3 statute only by omitting the words "pursuant to section 30167(b)." The RMA's creative reading aside, § 30166(m)(4)(C)'s limiting language does not apply to disclosures pursuant to statutes other than § 30167(b). By affirmatively stating that § 30166(m)(4)(C) applies to disclosures made "pursuant to section 30167(b)," Congress defined the statute's narrow and specific scope.

2. The RMA contorts the statute's plain language.

Although the RMA does not confront the statute's "pursuant to section 30167(b)" language directly, it suggests that rather than indicating the context in which NHTSA must make findings to disclose EWR data, Congress meant that NHTSA may *only* release EWR data pursuant to § 30167(b). *See* RMA Br. 36 ("Disclosure is made 'pursuant to' § 30167(b), or not at all."). The language of § 30166(m)(4)(C) reveals no such intent. The statute does not state that EWR data may be released *only* pursuant to § 30167(b), but rather sets forth the conditions under which the mandatory reporting requirement applies to EWR data.[2]

[2]RMA construes § 30166(m)(4)(C) as if it read: "None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed unless the Secretary determines, pursuant to section 30167(b), that the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121," or, perhaps, "None of the information collected

Comparing the language of § 30166(m)(4)(C) with other statutes affirms that Congress did not intend the provision to preclude disclosure of EWR data under other statutory schemes not mentioned in § 30166(m)(4)(C). Congress has repeatedly enacted legislation that prohibits the disclosure of sensitive information except under specifically enumerated circumstances. *See, e.g.*, 5 U.S.C. § 9101(d) ("Criminal history record information received under this section *shall be disclosed or used only* for the purposes set forth in paragraph (b)(1) or for national security or criminal justice purposes authorized by law[.]" (emphasis added)); 7 U.S.C. § 4608(g)(2) (books and records associated with honey production may be disclosed "*only* in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, that involves the order with respect to which the information was furnished or acquired" (emphasis added)); 10 U.S.C. § 616 ("The recommendations of a selection board *may be disclosed only* in accordance with regulations prescribed by the Secretary of Defense." (emphasis added)); 15 U.S.C. § 78u(h)(9)(B) ("Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph *may be disclosed or used only* in an administrative, civil, or

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pursuant to the final rule promulgated under paragraph (1) may be disclosed except under section 30167(b), notwithstanding the proviso to that subsection that disclosure under it is in addition to the requirements of 5 U.S.C. § 552."

criminal action or investigation by the Department of Justice or the State securities agency[.]" (emphasis added)); 18 U.S.C. § 2518(b) ("Such applications and orders [for the interception of wire, oral or electronic communications] *shall be disclosed only* upon a showing of good cause before a judge of competent jurisdiction." (emphasis added)). In each of those statutes, Congress manifested its intent that the information at issue be released "only" under specific circumstances, not simply that disclosures pursuant to specific statutory authorities be limited.

Signs of Congress's intent to limit disclosure of EWR data generally are nowhere to be found in the TREAD Act. Section 30166(m)(4)(C) does not state that EWR data may be disclosed "only" under § 30167(b), or that the data is "confidential" unless certain findings are made. If Congress had intended § 30166(m)(4)(C) to prohibit the disclosure of EWR data in every circumstance *except* pursuant to § 30167(b), it could have enacted legislation that reflected that intent. The absence of words like "only" and "confidential" in § 30166(m)(4)(C) is even more telling given Congress's precise language in 49 U.S.C. § 30117, which requires motor vehicle and tire manufacturers to maintain the names and addresses of purchasers. There, Congress explicitly precluded the release of customer names and addresses except under specific statutes, including § 30167(b): NHTSA's regulations must "provide reasonable assurance that a customer list of a distributor or dealer, or similar information, will be made available to a person . . . only when

necessary to carry out this subsection and sections 30118-30121, 30166(f) and 30167(a) and (b) of this title." 49 U.S.C. § 30117(b)(1).

Rather than using language to exempt EWR data from disclosure under FOIA, Congress enacted legislation that limits only NHTSA's *obligation* to release EWR data pursuant to the mandatory reporting requirement set forth in § 30167(b). The limited scope of the EWR disclosure provision leaves no room to argue that the statute is ambiguous, let alone that the plain language of the statute exempts EWR data from disclosure. In particular, nothing in the statute suggests that Congress intended § 30166(m)(4)(C) to contradict § 30167(b)'s language setting forth that its disclosure requirements are in addition to those imposed by FOIA. To the contrary, the plain language of the § 30166(m)(4)(C) makes clear that its limitations apply *only* to data disclosed pursuant to the Secretary's obligations under § 30167(b), and not under FOIA.

3. The RMA misreads *Norton*.

The RMA argues that § 30166(m)(4)(C)'s limited language qualifies the statute under Exemption 3 based, in part, on a misreading of this Court's holding in *Norton*. There, the Court noted that to qualify as an Exemption 3 statute, a statute must "explicitly deal with public disclosure." 309 F.3d at 38. Because § 30166(m)(4)(C) "deals with disclosure," RMA argues that it must be an Exemption 3 statute. *See* RMA Br. 23. The RMA's argument is untenable because

although *Norton* establishes that "dealing with disclosure" is a *necessary* characteristic of an Exemption 3 statute, nothing in *Norton* suggests that it is *sufficient* to bring a statute within Exemption 3.

Hundreds of statutes seek to clarify when information collected by the government must be or can be disclosed, or when it must be or can be treated as confidential. But not every statute that governs some aspect of disclosure qualifies as an Exemption 3 statute. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1285 (D.C. Cir. 1983) (holding that a statute that controls some aspects of the disclosure of medical device information does not create a statutory exemption); *see also Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 949 (10th Cir. 1990) (18 U.S.C. § 1905, which criminalizes the unlawful disclosure of trade secret information, is not an Exemption 3 statute); *Charlotte-Mecklenburg Hosp. Authority v. Perry*, 571 F.2d 195, 200 (4th Cir. 1978) (Title VII, which prohibits EEOC from making certain information public, is not an Exemption 3 statute). Congress did not intend that every statute "dealing with disclosure" create a statutory exemption from FOIA; in fact, Congress amended § 552(b)(3) to narrow the field of statutes that exempt information from disclosure under FOIA after the Supreme Court's decision in *FAA v. Robertson*, 422 U.S. 255 (1975), which read § 552(b)(3) broadly. *See* Pub. L. 94-409, Sept. 13, 1976. Especially in light of Congress's amendment to § 552(b)(3), which specifies precisely how a

statute must "deal with" disclosure to qualify under Exemption 3, the RMA's argument must be rejected.

D. The Plain Language of § 30166(m)(4)(C) Does Not Render the Statute a Nullity.

In contesting the plain reading of § 30166(m)(4)(C), the RMA argues that only its contorted reading of the statute gives meaning to the TREAD Act's disclosure provision. The RMA's argument is based on the flawed premise that unless § 30166(m)(4)(C) is read to protect EWR data from disclosure under FOIA, the statute has no meaning. To reach that conclusion, the RMA not only disregards the differences between disclosure under § 30167(b) and under FOIA, but also improperly weighs what it perceives to be Congress's purpose in enacting § 30166(m)(4)(C).

Section 30166(m)(4)(C)'s effect is apparent—it precludes NHTSA from releasing EWR data as part of its mandatory reporting requirement of § 30167(b) unless the Secretary makes certain findings. Contrary to the RMA's argument, the plain language of the TREAD Act does have an effect that is distinct from § 30167(b). Section 30167(b) outlines the conditions that trigger the Secretary's affirmative reporting obligations—that disclosure will aid in the execution of §§ 30117(b) and 30188-21—but does not say that the disclosure of information under § 30167(b) is strictly limited to the information the meets those criteria. The TREAD Act fills that gap with respect to EWR data; whereas § 30167(b)

establishes what the Secretary must include in its mandatory disclosure, § 30166(m)(4)(C) establishes what the Secretary cannot include in that specific release absent the required findings.

Despite the TREAD Act's clear focus on the scope of the Secretary's mandatory disclosure obligation, the RMA argues that limiting the application of § 30166(m)(4)(C) to its plain language renders the statute meaningless because EWR data can be obtained through FOIA. There is a critical difference between the Secretary's disclosure obligations under § 30167(b), however, and the availability of information under FOIA. The Secretary's affirmative disclosure obligations require it to disclose specific information, even if that information would not ordinarily be available to the public—for example, NHTSA may be required to disclose information that contains a trade secret. By contrast, if EWR data is sought under FOIA, its disclosure is subject to FOIA's exemptions, which (as the proceedings in this case demonstrate) may limit public access to the information in some instances.[3]

[3]The RMA suggests that Public Citizen's argument on this point is inconsistent because it argued below, in support of its own claims, that EWR data is not exempt from disclosure under FOIA. RMA Br. 37-38, n.10. Not so. Our argument was (and is) that categories of EWR data are not *categorically* exempt under FOIA's Exemption 4, and, indeed, that NHTSA lacks authority to create categorical exemptions; it is not that particular items of EWR data could never be found, on a case-by-case basis, to be exempt. In any event, NHTSA itself is continuing to propose to exempt much EWR data under Exemption 4 notwithstanding Public Citizen's views. 71 Fed. Reg. 63,738 (Oct. 31, 2006).

Thus, by partially exempting EWR data from the affirmative public disclosure requirements of § 30167(b) and relegating members of the public who seek access to it to FOIA, § 30166(m)(4)(C) limits public access to some EWR data to what is available under FOIA. Without the statute, it would have been unclear whether NHTSA was obligated to release *all* EWR data as part of its reporting obligation. The RMA may wish the statute did more, but that is not enough to establish that limiting it to its plain meaning renders it superfluous.

The RMA's argument that the continued availability of EWR data under FOIA undercuts § 30166(m)(4)(C) assumes that Congress intended to protect the confidentiality of EWR data—an intent missing from the plain language of the statute. Congress's intent is clear from the language of § 30166(m)(4)(C): NHTSA is only obligated to release EWR data pursuant to its mandatory reporting requirement if the conditions set forth in § 30166(m)(4)(C) are met.

E. The RMA's Resort to "Legislative History" Is Unavailing.

RMA urges this Court to consider the legislative history of the TREAD Act. This Court need not consider § 30166(m)(4)(C)'s legislative history because the plain language of the statute makes an inquiry into legislative history unnecessary, *see Whitfield v. United States*, 543 U.S. 209, 210 (2005); *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) ("Only where the statutory expression is genuinely ambiguous is legislative history useful or necessary." (quotation omitted)), and

because an Exemption 3 statute must "on its face exempt matters from disclosure." *Norton*, 309 F.3d at 38. Nonetheless, the TREAD Act's legislative history demonstrates, if anything, that Congress did not intend that § 30166(m)(4)(C) exempt EWR data from disclosure under FOIA. Rather, Congress intended only that § 30166(m)(4)(C) define the subset of EWR data that NHTSA is obligated to disclose under § 30167(b).

This Court has stated that a claimed withholding statute's legislative history is irrelevant as to whether Congress intended to exempt information from disclosure under FOIA's Exemption 3. *Norton*, 309 F.3d at 38. Accordingly, this Court's review is limited to the "actual words of the statute." *Id.* Both the Supreme Court and this Court have identified those statutes that Congress has intended to exempt information from disclosure under FOIA based on the language of the statutes. *See Sims*, 471 U.S. 159 (statute requiring CIA Director to prevent disclosure of "intelligence sources and methods"); *Baldrige*, 455 U.S. 345 (statute expressly forbidding disclosure of census information); *GTE Sylvania*, 447 U.S. 102 (statute providing that trade secret information obtained by the agency shall not be disclosed); *Tax Analysts*, 410 F.3d 715; *Lopez*, 393 F.3d 1345 (holding that Exemption 3 protects information regarding grand jury investigation because Fed. R. Crim. P. 6(e) prohibits government attorneys from "disclos[ing] a matter occurring before the grand jury"). Given Congress's demonstrated ability to create

statutory exemptions from FOIA, this Court will not look for congressional intent in legislative history where Congress has declined to clearly protect information from disclosure. *See Reporters Comm.*, 816 F.2d at 735 ("Congress was well aware of modes of statutory interpretation that agencies and courts use to divine congressional intent—and wished, at least for the purpose of applying Exemption 3, to confine us essentially to the plain meaning rule.").

Even if this Court were to look beyond the plain language of § 30166(m)(4)(C), however, the statute's legislative history does nothing to establish that Congress intended the TREAD Act to exempt EWR data from FOIA. The RMA relies primarily on two congressional floor statements to support its argument. The Supreme Court and this Court have regularly warned against using such statements to alter statutory text. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002); *NRDC v. EPA*, 907 F.2d 1146, 1157 (D.C. Cir. 1990). Given that floor statements are a particularly weak form of legislative history, this Court should not rely on them to defeat the plain language of § 30166(m)(4)(C).

In any event, other statements, including statements by the same members the RMA quotes, show that although the Act would affect disclosure of EWR data pursuant to the Secretary's affirmative obligations under § 30167(b), the data would remain available to the public under alternative disclosure schemes:

> [W]ith respect to information that NHTSA currently requires be disclosed to the public it is my understanding of the committee's

> intention that we not provide manufacturers with the ability to hide from public disclosure information which under current law must be disclosed.

146 Cong. Rec. H9629 (daily ed. Oct. 10, 2000) (statement of Rep. Markey); *see also id.* (statement of Rep. Tauzin to same effect). The RMA's construction of Rep. Markey's statement—that the TREAD Act would change the public's access to information but not the manufacturers' obligation to report it to NHTSA, RMA Br. 26—is as strained as its construction of § 30166(m)(4)(C). Rep. Markey stated that Congress did not intend to "provide manufacturers with the ability to hide from *public disclosure* information which under current law must be disclosed." 146 Cong. Rec. H9629 (emphasis added). Similarly, other legislators emphasized that the Act was intended to promote disclosure to consumers, not restrict it. For example, Representative Waxman stated that he supported the Act because it "will improve the flow of important safety information … to federal regulators and consumers." Id. at H9631; see also 146 Cong. Rec. S10273 (daily ed. Oct. 11, 2000) (statement of Sen. McCain emphasizing that the Act would not inhibit the release of information to the public).

The RMA makes much of a letter written by Public Citizen's President Joan Claybrook, which mistakenly said the statute would preclude release under FOIA. The letter, written after both Houses had already voted on the TREAD Act, could not have influenced the legislative process and is in no sense "legislative history."

Moreover, the letter's misreading was immediately pointed out by NHTSA's Chief Counsel before the President signed the Act, *see* JA at 202, and President Clinton's signing statement emphasized the need to "assure[] maximum public availability of information" under the Act, Statement by the President on Signing of TREAD Act (Nov. 2, 2000), which would have been nonsensical if the Act were understood to foreclose disclosures. The RMA's citation of Ms. Claybrook's letter establishes only that in the heat of a lobbying effort it is possible to misread even unambiguous statutory language—which will hardly come as news to this Court given its frequent need to correct mistaken readings of clear statutes even by expert agencies and district courts. *See, e.g.*, *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006).

In any event, the plain language of § 30166(m)(4)(C) sufficiently demonstrates Congress's intent to maintain FOIA's disclosure requirements and is entirely consistent with the Act's structure. Section 30167— the only disclosure statute that § 30166(m)(4)(C) governs—sets forth disclosure requirements that are explicitly distinct from those set forth in FOIA. The RMA's reading of § 30166(m)(4)(C) as governing the release of information pursuant to both § 30167(b) *and* FOIA would clash with the plain language of § 30167(b). Because, by its very terms, § 30167(b)'s reporting requirements, as incorporated by reference in the TREAD Act, operate independently of FOIA, a provision that

purports to govern only those reporting requirements can have no effect on the disclosure of information under FOIA.

II. The Secretary's Previous Interpretations of § 30166(m)(4)(C) Are Irrelevant Because this Court Reviews De Novo Whether a Law Is an Exemption 3 Statute.

It is well established, as the RMA acknowledges, that this Court's review is *de novo*. RMA Br. 20 ("In its review, the Court accords no deference to NHTSA's interpretation of FOIA."); *see also Norton*, 309 F.3d at 32; *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 334 (D.C. Cir. 1987). This Court's *de novo* review of a claimed withholding statute is independent of the agency's interpretation of FOIA. *Iron & Sears*, 606 F.2d at 1220; *Am. Jewish Cong. v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978) ("Nondisclosure is countenanced by Subsection (B) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data[.]"). There are two reasons why courts do not give deference to an agency's interpretation of FOIA or its exemptions. First, because FOIA applies equally to all federal agencies, no agency is particularly suited to determine whether information in its possession is subject to disclosure. *Reporters Comm.*, 816 F.2d at 734. Second, declining to give deference to an agency's conclusions regarding the applicability of a FOIA exemption avoids the inevitable tension that arises between FOIA's disclosure

mandate and the "understandable reluctance of government agencies to part with that information." *Id*.

Despite this Court's clearly established standard of review, the RMA spends several pages focusing on the irrelevant issue of the Secretary's supposedly inconsistent interpretations of the TREAD Act. Relying on the principles articulated in *SEC v. Chenery*, 318 U.S. 80 (1943), the RMA argues that the Secretary's litigation position concerning the interplay of §§ 30166(m)(4)(C) and 30167(b) does not appear in the rulemaking record and that a remand to the agency is therefore necessary. The RMA's arguments, however, contradict its own recognition that this Court's review of an alleged statutory exemption to FOIA is *de novo*. Whether a statute manifests a congressional intent to exempt a certain set of information from disclosure under FOIA does not depend on the breadth of the administrative record or the consistency of the agency's interpretations. The very premise of the RMA's argument—that this Court could consider an agency's interpretation in an Exemption 3 case—flies in the face of this Court's charge in an Exemption 3 case. This Court must decide as a matter of law whether § 30166(m)(4)(C), on its face, clearly and unambiguously manifests a congressional intent to keep EWR data confidential. NHTSA's past interpretation

of the statute is irrelevant to that question, making consideration of its rationale neither necessary nor appropriate. [4]

The RMA's arguments notwithstanding, this Court should limit its analysis to the clear language of the statute. Indeed, the RMA's own assertion that this Court need not give *Chevron* deference to NHTSA's interpretation, (RMA Br. 31) underscores the point, though the RMA's suggestion that the reason for not affording deference is the inconsistency of the agency's position is off-point. Rather, the reason no deference is owed is that this Court must affirm the district court unless it concludes as a matter of law that § 30166(m)(4)(C), on its face, explicitly exempts EWR data from disclosure, regardless of NHTSA's interpretation of the statute. Only if the language of the § 30166(m)(4)(C) unambiguously exempts EWR data from disclosure may this Court reverse the district court. *Iron & Sears*, 606 F.2d at 1220 ("[O]nly explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption."). Although this Court should reach the conclusion that § 30166(m)(4)(C) does not

[4]Thus, this case is unlike cases cited by the RMA where courts were considering the *reasonableness* of an agency's statutory construction under *Chevron* principles, under which the reasonableness of the agency's construction could not be affirmed unless the construction was actually advanced by the agency in the administrative proceedings. Here, the Court is not really reviewing the *agency's* construction of the statute; it is determining for itself what the statute means.

exempt EWR data from disclosure, its decision must be based on the plain language of the statute, as opposed to the Secretary's interpretation. "[A] statute that is claimed to qualify as an Exemption 3 withholding statute must, *on its face*, exempt matters from disclosure." *Reporters Comm.*, 816 F.3d at 735.

CONCLUSION

For the foregoing reasons, this Court should conclude that § 30166(m)(4)(C) does not specifically exempt EWR data from disclosure under FOIA, and thus affirm the district court's judgment dismissing the RMA's cross-claim.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached Brief for Appellee Public Citizen, Inc., complies with Fed. R. App. P. 32(a)(5), (a)(6), and (a)(7)(B), because it has been prepared in a proportionally spaced typeface, using Microsoft Word 2003 in 14 point Times New Roman font, and contains 6,927 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

_____

Scott L. Nelson

Dated: July 6, 2007

CERTIFICATE OF SERVICE

I, Scott L. Nelson, certify that on behalf of Public Citizen, Inc., a copy of the foregoing Brief for Appellee Public Citizen was served by first-class mail, postage prepaid and by e-mail on this 6th day of July, 2007, on the following counsel of record:

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CONTENTS OF ADDENDUM

5 U.S.C. § 552(b)

This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention

of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

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 amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

49 U.S.C. § 30166(m)

(1) Rulemaking required.--Not later than 120 days after the date of the enactment of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, the Secretary shall initiate a rulemaking proceeding 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.

(2) Deadline.--The Secretary shall issue a final rule under paragraph (1) not later than June 30, 2002.

(3) Reporting elements.--

> (A) Warranty and claims data.--As part of the final rule promulgated under paragraph (1), the Secretary shall require manufacturers of motor vehicles and motor vehicle equipment to report, periodically or upon request by the Secretary, information which is received by the manufacturer derived from foreign and domestic sources to the extent that such information may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States and which concerns--
>
> > (i) data on claims submitted to the manufacturer for serious injuries (including death) and aggregate statistical data on property damage from alleged defects in a motor vehicle or in motor vehicle equipment; or
> >
> > (ii) customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement of motor vehicles or items of motor vehicle equipment.
>
> (B) Other data.--As part of the final rule promulgated under paragraph (1), the Secretary may, to the extent that such information may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States, require manufacturers of motor vehicles or motor vehicle equipment to report, periodically or upon request of the Secretary, such information as the Secretary may request.

(C) Reporting of possible defects.--The manufacturer of a motor vehicle or motor vehicle equipment shall report to the Secretary, in such manner as the Secretary establishes by regulation, all incidents of which the manufacturer receives actual notice which involve fatalities or serious injuries which are alleged or proven to have been caused by a possible defect in such manufacturer's motor vehicle or motor vehicle equipment in the United States, or in a foreign country when the possible defect is in a motor vehicle or motor vehicle equipment that is identical or substantially similar to a motor vehicle or motor vehicle equipment offered for sale in the United States.

(4) Handling and utilization of reporting elements.--

(A) Secretary's specifications.--In requiring the reporting of any information requested by the Secretary under this subsection, the Secretary shall specify in the final rule promulgated under paragraph (1)--

(i) how such information will be reviewed and utilized to assist in the identification of defects related to motor vehicle safety;

(ii) the systems and processes the Secretary will employ or establish to review and utilize such information; and

(iii) the manner and form of reporting such information, including in electronic form.

(B) Information in possession of manufacturer.--The regulations promulgated by the Secretary under paragraph (1) may not require a manufacturer of a motor vehicle or motor vehicle equipment to maintain or submit records respecting information not in the possession of the manufacturer.

(C) Disclosure.--None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.

(D) Burdensome requirements.--In promulgating the final rule under paragraph (1), the Secretary shall not impose requirements unduly burdensome to a manufacturer of a motor vehicle or motor vehicle

equipment, taking into account the manufacturer's cost of complying with such requirements and the Secretary's ability to use the information sought in a meaningful manner to assist in the identification of defects related to motor vehicle safety.

(5) Periodic review.--As part of the final rule promulgated pursuant to paragraph (1), the Secretary shall specify procedures for the periodic review and update of such rule.

49 U.S.C. § 30167

(a) Confidentiality of information.--Information obtained under this chapter related to a confidential matter referred to in section 1905 of title 18 may be disclosed only in the following ways:

(1) to other officers and employees carrying out this chapter.

(2) when relevant to a proceeding under this chapter.

(3) to the public if the confidentiality of the information is preserved.

(4) to the public when the Secretary of Transportation decides that disclosure is necessary to carry out section 30101 of this title.

(b) Defect and noncompliance information.--Subject to subsection (a) of this section, the Secretary shall disclose information obtained under this chapter related to a defect or noncompliance that the Secretary decides will assist in carrying out sections 30117(b) and 30118-30121 of this title or that is required to be disclosed under section 30118(a) of this title. A requirement to disclose information under this subsection is in addition to the requirements of section 552 of title 5.

(c) Information about manufacturer’s increased costs.--A manufacturer opposing an action of the Secretary under this chapter because of increased cost shall submit to the Secretary information about the increased cost, including the manufacturer's cost and the cost to retail purchasers, that allows the public and the Secretary to evaluate the manufacturer’s statement. The Secretary shall evaluate the information promptly and, subject to subsection (a) of this section, shall make the information and evaluation available to the public. The Secretary shall publish a notice in the Federal Register that the information is available.

(d) Withholding information from Congress.--This section does not authorize information to be withheld from a committee of Congress authorized to have the information.