178158

Docket No. NHTSA-02-12150 - 8
RIN 2127-AI20

DEPT. OF TRANSPORTATION
02 JUL -2 AM 9:21

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION DEPARTMENT OF TRANSPORTATION

Concerning

CONFIDENTIAL BUSINESS INFORMATION 67 Fed. Reg. 21198 (April 30, 2002)

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Faye Little
Judge K. K. Legett Fellow
Washington Legal Foundation
Texas Tech University
School of Law

July 1, 2002

WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 588-0302
www.wlf.org

July 1, 2002

Docket Management Facility
Docket No. NHTSA-02-12150
Department of Transportation
400 Seventh Street, SW
Nassif Building, Room PL-401
Washington, DC 20590

Re: Proposed Rulemaking Regarding the National Highway Traffic Safety Administration's Regulations on the Treatment of Confidential Business Information. (67 Fed. Reg. 21198 (April 30, 2002); Docket No. NHTSA-02-12150)

Dear Docket Clerk:

The Washington Legal Foundation (WLF) hereby submits these comments in partial support and partial opposition to the proposed rule amending and reorganizing 49 CFR Part 512. WLF supports t he proposed rulemaking because it is a responsible effort on the part of the National Highway Traffic Safety Board (NHTSB) to align the National Highway and Traffic Administration's (NHTSA's) regulations with current case law concerning release to the public of voluntarily-submitted, confidential business information.

However, WLF opposes some of the additional amendments to part 512 which decline to take advantage of the courts' broader definition of what is a "voluntary submission." *See Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). WLF also opposes the NHTSA regulation amendments which fail to give information submitters sufficient notice of pending, FOIA requests for their information.

Interests of WLF. WLF is a non-profit public interest law and policy center based in Washington, D.C. with supporters in all 50 states. While WLF engages in litigation, administrative proceedings, and public education efforts covering a variety of areas, WLF devotes a substantial portion of its resources to promoting the interests of a free market economy and to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators.

Of particular relevance to this rulemaking proceeding, WLF has litigated to protect the rights of businesses to protect their confidential business information. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *Rutigliano v. Appleton Papers, Inc.*, 2000 WL 1705152 (D.N.J.). In addition to defending business rights in the courts, WLF produces timely publications on this and other topics through its legal studies division. *See, e.g.*, Gerald H. Yamada, *Federal Agency Policies Imperil Privacy of Business Information* (WLF Legal Opinion Letter, April 5, 2002).

WLF believes in the proper government regulation of confidential business information according to the law as it is interpreted by our judicial system. While the government possesses an interest in making intelligent, well-informed decisions, businesses possess a strong, privacy interest in maintaining the integrity of their confidential information. In order to encourage business cooperation with government agencies when businesses are not required to submit information and to protect business rights, it is "necessary to protect the confidentiality of information...which would customarily not be released to the public by the person from whom it was obtained." S.Rep. No. 813, 89th Cong., 2d Sess. 9 (1964) U.S.Code Cong. & Admin. News 1966, p. 2418 ("Senate Report on FOIA Exemption 4"). Current legal precedent echoes this

statement by treating information confidentially when it is voluntarily given to a government agency and is of the kind that the business customarily withholds from the public. *Critical Mass*, 975 F.2d at 880.

Regulatory History. NHTSA's last revision to Part 512 regarding the treatment of confidential business information took place on November 28, 1989. The revision incorporated then current case law changes by providing procedural clarifications and amending Appendix B–Class Determinations. 54 FR 48892. Part 512 has not been amended since 1989.

Exemption 4 of the Freedom of Information Act (FOIA) protects "trade secrets and commercial or financial information obtained from a person that is privileged or confidential." 5 U.S.C. 552(b)(4). The "exemption is intended to protect the interests of *both* the government and submitters of information." Department of Justice (DOJ) FOIA Guide, Exemption 4, p. 1, May 2000 (emphasis added). The exemption "encourages submitters to *voluntarily* furnish information to the government and it correspondingly provides the government with an assurance that such information will be reliable." DOJ FOIA Guide, Exemption 4, p. 1, May 2000 (emphasis added).

Prior to 1992, the courts used a test for confidential business information established in *National Parks and Conservation Association v. Morton*. 498 F.2d 765, (D.C. Cir. 1974). *National Parks* was a suit under FOIA to enjoin federal officials from refusing to permit the plaintiff to inspect and copy certain agency records regarding the concession operations of the National Parks Service. Before it gave concessionaires the ability to further develop the record to show that they would be prejudiced by the information's disclosure, the United States Court of

Appeals for the District of Columbia Circuit held that in order for information to be within the commercial or financial information, confidential Exemption 4 of FOIA, disclosure of that information must either: 1) impair the government's ability to obtain necessary information; or 2) cause substantial harm to the competitive position of the person from whom the information was obtained (the competitive harm test). 498 F.2d at 770.

In *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), the D.C. Circuit Court established a new standard to define confidential business information submitted to a government agency voluntarily. The court found that voluntarily submitted information must be treated as confidential under FOIA Exemption 4 and protected from public disclosure simply if the information is commercial in nature and is not customarily released to the public by the submitter. *Id.* at 880. The court's decision was significant because it eliminated the need for companies which voluntarily submitted information to government agencies to meet the additional competitive harm test found in *National Parks*.

In order to comport with the voluntary submission definition of confidential business information in *Critical Mass* and to adhere to its practical experience, the NHTSB proposed modifications to Part 512 on April 30, 2002. (67 FR 21198) Considering the fundamental substantive differences in the confidentiality of voluntarily submitted business information between the *National Parks* rule and the *Critical Mass* rule, the NHTSB somewhat downplays the difference between the standards when it states that although "the proposal constitutes a significant change in the presentation and style of Part 512, it will not alter most of the substantive requirements contained in the regulation." *Id.*

WLF Comments. WLF believes that the NHTSB's proposed changes to Part 512 only partially serve the agency's intended purpose "to ensure the efficient processing of requests for confidential treatment and the proper protection of sensitive business information received by the NHTSA." 67 Fed. Reg. 21198. While the changes initially promote these goals, the remainder of the Part 512 undercuts them.

In Subpart A, the NHTSB proposes to revise the definition of "confidential business information" to reflect the changes made in case law. 67 Fed. Reg. 21198. The definition applies differing standards to determine the confidentiality of two categories of information, required submissions and voluntary submissions. 67 Fed. Reg. 21203. The NHTSA deems required submissions confidential under the *National Parks* test, when its release either "would likely impair the government's ability to obtain necessary information in the future or would likely cause substantial harm to the competitive position of the person from whom the information was obtained." Part 512.3(c)(2)(i); 67 Fed. Reg. 21199. The NHTSA deems voluntary submissions confidential when they are "the kind of information that would customarily not be released to the public by the person from whom it was obtained." Part 512.3(c)(2)(ii); 67 Fed. Reg. 21203.

WLF supports these changes for several reasons. First, the court handed down its decision in *Critical Mass* which changed the definition of confidential for voluntarily submitted information over a decade before this proposed regulation change. That is more than enough time for government agencies "to update specific sections [of their regulations] to reflect current case law" as the Federal Register Notice contends. 67 Fed. Reg. 21198.

Second, the changes further the purposes of FOIA's Exemption 4 which are "to protect

the interests of *both* the government and submitters of information." DOJ FOIA Guide, Exemption 4, p.1, May 2000 (emphasis added). Both the governmental interest of efficient operation and the business interest in maintaining informational secrecy are served by using the lesser burden of proof of confidentiality for voluntarily submitted business information. *See National Parks*, 498 F.2d at 767.

Third, the lesser burden for voluntarily submitted information furthers the governmental interests expressed in *Critical Mass*. The court stated, "when information is obtained under duress, the Government's interest is in ensuring its continued reliability; when that information is volunteered, the Government's interest is in ensuring its continued availability." 975 F.2d at 878.

When businesses voluntarily provide information to the government, the court presumes that the government's interest in continued availability of information will be threatened by disclosure of that information, because businesses whose confidence has been betrayed will refuse to cooperate with the government in the future. *Id.* The court in *National Parks* also noted the probable consequences of a breach of confidence by the government when it stated that, "[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the government to make intelligent, well-informed decisions will be impaired." 498 F.2d at 767.

The new confidentiality definition assures businesses that their voluntary submissions will be kept confidential when the business treats that information as confidential. The assurance decreases the possibility of a breach of confidence by the government and subsequently reduces the adverse consequences of any breach.

Fourth, the new confidential definition proposed by the NHTSB eliminates legal guess work by businesses as to what voluntarily submitted information will and will not be deemed confidential by the NHTSA. When confidential information is defined by ordinary business practice, businesses are not required to research and decipher case law and – what some would say is much more difficult – attempt to predict what a governmental agency will do. Instead, the business will look to what information it customarily releases to the public and know that if it voluntarily submits this information to NHTSA, that it may be released to the public under a FOIA request. Conversely, the business will know that if it voluntarily submits information to NHTSA that is of the kind it does not customarily release to the public, NHTSA will protect that information for the business.

In short, WLF supports the proposed confidential definition change by NHTSB. The change encourages businesses to voluntarily provide useful, business information to the government that the businesses do not customarily release to the public, with confidence that the information proffered will be protected.

WLF supports Subpart B of the proposed rule which continues to further the agency's purposes by establishing specific requirements for submitters who request confidential treatment. 67 Fed. Reg. 21198. The rule requires submitters of information to provide supporting data for their confidential treatment request with a signed certificate verifying the data. *Id.* Furthermore, this Subpart outlines clear standards as to where and how to mark information contained in submissions requested to be confidential. *Id.* Subpart B then informs submitters of the information needed to process their requests. *Id.* at 21199. It minimizes the burden on submitters and provides other agency offices with the information they need to perform their

assigned tasks by changing the submission copy requirements. *Id.*

WLF supports Subpart C which assembles all additional requirements of information submitters into one subpart of 512. *Id.* The Subpart collects and outlines the submitter's continuing obligations to the agency after information has been submitted, covers procedural matters, and specifies the consequences of non-compliance with Part 512. *Id.*

Subparts A, B, and C, accomplish the rulemaking's stated purposes of efficiency and proper protection. Because of the definition's clarity in Subpart A, the procedural requirements for submission of requested confidential information in Subpart B, and the comprehensible collection of further requirements for submitters in Subpart C, submitters are properly informed about the items of information needed by the agency to make a decision regarding their confidential requests. *Id.* at 21198. For those reasons, WLF supports these proposed subparts of the NHTSB's rulemaking efforts, because they help ensure the protection of information claimed to be confidential. *Id.*

However, WLF opposes Subpart D because it fails to fully protect sensitive business information. *Id.* at 21198-21200. The amendments to Subpart D unnecessarily continue current class determinations presumed to cause competitive harm, add new class determinations presumed not to cause competitive harm, and establish a presumption that release of a company's test procedures do not cause competitive harm. *Id.* at 21200.

After the NHTSB's appropriate and qualified effort to reflect current case law with the proposed rule concerning voluntarily submitted business information, the agency retains current categories or classes which presumptively cause or do not cause competitive harm. *Id.* at 21199. WLF submits that these classes undermine all advantages given to both the government and

private businesses in at least three ways.

First, these distinctions take away with one hand what they gave with the other. When the rule, in Part 512.3(c)(2)(ii), allows voluntarily submitted business information to remain confidential if it is of the kind not customarily released by the submitter, the rule gives protection to sensitive business information and encourages businesses to share information voluntarily with the NHTSA, who in turn can use the information to make intelligent and enlightened decisions. *See discussion supra.* But with the class distinctions in Subpart D, the NHTSB proposes to scrutinize the voluntarily-given, business information not customarily released to the public under a heightened burden of proof, namely the competitive harm test in *National Parks.* However, the courts have required companies to meet this competitive harm test burden only for *required* submissions to government agencies, not those which were submitted *voluntarily. See Critical Mass*, 975 F.2d at 880. In sum, the class distinctions' blanket application in Subpart D unfairly limits the definition of confidential information proposed in Subpart A.

Second, the class determinations do not follow the necessary determinations, namely whether the information was offered voluntarily (or not) to the agency, before placing submitted information into classes. The NHTSB's proposed definition of "confidential" necessarily classifies information into two categories – required submissions and voluntary submissions – before it applies the standard to determine whether the information will be given confidential treatment. *See* Part 512.3(c)(2)(i-ii). In this sense, the class distinctions of Subpart D put the cart before the horse.

If the initial determination of whether information was given voluntarily (or not) to the agency is never made, then the correct burden to prove the information's confidentiality will not

be applied. Determining a class presumed to cause (or to not cause) competitive harm fails to take into account the nature of the information offered to the NHTSA. When businesses give information voluntarily to the NHTSA which they do not customarily afford the public, that information should be kept confidential according to current case law as the NHTSB's proposed definition in Subpart A properly suggests. *See Critical Mass*, 975 F.2d 871; Part 512.3(c)(2)(ii); 67 Fed. Reg. 21198.

Third, these class distinctions may fully subvert other substantive law. As the comments submitted on June 26, 2002, by the Utilimaster Corporation and Blue Bird Body Company both suggest, the class distinctions ignore the specific statutory disclosure provision in the Transportation Recall Enhancement, Accountability and Documentation Act (TREAD). The important points advanced by Utilimaster and Blue Bird are these: 1) the TREAD Act precludes disclosure of all information collected pursuant to the National Traffic and Motor Vehicle Safety Act 30167(b) unless the NHTSA makes other preliminary determinations; 2) FOIA's Exemption 3 precludes disclosure of information specifically exempted from disclosure by statute; 3) Both the government and industry are obliged to comply with the TREAD Act. WLF endorses and incorporates by reference the comments and views advanced by Utilimaster Corporation and Blue Bird Body Company on this issue.

Finally, WLF opposes Subpart E because it gives an inadequate amount of time to businesses to review and respond to FOIA requests submitted to the NHTSA by third parties. Businesses who have submitted information to the NHTSA need adequate notice in order to thwart FOIA requests from third parties seeking to obtain putative, confidential information on those businesses. Also, the wording of the regulation leaves an inordinate amount of room for

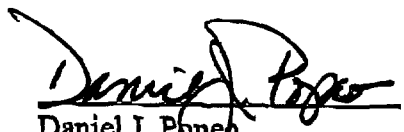
the NHTSA's discretion. When the regulation says, "written notice will be given at least ten (10) working days before the day of release, unless the Administrator finds that shorter notice is within the public interest," the regulation gives no assurance to businesses that they will have an appropriate notice of the release of their submissions to the NHTSA. 67 Fed. Reg. 21206. In order for submitters to be aware of and respond to possible threats to their business positions by the unwarranted release of confidential information, it is incumbent upon NHTSA to give greater notification of FOIA requests to these submitters.

Consequently, WLF proposes that the agency provide the third-party FOIA request to the affected business within three (3) business days after receiving it. Furthermore, the agency should send to the affected business copies of all correspondence between the agency and the FOIA requester, including correspondence providing the status of the processing of the FOIA requests. Finally, since FOIA requires agencies to respond to FOIA requests within 20 working days, we do not think that the agency should ever give less than ten (10) day advance notice to the company before releasing business documents. 5 U.S.C. 552. WLF submits that notice to an affected business of a FOIA request by a third party should never be less than five (5) working days, even if the "public interest" exception is invoked. 67 Fed. Reg. 21206; Part 512.23(b).

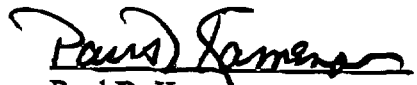
Conclusion. For the reasons indicated, WLF partially supports and partially opposes the National Highway Safety and Traffic Board's proposed amendments to the NHTSA's regulations regarding the agency's treatment of confidential business information. WLF urges that the rule be amended and modified with respect to the treatment of voluntary submissions to the NHTSA and the notice of pending FOIA requests for business information. The proposed rule as

suggested by the WLF will further both the governmental interest in efficiency and the business interest in protection of confidential information.

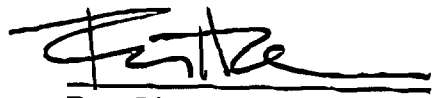
Respectfully submitted,



Daniel J. Popeo
Chairman and General Counsel



Paul D. Kamenar
Senior Executive Counsel



Faye Little
Judge K. K. Legett Fellow
Texas Tech School of Law