

Exhibit 1



November 13, 2014

FOIA Officer – HCC-40
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590
Transmitted electronically to foia.office@fhwa.dot.gov

FOIA REQUEST

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Advocates for Highway and Auto Safety (Advocates) requests that the Federal Highway Administration (FHWA, the agency) provide any and all agency records regarding the ET-Plus guardrail end terminal (end terminal) manufactured by Trinity Industries (Trinity) based in Dallas, Texas and any or all subsidiaries or affiliates of Trinity including, but not limited to, Trinity Highway Products LLC. This FOIA request is limited in time to all responsive records dated on, or in the possession of, the agency beginning on, January 1, 2000, but in all other respects seeks all records regarding—

- changes to the design of the end terminal;
- research conducted regarding the end terminal;
- testing of the end terminal;
- communications from Trinity to FHWA employee Nicholas Artimovich regarding the end terminal;
- communications by FHWA employee Nicholas Artimovich to Trinity or others regarding the end terminal;
- all records of communications to or from FHWA employees and FHWA contractors regarding the end terminal.

The scope of this request covers all agency records including, but is not limited to, memoranda, letters, notes, telephone messages, electronic mail (e-mail) and electronic files, transcribed materials, technical analyses, technical assistance documents regardless of format and whether as drafts or in final form.

Following your notification to us of having searched and identified the relevant records within the statutory time frame controlling a response to a FOIA request, we will arrange with FHWA personnel

to inspect the records you make available to us and then determine whether and to what extent any duplication of selected records might be required.

Should you deny access to any of the requested records, please describe each denied record in detail and, in each instance of denial, state the exact statutory basis for your denial as well as your reasons for believing that this statutory basis for denial should be applied in this instance. Also state separately your reasons for not invoking your discretionary authority to release the records in the public interest. If you determine that some records or portions thereof are exempt from release and you decide not to release them, we ask that you promptly provide us with access to all other records or segregable portions of records that you determine can be released.

Since furnishing the records, including any necessary duplication, will be used solely to inform Congress and the public regarding the FHWA's conduct in relation to the ET-Plus guardrail end terminal and the manner in which the agency implements important statutory policy requirements, we ask that any fees associated with this request be waived pursuant to 5 U.S.C. § 552(a)(4)(A) for Advocates, a not-for-profit, consumer advocacy organization. Advocates has no commercial interest in, and will make no commercial use of, any materials supplied to us pursuant to your release on any of the requested records. Moreover, a release of the requested records will generate benefits for the general public by, among other things, helping to promote public awareness of the safety impacts of the FHWA's decisions and actions affecting federal laws, regulations, and commercial transportation practices and policies under its jurisdiction that may have a lasting impact on the safety of the traveling public. In further support of a fee waiver, a statement is enclosed of Advocates' extensive qualifications and activities as a not-for-profit, public interest organization in the field of highway safety.

Access to the records sought through this FOIA request is required within 20 days of your receipt of the request in conformity with 5 U.S.C. § 552(a)(6)(A)(i). If you anticipate the need for any delay beyond this time limit for responding to our request, you are required to notify us promptly in writing of the need for and the length of the prospective delay. Please contact Peter Kurdock, Director of Regulatory Affairs, Advocates for Highway and Auto Safety, at pkurdock@saferoads.org. Alternatively, Mr. Kurdock can be reached by telephone at (202) 408-1711. If some records falling within the scope of our FOIA request are available prior to completion of FMCSA's search for and identification of all relevant records that are responsive to our request, we would appreciate an opportunity to inspect such records as soon as they can be made available.

Respectfully submitted,



Shaun Kildare
Director of Research
Advocates for Highway
And Auto Safety

Enclosure: Statement in support of the request for a fee waiver.

**ADVOCATES FOR HIGHWAY AND AUTO SAFETY
SUPPLEMENTAL INFORMATION
IN SUPPORT OF FOIA FEE WAIVER APPLICATION**

Advocates for Highway and Auto Safety (Advocates) is a non-profit, educational and lobbying organization dedicated to reducing the number of deaths and injuries and the societal cost of motor vehicles crashes on our nation's highways. Advocates supports public policies that will promote crash and injury prevention as well as result in cost-savings. To accomplish these goals Advocates engages in research and analysis of motor vehicle and highway safety issues and data, and disseminates this information to the public, the media and Congress. Advocates is a nationally recognized public interest organization that fosters government action at all levels to decrease highway losses and improve public health and safety for the traveling public. Advocates participates in developing legislative and regulatory policies, expanding public knowledge and understanding of highway safety issues and reducing the devastating personal losses and societal impacts of deaths and injuries in motor vehicle crashes. Advocates addresses both vehicle safety, including passenger vehicles, light-duty trucks, as well as commercial motor vehicles (trucks and motor coaches) and highway safety issues of major concern to the public in the following ways:

- Dissemination of information and educational materials to the general public, the media, Congress, and other interested organizations;
- Providing the public with insight and understanding of the operations, activities, and processes of government regarding highway and auto safety;
- Responding with comments to agency rulemaking proposals and other initiatives that affect safety in order to encourage agency action and policies that will enhance highway and auto safety;
- Supporting safety legislation, including testifying before committees of the U.S. Congress and state legislatures and at agency safety hearings;
- Presenting speeches on highway and auto safety before transportation organizations and publishing articles in authoritative journals and magazines;
- Participating in professional transportation organizations, societies and safety coalitions.

Advocates is a coalition of safety-oriented organizations and has no commercial or profit-making interest in highway and vehicle safety. Agency records obtained by Advocates under the Freedom of Information Act are not used for any commercial purpose or offered for resale. Actions taken by Advocates are entirely in the public interest for the purpose of promoting improvements in highway and auto safety that benefit the general public.

Advocates has a long history of involvement in issues that affect the Federal Highway Administration programs and activities, implementation of the Federal-Aid Highway Act provisions, issues affecting commercial motor vehicles and national commercial motor vehicle safety policy, as well as the proper execution of the Moving Ahead for Progress in the 21st Century (MAP-21) Act. Advocates has a long-term relationship in engaging with the Federal Highway Administration (FHWA) regarding agency programs and operations including highway work zone barrier policies, speed limit enforcement,

highway pavement and bridge policy and, most recently, on truck size and weight data and research. The purpose of Advocates request for records regarding ET-Plus guardrail end terminal manufactured by Trinity Industries is to inform the public about the role of federal government, the Department of Transportation and the FHWA in carrying out statutory requirements and in developing and adopting policies that impact public safety and the highway environment including guardrails and highway appurtenances, and to educate the public about transportation policy issues and how governmental decisions impact their safety.

Exhibit 2



U.S. Department
of Transportation
**Federal Highway
Administration**

December 15, 2014

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer To:
HSST/2015-0061

Mr. Peter Kurdock
Advocates for Highway and Auto Safety
750 First Street NE
Suite 1130
Washington, DC 20002

1200 New Jersey Ave., SE
Washington, D.C. 20590

Dear Mr. Kurdock:

This letter is being sent in response to your request for a fee waiver regarding FOIA request 2015-0061. Please be advised that your fee waiver request has been granted in part for the reasons stated below. See 49 CFR 7.43 and 5 U.S.C. 552(a)(4)(A).

In order to qualify for a fee waiver or a fee reduction under the public interest standard, a FOIA requester must show that: (1) the disclosure of the requested records "is likely to contribute significantly to public understanding of the operations or activities of the government" and (2) the disclosure of such records is "not primarily in the commercial interest of the requester." In determining whether disclosure is likely to contribute significantly to public understanding of government operations, and whether the request is primarily in the commercial interest of the requester, DOT regulations outline several factors for consideration:

- 1) That the subject matter of the requested records concerns the operations or activities of the Federal Government;
- 2) That the disclosure is likely to contribute to an understanding of Federal Government operations or activities;
- 3) That disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons (to establish this factor, the requester must show an intent and ability to disseminate the requested information to a reasonably broad audience of persons interested in the subject);
- 4) That the contribution to public understanding of Federal Government operations or activities will be significant; and
- 5) That the requester does not have a commercial interest that would be furthered by the requested disclosure or that the magnitude of any identified commercial interest to the requester is not sufficiently large in comparison with the public interest in disclosure to render the disclosure one that is primarily in the commercial interest of the requester.

Based on a review of the information you submitted, we have concluded that items 1-3 of your request meet this criteria.

In your supplemental information in support of your FOIA fee waiver request you explain, in great detail, the history and objectives of your organization. Notwithstanding, your status as a nonprofit does not alleviate your responsibility to satisfy all statutory requirements for a fee waiver. The supplemental information submitted fails to establish how the FHWA response to the broad requests listed in items 4-6 will contribute to the understanding of Federal government operations and activities. You have not adequately stated how the many documents included in these all-encompassing items will contribute to the understanding of government activities. Since you have failed to satisfy factor 2 of the fee waiver requirements, you have also failed to demonstrate, with specificity, how your request will contribute significantly to the public's understanding, 49 C.F.R. §7.43(c)(4). In fact, it appears that the explanation you submitted is incomplete.

As you may know, FHWA has already made a great deal of information available to the public. That information includes: (1) An overview of guardrails which outlines the function of a guiderail, memoranda on In-service Performance Evaluations and Continuous Monitoring of Roadside Safety Features as well as the Application and Installation of Roadside Hardware. Most recently, FHWA released Trinity's ET-Plus Guardrail End Terminal Re-testing Plan along with FAQs on the Trinity ET-Plus Re-Testing/Guardrail End Terminal Safety and Crash Test Plan for the ET-Plus Guardrail End Terminal. The FHWA has made this information available to the public in order to further the public's understanding of FHWA's government activities.

In light of the information already available to the public in addition to your lack of specificity regarding items 4-6 of your request, there is no reason to conclude that a fee waiver for these items should be granted.

Pursuant to U.S. Department of Transportation regulations (49 C.F.R. § 7.32), you have the right to appeal this decision in writing to Ms. Sarah Shores, Associate Administrator for Administration, Federal Highway Administration. Your appeal may be mailed to 1200 New Jersey Avenue, S.E., E66-322, Washington, D.C. 20590-9898, or sent via e-mail at FHWA.foia.appeals@dot.gov or via fax at 202-366-7499. Should you wish to exercise this right, the agency decision on the appeal will be the final administrative action. Your appeal must be postmarked or, in the case of electronic or facsimile transmission submitted, within forty-five (45) calendar days from the date the initial determination is signed and should include the FHWA file or reference number assigned to the request and all information and arguments relied upon in making the appeal.

The FHWA has determined that the cost for searching for and duplicating records responsive to items 4-6 of your request is as follows:

Search Time (\$ 60.00 per hour – approximately 152 hours @ \$60 per hour; total for search time- \$9120.00
Duplication copies – Direct cost of production (2) – 128 GB flash drives @ 65.00 each total – \$130.00
Total: \$9,250.00

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Michael S. Griffith". The signature is fluid and cursive, with the first name "Michael" being the most prominent.

Michael S. Griffith
Director, Office of Safety Technologies
Office of Safety

Exhibit 3



January 16, 2015

Ms. Sarah Shores
Associate Administrator for Administration
Federal Highway Administration
1200 New Jersey Avenue, SE, E66-322
Washington, D.C. 20590-9898
via electronic mail: FHWA.foia.appeals@dot.gov

Re: HSST/2015-0061

Dear Ms. Shores:

Advocates for Highway and Auto Safety (Advocates) appeals the rejection in part of the fee waiver submitted for agency records in the possession of the Federal Highway Administration (FHWA) relating to the ET-Plus guardrail end terminal (end terminal) manufactured by Trinity Industries (Trinity) based in Dallas, Texas requested pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

In correspondence dated December 15, 2014, FHWA notified Advocates that it was granting the fee waiver as it pertained to documents involving changes to the design of the end terminal, research conducted regarding the end terminal, and testing of the end terminal.¹ However, the agency rejected the fee waiver request for records relating to the communications from Trinity to FHWA employee Nicholas Artimovich regarding the end terminal, communications by FHWA employee Nicholas Artimovich to Trinity or others regarding the end terminal, and all records of communications to or from FHWA employees and FHWA contractors regarding the end terminal.² According to the agency, the cost of providing items 4-6 to Advocates would be \$9,250. This fee is prohibitive for a small public interest organization such as Advocates. Copies of Advocates' FOIA request, complete fee waiver petition and FHWA's response are attached.

The FHWA asserts that the release of records relating to the communications of its employees and contractors regarding the end terminal would not significantly contribute to the understanding of Federal Government operations or activities. The agency also notes that some information related to the end terminal has been made available to the public. Yet, none of documents outlined in FHWA's response are records of communications by FHWA employees and/or contractors.

The records outlined by Advocates in items 4-6 of its FOIA request are no different than documents relating to the research, design and testing of the end terminal in that they will undoubtedly reflect the FHWA's operations and activities regarding the end rail terminal. In fact, the communications records directly relate to how the agency performed its oversight duties as it pertains to a piece of equipment placed on our nation's highways that has been linked to multiple deaths and injuries. Furthermore, these records will show the specific actions or inaction FHWA employees engaged in regarding the issue of the safety of the end terminal. Records of agency personnel communications can be used to inform policy

¹ Identified by FHWA in its response as items 1-3.

² Identified by FHWA in its response as items 4-6.

makers as to any errors that occurred or what better course of action can be taken in the future to avoid another such occurrence. Furthermore, under the Electronic Freedom of Information Act Amendments of 1996, the electronic records of communications by FHWA employees and contractors are to be treated no differently than other documents requested pursuant to FOIA. Under Section 3 of the Act, electronic records are to be treated as agency records covered by FOIA.³

The FHWA is most surely aware that the safety community, policy makers at all levels of government, and the traveling public are keenly interested in the myriad of serious issues surrounding the end terminal. As noted in the fee waiver application, the purpose of Advocates request for records regarding the end terminal is to inform the public about the role of the Federal Government, the Department of Transportation and the FHWA in carrying out statutory requirements and in developing and adopting policies that impact public safety and the highway environment including guardrails and highway appurtenances, as well as to educate the public about transportation policy issues and how governmental decisions impact their safety. In this regard, the records of agency communications with non-agency contractors and other involved third parties will significantly contribute to the public's understanding of the safety issues.

The only question in this appeal is whether fees should be charged to the requestor, Advocates, for certain agency records related to a specific topic, but not other records related to the same topic. FHWA has already determined that the records of communications are releasable under the FOIA, and that the requestor has met the test for a fee waiver with respect to some of the requested records. The FHWA response letter fails, however, to support its determination that Advocates use of the records regarding the end terminal design would significantly contribute to the public's understanding of Federal Government operations or activities, but that Advocates' use of the records of agency communications regarding the end terminal design would not. The distinction between the two sets of records has not been established and, indeed, does not exist. These are not personnel records or records of otherwise private or privileged conversations. The records were made during the course of conducting agency business, during working hours and at taxpayer expense. Potential embarrassment or inconvenience to the agency or agency personnel is not a valid basis for imposing fees on requestors. The agency determination to impose fees for the release of these records, while no fee is imposed for the release of other records on the same subject is erroneous.

The disclosure of the communications records that the agency has determined are not to be provided free of charge will significantly contribute to the public understanding of FHWA's operations and activities regarding an issue of profound importance. As such, the documents requested by Advocates in its FOIA request identified as items four through six by the agency should be provided without a fee pursuant to 5 U.S.C. § 552(a)(4)(A).

Respectfully submitted,



Shaun Kildare
Director of Research
Advocates for Highway
And Auto Safety

³Public Law No. 104-231 (1996).

Exhibit 4



U.S. Department
of Transportation
**Federal Highway
Administration**

1200 New Jersey Ave., SE
Washington, D.C. 20590

FEB 03 2015

FOIA Control Number:
2015-0102A

In Reply Refer To:
HCC-40

Mr. Shaun Kildare
Advocates for Highway and Auto Safety (Advocates)
750 First Street NE, Suite 1130
Washington, DC 20002

Dear Mr. Kildare:

This letter responds to your January 16, 2015, correspondence appealing the Federal Highway Administration's (FHWA) initial determination regarding your Freedom of Information Act (FOIA) request, Control Number 2015-0061. In the December 15, 2014, initial decision, FHWA partially denied your request for a waiver of the fees associated with the processing of your FOIA request for documentation relating to the ET-Plus guardrail end terminals manufactured by Trinity Industries (Trinity).

In response to your appeal, FHWA has reviewed the file on this matter, including your initial FOIA request and the Office of Safety Technologies (HSST) response, along with the threshold requirements regarding fee waivers or reduction, and your appeal in accordance with the FOIA, 5 U.S.C. § 552, the U.S. Department of Transportation (DOT) FOIA regulations at 49 CFR Part 7. After completing this review, I am denying your appeal.

I. Background

In your November 13, 2014, FOIA request, you sought a fee waiver and:

“[A]ny and all agency records regarding the ET-Plus guardrail end terminal (end terminal) manufactured by Trinity Industries (Trinity) based in Dallas, Texas and any or all subsidiaries or affiliates of Trinity including, but not limited to, Trinity Highway Products LLC. This FOIA request is limited in time to all responsive records dated on, or in the possession of, the agency beginning on, January 1, 2000, but in all other respects seeks all records regarding-

- [1] changes to the design of the end terminal;
- [2] research conducted regarding the end terminal;
- [3] testing of the end terminal;
- [4] communications from Trinity to FHWA employee Nicholas Artimovich regarding the end terminal;

- [5] communications by FHWA employee Nicholas Artimovich to Trinity or others regarding the end terminal;
- [6] all records of communications to or from FHWA employees and FHWA contractors regarding the end terminal.”

On November 15, 2014, the Director, HSST granted your fee waiver, in part, for items 1-3; however, HSST also determined that for items 4-6 you failed to satisfy factors 2 and 4 under 49 C.F.R. §7.43(c), in that you failed to demonstrate with specificity how the documents included in these all-encompassing items will contribute to the understanding of government activities or that the contribution to public understanding of Federal Government operations or activities will be significant.

II. FHWA Response to Appeal

On January 16, 2015, you challenged the HSST determination and appealed the fee waiver denial for items 4-6 (“communications from Trinity to FHWA employee Nicholas Artimovich regarding the end terminal, communications by FHWA employee Nicholas Artimovich to Trinity or others regarding the end terminal, and all records of communications to or from FHWA employees and FHWA contractors regarding the end terminal.”) You state that “the cost of providing items 4-6 to Advocates would be \$9,250. This fee is prohibitive for a small public interest organization such as Advocates.” Finally, you argue “the documents requested by Advocates in its FOIA request identified as items four through six by the agency should be provided without a fee pursuant to 5 U.S.C. § 552(a)(4)(A).”

The following is our response to the claims you raised on appeal of our initial response to request, Control Number 2015-0061:

A. FOIA Fee Waiver Requirements

In order to receive a fee waiver, the requester must show that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The requester bears the burden of establishing that both of these statutory requirements have been satisfied. See FOIA Update, Vol. VIII, No. 1, at 4 (“OIP Guidance: New Fee Waiver Policy Guidance”); see also Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 55 (9th Cir. 1997) (reiterating that “requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver” (citing McClellan, 835 F.2d at 1284-85)).

Under DOT regulations there are five factors to consider when evaluating a fee waiver request. Those factors are: (1) the subject matter of the requested records concerns the operations and activities of the Federal government; (2) the disclosure is likely to contribute to an understanding of Federal government operations or activities; (3) the disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) the contribution to public understanding of Federal government operations or activities will be significant; and, (5) the public interest in

disclosure is greater in magnitude than the requester's commercial interest. 49 C.F.R. § 7.43(c). After considering these factors and after the requester establishes the requirements are satisfied, the Agency may waive or reduce properly assessable fees. Id.

B. Analysis of your Fee Waiver Request

In your appeal, you explain that you are a nonprofit entity. Notwithstanding this, your status as a nonprofit does not alleviate your responsibility to satisfy all statutory requirements for a fee waiver. VoteHemp, Inc. v. DEA, 237 F.Supp.2d 55, 59 (D.D.C. 2002) (explaining that nonprofit status “does not relieve [the requester] of its obligation to satisfy the statutory requirements for a fee waiver”).

Under FOIA, requesters seeking fee waivers must address the five factors of the statutory requirements in sufficient detail for the agency to make an informed decision as to whether it can appropriately waive or reduce the fees in question. See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (reiterating that requests for fee waiver requests must be made with “reasonable specificity,” and based on more than “conclusory allegations”). In the HSST decision, they determine your initial request fails to satisfy factors 2 and 4 with respect to items 4-6. In your appeal, you argue you have satisfied factors 2 and 4 and ask that items 4-6 be disclosed to you without any fee. Factors 2 and 4 are discussed below.

a. Factor 2: Whether Disclosure is Likely to Contribute to an Understanding of Government Operations or Activities.

Your appeal fails to establish how the FHWA response to the broad request for records that you submitted will contribute to the understanding of Federal Government operations and activities that you articulate in your fee waiver appeal. A court will defend a requester's attempt to “corroborate existing suspicions,” but it will not compel an agency to subsidize a “fishing expedition.” Jarvik v CIA, 495 F.Supp.2d 67, 73 (D.D.C. 2007). Courts consider “the objectives and reasons given by the requester in support of the waiver” when analyzing the second fee waiver factor. In Defense of Animals v. National Institutes of Health, 543 F.Supp.2d 83, 109 (D.D.C. 2008). A requester seeking a fee waiver bears the initial burden of identifying the public interest to be served. See Ely v. United States Postal Service, 753 F.2d at 165. The D.C. Circuit has explained that it is important to consider the “connection between the material sought and a matter of genuine public concern.” Nat'l Treasury Employees Union v. Griffin, 811 F.2d 644, 648 (D.C. Cir. 1987). As a result, a requester “must pinpoint the type of government activity he is investigating.” Jarvik v. CIA, 495 F.Supp.2d 67, 73 (D.D.C. 2007). When a public interest is asserted but not identified with reasonable specificity, and circumstances do not clarify the point of the requests, it is not arbitrary or capricious for an agency to infer . . . that any benefit to the public from disclosure and waiver “would be, at best, indirect and speculative.” Nat'l Treasury Employees Union v. Griffin, 811 F.2d at 647.

Your FOIA request and appeal seek to compel disclosure of items 4-6 without cost to Advocates. In your fee waiver appeal, you argue these “communications records directly relate to how the agency performed its oversight duties as it pertains to a piece of equipment placed on our nation's highways that has been linked to multiple deaths and injuries. Furthermore, these

records will show the specific actions or inaction [by] FHWA employees engaged in regarding the issue of the safety of the end terminals.” Your appeal briefly explains that it seeks a fee waiver for records that will contribute to the public understanding “as to any errors that occurred or what better course of action can be taken in the future to avoid another such occurrence.” While the public clearly has an interest in discovering unlawful agency action, you fail to identify any specific allegation of malfeasance, much less error, to warrant such a search at public expense. In light of the breadth of your FOIA request and the objectives and reasons given in support of your fee waiver request, it is clear that you have not provided sufficient detail regarding government activities or operations that are of a genuine public concern or would disclose unlawful agency activity.

i. Communicating this Information to the Public.

Moreover, in the event that FHWA finds releasable information in response to your request, your justification fails to demonstrate with particularity how you will communicate that information to the public. Under Carney v. DOJ, 19 F.3d 807, 814 (2d Cir. 1994), the relevant inquiry is “whether requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” You fail to state with any specificity what you will do with the findings other than generally, “will be used solely to inform Congress and the public regarding the FHWA's conduct in relation to the ET -Plus guardrail end terminal and the manner in which the agency implements important statutory policy requirements.” This is insufficient. See generally, Inst. For Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F.Supp.2d 1226, 1231-32 (D. Or. 2003) (plaintiff provided a description of its expertise in analyzing this type of information, and stated its ability and intent to “produce a shorter, abstracted, informative analysis for the public.” The plaintiff noted that it would analyze the records requested in combination with a “campaign to collect information from various environmental groups regarding how the FWS has communicated with them and responded to their petitions to list.” Thus, plaintiff asserts, two sets of raw materials would be turned into a distinct work by the analytic and editorial efforts of plaintiff). The court in Ortloff v. DOJ, No. 98-2819, slip. op. at 21 (D.D.C. Mar. 22, 2002), stressed that to qualify for a fee waiver, the requester’s ability to disseminate information, “to the general public, or even to a limited segment of the public...must be demonstrated.”

In your initial request and appeal, you fail to explain what you would do with the information or how, specifically compared to the plaintiff in Inst. For Wildlife Prot., you would release any obtainable information to the public.

ii. The Requests Lack Necessary Specificity.

“Under well-established case law, fee waiver requests must be made with ‘reasonable specificity’...and based on more than ‘conclusory allegations.’” Judicial Watch, Inc., 326 F.3d at 1312. In your appeal, you state that you are seeking, “records of communications by FHWA employees and/or contractors” in order to demonstrate “specific actions or inaction [by] FHWA employees....” In both your initial request and in your appeal, however, you seek a large volume of records, but only state vague purposes for those records. These records are composed of emails and memoranda which contain personally identifiable information and commercial

business information. You request that the Agency satisfy this voluminous request for at least 9,500 records, in order to allow Advocates to access these documents without any specific plans regarding what Advocates will do with the information, if provided without cost. This concedes that your request lacks the requisite specificity necessary to warrant a fee waiver. You are asking that the public bear the full costs associated with your request but do not specify what you will do with the records other than exercise your discretion to pick and choose which records you will disseminate to the public. However, “the public should not foot the bill [for the search] unless [the public] will be the primary beneficiary of the search.” Crooker v. Department of the Army, 577 F.Supp. 1220, 1223 (D.D.C 1984) (quoting Burriss v. CIA, 524 F.Supp. 448, 449 (M.D. Tenn. 1981)). You did not narrow your request or specify the decisions for which you seek internal discussions and you offer no further information to explain or support this claim. AFGE v. U.S. Dep’t of Commerce, 632 F.Supp. 1272, 1278 (D.D.C. 1986)(finding union's allegations to be too ephemeral to warrant waiver of search fees without further evidence that informative material will be found).

Simply put, you have not stated with specificity how the records included in your all-encompassing request will contribute to the public’s understanding of government’s operations and activities articulated in your fee waiver appeal.

iii. An Agency Decision to Grant a Fee Waiver for One Set of Agency Records Does not Mean it Should Grant a Fee Waiver for All Agency Records.

Your appeal argues that since Advocates has already met the test for a fee waiver with respect to some of the requested records, FHWA should release of the records requested by you similarly without fee. While some courts have determined that “if a single record warrants a waiver, all responsive records ‘fall under the waiver,’” those courts have not gone as far as you insist. Campbell v. U.S. Dep’t of Justice, 164 F.3d 20, 36 (D.C. Cir. 1998). Campbell, for instance, specifies that “once a given record is deemed to contain information warranting a waiver, all of the related pages *within* that record that are responsive to the FOIA request fall under the waiver.” Id. (emphasis added). Moreover, the Campbell court also noted that “[a] different standard might apply to records or files that are uncommonly large or that contain only a few substantive documents relative to the volume of administrative information.” Id. at 36 n.16. In this case, the records contained under items 1-3 are separate and distinct from those records contained in items 4-6 and you have requested an uncommonly large amount of information, at least 9,500 distinct records, which may only contain a few substantive documents after redactions are applied. Finally, your request can be distinguished from both Campbell and Inst. For Wildlife Prot., in that those cases requested very specific and finite records. In Campbell, the requester sought “the FBI file” on a specific author. In Inst. for Wildlife Pro., the requester sought only petitions that used a particular form of computerized mapping and analysis. Your request is in no way analogous to the requests in these cases.

Given the broad nature of your request and the records requested, I find the link between the many records requested and the stated reasons that these records will contribute to public understanding of government activities to be tenuous, at best.

b. Factor 4: Whether the Contribution to Public Understanding of Federal Operations or Activities will be Significant.

Your appeal letter also fails to demonstrate, with specificity, how the voluminous nature of your request (items 4-6) will contribute *significantly* to the public's understanding, above what is already made publicly available, as required by the fee waiver regulations. 49 C.F.R. §7.43(c). See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Educ., 593 F.Supp.2d 261, 268 (D.D.C. 2009) (“[T]he requester must clear away any inferences that could cast doubt on his eligibility for a fee waiver by describing with reasonable specificity how the requested disclosure will contribute significantly to the public's understanding.”)(citation and internal quotations omitted).

“Ready accessibility [to requested information] would tend to make the potential contribution of disclosure less significant than otherwise.” Community Legal Services Inc. v. U.S. Housing and Urban Development, 405 F.Supp.2d 553, 559 (E.D. Pa. 2005). See also Sierra Club Legal Def. Fund, No. 93-35383, slip op. at 4 (9th Cir. 1994). As FHWA explained in the initial responses to this fee waiver request, the Advocates have been provided access to documents involving changes to the design of the end terminal, research conducted regarding the end terminal, and testing of the end terminal. In addition, FHWA has amassed and provided public access to the end terminal information Advocates and others have similarly requested via FOIA in its electronic reading room at: <http://www.fhwa.dot.gov/guardrailsafety/index.cfm>. “The public's understanding of the subject, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.” Judicial Watch Inc. v. U.S. Department of Justice, 185 F.Supp.2d 54, 62 (D.D.C 2002)(internal citations omitted).

Although a fee waiver requester “need not make any specific allegation[s] concerning... wrongdoing,” courts have denied fee waivers “where the requester made, but did not adequately substantiate, an allegation that the Government was involved in some malfeasance.” Natural Resources Defense Council, Inc. v. EPA, 581 F.Supp.2d 491, 501 (S.D.N.Y 2008). In your fee waiver request, you state that the records you request will demonstrate “specific actions or inaction [by] FHWA employees.” You state that you seek these records to review “how the agency performed its oversight duties as it pertains to a piece of equipment placed on our nation's highways that has been linked to multiple deaths and injuries.” Neither your initial request nor appeal letter, however, identify, with any particularity, any possible wrongdoing or improper decisions by the Agency. The only enhancement of public understanding that your appeal letter suggests will occur is to demonstrate the FHWA's compliance, or potential noncompliance, with various federal laws. As a result, absent more specificity regarding the allegations of wrongdoing, there will not be a significant contribution to the public's understanding of government operations or activities.

Due to the lack of specificity of your request and your inability to explain, with specificity, how the documents requested will enhance public understanding to a significant extent, there is no reason to conclude that a fee waiver should be granted. See Judicial Watch, Inc. v. DOJ, 185 F.Supp.2d 54, 62 (D.D.C. 2002).

III. Conclusion

For all the reasons stated above, the Agency denies your fee waiver appeal. I am the FHWA official responsible for this decision. Mrs. Mindy Kaiden Levenson, on behalf of the FHWA Office of the Chief Counsel, and Mr. John Allread, on behalf of the DOT Office of the General Counsel, both have concurred with this decision. Although the appeal of your fee waiver is denied, your request for documents remains open pending your agreement to pay the cost of processing. Please contact the FHWA Office of Safety Technologies within 10 days of this letter with your agreement to pay the estimate in order for the FOIA request processing to continue. Keep in mind that you must agree to pay the estimated cost, regardless of whether the information you are seeking is determined to be releasable or withheld pursuant to one or more of the FOIA exemptions as defined in both DOT regulation 49 C.F.R. Part 7 and 5 U.S.C. § 552. If you do not respond within 10 days of receipt of this letter, your FOIA request will be administratively terminated. This concludes the Agency's review of this appeal. You are advised that, under the provisions of 5 U.S.C. § 552(a)(4)(B), you are entitled to seek judicial review in the U.S. District Court in the district where you reside, the district where you have your principal place of business, the district in which the records are kept, or in the District of Columbia.

If you have any questions with regard to this letter, please feel free to contact Mr. Adam Brill, Attorney Advisor, at 202-366-4241.

Sincerely yours,



Sarah J. Shores
Associate Administrator
for Administration

Enclosures

cc: HSST

Exhibit 5



U.S. Department
of Transportation

**Federal Highway
Administration**

February 20, 2015

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer To:
HSST/2015-0061

Mr. Peter Kurdock
Advocates for Highway and Auto Safety
750 First Street NE
Suite 1130
Washington, DC 20002

Dear Mr. Kurdock:

This is in response to your Freedom of Information Act (FOIA) request dated November 13, 2014, in which you requested:

“[A]ny and all agency records regarding the ET-Plus guardrail end terminal (end terminal) manufactured by Trinity Industries (Trinity) based in Dallas, Texas and any or all subsidiaries or affiliates of Trinity including, but not limited to, Trinity Highway Products LLC. This FOIA request is limited in time to all responsive records dated on, or in the possession of, the agency beginning on, January 1, 2000, but in all other respects seeks all records regarding-

- [1] changes to the design of the end terminal;
- [2] research conducted regarding the end terminal
- [3] testing of the end terminal
- [4] communications from Trinity to FHWA employee Nicholas Artimovich regarding the end terminal
- [5] communications by FHWA employee Nicholas Artimovich to Trinity or others regarding the end terminal;
- [6] all records of communications to or from FHWA employees and FHWA contractors regarding the end terminal.”

Records responsive to items 1-3 of your request are enclosed. These records are being provided in full.

On February 3, 2015, the Agency issued a final Agency decision regarding your request to waive all fees associated items 4-6 of your FOIA request. In light of this decision and consistent with the provisions of 49 C.F.R. §7.45, FHWA will defer further processing of your request until you:

- (1) agree to all costs associated in processing items 4-6 of this request or
- (2) consult with the Agency further to reformulate your request in order to meet your needs at a lower cost. Please respond by March 12, 2015. If the Agency does not receive a

response, be advised that your request will be closed as a matter of administrative discretion.

If you have any questions or concerns, please contact Denesha James at Denesha.James@dot.gov or by telephone on (202) 366-3813.

Sincerely yours,



Michael S. Griffith
Director, Office of Safety Technologies
Office of Safety