

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

-----x Civil Action No.:  
HAROLD E. MORRIS and  
LAURA J. SHARE,

Plaintiffs,

-against-

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION,

Defendant.

-----x

Plaintiffs HAROLD E. MORRIS and LAURA J. SHARE, by their attorneys, The Edelsteins Faegenburg & Brown LLP, allege as follows:

**NATURE OF ACTION**

1. This is an action under the Freedom of Information Act (FOIA), 5 USC § 552, for declaratory, injunctive, and other appropriate relief against the National Highway Traffic Safety Administration (hereinafter “NHTSA”), for continued on-going violations of Sections 552(a)(6)(A)(i) and (a)(6)(B)(i) of FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and 552(a)(6)(B)(i).

2. NHTSA has failed to timely provide records in response to your Affirmant’s FOIA requests filed on behalf of the Plaintiffs sent to said agency commencing on about September 22, 2021. Your affirmant seeks immediate release of the requested agency records from NHTSA, and other relief as set forth below.

**JURISDICTION AND VENUE**

3. The Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 522(a)(4)(B), (a)(6)(E)(iii), and 28 U.S.C. § 1331.

4. Venue is proper in this district pursuant under 5 U.S.C. § 552(a)(4)(B) because New York resides in this district.

5. NHTSA is a component agency of the United States Department of Transportation charged with, inter alia, adopting and enforcing motor vehicle fuel economy standards. NHTSA is an agency of the United States within the meaning of 5 U.S.C. § 552(t)(l). NHTSA has possession of and control over records that Plaintiff seeks and has requested pursuant to FOIA.

### **STATUTORY AND REGULATORY BACKGROUND**

6. FOIA requires federal agencies to make promptly available to any person any requested records, except for those records that properly fall within one of the statute's exemptions. 5 U.S.C. § 552(a)(3)(A).

7. Once an agency receives a FOIA request, it has twenty (20) business days to respond with a determination of whether such responsive documents exist and whether they may be released. 5 U.S.C. § 552(a)(6)(A)(i).

8. An agency may only delay its response to a request in the event that "unusual circumstances" as defined by FOIA exist. Even in this event, it may extend its time to respond by no more than ten days. 5 U.S.C. § 552(a)(6)(B)(i); 40 C.F.R. § 2.104(d); 49 C.F.R. § 7.34(a).

9. An agency may only delay its response to a request in the event that "unusual circumstances" as defined by FOIA exist. Even in this event, it may extend its time to respond by no more than ten days. 5 U.S.C. § 552(a)(6)(B)(i); 40 C.F.R. § 2.104(d); 49 C.F.R. § 7.34(a).

10. If the agency fails to comply with the statutory time limits, the person making the request will be deemed to have exhausted their administrative remedies and may bring suit. 5 U.S.C. § 552(a)(4)(B), (a)(6)(C)(i).

11. FOIA permits the Court to grant "reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i).

**FACTUAL BACKGROUND**

12. The underlying case involves claims sounding in products liability brought by the Plaintiffs HAROLD E. MORRIS and LAURA J. SHARE against HARLEY-DAVIDSON MOTOR COMPANY GROUP, LLC in connection with a series of motorcycle accidents that occurred in 2019 and 2020, which resulted in catastrophic injuries and wrongful death.

13. The actions, which are pending in the New York State Supreme Court Monroe County deal with NHTSA Recall 19V-843, Safety Campaign 0175, issued in November 2019, stemming from a defect in certain 2019 and 2020 HARLEY-DAVIDSON Trike Models wherein the Traction Control System software used on the subject motorcycles responded incorrectly to a faulty wheel rear wheel speed signal by activating one of the rear brakes, causing an unexpected change in vehicle direction thereby increasing the risk of a crash. Over 12,000 vehicles were subject to the recall. Summons and Complaints in the respective actions are annexed hereto. **(Exhibit "A")**

14. Briefly stated, on February 18, 2019, HAROLD E. MORRIS (75), a long-time experienced motorcyclist, was operating his newly purchased 2019 Harley-Davidson FLHCUTG Trike on a roadway in LaBelle, Florida with his long-time companion Pamela M. Sinclair (63) riding as a passenger. The Trike was heading straight when suddenly and without warning, the brakes malfunctioned causing the vehicle to swerve into the opposite lane of travel, veer off the roadway and down an embankment, causing Mr. Morris and Ms. Sinclair to be ejected and sustain personal injuries.

15. The Trike was towed to the HARLEY-DAVIDSON dealership where Mr. MORRIS purchased it from where an inspection under the purview of HARLEY-DAVIDSON failed to reveal the cause of the accident. The vehicle underwent significant repairs and was returned to Mr. MORRIS with the assurance that it was safe to operate.

16. A few months later, in late November 2019, HARLEY-DAVIDSON issued the subject self-recall through NHTSA regarding the Traction Control System notifying the affected customers to bring the vehicles into HARLEY-DAVIDSON dealerships to have the software updated, which would reportedly solve the problem. Mr. MORRIS brought the vehicle into his dealership where the recall fix was reportedly completed.

17. In December 2019, Mr. MORRIS filed a claim with HARLEY-DAVIDSON seeking to recover medical expenses incurred on behalf of himself and Ms. Sinclair in connection with the Florida accident based upon his belief that the accident may have resulted from the Traction Control System defect that was the subject of the recall.

18. HARLEY-DAVIDSON formally denied the claim in January 2020 after determining that there was no evidence that the vehicle experienced the recall condition.

19. On June 6, 2020, Mr. MORRIS was operating the Trike on a roadway in Hamlin Township, Pennsylvania, with Ms. Sinclair as his passenger, when the vehicle veered off the roadway and overturned, killing Ms. Sinclair and critically injuring Mr. MORRIS.

20. In late October 2019 LAURA J. SHARE (62), another long-time experienced motorcyclist, purchased a 2020 Harley-Davidson FLHCUTG Trike from the same HARLEY-DAVIDSON dealership as Mr. MORRIS. On May 2, 2020, she brought the vehicle into the dealership after receiving notification of the recall pertaining to the defective Traction Control System. The recall fix was reportedly addressed.

21. A few weeks later, on May 27, 2020, Ms. SHARE was operating the Trike on an Interstate Highway in Rochester, N.Y. when it went out of control and overturned causing her to sustain catastrophic injuries.

### **NHTSA'S INVOLVEMENT**

22. NHTSA was first made aware of the MORRIS and SHARE accidents by your Affirmant's offices on or about June 26, 2020 (MORRIS) and May 5, 2021 (SHARE).

**(Exhibit "B")**

23. On or about September 22, 2021, your Affirmant's offices filed an initial FOIA request with NHTSA asking to be provided with "copies of all manufacturer communications, supporting documents, records, and reports in connection with the subject recall including all communications to the manufacturer by NHTSA." The request (ES21-000797) was acknowledged by letter from NHTSA dated September 23, 2021. **(Exhibit "C")**

24. On or about November 19, 2021, NHTSA responded to the request stating: "We have completed our search, but did not locate any additional records responsive to your request" and stating that responsive records to the recall were posted to the agency's website. **(Exhibit "D")**

25. Annexed hereto are the records that appear on the NHTSA website. While the documents contain HARLEY-DAVIDSON generated service bulletins, dealership communications, safety recall information, recall quarterly reports, a recall chronology and NHTSA Part 573 safety recall reports, there is only one formal letter dated December 11, 2019, from NHTSA to HARLEY-DAVIDSON acknowledging the recall notification. **Notably, no other communications including letters, emails, internal and external memoranda between NHTSA'S Office of Defects Investigation and HARLEY-DAVIDSON were provided.**

**(Exhibit “E”)**

26. Relying on NHTSA’S representations that the responsive materials were posted on their website, your Affirmant’s office did not appeal or otherwise pursue their determination.

27. In April 2022, during discovery in the MORRIS and SHARE cases, your Affirmant’s offices were provided with a series of email communications between NHTSA’S Office of Defect Investigations and HARLEY-DAVIDSON pertaining to the recall.

In addition, letters and emails regarding the MORRIS case were exchanged. **These communications were not provided by NHTSA in its November 2021 FOIA response.**

Attached are samples of the non-confidential emails provided by HARLEY-DAVIDSON.

The emails regarding the MORRIS case are being withheld due to a confidentiality agreement.

**(Exhibit “F”)**

28. Having learned of the existence of the above communications as well as other relevant materials related to the subject recall and the MORRIS and SHARE cases, your Affirmant’s offices filed an additional more specific FOIA request with NHTSA

(No. 220516-001) on or about May 12, 2022, asking to be provided with the following

**(Exhibit “G”):**

ALL DOCUMENTS, CORRESPONDENCE, INTERNAL MEMORANDUM, E-MAILS, COMPLAINTS, VEHICLE OWNER (VOQ) QUESTIONNAIRES/SAFETY COMPLAINTS AND INVESTIGATIVE RECORDS/REPORTS IN CONNECTION WITH 2019, 2020 & 2021 HARLEY-DAVIDSON TRIKE MODELS FLHTCUTG, FLRT AND FKHCUTGSE.

ALL DOCUMENTS, CORRESPONDENCE, INTERNAL MEMORANDUM, E-MAILS, COMPLAINTS, VEHICLE OWNER (VOQ) QUESTIONNAIRES/SAFETY COMPLAINTS AND INVESTIGATIVE RECORDS/REPORTS IN CONNECTION WITH NHTSA RECALL NO. 19V-843.

ALL DOCUMENTS, CORRESPONDENCE, INTERNAL MEMORANDUM, AND E-MAILS EXCHANGED BETWEEN NHTSA OFFICE OF DEFECTS INVESTIGATIONS, INCLUDING SAFETY DEFECTS ENGINEERS, AND HARLEY-DAVIDSON MOTOR COMPANY IN CONNECTION WITH NHTSA RECALL NO. 19V-843.

ALL DOCUMENTS, CORRESPONDENCE AND E-MAILS EXCHANGED BETWEEN NHTSA OFFICE OF DEFECTS INVESTIGATIONS/TRENDS ANALYSIS DIVISION AND HARLEY-DAVIDSON MOTOR COMPANY IN CONNECTION WITH JUNE 21, 2021, NOTIFICATION (NO. DI210M004) FOR SELECTED DEATH & INURY INCIDENTS (MOTORCYCLES) 2021 Q1, 2, 4.

ALL DOCUMENTS, CORRESPONDENCE AND E-MAILS EXCHANGED BETWEEN NHTSA OFFICE OF DEFECTS INVESTIGATIONS AND HARLEY-DAVIDSON MOTOR COMPANY IN CONNECTION WITH VEHICLE OWNER (VOQ) QUESTIONNAIRE/SAFETY COMPLAINT VOQ-11331036 (VIN: 1HD1MAF12KB853603) (HAROLD E. MORRIS)

ALL DOCUMENTS, CORRESPONDENCE AND E-MAILS EXCHANGED BETWEEN NHTSA OFFICE OF DEFECTS INVESTIGATIONS AND HARLEY-DAVIDSON MOTOR COMPANY IN CONNECTION WITH VEHICLE OWNER (VOQ) QUESTIONNAIRE/SAFETY COMPLAINT VOQ-11415400 (VIN: 1HD1MAF11B852914) (LAURA SHARE)

29. Commencing on July 18, 2022, your Affirmant's office began a series of communications via email with NHTSA seeking an update on the FOIA request. In sum and substance, NHTSA advised that the request had been misdirected to the wrong individual, that NHTSA only releases public records and that the agency (understandably) deals with a large volume of requests. In addition, your Affirmant's office was advised to "narrow the scope of the request you didn't receive through normal discovery filings" in order to be moved up in the response process. **(Exhibit "H")**

30. While your Affirmant understands and appreciates the burden that NHTSA and other Federal Agencies are tasked with to properly and timely respond to FOIA requests, it is respectfully submitted that given the seriousness of the underlying issues in the MORRIS and SHARE cases and NHTSA'S failure to accurately respond to your Affirmant's offices initial FOIA request in September 2021, that the aforementioned records sought in the May 2022, FOIA request **(No. 220516-001)** be provided forthwith.

31. Based upon the foregoing your Affirmant has exhausted all remedies because NHTSA has failed to timely and fully comply with the subject FOIA requests.

**CLAIM FOR RELIEF**

**NHTSA Violation of FOIA**

32. Paragraphs 1-31 are realleged and incorporated by reference.

33. NHTSA'S failure to respond to your Affirmant's September 22, 2021, and May 12, 2022, requests for records violates FOIA 552(a)(6)(A)(i) and (a)(6)(B)(i) of FOIA 5 U.S.C. § 552(a)(6)(A)(i) and 552(a)(6)(B)(i) and NHTSA'S own corresponding regulations, 49 C.F.R. § 7.31(a).

**PRAYER FOR RELIEF**

**WHEREFORE**, your Affirmant, on behalf of HAROLD E. MORRIS and LAURA J. SHARE respectfully requests that this Court grant the following relief:

1. Declare NHTSA'S failure to respond to your Affirmant's FOIA requests unlawful;
2. Direct NHTSA to immediately make available to your Affirmant all responsive, non-exempt agency records;
3. Retain jurisdiction over this action to rule on any assertions by NHTSA that any responsive records in whole or part, are exempt from disclosure;
4. Award your Affirmant costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
5. Grant such other relief as this Court may deem just and proper.

Dated: New York, New York  
September 12, 2022

*Respectfully Submitted,*



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Paul J. Edelstein (8219)  
THE EDELSTEINS, FAEGENBURG



**& BROWN, LLP**  
Attorneys for Plaintiffs  
**HAROLD E. MORRIS and**  
**LAURA J. SHARE**  
26 Broadway, Suite 901  
New York, N.Y. 10004  
Tel. (212) 425-1999  
Fax (917) 900-1801  
E-mail: [paul@efbpilaw.com](mailto:paul@efbpilaw.com)

**CERTIFICATION AND CLOSING**

Upon Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a non-frivolous argument for extending, modifying or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

Dated: New York, New York  
September 12, 2022



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Paul J. Edelstein (8219)  
THE EDELSTEINS, FAEGENBURG &  
BROWN, LLP  
Attorneys for Plaintiffs  
HAROLD E. MORRIS and  
LAURA J. SHARE  
26 Broadway, Suite 901  
New York, N.Y. 10004  
Tel. (212) 425-1999  
Fax (917) 900-1801  
E-mail: [paul@efbpilaw.com](mailto:paul@efbpilaw.com)