



U.S. Department of Justice

Ronald C. Machen Jr.  
United States Attorney

*District of Columbia*

---

*Judiciary Center  
555 Fourth St., N.W.  
Washington, D.C. 20530*

January 10, 2013

**VIA E-MAIL**

Walter D. Kelley, Jr., Esq.  
Tara Zurawski, Esq.  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
[wdkelley@JonesDay.com](mailto:wdkelley@JonesDay.com)  
[tzurawski@jonesday.com](mailto:tzurawski@jonesday.com)

Matthew B. Kirsner, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
Eighth & Main Building, Suite 1450  
707 East Main Street  
Richmond, VA 23219  
[mkirsner@eckertseamans.com](mailto:mkirsner@eckertseamans.com)

Russell C. Brown, Esq.  
The Law Offices of Russell C. Brown, P.C.  
P.O. Box 1780  
Henderson, TX 75653  
[russell@rcbrownlaw.com](mailto:russell@rcbrownlaw.com)

**RE:** *Trinity Industries, Inc., et al. v. Spig Industry, LLC., et al.,*  
Case No. 11-cv-937 CMH-TRJ (E.D. Va.)

In re: Suspected Violation of the Protective Order

Dear Counsel,

I write to apprise you of a suspected violation of the protective order in the litigation among you. The Public Affairs Office as well as the Freedom of Information Act ("FOIA") office of the U.S. Department of Transportation ("DOT") has recently received multiple inquiries

from several outlets of local Fox television stations requesting specific information related to the deposition of Nicholas Artimovich in your case, as well as a draft DOT document (Exhibit 16 to Mr. Artimovich's deposition transcript) that was discussed during Mr. Artimovich's limited testimony. The media requests reference and quote specific portions of Mr. Artimovich's transcript, as well as include a copy of the aforementioned draft DOT document. It was my understanding that these documents were subject to the protective order and not to be disclosed without authorization. While the draft document may be subject to FOIA requests, the exact copy with the exhibit sticker from Mr. Artimovich's deposition is not considered by DOT to be subject to FOIA at this time.

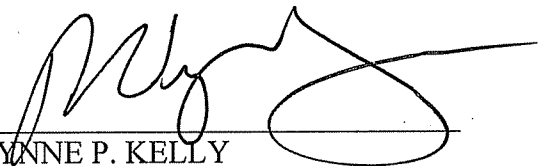
Therefore, in response to these requests, DOT has done the following: 1) confirmed that no DOT or Department of Justice personnel who had copies of Exhibit 16 have disclosed them to any third parties; 2) reviewed your (the parties') instructions regarding information considered confidential and highly confidential governing the litigation from which the subject subpoena springs; and 3) declined to provide any additional information to the press until we notified you of this potential violation of the protective order in your case.

I have attached copies of the media inquiries for your review and respectfully request your prompt response on whether you believe a violation of the protective order governing your case has taken place and, if so, any guidance on how you wish for DOT to proceed. Of course, DOT will ultimately act in the best interests of the United States upon a review of all of the information available to it, but we wish to bring this situation to your immediate attention.

Sincerely,

RONALD C. MACHEN JR.  
United States Attorney

BY:



WYNNE P. KELLY

Assistant United States Attorney

Phone: (202) 307-2332

Email: [wynne.kelly@usdoj.gov](mailto:wynne.kelly@usdoj.gov)

# **EXHIBIT 1**

-----Original Message-----

**From:** Daniel Goldstein [Daniel.Goldstein@FOXTV.COM]

**Sent:** Thursday, January 10, 2013 01:16 PM Eastern Standard Time

**To:** Dollinger, Kelly (FHWA)

**Subject:** Hi Kelly. Need you to confirm the authenticity of a draft FHWA document

Hi Kelly,

We have obtained copies of what appears to be a draft of a letter that was to be sent to Brian Smith of Trinity Industries regarding the performance of the ET-Plus guardrail system. I've included it so that you can compare what we have to what FHWA has.

As you are probably aware, this draft letter was described in Nicholas Artimovitch's sworn deposition on July 26<sup>th</sup>, 2012 as Exhibit 16.

The draft attached reads in the first line "It has come to our attention from various sources that w-beam guardrail terminals using the ET-PLUS head may not be performing as intended"

It also reads "the number of highway crashes with fatal injuries involving the ET-PLUS terminals does not match the excellent history of the original ET-2000 terminal"

The letter also states that Trinity "makes no mention of one of the more visible differences between the older extruder heads and the ones you are currently selling: the change in width of the feeder rails from 5 inches down to 4 inches"

The letter also asks of Trinity to supply various drawings and actual extruder heads and their dimensions.

As you can imagine, this draft letter is particularly significant to our investigation. Specifically, because our FOIA request asked for all "drafts" of correspondence involving the ET-Plus and involving Nicholas Artimovich, we would like to know why this letter was apparently excluded from our FOIA request.

Moreover, we would like to know the following things about this letter.

First of all. Can FHWA confirm this is indeed their agency's draft letter?

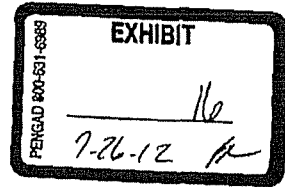
Second. When was this draft composed and by whom? (the deposition indicates that this letter might have been composed by Michael Griffith, the director of the Office of Safety Technologies in April or May of 2012)

Third. Why was it not completed and sent?

I thank you for your help in this matter.

Daniel Goldstein  
Investigative Producer  
WTTG FOX5 News

Washington D.C.  
[daniel.goldstein@foxtv.com](mailto:daniel.goldstein@foxtv.com)  
202-895-3367  
202-297-5411 (cell)



Brian Smith

Trinity Industries

Dear Mr. Smith:

It has come to our attention from various sources that w-beam guardrail terminals using the ET-PLUS head may not be performing as intended. We appreciate the time you took to meet with Mr. Nicholas Artimovich of my office at the recent meeting of the American Traffic Safety Services Association in Tampa, Florida, to explain the crash test performance of the current ET-PLUS terminals. However, even though it appears that the ET-PLUS terminal can still meet crash testing requirements, the number of highway crashes with fatal injuries involving the ET-PLUS terminals does not match the excellent history of the original ET-2000 terminal.

FHWA letter CC-12G, dated January 18, 2000, is our initial letter to Trinity Industries on the ET-Plus design, and the drawings attached to that letter show the width of the c-channel feeder rails to be 5 inches in both the ET-2000 and ET-Plus designs. In support of FHWA Letter CC-94 dated September 2, 2005, Texas Transportation Institute conducted two tests of the ET-PLUS terminal for the 31-inch tall Midwest Guardrail System (MGS). The information contained in our files for these two letters do acknowledge a number of improvements you made to the ET-2000 to develop the ET-PLUS, but make no mention of one of the more visible differences between the older extruder heads and the ones you are currently selling: the change in width of the feeder rails from 5 inches down to 4 inches.

We ask the following of Trinity:

1. Drawings of the extruder head used in the 2005 tests at TTI, specifically those used in TTI Test No. 220601-1&2.
2. If available, you locate the extruder head(s) used in the 2005 tests at TTI and document the internal and external dimensions.
3. You conduct an in-service performance evaluation of the current Trinity extruder terminals to determine their performance. Please include an investigation into the crashes documented by Mr. Joshua Harman. Listed in the enclosed document.



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

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

November 9, 2012

Refer To: HCC-40  
FOIA Control Number: 2013-0039

Mr. Daniel Goldstein  
Fox5 News WTTG  
5151 Wisconsin Avenue  
Washington, DC 20016

Dear Mr. Goldstein:

This letter is in reference to your Freedom of Information Act (FOIA) request dated November 9, 2012, in which you specifically requested copies of all e-mails and written correspondence of Nicholas (Nick) Artimovich II pertaining to ET-Plus end terminals manufactured by Trinity Highway Products LLC or Trinity Industries between 1999 and the present. Your request was received in our office on November 9, 2012, and has been assigned FOIA Control Number 2013-0039.

After reviewing your request, we have determined that any responsive records, if they exist, would likely reside in the FHWA Office of Safety (HSA). Your request has been forwarded to this office for action, and you will receive a response from them directly. The point of contact in HSA is Ms. Monique Simmons, who may be reached at 202-493-0272.

If you have any questions with regard to this letter, please feel free to contact me at 202-366-0948.

Sincerely,

Ronald E. Gagnon  
FOIA Analyst

cc: HSA (Monique Simmons)

**Steward, Gwen (FHWA)**

---

**From:** Daniel Goldstein <Daniel.Goldstein@FOXTV.COM>  
**Sent:** Friday, November 09, 2012 12:53 PM  
**To:** FOIA Officer (FHWA)  
**Subject:** FOIA REQUEST

Daniel Goldstein  
Investigative Producer  
FOX5 News WTTG  
5151 Wisconsin Ave  
Washington D.C. 20016

Nov 9, 2012

FOIA Office  
Federal Highway Administration  
400 Seventh Street, SW  
HMS-10/Room 4428, DOT HQ  
Washington, DC 20590

**FOIA REQUEST**

**Expedited processing requested**

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of all e-mail and written correspondence of Nicholas (Nick) Artimovich II, a Highway Engineer with the Office of Safety Design at the Federal Highway Administration involving ET-Plus end terminals manufactured by Trinity Highway Products LLC or Trinity Industries between 1999 and the present.

All e-mail and written correspondence, including all drafts by all personnel at the Office of Safety Design at the Federal Highway Administration involving the ET-Plus end terminals manufactured by Trinity Highway Products LLC or Trinity Industries between 1999 and the present.



We specifically request any and all correspondence involving the performance of the ET-Plus, the ET-2000, the Euro-ET and the ET-2000 Plus by all FHWA officials. We also request all approvals of the ET-Plus and its variations by the FHWA.

We also request all testing documents, submittals, photographs and videos of the ET-Plus, ET-2000, ET-2000 Plus and the Euro-ET .

I would like to receive the information in the following format: electronic.

As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages.

Through this request, I am gathering information on the performance of the ET-Plus nationwide that is of current interest to the public because evidence has been building that the ET-Plus has been failing nationwide and around the world and causing injuries and fatalities

This information is being sought on behalf of FOX Television Stations, FOX5 WTTG for dissemination to the general public. .

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. .

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act.

I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request.

Please provide expedited processing of this request which concerns a matter of urgency.

As a journalist, I am primarily engaged in disseminating information.

The public has an urgent need for information about these guardrails as we have discovered many are failing around the country and causing severe injuries and deaths.

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

I look forward to your reply within 20 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Daniel Goldstein  
Investigative Producer  
FOX5 NEWS WTTG  
Washington D.C.  
202-895-3367 (office)  
202-297-5411 (cell)  
Email [daniel.goldstein@foxtv.com](mailto:daniel.goldstein@foxtv.com)



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

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

November 9, 2012

Refer To: HCC-40  
FOIA Control Number: 2013-0115

MR. DALE RUSSELL  
FOX 5/ATLANTA  
1551 BRIARCLIFF ROAD  
ATLANTA, GA 30306

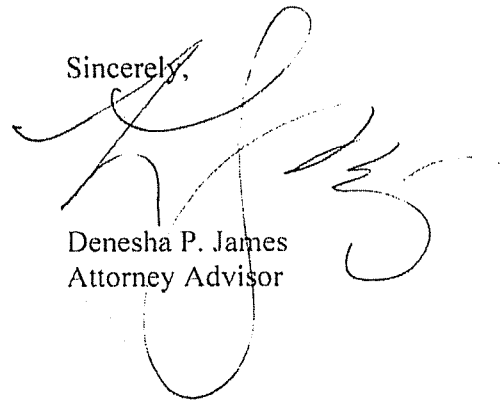
Dear Mr. Russell:

This letter is in reference to your Freedom of Information Act (FOIA) request dated January 4, 2013, in which you specifically requested information regarding the ET-2000, ET-Plus, and or ET-2000 Plus, produced by Trinity Industries. Your request was received in our office on January 4, 2013, and has been assigned FOIA Control Number 2013-0115.

After reviewing your request, we have determined that any responsive records, if they exist, would likely reside in the FHWA Office of Safety (HSA). Your request has been forwarded to this office for action, and you will receive a response from them directly. The point of contact in HSA is Ms. Monique Simmons, who may be reached at 202-493-0272.

If you have any questions with regard to this letter, please feel free to contact me at 202-366-0948.

Sincerely,



Denesha P. James  
Attorney Advisor

cc: HSA (Monique Simmons)

## **Pritchard, Edward A (FHWA)**

---

**From:** Dale Russell <Dale.Russell@FOXTV.COM>  
**Sent:** Friday, January 04, 2013 12:24 PM  
**To:** FOIA Officer (FHWA)  
**Cc:** Dale Russell; Mindy Larcom  
**Subject:** FOI Request

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of the following information regarding FHWA examination of ET- 2000, ET- Plus, and or ET-2000 Plus, produced by Trinity Industries.

We are looking for limited and specific information and email correspondence.

- 1) On January 25<sup>th</sup>, 2012, Nicholas Artimovich received an email from Brian Smith at 12:14 PM asking Mr. Artimovich to send photos of the ET Plus head. We would like to get copies of any response to this request, from Mr. Artimovich or other FHWA employees, including photos or drawings.
- 2) We would like to get copies of the photograph taken from the video of a 2005 crash test conducted by TTI and Trinity Industries on the ET-Plus guard rail system, that was provided by Trinity Industries to Mr. Artimovich in February or March of 2012- to prove that the feeder shoot or channel in question was four inches in width.
- 3) We would like to get copies of any and all email exchanges between Richard Powers and Trinity Industries regarding proposed changes to the terminal heads.
- 4) We would like to get copies of an in-house "test" conducted by Mr. Artimovich, as he described during sworn testimony on 7/26/2012 in a Trinity Industries lawsuit deposition. In, his testimony, Mr. Artimovich stated he took "screen shots" from two TTI crash test videos and compared them to determine the width of the feeder channel. Please include any accompanying mathematical computations or other supporting documents that were used during this in-house examination.

I would like to receive the information in the following format: electronic.

As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages.

Through this request, I am gathering information on the performance of the ET-Plus nationwide that is of current interest to the public because evidence has been building that the ET-Plus has been failing nationwide and around the world and causing injuries and fatalities

This information is being sought on behalf of FOX Television Stations, FOX5 Atlanta, for dissemination to the general public. .

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. .

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act.

I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request.

Please provide expedited processing of this request which concerns a matter of urgency.

As a journalist, I am primarily engaged in disseminating information.

The public has an urgent need for information about these guardrails as we have discovered many are failing around the country and causing severe injuries and deaths.

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

**Dale Russell**

Senior Investigative Reporter

Fox 5/Atlanta

1551 Briarcliff Road

Atlanta, Ga 30306

**Facebook: Dale Russell Fox 5**

**Twitter: DaleRussellFox5**