

TOYOTA

TOYOTA MOTOR NORTH AMERICA, INC.

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June 23, 2010

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National Highway Traffic Safety Administration
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OFFICE OF CHIEF COUNSEL
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NHTSA
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Re: Request for Confidential Treatment; PE10-008

On June 16, 2010, representatives of Toyota Motor Corporation and Toyota Motor North America, Inc. (collectively "Toyota") met with representatives of the Office of Defects Investigation (ODI) concerning the above referenced Preliminary Evaluation. Certain documents discussed at that meeting are being provided to the agency. Because some of the documents and information are confidential and proprietary, Toyota is submitting them to your office with a request for confidential treatment pursuant to Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), and NHTSA's regulations at 49 C.F.R. Part 512.

The information required by Part 512 is set forth below.

A. Description of the Information (49 C.F.R. § 512.8(a))

The information for which confidential treatment is being sought consists of information and documents prepared by Toyota that describe details of (1) design and engineering specifications, (2) internal product standards, and (3) information about the scope and kinds of testing that Toyota performs and about Toyota's proprietary test protocols.

B. Confidentiality Standard (49 C.F.R. § 512.8(b))

This submission is subject to the confidentiality standard set forth in 49 C.F.R. § 512.15(b) for information whose public disclosure would be likely to cause substantial harm to the competitive position of the submitter or to its suppliers.

C. Justification for Confidential Treatment (49 C.F.R. § 512.8(c))

The materials identified in this request are entitled to confidential treatment under the FOIA Exemption 4 and this agency's regulations at 49 C.F.R. § 512.15(b). Information submitted under legal compulsion is exempt from disclosure if its disclosure would be likely to result in substantial harm to the competitive position of the submitter. *See* 49 C.F.R. § 512.15(b); *see also*, e.g., *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). As the United States District Court for the District of Columbia stated, the "likelihood of substantial injury" can be established "by demonstrating that disclosure would provide competitors with valuable insights into the company's operations, give competitors pricing advantages over the

company, or unfairly advantage competitors in future business negotiations.” *People for the Ethical Treatment of Animals v. US. Dep’t of Agric.*, No. Civ-03 C 195-SBC, 2005 WL 1241141, at *7 (D.D.C. May 24, 2005).

Under FOIA Exemption 4, a submitter need not establish a certainty that competitive harm will result from a disclosure. Rather, a submitter need establish only that competitive harm is a *likely* result of a disclosure. *See, e.g., Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 29 (D.D.C. 2000).

FOIA Exemption 4 was enacted to prevent disclosures that would “eliminate much of the time and effort that would otherwise be required to bring to market a product competitive with the [submitter’s] product.” *Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999). “Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.” *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981). In addition, courts have recognized that Exemption 4 may be invoked to prevent the substantial competitive harm that can be expected from disclosures that would inform competitors about a firm’s “operational strengths and weaknesses.” *See Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976); *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, No. Civ-03 C 195-SBC, 2005 WL 1241141, at *7 (D.D.C. May 24, 2005).

The information for which Toyota is seeking confidential treatment clearly qualifies for withholding under this agency’s precedent and the case law interpreting Exemption 4

The disclosure of the design information in the submission would be likely to cause substantial harm to Toyota’s competitive position. This information was developed through Toyota’s investments of considerable money, time, expertise, and effort. Independent development or reproduction of the information similarly would require great expense, time, expertise, and effort. The disclosure of such information, therefore, would provide a huge windfall to Toyota’s competitors. Such windfalls are not an intended by-product of the FOIA, and Exemption 4 is properly invoked to prevent them. *Worthington Compressors*, 662 F.2d at 51.

The competitive harm to Toyota resulting from the disclosure of this information is clear. The disclosure of detailed drawings, descriptions, and specifications could enable competitors to replicate Toyota’s designs, evaluate the performance of a variety of possible design options, and avoid much of the trial-and-error that typically is required for independent design efforts. Similarly, design and development information could be provide insights into Toyota’s design philosophy and the specific design features of Toyota’s products as they have evolved over time. Such valuable information could enable competitors to compete far more effectively against Toyota and to evaluate their own materials and design options for similar components without incurring the costs associated with independent design evaluations.

In addition, the information provides a window into Toyota’s design validation and evaluation processes. Such process information—which also has been developed by Toyota over long periods of time at great expense—would be extremely valuable to competitors in benchmarking their own design processes and evaluating the operational capacities of Toyota, which, in turn,

could inform decisions about resource allocation and the development of design capacities necessary to compete more effectively against Toyota.

Thus, the disclosure of design information reasonably could be expected to enable competitors to bring competitive products to market faster and at less cost than they otherwise could. Such a disclosure also would reveal valuable information about Toyota's operational capacities—which is competitively valuable information that should be protected under Exemption 4. *Kleppe*, 547 F.2d at 684; *People for the Ethical Treatment of Animals*, No. Civ-03 C 195-SBC, 2005 WL 1241141, at *7.

Similarly, the disclosure of Toyota's testing practices and philosophies would be competitively harmful. Competitors could use such information to discern the scope of testing undertaken by Toyota in connection with product development, validation, and evaluation. In addition, the information reveals specific proprietary test procedures and methods used by Toyota in a variety of contexts. Because testing is essential to motor vehicle manufacturing, and because the development of testing expertise requires significant time and money, the disclosure of this information would provide a windfall to Toyota's competitors at Toyota's expense.

D. Class Determination (49 C.F.R. § 512.8(d))

The information for which confidential treatment is sought does not fit within a class determination.

E. Duration for Which Confidential Treatment is Sought (49 C.F.R. § 512.8(e))

Because the information for which confidential treatment is sought is the kind of information that Toyota and its suppliers do not ever customarily disclose to the public and that will continue to retain its competitive value indefinitely, Toyota requests that the information be accorded confidential treatment indefinitely.

F. Contact Information (49 C.F.R. § 512.8(f))

Chris Santucci
Manager, Technical and Regulatory Affairs
Toyota Motor North America, Inc.
601 13th Street, NW Suite 910 South
Washington, DC 20005
(202) 775-1707

As specified in Part 512, Toyota is providing two sets of the complete document, with the confidential material identified, and one set with the confidential material removed. Toyota has also enclosed certificates in support of confidentiality executed by a representative of Toyota.

If you receive a request for disclosure of the information for which confidential treatment is being sought before you have completed your review of our request, Toyota respectfully requests notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Sincerely,

A handwritten signature in black ink, appearing to read 'CS', with a long horizontal flourish extending to the right.

Chris Santucci
Manager, Technical and Regulatory Affairs
Toyota Motor North America, Inc.

CS:mh
Enclosures

Certificate in Support of Request for Confidentiality

I, Chris Santucci, pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

- (1) I am Manager, Technical and Regulatory Affairs, and I am authorized by Toyota Motor North America, Inc. ("Toyota") to execute documents on its behalf;
- (2) I certify that the information described in the attached document is confidential and proprietary data and is being submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. 552(b)(4);
- (3) I hereby request that the information contained in the pertinent documents be protected on a permanent basis;
- (4) This certification is based on the information provided by the responsible Toyota personnel who have authority in the normal course of business to release the information for which a claim of confidentiality has been made to ascertain whether such information has ever been released outside Toyota;
- (5) Based upon that information, to the best of my knowledge, information and belief, the information for which Toyota has claimed confidential treatment has never been released or become available outside Toyota, except for disclosures to suppliers and contractors who were provided the information with the understanding that such information must be maintained in strict confidence, and except for required disclosures that may have been made in connection with Congressional investigations, which were accompanied by requests for confidential treatment;
- (6) I make no representations beyond those contained in this certificate and, in particular, I make no representations as to whether this information may become available outside Toyota because of unauthorized or inadvertent disclosure (except as stated in paragraph 5); and
- (7) I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of June, 2010



Chris Santucci
Manager
Toyota Motor North America, Inc.