

AUG 25 2004

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Patrick M. Raher  
Hogan & Hartson, L.L.P.  
Columbia Square  
555 Thirteenth Street, NW  
Washington, DC 20004-1109

Re: Request for Confidential Treatment of Information (PE03-058).

Dear Mr. Raher:

This is in response to your letter, dated March 29, 2004, in which you request confidential treatment for information submitted on behalf of Mercedes-Benz USA, LLC (Mercedes-Benz) regarding the above matter. These materials are located in Mercedes-Benz's twenty-one (21)-page response to Jeffrey Quandt, Appendix C of the response, and in the files contained on a single CD-ROM. Your letter states that the materials contain information related to customer complaints, field reports, warranty data, and proprietary product design and materials specifications. Mercedes-Benz requests that this information be withheld indefinitely.

**Warranty Data, Field Reports, and Consumer Complaints**

Citing various portions of the Confidential Business Information (CBI) final rule's preamble that justified the withholding of early warning reporting (EWR) warranty data, 68 Fed. Reg. 44209 (July 28, 2003), Mercedes-Benz argues that its warranty data, field reports, and consumer complaint information, if disclosed, would be likely to cause substantial competitive harm. As to warranty data, Mercedes-Benz asserts that the data can provide competitors with information regarding the reliability of a component or system that may be unavailable to these competitors. Mercedes-Benz argues its field report information would be of substantial value to other manufacturers and that competitors could use the information to either improve their own products or to address similar issues without making the same investment of resources or obtaining any market experience. Similarly, Mercedes-Benz states that its consumer complaint information can be used to create cross-company comparisons, which would be based on raw and unverified data. Mercedes-Benz states that the possibility of harm as a result of disclosure is "particularly true in the context of a defect investigation where detailed data is [sic] focused on a

single specific component." The company states that these data can be misused competitively and may give rise to misleading comparisons that can cause substantial competitive harm "in either the early warning or defect investigation contexts." Mercedes-Benz adds that the disclosure of field report information during EWR reporting, which the agency has already stated would cause competitive harm, is less likely to cause harm than disclosures made during the investigation stage.

Pointing to the agency's reasoning in the CBI final rule's preamble, Mercedes-Benz also argues that disclosing its information would impair the government's ability to collect this information in the future. The company asserts that disclosure would likely encourage the restriction of warranty programs, discourage candor from field personnel during the preparation of field reports, and discourage manufacturer efforts to collect data or to invest the resources needed to expand consumer complaint information collection efforts.

#### Product Design and Materials Specifications

Mercedes-Benz asserts that its product design and materials specifications information contains proprietary data related to the components under investigation. Mercedes-Benz states that the disclosure of the bracketed information in its written response, which discusses the failure mode involved and relates to the specific component design features and material specifications, would reveal valuable information to competitors that would ordinarily require a significant investment in research and testing to obtain. The other portions of the submission are described by Mercedes-Benz as information on the engineering and product specification changes used by competing suppliers to address the failures that have occurred in the original supplier's parts. Mercedes-Benz argues that because this information represents a significant investment in research and development, disclosure of the information would cause substantial competitive harm to Mercedes-Benz and its suppliers.

I have decided to deny your request for confidential treatment in part and grant it in part.

#### NHTSA's Response

Because the information described above, was required to be submitted by a formal agency information request, I reviewed Mercedes-Benz's claim for confidential treatment under the test announced in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and its progeny. Under that test, information is confidential under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), if its disclosure is likely to cause substantial competitive harm to the submitter or to impair the government's ability to collect the information in the future.

In order for NHTSA to withhold the submitted information from disclosure under Exemption 4, Mercedes-Benz must show that the disclosure likely would cause substantial competitive harm or that disclosure is likely to impair the agency's ability to obtain similar data in the future. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The agency disagrees with Mercedes-Benz's characterizations that its warranty, field report, and consumer complaint data are analogous to EWR data. As indicated within the preambles to both the final rule and response to petitions for reconsideration, the agency explained that defect investigation information is both "qualitatively and quantitatively different" from EWR information. 68 Fed. Reg. at 44219. In particular, the agency emphasized in the rule that EWR information, which applies across a manufacturer's entire product line, would have competitive impact while the more proscribed data collected in defect investigations would not.

Further, the agency does not agree with Mercedes-Benz's argument that the disclosure of its information would impair governmental interests. Your assertion that Mercedes-Benz, which markets luxury automobiles to a very demanding clientele, would stop maintaining warranty records, complaint data, and field reports to keep them from NHTSA is not credible. I do not believe that the disclosure of the submitted information, which is limited in scope, would discourage or otherwise deter manufacturers from its efforts to continue to collect and keep these data.

I have determined that the disclosure of warranty, field report, and consumer complaint information would not be likely to cause substantial competitive harm or impair the agency's ability to collect this information in the future. Consequently, the agency will not grant confidential treatment under Exemption 4 for warranty data, field reports, or consumer complaints as follows:

- Bracketed information in the written response located on page 8 (under subsection E.2.), page 9 (under subsections E.3., and F.), and page 11 (all);
- Appendix C to the written response, except as noted below; and
- The CD-ROM files identified as "Customer complaints with VIN.xls" and "Warranty Data Harmonic Balancer.mdb," except as noted below.

The agency has also determined that certain information that Mercedes-Benz argues is related to product design and material specifications would not, if disclosed, cause substantial competitive harm. This information is contained within the text of Mercedes-Benz's written response. These items of information identify the manner of failure that is occurring in the subject components. Revealing this information would not disclose detailed technical or engineering specifications of the subject components and would be unlikely to cause substantial competitive harm to Mercedes-Benz. Accordingly, the agency will not withhold the following item:

- Bracketed information located on page 3 (first full paragraph).

However, the agency has determined that certain warranty data and product design and material specification information would be likely to cause substantial competitive harm because the information describes certain warranty assumptions, the production process of the subject

components, and design elements used in the subject components. As a result, the agency will withhold under Exemption 4 the following items of information, all of which are contained in the body of Mercedes-Benz's written response:

- All of the bracketed information located on pages 2, 14, and 15.

Additionally, personal information, such as names, phone numbers and addresses, appear throughout the two CD-ROM files identified above. This information, including the last six digits of the vehicle identification numbers that appear, will be withheld under Exemption 6 of the FOIA, which applies to information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. This information is located in the following locations:

- File "Customer complaints with VIN.xls" -- Data within the "Owner Name," "Owner Address," and "Phone" columns; and
- File "Warranty Data Harmonic Balancer.mdb" --
  - a) "Warranty\_Customer\_Join" Query: Data within the "First Name," "Last Name," "Address," and "Phone" the columns; and
  - b) "Warranty Data Final" Query: Data within the "First Name," "Last Name," "Address," and "Phone" columns.

The agency will also treat the vehicle identification number (VIN) information contained in the above files and in Appendix C (page 1 of the two (2)-page field report) in a manner consistent with the recent class determinations in 49 CFR Part 512, Appendix C. 69 Fed. Reg. 21409 (April 21, 2004). As this information was provided during the course of an agency investigation, NHTSA will also withhold the information under Exemption 7(C), which covers investigatory materials that, if disclosed, could reasonably be expected to constitute an unwarranted invasion of personal privacy. See *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

Notwithstanding this grant of confidential treatment, the information may be disclosed under the various provisions set forth in 49 U.S.C. § 30167 and 49 C.F.R. Part 512. You will be notified prior to any such release of information.

If you disagree with this determination, you may request reconsideration. To request reconsideration, you must comply with the requirements of 49 CFR § 512.19, which must be submitted within 20 working days after the receipt of this letter. The request for reconsideration should show the particular competitive harm to your company from the disclosure of the information for which confidentiality has been denied and contain any legal arguments and

citations upon which you rely (49 CFR § 512.8). If no written request is submitted pursuant to 49 CFR § 512.19 within the required period of time, your submitted information will be placed in the public file.

Sincerely,

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Otto G. Matheke, III  
Senior Attorney