

NUS-213
S. YOH

MAY 24 2006

Mr. Adam C. Sloane, Esq.
Mayer, Brown, Rowe & Maw, LLP
1909 K Street, NW
Washington, DC 20006-1101

Re: Confidentiality Determination/EA04-025

Dear Mr. Sloane:

This responds to your October 18, 2005 letter requesting confidential treatment for a CD-ROM containing an executable file (.exe) submitted by DaimlerChrysler Corporation (DCC) in connection with the above referenced Office of Defects Investigation (ODI), EA04-025. Your October 18, 2005 letter withdraws and amends a September 14, 2005¹ request for confidential treatment for the CD-ROM. You state that DCC provided the CD-ROM to the agency voluntarily and seeks confidential treatment for the CD-ROM and the information contained therein for an indefinite period of time.

You assert various theories for confidential treatment for the CD-ROM and the executable file. First, DCC contends that the CD-ROM and codes that are embedded in it, which are codes for the design and operation of the entire instrument cluster, including the alarm depicted in the CD-ROM, were voluntarily submitted. Second, you assert that the disclosure of the materials would cause DCC to suffer substantial competitive harm. You state that although the information for which DCC is seeking confidential treatment is not readily apparent upon opening of the file contained in the CD-ROM, a skilled computer professional could "back the codes out" of the CD-ROM. Third, DCC claims that the disclosure of the CD-ROM would impair the agency's ability to obtain similar information in the future. Consequently, you assert that this information is entitled to protection under Exemption 4 of the Freedom of Information Act.

¹ This request for confidential treatment of the September 14, 2005 CD-ROM is distinguishable from the May 16, 2005 request for confidential treatment for the submission of a March 17, 2005 CD-ROM in connection with EA04-025. In the case of the March 17, 2005 CD-ROM, DCC claimed that the CD-ROM contained a simulation of a proposed warning system that if disclosed would cause significant competitive harm to DCC. As DCC notes, the March 17, 2005 CD-ROM did not include embedded codes. On September 15, 2005, the agency denied DCC's May 16, 2005 request because the disclosure of the CD-ROM was unlikely to cause competitive harm. A petition for reconsideration filed by DCC on October 17, 2005 stated that the agency incorrectly applied the competitive harm standard and that DCC voluntarily submitted the March 17, 2005 CD-ROM. On April 10, 2006, the agency denied DCC's petition for reconsideration finding that the CD-ROM was not voluntarily submitted to the agency.

You also maintain that the code for the instrument cluster constitutes an electronic blueprint and such should be protected from disclosure under paragraph 1 of Appendix B to Part 512, General Class Determinations.

I have decided to grant your request.

Because the materials described above were voluntarily submitted to the agency, we reviewed your claim for confidential treatment under the test announced in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992), and its progeny. Under that test, financial or commercial information provided to the government on a voluntary basis is "confidential" for purposes of Exemption 4 of the Freedom of Information Act (FOIA) if it is the kind of information that would customarily not be released to the public by the submitter. Your letter indicates that the CD-ROM and the executable file contained on it are information that you would not customarily release to the public. Therefore, I am according confidential treatment to the information contained in your submission.

Because I have reached my decision based on the *Critical Mass* standard, there is no need to evaluate DCC's remaining bases for confidential treatment. Therefore, I have not evaluated whether the disclosure of these materials would meet the substantial competitive harm or impairment tests under *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) or whether the code for the instrument cluster is entitled to class treatment.

Subject to the conditions below, this grant of confidential treatment will remain in effect indefinitely.

This grant of confidential treatment is subject to certain conditions. The information may be disclosed under 49 CFR § 512.22 based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances that may affect the protection of the information (49 CFR § 512.10). If necessary, you will be notified prior to the release of any information under the procedures established by our regulations (49 CFR § 512.22(b)).

Sincerely,

151

Otto G. Matheke, III
Senior Attorney

NHTSA:NCC111:DiMarsico:cyt:65263:5
NCC-113:Subj/Chron NCC05-008393
Info: NVS-213: S.Yon(w/enclosures)
NVS-214: J. Quandt(without enclosures)
ned . . . \confidentiality\misc05\DCC05-8393ajd.doc