

FEB 2005

Closed

BY CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Granta Y. Nakayama
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005

Re: Confidentiality Determination/PE04-057

Dear Mr. Nakayama:

This is in response to your letter of November 15, 2004 in which you request confidential treatment for information provided on behalf of Polaris Industries, Inc. (Polaris) in response to an information request (IR) issued by the Office of Defects Investigation (ODI) of the National Highway Traffic Safety Administration (NHTSA) during Preliminary Evaluation (PE)04-057, which concerns alleged transmission lock-up problems in Victory Motorcycles. You describe this information as related to or consisting of field reports, warranty records, studies, surveys, investigations, and drawings. Polaris' submission consists of a cover letter to ODI (dated November 15, 2004) and a series of attachments (as described below). You requested that this information be withheld on an indefinite basis.

The attachments, as listed below, contain the following information:

- Attachments A and B: field report printouts;
- Attachments C and D: warranty claims
- Attachment F: studies, surveys, and investigations related to the alleged defect;
- Attachment G: spreadsheet containing a list of transmission components with related design change information;
- Attachment H: technical drawings and related engineering design change documentation;
- Attachment I: a CD-ROM with electronic copies (in Excel) of Attachments B, D, and G; and
- Attachment J: copies of a warranty claim and two field reports.

Polaris does not seek confidential treatment for Attachment E (problem codes), an electronic copy of which is also contained in Attachment I.

You assert that Polaris provided this information voluntarily to the agency and that it is not customarily disclosed to the general public. Further, you contend that the information is entitled to protection from disclosure as self-critical analysis and as confidential business or trade secret information. As a result, you urge the agency to withhold this information pursuant to Exemption 4 of the Freedom of Information Act (FOIA) and/or the Trade Secrets Act, 18 U.S.C. § 1905. You also assert that the submission contains information about private individuals that should not be disclosed to the public.

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

Voluntary Submission

To determine whether a response is voluntary, one must consider the authority under which the information was requested, if any, and the language of the request based on an objective standard. In this case, ODI's IR was issued under 49 U.S.C. § 30166, which authorizes NHTSA to require manufacturers to submit reports. Thus, Polaris's response was not voluntary if the documents were within the scope of the IR.

The IR poses a series of detailed questions to Polaris pertaining to the alleged defect. Among other things, Polaris was required to provide to ODI:

- The number of vehicles it sold for specified model years (Question 1);
- Complaints, field reports, crash and incident claims (Question 2);
Bulletins and other communications to dealers, listing of activities and testing, and the number of repairs/replacements Polaris paid (Question 3);
- Warranty claims data (Question 4);
- Analyses, studies, and investigations (Question 5);
- Significant modifications or changes related to transmission failures (unintended upshifting and/or lock-up) (Question 6); and
- Polaris's assessment of the alleged defect (Question 7).

ODI's IR instructed Polaris to provide documents that relate or may relate to the issues described above. The term "related" is broad and given its ordinary meaning. *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992). Polaris responded to the IR by providing information that fell within the ambit of each information request. Moreover, while Polaris makes a general assertion that its submission is voluntary, Polaris does not identify which documents it believes were submitted voluntarily and it neglects to explain why any portion of its submission should be viewed as voluntary.

Accordingly, the agency does not accept Polaris's arguments that NHTSA should grant confidential treatment to its submission on the grounds that Polaris submitted the documents voluntarily.

Substantial Competitive Harm, Self-Evaluative Assessment, Trade Secrets

Your submission has been reviewed under the competitive harm standard set forth 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 FOIA 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.

Attachment F consists of a number of studies, surveys, and investigation reports conducted by or on behalf of Polaris that examine durability and quality control issues. These documents, if disclosed, would reveal the manner in which Polaris conducts its internal durability testing and product assessments. The disclosure of this information would be likely to cause Polaris to suffer substantial competitive harm. Accordingly, I agree to withhold this information under Exemption 4 of the FOIA.

I also agree to withhold under Exemption 4 portions of Attachment G, which contains a detailed compilation of relevant transmission components along with part numbers, component names, vehicle model and model year information, descriptions of accompanying design and engineering changes, part compatibility information, the number of vehicles produced before and after a given change, and the reasons and chronology of events that led to the changes. Other than the model year, vehicle model name, part number, and component name, disclosure would reveal detailed non-public information regarding Polaris' design and production process and would be likely to cause the company to suffer substantial competitive harm.

Additionally, Attachment H contains a series of technical drawings and information that document in detail the design and engineering changes implemented by Polaris. I agree to withhold these documents under Exemption 4 because their disclosure would reveal technical specifications and detailed information regarding the design and engineering process employed by Polaris. The drawings are also viewed by the agency as presumptively confidential under 49 CFR Part 512, Appendix B. As such, the disclosure of the information in Attachment H would be likely to cause Polaris to suffer substantial competitive harm.

As to the remainder of Polaris' submission, Polaris broadly asserts that the disclosure of the information would cause substantial competitive harm, as it would reveal the company's practices in addressing consumer complaints, field reports, crash/incident claims, and warranty data. Polaris cites 49 CFR Part 512, Appendix C for support.

The provision you cite, 49 CFR Part 512, Appendix C, which deals with the treatment of information submitted pursuant to the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Early Warning Reporting (EWR) rule, establishes class determinations applicable only to the routine submissions of EWR data. The limited scope of Appendix C is delineated in both the regulatory text and in the preambles to the final rule and the agency's subsequent response to petitions for

reconsideration. See 49 CFR Part 512, Appendix C; 68 FR 44,209, 44,211 (July 28, 2003); and 69 FR 21,409, 21,410 (April 21, 2004).

Information submitted to respond to a formal defect investigation IR is not covered by Appendix C's class determinations and Polaris offers no other explanation as to why its submission satisfies Exemption 4. Accordingly, I am denying this claim.

Further, as to your assertion that the remaining information is a trade secret, the term "trade secret" under Exemption 4 of the FOIA is viewed narrowly as a "secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). See also *CAS v. NHTSA*, 244 F.3d 144, 150-51 (D.C. Cir. 2001) (same). Warranty and field report data do not meet this definition.

Regarding the portions of Attachment G not addressed above, you have not shown that the disclosure of the model year, vehicle model name, part number, and component name would be likely to cause Polaris to suffer substantial competitive harm, particularly when the remaining portions of the attachment are withheld. Accordingly, I am denying your claim as to these four information categories in Attachment G.

You also contend that certain unidentified information in the cover letter to ODI (dated November 15, 2004) falls within the self-evaluative privilege or otherwise qualify as trade secret information. Although a self-evaluative privilege may have limited application within the context of private litigation, it is well-settled that such a privilege has no application to documents sought by a government agency, such as is the case here. See *FTC v. TRW*, 628 F.2d 207, 210 (D.C. Cir. 1980). Consequently, I decline to accept this assertion.

Privacy Interests

Some of the documents in Polaris's submission (warranty records and field reports) contain personal information about individual complainants and vehicle owners reporting problems with their vehicles. Wherever it appears in the submission, this personally identifying information, such as name, address, telephone number and the last six digits of Vehicle Identification Numbers (VINs), will be afforded confidential treatment under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), on the grounds that disclosure of this information would constitute an unwarranted invasion of privacy.

However, there is no identifiable privacy interest in one's place of employment and Polaris has not adequately explained why such an interest should attach with respect to its employees. Accordingly, information related to the identity of Polaris employees will not be withheld under Exemption 6.

To sum, I agree to withhold Attachments F, H, and portions of G as identified above under Exemption 4 and consumer/vehicle owner personal identifier information

contained in the submitted warranty records and field reports under Exemption 6. The remainder of your request is denied.

Notwithstanding this partial grant of confidential treatment, the information may be disclosed under the various provisions set forth in 49 U.S.C. § 30167 and 49 CFR 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,

(s)

Otto G. Matheke, III
Senior Attorney

