

2006 MAY 12 P 2:44

2006 MAY 12 P 2:44

OFFICE OF CHIEF
COUNSEL

MAYER
BROWN
ROWE
& MAW

May 10, 2006

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

Erika Z. Jones
Direct Tel (202) 263-3232
Direct Fax (202) 263-5232
ejones@mayerbrownrowe.com

Mr. Stephen P. Wood
Acting Chief Counsel
National Highway Traffic Safety Administration
400 Seventh Street, S.W., Rm. 5219
Washington, D.C. 20590

Re: Request for Confidential Treatment of Analysis
Prepared After The April 25, 2006 Meeting

Dear Mr. Wood:

On April 25, 2006, representatives of Polaris Industries, Inc. ("Polaris") met with members of the NHTSA Office of Defects Investigation to discuss issues related to alleged problems with transmissions on MY 1999 and 2000 Polaris Victory motorcycles. In preparation for the meeting, and to assist NHTSA in understanding the technical issues under discussion, Polaris voluntarily commissioned the creation of two analyses of the potential effect of adverse tolerance stackups of the relevant transmission components. These analyses have previously been submitted to your office with a claim for confidential treatment. During the meeting, ODI staff informally asked Polaris to consider commissioning, and submitting to NHTSA, an additional analysis of the potential effect of adverse tolerance stackups of the relevant transmission components. Polaris voluntarily has commissioned the requested additional analysis, and has attached it to this letter.¹

Because the analysis is confidential within the meaning of Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), and Polaris wishes to protect it from public disclosure, Polaris is submitting the analysis through the Office of Chief Counsel, with this request for confidential treatment pursuant to NHTSA's regulations at 49 C.F.R. Part 512.

¹ This analysis is very similar to the analyses that the undersigned submitted to the Office of Chief Counsel on May 4, 2006, which were entitled "Polaris Model Year 1999/2000 Engine: CETOL 6σ Analysis Report and Report 1st Addendum." The analysis at issue in this request for confidential treatment is entitled "Polaris Model Year 1999/2000 Engine: CETOL 6σ Analysis Report - 2nd Addendum" and it models different assumptions than the previous analyses.

Mr. Stephen P. Wood
May 10, 2006
Page 2

This request sets forth the supporting information required under Part 512. The certificate required by the regulations is attached.²

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

The information for which Polaris is seeking confidential treatment consists of a highly confidential tolerances analysis entitled "Polaris Model Year 1999/2000 Engine: CETOL 60 Analysis Report – 2nd Addendum."

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

The confidentiality standard applicable to this request is the one set forth in 49 C.F.R. § 512.15(d) for information that a submitter provides to the agency voluntarily. Under this standard, information is exempt from disclosure if it is the kind of information that the submitter does not customarily disclose to the public.

As explained below, even if the analysis were subject to the standard set in 49 C.F.R. § 512.15(b) for information submitted under legal compulsion, it would be exempt from disclosure because its disclosure would be likely to cause substantial harm to Polaris' competitive position.

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

Under this agency's regulations and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), information that is submitted voluntarily should be withheld if it is the kind of information that the submitter does not customarily disclose to the public. *See Center for Auto Safety v. NHTSA*, 244 F.3d 144, 147 (D.C. Cir. 2001); 49 C.F.R. § 512.15(d).

The analysis is being submitted voluntarily pursuant to an informal, oral request by NHTSA personnel. The analysis is not the subject of any pending written information requests or other compulsory submission requirements. Rather, as noted above, it was voluntarily prepared by Polaris to assist the agency in understanding the technical issues related to a Polaris motorcycle transmission issue and is being submitted pursuant to a non-compulsory request.

In such circumstances, the submission of the analysis must be viewed as voluntary as a matter of law. Under the case law governing information submitted by private parties to Federal agencies, information is deemed to be voluntarily-submitted if the agency did not in fact invoke its authority to compel the submission of the information, even if – as here – the agency had such

² Because the consultant who prepared the analysis did so under an agreement that he and his firm would not publicly disclose it, we have not obtained a certificate in support of confidentiality from the consultant. If, however, the agency concludes that a third-party certificate is required, we will supply one on request.

Mr. Stephen P. Wood
May 10, 2006
Page 3

authority. See *Parker v. Bureau of Land Management*, 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001) ("In addition to possessing the authority to compel submission, the agency must also exercise that authority in order for a submission to be deemed mandatory."); U.S. Dept. of Justice, *Freedom of Information Act Guide, May 2004*, Exemption 4, text at footnote 95 ("Furthermore, the existence of agency authority to require submission of information does not automatically mean such a submission is 'required'; the agency authority must actually be exercised in order for a particular submission to be deemed 'required.'") (footnote omitted); <http://www.usdoj.gov/oip/exemption4.htm>; *id.*, text at footnote 232 (noting that "the D.C. Circuit has made it clear that an agency's unexercised authority, or mere 'power to compel' submission of information, does not preclude such information from being provided to the agency 'voluntarily'").

This is the type of information that Polaris never discloses to the general public. Polaris takes steps to guard against the external distribution of this kind of information, and does not routinely make it available even within the company, except to personnel who need it in the performance of their employment-related duties. Thus, this information should be withheld from disclosure under 49 C.F.R. § 512.15(d).

Even if, however, the analysis were deemed to have been submitted under legal compulsion, it would qualify for confidential treatment, because its disclosure would be likely to cause substantial competitive harm to Polaris. See, e.g., *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); 49 C.F.R. § 512.15(b). This information, which is tantamount to a virtual blueprint, would provide invaluable design information to Polaris' competitors if it were disclosed by NHTSA. The analysis includes detailed information about the design tolerances for all of Polaris' transmission components, including information about nominal design standards. This information would reveal to Polaris' competitors the tolerances Polaris accepts for each of its critical transmission components, which would reveal a crucial element of the cost of constructing a motorcycle transmission.

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). The information at issue here should be protected under these standards.

Thus, regardless of whether the information is viewed under the standard set forth in 49 C.F.R. § 512.15(b) or the standard set forth in 49 C.F.R. § 512.15(d), it should be withheld from disclosure.

Mr. Stephen P. Wood
May 10, 2006
Page 4

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

The analysis does not come within a class determination.

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

Because Polaris anticipates that it will never customarily disclose this type of information to the public and because the information will retain its competitive value indefinitely, Polaris requests that the analysis be accorded confidential treatment permanently.

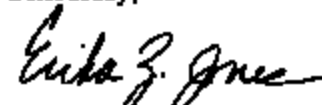
F. Contact Information (49 C.F.R. § 512.8(f))

Please direct all inquiries and responses to the undersigned at the address, telephone number, and email address shown on the first page of this letter.

* * *

As required by your regulations, we are providing two confidential copies of the documents. Because we are seeking the withholding of the analysis in its entirety, we are not enclosing a public version. The certification required by your regulations is attached to this letter. If you receive a request for disclosure of the information for which confidentiality is being sought before you have completed your review of our request, Polaris respectfully requests notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Sincerely,

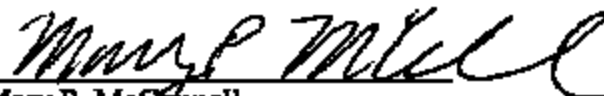

Erika Z. Jones

Certificate in Support of Request for Confidentiality

I, Mary P. McConnell, pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

- (1) I am Vice President and General Counsel of Polaris Industries Inc. ("Polaris") and I am authorized by Polaris to execute documents on its behalf;
- (2) I certify that the information described in the accompanying letter and attached hereto 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 indicated document be protected on a permanent basis;
- (4) This certification is based on the information provided by the responsible Polaris 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 Polaris;
- (5) Based upon that information, to the best of my knowledge, information and belief the information for which Polaris has claimed confidential treatment has never been released or become available outside Polaris, except to certain consulting firms and contractors under agreements to preserve the confidentiality of the information;
- (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 Polaris because of unauthorized or inadvertent disclosure, except as stated in paragraph 5; and
- (7) I certify under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2006.


Mary P. McConnell
Vice President and General Counsel
Polaris Industries Inc.