

DAIMLERCHRYSLER

September 12, 2005

Ms. Jacqueline Glassman, Esq.
Chief Counsel
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, DC 20590

DAIMLERCHRYSLER CORPORATION
SEP 13 P 4:30
Stephan J. Speth
Director
Vehicle Compliance & Safety Affairs

Re: Request for Confidential Treatment for Certain Documents Provided
In Response to EA05-009

Dear Ms. Glassman:

DaimlerChrysler Corporation has submitted information to the Office of Defects Investigation relating to EA05-009. In connection with that submission, DaimlerChrysler is submitting various documents referenced in Enclosures 8 and 9 of EA05-009 and provided in the enclosed CD-Rom to the Office of Chief Counsel and requesting that they be permanently protected from public release pursuant to 49 C.F.R. Part 512.

DaimlerChrysler has carefully reviewed its submission and has identified documents containing confidential information the disclosure of which would cause competitive harm. The justifications for confidential treatment are set forth below.

Evaluation and Remediation Protocols

The documents referenced in Enclosures 8 and 9 contain highly sensitive information relating to DaimlerChrysler's attempts to identify, evaluate, and remedy potential problems relating to headlamp operation. The information in the documents reveals DaimlerChrysler's processes for identifying and addressing power steering development issues. The disclosure of such information would permit DaimlerChrysler's competitors to duplicate DaimlerChrysler's design, research, and remediation protocols without incurring the substantial expense associated with the development of their own protocols. This information, therefore, is commercially valuable, and its release would cause DaimlerChrysler substantial competitive harm.¹

¹ See *Worthington Compressors, Inc. v. Costle*, 862 F.2d 45, 52 (D.C. Cir. 1981) (in determining whether information should be withheld pursuant to Exemption 4, consideration should be given to "whether release of the requested information, given its commercial value to competitors, and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it"); *Public Citizen Health Research Grp. v. FDA*, 997 F. Supp. 56, 63 (D.D.C. 1998) (finding competitive harm based on the fact that disclosure would allow competitors "to follow in [the submitters'] footsteps, and thereby get a competitive product to the market sooner than otherwise"), *aff'd in part & rev'd in part*, 186 F.3d 898 (D.C. Cir. 1999). "Valuable intellectual property," such as this information, is protected from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *Occidental Petroleum Corp. v. SEC*, 873 F.2d 326, 341 (D.C. Cir. 1989).

Test Results, Analyses and Protocols

In addition, the documents referenced in Enclosures 8 and 9 contain highly sensitive information about DaimlerChrysler's test results, analyses, and test protocols used in the development of a vehicle headlamp system. The release of these documents would give a competitor the fruits of DaimlerChrysler's tests, test protocols, and test developmental strategies without having to incur the substantial costs associated with the development of their own analyses, test results, and test protocols, thereby enabling them to bring competitive products to market sooner and to improve their own development procedures at DaimlerChrysler's expense. Disclosure of this information would "eliminate much of the time and effort that would otherwise be required to bring to market a product competitive with [DaimlerChrysler's products]. This is clearly the type of competitive harm envisioned in Exemption 4 ***." *Public Citizen Research Grp. v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999) ("Public Citizen II").

In addition, the test results, analyses, and protocols revealed in these documents should be protected as "trade secrets" within the meaning of FOIA. Under FOIA Exemption 4, a trade secret is 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 Health Research Grp. v. FDA*, 704 F.2d 1290, 1288 (D.C. Cir. 1983) ("Public Citizen I"). The testing information in the documents is entitled to trade secret status under Exemption 4. See *Center for Auto Safety v. NHTSA*, 93 F. Supp. 2d 1, 15 (D.D.C. 2000) (holding test results to be trade secrets).²

Design Information and Performance Factors and Standards

The documents referenced in Enclosures 8 and 9 also are exempt from disclosure under FOIA because they reveal competitively valuable design and performance factor information related to vehicle headlamp systems. A number of the documents set forth key design elements for the headlamp system, and others reveal the performance factors that DaimlerChrysler considers significant in developing and marketing products and in investigating and remedying potential problems. Like the other information in this submission, the design and standards information reflected in these documents is the product of DaimlerChrysler's years of experience in the industry and reflects substantial investments of time and money in its development. Thus, disclosure of the information would be a windfall to DaimlerChrysler's competitors, as well as to would-be suppliers, because it would enable them to incorporate design elements and to discover the performance standards that DaimlerChrysler deems significant without incurring the substantial time and expense

² Because trade secret status is an independent basis for protection from disclosure under Exemption 4, information that does not qualify for trade secret status may nonetheless be entitled to protection as "confidential commercial information." See *Public Citizen I*, 704 F.2d at 1290. Thus this information is protectable even if it does not qualify for trade secret status, because, as we have shown, it is entitled to protection as "confidential commercial information."

necessary to develop their own designs and standards. As a result, DaimlerChrysler would suffer substantial competitive harm.³

The design information also qualifies for trade secret status under Exemption 4 because it is "a secret, commercially valuable plan, formula, process or device that is used for the making *** of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen I*, 704 F.2d at 1288. The information comes within this definition because it "reveal[s] a manufacturer's design decisions and judgments about" power steering systems design and performance. *Center for Auto Safety*, 93 F. Supp. 2d at 15.

The certification required by NHTSA regulations is attached to this letter. If you need any clarifications or additional information, please contact me at (248) 512-4188. If you receive a request for disclosure of these documents before you have completed your review of our claim for confidential treatment, DaimlerChrysler respectfully requests notification of the request and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Sincerely,



Stephen J. Speth

cc: Kathleen DeMeter

Attachments and Enclosures

³ See, e.g., *Warthington Compressors*, 682 F.2d at 51 ("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.") (footnote omitted); *Public Citizen II*, 185 F.3d at 905.

Certificate In Support of Request for Confidentiality

I, Stephan J. Speth, pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

- (1) I am DaimlerChrysler Corporation's Director, Vehicle Certification, Compliance and Safety Affairs and I am authorized by DaimlerChrysler to execute documents on behalf of DaimlerChrysler.
- (2) The information contained in the indicated documents is confidential and proprietary data and is being submitted with the claim that is entitled to confidential treatment under 5 U.S.C. 552 (b) (4).
- (3) I have personally inquired of the responsible DaimlerChrysler 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 DaimlerChrysler, except as to DaimlerChrysler suppliers with the understanding that such information be kept confidential.
- (4) Based upon such inquiries, to the best of my knowledge, information and belief the information for which DaimlerChrysler has claimed confidential treatment has never been released or become available outside DaimlerChrysler, except as stated in Paragraph 3; and
- (5) 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 DaimlerChrysler because of unauthorized or inadvertent disclosure; and
- (6) I certify under penalty of perjury that the foregoing is true and correct.

Executed on this 12th day of September 2005.



Mr. Stephan J. Speth