

2009 NOV 24 P 3: 02 DET-09-108

November 24, 2009

Mr. O. Kevin Vincent
Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE, Room W41-227
Washington, DC 20590

CHIEF COUNSEL
COUNSEL

Re: Request for Confidential Treatment: Information Voluntarily Submitted

Dear Mr. Vincent:

Today, on behalf of Isuzu Motors Limited, personnel of and counsel for Isuzu Manufacturing Services of America, Inc. (collectively, "Isuzu") met with staff of the Office of Defects Information ("ODI") in order to present voluntary test information and related analyses pertaining to a matter under investigation in the NHTSA investigation docketed as PE09-030. Isuzu specifically requested the meeting with ODI in order to apprise ODI personnel of the results of voluntary tests and analyses performed by Isuzu at Isuzu's sole discretion to assist ODI in the matter under investigation.

In connection with the meeting, Isuzu—again, at its sole discretion—provided ODI personnel with a DVD that included a PowerPoint presentation and videos of the voluntary testing. Because this information is of a kind that Isuzu never discloses to the public, Isuzu is submitting it to your office with this request for confidential treatment under 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4).

A certificate in support of confidentiality has been executed on behalf of Isuzu and is attached.

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

The information for which Isuzu is seeking confidential treatment consists of a PowerPoint presentation relating to voluntary testing and analyses performed by Isuzu, as well as videos of, the voluntary testing. This information is an offshoot of analyses and tests set forth in Enclosure 14 of a submission that Isuzu made to NHTSA on September 22, 2009, for which Isuzu also has sought confidential treatment.

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

The information is subject to the confidentiality standard set forth in 49 C.F.R. § 512.15(d) for information submitted voluntarily to NHTSA.

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

The testing and analyses reflected in the submission was performed voluntarily on Isuzu's own initiative. The meeting at which the information was presented was voluntarily requested by Isuzu. Isuzu voluntarily submitted the information to ODI.

At no time did ODI purport to require the preparation of the testis and analyses. Nor did ODI demand (or even request) the meeting at which the information was presented. Moreover, ODI did not ever purport to exercise its authority to compel the submission of the information.

Under these circumstances, the submission is voluntary as a matter of law. As the courts have held, information is voluntarily submitted if the agency did not invoke its authority to compel the submission of the information, even if the agency had such 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 (2009 ed.), Exemption 4, http://www.usdoj.gov/oip/foia_guide09/exemption4.pdf, text at footnote 100 ("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); *id.*, text near footnote 229 (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'") (emphasis in original).

Under 49 C.F.R. § 512.15(d) and applicable case law, information that is submitted voluntarily should be accorded confidential treatment if it is the type of information that the submitter does not customarily disclose to the public. See 49 C.F.R. § 512.15(d); see also, e.g., *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 147 (D.C. Cir. 2001). Isuzu does not ever, much less customarily, disclose to the public the kinds of test information and analyses for which it is requesting confidential treatment.

Thus, the information for which Isuzu is seeking confidential should be withheld from disclosure.

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

None of the information is subject to a class determination.

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

Because Isuzu does not anticipate that it will ever voluntarily release information of the kind for which it is seeking confidential treatment, Isuzu requests that the information be accorded confidential treatment permanently.

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

Please direct all inquiries to the undersigned at the address and telephone number on the letterhead.

As noted above, a certificate in support of confidentiality is attached to this letter. We have marked the file names of the PowerPoint and the videos to indicate that they contain confidential material. It was not possible to mark the individual images of the videos

If you receive a request for disclosure of the information for which confidential treatment is sought before you have completed your review of this request, Isuzu respectfully requests notification of the request and an opportunity to provide further justification for confidential treatment, if warranted.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeffery A. Marsee', with a stylized flourish at the end.

Jeffery A. Marsee
Chief Representative
Emissions and Safety
Isuzu Manufacturing Services of America, Inc

Enclosures

Certificate in Support of Request for Confidentiality

I, Jeffrey A. Marsee, pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

- (1) I am Representative, Emissions & Safety, Isuzu Manufacturing Services America, Inc., and I am authorized by Isuzu Motors Limited (Japan) to execute documents on behalf of Isuzu Manufacturing Services America, Inc. and Isuzu Motors Limited (collectively, "Isuzu");
- (2) I certify that the information contained in the attached documents 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 attached documents be protected on a permanent basis;
- (4) This certification is based on the information provided by the responsible Isuzu 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 Isuzu;
- (5) Based upon that information, to the best of my knowledge, information and belief, the information for which Isuzu has claimed confidential treatment has never been released or become available outside Isuzu;
- (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 Isuzu because of unauthorized or inadvertent disclosure (except as stated in paragraph 5); and
- (7) I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 24th day of November, 2009



Jeffrey A. Marsee
Chief Representative
Emissions & Safety
Isuzu Manufacturing Services America, Inc.