



November 22, 2011

Kevin Vincent, Esq.
Office of Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

2011 NOV 28 A 10:30

OFFICE OF CHIEF
COUNSEL

Re: Request for Confidential Treatment of Information Submitted in EA11-005

Dear Mr. Vincent:

BMW is submitting the attached documentation to supplement our September 16, 2011 response to EA11-005. It is based upon a meeting between BMW and NHTSA on October 25, 2011. Because the attached documentation is considered by BMW to be confidential, we believe it is entitled to confidential treatment under 49 CFR Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 USC § 552(b)(4). Accordingly, BMW is hereby submitting this request for confidential treatment of that material.

As set forth in the attached certificate, the information for which we are requesting confidential treatment is maintained in strict confidence by BMW. This information is not customarily made public by BMW, and contains both trade secrets and commercial information, which is privileged or confidential under 5 USC § 552(b)(4), 49 CFR 512, and 49 USC 30167(a).

We are requesting confidential treatment of this information on a permanent basis, because there is no foreseeable time in the future when this information could be disclosed without causing substantial harm to the competitive position of BMW. Please note that each page of the document that is requested to be afforded confidentiality has been marked "Business Confidential" in accordance with 49 CFR 512.

BMW requests confidential treatment of this information because disclosure would cause substantial competitive harm and because the information includes trade secrets. BMW submits that the competitive harm would be substantial because the design and manufacture of vehicles and vehicle components are the core of its business and because global competition in this business is intense.

The information in the attached document consists of preliminary results from BMW's field study and assessment of tests and analyses of vehicle systems/components. This information includes preliminary data pertaining to vehicle system/component design and performance as a result of conducting such tests and analyses. This information would provide valuable insight into how BMW conducts certain tests. This information could be used by another vehicle manufacturer to compare, evaluate, or improve its products without having to expend its own resources or to compensate BMW for the knowledge it would gain.

This information also consists of specific details pertaining to component performance as a result of a design preceding, and subsequent to, a production change. This information could be used by BMW's competitors to assess the success of a production change without having to compensate BMW for such information.

Some of the information also consists of statistical forecasting and field data analyses of vehicle systems / components. This information would provide a competitor with valuable

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information pertaining to current and future performance of a vehicle component in the field. This information would allow a competitor to make informed product decisions without having to expend considerable resources to develop and implement their own product, assess field performance of that product over time, and make any necessary product change decisions

BASIS FOR REQUEST FOR CONFIDENTIAL TREATMENT

Exemption 4 of the FOIA protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The information for which BMW is requesting confidential treatment is "commercial" information that is "privileged or confidential." *See Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 28 (D.D.C., 2000) ("In the context of Exemption 4, the terms 'commercial' and 'financial' should be given their ordinary meanings. Further, the exemption applies where the submitter has a 'commercial interest' in the information.") (citations omitted).

The information for which BMW is requesting confidential treatment are the product of BMW's long experience and substantial investments of time and money in establishing this information. The disclosure of this information would permit BMW's competitors to understand certain issues involving specific vehicle systems/components without having to incur the substantial time and expense associated with these efforts that have already been expended by BMW. BMW's competitors could use this information to analyze, further develop, and improve their products without having to expend the substantial resources that have already been incurred by BMW.

This information, therefore, would be commercially valuable to BMW's competitors, and its disclosure would cause BMW substantial competitive harm. Consequently, this information should be accorded confidential treatment under the Exemption 4 of the FOIA. *See Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 (D.C. Cir. 1981) (application of Exemption 4 depends on "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"); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (information is exempted from disclosure under FOIA Exemption 4 if its disclosure would "cause substantial harm to the competitive position of the person" submitting it); *cf. Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999) (harm caused by a disclosure 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 is "clearly the type of competitive harm envisioned in Exemption 4").

The information for which we are requesting confidential treatment is maintained in strict confidence by BMW. This information is not customarily made public by BMW and contains both trade secrets and commercial information, which is privileged or confidential under 5 U.S.C. § 552(b)(4), 49 C.F.R 512, and 49 U.S.C. 30167(a).

BMW treats these materials as confidential proprietary information available only to authorized BMW personnel under strict confidentiality agreements, and is otherwise not available to the public. These documents are maintained under a record-keeping system which is intended to control dissemination of this material within BMW, and to assure that it is not openly available outside of BMW. Security systems are used to limit access to facilities which house this documentation, and employees are given instructions in how to

further limit access to this documentation, as well as, information dissemination and disclosure procedures.

Thus, because BMW would suffer substantial harm to its competitive position if any of the information was disclosed, the information should be accorded confidential treatment.

* * *

If NHTSA receives a request for disclosure of any of the information, BMW respectfully requests notification of the request and an opportunity to provide further justification for the confidential treatment of the information, if warranted.

As noted above, the certificate required by 49 CFR 512 is attached to this letter. If you need additional information, please do not hesitate to contact me at (201) 571-5360, or Martin Rapaport of my staff at (201) 571-5208.

Sincerely,



Jan Urbahn
General Manager
Safety Engineering and Intelligent Transportation Systems

Attachments:

BMW Document
49 CFR 512 Certificate



CERTIFICATE IN SUPPORT OF REQUEST FOR CONFIDENTIAL TREATMENT

I, Martin Rapaport, pursuant to the provisions of 49 CFR Part 512, state as follows:

(1) I am the Records and Safety Coordination Manager, Safety Engineering and Intelligent Transportation Systems for BMW of North America, LLC ("BMW"), and I am authorized by BMW to execute documents on its behalf.

(2) The information attached hereto and identified in the attached letter is confidential and proprietary and is being submitted with the claim that it is entitled to confidential treatment under 5 USC § 552(b)(4) and 49 CFR Part 512.

(3) I have personally inquired of the responsible BMW 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 BMW.

(4) Based upon such inquiries, to the best of my knowledge, information, and belief, the information for which BMW has claimed confidential treatment has not been released outside of BMW.

(5) I make no representation beyond those contained in this certificate, and, in particular, I make no representation as to whether the information may become available outside of BMW because of unauthorized or inadvertent disclosure.

(6) I certify under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of November, 2011.

A handwritten signature in black ink, appearing to read 'M. Rapaport', written over a horizontal line.

Martin Rapaport
Records and Safety Coordination Manager
Safety Engineering and Intelligent Transportation Systems
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Company

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