

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

JUN 17 2013

Don Swearingen
Vice President, Fixed Operations
Mitsubishi Motors North America, Inc.
P.O. Box 6400
Cypress, CA 90630-0064

Re: Request for Confidential Treatment in Response to EA 12-005

Dear Mr. Swearingen:

This responds to your February 28, 2013 request for confidential treatment for Mitsubishi Motors North America, Inc. (Mitsubishi) information submitted in response to an Office of Defects Investigation information request (IR) in EA12-005. Mitsubishi requests that documents marked confidential on the CD-ROM labeled "Mitsubishi Motors North America, Inc. EA12-005 Confidential Response to Request No. 2-6" attached to its response to the IR be granted confidential treatment. Mitsubishi requests that this information be kept confidential indefinitely.

Mitsubishi seeks confidential treatment for information it considers to be confidential business information and information that is not released to the public. This information is marked confidential in electronic submissions contained on CD-ROMs.

I note that your submission contains potentially identifying personal information for consumers. This potentially personally identifying information, name, address, telephone number and the last six digits of any vehicle identification numbers ("VIN") will be accorded confidential treatment pursuant to Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6).

I have reviewed your submission, including the materials that you claim are entitled to confidential treatment and the arguments that you assert in support of your claims. While I have not reached a conclusion regarding each individual argument that you assert, I conclude that, with the exception of the pages discussed below, the materials for which you requested confidentiality are entitled to confidential treatment pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4).

Your request includes several pages that contain information that is in the public domain. Information does not qualify for confidential treatment under Exemption 4 if identical information is in the public domain. *See Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999). Under the public domain doctrine

“materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.” *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999); *see also Marino v. Drug Enforcement Admin.*, 685 F.3d 1076, 1080 (D.C. Cir. 2012) *quoting Student Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001).

A number of pages included in your request for confidential treatment include traffic accident reports from the states of Nevada and Texas, including photographs from the accident scene. Under Nevada law, traffic accident reports, like those included in your request, are publicly available. *See Nev. Rev. Stat. § 239.010(1)* (“public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential”). Similarly, Texas law makes investigation reports publicly available. *See Tex. Gov’t Code Ann. § 552.001(a)*.

Because these traffic records are publicly available, they do not qualify for confidential treatment under Exemption 4 of the FOIA. Accordingly, your request for confidential treatment for pages 5 through 55, 247 through 268, 270, and 272 through 376 is denied. I note, however, that the personal identifying information contained in these records will be accorded confidential treatment under Exemption 6 of FOIA.

Your request for confidential treatment also includes photographs of production vehicles’ underbodies. Because this view can be easily replicated with identical production vehicles, information identical to that found in these underbody photographs is in the public domain. Accordingly, your request for confidential treatment of the photographs on pages 380, 382, 384, and 386 is denied.

Further, your request includes compliance-test data. The agency has long taken the position that, although testing is not required before certification, testing conducted for purposes of certification of compliance should not be withheld from public disclosure. While we recognize that such test results may have competitive consequence, the agency believes that the public’s interest in having access to a company’s basis for certification outweighs the manufacturer’s more limited interest in protecting competitively sensitive information that may be contained in the compliance testing. Further, we do not believe that disclosure will discourage such testing or discourage the development of other means of documenting compliance (such as computer modeling). Section 30115 requires a good faith basis and exercise of reasonable care in certification of compliance and, by documenting that basis, manufacturers generally are able to justify their certification should it be later questioned.

Section 30167(a)(4) of the Vehicle Safety Act provides the agency with the authority to disclose otherwise confidential information “when the Secretary of Transportation decides that disclosure is necessary to carry out section 30101.” Section 30101, in turn, sets forth the purpose of the Vehicle Safety Act, which “is to reduce traffic accidents and deaths and injuries resulting from traffic accidents,” including through the prescription of vehicle safety standards. Section 30115 requires certification to those safety standards and Section 30112 prohibits the sale of noncompliant vehicles.

NHTSA's investigations ensure compliance with those statutory provisions and with the federal motor vehicle safety standards. To the extent a company based that compliance on vehicle testing, the public has a strong interest in access to that information. We believe the public's access to information relating to the manufacturer's compliance with legal obligations to meet the federal motor vehicle safety standards, including its margin of compliance, outweighs the potential competitive harm flowing from the disclosure of such compliance information. We will not protect from disclosure test data that forms the basis for certification with federal motor vehicle safety standards. Accordingly, your request for confidential treatment for pages 400 through 482, 505 through 603, 605 through 647, 650 through 808, 811 through 969, 974 through 1026, 1028 through 1047, and 1057 through 1079 is denied.

This partial grant of confidential treatment is subject to certain conditions. The information may be disclosed under 49 CFR 512.22 based upon newly discovered or changed facts, and you must inform the agency of any changed circumstances that may affect the protection of the information. 49 CFR 512.10. Furthermore, this information may be disclosed if such disclosure would be in the public interest, pursuant to the procedures established in 49 CFR 512.23. If necessary, you will be notified prior to the release of any information under the procedures established by our regulations. 49 CFR 512.22(b).

If you disagree with the partial denial of your request noted above, you may request reconsideration. If you seek reconsideration, your request must be addressed to NHTSA's Chief Counsel and filed within 20 working days after the receipt of this letter. 49 CFR 512.19(a). Any such request should contain additional justification supporting your claims for confidential treatment consistent with 49 CFR Part 512 and applicable case law.

Sincerely,

Original Signed By

Otto G. Matheke, III
Senior Attorney

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DRAFT NE 6/11/13; rev w/OM changes by NE 6/11/13
NCC-111: subj, om, cyt **NCC13-001158**
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