

BMW Group

June 7, 2019

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

Re: Request for Confidential Treatment of Information Submitted in PE19-002

Dear Mr. Morrison:

BMW of North America, LLC, on behalf of BMW AG, Munich, Germany ("BMW") is submitting its response to the Information Request, dated April 2, 2019, in the above captioned matter. Because this information, contained on the attached CD No. 2, 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), 18 USC § 1905, 49 CFR 512, and 49 USC 30167(a).

We further request that CD No. 2 be accorded confidential treatment 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. The documentation on CD No. 2 has been marked in accordance with the November 19, 2007 amendments to 49 CFR 512. As required, we are also attaching CD No. 2a in which the confidential material has been redacted.

BMW requests confidential treatment of the information on CD No. 2 because disclosure would cause substantial competitive harm and 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 consists of results of tests and analyses of vehicle systems/components. This information includes details pertaining to vehicle system/component design and performance as a result of conducting such tests and analyses. Some of the information also consists of test and analyses methodologies that have been developed in order to understand issues regarding specific vehicle systems/components. These tests and analyses methodologies would provide valuable insight into how BMW conducts certain tests. Competitors who would have access to this information would be able to understand the design basis for certain components without having to make the necessary investments that have been made by BMW. Competitors would gain the free use of BMW's development work and put BMW at a competitive disadvantage.

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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), 18 USC § 1905, 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.

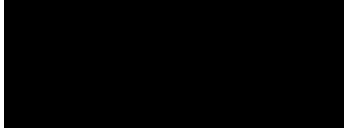
Thus, because BMW would suffer substantial harm to its competitive position if any of the information on CD No. 2 were disclosed, the information should be accorded confidential treatment.

* * *

If NHTSA receives a request for disclosure of any of the information on CD No. 2, 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,



Samuel Campbell, III
Department Head
Safety Engineering & Intelligent Transportation Systems

Attachments:

49 CFR 512 Certificate
CD No. 2 (Confidential Information) – 2 copies
CD No. 2a (Confidential Information Redacted)

Cc:

B. York – NHTSA – (ODI) – (letter only)

BMW Group

CERTIFICATE IN SUPPORT OF REQUEST FOR CONFIDENTIALITY

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

- (1) I am the Recall 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 this certificate on its behalf.
- (2) I certify that the information marked "Confidential Business Information" and attached to BMW's June 7, 2019 letter is confidential and proprietary and is being submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. §552 (b)(4) and Section 112(e) of the National Traffic and Motor Vehicle Safety Act of 1966 as amended and implemented in 49 CFR Part 512.
- (3) I hereby request that the information marked "Confidential Business Information" and attached to BMW's June 7, 2019 letter be protected for the time periods identified in the letter.
- (4) This certification is based on the information provided by the responsible BMW personnel who have authority in the normal course of business to release the information for which a claim on confidentiality has been made to ascertain whether such information has ever been released outside BMW.
- (5) Based upon that information, to the best of my knowledge, information and belief, the information for which BMW has claimed confidential treatment has never been released or become available outside BMW, except to select suppliers pursuant to confidentiality agreements.
- (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 BMW because of unauthorized or inadvertent disclosure.
- (7) I certify under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of June, 2019.



Martin Rapaport
Recall Records and Safety Coordination Manager
Safety Engineering and Intelligent Transportation Systems
BMW of North America, LLC