

NHTSA Complete Record Information



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Subject: RE: REQUEST FOR RECONSIDERATION OF JUNE 1, 2010 PARTIAL DENIAL OF TOYOTA'S
REQUEST FOR CONFIDENTIAL TREATMENT/TQ10-001

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Sign Office: **Signature:** **Cleared For:**
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Incoming info. rec'vd: a ltr. addressed to "Mr. O. Kevin Vincent" and a box with enclosures. All were given to Lloyd Guerci on 7/19/2010.

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Description	Added By	Date & Time
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July 19, 2010

BY HAND DELIVERY

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

Re: Request for Reconsideration of June 1, 2010
Partial Denial of Toyota's Request for
Confidential Treatment/TQ10-001

Dear Mr. Vincent:

Pursuant to 49 C.F.R. § 512.19, Toyota Motor North America, on behalf of Toyota Motor Corporation and its subsidiaries and affiliates (collectively, "Toyota"), hereby seeks reconsideration of portions of a partial denial of confidential treatment in the above-referenced matter. The partial denial of confidential treatment was conveyed in a June 1, 2010 letter to the undersigned from Otto G. Matheke, III. Mr. Matheke's letter was received on or around June 2, 2010 and addressed a confidential treatment request, dated April 9, 2010, for portions of a submission made by Toyota on April 2, 2010. Through Mr. Matheke, NHTSA granted Toyota additional time, up to and including today, to submit a request for reconsideration of the June 1st determination.

Toyota has carefully reviewed the confidentiality determination and is seeking reconsideration for documents that fall into three categories.

First, Toyota is seeking reconsideration of the denial of confidential treatment for portions of documents that disclose certain Toyota analyses and summaries of regulatory and legal developments, research and trade association activities, and internal activities and organizational information. The information for which Toyota is seeking reconsideration is outside the scope of the Information Request in the above-referenced investigation (as well as outside the scope of the Information Requests in the TQ10-002 and RQ10-003 investigations). The great majority of the information for which Toyota is seeking reconsideration falls into this category.

Second, Toyota is seeking reconsideration of the denial of confidential treatment for a modest number of Japanese-language documents that, in subject matter, overlap with the first category described above and for which NHTSA could not readily identify translations. There were English-language versions of all but three of these Japanese-language documents in the April 2, 2010 TQ10-001 submission, and, as explained in further detail below, Toyota is supplying information that will allow NHTSA to marry up these Japanese-language documents to their

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English counterparts. With regard to the three Japanese-language documents for which Toyota is seeking reconsideration and for which English versions were not supplied in the April 2nd submission, Toyota is supplying the translations with this request for reconsideration.

The third category of documents consists of three Japanese-language documents for which NHTSA also could not identify English translations. The English-language versions of these documents were submitted by Toyota and have been granted confidential treatment by NHTSA. In this request for reconsideration, Toyota is supplying the counterpart English documents.

We are supplying a table in Attachment A that lists the documents for which NHTSA denied confidential treatment in the June 1st determination. For each such document, we indicate whether or not Toyota is seeking reconsideration. In addition, the table supplies additional information about some of the documents, such as Bates number information and information about English-language translations.

DISCUSSION

The standards applicable to the withholding of information under 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), are well established.

Information submitted *voluntarily* to the agency is entitled to confidential treatment if it is the kind of information that the submitter does not customarily disclose to the public. *See, e.g., Center for Auto Safety v. NHTSA*, 244 F.3d 144, 147 (D.C. Cir. 2001); 49 C.F.R. § 512.15(d). When an agency has not actually exercised its authority to compel the submission of information, the submission of that information must be deemed "voluntary" as a matter of law. *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 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)). Here, the information falling into the first two categories described above was voluntarily-submitted as a matter of law.

With regard to information submitted under compulsion, Part 512 and FOIA Exemption 4 mandate withholding if the disclosure of the information would be likely to cause substantial competitive harm to the submitter. *See* 49 C.F.R. § 512.15(b); *see also, e.g., Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under FOIA Exemption 4, a submitter need not establish a certainty that competitive harm will result from a disclosure. Rather, a submitter need establish only that competitive harm is a *likely* result of a disclosure. *See, e.g., Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 29 (D.D.C. 2000). With regard to such information, FOIA Exemption 4 was enacted to prevent disclosures 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.” *Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999). “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.” *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

We now turn to the three categories of information for which reconsideration is being sought.

A. Toyota Summaries, Reports, And Presentations.

NHTSA denied confidential treatment for a large number of documents—such as reports, emails, and presentations—setting forth Toyota analyses, descriptions, and summaries of ongoing regulatory, legal, and political developments; media and public relations issues; trade association initiatives; research initiatives; internal organizational issues and facts; and developments and activities relating to recalls, investigations, meetings with NHTSA and other authorities, and similar regulatory and safety-related matters. It is Toyota’s understanding that NHTSA denied confidential treatment for such information on a document-by-document basis.

Most of the information in these documents is far outside the scope of the TQ10-001 investigation (and also is outside the scope of the TQ10-002 and RQ10-003 investigations). Toyota is seeking reconsideration of the denial of confidential treatment for such non-responsive information in these documents (which are included in Attachment B).

Because the TQ10-001 Information Request did not require the submission of such non-responsive information, Toyota’s submission of the information was voluntary as a matter of law. That NHTSA *could* have compelled the submission of the information is not material to this issue. As the Department of Justice has explained, “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.’” 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.

The Justice Department’s conclusion in this regard accords with judicial holdings on FOIA Exemption 4. Thus, in *Center for Auto Safety*, no one questioned that NHTSA *could* have compelled the submission of the information at issue had it sought and obtained the necessary prior OMB approval. NHTSA did not do so, however, and, as a result, if the submitters had not provided the information, they could not have been compelled to do so under the Information Request at issue in *Center for Auto Safety*. See *Center for Auto Safety*, 244 F.3d at 148-49. So here, if Toyota had not submitted the non-responsive information, NHTSA would not have been

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in a position to compel the submission *under the Information Request that it actually issued*, because that request did not call for the submission of the information.

Similarly, in *Cortez III v. NASA*, 921 F. Supp. 8 (D.D.C. 1996), the district court found a submission of rate ceiling information to NASA to be voluntary because NASA did not, in fact, require the submitter to provide such information when it required the submission of other data. *See id.* at 12-13. Again, the fact that NASA *could* have required the submission of rate ceiling information was irrelevant, because it did not do so.

Thus, Toyota's submission of non-responsive information here was voluntary as a matter of law because NHTSA did not exercise its authority to compel the information. Consequently, this non-responsive information must be evaluated under the *Critical Mass/Center for Auto Safety* voluntariness standard. As noted above, that standard mandates withholding if the information is of a kind that the submitter does not customarily disclose to the public.¹

Under the voluntary submission standard, the non-responsive information in the submission clearly merits confidential treatment. Toyota does not customarily disclose to the public the kinds of analyses, summaries, and descriptions contained in the documents. These documents reveal how Toyota manages and disseminates information internally; how it analyzes the legal, political, and regulatory environments in which it acts; some of the research initiatives in which Toyota is involved; how it manages a variety of safety and regulatory activities; how it organizes its safety and regulatory resources; and how it structures and analyzes interactions with regulators, lawmakers, and trade groups. Toyota regards such information as highly confidential and does not customarily disclose it to the public.²

Because the information that is beyond the scope of the Information Request was voluntarily submitted and is of a kind that Toyota does not customarily disclose to the public, Toyota is requesting that NHTSA reconsider its denial of confidential treatment for such information in the documents assembled in Attachment B to this request. In Attachment B, the information for which Toyota is seeking reconsideration is identified as follows:

¹ That Toyota did not assert that the information was voluntarily submitted at the time of submission does not weigh against evaluating the information under the voluntariness standard now. In *Center for Auto Safety*, the D.C. Circuit specifically rejected an argument that the failure of some submitters to assert that a submission was voluntary should preclude the application of the voluntary submission standard. The Court held that the subjective intent and understandings of the submitter are irrelevant to whether the voluntariness test applies. Rather, the submission must be evaluated under an objective standard to determine whether or not it was made under compulsion. *See Center for Auto Safety*, 244 F.3d at 149-150.

² For these reasons, Toyota also regards the disclosure of such information as likely to cause substantial competitive harm.

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- Some of the pages in Attachment B consist solely of information that is not responsive to the Information Request in TQ10-001 and, hence, was voluntarily submitted. Such pages have been labeled “Entire Page Confidential Business Information” at or near the top of each such page.
- Some of the pages in Attachment B consist both of non-responsive and responsive information. Toyota is seeking reconsideration only for the voluntarily-submitted (non-responsive) information on such pages and has put brackets around the non-responsive information and marked such pages with a label (at or near the top of the page) that says “Confidential Business Information.”
- Finally, a few pages of the documents in Attachment B consist entirely of responsive information or of information which is not customarily withheld from the public. Toyota is not seeking reconsideration for those specific pages, and, hence, those pages are not labeled confidential and do not have brackets or other markings.

* * *

For the foregoing reasons, Toyota requests that the denial of confidential treatment for the indicated documents in Attachment B be reconsidered.

B. Japanese-Language Summaries And Reports.

NHTSA also denied confidential treatment for certain *Japanese-language* versions of documents of the same type that is discussed in Section A, above. In some cases, NHTSA denied confidential treatment for such documents solely because NHTSA could not identify their English-language counterparts. In a few cases, NHTSA denied confidential treatment for a Japanese-language document of this type both because NHTSA could not identify the English-language counterpart and because NHTSA concluded that the disclosure of the document would not cause substantial competitive harm.

Toyota requests reconsideration of the denial of confidential treatment for the Japanese-language documents assembled in Attachment C. In all but three cases, the English-language counterparts of those Japanese documents were included in the April 2nd TQ10-001 submission. The Bates numbers of those English-counterparts are indicated on a separate sheet that precedes each Japanese-language document. (All of the English-language counterparts referred to in such sheets can be found in Attachment B.)³

³ The table in Attachment A also includes information linking Japanese-language documents to their English counterparts. Toyota recognizes that the location of an English-language counterpart for Japanese-language documents was not always self-evident and regrets the

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As noted, Toyota did not submit English-language versions of three of the Japanese-language documents in Attachment C. We are supplying those translations in Attachment C. Each of the translations being submitted in Attachment C follows its Japanese-language counterpart, and a sheet indicating the presence of the translation precedes each of the three Japanese-language documents.

For the reasons set forth above in Section A, the non-responsive information in the Japanese-language documents in Attachment C should be evaluated in accordance with the voluntary submission standard.⁴

C. Three Japanese-Language Documents Subject To The Competitive-Harm Standard.

NHTSA also denied confidential treatment for three other Japanese-language documents on the ground that NHTSA could not identify translations of those documents. Toyota has identified the English-language counterparts of these documents and is providing the Bates numbers of the English-language documents in the accompanying table. These documents were responsive to the Information Request in TQ10-001 and should be withheld under the competitive-harm standard.

Two of the Japanese-language documents are identified in the June 1st confidentiality determination as Attachment30-101_M-028_j.pdf and Attachment30-102_M-045_j.pdf. (The Bates numbers of these documents are TOY-TQ001-90000708 and TOY-TQ001-90000710, respectively). The English-language counterparts of these two documents, TOY-TQ001-90000708T and TOY-TQ001-90000710T, were submitted on April 2, 2010 and were accorded confidential treatment. (Toyota bases this conclusion on the fact that they are not identified in the lists of documents that were denied confidential treatment in the June 1st letter.) In both cases, Toyota sought (and was granted) confidential treatment of the first and fourth pages of the English-language documents. Thus, the corresponding information in the Japanese-language documents, as shown in the marked versions in Attachment D, should be accorded confidential treatment. For the convenience of the agency, we also are providing the English-language counterparts of these two documents in Attachment D.

NHTSA also denied confidential treatment for a Japanese-language document bearing the Bates number TOY-TQ001-90000204. An English-language version of that document—TOY-TQ001-90000039—was submitted by Toyota on March 19, 2010. NHTSA has issued its confidentiality

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omission of detailed information that would have facilitated the process of marrying up Japanese-language documents to their English-language counterparts.

⁴ The documents in Attachment C have been marked in accordance with the convention set forth in Section A, above.

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determination for the March 19th submission and granted confidential treatment for that document in its entirety. Thus, TOY-TQ001-90000204, which we are including in Attachment D, also should be granted confidential treatment in its entirety. (For the convenience of the agency, we are providing the English-language counterpart—TOY-TQ0-001-9000039—in Attachment D, as well.)

* * *


For the foregoing reasons, Toyota respectfully requests reconsideration of the denial of confidential treatment for the Japanese-language documents in Attachment D.

* * *

If this request for reconsideration is granted in whole or in part, Toyota will expeditiously provide redactions of the pertinent documents for the public file.

If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,



Adam C. Sloane

Enclosures