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November 5, 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 August 26, 2010
Partial Denial of Toyota's Request for
Confidential Treatment/TQ 10-001

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 an August 26, 2010 letter to the undersigned from Otto G. Matheke, III. Mr. Matheke's letter was received on September 1, 2010, and addressed a confidential treatment request for portions of a submission made by Toyota on April 9, 2010. Through Mr. Matheke, NHTSA granted Toyota additional time, up to November 5, 2010, to submit a request for reconsideration of the August 26th determination. Toyota is seeking reconsideration for three categories of documents.

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).

Second, Toyota is seeking confidential treatment for a small number of documents that contain information on Toyota staffing of various matters, including information identifying specific individuals.

Third, Toyota is seeking reconsideration for a number of documents that were denied confidential treatment on the basis of the third-party certification requirement set forth at 49 C.F.R. § 512.9.

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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 than 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). In determining whether substantial competitive harm may result from a disclosure, courts have considered whether disclosures 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). In addition, courts have recognized that Exemption 4 may be invoked to prevent the substantial competitive harm that can be expected from disclosures that would inform competitors about a firm’s “operational strengths and weaknesses.” *See Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976); *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, No. Civ-03 C 195-SBC, 2005 WL 1241141, at *7 (D.D.C. May 24, 2005).

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

A. Toyota Summaries, Reports, And Presentations.

NHTSA denied confidential treatment for a 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.

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. The pertinent documents are included in Attachment A.

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 immaterial. 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 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 air bag information at issue in the case had it sought and obtained 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 to which the submitters responded. *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 able 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.

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*

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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.

Because Toyota voluntarily submitted the information that is beyond the scope of the Information Request, and because Toyota does not customarily disclose similar information to the public, Toyota requests reconsideration of the denial of confidential treatment for non-responsive information in the documents assembled in Attachment A to this request. In Attachment A, the information for which Toyota is seeking reconsideration is identified as follows:

- Some of the pages in Attachment A 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 A consist both of non-responsive and responsive information. Toyota is seeking reconsideration only for the voluntarily-submitted (non-responsive) information 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.”
- A few pages contain no confidential material. These pages have no markings or confidential labels.

¹ It is irrelevant that Toyota did not assert that the submission of the information was voluntary when Toyota provided it to the agency. 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.

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B. Staffing Information.

Toyota also is seeking reconsideration of NHTSA's denial of confidential treatment for the following documents:

- TOY-TQ001-00054684.pdf ("Pedal & Reinforcement Bar Crisis Team");
- TOY-TQ001-00055565.pdf ("Service Parts Field Repair"—Recurring Meeting Attendees);
- TOY-TQ001-00055633.pdf ("Pedal & Reinforcement Bar Crisis Team");
- TOY-TQ001-00056168.pdf ("Pedal & Reinforcement Bar Crisis Team");
- TOY-TQ001-00056205.pdf ("Service Parts Field Repair Team");
- TOY-TQ001-00056206.pdf ("Service Parts Field Repair Team");
- TOY-TQ001-00056239.pdf ("Service Parts Field Repair"—Recurring Meeting Attendees);
- TOY-TQ001-00056308.pdf ("Pedal & Reinforcement Bar Crisis Team");
- TOY-TQ001-00057060.pdf ("Service Parts Field Repair"—Recurring Meeting Attendees); and
- TOY-TQ001-00057129.pdf ("Pedal & Reinforcement Bar Crisis Team").

These documents should be protected from disclosure because they reveal the identities of specific staff members deployed to work on various projects and how Toyota staffs critical functions. The disclosure of the information could be used by competitors to benchmark their own responses to critical issues, to assess Toyota's operational capabilities, and to target specific Toyota employees for recruitment efforts. Accordingly, the disclosure of the information would be likely to cause Toyota substantial harm to its competitive position.

For these reasons, Toyota requests that NHTSA reconsider its denial of confidential treatment for the documents identified above and grant confidential treatment for those documents.

D. Third-Party Certificate Documents.

NHTSA also denied confidential treatment for certain documents under the third-party certificate requirement set forth in 49 C.F.R. § 512.9. Toyota requests reconsideration of that determination as set forth below.

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1. TOY-TQ001-00058372.pdf

First, NHTSA denied confidential treatment for the entirety of a document bearing the file name TOY-TQ001-00058372.pdf. Many of the pages in this file, however, were Toyota documents, and there is no evidence that these pages were shared with third parties.

In addition, a significant number of the pages in this document were shared with, or obtained from, Thermoflex Corp. Although on page 2 of Mr. Matheke's August 26 letter, Thermoflex appears on a list of entities for which Toyota did not provide certificates in support of confidential treatment, Toyota *did* provide a certificate in support of confidential treatment from Thermoflex. That certificate was transmitted to NHTSA by the undersigned on April 22, 2010.

It also appears that NHTSA denied confidential treatment for many of the pages in this document because NHTSA believed that the data on these pages was obtained from, or shared with, Stephen Computer Services, Inc. (This company also appears in the August 26 Matheke letter's list of entities from which Toyota did not obtain certificates.) Specifically, it appears that NHTSA denied confidential treatment for numerous "Process Control" and "Capability Study" sheets because Stephen Computer Services' name appears on these sheets. Stephen Computer Services, however, merely provided the blank template upon which Toyota recorded the data on the "Process Control" and "Capability Study" sheets. The confidential information on these sheets was not shared with Stephen Computer Services.

NHTSA also denied confidential treatment for pages provided by, or shared with, Bodycote PLC. Toyota has obtained a certificate in support of confidential treatment executed by Exova Test Labs, the successor-in-interest to Bodycote. That certificate is attached. *See Attachment B.*

Based on the information provided above and the certificates attached to this request, Toyota requests that NHTSA reconsider its denial of confidential treatment for TOY-TQ001-00058372.pdf. This request relates to *all* of the pages of TOY-TQ001-00058372.pdf *except* for certain pages for which certificates have not been submitted or that do not contain confidential business information. The pages in TOY-TQ001-00058372.pdf for which Toyota is *not* seeking reconsideration end in the following Bates numbers (all such pages are preceded by the Bates prefixes TOY-TQ001-000): 58372-58374, 58448, 58449-58453, and 58462-58471. With regard to these specified pages—and only these pages—of TOY-TQ001-00058372.pdf, Toyota is not seeking reconsideration of NHTSA's denial of confidential treatment.

2. TOY-TQ001-00058472.pdf

NHTSA also denied confidential treatment for the entirety of the file bearing the file name TOY-TQ001-00058472.pdf on the ground that Toyota did not fully comply with 49 U.S.C. § 512.9. As is the case with TOY-TQ001-00058372.pdf, many of the pages in this file were Toyota documents that were not shared with other entities.

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There were, however, pages from, or that may have been shared with, The Stewart Company and Pretty Products, LLC. Toyota has obtained certificates in support of confidential treatment from these two entities, which are attached to this request. *See* Attachment B.

Accordingly, Toyota requests that NHTSA reconsider its denial of confidential treatment for TOY-TQ001-00058472.pdf. This request relates to *all* of the pages of TOY-TQ001-00058472.pdf *except* for certain pages that do not contain confidential business information. The pages in TOY-TQ001-00058472.pdf for which Toyota is *not* seeking reconsideration end in the following Bates numbers (all such pages are preceded by the Bates prefixes TOY-TQ001-000): 58472-58473, 58478-58479, 58594-58599, and 58645. With regard to these specified pages—and only these pages—of TOY-TQ001-00058472.pdf, Toyota is not seeking reconsideration of NHTSA's denial of confidential treatment.

3. TOY-TQ001-00058657.pdf

NHTSA also denied confidential treatment for the entirety of the file bearing the file name TOY-TQ001-00058657.pdf on the ground that Toyota did not fully comply with 49 U.S.C. § 512.9. As is the case with TOY-TQ001-0058372.pdf and TOY-TQ001-0058472.pdf, many of the pages in this file were Toyota documents that were not shared with other entities.

There were, however, pages from, or that may have been shared with, LaGrange Molded Products, Inc., The Stewart Company, Pretty Products, LLC, and Nelson Laboratories. As noted above with regard to The Stewart Company and Pretty Products, Toyota has now obtained certificates in support of confidentiality from these companies. As the successor-in-interest to LaGrange Molded Products, Pretty Products' certificate expressly covers the LaGrange Molded Products pages, as well. Toyota also has obtained a certificate executed on behalf of Nelson Laboratories, which is attached. *See* Attachment B.

Accordingly, Toyota requests that NHTSA reconsider its denial of confidential treatment for TOY-TQ001-00058657.pdf. This request relates to *all* of the pages of TOY-TQ001-00058657.pdf *except* for certain pages that do not contain confidential business information. The pages in TOY-TQ001-00058657.pdf for which Toyota is *not* seeking reconsideration end in the following Bates numbers (all such pages are preceded by the Bates prefixes TOY-TQ001-000): 58657-58658, 58668-58670, 58674, 58691, 58864-58874, and 58890-58896. With regard to these specified pages—and only these pages—of TOY-TQ001-00058657.pdf, Toyota is not seeking reconsideration of NHTSA's denial of confidential treatment.

4. TOY-TQ001-00059066.pdf

Finally, NHTSA denied confidential treatment for the entirety of the file bearing the file name TOY-TQ001-00059066.pdf on the ground that Toyota did not fully comply with 49 U.S.C. § 512.9.

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The pages in this document came from, or were shared with, Thermoflex and BT Western Corp. As noted above, Toyota previously provided a certificate in support of confidential treatment from Thermoflex. In addition, Toyota has obtained a certificate in support of confidential treatment from BT Western Corp., which is attached. *See Attachment B.*

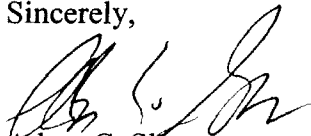
Accordingly, Toyota requests that NHTSA reconsider its denial of confidential treatment for TOY-TQ001-00059066.pdf. This request relates to *all* of the pages of TOY-TQ001-00059066.pdf *except* for certain pages that do not contain confidential business information. The pages in TOY-TQ001-00059066.pdf for which Toyota is *not* seeking reconsideration end in the following Bates numbers (all such pages are preceded by the Bates prefixes TOY-TQ001-000): 59066-59081, 59085-59086, 59090-59093, 59098-59101, 59108, 59110, 59112-59115, 59123, 59131-59132, 59138-59139, 59142, 59148-59150, 59154, and 59160.

* * *

For the convenience of the agency, we are including a disk with an index of the documents (or, in some cases, pages) that were denied confidential treatment. The index indicates whether Toyota is seeking reconsideration of the denial of confidential treatment with regard to those documents and pages.

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