UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

QUALITY CONTROL SYSTEMS CORP.,

Plaintiff,

v.

U.S. DEPARTMENT OF TRANSPORTATION,

Defendant.

Civil Action No. 17-cv-1266 (DLF)

MEMORANDUM OPINION AND ORDER

In 2016, the driver of a Tesla Model S operating in Autopilot mode was killed when his vehicle collided with a tractor trailer in Florida. The crash triggered a National Highway Transportation Safety Administration (NHTSA) investigation conducted by the Office of Defects Investigations, which ultimately issued a report closing the investigation after concluding that the Tesla's Autopilot and Automatic Emergency Braking systems performed as designed and were not defective. One conclusion of the report—that Tesla crash rates dropped by nearly 40 percent after Autosteer was installed—caught the attention of plaintiff Quality Control Systems Corporation (Quality Control). Quality Control seeks to test the scientific validity of that conclusion by independently analyzing the underlying data, which Quality Control tried to obtain through the Freedom of Information Act (FOIA), 5 U.S.C. § 552. When NHTSA refused to disclose the data, Quality Control filed this lawsuit.

Before the Court are defendant U.S. Department of Transportation's Motion for Summary Judgment, Dkt. 10, and Quality Control's Cross-Motion for Partial Summary Judgment, Dkt. 12. For the reasons that follow, the Court will deny both motions without prejudice.

I. BACKGROUND

After the fatal Tesla collision, NHTSA's Office of Defects Investigations opened an investigation into the vehicle's automatic control systems that were operating at that time, including the Automatic Emergency Braking and Autopilot systems. Def.'s Statement of Facts ¶ 4, Dkt. 10; Quandt Decl. Ex. 1 at 1 (ODI Resume), Dkt. 10-1.[1] As part of the investigation, Division Chief Jeffrey Quandt sent Tesla a July 8, 2016 letter that requested responses to 11 questions, the first of which is at issue here. Def.'s Statement of Facts ¶ 5. Question 1 requested that Tesla provide 17 categories of data about vehicles equipped with Autopilot, including:

1) the mileage of the vehicle at the time of the last data retrieval;

2) the mileage of the vehicle at the time the Autosteer software was installed on the vehicle;

3) whether the vehicle experienced any airbag deployments before Autosteer was installed; and

4) whether the vehicle experienced any airbag deployments after Autosteer was installed.

Def.'s Statement of Facts ¶ 6; Quandt Decl. Ex. 2 at 2.

On August 8, 2016, Tesla responded to Quandt's request by submitting a Microsoft Access database that contained data in response to question 1. Def.'s Statement of Facts ¶ 7. That same day, Tesla invoked 49 C.F.R. § 512 and FOIA exemption 4, 5 U.S.C. § 552(b)(4), to request that the NHTSA treat the database confidentially. Quandt Decl. Ex. 4 at 1–4. Tesla claimed that release of proprietary operations and technology data from the database would

[1] Because Exhibits 1–9 attached to Quandt's declaration were collectively filed as Dkt. 10-1, the Court will dispense with citing that docket number when citing these exhibits. In addition, where Quality Control does not dispute the facts contained in the Department of Transportation's statement of facts, the Court will dispense with parallel citations to Quality Control's statement of facts. *Compare* Def.'s Statement of Facts, Dkt. 10, *with* Pl.'s Statement of Facts, Dkt. 12-5.

likely cause Tesla substantial competitive harm. Quandt Decl. Ex. 4 at 1–2. Tesla was particularly concerned about a release of the following data: customer complaint data; data about repair orders, deaths, injuries, and property damage; log data that reveals how Tesla collects and analyzes vehicle data; internal vehicle pictures; and personal identifying information about customers. *Id.* at 2–4.

The Office of Defects Investigation closed its investigation on January 19, 2017 after issuing a 12-page report that analyzed various aspects of the Autopilot and Automatic Emergency Braking systems. Def.'s Statement of Facts ¶ 9; Quandt Decl. Ex. 1 at 1–12 (report). That report contained the following chart (Figure 11):

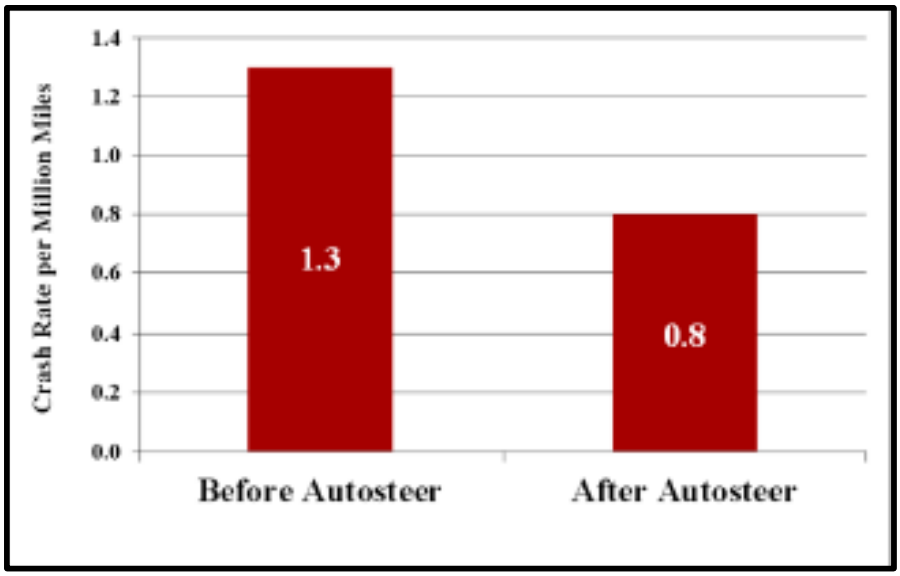

Figure 11. Crash Rates in MY 2014-16 Tesla Model S and 2016 Model X Vehicles Before and After Autosteer Installation.

Def.'s Statement of Facts ¶ 9; Quandt Decl. Ex. 1 at 11. Figure 11 is based on data related to crashes that resulted in airbag deployment before and after Autosteer was installed. Quandt Decl. Ex. 1 at 10. According to the report, the data in Figure 11 "show that the Tesla vehicles crash rate dropped by almost 40 percent after Autosteer installation." *Id.*

A month after the NHTSA report was issued, Quality Control submitted a FOIA request to NHTSA via a letter dated February 24, 2017. Quandt Decl. Ex. 6 at 1–2. Quality Control asked for "all mileage and airbag deployment data supplied by Tesla analyzed by [Office of Defects Investigations] to calculate the crash rates shown in Figure 11" and "all records related to any statistical summaries, formulas, models, adjustments, sample weights, and/or any other data or methods relied upon to calculate the crash rates shown in Figure 11." *Id.* at 2. When NHTSA failed to respond to Quality Control's FOIA request, Quality Control filed this lawsuit on June 28, 2017.

NHTSA's search for records responsive to Quality Control's FOIA request revealed that Tesla's Microsoft Access database and a Microsoft Excel file contained data used to calculate the crash rates shown in Figure 11 of the Office of Defects Investigation's report. Quandt Decl. ¶¶ 21–23. On July 5, 2017, NHTSA's Chief Counsel's Office determined that FOIA exemption 4 applied to the database because it concluded that the release of the database was likely to cause Tesla substantial competitive harm under *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).[2] Quandt Decl. Ex. 5 at 1. Accordingly, on July 21, 2017, NHTSA informed Quality Control that it had responsive records that were being withheld under FOIA exemption 4. Quandt Decl. Ex. 9 at 1. The parties subsequently filed competing motions for summary judgment.

[2] NHTSA does not issue decisions about confidentiality treatment until a FOIA or other request presents a need for public release. Matheke Decl. ¶¶ 6, Dkt. 10-3. Thus, although Tesla made a request for confidentiality in August 2016, NHTSA did not make a decision about Tesla's request until after NHTSA received Quality Control's FOIA request. *Id.* ¶¶ 11-16.

II. LEGAL STANDARDS

Rule 56 of the Federal Rules of Civil Procedure mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" and, viewing the evidence in the light most favorable to the nonmoving party, "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Paige v. Drug Enforcement Admin.*, 665 F.3d 1355, 1358 (D.C. Cir. 2012). "A dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Paige*, 665 F.3d at 1358. A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]hese general standards under rule 56 apply with equal force in the FOIA context." *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

To prevail under Rule 56, a federal agency "must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam) (quoting *Nat'l Cable Television Ass'n, Inc. v. F.C.C.*, 479 F.2d 183, 186 (D.C. Cir. 1973)). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). "That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." *Id.* (citing 5 U.S.C. § 552(a)(4)(B)).

An agency "can meet this burden through affidavits or declarations that describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information

withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *People for the Ethical Treatment of Animals v. U.S. Dep't of Health & Human Servs.*, No. 16-5269, 2018 WL 4000478, at *2 (D.C. Cir. Aug. 17, 2018) (internal quotation marks omitted). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wolf v. C.I.A.*, 473 F.3d 370, 374–75 (D.C. Cir. 2007) (internal quotation marks omitted).

III. ANALYSIS

Through their briefing, the parties have narrowed their dispute to the following issues: (1) whether the four categories of data that Quality Control seeks from Tesla's Microsoft Access database are confidential information protected by FOIA exemption 4; and (2) whether data in the Microsoft Excel file that NHTSA's Office of Defects Investigation used to calculate the crash rates reflected in Figure 11 is deliberative-process material protected by FOIA exemption 5. The Court addresses each issue in turn.

A. Whether FOIA Exemption 4 Protects Data in Tesla's Microsoft Access Database

As noted, Quality Control seeks 4 of 17 categories of data that Tesla submitted in response to question 1 of NHTSA's July 8, 2016 information request. Pl.'s Reply at 2, Dkt. 15. Those four categories consist of (1) the mileage of each vehicle at the time of the last data retrieval; (2) the mileage of each vehicle at the time the Autosteer software was installed on the vehicle; (3) data reflecting whether each vehicle experienced any airbag deployments before the Autosteer software was installed; and (4) data reflecting whether each vehicle experienced any airbag deployments after the Autosteer software was installed. *Id.* Quality Control acknowledges that NHTSA's asserted rationale may apply to certain categories of data in the Microsoft Access database, but it argues that the vehicle mileage and airbag deployment data that Quality Control seeks is not confidential information. Pl.'s Reply at 3–6.

FOIA exemption 4 allows agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). There is no dispute that the data Quality Control seeks is commercial information obtained from a person. *See* Pl.'s Cross-Mot. Br. at 9, Dkt. 12. The only question is whether the information is "confidential." *Id.*

Under the *National Parks* test, information is "confidential" if the government requires it to be submitted and disclosure is likely to cause substantial harm to the competitive position of the person providing the information.[3] *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008) (quoting *Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc). This is an objective test, *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 268 (D.C. Cir. 1982), that does not require the agency to show actual competitive harm, *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). Instead, the agency must show "both actual competition and a likelihood of substantial competitive injury." *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1331 (D.C. Cir. 2014). Although "[c]onclusory and generalized allegations of substantial competitive harm" are "unacceptable," "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291. When reviewing an agency's determination of substantial competitive harm, courts in this Circuit "recognize that predictive judgments are not

[3] Quality Control does not dispute that the *National Parks* test applies because Tesla was required to supply the data to NHTSA pursuant to the agency's investigative authority. *See* Pl.'s Cross-Mot. Br. at 10. Although the *National Parks* test also addresses whether disclosure would impair the agency's ability to get necessary information in the future, 498 F.2d at 770, that prong of the test is not at issue here.

capable of exact proof" and will "generally defer to the agency's predictive judgments as to the repercussions of disclosure." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010) (internal quotation marks and citations omitted).

NHTSA initially relied on Tesla's August 10, 2016 request for confidential treatment as the basis for withholding the four requested categories of data. *See* Quandt Decl. Ex. 5 at 1. In that request, Tesla asserted that the data was confidential because Tesla took measures to ensure that it was not released outside the company. Quandt Decl. Ex. 4 at 1. Tesla also explained that the data includes proprietary operations and technology information that competitors could use to improve their ability to identify and track vehicle problems and performance, without incurring the costs that Tesla incurred to develop these processes. *Id.* at 2. Tesla highlighted specific categories of information that would cause it substantial harm: consumer complaint data; analyses of claims about deaths, injuries, and property damage; log data and how Tesla analyzes that data; and pictures from vehicle logs or investigations. *Id.* at 2–4.

NHTSA later requested a declaration from Tesla to support its decision to withhold the Microsoft Access data. Schwall Decl. ¶ 4, Dkt. 13-2. Accordingly, Tesla's Director of Field Performance Engineering, Matthew L. Schwall, submitted a December 20, 2017 declaration describing the various ways the data could reveal "proprietary secrets" about Tesla's Over-the-Air transmission system—a system that allows Tesla to provide vehicle-level software updates and acquire vehicle data remotely by transmission (rather than requiring customers to bring their vehicles to service facilities). *Id.* ¶¶ 10–13. Schwall asserts that "it would take years for most competitors to gain as much experience in the process of sending and receiving [Over-the-Air] data as Tesla has." *Id.* ¶ 14. And Schwall provides multiple examples to support his assertion.

Id. ¶¶ 15–22. None, however, adequately demonstrates how disclosure of the specific information Quality Control seeks here—mileage and airbag deployment data—is confidential.

First, Schwall argues that the release of certain dates would reveal information about (1) the efficacy and volume of software updates Tesla can send via the Over-the-Air transmission system, (2) Tesla's strategy for the timing and frequency of data transmissions, (3) warranty-coverage start dates, (4) manufacturing production information, and (5) sales trends over time. *Id.* ¶¶ 15, 16, 19, 21–22. But the mileage and airbag deployment data that Quality Control seeks here do not include dates.

Second, Schwall asserts that the data includes information about Tesla's proprietary safety-technology algorithms. *Id.* ¶ 17. Again, however, Schwall fails to explain how the mileage and airbag deployment data reveal safety-technology algorithms, or any algorithm for that matter.

Third, Schwall claims the database contains information about the vehicles that installed Autosteer, including "the percentage of customers who purchased the [Autosteer] package." *Id.* ¶ 18. But Schwall does not explain how this insight would justify withholding the data under FOIA exemption 4. *Biles v. Dep't of Health & Human Servs.*, 931 F. Supp. 2d 211, 223 (D.D.C. 2013) ("[M]ere observations that disclosure will provide 'insight' into certain types of information fail to show how such 'insight' creates a likelihood of substantial competitive harm and are therefore insufficient to establish [the agency's] burden of proof.").

Fourth, Schwall asserts that the states or territories where Tesla vehicles were registered are contained in the database and, when combined with the warranty-coverage start dates, would reveal the percentage of customers in each state or territory who bought the Autopilot feature and how that percentage changed over time with the addition of other functionalities. *Id.* ¶ 19. But

neither the mileage nor airbag deployment data reveals such information. And, in any event, Schwall does not explain how this information would create a likelihood of competitive harm.

Finally, Schwall states that the data "contains breakdowns of both fleet and individual customer mileage, including the mileage when a customer installed an Autopilot feature and the mileage when Tesla collected information from that customer's vehicle." *Id.* ¶ 20. But once again, Schwall provides no explanation about *how* the disclosure of mileage information alone would likely cause Tesla substantial competitive harm.

In defending the withholding under exemption 4, both NHTSA and Tesla have focused on disclosure of the Microsoft Access database *as a whole*, rather than on the four *specific* categories of data Quality Control seeks here. For this reason, the Court is unable to determine whether *any* of the four specific categories of data—segregated from the other data in the Microsoft Access database—constitute confidential information protected by FOIA exemption 4. The Court will therefore deny without prejudice both parties' motions with respect to whether NHTSA properly withheld, pursuant to exemption 4, four categories of data from the Microsoft Access database.

B. Whether FOIA Exemption 5 Protects Data in Quandt's Microsoft Excel File

Quality Control also seeks the underlying data and methods that Quandt used to calculate the crash rates shown in Figure 11 of NHTSA's January 19, 2017 report. *See* Quandt Decl. Ex. 6 at 2. That data is located in a Microsoft Excel file that Quandt created based on data from the Microsoft Access database. Quandt Decl. ¶¶ 17, 18. Quandt reports that he computed the crash rates in Figure 11 "by examining the sums of the miles driven prior to Autosteer activation, miles driven after Autosteer activation, airbag deployment events prior to Autosteer activation and airbag deployment events after Autosteer activation for all of the subject vehicles." *Id.* ¶ 17.

NHTSA invoked FOIA exemption 5 to withhold the Excel file and the underlying data that Quandt used to create the file.

FOIA exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). To state it more plainly, exemption 5 "covers information that would be privileged from disclosure in litigation." *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 672 (D.C. Cir. 2016). "Included within this exemption is the deliberative process privilege, which protect[s] the decisionmaking processes of government agencies and encourage[s] the frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fishbowl." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (internal quotation marks omitted). Information withheld under exemption 5's deliberative process privilege must be both "predecisional and deliberative." *Id.* Typically, raw facts are not deliberative and must be disclosed. *Id.* Facts may be withheld, however, when their selection involves a policy-oriented judgment. *Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 465 (D.C. Cir. 2014). To determine whether a record that contains facts is deliberative for the purpose of applying FOIA exemption 5, the "key question" is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

NHTSA concedes that Quandt's Excel file "contains factual data that might not otherwise be considered deliberative," but NHTSA argues that the data Quality Control seeks here is part of the deliberative process because it "contains Mr. Quandt's work product, including his

decisions about how to look at Tesla's data, how to select portions of it to examine, and how to interpret it." Def.'s Mot. for Summ. J. at 14, Dkt. 10. NHTSA further argues that Quandt had to exercise judgment to determine which data in the Microsoft Access database was significant. Def.'s Reply at 13, Dkt. 13 ("Quandt had to separate significant facts from insignificant facts in the database and analyze which pieces of data were important and which pieces of information were necessary for his calculations." (internal quotation marks omitted)). *See also Mapother*, 3 F.3d at 1539 (recognizing the need to "shelter" facts that "assist the making of a discretionary decision").

Quandt's declaration, however, does not fully support NHTSA's claim. Quandt states that he "performed an analysis of Tesla's raw vehicle data to determine whether and to what extent crash rates changed after the installation of Autosteer." Quandt Decl. ¶ 16. But he admits that he "did not rely upon any statistical summaries, formulas, models, adjustments, sample weights, or any other data or methods." *Id.* ¶ 20. Instead, he performed calculations "by examining the *sums* of the miles driven prior to Autosteer activation, miles driven after Autosteer activation, airbag deployment events prior to Autosteer activation and airbag deployment events after Autosteer activation for all of the subject vehicles." *Id.* ¶ 17 (emphasis added). It thus appears that Quandt performed a straightforward mathematical calculation involving categories of data clearly identified in Figure 11. Based on Figure 11 and his declaration, it appears that Quandt simply divided the total number of airbag activations by the total number of miles driven to determine the average crash rate (per million miles) for select Tesla vehicle models (both before and after Autosteer installation).

Most significantly, NHTSA has not adequately explained how disclosing data from the Excel file would expose its decisionmaking process in such a way as to chill candid discussion

within the agency and undermine its ability to perform its functions. *See Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (an agency must show that "the selection or organization of facts is part of [the agency's] deliberative process").

The Court needs additional information to determine whether the Microsoft Excel file data that Quandt used (and the calculations he performed) to prepare Figure 11 reflect his deliberative judgment or are simply raw data (and basic mathematical calculations). It is also difficult for the Court to determine whether (and if so, how) the underlying data Quality Control seeks to obtain from the Microsoft Excel file differs from the four categories of data Quality Control seeks from the Microsoft Access database. Accordingly, the Court will deny without prejudice both parties' motions with respect to the applicability of FOIA exemption 5.

ORDER

For the foregoing reasons, it is **ORDERED** that Defendant U.S. Department of Transportation's Motion for Summary Judgment, Dkt. 10, and Quality Control's Cross-Motion for Partial Summary Judgment, Dkt. 12, are **DENIED WITHOUT PREJUDICE**.

It is further **ORDERED** that the parties shall confer and submit a joint status report on or before October 19, 2018 that proposes a schedule for further proceedings consistent with this memorandum opinion and order.

Dabney L. Friedrich

DABNEY L. FRIEDRICH
United States District Judge

September 30, 2018