

May 12, 2022

Ann E. Carlson
Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Ave., SE,
Room W41-227
Washington, DC 20590

Re: Request for Confidential Treatment of Business Information Submitted Regarding EA19-001

Dear Ms. Carlson:

Mitsubishi Motors North America, Inc. ("MMNA") yesterday provided information in response to an Information Request ("IR"), dated March 31, 2022, in the above-referenced matter. Because the response to the IR includes confidential business information that is exempt from disclosure pursuant to Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), and 49 C.F.R. Part 512, MMNA is submitting the response through your office with this request for confidential treatment and certificate in support of confidentiality.

The information required by Part 512 is set forth below.

A. Description of the Information (49 C.F.R. § 512.8(a))

The confidential business information in the response includes consumer complaints, crash reports, Mitsubishi Engineering Product Quality Reports, property damage reports, and an Excel Spreadsheet entitled "EA19-001 Response 5.2022" ("the Excel Spreadsheet"). The pages containing confidential business information have headers indicating the presence of such information.

B. Confidentiality Standard (49 C.F.R. § 512.8(b))

Prior to the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), this submission would have been subject to the confidentiality standard in 49 C.F.R. § 512.15(b), for information that the submitter is required to submit to NHTSA. The standard for confidential treatment is now set forth in *Food Marketing Institute*, 139 S. Ct. at 2366.

C. Justification for Confidential Treatment (49 C.F.R. § 512.8(c))

In *Food Marketing Institute*, the Supreme Court held that information is "confidential" within the meaning of FOIA Exemption 4 when it is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." 139 S. Ct. at 2366.

MMNA customarily and actually treats the information for which it is requesting confidential treatment as private. MMNA limits the dissemination of the information to those employees of MMNA and its parent corporation, Mitsubishi Motors Corporation, who require access to it in the performance of their employment-related duties and takes steps

to assure that employees protect the confidentiality of information to which they obtain access.

As for an assurance of confidentiality, the Supreme Court expressly declined to hold that an assurance is, in fact, a *necessary* condition for confidentiality. *Id.* at 2363. Nor did the Court describe the nature of the “assurances” to which it referred.

The United States District Court for the District of Columbia has repeatedly stated that an assurance of confidentiality is *not* required. *See Naumes v. Dep’t of the Army*, Civ. A. No. 21-1670 (JEB), slip op. at 19 (D.D.C. Mar. 1, 2022); *Cause of Action Inst. v. Export-Import Bank of the U.S.*, Civ. A. No. 19-1915 (JEB), slip op. at 38 (D.D.C. Jan. 27, 2022); *Renewable Fuels Ass’n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021)). The district court reached this conclusion because, as a result of the *Food Marketing Institute* decision, *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), governs the application of FOIA Exemption 4 in the D.C. Circuit, and *Critical Mass* does not require a governmental assurance of confidentiality. *Renewable Fuels*, 519 F. Supp. 3d at 12

In addition, the court noted that requiring assurances would lead to “many fairly arbitrary disputes over whether such an assurance can be implied.” *Id.*

Even if an assurance of confidentiality were required, an *implied* assurance would be sufficient, and such an implied assurance could be inferred from a number of considerations, including an agency's past practice. *See Flyers Rights Educ. Fund, Inc. v. FAA*, 2021 WL 4206594, at *7-*9 (D.D.C. Sept. 16, 2021) (appeal filed); *see also* Department of Justice Office of Information Policy (“OIP”), “Exemption 4 After the Supreme Court’s Ruling in *Food Marketing Institute v. Argus Leader Media*,” <https://www.justice.gov/oip/exemption-4-aftersupreme-courts-ruling-food-marketing-institute-v-argus-leader-media>, at 5.

Here, if an assurance of any kind were required, NHTSA's past practice with regard to *voluntary* submissions provides the appropriate precedent to consider. This is because, as the district court noted in *Renewable Fuels Association* (see above), the *Critical Mass Energy Project* voluntary-submission analysis now supplies the FOIA Exemption 4 standard in the D.C. Circuit. Under the voluntary-submission standard, NHTSA routinely accorded confidential treatment to the kinds of information that the submitter customarily withheld from disclosure to the general public. *See* 49 C.F.R. § 512.15(d).

As noted above, MMNA does not customarily or actually disclose to the public the information for which it is seeking confidential treatment. Thus, NHTSA's past practice in the voluntary submission context provides MMNA with ample assurance of confidentiality.¹

¹ The disclosure of the information for which confidential treatment is being sought would provide competitors with insights into MMNA's practices with regard to commercially important customer-relations and customer-satisfaction issues, enabling competitors to benefit from MMNA's time and expense in developing these practices. This consideration bears on the reasonable foreseeability of the harm that would result from a disclosure. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). In the post-*Food Marketing Institute* context, reasonably foreseeable harms sufficient to justify withholding under FOIA Exemption 4 include impairment of the legitimate commercial, financial, business, or research interests of the submitter. *See Naumes*, slip op. at 22-23.

D. Class Determination (49 C.F.R. § 512.8(d))

None of the information at issue is subject to a class determination.

E. Duration For Which Confidential Treatment Is Sought (49 C.F.R. § 512.8(e))

Because MMNA does not contemplate that it will ever disclose the information, and because the information will retain its competitive value indefinitely, MMNA requests that the information be accorded confidential treatment permanently.

F. Contact Information (49 C.F.R. § 512.8(f))

Please direct all inquiries to Kurt Kurata, kurt.kurata@na.mitsubishi-motors.com or 949.763.1790.

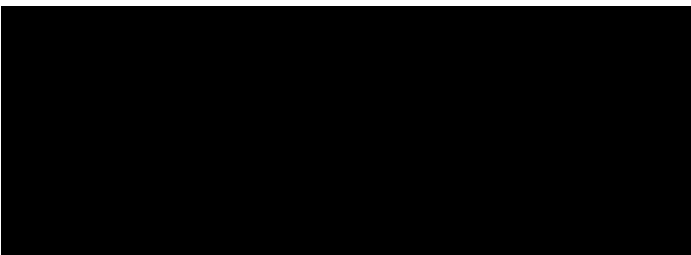
* * *

A certificate in support of confidentiality executed on behalf of MMNA is attached.

The submission includes personal identifying information ("PII") of consumers. MMNA understands that, pursuant to the Privacy Act and FOIA Exemption 6, NHTSA must redact such PII prior to any disclosure of the MMNA response to the public.

If you receive a request for disclosure of the information for which confidential treatment is being sought before you have completed your review of our request, MMNA respectfully requests notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Respectfully submitted,



Daniel Ball
Vice President, Aftersales
Mitsubishi Motors North America, Inc.

CERTIFICATE IN SUPPORT OF REQUEST FOR CONFIDENTIALITY

I, Daniel Ball, Vice President, Aftersales of Mitsubishi Motors of North America, Inc. ("MMNA), pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

(1) I am Vice President, Aftersales and I am authorized by MMNA to execute documents on behalf of MMNA;

(2) I certify that the information contained in the Excel Spreadsheet or otherwise marked as confidential business information submitted to NHTSA by MMNA on May 11, 2022 is submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. § 552(b)(4);

(3) I hereby request that the information contained in the pertinent documents be protected on a permanent basis;

(4) This certification is based on the information provided by the responsible MMNA personnel who have authority in the normal course of business to release the information for which a claim of confidentiality has been made to ascertain whether such information has ever been released outside MMNA;

(5) Based upon that information, to the best of my knowledge, information, and belief, the Excel Spreadsheet and other confidential business information contained therein for which MMNA has claimed confidential treatment has never been released or become available outside of MMNA except for one or more disclosures to MMNA's parent company, Mitsubishi Motors Corporation, which was or were made with the understanding that Mitsubishi Motors Corporation would protect the confidentiality of the information;

(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 of MMNA because of unauthorized or inadvertent disclosure except as stated in Paragraph 5; and

(7) I certify under penalty of perjury that the foregoing is true and accurate to the best of my information, knowledge and belief.

Executed on this the 12th day of May, 2022.



Daniel Ball
Vice President, Aftersales
Mitsubishi Motors North America, Inc.