

Jennifer Allman
Head, Vehicle Safety Compliance and Product
Analysis

July 14, 2023

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 for July 14, 2023,
PE19-012 UA5 Warranty Claims Request

Dear Ms. Carlson:

FCA US LLC (f/k/a Chrysler Group LLC) ("FCA US") is voluntarily submitting additional information to the National Highway Traffic Safety Administration ("NHTSA") Office of Defects Investigation ("ODI") in connection with the above-referenced request(s).

Based on a careful review of this information, FCA US has determined that the information being provided is confidential and should be accorded confidential treatment under this agency's regulations at 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4). Therefore, FCA US is submitting this information, together with this request for confidential treatment, to the Office of Chief Counsel.

The information required by Part 512 is set forth below.

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

The business information for which confidential treatment is being sought is within the following enclosure(s) which contain(s) information related to the above-referenced request(s):

- **PE19-012_UA5_20230714_CONF BUS INFO.accdb**, consisting of one Microsoft Access file containing entire page confidential business information; (This file cannot be Bates stamped, but has been designated as Confidential Business Information in the title of the file). This consists of information provided in response to the above referenced request(s).

The information for which confidential treatment is being sought has a banner at the top indicating that the entire page consists of confidential business 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 substantial competitive harm

¹ FCA US has taken steps to assure that files sent via email or secure file transfer are free of any errors or defects that would prevent NHTSA from opening the files. If, however, the agency is unable to open the files, FCA US respectfully requests that the agency inform FCA US of the issue, so that FCA US may take steps to supply NHTSA's Office of Chief Counsel with a file that is fully functional.

standard set forth in 49 C.F.R. § 512.15(b) for information that a submitter is required to provide to the agency. 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.

FCA US customarily and actually treats the information for which confidential treatment is being requested as private. FCA US makes this information available only to employees, agents, and suppliers who require the information to perform their duties for FCA US and who receive the information with the understanding of their obligations to maintain its confidentiality.

With regard to assurances of privacy, 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.

In considering the question of assurances, the United States District Court for the District of Columbia repeatedly has concluded that an assurance of confidentiality is not required under D.C. Circuit precedent. *See Naumes v. Dep’t of the Army*, 2022 WL 594541, at *8 (D.D.C. Mar. 1, 2022) (“This Circuit does not require assurances of privacy as a separate component of confidentiality, and this Court will not ‘read the word “confidential” to impose a blanket requirement that the government provide an assurance of privacy in every case in which it asserts Exemption 4.’”) (quoting *Renewable Fuels Ass’n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021)); *Cause of Action Inst. v. Export-Import Bank of the U.S.*, 2022 WL 252028, at *18 (D.D.C. Jan. 27, 2022) (stating that the Supreme Court did not resolve whether assurances are a mandatory element of confidentiality under Exemption 4, and “this Court has since explained that binding Circuit precedent compels an answer in the negative”); *Renewable Fuels*, 519 F. Supp. 3d at 12 (declining to require proof of an assurance of confidentiality). At most, according to the D.C. district court, an assurance is “relevant but not strictly required.” *See Wilson v. FCC*, 2022 WL 4245485, at *7 (D.D.C. Sept. 15, 2022). Indeed, “[i]f anything, courts here have taken the position that privately held information is generally confidential absent an express statement by the agency that it would not keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue).” *Id.* at *10 (internal quotation marks omitted).

Moreover, even if an assurance of some kind were required under *Food Marketing Institute*, such an assurance need not take the form of a promise by an agency to protect the confidentiality of confidential business information. Although a promise of confidentiality was involved in *Food Marketing Institute*, in ordinary speech, an actual promise need not be made for information to be communicated “under an assurance of privacy.”

The Department of Justice Office of Information Policy (“OIP”) recognized that fact in guidance concerning *Food Marketing Institute*. Specifically, OIP instructed agencies that an **express** assurance of confidentiality is not required. *See* Exemption 4 After the Supreme Court’s Ruling in *Food Marketing Institute v. Argus Leader Media*, <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader->

media#:~:text=In%20conclusion%2C%20the%20Court%20held,at%202366. (second paragraph in subsection headed “Second Condition – Assurance of Confidentiality by Government”) (“[A]n assurance of confidentiality can be either explicit or implicit.”).

As the OIP guidance explains, past agency practice with regard to similar information can suffice for establishing an “implied assurance” of confidentiality. *See id.* (second paragraph under subsection headed “Implied Assurance”) (“Factors to consider include the government’s treatment of similar information For example, an agency’s long history of protecting certain commercial or financial information can serve as an implied assurance to submitters that the agency will continue treating their records in the same manner.”).

The United States District Court for the District of Columbia has reached the same conclusion that implied assurances are sufficient under Exemption 4. *See Flyers Rights Educ. Fund, Inc. v. FAA*, 2021 WL 4206594, at *7-*9 (D.D.C. Sept. 16, 2021) (appeal filed). After noting that courts in the district had concluded that assurances are not required (*id.* at *7), the court stated that it “need not determine whether the second prong of *Food Marketing* is mandatory because it is satisfied that the withheld information was provided by Boeing to the FAA under an ‘assurance of privacy’” (*id.* at *8). Having noted that the plaintiff disputed the FAA’s examples of alleged express assurances of privacy, the court found that Boeing had received implied assurances of privacy. Those assurances were derived from the context of the submission and, in particular, upon the FAA’s past practices with respect to withholding proprietary information. *See id.* at *8-*9.

The court reached a similar conclusion in *Center for Medical Progress v. U.S. Dep’t of Health & Human Servs.*, 2022 WL 4016617 (D.D.C. Sept. 3, 2022). There, the court found that there were “implied” assurances of confidentiality (*id.* at *11) based, first, on a government declaration stating that the putative Exemption 4 information had been “‘routinely withheld at [the National Institutes of Health (“NIH”)] and other agencies . . . precisely in recognition of the commercial sensitivity of the information,’” and, second, on a submitter declaration indicating the submitter’s understanding of and reliance upon NIH’s standard practices (*id.*; quoting declaration).

Because the voluntary submission standard (*see Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc)) now governs all submissions of information in the D.C. Circuit (*see Renewable Fuels Ass’n*, 519 F. Supp. 3d at 12), NHTSA’s prior practice with regard to voluntary submissions provides the relevant standard for whether NHTSA’s past practice provides an assurance of privacy—if an assurance is required at all. In the context of voluntary submissions, NHTSA has consistently accorded confidential treatment to the kinds of records that are being submitted today.

FCA US has voluntarily communicated confidential business information to NHTSA many times over many years. When considering confidential treatment requests for voluntarily-submitted information, NHTSA has adhered to a practice of keeping such information confidential and not disclosing it if—as is the case here—the information for which confidential treatment is being requested consists of information that FCA US does not customarily disclose to the public. Pending further communication with the Office of Chief Counsel, FCA US views this practice as sufficient assurance—assuming that an assurance of some sort is even necessary—for the instant submission.

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Accordingly, the confidential treatment of the information that FCA US is submitting is warranted because that information is both customarily and actually treated as private by FCA US and is being provided to the government with an assurance of privacy derived from the expectation that NHTSA will continue its past practice—established both in the voluntary- and compelled-submission contexts—of not disclosing confidential commercial information of the kind at issue here.

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

The information for which confidential treatment is sought does not fit within a class determination.

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

FCA US does not anticipate ever adopting a custom of disclosing to the public the kind of information for which confidential treatment is being sought. Therefore, FCA US requests that this information be accorded confidential treatment indefinitely.

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

Please direct all inquiries and responses to the undersigned at:

800 Chrysler Drive
CIMS 482-00-83
Auburn Hills, MI 48326
(248) 494-2681
Jennifer.Allman@stellantis.com

The submission includes VINs from which customer identities may be derivable. FCA US assumes that NHTSA will redact these VINs and any other Personal Identifying Information prior to disclosing any of the submitted information 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, FCA US respectfully requests notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Sincerely,



Jennifer Allman

Enclosures

cc: Mr. Bruce York