

Toyota Motor North America, Inc.

Vehicle Safety & Compliance
Liaison Office
Mail Stop: W4-2D
6565 Headquarters Drive
Plano, TX 75024

July 1, 2022

Ms. Ann Carlson, Chief Counsel
Office of Chief Counsel, NCC-100
National Highway Traffic Safety Administration
West Building, Room W41-227
1200 New Jersey Ave., SE
Washington, D.C. 20590

Subject: NEF-102pub; EA21-002: Request for Confidential Treatment

Dear Ms. Carlson:

Toyota Motor North America (“Toyota”) is submitting its response to NHTSA's letter regarding EA21-002, a defect investigation into various manufacturers' vehicles to investigate whether a safety defect related to propellant degradation exists in non-recalled desiccated phase-stabilized ammonium nitrate (PSAN) frontal air bag inflators manufactured by Takata. Pursuant to 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(4), Toyota requests that the information identified in Enclosure 2 be granted confidential treatment.

Based on prior communications with the NHTSA Office of the Chief Counsel and NHTSA's guidance posted on its website (available at [REDACTED]), Toyota understands that, due to the ongoing COVID-19 situation, NHTSA staff will not be present in the office to receive the confidential materials that are normally submitted through mail. As such, Toyota is sending this submission via secure file transfer to the Office of Defects Investigation and to the Office of Chief Counsel. The file transfer includes:

- (1) This Request for Confidential Treatment;
- (2) Enclosure 1: The confidential certification of Toyota required under Part 512;
- (3) Enclosure 2: A confidential copy of Toyota's response to this Information Request including Attachments;
- (4) Enclosure 3: A public copy of Toyota's response to this Information Request including attachments with the confidential information redacted.

Toyota's understanding is that submission through this method is in conformance with NHTSA's aforementioned guidance posted on its website and will not prejudice the agency's evaluation of whether the attached material will be afforded confidential treatment under its regulations. Toyota is also willing to send this duplicate copy of this submission through mail per the usual submission process in the future upon NHTSA's request.

Because this submission includes the kind of confidential information that Toyota does not customarily disclose to the public, and because Toyota has not actually disclosed this information publicly, Toyota is submitting the information through your office with this request for confidential treatment, pursuant to 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4).

The supporting information required by 49 C.F.R. Part 512 is set forth below.

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

The information for which Toyota is requesting confidential treatment consists of product design information, product assessment and evaluation analyses and processes, part inventory data, vehicle production data, and detailed information related to the quantities of inflators installed into vehicles under certain recalls. The materials have been marked as confidential.

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) ("Food Marketing"), the submission would have been subject to the confidentiality standard set forth in 49 C.F.R. § 512.15(b) for information that the submitter is required to submit. The standard for confidential treatment is now set forth in *Food Marketing*, 139 S. Ct. at 2366.

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

In *Food Marketing*, 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.

Toyota both customarily and actually treats the information for which it is requesting confidential treatment as private and confidential. Toyota has not "actually" disclosed the information for which it is seeking confidential treatment. Nor does it "customarily" disclose the *kinds* of information for which it is seeking confidential treatment. To the contrary, Toyota carefully guards the confidentiality of such information to ensure its continued privacy. The information is made available only to employees, contractors, and suppliers that require the information in the performance of their work for Toyota, and Toyota takes steps to ensure that its employees, contractors, and suppliers understand the necessity of safeguarding the information from disclosure. Also, if required by rule or order in litigation, a Protective Order limiting its disclosure is obtained to maintain the confidentiality of the information.

With regard to an "assurance of privacy," the Supreme Court expressly declined to hold that an assurance is, in fact, a *necessary* condition for confidentiality. See *Food Marketing*, 139 S. Ct. at 2363; see also *Renewable Fuels Ass'n v. U.S. EPA*, 2021 WL 602913, at *7-*8 (D.D.C. Feb. 16, 2021) (declining to require proof of an assurance of confidentiality in part because, as a result of the *Food Marketing* decision, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), which does not refer to assurances, governs the application of FOIA Exemption 4 in the D.C.

Circuit, and because such a requirement would lead to “many fairly arbitrary disputes over whether such an assurance can be implied”).

Moreover, even if an assurance of some kind were required, the Supreme Court did not describe the kind of assurances that would suffice for confidentiality under FOIA Exemption 4. Although a promise of confidentiality was involved in *Food Marketing*, in ordinary speech, an actual promise need not be made for information to be communicated “under an assurance of privacy.” Thus, the Department of Justice Office of Information Policy (“OIP”) issued guidance instructing 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*.

at 5 (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 action 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.”).

In assessing whether NHTSA’s past practice provides an implied assurance of privacy, NHTSA’s past practice with regard to *voluntary* submissions provides the applicable precedent. This is because, in overruling the substantial-competitive-harm standard set forth in *National Parks & Conservation Association v Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), the Supreme Court embraced a definition of “confidential” that focuses on the submitter’s actual and customary treatment of the information, just like the *Critical Mass* voluntary-submission standard incorporated into 49 C.F.R. Part 512 does. See *Critical Mass*, 975 F.2d at 879 (voluntarily-submitted information is confidential under Exemption 4 “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained”); 49 C.F.R. § 512.15(d) (voluntary-submission standard).

Under *Food Marketing*, this standard now applies to both voluntary and compelled submissions. As the United States District Court for the District of Columbia has explained, “[t]he import of *Food Marketing*’s holding that the ordinary meaning of ‘confidential’ applies in *all* Exemption 4 cases, then, is clear: *Critical Mass* and its progeny now supply the framework in this Circuit for determining whether voluntarily submitted *and* involuntarily submitted commercial or financial information are ‘confidential’ under Exemption 4.” *Ctr. for Investigative Reporting v. U.S. Customs & Border Protection*, 436 F. Supp. 3d 90, 109 (D.D.C. 2019); see also *Renewable Fuels Ass’n*, 2021 WL 602913, at *7 (stating that “[t]he current law of the D.C. Circuit, which remains binding authority, is that information is confidential under Exemption 4 ‘if it is of a kind that would customarily not be released to the public by the person [or entity] from whom it was obtained’”) (quoting *Critical Mass*, 975 F.2d at 879, and citing *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 109); *Leopold v. U.S. Dep’t of Justice*, 2021 WL 124489, at *6 n.8 (D.D.C. Jan. 13, 2021) (“The court in *Investigative Reporting* determined, and this Court agrees, that after *Food Marketing*, the framework provided by the D.C. Circuit’s opinion in *Critical Mass Energy Project* determines whether commercial and financial information is confidential regardless of whether it is submitted voluntarily or involuntarily.”).

Thus, regardless of whether a submission to NHTSA is compelled or voluntary, in determining whether the submitter has an assurance of confidentiality, NHTSA's long-standing practice with regard to voluntary submissions provides the appropriate framework. If NHTSA typically has accorded confidential treatment to voluntary submissions of the kinds of information that the submitter is providing, then the submitter has an adequate implied assurance of confidentiality, if an assurance of any kind is needed.

Toyota has made many submissions to NHTSA over the years, and, particularly in the context of voluntary submissions, NHTSA has consistently accorded confidential treatment to cost and other financial information; design information; design and engineering drawings; information about design and engineering changes; design validation/verification documents and failure mode analyses; engineering change instructions; future product plans; future sales projections; information about internal communications capabilities and processes; inventory information; lead-time information; manufacturing process information; organizational process information; product assessment and evaluation analyses and processes; proprietary test procedures, protocols, and analyses; quality control process information; supplier information (including supplier identification information and supplier assessments); and warranty information (including in particular, extended warranty sales information) and detailed recall remedy information such as that provided pursuant to the Takata Amended Coordinated Remedy Order beyond that specified by regulation.

The information described in Section A of this request for confidential treatment falls within the categories of information that NHTSA has protected from disclosure under the *Critical Mass* voluntary-submission standard, and NHTSA's past practice in this regard provides Toyota sufficient assurance—assuming that an assurance of some sort is even necessary—that NHTSA would accord confidential treatment to the same kinds of information in this submission.

Thus, the information for which Toyota is seeking confidential treatment is actually and customarily treated as private by Toyota and is being submitted with an assurance of confidentiality.

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

None of the information for which confidential treatment is being sought is subject to a class determination.

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

Because Toyota does not anticipate ever customarily disclosing this kind of information to the public, unless it is otherwise disclosed, Toyota requests that the information be accorded confidential treatment indefinitely or until the information is released to the public.

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

Please direct all inquiries to the undersigned at the address and telephone number on the letterhead.

* * *

As discussed, above, Toyota is sending a submission via secure file transfer to the Office of Defects Investigation and to the Office of Chief Counsel. One portion of the information includes the confidential information, and the other is the public copy with the confidential information redacted.

Ms. Ann Carlson, Chief Counsel

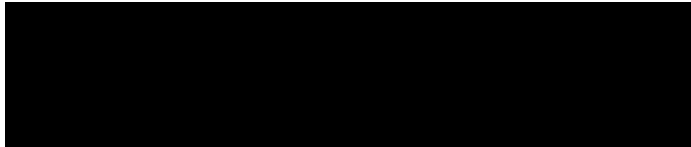
July 1, 2022

Page 5

Toyota understands this to be in conformance with NHTSA's guidance posted on its website on submitting confidential information during COVID-19 social distancing.

If you receive a request for disclosure of this information before you have completed your review of our request, Toyota respectfully requests notification and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Sincerely,



General Manager
Toyota Motor North America, Inc.

Enclosures

Enclosure 1:

Certificate of Toyota in Support of Request for Confidential Treatment

Enclosure 2:

Response including Attachments – Confidential Information

Enclosure 3:

Response including Attachments – Confidential Information Removed