INFORMATION REDACTED PURSUANT TO THE FREEDOM OF INFORMATION ACT (FOIA), 5 U.S.C. 552(B)(6)

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May 3, 2021

Ann Carlson
Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
West Building, Room W41-227
Washington, DC 20590

Re: PE21-007: Britax Request for Confidential Treatment

Dear Ms. Carlson:

Britax Child Safety, Inc. ("Britax") is submitting its response to an information request in the above-referenced matter. Because today's submission includes confidential business information (as described below), Britax is submitting the material through your office with this request for confidential treatment.

The supporting information required by NHTSA's regulations at 49 C.F.R. Part 512 is set forth below.

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

The confidential business information consists of information relating to Britax's database search methods, as well as comparative design information and information about how Britax conducts investigations and inspections and the results of and images from one such investigation. We have also redacted personal identifying information of certain individuals from the public version of this response.

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

Prior to the United States 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 set forth in 49 C.F.R. § 512.15(b) for information that the submitter is compelled to submit. The information now is subject to the standard set forth in *Food Marketing Institute* for the withholding of information under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4).

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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.

Britax both customarily and actually treats the information for which it is requesting confidential treatment as private and confidential. Britax 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, Britax carefully guards the confidentiality of such information to ensure its continued privacy. The information is made available only to employees and agents of Britax who require the information in the performance of their work for Britax, and Britax takes steps to ensure that these individuals understand the necessity of safeguarding the information from disclosure.

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 Institute*,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 Institute* 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 Institute*, 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*, https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-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 Institute*, 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.

In the context of voluntary submissions, NHTSA has consistently accorded confidential treatment to information that would reveal the operational capabilities of submitters. NHTSA also has consistently protected design information and information about submitters' product evaluation procedures, capabilities, and conclusions. Thus, 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.

NHTSA's past practice in this regard provides Britax sufficient assurance that NHTSA would accord confidential treatment to the kinds of information that are in this submission, assuming that an assurance of some sort is even necessary.

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

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

The information is not subject to a class determination.

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

Britax 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.

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A certificate in support of confidentiality executed on behalf of Britax is enclosed.

We could not place confidential treatment headers on the images in the response to request number 6. Like the other files containing confidential business information, the folder containing those images has the word "Confidential" in the folder's name to indicate the presence of confidential business information.

If you receive a request for disclosure of the information, Britax respectfully requests notification and an opportunity to provide further justification for confidential treatment, if warranted.

Sincerely,

[redacted]

Erika Z. Jones
Counsel to Britax Child Safety, Inc.

Certificate in Support of Request for Confidentiality

I, Julia Lentini, pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

(1) I am Director of Compliance, and I am authorized by Britax Child Safety, Inc. ("Britax") to execute documents on its behalf;

(2) I certify that the information described in the attached confidential treatment request is confidential and proprietary data and is being 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 Britax personnel who have authority in the normal course of business to release the information for which a claim of Britax;

(5) Based upon that information, to the best of my knowledge, information and belief, the information for which Britax has claimed confidential treatment has never been released or become available outside Britax, except for disclosures to counsel who were provided the information with the understanding that such information must be maintained in strict confidence;

(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 Britax 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 correct.

Executed on this 3rd day of May, 2021.



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Julia Lentini
Director of Compliance
Britax Child Safety, Inc.