



VIA SFTP Link

March 25, 2024

John Donaldson
Deputy Chief Counsel
Office of Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
West Building W41-227
Washington, D.C. 20590

CC: Michael Kuppersmith

Re: Request for Confidential Treatment Pursuant to 49 CFR Part 512 for Certain Documents Provided in Response to PE23-020

Dear Mr. Donaldson:

The Office of Defects Investigation (“ODI”) has requested Nissan North America, Inc. (“Nissan”) to provide certain information in connection with the matter referenced above, and Nissan is responding to this Information Request under separate cover. This submission includes an appendix of confidential attachments, which Nissan is submitting to the Office of Chief Counsel in accordance with NHTSA’s regulations and NHTSA’s instructions for the Submission of Confidential Business Information During Covid-19 Social Distancing (<https://www.nhtsa.gov/coronavirus/submission-confidential-business-information>). Nissan is hereby requesting that the confidential attachments be permanently protected from public release pursuant to 49 C.F.R. Part 512.

This cover letter sets forth the justifications for Nissan’s request for confidential treatment. Nissan has prepared a table that provides the justifications for the confidential material. The table is attached to this letter as an appendix. The table refers to the categorized justifications in the cover letter where appropriate and uses numerical codes which are set forth below.

The attached confidential documents and information generally contain confidential business information. More specifically, many of the confidential documents can be categorized as: evaluation and remediation protocols (category “1” in the accompanying table); test results, analyses, and protocols (category “2” in the accompanying table); and design information and performance factors and standards (category “3” in the accompanying table). The legal justifications for each category of confidential documents are provided below. As you will note in the accompanying table, many documents qualify as confidential for more than one reason.

Nissan treats all of the information at issue in this letter confidentially. Nissan does not publish or disseminate this type of information, except for certain limited disclosure to Nissan’s suppliers

which are made subject to confidentiality agreements or other understandings that the suppliers will maintain the information in strictest confidence. Moreover, Nissan limits access to the information to specific employees.

Confidential Business Information

Documents reflecting Nissan's internal product and design standards, development strategies, evaluation methods, testing protocols for product development, and manufacturing and quality control processes contain confidential, competitively sensitive information that Nissan does not disclose publicly. The U.S. Supreme Court, in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019), 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 assurance of privacy." Nissan both customarily and actually treats the information for which it is requesting confidential treatment as private and confidential. Nissan does not publish or disseminate this type of information in this format, and limits access to the categories of information within this compilation to specific employees.

The Supreme Court's decision in *Food Marketing Institute* does not describe the nature of the "assurances" to which it referred. Moreover, the U.S. Department of Justice's Office of Information ("OIP") has instructed agencies that an express assurance of confidentiality is not required, but rather "an assurance of confidentiality can be either explicit or implicit." See United States Department of Justice Office of Information Policy, *Exemption 4 after the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media* (2019) (available

As OIP guidance explains, past agency action on similar information can establish an "implied assurance" of confidentiality. For example, if an agency has typically protected certain commercial or financial information, this can serve as an implied assurance that the agency will continue treating the type of information as confidential. In past years, Nissan has made voluntary submissions to NHTSA, and NHTSA has treated that information—the same type of information submitted here—as confidential. Nissan believes ODI's assurance as well as this past practice supports its view that NHTSA will treat the information being submitted here as confidential.

Nissan customarily and actually treats the information confidentially, and the information is being provided with the expectation and assurance that NHTSA will continue its past practice of not disclosing confidential commercial information except as otherwise required. Therefore, for the reasons described above and more specifically below, the information should be accorded confidential treatment under *Food Marketing Institute* and related guidance.¹

¹ Moreover, Nissan's voluntary submission qualifies for confidential treatment under NHTSA's prior application of Part 512.15. Documents reflecting Nissan's internal product and design standards, development strategies, evaluation methods, testing protocols for product development, and manufacturing and quality control processes contain confidential, competitively sensitive information that Nissan does not disclose publicly. Confidential treatment for this information is warranted because its release would permit a competitor to duplicate Nissan's efforts with respect to product design, research, and development protocols and strategies without incurring the substantial investment involved in reverse engineering or in developing their own protocols and strategies. See *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 (D.C. Cir. 1981) (in deciding whether to

1. Evaluation and Remediation Protocols

Some of the submitted material contains highly sensitive information that may reveal Nissan's protocols and processes for identifying, evaluating, and remedying potential problems in its products. It also includes such information from suppliers. Disclosing such information would allow Nissan's competitors to duplicate Nissan's design, research, and remediation protocols without incurring the substantial expense associated with developing their own protocols. This information, therefore, is commercially valuable, and its release would cause Nissan substantial competitive harm. See *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 (D.C. Cir. 1981) (in determining whether information should be withheld pursuant to Exemption 4, consideration should be given to "whether release of the requested information, given its commercial value to competitors, and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it"); *Public Citizen Health Research Grp. v. FDA*, 997 F. Supp. 56, 63 (D.D.C. 1998) (finding competitive harm based on the fact that disclosure would allow competitors "to follow in [the submitters'] footsteps, and thereby get a competitive product to the market sooner than otherwise"), *aff'd in part & rev'd in part*, 185 F.3d 898 (D.C. Cir. 1999). "Valuable intellectual property," such as this information, is protected from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989).

2. Test Results, Analyses, and Protocols

The information for which confidential treatment is sought includes highly sensitive information about Nissan's test results, protocols, and analyses of its products. It also includes such information from suppliers. Releasing these materials would give a competitor the fruits of Nissan's tests and test developmental strategies without having to incur the substantial costs associated with the development of their own analyses and test results, thereby enabling them to bring competitive products to market sooner and to improve their own development procedures at the expense of Nissan. Disclosure of this information would "eliminate much of the time and effort that would otherwise be required to bring to market a product competitive with [Nissan's products]. This is clearly the type of competitive harm envisioned in Exemption 4 * * * ." *Public Citizen Research Grp. v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999) ("*Public Citizen II*").

withhold information pursuant to Exemption 4, consideration should be given to "whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it"); see also, e.g., *Public Citizen Health Research Group v. FDA*, 997 F. Supp. 56, 63 (D.D.C. 1998) (finding competitive harm based in part on the fact that disclosure would allow competitors "to follow in [the submitter's] footsteps, and thereby get a competitive product to the market sooner than otherwise"). Accordingly, because the release of the information in this category would result in "substantial harm to the competitive position" of Nissan, it is entitled to protection from public disclosure. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). See also, e.g., *Critical Mass Energy Project v. NCR*, 975 F.2d 871, 878 (D.C. Cir. 1992); *Occidental Petroleum v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989) (information relating to product development is "valuable intellectual property" entitled to protection from public disclosure under Exemption 4).

3. Design Information and Performance Factors and Standards

Some of the documents reveal competitively sensitive and highly valuable design and performance factor information of Nissan and its suppliers. A number of the documents set forth key design elements for the subject vehicles, and others reveal the performance factors that Nissan considers significant in developing and marketing products. Like the other information in this submission, the design and standards information reflected in these documents is the product of Nissan's years of experience in the industry and reflects substantial investments of time and money in its development. Thus, disclosure of the information would be a windfall to Nissan competitors (especially to new market entrants), as well as to would-be suppliers, because it would enable them to incorporate design elements and to discover the performance standards that Nissan considers significant without incurring the substantial time and expense necessary to develop their own designs and standards. As a result, Nissan would suffer substantial competitive harm. See, e.g., *Worthington Compressors*, 662 F.2d at 51 ("Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.") (footnote omitted); *Public Citizen II*, 185 F.3d at 905. In addition, some of the documents are entitled to protection pursuant to NHTSA's class determination contained in Appendix B to Part 512. See 49 CFR Part 512, Appendix B, (1).

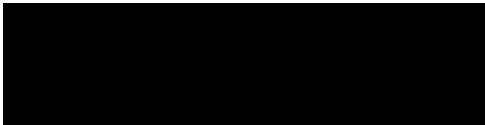
* * * *

Nissan requests that the information discussed above be granted confidential treatment on a permanent basis. Disclosure of the information would cause Nissan and its suppliers substantial competitive harm, and there is no foreseeable time in the future when such disclosure would not inure to the competitive advantage of Nissan's competitors and cause Nissan substantial competitive harm.

If you need any clarifications or additional information, please contact me. If you receive a request for disclosure of these documents before you have completed your review of our claim for confidential treatment, Nissan respectfully requests notification of the request and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Should you or your staff have any questions or concerns regarding this request, please contact me at (615) 725-5527. Thank you for your consideration in this matter.

Sincerely,



Wilbert Swindell
Manager, Technical Compliance
Nissan North America, Inc.

Enclosures

CERTIFICATE IN SUPPORT OF REQUEST FOR CONFIDENTIALITY

I, Wilbert Swindell, pursuant to the provisions of 49 CFR 512, state as follows:

(1) I am Wilbert Swindell, Manager, Technical Compliance and I am authorized by Nissan North America, Inc. (NNA) to execute this document.

(2) I certify that the information contained in the attached documents is confidential and proprietary and is being submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. Section 552(b)(4) (as incorporated by reference in and modified by the statute under which the information is being submitted.)

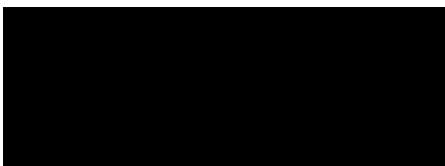
(3) I hereby request that the information contained in Nissan's response be protected on a permanent basis.

(4) This certification is based on the information provided by the responsible Nissan 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 Nissan.

(5) Based upon that information, to the best of my knowledge, information and belief, the information for which Nissan has claimed confidential treatment has never been released or become available outside Nissan or its suppliers.

(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 Nissan because of unauthorized or inadvertent disclosure; and

(7) I certify under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of March, 2024.



Wilbert Swindell
Manager, Technical Compliance
Nissan North America, Inc.