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March 22, 2024

Mr. John Donaldson
Office of the Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE, Room W41-227
Washington, DC 20590

Re: Request for Confidential Treatment of Information Pertaining to PE24-002

Dear Mr. Donaldson:

Today, Ford Motor Company ("Ford") is submitting its response to the above referenced Preliminary Evaluation request. Ford has determined that the response contains confidential business information that should be accorded confidential treatment under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), and NHTSA's regulations at 49 C.F.R. Part 512. Therefore, Ford is requesting confidential treatment of the designated information.

The information required by your regulations is set forth below.

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

We are supplying a copy of the entire submission, together with "public" copies that do not include the confidential information. PDF files containing a copies of the documents are labeled "CONFIDENTIAL" and documents contained in the electronic files are marked "ENTIRE PAGE CONFIDENTIAL BUSINESS INFORMATION" or "CONFIDENTIAL BUSINESS INFORMATION" in the top margin as appropriate. The second PDF for each corresponding file is labeled "PUBLIC" and contains a "public" copy of the documents. Ford notes that these PDF documents were created using Adobe Acrobat 9.0 Professional and must be printed by selecting "document and comments" or "document and markups" in order to print the appropriate bracket markings. The confidential business information in the submission consists of engineering designs, design change information; engineering specifications, standards, and drawings; failure mode analyses; test standards, test procedures, and information about the scope of Ford testing; internal analyses, product evaluation process and capacities information; information about extended warranties, and warranty reduction strategies.

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) ("Food Marketing Institute"), the 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*.

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

FOIA Exemption 4 precludes the disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The information for which Ford is seeking confidential treatment is clearly "commercial" because Ford qualifies as a "person" under the case law governing Exemption 4. *See, e.g., Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000).

In *Food Marketing Institute*, the Supreme Court held that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." 139 S. Ct. at 2366.

Ford customarily and actually treats the information for which it is requesting confidential treatment as private. Ford has specifically taken steps to protect the confidentiality of this information by limiting access to only those individuals within Ford who need access to this information in the ordinary course of business. To the best of Ford's knowledge and belief, this confidential information has not been publicly disclosed by Ford.

With regard to an "assurance of privacy," the Supreme Court expressly declined to hold that such an assurance actually is a *necessary* condition for confidentiality. *See Food Marketing Inst.*, 139 S. Ct. 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 has concluded in numerous cases that an assurance of confidentiality is *not* required. *See Naumes v. Dep't of the Army*, 2022WL 594541, at *8 (D.D.C. Feb. 28, 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 and citation 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>, 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.”).

Because the voluntary submission standard 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. Here, Ford and other companies have made many voluntary confidential submissions to NHTSA throughout the years. During that time, NHTSA consistently treated voluntarily submitted information as confidential if, as is the case here, the submitter of the information does not customarily disclose such information to the public. NHTSA’s past practice of treating information like that being submitted today as confidential should be deemed to suffice as an “assurance” of privacy—to the extent that an assurance is required at all.

The competitive nature of the harm that would result from a disclosure of the information also is relevant to the reasonable foreseeability of that harm. 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*, 2022 WL 594541, at *10. Here, the submission includes a great deal of information about how Ford conducts internal analyses, approaches quality control issues, tracks emerging trends in product quality issues, and engages in product evaluation and remediation processes. The disclosure of such information would cause Ford substantial competitive harm. As the D.C. Circuit has noted, information that could be used by competitors “to improve their own manufacturing and quality control systems” merits protection under FOIA Exemption 4. See *United Technologies Corp. v. U.S. Dep’t of Def. & Def. Contracting Mgmt. Agency*, 601 F.3d 557, 564 (D.C. Cir. 2010). Every vehicle manufacturer must perform internal analyses and address product quality issues. A disclosure revealing how Ford addresses these matters would enable competitors to develop analytic techniques and product evaluation processes at far less cost and in far less time than independent development efforts would involve. As a result, competitors could use the information to bring competitive products to market faster and at less expense, and to address product evaluation issues at lower cost, than they otherwise could. Like much of the other information at issue in this request, this information also would shed light on Ford’s operational capabilities.

The disclosure of the designs, design process information and design change information would be likely to cause substantial harm to Ford’s competitive position. Ford developed this information through investments of considerable money, time, expertise, and effort. Independent

development or reproduction of the information would likewise require great expense, time, expertise, and effort. The disclosure of such information, therefore, would provide a huge windfall to Ford's competitors. Such windfalls are not an intended by-product of the FOIA, and Exemption 4 is properly invoked to prevent them. *Worthington Compressors*, 662 F.2d at 51.

Accordingly, the information that Ford is submitting is entitled to confidential treatment under *Food Marketing Institute*: The information is both customarily and actually treated as private by Ford, and it is being provided to the government with an assurance of privacy derived from the expectation that NHTSA will continue its past practice of withholding voluntarily-submitted confidential commercial information.

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

The submission contains a number of engineering drawings, engineering specification requirements for future plans on specific models that are exempt from disclosure under the Class Determination set forth in paragraph 1 of Appendix B of Part 512.

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

Because the information for which confidential treatment is being sought is the kind of information that Ford does not anticipate ever customarily disclosing to the public, and because the information is likely to retain its competitive value indefinitely, Ford requests that the information be accorded confidential treatment on a permanent or indefinite basis.

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

Please direct all written notices to me at Ford Motor Company, Suite 400, Fairlane Plaza South, 330 Town Center Drive, Dearborn, Michigan 48126. Please direct all non-written communication to Ms. Julie L. Ludington, Esq. in Ford's Office of the General Counsel who may be contacted by telephone at (313) 570-7933.

* * *

Ford has supplied one copy of the entire submission. A certificate in support of confidentiality executed on behalf of Ford is included as Attachment 1.

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, Ford respectfully requests notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted. In the event that the agency should conclude that all or part of the submitted information is not to be given confidential treatment, Ford asks the agency to provide reasonable notice prior to any contemplated disclosure in order that Ford may pursue such legal remedies as it may choose.

Sincerely,



for
Emily Frascaroli

Enclosure