



Fisker Inc.
1888 Rosecrans Avenue
Manhattan Beach, California 90266
Fiskerinc.com

April 18, 2024

Mr. John Donaldson
Deputy Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: NHTSA Information Request PE24-005 Request for Confidential Treatment

Dear Mr. Donaldson,

Today, Fisker Group Inc. ("Fisker") is submitting its response to the information request in the above-referenced investigation. Because the response includes confidential business information that should be withheld from disclosure, Fisker is submitting the response 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 your regulations is set forth below.

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

The documents and pages for which Fisker is requesting confidential treatment are outlined in Attachment 1. We are supplying two copies of the entire confidential submission, together with a "public" copy that does not include the confidential information. Fisker is providing two uploads, one upload containing copies of confidential documents labeled "CONFIDENTIAL" and documents contained in the electronic files are marked "ENTIRE PAGE CONFIDENTIAL BUSINESS INFORMATION" in the top margin as appropriate. Fisker is providing a second upload labeled "REDACTED" and contains a "public" copy of the documents. The confidential business information in the submission consists of test results, analysis, engineering assessments and judgement, FMEA methodologies, engineering specifications, design information of Fisker's suppliers, and personal identifying information of customers, and the methodologies for which Fisker assesses and handles customer contacts.

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

Prior to the U.S. 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 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*, 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. Fisker customarily and actually treats the information for which it is requesting confidential treatment as private and does not, in the normal course of business, release this information outside of the company. The suppliers with which some of the information has been shared also treat the information as private.



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As for an assurance of confidentiality, 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. The United States District Court for the District of Columbia has repeatedly stated that an assurance of confidentiality is **not** required. *See Naumes v. Dep’t of the Army*, 588 F. Supp. 3d 23, 40 (D.D.C. 2022); *Renewable Fuels Ass’n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021); *Cause of Action Inst. v. Exp.-Import Bank of the United States*, Civil Action No. 19-1915 (JEB), 2022 U.S. Dist. LEXIS 15170, at *55-56 (D.D.C. Jan. 27, 2022).

As explained in *Renewable Fuels Ass’n*, requiring assurances would lead to “many fairly arbitrary disputes over whether such an assurance can be implied.” 519 F. Supp. 3d at 12. Even if an assurance of confidentiality were required, an *implied* assurance would be sufficient, and such an implied assurance could be inferred from a number of considerations, including an agency’s past practice. *See Flyers Rights Educ. Fund, Inc. v. FAA, Civil Action No. 19-3749 (CKK)*, 2021 U.S. Dist. LEXIS 175977, at *25-27 (D.D.C. Sep. 16, 2021); *see also* Department of Justice Office of Information Policy (“OIP”), “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>.

Here, if an assurance of any kind were required, Fisker has an ample basis for an implied assurance of confidentiality, both because the designated confidential information would have been protected from disclosure under the former more-demanding substantial-competitive-harm standard and because of NHTSA’s past confidentiality practices. Indeed, under the now-superseded substantial competitive-harm standard, manufacturers routinely sought and received confidential treatment for cost and financial information and supplier capabilities and relationships because such information could provide competitors with insights into a submitter’s market penetration, operational practices and capacities, marketing plans, commercial strategies, and costs.

As for the other kinds of information for which Fisker is seeking confidential treatment, the undersigned is aware that NHTSA has routinely accorded confidential treatment to technical test results, analysis, engineering assessments, engineering specifications, FMEA, design information of Fisker’s suppliers, and personal identifying information of customers. In doing so, NHTSA has followed the courts in recognizing that this type of information would enable a competitor to bring a competitive product to market more quickly and with less effort and satisfied the former substantial-competitive-harm standard. *See, e.g., Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999). The D.C. Circuit also underscored the competitive significance of quality assurance information, noting that information that could be used by competitors to “improve their own manufacturing and quality control systems” is competitively valuable and should be withheld from disclosure under FOIA Exemption 4. *United Technologies Corp. v. U.S. Dep’t of Def. & Def. Contracting Mgmt. Agency*, 601 F.3d 557, 564 (D.C. Cir. 2010).

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))

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



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

Please direct all notices to me at jwalker@fiskerinc.com.

* * *

Fisker is supplying a copy of the entire submission, together with a "public" copy that does not include the confidential information. As noted above, we are also supplying an overview to assist in the identification of the documents for which Fisker and its suppliers are requesting confidential treatment as Attachment 1. A certificate in support of confidentiality executed on behalf of Fisker is included as Attachment 2.

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, Fisker 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, Fisker asks the agency to provide reasonable notice prior to any contemplated disclosure in order that Fisker may pursue such legal remedies as it may choose.

Sincerely,

A handwritten signature in blue ink that reads "Justin Walker".

[Justin Walker \(Apr 17, 2014 2:14 PM PDT\)](#)
Justin Walker VP, Managing Counsel

Fisker Group Inc.

Enclosures



Fisker Inc.
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Attachment 1

PE24-005

Request for Confidential Treatment of Document

Tab	Document Type	Document Description	Reason for Confidential Treatment
A	Test Results, Analysis, Engineering Assessments and Judgement, and FMEA	Documents reflecting the design and specifications, or the results of engineering testing and/or engineering assessments conducted by Fisker, or on behalf of Fisker by a third-party vendor or supplier; Documents containing personal identifying information of customers and Fisker's methodologies for the assessment and handling of customer contacts.	Information concerning or revealing the design, specifications and technical requirements and assessments of Fisker or its suppliers is of economic value to competitors and could be used by competitors to improve their own products and processes without the need to invest the substantial resources invested by Fisker and/or its suppliers; Additionally, the manner in which Fisker conducts technical assessments of customer contacts concerning its products, and the methodologies for which Fisker assesses and handles customer contacts could be used by competitors to also improve their own processes and products. Public disclosure of this information would result in significant competitive harm.

PE24-005

**CERTIFICATE IN SUPPORT OF REQUEST
FOR CONFIDENTIALITY**

I, Justin Walker, pursuant to the provisions of 49 CFR Part 512, state as follows:

1. I am Vice President, Managing Counsel of Fisker Group Inc. ("Fisker"), and I am authorized by Fisker to execute this certificate on its behalf;
2. The information attached to Fisker's letter to NHTSA's Office of the Chief Counsel dated April 18, 2024, contains confidential and proprietary data and is 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 indicated documents be accorded confidential treatment on a permanent or indefinite basis;
4. This certification is based on information provided by the responsible Fisker personnel who have authority in the normal course of business to release the type of information for which a claim of confidentiality has been made to ascertain whether such information has ever been released outside Fisker;
5. Based upon such inquiries, to the best of my knowledge, information and belief, the information for which Fisker has claimed confidential treatment has never been released or become available outside Fisker except as hereinafter specified:
 - i. Portions of these documents may be shared with Fisker suppliers with the expectation that they will be kept confidential.
 - ii. During the course of defending itself in litigation or arbitration, Fisker may have been, or may be required to produce such information subject to a protective order or pursuant to a legal request.
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 Fisker because of unauthorized or inadvertent disclosure, except as stated in Paragraph 5; and

I certify under penalty of perjury that the foregoing is true and correct.

Executed on this the 18th day of April, 2024.

Justin Walker
Justin Walker (Apr 17, 2024 21:45 PDT)