

This class determination remains applicable insofar as it does not conflict with *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). The Agency is in the process of evaluating whether any changes need to be made to its regulations and guidance to conform with this recent U.S. Supreme Court decision and will update class determinations, as appropriate.

US EPA ARCHIVE DOCUMENT

Class Determination 1-13, Confidentiality of Business Information Submitted in Certification Applications for 2013 and subsequent model year Vehicles, Engines and Equipment

U.S. Environmental Protection Agency (EPA) regulations issued under the authority of the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, prescribe procedures for determining whether business information submitted to the Agency and claimed as confidential by third parties should be released to the public when disclosure is requested under the Act. 40 C.F.R. § 2.207 of the regulations provides that a determination that information is or is not entitled to confidential treatment for reasons of business confidentiality may be made on a class basis if one or more characteristics common to all items of such information necessarily will result in identical treatment under the regulations for each such item of information. In accordance with the regulation, the Assistant General Counsel for the General Law Office, as the General Counsel's designee, herein makes the requisite determination that information submitted by vehicle, engine, and equipment manufacturers for the purpose of certification and compliance with Clean Air Act regulatory requirements will be treated identically and should be the subject of a class determination. This class determination will apply prospectively for 2013 and subsequent model year vehicles, engines and equipment regulated by the Office of Transportation and Air Quality and only covers information that is submitted by manufacturers to obtain certificates of conformity. EPA intends to treat this information in a manner largely consistent with previously applicable class determinations for the same type of information.¹

In accordance with 40 C.F.R. § 2.207, I find that:

- 1) EPA will possess large numbers of applications for certification and associated compliance reports for vehicles, engines and equipment for model year 2013 and beyond, which contain information claimed to be entitled to confidential treatment for reasons of business confidentiality. The Agency requires the submission of such documents to assure compliance with Clean Air Act requirements and will continue to require such documents in the future.
- 2) Certain categories of information contained in documents submitted to the Agency by manufacturers of vehicles, engines, and equipment share common characteristics that necessarily will result in identical treatment with respect to claims of business confidentiality. It is therefore appropriate to treat such information on a class basis for purposes of determining whether information is entitled to confidential treatment.

¹ See Class Determination 2-80, Confidentiality of Business Information Submitted in Applications for Certification of Light-Duty Motor Vehicles for Model Year 1981," August 21, 1980; Class Determination 1-79, Confidentiality of Business Information Submitted in Applications for Certification of Light-Duty Motor Vehicles for Model Year 1981," 1979; 3-78, Confidentiality of Business Information Submitted in Applications for Certification of Light-Duty Motor Vehicles for Model Year 1980," August 14, 1978; Class Determination 4-77 "Confidentiality of Business Information Submitted in Applications for Light-Duty Motor Vehicle Certifications Through Model Year 1979," May 12, 1977; 2-77, Confidentiality of Business Information Submitted in Applications for Certification of Light-Duty Motor Vehicles for Model Year 1978," March 31, 1977.

- 3) A class determination that such information is or is not entitled to confidential treatment would streamline the Agency's response to requests for information under the Act and would further the purposes of the Act by assuring the American public timely access to requested information, consistent with the rights of affected businesses to be protected from improper disclosure of confidential treatment. It will also serve a useful purpose in that it will remove the necessity of clearing all of the information in each application prior to its being made available to the public.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions of the Act. One of these exemptions is for the "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552(b)(4)). The information contained in the application for certification is clearly commercial or financial information. The real issue is whether the information is exempt from disclosure as "trade secrets" or is otherwise "confidential" within the meaning of 5 U.S.C. 552(b)(4).

Before EPA may conclude that information in an application for certification is exempt from disclosure as trade secret or confidential information, the Agency must find that the information is in fact maintained in confidence by the business and is not publically available. If it is not maintained in confidence or is publically available, it is not entitled to confidential treatment, and EPA must disclose the information.

Information that has not been obtained voluntarily, has been kept confidential and has not been made public in any way may be entitled to confidential treatment under 5 U.S.C. 552(b)(4) if it meets one of the tests set out in National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). See also Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992). Under Morton, commercial or financial information may only be withheld from disclosure if disclosure by EPA would be likely: (1) to impair the ability of the Government to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person who submitted it to the Government. The first test is not applicable to the information in applications for certification because release of the information is unlikely to result in a diminution of the reliability or quality of what is submitted as the submission is required by statute (or regulation) in order for the submitter to receive certification and compliance with Clean Air regulatory requirements. The second test is applicable if disclosure of specific information would cause substantial harm to the competitive position of the manufacturer submitting an application.

Consistent with previous class determinations, I have determined that the information in the applications for certification vehicles, engines, and equipment for model year 2013 and beyond will be treated as outlined below. The regulated industries covered by this document are:

- Light-duty and medium duty passenger vehicles (LD)
- Nonroad Spark-ignition (marine, small, and large) engines (NRSI)
- Nonroad evaporative components and equipment (Nonroad Evap)
- Locomotives (Loco)
- Nonroad Compression-ignition engines and equipment (NRCI)

Motorcycles, All-terrain Vehicles, and Snowmobiles (MC-ATV-Snow)
 Heavy-duty On-highway vehicles and engines (HD On-highway)²
 Marine Compression-ignition engines (Marine CI)

Information Not Entitled to Confidential Treatment

I have determined that any data which concerns emission test results from vehicle, engine, or equipment models or prototype test vehicles, engine, or equipment and that is submitted by manufacturers to obtain certificates of conformity is not entitled to confidential treatment (see Table 1 below). Under section 208 of the Clean Air Act (42 U.S.C. 7542), “emission data” is not entitled to confidential treatment and must be released at any time. Section 2.301 of the regulations defines “emission data” and further clarifies that emission data, standards or limitations, and any other information provided under section 208 of the Clean Air Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public. While Section 2.301 does allow confidential treatment for information concerning any product, method, device, or installation prior to its introduction into commerce, this allowance does not apply to the extent that such information is “necessary to allow EPA to disclose that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicality, or attainability (or lack thereof) of an existing or proposed standard or limitation.” Emission test results are necessary for such purposes, and so are never entitled to confidential treatment. Emission test results data are the final test result measurements of pollutants required to be measured for the vehicle/engine in question for a given test cycle according to applicable regulations. Emissions test results data includes, for example, test results of measured pollutants such as CO, CO₂, NO_x, etc , as applicable. Therefore, any claim for confidential business treatment of “emission test results data,” as described above, will be denied.

Table 1 - Manufacturer Information Not Considered to be CBI								
	LD	NRSI	Nonroad Evap	Loco	NRCI	MC-ATV-Snow	HD On-highway	Marine CI
Emission Test Results Data	X	X	X	X	X	X	X	X

X- Information applicable to this industry category

Information Entitled To Confidential Treatment Until Introduction Into Commerce

² Although this class determination is generally applicable to the heavy-duty on-highway vehicle and engine industry, it is not applicable to heavy-duty greenhouse gas (HD GHG) certification for the tractor and vocational vehicles category. While we do believe that the same principles will likely apply to HD GHG compliance, we are not extending this class determination to HD GHG compliance for tractor and vocational vehicles at this time because this program is still in the early stages of its implementation. We intend to issue a class determination applicable to the HD GHG compliance program for tractors and vocation vehicles at a later date. Manufacturers concerned about CBI related to HD GHG compliance should also refer to statements EPA has made in the HD GHG rulemaking and throughout the program’s implementation (see e.g., “EPA’s Greenhouse Gas (GHG) Emission Requirements for Heavy-Duty Engines and Vehicles – Overview,” November 3, 2011, at page 11, available at <http://www.epa.gov/otag/climate/documents/hd-ghg-workshop-overview.pdf>).

I have determined that the information set forth below in table 2 should be entitled to confidential business treatment until the date on which the vehicle, engine, or equipment model in question is introduced into commerce. This information will only be given confidential treatment if the manufacturer (1) asserts that the information is entitled to confidential treatment, and (2) has not waived or withdrawn that assertion. Inherent in assertion (1) are the following representations by the manufacturer: (a) the manufacturer has maintained the information in confidence, (b) the information cannot be readily obtained by others by legitimate means, and (c) disclosure of the information to the public prior to model introduction into commerce would be likely to cause substantial harm to the manufacturer’s competitive position. Upon request by EPA, the manufacturer is expected to substantiate these representations to EPA’s satisfaction.

Table 2 - Manufacturer Information Considered to be CBI until "Introduction Into Commerce"								
	LD	NRSI	Nonroad Evap	Loco	NRCI	MC-ATV-Snow	HD On-highway	Marine CI
Vehicle/Engine/Evaporative Family Information	X	X	X	X	X	X	X	X
Models and Parts information	X	X	X	X	X	X	X	X
Engine Family/Evaporative Family/Test Group Determinants	X	X	X	X	X	X	X	X
Fuel Economy Label Information	X	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Footprint Information	X	n/a	n/a	n/a	n/a	n/a	n/a	n/a
CAFE and GHG Information	X	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Adjustable Parameters	X	X	n/a	X	X	X	X	X
Certificate Request Information	X	X	X	X	X	X	X	X
Emission Control System Information	X	X	X	X	X	X	X	X
Contacts/Importers/Agents of Service/Ports	X	X	X	X	X	X	X	X
Exhaust Emission Standards and Family Emission Limits (FELs)	X	X	X	X	X	X	X	X
Emission Deterioration Factors	X	X	X	X	X	X	X	X
Test Information	X	X	X	X	X	X	X	X
Documents - version redacted by manufacturer	X	X	X	X	X	X	X	X

X – Information applicable to this industry category

n/a – Information not applicable to this industry category

Note: Certification correspondence that relates directly to the categories in this table will be afforded the same protection as the underlying information.

Prior to introduction of the vehicle, engine, or equipment model into commerce, manufacturers typically keep information about new models confidential. Manufacturers submit this information to EPA well in advance of producing and marketing new vehicles, engines, or equipment. If a manufacturer’s competitors were able to acquire this information prior to introduction into commerce, they could use the information to compete for additional share in a particular market segment. This would be likely to cause substantial competitive harm to the manufacturer who submitted the information. For these reasons, if a manufacturer makes the representations set out above, I have determined that the information is entitled to confidential business treatment until the date of

introduction into commerce, unless EPA becomes aware that the particular information has become generally available to the manufacturer's competitors or requests the manufacturer to substantiate these representations to EPA's satisfaction.

The information listed in Table 2 is generally readily discernible once the model in question has been introduced into commerce. For this reason, the class determination for the information in Table 2 provides for confidential treatment on a class-wide basis only until the model in question is introduced into commerce. Manufacturers, however, are not precluded from requesting confidential treatment for the information in Table 2 for models that already have been introduced into commerce, or from requesting that a confidential treatment determination for the information in Table 2 be continued beyond the date when the model in question is introduced into commerce. Such requests will not be addressed under this class determination, but rather will be reviewed on a case-by-case basis using the substantial-competitive harm standard applicable generally to requests for confidential treatment under FOIA Exemption 4. In the situation where a manufacturer wishes to assert that information covered under this section is entitled to confidential treatment, the manufacturer must state clearly that it is claiming specific information listed in Table 2 (and state what the information is) as confidential beyond the date of introduction and provide reason why the material is appropriately listed as CBI. Failure to do so constitutes a waiver of any further claim.

Information Entitled to Confidential Treatment

Certain types of information in applications and compliance reports that may be entitled to confidential treatment beyond the date on which the model in question has been introduced into commerce. I have determined that the information in Table 3 below may be entitled to confidential treatment indefinitely, both before and after model introduction into commerce. In accordance with EPA regulations at 40 C.F.R. sections 2.204 and 2.205, this information will be entitled to confidential treatment if the manufacturer (1) asserts that the information is entitled to confidential treatment, and (2) has not waived or withdrawn that assertion. Inherent in assertion (1) are the following representations by the manufacturer: (a) they have maintained the information in confidence, (b) the information cannot be readily obtained by other legitimate means, and (c) disclosure of the information to the public both before and after model introduction would be likely to cause substantial harm to the manufacturer's competitive position. Upon request by EPA, the manufacture would be expected to substantiate these representations to EPA's satisfaction. As noted above, if a manufacturer is unable to show harm to its competitive position after model introduction into commerce but can show harm prior to model introduction into commerce, the information will be entitled to confidential treatment prior to introduction into U.S. commerce.

Table 3 - Manufacturer Information Entitled to Confidential Treatment

	LD	NRSI	Nonroad Evap	Loco	NRCI	MC-ATV-Snow	HD On-highway	Marine CI
Bond Information	n/a	X	n/a	n/a	n/a	n/a	n/a	n/a
Projected Sales	X	X	X	X	X	X	X	X
Production Start and End Dates	X	X	X	X	X	X	X	X
Aftertreatment Device Details	X	X	X	X	X	X	X	X
Auxiliary Emission Control Devices (AECs)	X	X	X	X	X	X	X	X
Technical Description Information	X	X	X	X	X	X	X	X
Regulatory Compliance Plans (eg: Averaging, Banking and Trading pre-production plans)	X	X	X	X	X	X	X	X
Engine Family Comments Deterioration Factor Test Procedures and Underlying Information	X	X	X	X	X	X	X	X

n/a – Information not applicable to this industry category

X – Information Applicable to this industry

Note: Certification correspondence that relates directly to the categories in this table will be afforded the same protection as the underlying information.

The types of information in Table 3 may be confidential both before and after model introduction into commerce if they are not readily ascertainable from an examination of the vehicle model in question. For example, information concerning catalysts might reveal the formulation or method of making a catalyst that would only be available from an analysis of the catalyst in a vehicle or engine. However, catalyst information would not be readily ascertainable without significant investment of time and reverse engineering by a person knowledgeable with emission control systems and catalyst development. Therefore, this information would be entitled to confidential treatment both before and after introduction into U.S. commerce. As another example, information concerning projected sales is conjectural and might reveal the manufacturer’s marketing projections or strategy for a particular model or its technique of market analysis or sales and income projections. Given this circumstance, this information is also entitled to confidential treatment both before and after introduction into commerce. If EPA receives a request for this information, the agency will request that the manufacturer substantiate its confidentiality claims, consistent with the regulations at 40 C.F.R. Part 2. The agency expects that information in the substantiation might reveal other confidential information.

Consistent with the substantiation process of 40 C.F.R. § 2.205, if EPA determines that the disclosure of certification and compliance information would likely result in substantial competitive harm to a manufacturer, we will determine that the information is exempt from disclosure under 5 U.S.C. 552(b)(4)). EPA policy requires that any information that is exempt under 5 U.S.C. 552(b)(4)) must be maintained subject to any modification that might arise under 40 CFR § 2.205(h) or any other requirement of 40 C.F.R. Part 2.