

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 3-78

CONFIDENTIALITY OF BUSINESS INFORMATION SUBMITTED IN APPLICATIONS
FOR CERTIFICATION OF LIGHT-DUTY MOTOR VEHICLES FOR MODEL YEAR 1980

On March 31, 1977, the General Counsel issued Class Determination 2-77 "Confidentiality of Business Information Submitted in Applications for Light-Duty Motor Vehicle Certifications Through Model Year 1978." On May 12, 1977, the General Counsel issued Class Determination 4-77 "Confidentiality of Business Information Submitted in Applications for Light-Duty Motor Vehicle Certifications Model Year 1979." The Office of Mobile Source Air Pollution Control (MSAPC) has now completed preparation of the application for certification of light-duty motor vehicles for model year 1980. MSAPC has requested that I issue a class determination on the confidentiality of the information to be contained in the 1980 applications for certification.

Under 40 CFR 2.207 I have authority to issue class determinations concerning entitlement of business information to confidential treatment. In the case of applications for certification of light-duty motor vehicles for model year 1980, I have found:

(1) EPA will possess large numbers of applications for certification of light-duty motor vehicles for model year 1980.

(2) The information contained in the applications is of the same character with only slight modifications that can be dealt with individually. It is proper to treat all of the applications as in the same class for purposes of this determination.

(3) A class determination will 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.

For the 1980 model year, MSAPC has made changes in the format of the application for certification; however, the substance of the application remains essentially the same as in past years. The new format is divided into 16 sections each with subsections. This Determination refers to these sections or subsections by number and title.

EPA may withhold information from disclosure under the Freedom of Information Act if the information falls within one of the exemptions of the Act. One of these exemptions is for "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 publicly available. If it is not maintained in confidence or is publicly available, it is not entitled to confidential treatment, and EPA must disclose the information.

Information that 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). 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 this information is not voluntarily submitted, and EPA's ability to obtain it would not be harmed by disclosure (40 CFR 2.208(e)(2)). The second test is applicable if disclosure of specific information would cause substantial harm to the competitive position of the manufacturer submitting an application.

In keeping with the Class Determination 2-77, I have determined that the information in the applications for certification for light-duty motor vehicles for model year 1980 will be treated as follows:

I. I have determined that the information set forth below is never entitled to confidential treatment because it is generally available to the public or competitors and because disclosure would not be likely to cause any harm to the competitive position of any manufacturer. Even if a manufacturer makes a claim for confidential treatment concerning this information, it will be denied.

- A. All information in Section 01 "Communications."
- B. All information in Section 02 "Statement of Business Confidentiality" except substantiating information (see Part III of this Determination).
- C. All information in Section 04 "Facility and Equipment."
- D. All information in Section 05 "Test Procedures."
- E. All information in Section 14 "Test Schedule Forecast."

In addition, any data which concerns actual emissions from vehicle models or prototype test vehicles is never entitled to confidential treatment. Under section 208 of the Clean Air Act (42 U.S.C. 7542), "emission data" are not entitled to confidential treatment and must be released at any time. Any claim for confidential treatment of emission data will be denied.

II. I have determined that the information set forth below may be entitled to confidential treatment until the date on which the vehicle model in question is introduced into the public market. This information will only be given confidential treatment if the manufacturer (1) asserts that the information is entitled to confidential treatment, (2) has not waived or withdrawn that assertion, and (3) can show, to EPA's satisfaction, that the manufacturer has maintained the information in confidence, the information cannot be readily obtained by others by legitimate means, and disclosure of the information to the public prior to model introduction would be likely to cause substantial harm to the manufacturer's competitive position.

- A. All information in Section 03 "Fuels and Lubricants."
- B. All information in Section 06 "Maintenance and Warranty."
- C. All information in Section 07 "Label Format."
- D. All information in Section 08 "General Technical Description" except subsection 08.08.00.00 "Catalyst" (see part III of this Determination).
- E. All information in Section 09 "Evaporative Emission Family Description" except subsection 09.04.00.00 "Evaporative emission family sales" (see part III of this Determination).
- F. All information in Section 10 "Engine Family Descriptions" except subsections 10.07.05.00 "Catalyst Features," 10.08.00.00 "Projected engine family sales," and 10.10.25.00 "Projected sales" (see part III of this Determination).
- G. All information in Section 11 "Starting and Shifting Schedules."
- H. All information in Section 12 "Vehicle Books."
- I. All information in Section 13 "Evaporative Emission Control Deterioration Program."
- J. All information in Section 15 "Revisions."
- K. All information in Section 16 "Request for Certificate."

Prior to introduction of the vehicle model to the public market, manufacturers keep information about new models secret. Manufacturers submit this information to EPA well in advance of marketing new vehicles. If a manufacturer's competitors were able to acquire this information

prior to introduction, they would be likely to use the information to increase their market share and decrease the market share of the manufacturer. This would be likely to cause substantial competitive harm to the manufacturer. For these reasons, if the manufacturer makes the representations set out above to EPA's satisfaction, I have determined that the information is entitled to confidential treatment until the date of introduction, unless EPA becomes aware that the particular information has become generally available to the manufacturer's competitors.

Because the information consists of engineering details or other information about the vehicle models that the manufacturer plans to market, once the vehicle model in question has been marketed most of the information will be available to the public through examination and testing of the vehicle model. Any information not readily available through examination is background information, the release of which would not be likely to cause substantial competitive harm. If a manufacturer makes a claim of confidential treatment after the date on which the vehicle model in question is introduced to the public market, it will not be honored.

III. There are some types of information in applications that may be entitled to confidential treatment beyond the date on which the model in question has been introduced into the public market. I have determined that the information set forth below may be entitled to confidential treatment both before and after model introduction if

the manufacturer (1) asserts that the information is entitled to confidential treatment, (2) has not waived or withdrawn that assertion, and (3) can show, to EPA's satisfaction, that the manufacturer has maintained the information in confidence, the information cannot be readily obtained by others by legitimate means, and 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. (If the manufacturer is unable to show harm to its competitive position after model introduction but can show harm prior to model introduction, the information will be treated in accordance with part II of this Determination).

A. Substantiating information in Section 02 "Statement of Business Confidentiality" (see part IV of this Determination).

B. All information in subsection 08.08.00.00 "Catalyst."

C. All information in subsection 09.04.00.00 "Evaporative emission family sales."

D. All information in subsections 10.07.05.00 "Catalyst Features," 10.08.00.00 "Projected engine family sales," and 10.10.25.00 "Projected sales."


E. Blueprints that may have been submitted to supplement the engineering information in the various sections of the application.

Each of these types of information may be confidential both before and after model introduction if they are not readily ascertainable from an examination of the vehicle model in question. For example, blueprints may reveal more information than would be apparent from an

engineering examination or test of the vehicle. Information concerning catalysts might reveal the formulation or method of making a catalyst that would not be available from an analysis of the catalyst in the vehicle. Information concerning projected sales are conjectural and might reveal the manufacturer's marketing projections or strategy for a particular model or its techniques of market analysis or sales and income projections. Information in the substantiation might reveal other confidential information to protect confidential information in the application.

IV. Any information submitted in Section 02 "Statement of Business Confidentiality" to substantiate a claim of confidentiality which pertains to the claim, is not otherwise possessed by EPA, and is claimed as confidential in its own right will not be disclosed by EPA without the consent of the manufacturer unless disclosure is ordered by a Federal court (40 CFR 2.205(c)).

If EPA determines that the disclosure of information from an application for certification under this Determination would be likely to result in substantial competitive harm to the manufacturer, 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 in confidence subject to any modification that might arise under 40 CFR 2.205(h) or any other requirement of 40 CFR, Part 2.



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August 14, 1978

Date