

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 1-84
IMPORTED VEHICLE MODIFICATIONS AND EMISSIONS TESTING INFORMATION

Motor vehicles not originally intended for sale in the United States are not always designed to meet federal emission standards. Such vehicles may be conditionally admitted into the United States with the understanding that they will be modified to meet applicable federal requirements (40 C.F.R. §85.1504). The importer or consignee must submit documentation on modifications and emissions testing (test packages) to EPA so that the Agency can determine whether the individual imported vehicles comply with federal emission requirements. Various importers have submitted and will submit thousands of such test packages.

EPA expects to receive many requests under the Freedom of Information Act (FOIA) for information contained in these test packages. Three types of businesses might assert that the requested material is confidential business information. First, the importer for resale might claim confidentiality. This is the importer of record for the vehicle for which the test package is submitted. Second, the business which modifies the subject vehicle might desire nondisclosure. The test package contains a list and pictures of modifications performed on the vehicle. Finally, the laboratory which performs the testing and submits the test package on behalf of the importer might make a confidentiality claim. In light of these potential FOIA requests and confidentiality claims, the Manufacturers Operations Division of the Office of Air and Radiation has requested that I issue a class determination

regarding the confidentiality of the information included in the test packages.

Under 40 C.F.R. §2.207 I have authority to issue class determinations concerning entitlement of business information to confidential treatment. In the case of test packages submitted by commercial importers of motor vehicles not originally designed for sale in the United States, I have found:

- (1) EPA possesses large numbers of test packages from commercial importers of motor vehicles and will continue to acquire such documents in the future.
- (2) The information contained in the test packages with respect to each vehicle is of the same character, with only slight variations that can be dealt with individually. Therefore, it is proper to treat all of the information similarly for the purpose of this determination.
- (3) A class determination will serve a useful purpose by simplifying EPA responses to FOIA requests for the information, reducing the burden of individual determinations, and informing requesters and affected businesses of EPA's position in advance.

This class determination applies to the following specific information with respect to each motor vehicle test package:

1. Testing procedures
2. Emissions readings
3. Vehicle description (on "Motor Vehicle Emission Test Report Form"), as follows:

- A. Make of vehicle, model of vehicle, model year of vehicle, vehicle identification number
- B. Mileage at time of test
- C. Engine serial number
- D. Vehicle curb weight, inertia weight class, transmission type, equipped with air conditioning
- E. Equipped with PCV system
- F. Fuel filler neck restrictor, unleaded label
- G. Description of emission control modifications
- H. Photographs of modifications

If the required contents of test packages changes in the future in a way that affects this determination, EPA will modify the determination accordingly.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions in the Act. One exemption 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 material contained in the test packages is clearly commercial information obtained from a person. 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) and EPA's FOIA regulations at 40 C.F.R. Part 2. Section 2.201(e) of the FOIA regulations makes it clear that those regulations are applicable to confidentiality determinations under the Trade Secrets Act (18 U.S.C. 1905) as well as under the FOIA.

Before EPA may conclude that material is exempt from disclosure as a trade secret or confidential commercial 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 material in the test packages because importers are required to submit this information under 40 C.F.R. §85.1504. Therefore, the information is not voluntarily submitted, and EPA's ability to obtain it would not be harmed by disclosure (40 C.F.R. §2.208 (e)(2)). Under the second test, which is applicable here, the determination of confidentiality is based upon whether disclosure of specific information would cause substantial harm to the competitive position of the importer, the modifier or the testing laboratory.

I have determined that the information in the test packages submitted by importers of motor vehicles will be treated as follows:

I. I have determined that the information set forth below is never entitled to confidential treatment either because it is generally available to the public or competitors, or because disclosure would not be likely to cause substantial harm to the competitive position of the business.

1. Testing procedures - Imported vehicles must be tested in accordance with the Federal Test Procedure (FTP) set forth at 40 C.F.R. Part 86 to demonstrate compliance with federal emission standards. The testing laboratories include data regarding test procedures in the test packages. These are readings taken from test equipment submitted to demonstrate to EPA that the FTP was properly conducted. For example, the FTP requires that the temperature of the test cell be within a specified range during testing. Therefore, the laboratory will submit to EPA the actual temperature readings of its test cell to show that it was within the required range. While the data concerning test procedures are business specific, release of such information would not cause substantial harm to the competitive position of the businesses involved. The required test procedures are expressed in such detail in 40 C.F.R. Part 86 that information indicating compliance is already known within a small degree of variation.

2. Emissions readings - The test packages include data which describe the emission results of the particular vehicle tested. While many emissions readings are not expressed in grams per mile (the statutory measurement), the readings themselves are used to calculate the final emission results (in grams per mile), which are compared to the federal statutory standards. Therefore, this information constitutes "emission data" as defined in 40 C.F.R §2.301(a)(2). Under Section 208 of the Clean Air Act (42 U.S.C. §7542) and 40 C.F.R. §2.301(f), "emission data" are not entitled to confidential treatment and must be released. Any claim for confidential treatment of emission data will be denied.

3. Vehicle description

A. Make of vehicle, model of vehicle, model year of vehicle, vehicle identification number - Each motor vehicle has a unique vehicle identification number (VIN) which identifies the make, model and approximate date of manufacture, as well as the particular dealer who sold the car to the importer. Trend Import Sales, Inc. v. EPA, No. 82-3665 (D.D.C. March 1, 1983), determined that this information was not business confidential where the VIN's of the automobiles in question were already in the possession of the requester and available to the public. Based on the reasoning in Trend as discussed below, I have determined that this information is never entitled to confidential treatment.

First, the VIN and the information contained within it is generally available to the public from various sources. Some state laws require this information upon sale or registration of a vehicle. For example, California maintains a registration history of each passenger vehicle sold in the state. Registration histories are available for public inspection and include "Reports of Sale" forms which contain the dealer's name and the VIN of the car that has been sold. In addition, private information services routinely acquire VIN's from the states and furnish this information to clients who request it. Car manufacturers and dealers commonly utilize these services to learn what cars have been registered in the United States, along with their VIN's. In practice, therefore, VIN's of most imported cars are publicly available by the time application for compliance with federal standards is made.

In some cases the VIN may not be already available to the public from another source. Even assuming such a case, I have concluded that disclosure by EPA would not be likely to cause substantial harm to the competitive position of the submitter.

The importer in Trend contended that the VIN's of nine automobiles constituted confidential information because disclosure would threaten Trend's ability to purchase automobiles from its European source in the future. Trend argued that a European manufacturer could easily determine from a VIN Trend's source of purchase. Since the European dealers

who sold to Trend were circumventing the usual exclusive export arrangements of those manufacturers with whom the dealer was under contract, Trend argued that discovery of such unauthorized sales would place dealers in danger of losing their dealerships and Trend at a risk of losing its source. However, it is unlikely that an importer's European source could be cut off in this manner because most European dealerships are factory-owned. In addition, the franchise laws of Germany and other European countries provide that manufacturers cannot stop the sale of "gray market" cars (cars sold in the United States which were not designed for sale in the United States) for the reason that the dealer is circumventing the manufacturer's exclusive export arrangements.

Trend also argued that access by competitors to the makes or models comprising the "mix" of automobiles imported by Trend - as revealed through the VIN's - would give competitors an edge in the market. However, there are many such importers of gray market cars. Although the VIN's of specific vehicles obtained by one importer at a certain time may not yet be public knowledge, the VIN's revealing the "mix" of cars being imported by similarly situated importers are available through the sources described above. Therefore, it is unlikely that disclosing the VIN's of the automobiles received by one importer would cause substantial harm to its competitive position.

B. Mileage at time of test - EPA has previously determined that this information is not entitled to confidential

treatment. This finding was made in "Class Determination 2-80, Confidentiality of Business Information Submitted in Applications for Certification of Light Duty Motor Vehicles for Model Year 1981" (CD 2-80), which adopts "Class Determination 3-78" applying to light duty motor vehicles for model year 1980. The same reasoning that was applied to domestic cars in those determinations applies to import cars at issue here. Therefore, disclosure of an import vehicle's mileage at the time of testing would not be likely to cause substantial harm to a company's competitive position.

C. Engine serial number - This is the serial number of the engine contained in the vehicle and is vehicle specific. Normally access to the engine serial number can lead to the identity of the manufacturer of the vehicle and, therefore, the importer's source of purchase. Such information can also be determined from the VIN. Consequently, the rationale rebutting the argument that VIN's are confidential business information because one can determine the importer's source of purchase from them applies to engine serial numbers as well. Therefore, the engine serial number is not entitled to confidential treatment.

D. Vehicle curb weight, inertia weight class, transmission type, whether or not equipped with air conditioning - This information is not vehicle specific but is descriptive of many vehicles of the same model imported by various businesses. Because this information is available to many importers, it is not entitled to confidential treatment.

E. Whether or not equipped with PCV System - All automobiles sold for use in the United States have a PCV (Positive Crankcase Ventilation) System so that they can meet the regulatory requirement prohibiting crankcase emissions. As a result this information is well known in the automotive industry and, therefore, not business confidential.

F. Whether or not equipped with fuel filler neck restrictor and unleaded label - The manufacturer of any motor vehicle equipped with an emission control device which will be significantly impaired by the use of leaded gasoline must comply with these requirements as set forth in 40 C.F.R. §80.24. Import cars must meet these requirements as well. Therefore, this information is common knowledge within the automotive industry and, consequently, not entitled to confidential treatment.

II. I have determined that certain information submitted on the test report form may be entitled to confidential treatment, as outlined below.

G. Description of emission control modifications - The descriptions provided by the submitter are normally generic in nature. It is well known in the automotive industry that certain generic devices are the modifications necessary for imported vehicles to meet federal emission standards. The following list identifies generic descriptions of emission control modifications that will never be treated as confidential information:

-11-

1. Air Injection and related parts.
2. Air Pump and related parts.
3. Pulse Air Valve.
4. Evaporative Control Charcoal Cannister.
5. EGR Valve.
6. Catalytic Converter.
7. O-2 Sensor with Feedback Computer.
8. Pump Calibration and related changes.
9. Vacuum Switches.
10. Trap Catalyst.

Descriptions that are substantially more detailed than these generic terms may reveal information that is specific to the business which modified the vehicle. Therefore, information describing the modifications done to the test vehicle in more detail than the generic names listed above shall be evaluated on a case-by-case basis. However, this information may qualify as confidential only if the business (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 business 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 at the time in question would be likely to cause substantial harm to the business's competitive position.

In addition, for this category of information, an important consideration in determining confidentiality will be whether the subject vehicle has been introduced into the market. Information in this category may be confidential both before and after market introduction but will only be considered for confidential treatment after the vehicle is marketed if the information is not readily ascertainable through examination. If the information is readily ascertainable through examination of the vehicle and the vehicle has been marketed, the information will not be considered for confidential treatment.

H. Photographs of modifications - These photographs show how a particular laboratory installs an emission control system in a particular vehicle. While much of this information is well known by the automotive industry, there may be instances where the photographs reveal specific modification procedures in such detail as to enable competition with the modifier. Therefore, if claimed confidential, these photographs shall be examined on a case-by-case basis to ascertain the information they may disclose. The information may be found to be entitled to confidential treatment only if EPA determines that the business has met the three numbered qualifications outlined in section G., above.

However, the photographs will not be considered for confidential treatment after the vehicle has been introduced into the market or has otherwise left the modifier's hands.

Since anything in the photographs would be readily ascertainable through examination of the vehicle itself, confidential treatment will not be considered once the car has left the modifier's control in such a way as to make the car available for inspection by others.

III. If EPA determines that the disclosure of information from a test package under this determination would be likely to result in substantial competitive harm to the submitter, 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) be maintained in confidence subject to any modification that might arise under 40 C.F.R. §2.205(h) or any other requirement of 40 C.F.R., Part 2.

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Date

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