

Request for Disclosure of ZEV Credit Information – The Board's Options

Tom Jennings

Chief Counsel

December 6, 2007

Role of ZEV Credits

- **Manufacturers produce vehicles generating “gold,” “silver,” and “bronze” credits**
- **Credits can be banked and traded**
- **Credits used in complex system to meet “ZEV obligation”**
- **Choice of base compliance path, or alternative path focusing on fuel cell cars**

Background

- **December 2006 ZEV Alliance request for all ZEV credit information**
- **Automakers submit trade secret justifications: Data are trade secrets that are exempt per Gov. Code section 6254.7(d)**
- **January-February 2007: Legal staff finds data are exempt from disclosure**

Background (cont'd)

May 2007 Board meeting

- ZEV Alliance asserts need for ZEV credit data
- Resolution 07-18 directs staff:

“take a broad legal view regarding the ‘disclosure of credits’ issue in order to achieve a transparent process”

Background (cont'd)

- **Legal staff invites additional analysis from automakers and ZEV Alliance**
- **August letters from:**
 - **First Amendment Project for ZEV Alliance**
 - **Counsel for large-volume manufacturers**
 - **Individual manufacturers**

The California Public Records Act

- **“Access to information concerning the conduct of the public’s business is a fundamental and necessary right of every person in the state.”**
- **Some specific exemptions to disclosure**

Government Code Section 6254.7

- *Subsections (a), (b) and (c):* Declare three categories of information to be public records
- *Subsection (d):* With two exceptions, “trade secrets are not public records under this section.”
- *Subsection (e):* Emission data are public, even if trade secret
- *Subsection (f):* Data used to calculate emission costs of obtaining emissions offsets are not public records; some data is public after permit issued

Government Code Section 6254.7

- **Three issues:**
 - **Is the information “trade secret” as defined?**
 - **Are trade secrets only protected if they fall under the subsections (a), (b) or (c) items declared to be public record?**
 - **If so, is the ZEV credit information covered by subsections (a), (b) or (c)?**
- **Any exemption is “absolute”**

Gov. Code Sec. 6254.7(d)

Is it Trade Secret?

- “Any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information”
- “which is not patented,”
- “which is known only to certain individuals within a commercial concern . . .”

Gov. Code Sec. 6254.7(d)

Is it Trade Secret? (cont'd)

- “. . . who are using it to fabricate, produce, or compound an article of trade or a service having commercial value”
- “and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.”
- ARB Counsel concludes data are trade secret

Is Trade Secret exemption just for records declared Public?

- **Original 1971 enactment**
 - Subsection (a) and (b) identify two categories of air pollution records that are public records
 - Original (c): “Trade secrets are not public records under this section.”
- **Five of the six amendments are consistent with this.**

Is Trade Secret exemption just for records declared Public? (cont'd)

- **1981 Amendment:**
 - “Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, trade secrets are not public records under this section.”
 - Refers to disclosure requirements for standardized tests

Does ZEV credit data fall under (a)?

- **“All information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce . . . ”**
 - Refers to actual emission data or information used to calculate emission data
 - ZEV credits based on certification standard, not actual emissions

Gov. Code Sec. 6254.7

Conclusion

- **ZEV credit information qualifies as “trade secret”**
- **But the “trade secret” exception in section 6254.7(d) doesn’t cover this kind of information**

Gov. Code Sec. 6254(k) Evidence Code Sec. 1060

- **Gov. Code Sec. 6254(k) makes Evidence Code Sec. 1060 privileged trade secrets exempt from disclosure**
- **Evidence Code Sec. 1060**
 - **“trade secret” information**
 - **“if the allowance of the privilege will not tend to conceal a fraud or otherwise work injustice.”**

Evidence Code Sec. 1060

- “conceal a fraud or otherwise work injustice.”
- *Uribe v. Howie* case (1971)
 - Monthly pesticide spray reports submitted to county Ag commissioner
 - “the trade secret might be protected only if the interests of justice are best served.”
(19 Cal.App.3d at 207)
 - *Uribe* court finds balance favors disclosure

Comparing Public Interests

Public interest in disclosure

- **Need of public to monitor compliance**
 - Compare nondisclosure of income tax returns
 - Staff announces all manufacturers have positive credit balances for model-years 2005 and 2006.

Comparing Public Interests (cont'd)

Public interest in disclosure

- **Necessary to understand actual impact of various possible amendments**
- **Example: Gold credit balance may determine whether mfr. can abandon alternative compliance path if requirements tightened**
- **Board can hear and discuss in closed session**

Comparing Public Interests (cont'd)

Public interest in Nondisclosure

- **Potential competitive harm to automakers**
 - Tips off competitors to compliance plans
 - Affects bargaining positions in credit transactions
 - How would universal disclosure affect?

Comparing Public Interests (cont'd)

Public interest in Nondisclosure

- **Staff relies heavily on information provided by mfrs confidentially**
- **Potential for disclosure could eliminate the sharing of key data to detriment of rule development**

Comparing Public Interests (cont'd)

Role of Board

- **Strong competing public interests**
- **Board has leading policy role**
- **Appropriate for Board to make balancing decision**

Summary

- **ZEV credit information is trade secret but is not exempt absolutely from disclosure**
- **Under Evidence Code trade secret privilege:**
 - **Disclose if withholding would work injustice**
 - **Strong public interests both ways**
 - **Board should appropriately balance the interests**