07-12-10

DECLARATION OF JAMES S. EHLMAN

I, James S. Ehlmann, declare as follows:

1. I am the Manager of Vehicle Emissions of the Environment, Energy, and Safety Policy Center at General Motors Corporation ("GM"), where I have worked for more than 18 years. Along with my colleagues at GM, I am currently responsible for GM's compliance with emissions regulations adopted by the federal government and the State of California. I am therefore familiar with the Zero Emission Vehicle ("ZEV") regulations in California and the reporting that GM does to the ARB under that regulation.

2. I am submitting this declaration in connection with ARB Agenda Item 07-12-10 to be considered at the ARB meeting on January 24, 2008.

3. The December 3, 2007 Options Report published by the ARB Office of Legal Affairs states that "when ARB staff develops or administers regulations it relies in no small part on confidential trade secret information voluntarily provided by manufacturers." Options Report at 3. I agree with OLA's conclusion and believe that the voluntary submission of information, both confidential business information, including trade secrets, and non-confidential business information, to ARB provides substantial assistance to the agency in execution of its duties.

5. GM has for many years supplied confidential business information, including trade secrets, to the ARB. These submissions, however, were predicated upon GM's belief that such information was exempt from disclosure as confirmed by ARB's past practice in protecting such information from public disclosure. The disclosure of GM trade secret information that has been submitted to ARB can, and will, have substantial adverse financial consequences for GM. The automobile industry is extremely competitive and all manufacturers, including GM, protect their trade secrets so as to preserve their competitive advantages. If ARB adopts a policy of

allowing GM trade secrets to be released to the general public, GM will no longer be able to supply ARB with such information as the cost of doing so will be too great.

6. GM believes that releasing manufacturers' trade secrets will not only have a substantial detrimental impact on GM, but also on the ability of ARB to perform its work. Manufacturers are a crucial source of information for ARB staff, a point recognized by the Options Report. If ARB decides to release manufacturer trade secrets, GM will not be able to be a source of information for the staff. GM believes that forcing ARB staff to implement policy without access to the best sources of information will significantly prejudice ARB's ability to carry out its regulatory programs, and thus harm the public interest.

7. As part of its compliance with the ARB ZEV regulations, GM submits an annual report to ARB and, as necessary, updates that report during the course of the year. The ZEV program allows for the accumulation of credits towards compliance by selling vehicles with certain emissions characteristics. As the Options Report explained: "The amount of credit generated by each ZEV depends on the model year and the characteristics of the ZEV." Options Report at 4. Credits earned by a manufacturer can be "banked" for usage in later years or traded between manufacturers. The ZEV regulation has multiple compliance options and a complicated formula for determining the credit level of manufacturers.

8. To establish our compliance with the ZEV regulation, General Motors submits a report to ARB that details the volume of automobiles delivered for sale in California in each different credit level (ZEV, AT PZEV, PZEV). These reports thus contain "information" that "discloses" the "nature" or "quantity" or "degree" of regulated emissions which a "machine, equipment or other contrivance" will produce and which ARB requires to be submitted to it. The

same is true for a manufacturer's ZEV credit information which simply discloses the same information on an aggregate level.

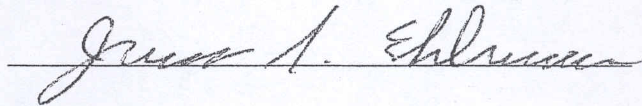
9. I agree with OLA's assessment that disclosure of "the ZEV credit information gives a strong indication of a manufacturer's product plans and compliance strategy, and disclosure could provide valuable information to competitors and parties with whom the manufacturer may wish to enter into a credit transaction – to the financial detriment of the manufacturer." Options Report at 3. OLA suggests, however, that this detriment "will be partially mitigated" if every manufacturer's ZEV credit information is released. This overlooks the important competitive fact that the ZEV regulation, and thus ZEV credit information, applies in a different way to each of the six large volume manufacturers, dependent upon their individual business circumstances. This disparate adverse impact will result in substantial competitive harm to General Motors and other large volume manufacturers depending on their respective competitive positions. In addition, OLA's position ignores the disparate competitive impact of trade secret disclosure in relation to the lower volume manufacturers, who also have different business circumstances and requirements under the ZEV regulations. Therefore, any disclosure of General Motors ZEV credit information will place it at a competitive disadvantage in relation to both large and smaller volume manufacturers, dependent on their individual business circumstances, and cause a corresponding substantial financial detriment. In short, it is General Motors belief that even if all manufacturers' trade secret information becomes known to all other manufacturers, there will be no "level playing field" in terms of the practical disparate and detrimental impact of that information on an individual manufacturer's competitive position relative to all its competitors.

10. In fact, this adverse impact on manufacturers sharing data with CARB staff, and the disparate and detrimental impact, both discussed in Paragraph 9 above, were both recognized by CARB Chief Counsel Jennings in his presentation to the Board of the Options Report at the Board's December 6, 2007 meeting. For example, during that presentation Chief Counsel Jennings stated the following.

> "There are two public interests we've identified. The first one is the basic interest that the companies have in not having their information provided to potential competitors. As I described before, it could tip off competitors to their compliance plans. It could affect their bargaining positions and credit transaction. There is a question that we haven't explored very much, **but it is possible that if everybody's data was disclosed, that could in some ways level the playing field**. Because although companies would know your data, you could know their data. **But obviously some companies who were sort of more on the edge would be more affected than other companies.**" (Transcript at page 319, Lines 11-24) (Emphasis added).

Pursuant to the laws of California, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 23rd day of January in Detroit, Michigan.



James S. Ehlmann

State of California

California Environmental Protection Agency

Air Resources Board

January 24, 2008 California Air Resources Board Public Meeting Agenda Item 07-12-10

Options Regarding the Requested Disclosure of Zero Emission Vehicles (ZEV) Credit Data Based on Submittals by Vehicle Manufacturers Who Have Designated the Data as Confidential Trade Secret Information

Comments of General Motors Corporation

January 24, 2008

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Executive Summary

The Air Resources Board is considering a Report by the Office of Legal Affairs ("Options Report") regarding the disclosure of information about manufacturers' zero-emission vehicle ("ZEV') credits.[1] General Motors believes, as does the Options Report, that this information constitutes trade secrets. As such, the disclosure of the ZEV credit information would be highly detrimental to the high volume manufacturers from a competitive standpoint, and will hurt the interests of consumers in California who depend on a competitive new vehicle market. In addition, there is no reason why the parties who have requested this information cannot fully participate in rulemaking concerning the ZEV program without this type of information.

The agenda item relating to the Board's consideration of the disclosure issue refers to a compilation of data prepared from manufacturer submissions, but that compilation has not been provided for review. Under these circumstances it would not be proper for the Board to proceed with this agenda item at the hearing this week.

California courts have long recognized that it is important to protect trade secrets. *See Wilson v. Superior Court*, 66 Cal. App. 275, 278 (1924) ("The policy of the law is unquestionably that of fostering and protecting trade secrets . . . ."). To the extent the Board decides to go forward this week with the ZEV credit information agenda item, there are numerous grounds on which the Board is required to deny disclosure, any one of which would be sufficient to compel such a result.

1. The Board's current regulations absolutely require the withholding of trade secrets from disclosure. Those regulations do not allow the Board to follow the course suggested by OLA, because the regulations are premised on a Board determination that it is in the public interest to withhold trade secrets from public disclosure. The Board is bound to follow those regulations in any action it might take on this or any other information request.

2. The information is also protected by a separate statutory provision, Health & Safety Code § 43206, which ensures that such trade secrets provided to ARB in annual reporting processes is absolutely exempt from disclosure, provided the information constitutes trade secrets -- a point that is not in dispute.

3. Under Government Code § 6254.7, trade secret information is absolutely protected from disclosure. The records and information involved here come within the ambit of section 6254.7.

4. Under the statutory provision that the Options Report primarily addresses, which is Government Code § 6254(k), the question is whether the information would be exempt from disclosure under Evidence Code § 1060. On that basis, the information should not be disclosed

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[1] The December 3, 2007 report is entitled "Options Regarding the Requested Disclosure of Zero Emission Vehicle (ZEV) Credit Data Based on Submittals by Vehicle Manufacturers Who Have Designated the Data as Confidential Trade Secret Information," and was written by W. Thomas Jennings, Chief Counsel, and Diane Moritz Johnston, Senior Staff Attorney, of the Air Resources Board's Office of Legal Affairs. ("Options Report")

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Introduction

General Motors has actively participated in the efforts of the large volume manufacturers to avoid a dispute about the proper treatment of the industry's ZEV credit information. (To the extent that they are consistent with these General Motors comments, General Motors incorporates and adopts by reference the joint industry comments submitted by the Pillsbury law firm with respect to Agenda Item 07-12-10.) GM and the industry begin from the premise, which is shared in the Options Report, that this information constitutes trade secrets. GM hopes that the efforts to resolve this matter prior to the January 24 hearing will be successful.

As discussed below in these comments, General Motors respectfully requests that the Board take the following actions: 1) direct the staff to not disclose the ZEV credit information that is the subject of Agenda Item 07-12-10; and 2) direct the staff to withdraw its Options Report because it does not fully comprehend all state and federal laws applicable to this issue. Such an outcome would be consistent with the Board's own regulations concerning trade secrets, and with applicable state and federal laws, including the California Health & Safety Code, and the California Government Code.

1. There Has Not Been Sufficient Notice of the Specific Disclosure That the Board Is Being Asked to Consider.

Before addressing the merits of the disclosure issue under the governing regulations and statutes, GM wishes to bring to the Board's attention a serious procedural defect in the course that the Board is now being asked to follow. In essence, the Board has failed to provide proper notice regarding Agenda Item 07-12-10 and, therefore, is precluded from taking action on that agenda item at the January 24, 2008 Board meeting.

As posted on ARB's website, the purpose of Agenda Item 07-12-10 is as follows:

> "The Board will consider a tabled motion to disclose, after 21 days' notice, **information compiled by ARB from submittals by vehicle manufacturers** of information on their production of ZEVs, partial ZEV allowance vehicles (PZEV), and advanced technology PZEVs, and any exchanges of ZEV credits. This information, which was claimed to be trade secrets by all large volume manufacturers, is relevant to the upcoming rulemaking on proposed amendments to the ZEV regulation. Staff will also report on efforts to reach an agreement with manufacturers to disclose information sufficient to assure a transparent rulemaking process." (Emphasis added)

Agenda Item 07-12-10 fails to provide adequate notice under the California Administrative Procedure Act (APA) and, therefore, cannot be considered at the January 24, 2008 meeting. That agenda item states, in effect, that the Board is to consider whether "information **compiled by the ARB** from submittals by vehicle manufacturers" of ZEV related data should be disclosed to the public. This is consistent with the entitled agenda item that refers

only to "disclosure of Zero Emission Vehicle (ZEV) credit data **based on submittals by vehicle manufacturers**..." (Emphasis added) There has been no notice provided to the public regarding the exact nature of the "information **compiled by the ARB**" and "**based** on submittals by vehicle manufacturers." (Emphasis added). Such a compilation is completely different from the actual data supplied by the Manufacturers. Absent adequate notice about the ARB compilation, the Board has not followed the APA procedures in this proceeding and, therefore, action by the Board to change the ARB policy at the public meeting on January 24, 2008 would violate the APA.

More specifically, there has been no publication or even a general description of exactly what would be contained in the compilation of information, apparently prepared by the ARB staff, which the Board is going to be asked to disclose. In effect, the Board is being asked to adopt a regulation or order at a public hearing, without having first given the public access to the proposed rule or order, and sufficient time to analyze or comment on the proposed rule or order. Certainly, the Options Report — which is the only systematic presentation of the action that the Board is being asked to consider — does not contain or fully describe the staff's compilation of data.

It is not possible for GM or any other interested party to prepare effectively for this agenda item unless we and other members of the public know exactly what is contained in ARB's compilation. We do not believe the Board or the Office of Legal Affairs has attempted to explain to the public why such an unusual approach is being taken to the issue of what information, if any, to disclose to the public. Given these circumstances any Board action related to Agenda Item 07-12-10 would violate the APA.[2]

In addition, the approach that the Board is being asked to take does not substantially comply with ARB's own procedural regulations. 17 C.C.R. § 60005 requires "staff reports" for items to be heard by the Board at a public hearing. There has been no such report concerning the release of an ARB compilation of data from manufacturers that has been adequately identified to the public. Thus, it appears that the ARB Public Meeting Agenda notice fails to comply with 17 C.C.R. § 60005, and precludes the Board from acting to disclose any such data.

To the extent that the Board decides instead to proceed with consideration of Agenda Item 07-12-10, we offer in the balance of these comments our position on the merits of the question of whether the trade-secret ZEV information should be disclosed. By providing such additional substantive comments General Motors does not waive any of the procedural deficiencies identified in these comments.

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[2] To the extent ARB is concerned about the confidential status of the relevant information we believe that ARB should provide each manufacturer with the sections of the compilation that pertain to each manufacturer. In addition, ARB should be prepared to conduct portions of any hearing on this agenda item in camera, with appropriate participation by counsel for the interested parties who have executed an appropriate confidentiality agreement.

2. The Regulations of the Air Resources Board Compel Withholding of the Trade Secret Information.

The first important point, which appears to have been overlooked in the proceedings to date, is that ARB has already decided, in its regulations implementing the California Public Records Act, which trade secrets are not to be disclosed to the public. The ARB regulations concerning the treatment of information in its possession is contained in article 2, subchapter 4, chapter 1 of the Board's title 17 regulations. Those regulations provide a process by which the public may obtain access to information in the Board's possession. 17 C.C.R. § 91010 states that, in the case of information which the Board may decide to release, the Board is to give the following notice to the owner of the information:

> The state board shall give notice to any person from whom it requests information that the information provided may be released (1) to the public upon request, *except trade secrets which are not emission data or other information which is exempt from disclosure or the disclosure of which is prohibited by law,* and (2) to the federal Environmental Protection Agency, which protects trade secrets as provided in Section 114(c) of the Clean Air Act and amendments thereto and in federal regulations.

17 C. C.R. § 91010 (emphasis added).[3] The balance of the title 17 regulations explains the steps that are to be followed if the Board is considering or decides to release information in its possession. There is no provision in those regulations for a balancing of interests with respect to the disclosure of trade secrets. In that important respect, the title 17 regulations reflect a CARB determination that it is in the public interest to absolutely protect trade secrets from disclosure. Indeed, any other approach would conflict with other provisions of applicable state and federal law, including those analyzed below in these comments.

The regulations in title 17 are controlling, unless and until repealed or revised by the Board. They provide that "[t]he state board shall not disclose data identified as confidential, except in accordance with the requirements of this subchapter." *Id.*. § 91011. "It is well settled an administrative agency is bound by its own rules and regulations." *Talmo v. Civil Service Comm.*, 231 Cal. App. 3d 210, 218 (1991); *see also Bonn v. Cal. State Univ., Chico*, 88 Cal. App. 3d 985, 990 (1979) ("[I]t is fixed law that an administrative agency is bound by its own regulations.") (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

Because ARB's regulations provide an absolute protection against the disclosure of trade secrets, the type of balancing process suggested by the Options Report has no place in the current proceeding. The policy decision whether to absolutely protect trade secrets as a class or category of information has already been made by the Board through the regulations in title 17. This

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[3] It is important to note that CARB did provide such a notice in its October 11, 2006 Manufacturers Advisory Correspondence (MAC) 2006-03 regarding "Zero Emission Vehicles (ZEV) Credit Reporting and Tracking System" at page 6. Not only did that notice cite the CARB regulation discussed above, and indicate that trade secrets are not to be released to the public, it also stated the following without qualification: "Trade secrets as defined in Government Code Section 6254.7 are not public records and therefore will not be released to the public."

alone is sufficient grounds to deny access to the highly confidential and sensitive trade secret information related to ZEV credits being sought via the California Public Records Act.

3. The Health & Safety Code Prohibits the Release of the Trade Secret Information

Health & Safety Code § 43206 provides that "every person who manufactures new motor vehicles for sale in California shall file with the state board a report as to the person's efforts and progress in meeting state standards adopted pursuant to Section 43101 . . . . However, the manufacturer may designate that a portion of the report is a trade secret and the portion shall not be released...." Unless ARB investigates and determines the designated portions to not be trade secrets, Section 43206 absolutely prohibits the disclosure of the confidential portions of the report. *Id.*

Section 43101 is ARB's general authority to set emissions standards and is listed as providing statutory authority for the ZEV standards. Therefore, Health & Safety Code § 43206 is directly applicable to the ZEV credit reports at issue. In effect, the manufacturers' ZEV credit reports provide the basis for determining ZEV credits, and are central to CARB staff's determination of whether a manufacturer is meeting" California's ZEV standards. And as Chairperson Nichols noted at the December 6 Board hearing, the submission of ZEV credit information is "an annual reporting requirement" (Hearing Trans. at 356:22). As such, trade secrets contained in reports detailing compliance with state emissions standards such as the ZEV standards are absolutely exempt from the Public Records Act under Health & Safety Code § 43206, and under Government Code § 6254(k) which forbids disclosure by operation of another provision of state law. (Please see Item 5 below.)

This position is further supported by review of the MAC that implements the reporting and tracking requirements of the ZEV standards. That MAC specifically provides that its purpose is "...to determine ZEV credit compliance." (October 11, 2006 ARB cover letter and page 2 of the MAC.) This would be consistent with reporting on a manufacturer's efforts and progress in meeting the ZEV standards that were adopted pursuant to Health & Safety Code § 43101. Furthermore, the MAC itself describes the fact that the ZEV credit data is part of an overall mandated reporting scheme that requires annual as well as updated reports from the manufacturers to CARB in order to demonstrate compliance with the ZEV standards. (See MAC at page 3.)

The Options Report completely ignores section 43206 of the Health & Safety Code, even though it is directly relevant under Government Code § 6254(k), and the MAC implementing the tracking and reporting requirements of the ZEV program. Under that provision of the Government Code, records are exempt from disclosure in response to a Public Records Act request when such disclosure is "exempted or prohibited pursuant to . . . state law." Govt. Code § 6254(k); *see also id.* § 6276.04. Section 43206 of the Health & Safety Code thus provides an independent and absolute basis for nondisclosure of the ZEV credit information.

4. Government Code § 6254.7 Also Protects the ZEV Credit Information

The Options Report spends much of its attention on Government Code § 6254.7 and ignores other independent grounds for absolute protection of trade secrets as discussed in these comments. Nevertheless, to the extent that the Board wishes to consider § 6254.7, it should not

accept the analysis contained in the Options Report for at least two reasons. First, the Options Report misunderstood the scope of § 6254.7(d). Second, even assuming that Options Report is correct as to the scope of § 6254.7(d), it improperly limits that the scope of § 6254.7(a) and thus erroneously concluded that the ZEV credit information may be disclosed to the public.

(a) Section 6254.7(d) Provides Broader Protection Than Suggested by the Options Report.

Government Code § 6254.7(d) states in part the following:

> 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.

Prior to this subsection, section 6254.7 defines various sets of documents as being "public records." Relying on the phrase "under this section" in §6254.7(d), the Options Report determined that section 6254.7(d) provides an exception to the Public Records Act for those records that are explicitly defined as "public records" in another provision of section 6254.7 only, and not defined as "public records" in other sections of the Government Code. The reasoning of the Options Report is erroneous.

To begin, under the Option Report's analysis, a recent amendment to section 6254.7(d) is wholly and completely superfluous. In 1981, the Legislature added language to section 6254.7(d) that exempted parts of the Education Code from the trade secret exemption. Ch. 729, § 2, Stats. 1981. It is clear none of the records referenced by way of the Education Code would fall under any of the definitions of "public records" elsewhere in section 6254.7. Under the Options Report, the reference to the Education Code has no effect whatsoever and is completely and totally superfluous. As a general rule of statutory construction, statutes are not to be read in such a manner. *See, e.g., Dix v. Superior Court*, 53 Cal.3d 442, 459 (1991). And that canon of statutory construction is even more powerful here where the statutory language being rendered superfluous by the Option Report's interpretation was inserted by a separate legislative act. Perhaps from time to time in the legislative drafting process, a superfluous phrase or word is mistakenly inserted into a statute, but the Options Report believes that an entire legislative amendment to section 6254.7(d) was totally superfluous. Such reasoning cannot stand. Effect must be given to the reference to the Education Code in § 6254.7(d), and the only way to do so is to read § 6254.7(d) as applying beyond the definitions of public records in other portions of § 6254.7.

The Options Report attempts to avoid this conclusion by focusing on the phrase "under this section" in § 6254.7(d). Under the overly restrictive reading taken by the Options Report, § 6254.7 would function as follows. First, a particular record is defined as a "public record" by § 6254.7(a), (b), or (c). Second, if the record is a trade secret under § 6254.7(d) it is then defined as "not public records" and, therefore, not subject to disclosure. This analysis ignores the rest of the Public Records Act. Government Code § 6252(e) defines "public records" broadly and in a way that would include most records defined as public records in § 6254(a), (b), and (c). In turn, Government Code § 6253 then allows for the public access to those "public records." If § 6254.7(d) only applies to § 6254.7, then it is a completely irrelevant provision, because even if a particular record is specifically defined as a "public record" in § 6254.7(a), but then, because it

is a trade secret, defined as not a public record "under this section," they would nonetheless then likely fall under the disclosure provisions of §§ 6252(e) and 6253. Such a result is illogical at best.

Conversely, if the trade secrets exception in § 6254.7(d) is limited and certain information is defined as a "public record," even if it is a trade secret, the results are also absurd. *See* §§ 6254.7(d), (e). Under the narrow reading of the Options Report, even though the statute is plainly intended to force disclosure of that specific information, it would be subject to withholding under any of the provisions listed in § 6254, including as a trade secret under § 6254(k). Courts are clear that such absurd results are to be avoided, even if the literal language of a statute suggests such an interpretation. *See, e.g., People v. Anzalone*, 19 Cal.4th 1074, 1079 (1999).

The only manner in which § 6254.7(d) makes sense within the structure of the entire statutory scheme is to view it more broadly than suggested by the Options Report. Indeed, that broader view has been the one applied by CARB and other California agencies for years. Any other construction of the statute is simply illogical. Because the Options Report has properly concluded that the ZEV credit information is a trade secret for the purposes of § 6254.7(d), they are not subject to disclosure without resort to further analysis with respect to other subsections of Section 6254.7. In essence, section 6254.7(d) provides absolute protection from disclosure of trade secrets such as the ZEV credit data.

(b) **The Requested Records Fall Under the § 6254.7(d) Exemption Even Under Option Report's Reading of the Statute.**

Although, as described above, the Option Report's reading of § 6254.7(d) is flawed, the relevant records are exempt from disclosure even under the Option Report's reading of the statute. Under the view outlined in the Options Report, if the record requested falls under the definition "public records" of §§ 6254.7(a), (b), or (c), and is a trade secret under § 6254.7(d), then it is exempt from disclosure. Despite the Option Report's contrary conclusion, the relevant records fall under the definition in § 6254.7(a) which provides the following:

> 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, which any air pollution control district or air quality management district, or any other state or local agency or district, requires any applicant to provide before the applicant builds, erects, alters, replaces, operates, sells, rents, or uses the article, machine, equipment, or other contrivance, are public records.

The ZEV credit information provides "information" that discloses the "nature, extent, quantity, or degree" of air pollution that motor vehicles produce, and manufacturers are required by CARB to submit such information in order to sell motor vehicles in California. *See* MAC #2006-03 and Declaration of James S. Ehlmann ¶ 8. It is therefore protected even under the Options Report's analysis.

The Options Report suggested, however, that the ZEV credit data does not come within § 6254.7(a) because, in its view, that section applies to "information disclosing the actual

emissions of air contaminants from machines and other contrivances (which would include motor vehicles)." Options Report at 16. This is an erroneous reading of the statute. First, it ignores the plain text of the provision which is far broader, i.e., there is no limitation solely to "actual emissions"; indeed, there is not even a reference to that phrase.

Second, the broader scope of § 6254.7(a) is supported by § 6254.7(e) which defines, notwithstanding section (a), "all air pollution emission data" to be a public record even if it is a trade secret, but then exempts "data used to calculate emissions data." If section (a) was limited to "actual emissions" it would seem to be superfluous, as actual emissions themselves would appear to then fall within "all air pollution emission data." In addition, under California law and ARB regulations, it is well-established that "actual emissions" are never protected from disclosure. These factors indicate that subsection 6254.7(a) provides a much broader coverage than asserted by the Options Report. Otherwise that subsection is superfluous and redundant to other California law. In sum, when the plain language of § 6254.7(a) is considered, the relevant information falls within its purview and is therefore exempt from disclosure even under the Options Report's erroneous reading of § 6254.7(d).

5. The ZEV Credit Records are Exempt from Disclosure Under Government Code § 6254(k) and Evidence Code § 1060.

Government Code § 6254(k) provides that agencies are not to disclose "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." One focus of the Options Report is whether the ZEV credit information would be exempt pursuant Government Code § 6254(k)'s incorporation of the Evidence Code privilege against the dissemination of trade secrets. Evidence Code § 1060 provides that "the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." The Options Report determined that the ZEV credit information is properly considered a trade secret and that its protection would not conceal fraud. Thus, according to the Options Report, the only question under Evidence Code § 1060 is whether allowing ARB to withhold the information would "otherwise work injustice."

Under any reasonable meaning of the term "injustice," the ZEV credit information is subject to protection. It can hardly be said that allowing manufacturers to keep ZEV credit information confidential "works injustice" on the public, unless, perhaps, that information were to indicate noncompliance with applicable standards (which, as the Options Report concedes, is not the case). As the Commission Notes to Evidence Code explain, the exceptions to the privilege are designed to prevent parties from avoiding the consequences of their actions by frustrating justice by claiming trade secret protection. The Commission Notes state: "[D]isclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny." Evidence Code § 1060, Commission Notes.

Indeed, as one court has explained, "Allowance of the trade secret privilege may not be deemed to 'work injustice' within the meaning of Evidence Code section 1060 simply because it

would protect information generally relevant to the subject matter of an action or helpful to preparation of a case." *Bridgestone/Firestone, Inc. v. Superior Court*, 7 Cal. App. 4th 1384, 1391 (1992); *see id.* at 1392 (suggesting injustice when resolution of lawsuit depends on trade secret information). Under the plain language of Government Code § 6254(k) and Evidence Code § 1060 the ZEV credit information is exempt from disclosure.

Despite the plain language of the Evidence Code, Options Report relies on a thirty-six year old decision from the Fourth District Court of Appeal that ignored the actual language of the statute and appears to have instead adopted some sort of a balancing test. *See Uribe v. Howie*, 19 Cal. App. 3d 194 (1971). Thus, the *Uribe* court disregarded the plain language, and essentially read the trade secrets privilege as equivalent to the catch-all exception which allows the withholding of records when "public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record," Govt. Code. § 6255.[4] At issue in *Uribe* was whether farm workers could inspect pesticide reports to assist them in treating an illness that possible resulted from the use of the pesticides in question. It is plain that preventing disclosure in such situations would work an "injustice" under the prevailing understanding of § 1060. But there is certainly no such interest here. There is no similar direct threat to the health or welfare of any person if the ZEV credit information is not disclosed.

Even under a balancing test, the ZEV credit information should be protected. The Options Report recognizes that manufacturers regularly provide confidential information to ARB. If there is a risk that ARB will, at any point in time, decide to release such trade secret information, manufacturers will no longer be willing to work with the agency on such a basis. As the Options Report recognized, this will "have an adverse impact on staff's ability to develop and implement ARB's regulatory programs." Options Report at 22. When ARB's ability to properly function is weighed against a citizen group's ability to view trade secrets that show *how*, not *if*, manufacturers are complying with a regulatory program, it is evident that the public interest weighs heavily in nondisclosure.

In applying Evidence Code § 1060, once it is established that there is a trade secret at issue, the burden is on the party seeking the information to show that the information should be divulged. *Bridgestone*, 143 Cal. App. 3d at 713. The Options Report fails to mention this critical point. Thus, even if the balancing approach of *Uribe* is used, the burden is on the party seeking access to the trade secret to show that withholding the information will work an "injustice." The presumption is that once it is determined that a trade secret is at issue it will be withheld unless the party seeking it can prove an injustice.

Finally, in considering the trade secret privilege courts have recognized that the presence of protective orders is relevant to the analysis. *Bridgestone*, 143 Cal. App. 3d at 713. Here, the manufacturers have agreed to disclose much, if not all, of the requested information under the terms of an appropriate non-disclosure agreement. Such an outcome would allow the petitioning parties access to the information in a manner that would nonetheless protect trade secrets and

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[4] It bears noting that that the *Uribe* case is not binding on the Third District Court of Appeals which would likely hear any legal challenge to the Board's decision here. *See, e.g.*, *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4 (1987). As the *Uribe* case ignores the language and structure of the § 6254 the Third District could properly come to a different conclusion and apply the statute as written.

thus competition. ***But, to date, the petitioning parties have rejected such an offer.*** Having done so, the Board must recognize that it is much more difficult for the petitioning parties to meet their burden of "injustice" after rejecting an agreement that would both allow them access to the information while still protecting trade secrets.

6. Other Provisions of Federal Law Exempt the ZEV Credit Information from Disclosure

Just as section 6254(k) exempts records from disclosure when disclosure of the record is exempted or prohibited by state law, it also does so when disclosure of the record is exempted or prohibited by federal and state law. Federal law prohibits the disclosure of trade secrets of this nature under 18 U.S.C. § 1905, under the FOIA exception for trade secrets, 5 U.S.C. § 552(b)(4), and under the limitation on the disclosure of certain Clean Air Act testing information, 42 U.S.C. § 7542. Those sources of federal law, which are not addressed in the Options Report, provide an independent basis for protecting the trade secret information.

7. Conclusion

General Motors believes that there are ample state and federal laws that provide an absolute protection of manufacturers' ZEV credit data from public disclosure. Accordingly, General Motors respectfully requests that CARB undertake the following actions at its January 24, 2008 meeting. First, deny the pending CPRA request for manufacturers' ZEV credit data in its entirety. Second, instruct the OLA to withdraw its Options Report because it does not fully address several state and federal laws applicable to the issue of disclosure of manufacturers' trade secrets related to ZEV credit data.