

**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**

**To Be Considered by the Air Resources Board December 6, 2007**

**Report by the Air Resources Board's Office of Legal Affairs  
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**December 3, 2007**

**SUMMARY**

In December 2006, the ZEV Alliance<sup>1</sup> submitted a request under the California Public Records Act<sup>2</sup> to the California Air Resources Board (ARB or Board), seeking specified information related to ARB's zero emission vehicle (ZEV) regulation – title 13, California Code of Regulations (C.C.R.) section 1962. The data sought essentially consisted of all of ARB's records for each vehicle manufacturer on the ZEV credits generated and exchanged by the three vehicle categories established by the regulation – “gold” ZEVs, “silver” advanced technology partial ZEV allowance vehicles (AT PZEVs), and “bronze” PZEVs. A manufacturer complies with the requirements of the ZEV regulation by producing vehicles that generate “ZEV credits” from these three vehicle categories sufficient to meet the manufacturer's passenger car and light-duty truck “ZEV obligation” for each model year starting with 2005. The manufacturer may also acquire credits through purchases or other trading options, and use banked credits. There are complex mechanisms for assigning ZEV credits for each gold, silver and bronze vehicle. For the six large volume manufacturers,<sup>3</sup> there are also complex mechanisms on the maximum percentages of silver and bronze credits that can be used to meet each model year's requirements. ARB staff is preparing proposed amendments to the ZEV regulation for consideration at an upcoming Board hearing, now tentatively scheduled for February 28-29, 2008.

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<sup>1</sup> The ZEV Alliance consists of the American Lung Association of California, the Bluewater Network, the California Electric Transportation Coalition, the Center for Energy Efficiency and Renewable Technologies, the Coalition for Clean Air, Energy Independence Now, Environment California, the Natural Resources Defense Council, the Planning and Conservation League, Sierra Club California, the Steven and Michele Kirsch Foundation, and the Union of Concerned Scientists.

<sup>2</sup> Government Code sections 6250 through 6276.46.

<sup>3</sup> Currently Toyota, General Motors, Ford, Honda, DaimlerChrysler and Nissan.

Each manufacturer is required to submit ZEV credit information, and all of ARB's records on individual manufacturers' ZEV credit information are derived from the manufacturers' submittals. All six large volume manufacturers, and most other manufacturers, designated their submittals as confidential trade secret.

In accordance with ARB regulations, the ARB legal staff requested that each manufacturer submit a demonstration why its ZEV credit information was exempt from disclosure. In their responses, most manufacturers stated that their ZEV credit information was "trade secret" that was exempt from disclosure under Government Code section 6254.7(d); some referred more generally to the Public Records Act. After reviewing the submittals, in January and February 2007 the ARB legal staff notified the ZEV Alliance that ARB had found the justifications of confidentiality to be sufficient, and provided "redacted" documents that omitted the data designated confidential.

At its May 2007 meeting, the Board heard a status report on the ZEV program. ZEV Alliance representatives complained that each manufacturer's ZEV credit information should be released. The Board adopted a resolution which, among several other things, directed staff to "take a broad legal view regarding the 'disclosure of credits' issue in order to achieve a transparent public process." The legal staff subsequently invited both the manufacturers and the ZEV Alliance to submit additional analyses supporting their positions, and has now completed its review of all pertinent materials.

If a record qualifies as a trade secret and is exempt from disclosure under Government Code section 6254.7(d), it is exempt "absolutely" without resort to a balancing of public interests. It is the Chief Counsel's opinion that the ZEV credit records are trade secrets as defined in section 6254.7(d). However, after considering arguments made by the First Amendment Project (FAP) in an August 23, 2007 letter on behalf of the ZEV Alliance (ZEV Alliance/FAP letter), he has also concluded from the language of the statute and the legislative history that: (1) the absolute exemption under section 6254.7(d) only applies to records that are otherwise declared to be public records under section 6254.7(a), (b) or (c), and (2) the ZEV credit information does not fall under any of those three subsections. The data are therefore not exempt from disclosure under Government Code section 6254.7(d).

The Public Records Act also exempts from disclosure records that are privileged under Evidence Code section 1060 because they are trade secrets and "allowance of the privilege will not tend to conceal a fraud or otherwise work injustice." It is the Chief Counsel's opinion that allowance of the privilege for the ZEV credit information would not tend to conceal a fraud. Case law indicates that the question whether the privilege would otherwise work injustice calls for a balancing of public interests. In the case of the ZEV credit information, there are strong public interests supporting both disclosure and nondisclosure, and as the policy-making entity it is appropriate for the Board itself to make the ultimate balancing determination.

The ZEV Alliance asserts that disclosure is in the public interest because the public has a right to monitor the compliance status of the manufacturers. Yet while there is also a public interest in compliance with the federal and state tax laws, that does not result in a right of the public to review all tax returns. Given the particular interest in the ZEV regulation, ARB staff is advising the public – we believe consistent with the confidentiality claims – that no manufacturer has a negative ZEV credit balance for model-years 2005 or 2006. Perhaps a stronger public interest in disclosure is that it will help the public in the pending ZEV rulemaking to understand what will be the most likely actual impact of various potential amendments, since a manufacturer’s compliance response to the amendment may depend on its particular ZEV credit status. We believe that the Board would be legally authorized to conduct a closed session to receive and discuss confidential information; while this would better inform the Board, the ZEV Alliance would still not have the benefit of the information in formulating its positions on the rulemaking.

There are at least two significant public interests in nondisclosure. First, 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. More importantly to the general public interest, when ARB staff develops or administers regulations it relies in no small part on confidential trade secret information voluntarily provided by manufacturers. This can include important information that is relevant to how a manufacturer may react to or be affected by potential changes to the regulation. If manufacturers believe that such information may be disclosed publicly, there is a likelihood that these important sources of information will no longer be available. This would be a detriment to ARB’s effective administration of its motor vehicle emissions control program.

The Chief Counsel is not aware of any other statutory provisions that would exempt the ZEV credit data from disclosure. If the Board were to conclude that some or all of the ZEV credit information is not exempt from disclosure, under ARB regulations the information may not be publicly released until the manufacturers receive 21-days notice, so they have the opportunity to seek court intervention if they wish to do so.

### **RECOMMENDATION**

We recommend that the Board accept the Chief Counsel’s legal conclusion that the ZEV credit information is trade secret under Government Code section 6254.7(d), but it is not exempted by that provision from disclosure because only information falling under section 6254.7(a), (b) or (c) and the ZEV credit data do not meet that criterion.

We also recommend that the Board accept the Chief Counsel’s legal conclusion that the ZEV credit information is trade secret for purposes of the trade secret privilege in Evidence Code section 1060, which is incorporated into the Public Records Act by Government Code section 6254(k). However, Evidence Code section 1060 only protects trade secrets where allowance of the privilege “will not tend that to conceal a

fraud or otherwise work injustice. This triggers a balancing of the public interests. There are strong public policy considerations for both disclosure and nondisclosure. As the ultimate policy-making body, it is appropriate for the Board itself to make the balancing determination. If the Board determines that the public interest favors disclosure, the records may not be released until the submitting manufacturers receive 21-days notice.

## ANALYSIS

### I. The Role of Credits in the ZEV Regulation

As amended in 2003, ARB's ZEV regulation establishes a complex mechanism in which a "ZEV obligation" is established for each model year starting with 2005, and each of the six large-volume manufacturers must then comply with the regulation by including in its California sales fleet of passenger cars and light-duty trucks a mix of "gold" ZEVs, "silver" AT PZEVs, and "bronze" PZEVs sufficient to meet its "ZEV obligation" for the model year. Various amounts of ZEV credits are generated by a manufacturer's production of ZEVs, AT PZEVs and PZEVs, the amounts depending on the characteristics of the vehicles produced. The ZEV credits are then applied to determine compliance for each model year, subject to a number of restrictions on how ZEV credits generated by different categories of vehicles can be used. The following description provides a flavor for the complexity of the mechanism, but is not exhaustive.

**The ZEV Obligation.** The ZEV obligation is expressed as a percentage of the manufacturer's annual fleet sales of passenger cars and lighter light-duty trucks (LDT1s); for model-years 2005-2008 the ZEV obligation for those vehicles is 10 percent, and in model-years 2009-2011 it is 11 percent. As applied by ARB, the same percentage for each model year is applied to heavier light-duty trucks (LDT2s) starting in model-year 2012; there is a phase in under which 34 percent of the 10 percent overall ZEV percentage is applied to model-year 2008 LDT2s and 51 percent of the 11 percent overall ZEV percentage is applied to model-year 2009 LDT2s.

**Accrual of ZEV credits.** Each ZEV, AT PZEV and PZEV marketed in California generates ZEV credits that depend on the characteristics of the vehicle. Every 1996 and subsequent model-year ZEV generates credits, and every 2000 and subsequent model-year PZEV and AT PZEV generates credits. These credits can be banked and exchanged between parties.

The amount of credit generated by each ZEV depends on the model year and the characteristics of the ZEV. For model-years 1996-2000, the ZEV credit from a single ZEV could range from 2 to 10. For model-years 2001-2002 there was a multiplier of four – but only if the ZEV is placed in service by September 30, 2003; there were also multipliers based on extended electric range of the ZEV (if any). Starting with the 2003 model year, ZEVs were broken into five categories with the total credit generated by each ZEV ranging from 1.25 for a neighborhood electric vehicle (NEV) to 40 for a typical fuel cell vehicle. In model-year 2008 the range is 0.15 to 40, and in 2012 it is 0.15 to 3.

Each PZEV generates 0.2 ZEV credit. There are multipliers that increase the credit for model-year 2000-2005 PZEVs; the multiplier for model-years 2000-2003 was 4. An AT PZEV will typically generate a total ZEV credit of 0.4 to 0.9 or higher, depending on various characteristics.

**Use of ZEV Credits.** Under what is called the “base path,” in the 2005-2008 model years, a manufacturer may meet up to 60 percent of its ZEV obligation with credits from PZEVs, and up to 80 percent with credits from AT PZEVs. Up to 100 percent of the ZEV obligation may be met with credits from ZEVs. As the annual percentage ZEV obligation increases after the 2008 model year, PZEVs may not be used to cover more than 6 percent of the manufacturer’s fleet, and credits from AT PZEVs may not be used to meet more than half the manufacturer’s remaining ZEV obligation.

The “alternative path” was designed for companies that wanted to focus their ZEV development efforts on fuel cell vehicles. Under the “alternative path,” a manufacturer may use silver credits (from vehicles such as a qualifying hybrid-electric vehicle) for a given implementation phase (model-years 2005 to 2008 and then the three following three-year periods – as long as the manufacturer produces during that phase Type III ZEVs (fuel cell vehicles) in a volume equal to the manufacturer’s market share of a specified market-wide number of vehicles. For model-years 2005 to 2008, the market-wide number of fuel cell vehicles is 250. The regulation currently provides that the market-wide number rises to 2,500 fuel cell vehicles in model-years 2009-2011, 25,000 in 2012-2014, and 50,000 in 2015-2017. There are mechanisms allowing a manufacturer to meet up to half its fuel cell vehicle allotment under the alternative fuel path with much larger numbers of new battery electric vehicles. The Board is tentatively scheduled to conduct a hearing on amendments to the ZEV regulation on February 28-29, 2007. While the proposed amendments are still under development, one area likely to be amended is the provision on the alternative compliance path.

In model-year 2006 only 75 percent of a manufacturer’s “gold” obligation could be met by NEVs placed in service between 2001 and 2005; the percentage fell to 50 percent for model-years 2007 and beyond. In model-year 2009 only 75 percent of a manufacturer’s “silver” obligation could be met by NEVs placed in service between 2001 and 2005; the percentage fell to 50 percent for model-years 2011 and beyond.

## **II. The Manufacturers’ Submittal of ZEV Credit Information**

As currently reported, each manufacturer’s ZEV credit information is contained in the forms that the manufacturer submits as required by title 13, C.C.R., section 1962 and as implemented by ARB’s Manufacturers Advisory Correspondence: MAC 2004-01 and MAC 2006-03. The ARB forms and specified electronic format for reporting credits and debits for ZEV reporting include: (1) an application form for opening a “ZEV account” with the ARB, (2) a form for indicating calculation method and Non-Methane Organic Gases (NMOG) production numbers, (3) credit and debit electronic format, and (4) a form for transferring credits. Specifically the records are: “Application for Zero Emission

Vehicle (ZEV) Account with the ZEV Bank,” “Calculation Method for Zero Emission Vehicle (ZEV) Credit Requirement,” “Credits,” “Debits,” and “Zero Emission Vehicle (ZEV) Credit Transfer Form.” These records contain the numbers of vehicles in each category for which each automaker is permitted to and has claimed ZEV credits. The forms also contain records of each automaker’s sale and/or purchase of ZEV credits. Blank copies of the four forms are available at the ARB webpage <http://www.arb.ca.gov/msprog/mac/mac.htm> , under MAC 06-03. The data submitted by the manufacturers and other account holders have been transferred by ARB staff to spreadsheets.

### **III. Requests for Disclosure of the Manufacturers’ ZEV Credit Information and Follow-Up Actions**

In a December 1, 2006 letter, the ZEV Alliance made a Public Records Act request for the following records:

1. The numbers of Zero-Emission Vehicles (ZEV), including Advanced Technology Partial ZEVs (AT-PZEVs) and Partial ZEVs (PZEVs), delivered for sale and/or delivered for sale and placed in California, by each individual automobile manufacturer covered under California’s Zero-Emission Vehicle Regulations and other ZEV Account Holders, for individual model years within the period of 1990 through 2005. This information should include the Type or Tier of each of the vehicles.  
[Footnote omitted]
2. For each of the individual vehicles identified in response to paragraph 1 above, the amount of ZEV credit allocated to those vehicles, including any multipliers and credits for specified vehicle placement and extended service, separated by type (e.g. ZEV range, fast refueling, etc.), and expressed both in credit amounts and in units of grams per mile of non-methane organic gases (NMOG).
3. The total number of ZEV credits, AT-PZEV credits, and PZEV credits accrued by each individual automobile manufacturer covered by California’s Zero-Emission Regulations and other ZEV Account Holders, by individual model year, within the period of 1990 through 2005, expressed both in credit amounts and in units of grams per mile of NMOG.
4. The number of ZEV credits used for compliance or debited for compliance with California’s Zero-Emission Vehicle Regulations in 2005 or earlier years, by individual automobile manufactured.
5. The number of ZEV credits that have been transferred, by model year, to each automobile manufacturer covered under California’s Zero-

Emission Regulations or other ZEV Account Holders, by other automobile manufacturers or Account Holders.

6. For the 2005 model year, the number of PCs, LDT1s, and LDT2s produced and delivered for sale in California by each individual automobile manufacturer covered by California's Zero Emission Vehicle Regulations.

ARB staff proceeded to review ARB's records to identify the material covered by the request. In this review, staff determined that all of the records either were submitted by a manufacturer or other account holder, or were derived from information submitted by a manufacturer or account holder. In most cases, the submittals had been designated as confidential, including the submittals from the six large-volume manufacturers. On January 12, 2007, staff sent letters to all manufacturers and Account Holders who had submitted covered data, asking them to submit documentation in support of their claim of confidentiality including information in six categories identified in ARB's regulations on handling requests for records under the Public Records Act. (title 17, C.C.R. § 91022(c)(1)-(6)).

Between January 19 and February 19, 2007, ARB received individual responses from 15 manufacturers or account holders. Four intermediate volume manufacturers – Volkswagen, Kia, Hyundai and Subaru – did not claim their data were confidential, so on January 24 and February 2, 2007 staff sent the ZEV Alliance representative all covered records pertaining to these manufacturers. Of the remaining 11, all but four specifically identified Government Code section 6254.7(d) and/or (e) as the statute authorizing nondisclosure of the ZEV credit information (one of these also identified Government Code section 6254.5(e)). The remaining four submitters – General Motors, Western Golf Car, Club Car and the University of California, Riverside – only referred generally to the Public Records Act (Government Code sections 6250 and following) and ARB's regulations on the disclosure of public records (title 17, California Code of Regulations, sections 91000-91022). With respect to the manufacturers claiming the information they submitted was confidential trade secret, ARB staff upheld the claims and provided only redacted nonconfidential data with letters transmitted to the ZEV Alliance between January 24 and February 20, 2007.

ZEV Alliance representatives expressed their disagreement with staff's determinations. On March 28, 2007, staff provided the representatives with copies of the manufacturers' trade secret justification letters except for those letters that were themselves claimed to contain trade secrets. On March 30, ARB attorneys had a conference call with ZEV Alliance representatives to discuss the basis for staff's determinations and the representatives' position that the records were not entitled to confidential treatment. Staff invited the representatives to submit their analysis in writing, but no written materials were received.

At its May 24-25, 2007 Board meeting, the Board heard staff's status report on ARB's ZEV program, in conjunction with the report from the ZEV Independent Expert Panel.

During the Board's consideration of the presentations and reports, ARB staff characterized the status of automakers' ZEV credits in general qualitative and quantitative terms that did not disclose the specific contents of the ZEV credit records in ARB's possession for each automaker. This reflected advice from ARB's Office of Legal Affairs that automakers had claimed confidentiality for the information and had substantiated their initial claims for treatment of the ZEV credit records in ARB's possession as confidential business information. At the conclusion of its consideration of these items, the Board adopted Resolution 07-18, on the need for a future rulemaking to amend the ZEV regulations. Among the findings and directions in Resolution 07-18, the Board directed staff to "take a broad legal view regarding the 'disclosure of credits' issue in order to achieve a transparent public process."

On June 21, 2007, the ARB Legal Office sent letters to all manufacturers who had claimed that their ZEV credit data were confidential, inviting additional analysis supporting their position that the data were exempt from disclosure. In a June 22 letter, the Legal Office sent a letter to the ZEV Alliance inviting its written analysis to support its position that the data were not exempt from disclosure. In July and August, ARB received letters in response from BMW, Mazda, and Honda (Honda claimed its letter was confidential as well). The August 23, 2007 ZEV Alliance/FAP letter asserted that the ZEV compliance materials are nonexempt public records. In an August 30, 2007 letter on behalf of Toyota, General Motors, Ford, Honda, DaimlerChrysler and Nissan, Michael Barr of Pillsbury Winthrop Shaw Pittman LLP provided additional analysis supporting their claims that the ZEV credit documents are exempt from disclosure.

Under the Board's regulations, whenever ARB makes a determination that records designated confidential by the records-submitter are not entitled to be withheld from disclosure, ARB may not release those records until the submitter has been given at least 21 days' notice. (title 13, C.C.R. section 91022(e)(2).) This gives the submitter the opportunity to seek a restraining order from a court before the information is actually released.

#### **IV. Guiding Principles for Administering the California Public Records Act**

California's Constitution provides for the right of access to information, stating:

- (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(California Constitution Article I, section 3)

A recent decision of the California Court of Appeals<sup>4</sup> fairly states what courts and others have viewed as the Public Records Act's guiding principles:

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<sup>4</sup> *City of San Jose v. The Superior Court of Santa Clara, Respondent; San Jose Mercury News, Inc., Real Party in Interest* (1999) 74 Cal.App.4<sup>th</sup> 1008.

Section 6250 expressly sets forth the purpose of the Act: “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” [Citations omitted.] Thus, the Act was passed “to ensure public access to vital information about the government’s conduct of its business.” [Citations omitted.]

The Act was modeled upon the federal Freedom of Information Act [FOIA; citations omitted], and has a common purpose. [Citations omitted.]

Disclosure of public records has the potential to impact individual privacy. The Act defines “public records” broadly to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. [Citations omitted.] Public records include “personal details about private citizens,” and disclosure may infringe upon privacy interests. [Citations omitted.]

Disclosure of public records thus involves two fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy. [Citations omitted.] Consequently, both the FOIA and the Act expressly recognize that the public’s right to disclosure of public records is not absolute. [Footnote omitted.] In California, the Act includes two exception to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to section 6254 [footnote omitted]; and (2) the “catchall exception” of section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. [Citations and footnote omitted.]

*City of San Jose v. The Superior Court of Santa Clara, Respondent; San Jose Mercury News, Inc., Real Party in Interest*, 74 Cal.App.4th 1008, 1016 to 1018 (1999).

**V. Are the ZEV Credit Records Exempt From Disclosure Under Government Code Section 6254.7(d)?**

**A. The Issues Presented.**

The primary claim of the manufacturers is that the ZEV credit records are “trade secrets” under Government Code section 6254.7(d) and accordingly are exempt from disclosure. California case law establishes that, if triggered, the exemption under section 6254.7(d) is absolute and does not trigger application of a balancing test

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regarding competing interests.<sup>5</sup> Given its centrality to the issue at hand, Government Code section 6254.7 is set forth in full below. We have concluded that three issues are presented. The first issue is whether the ZEV credit records are “trade secrets” under section 6254.7(d). The second issue is whether section 6254.7(d) exempts *all* trade secrets from disclosure or exempts only trade secrets that fall within the items listed in section 6254.7(a), (b), or (c). The third issue – triggered only if the answer to the second issue is that the section 6254.7(d) exemption applies only to trade secrets falling within the section 6254.7(a), (b) or (c) – is whether the ZEV credit records in fact fall within the section 6254.7(a), (b) or (c) items. The statutory language is as follows:

**Government Code § 6254.7.**

- (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, 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.
- (b) All air or other pollution monitoring data, including data compiled from stationary sources, are public records.
- (c) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations which constitute violations of standards provided in Section 1941.1 of the Civil Code, and records of subsequent action with respect to those notices and orders, are public records.
- (d) 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. "Trade secrets," as used in this section, may include, but are not limited to, 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 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.

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<sup>5</sup> “[T]he exemptions from public disclosure afforded by the [Public Records] Act and Government Code section 6254.7 are absolute and do not depend upon a further balancing of harm to the public.” *Masonite Corporation v. County of Mendocino Air Quality Management District* [“*Masonite II*”], 42 Cal.App.4th 436, 449 (1996).

- (e) Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records.
- (f) Data used to calculate the costs of obtaining emissions offsets are not public records. At the time that an air pollution control district or air quality management district issues a permit to construct to an applicant who is required to obtain offsets pursuant to district rules and regulations, data obtained from the applicant consisting of the year the offset transaction occurred, the amount of offsets purchased, by pollutant, and the total cost, by pollutant, of the offsets purchased is a public record. If an application is denied, the data shall not be a public record.

B. Is the ZEV Credit Information “Trade Secret” under Government Code Section 6254.7(d)?

The most appropriate way to determine whether the ZEV credit data constitute “trade secrets” under section 6254.7(d) is to go through the statutory definition clause-by-clause.

1. **“Any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information”**

The ZEV credit data are clearly a “compilation of information.”

The ZEV Alliance/FAP August 23 letter asserts that, “Further, no manufacturing data, product plans, engineering specifications or other information developed by the companies are at issue in this request. Credits are created and issued by the Air Board, not by the company, and are therefore not a trade secret belonging to the company.” (p. 3.) However, all of ARB’s ZEV credit information for each individual manufacturer covered by this analysis is directly derived from the information submitted by the manufacturer under a claim of confidentiality, including any credits issued” by ARB. We conclude that the ZEV credit records are clearly compilations of information that are covered by the first clause of the definition of trade secret.

2. **“which is not patented,”**

This element is clearly met and the ZEV Alliance/FAP do not assert otherwise.

3. **“which is known only to certain individuals within a commercial concern”**

Each of the affected manufacturers has asserted in their January/February letters that they have not released their ZEV credit information publicly, and most indicated in one form or another that they restrict the information within the company on a need-to-know basis. We have no reason to believe that this is not the case.

The ZEV Alliance/FAP assert that, "The historical information sought is not secret. Such data can be obtained, for example, from DMV records, and other available product line and sales data, or purchase from specialized data services." (August 23 letter p. 3.)

There is no doubt that with sufficient effort, parties could obtain a significant part of a manufacturer's ZEV credit information from publicly available sources. For the last several years the ARB Executive Order certifying vehicle models to an emissions category that generates ZEV credits has identified the applicable credit. An enterprising person could try to review records at the Department of Motor Vehicles to determine how many individual vehicles in that model were registered. It is not clear how universal the information would be and how the models would be broken down. Since the exact amount of credits for a vehicle will also depend on when it is placed into service, verifying that element could present challenges as well. The most difficult information to derive from publicly available sources would be exchanges of ZEV credits between manufacturers. Necessary information includes not only the amount of credits covered by a transaction but also whether the credits are gold (with a separate breakdown on NEVs), silver or bronze, and the model year in which each credit was generated. The ZEV Alliance/FAP letter does not identify any way in which data regarding ZEV credit exchanges could be obtained legally apart from ARB's disclosure of manufacturer-submitted records.

BMW's July 31, 2007 letter asserts that "the ease or difficulty with which information could properly be acquired or duplicated by others without the use of a public records request is of crucial consideration in the determination of trade secret status of information. *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51(D.C.Cir., 1981) (If private reproduction of the information would be so expensive or arcane as to be impracticable, disclosure of that information through the Freedom of Information Act conduit could damage the competitive position of the submitters.)" Given the importance of the ZEV credit information to the ZEV Alliance, one would assume that its members would go out and obtain the information from public sources if it really is readily publicly available. Their apparent failure to do so, and the efforts the manufacturers appear to have gone to in avoiding public releases, strongly suggests that complete or meaningful ZEV credit information is not readily available from public sources. We conclude that the treatment of the information satisfies this element of the definition of trade secret.

4. **“who are using it to fabricate, produce, or compound an article of trade or a service having commercial value”**

The products being produced are passenger cars and light-duty trucks – articles of trade that are being marketed in California and therefore must meet ARB’s ZEV requirements. The ZEV credit information is used by the manufacturers to assure that they are complying with ARB’s requirements and will be able to continue to do so. In some cases (like transportation system credits, or credits generated by account holders who are not full range vehicle manufacturers) the existing ZEV credits are commodities that are marketable to larger manufacturers subject to the regulation. Such account holders may obtain a business advantage by keeping their balances confidential.

5. **“and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.”**

The manufacturers assert that a company’s ZEV credit status is a major determinant for its future product plans with respect to the kinds of vehicles that it will produce, and knowledge of the information will make it easier for the other manufacturers to compete against the company. As Nissan puts it,

This data is critical to both Nissan’s business strategy and compliance in California. The data reflects our past, current, and future strategies for how Nissan will design, build market, distribute, sell, and service vehicles that meet both current and future emission (including ZEV mandate) and federal CAFE requirements. Each and every automotive manufacturer has a specific – and different – business model and plan for sales within California. These business models, plans, and strategies must address all facets of the automotive business, from the very first stages of R&D, through manufacturing, distribution, marketing, sales, and finally to ultimate disposition. There are hundreds if not thousands of factors to consider, and we are absolutely positive each automaker believes their strategy is the best.

Compliance with California current and future emission requirements – including the ZEV mandate – and federal CAFE standards represent one of the most challenging tasks facing Nissan. Compliance planning impacts future model mix, cutting edge technology, corresponding financial commitments, vehicle design, and other factors that are still unknown to Nissan.

This data, if released to the public, would very quickly find its way to our competitors. If that were to occur, it would result in tremendous harm to Nissan’s competitive position, as it would give our competitors a road map to our business strategies, including but not limited to compliance with California emission and ZEV mandate requirements.

Release of this data would jeopardize our competitiveness not only in California, but throughout the U.S. as well.

Nissan February 5, 2007 letter, p. 2.

The ZEV Alliance/ FAP letter asserts at p. 3: “Releasing the ZEV credit records is not equivalent to sharing business plans with competitors. Automakers claims that this information would allow competitors to know their automakers’ specific future plans are not credible.” We cannot agree. We believe that the showing of Nissan and other manufacturers adequately demonstrates that a manufacturer’s knowledge of its own ZEV credit information gives the manufacturer an opportunity to obtain a business advantage over competitors who do not know it and therefore cannot use it.

Upon consideration of the justifications of confidentiality from the manufacturers and the ZEV Alliance/FAP letter, we conclude that all of the requested ZEV credit information claimed to be confidential meets the definition of “trade secret” in Government Code section 6254.7(d).

C. Must Trade Secrets as Defined in Government Code Section 6254.7(d) Fall Within the Kinds of Air Pollution Information Identified in Section 6254.7(a) to Receive the Protections of Section 6254.7(d)?

The ZEV Alliance/FAP letter characterizes Government Code section 6254.7(d) as “intend[ing] to make the ‘degree of air contaminants or other air pollution information public,’ with protections for some types of trade secrets. Gov’t Code § 6254.7(a),(d),&(e).” (August 23 letter at p. 3.) The letter asserts that “ZEV credit records do not fit within section 6254.7 because they do not reveal the ‘degree of air contaminants or other air pollution information.’” The ZEV Alliance/FAP is clearly referring to the text of section 6254.7, and arguing (without further analysis) that if the ZEV credit information does not fall within section 6254.7(a) it is not exempt from disclosure, whether or not it is trade secret as defined by section 6254.7(d). ARB counsel have not systematically analyzed this issue before. It is not identified or addressed in Mr. Barr’s letter of August 30.

Government Code section 6254.7(a) consists of one long sentence providing that the kinds of air pollution information specified in the subsection “are public records.” That is the entire import of section 6254.7(a). Subsections 6254.7(b) and (c) identify two other categories of information – neither of them directly pertinent to this inquiry – which are similarly declared to be “public records.” Section 6254.7(d) provides that, with two specified exceptions, “trade secrets are not public records under this section.” The evident effect of section 6254.7(d), then, is that it provides an exemption only for those trade secrets that have been declared to be public records in section 6254.7(a), (b) or (c). While some ambiguity has been introduced by the Legislature’s amendments to section 6254.7, we have concluded that the better reading is to restrict the “trade secret” exception to the categories of information identified in section 6254.7(a), (b) or (c).

When Government Code section 6254.7 was originally enacted by the Legislature in 1970 (Stats. 1970 ch. 1295), it contained only what are now subsections (a), (b), and (d); further, what is now subsection (d) did not contain either of the exceptions that are now at the beginning of the first sentence. Given this language, it should be clear that the subsection (d) “trade secret” exemption initially applied only to the categories of information identified in subsections (a) and (b).

The Legislature has subsequently amended Government Code section 6254.7 six times. Amendments enacted in 1971 expanded the categories in subsections (a) and (b) in ways that are not pertinent to this analysis (Stats. 1971 ch. 186.) Amendments enacted in 1972 inserted subsection (c) (Stats. 1972 ch. 400); since this simply added another category of information declared to be “public records,” it was fully consistent with the original limits on the effect of subsection (d) even though it did not pertain to air pollution. The Legislature declared a category of information to be public record, but included an exception for trade secrets. Amendments enacted in 1973 added subsection (e) – declaring that all air pollution emission data are public records, even if they constitute trade secrets under subsection (d) – and added the opening clause of subsection (d) establishing that subsection (e) provides an exception from the subsection (d) exemption for “trade secrets.” (Stats. 1973, ch. 186.) Since “air pollution emission data” necessarily fall within the information identified in subsection (a), the 1973 amendment was again wholly consistent with the preexisting limits on subsection (d).

The confusion comes from the 1981 amendment (Stats. 1981, ch. 729) that inserted “and chapter 3 (commencing with Section 99150) of Part 65 of the Education Code” in the first sentence of Government Code section 6254.7(d), creating a second exception from the “trade secret” provisions in subsection (d). The referenced Education Code provisions pertain to standardized tests; along with amending Government Code section 6254.7(d) the 1981 chaptered bill enacted Education Code section 99157.5, which established disclosure requirements for standardized tests used in connection with admissions to post-secondary undergraduate institutions. Thus the information covered by the new exception has nothing to do with the kinds of information declared to be public records in Government Code section 6254.7(a), (b) or (c). If the subsection (d) “trade secret” exemption only applies to information declared in subsections (a), (b) or (c) to be public records, the 1981 amendment was mere surplusage – and statutory interpretations that render words surplusage are to be avoided. (*People v. Johnson*, 28 Cal.4th 240 (2002)) But it is even *more* unsatisfactory to conclude that the Legislature intended the 1981 amendment adding the Education Code reference to convert section 6254.7(d) from an exception applicable only to the three limited categories of information in section 6254.7(a), (b) and (c) into an exception applicable to *all* records that are otherwise public records. Moreover, such an interpretation would effectively nullify the preexisting “under this section” at the end of the first sentence of section 6254.7(d); interpretations that would render related provisions nugatory are also to be avoided (*People ex rel. Allstate Ins. Co. v. Weitzman*, 107 Cal.App.4th 534 (2002). On balance, we conclude that the 1981 amendment did not change the preexisting

effect of section 6254.7(d) to provide a “trade secret” exemption only for the categories of information identified in section 6254.7(a), (b) and (c).

The last amendment to Government Code section 6254.7, enacted in 1992, added the subsection (f) provisions on Public Records Act treatment of data used to calculate the costs of obtaining emissions offsets. (Stats. 1992, ch. 612.) Much of subsection (f) is essentially standalone language that operates independently of the preceding subsections. Unlike subsections (a), (b) and (c), the first and last sentences of subsection (f) identify information that is *not* public record, rather than information that *is* a public record. For this information, section 6254.7(d) does not come into play. The second sentence does identify a category of data is public record, and because of that the section 6254.7(d) exemption for trade secret information applies to this category of data.

D. Do the ZEV Credit Records Fall Within the Items Identified in Section 6254.7(a)?

The ZEV credit information clearly does not constitute “air or other pollution monitoring data” subject to Government Code section 6245.7(b), or records of building code violations subject to section 6254.7(c). Thus the issue turns on whether the ZEV credit information is covered by section 6254.7(a).

Section 6254.7(a) consists of one very long, 76 word sentence. It can be characterized as starting with the following subject:

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 . . .

It then further limits the specified category of information, analyses, plans or specifications to only those

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 . . . .

Thus, if the ZEV credit information does not fall within the subject set forth above, it does not fall with section 6254.7(a).

The clear focus of section 6254.7(a) is information disclosing the actual emissions of air contaminants from machines and other contrivances (which would include motor vehicles). This can include emission data or information such as process data that is used to calculate emission data.<sup>6</sup> The ZEV credit information is fundamentally different,

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<sup>6</sup> See Government Code section 6254.7(e), referring to “emission data” (which must be disclosed even if trade secret) and “data used to calculate emission data” (which if trade secret is not subject to disclosure).

at least with respect to credit-generating vehicles that are PZEVs and AT PZEVs. The emissions assigned to each PZEV and AT PZEV are *not* the actual emissions of any vehicle – including the vehicles tested to determine whether the test group qualifies for certification – and is not data used to calculate the actual emissions of any vehicle. The emissions values assigned to each PZEV and AT PZEV are rather the PZEV emissions standards to which the test group is certified. This is illustrated by the fact that each Executive Order certifying a test group separately identifies the actual emissions of the test vehicle and the PZEV certification standards. The actual emissions determined during testing are virtually always lower than the emission levels of the standard to which the vehicles are certified, because manufacturers virtually always build in a margin of safety in meeting the standard. And while every credit generated from a ZEV is premised on the fact that the ZEV has no emissions, such credits still do not fall easily into section 6254.7(a). The Chief Counsel concludes that the ZEV credit information is not covered by section 6254.7(a) and the trade secret information accordingly is not exempt from disclosure pursuant to section 6254.7(a).

**VI. Are the ZEV Credit Records Trade Secrets that Are Exempt from Disclosure Under the Public Records Act’s Incorporation of the Privilege Against Disclosure of Trade Secrets Under Evidence Code Section 1060?**

A. Issues Presented

Government Code section 6254(k), part of the Public Records Act, exempts from disclosure “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.” Under this exemption, if the Evidence Code establishes a privilege against disclosing information in a trial (or pretrial proceeding), then the information is exempt from disclosure by a state agency under the Public Records Act.

Evidence Code section 1060 addresses trade secrets, providing:

If he or his agent or employee claims the privilege, 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 a fraud or otherwise work injustice.

The fact that the manufacturers generally claimed that their ZEV credit information to be trade secret exempt from disclosure under Government Code section 6254.7 makes it appropriate to examine the applicability of Evidence Code section 1060, even though no manufacturer specifically invoked that provision. On its face, Evidence Code section 1060 establishes a two-pronged test for determining whether specified information is exempt from disclosure. First, it must be “trade secret.” Second, withholding the information must not tend to conceal a fraud or otherwise work injustice.

B. Is the ZEV Credit Information Trade Secret Under Evidence Code Section 1060?

The Legislature has adopted the identical definitions of “trade secret” in Civil Code section 3426.1(d) and Penal Code section 499c(a)(9) as the definition of trade secret for purposes of Evidence Code section 1060. (Evidence Code section 1061(a)(1).) These identical definitions provide that:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

After comparing the definitions of “trade secret” applicable to Government Code section 6254.7(d) and Evidence Code section 1060, we have concluded that the analysis demonstrating that the manufacturers’ ZEV credit information is trade secret under the Government Code provision is sufficient to demonstrate that the ZEV credit information is trade secret under Evidence Code section 1060. Therefore, the information is exempt from disclosure unless withholding it will tend to conceal a fraud or otherwise work injustice.

C. Will Withholding the ZEV Credit Information From Disclosure Tend to Conceal a Fraud or Otherwise Work Injustice?

We have identified one reported California case that examines the second prong of Evidence Code section 1060 in the context of a Public Records Act case. In *Uribe v. Howard*, 19 Cal.App.3d 194 (1971), a farm worker with physical disorders that she attributed to crop pesticides was refused permission to inspect the monthly pesticide spray reports submitted as required by law to the county agricultural commissioner. At the time of the trial in 1969, Government Code section 6254(d) exempted trade secrets from disclosure (this provision, which predated section 6354.7(d), no longer exists); Government Code section 6254(k) and Evidence Code section 1060 were identical to those provisions as they exist today. The Court of Appeals reversed the trial court’s decision that the pesticide reports were exempt from disclosure. The reviewing court concluded that the material in the pesticide reports did not constitute trade secrets. (19 Cal.App.3d 194 at 208-210.) The court nevertheless then proceeded to determine whether the second prong of Evidence Code section 1060 was met. It observed that under this prong (and under prior Government Code section 6254(d)) “the trade secret might be protected only if the interests of justice are best served.” (19 Cal.App.3d at 207.) The court held:

Alternatively, even if the information in the spray reports does contain trade secrets, we believe that the public interest is far better served by disclosure than by the converse. . . . [T]he information contained in the reports . . . [if publicly accessible] would be useful to study the long range effects of pesticides on humans, and in the treatment of present illnesses traceable in whole or in part to exposure of these chemicals. . . . Moreover, uncontradicted evidence is to the effect that the information in the reports would be most helpful to entomologists attempting to devise even more effective pesticide programs. . . . These considerations far outweigh the interests of the pesticide spray applicators in barring inspection of the spray reports by the public.

19 Cal.App.3d at 210.

In the present case of the ZEV credit information, we believe there are strong public interests supporting both nondisclosure and disclosure. And based on staff's review of the ZEV credit data, we do not believe there is any need to release any trade secret information to avoid the concealment of fraud. The issue comes down to determining whether nondisclosure will "work injustice" – put another way, whether justice is best served by nondisclosure or disclosure.

**The Public Interest in Disclosure:** The ZEV Alliance has identified two public interests which favor disclosure. First, the ZEV Alliance/FAP letter asserts that, "The requested data is either part of a compliance report to the government or it is the government's own record keeping. The public has a need to monitor compliance and administration of such important air pollution data and regulations." (ZEV Alliance/FAP letter, p. 4.) The letter characterizes the ZEV Alliance as "a watchdog for ZEV credits administration and compliance." (*Id.* p. 1). The basic premise is that the public has a right to know whether regulated parties are complying with the state's regulations, and in the case of the ZEV regulation the public cannot know whether all manufacturers are complying unless all of their ZEV credit information is released to the public. Further, to the extent there is one or more manufacturer in noncompliance, the premise would be that the public has a right to know what action ARB is taking to remedy the noncompliance.

There are, however, countervailing considerations with respect to this particular interest. For example, an argument could equally be made that the public has the right to see all federal and state income tax returns, in order to independently evaluate whether the tax authorities are adequately enforcing the tax laws. Nevertheless, tax returns are not universally available to the public, and we are aware of no significant movement to make them public as a matter of law. Given the heightened public interest in administration of the ZEV program, ARB staff believes it can state publicly, without compromising any claims of trade secret, that during model-years 2005 and 2006 all manufacturers had positive credit balances and thus are in compliance with the ZEV

regulation for those two model years<sup>7</sup> (model-year 2007 and reporting for it have not been completed). If members of the public do not find this characterization sufficient to satisfy the public interest, one possibility would be for the Board itself to review the data and disclose whether any manufacturer is running a negative ZEV credit balance after the 2005 and 2006 model years. If litigation ultimately ensues from this dispute, another possibility would be for a judge to inspect the data *in camera*.

The second public interest in releasing each manufacturer's ZEV credit data is so that the public will be more fully informed about the practical consequences of various possible amendments that could be considered in the upcoming ZEV rulemaking. The ZEV Alliance/FAP letter identifies one of the ZEV Alliance's objectives as seeking "to inform policy and future regulatory practices" regarding ZEVs. (ZEV Alliance/FAP August 23 letter, p.1.) In a November 28, 2007 letter to Analisa Bevan, Chief of ARB's Sustainable Transportation Technology Branch, representatives of eight members of the ZEV Alliance state that their "organizations strongly oppose any change to the ZEV Program until the gold, silver, and bronze credit levels for each manufacturer are made available to the public." They continue:

It is critically important that the public have access to this information which indicates if, how, and when automakers are and will be complying with California's ZEV regulation. This information also directly affects how many extremely low-polluting vehicles an automaker will produce (or not produce) in future years and, thus, how air quality and public health will be affected. The public interest in this critical compliance information clearly outweighs the private interest of automobile manufacturers in keeping it secret from California citizens.

Without this information it is difficult to assess the carmakers' progress in meeting their obligations under the regulation and even more difficult to provide thoughtful and specific input on staff's proposed changes to the regulation.

The ZEV regulation is comprised of a number of complicated elements, and the actual impact an amendment will have on a manufacturer may to some or even a large extent depend on the manufacturer's ZEV credit status. Although the ZEV Alliance has not provided any examples, a primary one would be that the amount of surplus gold ZEV credits a large-volume manufacturer has will affect its ability to choose the base path rather than the alternative path for the Phase II model-year 2009-2011 period. Depending on the level of those surplus credits, efforts to stimulate the production of certain kinds of ZEVs or near-ZEVs through amendments to the alternative path requirements might have the result of causing one or more manufacturers to abandon the alternative path and rely entirely on banked credits for its gold requirements. In

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<sup>7</sup> Note that a manufacturer is technically not fully in noncompliance with the ZEV regulation until it has failed to make up a ZEV credit deficit by the end of the next model year, except credits from PZEVs may be used to offset deficits for two model years. (title 13, C.C.R. section 1962(g)(7).)

addition, the amount of a large-volume manufacturer's banked ZEV credits could affect the speed at which it may develop new hybrid-electric vehicles.

Of particular concern would be that fact that the ultimate decision-makers in the upcoming ZEV rulemaking – the Board members – have not yet seen the individual manufacturers' ZEV credit data. This could be remedied by disclosure of the data to the Board in closed session – if that were permitted by law. Under the Bagley-Keene Open Meeting Act,<sup>8</sup> the Board conducts its deliberations in public meetings or open sessions. The Open Meeting Act, however, allows for closed sessions in specified circumstances. Government Code section 11126(c)(13) specifically allows ARB to meet in closed session:

(c) Nothing in this article shall be construed to do any of the following:

\* \* \* \*

(13) Prevent the State Air Resources Board from holding closed sessions when considering the proprietary specifications and performance data of manufacturers.

Does the manufacturer's ZEV credit information constitute "performance data"? Neither case law nor opinions of the Attorney General or ARB have interpreted this provision, and the Open Meeting Act defines neither "proprietary specifications" nor "performance data." Since the ZEV credit information demonstrates how a manufacturer's mix of ZEVs, AT PZEVs and PZEVs is performing with respect to compliance with the manufacturer's ZEV obligation, we believe the ZEV credit information is appropriately characterized as "performance data." But while this means the Board has the authority to consider the information and discuss it in closed session, it does not satisfy the interest in maximizing the ability of the ZEV Alliance and other members of the public to participate in a fully transparent rulemaking.

**The Public Interest in Nondisclosure:** There is a public interest in allowing manufacturers to proceed with compliance with the ZEV regulation without disclosure of their trade secret information about their own ZEV credit status. The manufacturer comments quoted in Section V.B.5. above identify potential adverse consequences that could result from disclosure. Adverse impacts for a manufacturer who may have traded particular kinds of credits with other manufacturers are of particular concern because it is unlikely that competitor manufacturers could have knowledge of, or could have anticipated credit changes due to trades with only publicly-available information at their disposal.

Ford and Mazda believe that disclosure of ZEV credit information could result in harm during the current ZEV regulatory process. They believe that competitors or other parties viewing themselves as adverse to a particular manufacturer could use that manufacturer's disclosed ZEV credit information to propose or seek to negotiate specific

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<sup>8</sup> Government Code sections 11120–11132.

changes to the ZEV regulation that would place the manufacturer at a competitive disadvantage. It is possible that the adverse impact that could result to an individual manufacturer from disclosure of its ZEV credit status would be partially mitigated if the ZEV credit information for all manufacturers is disclosed. While the individual manufacturer would have its closely-guarded ZEV credit information available to its competitors, at the same time that manufacturer would have the benefit of learning the ZEV credit information of each of its competitors.

Secondly, and of more importance to the public generally, is that disclosure of the ZEV credit information could substantially reduce the willingness of manufacturers to share trade secret data with the staff in the future. Since the manufacturers are required to submit the ZEV credit information, there would be sanctions if they refused to continue to submit the information to ARB following an ultimate determination that it is subject to disclosure. But there are many instances during the development and implementation of regulations in which manufacturers voluntarily share trade secret data so that staff will be better able to make fully informed decisions. In some instances this information is directly relevant to what compliance actions a manufacturer will take in response to a particular regulatory proposal under consideration. There have been instances where a manufacturer has advised staff – on a confidential basis only – that it is able to comply with a proposed standard that a trade association is claiming is not technologically feasible. While one could argue that the disclosure of this information is in the public interest because the public will be able to participate in the rulemaking in a more informed manner, it becomes doubtful that manufacturers will continue to supply trade secret information if they believe there is a real possibility that the data could be found to be disclosable under Evidence Code section 1060. This would have an adverse impact on staff's ability to develop and implement ARB's regulatory programs.

Ultimately, legal counsel recommends that the Board itself is the most appropriate entity to engage in the balancing of competing public interests and determine whether nondisclosure or disclosure best serves the interests of justice.

**VII. Are the ZEV Credit Records “Official Information” that Is Exempt From Disclosure Under the Public Records Act’s Incorporation of the Privilege Against Disclosure of Official Information Under Evidence Code Section 1040?**

Evidence Code section 1040 establishes a privilege against disclosure of “official information” that is “acquired in confidence by a public employee in the course of his or her duty,” subject to a balancing test. This provision is not applicable because the ZEV credit information was not received by ARB staff with staff's promise of confidentiality; it was received subject to staff's obligation to treat information designated by a manufacturer as confidential or trade secret in accordance with the Public Records Act and ARB regulations.