

Opinion No. 72-17

April 4, 1972

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QUESTIONS

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May the Environmental Improvement Board, subject to the confidentiality provision contained in Section 12-14-10(A), N.M.S.A., 1953 Comp., as amended, make air contaminant emission data and other information available to the public?

CONCLUSION

Yes.

OPINION

{*30} ANALYSIS

Section 110 of the federal Clean Air Act of 1970, 42 U.S.C. 1857 et seq., as amended, requires the several states to prepare and submit to the Administrator of the federal Environmental Protection Agency a plan providing for the "implementation, maintenance, and enforcement" of national ambient air quality standards within the respective states. Section 110(a) (2) (F) (iii) of the Act directs that state implementation plans provide for periodic reports from the owners or operators of emission sources describing the nature and amounts of such emissions. These reports are required by Section 110(a) (2) (F) (iv) of the Act to be correlated by the state with established emission limitations or standards, and they are to be made available at reasonable times for public inspection. Finally, the implementation plan is required to show that the state has the legal authority to fulfill the requirements of the plan including the authority to make emission "data available to the public as reported and as correlated with any applicable emission standards or limitations." See "Environmental Protection Agency Regulations On Preparation of Implementation Plans," 36 Fed. Reg. 22398-22417, 22400 (1971).

Prior to the 1972 Session of the New Mexico Legislature, Section 12-14-10(A), N.M.S.A., 1953 Comp. placed certain limitations on the public availability of any records or other information concerning air contaminant sources "furnished to or obtained by" the Environmental Improvement Board in the course of the Board's administration of the

New Mexico Air Quality Control Act, Sections 12-14-1 to 12-14-13, N.M.S.A., 1953 Comp. This information was to be confidential and not available to public scrutiny if it related "to processes or production techniques unique to the owner or operator, or if the publication thereof would adversely affect the competitive position of the person in his business operations."

In Chapter 51, Section 6, New Mexico Laws 1972, Section 12-14-10(A), **supra**, was amended to confer confidentiality only upon information which relates "to processes or production techniques unique to the owner or operator." When the amendment becomes effective on May 17, 1972, the statute will no longer require reports or information which do not relate to unique processes or production techniques of an owner or operator of an emission source to be treated as confidential. Chapter 51, Section 6, New Mexico Laws 1972 did not, however, expressly direct that emission data furnished to or obtained by the Environmental Improvement Board be made available for public inspection.

While the New Mexico Air Quality Control Act, **supra**, as amended, Chapter 51, New Mexico Laws 1972, does not expressly authorize the Environmental Improvement Board or the Director of the Environmental Improvement Agency, as custodian of the files and records of the Board, to make emission data and other information concerning air contaminant sources available for public inspection, Section 71-5-1, N.M.S.A., 1953 Comp. provides that:

"Every citizen of this state has a {31} right to inspect any public records of this state except records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions and except as otherwise provided by law."

Correspondingly, Section 71-5-2, N.M.S.A., 1953 Comp. imposes an obligation on any state officer having custody of any state records to make available for inspection, during the usual business hours, any record requested by any person having occasion to examine it for any lawful purpose. Failure to fulfill this obligation may subject the responsible official to criminal sanction. Section 71-5-3, N.M.S.A., 1953 Comp.

A "public record" is a document, report or writing which is prepared, ordered or obtained by a public official in connection with the orderly, customary or appropriate discharge of the responsibilities imposed by law upon his office or governmental agency. **MacEwan v. Holm**, 359 P.2d 413 (Ore. 1961); **Conover v. Board of Education**, 238 P.2d 581 (Cal. 1951). And see opinions of the Attorney General No. 72-3, issued January 12, 1972; No. 69-139, issued December 4, 1969; No. 61-137, issued December 27, 1961.

The Environmental Improvement Board is expressly directed to develop facts and make investigations and studies pursuant to the Air Quality Control Act, and in this connection it may "require the production of information relating to emissions which cause or contribute to air pollution." Section 12-14-5 (B) (2), **supra**. The Board is further empowered to require, by regulation, the submission of reports on the part of any person emitting an air contaminant regarding the nature and amounts of emissions and

the performance of emission control devices as well as any other information relating to the emission of air contaminants. Sections 12-14-5(E) (4) and (5), **supra**.

It would clearly appear then that reports regarding the nature and amounts of emissions and the performance of emission control devices as well as other written information or data pertaining to the emission of air contaminants furnished to or obtained by the Environmental Improvement Board are documents or writings which enter the custody and control of the Board in connection with the orderly, appropriate, indeed necessary, discharge of the statutory, responsibilities assigned to it. Accordingly these reports, documents or writings are "public records" for purposes of the public inspection provisions of Sections 71-5-1 and 71-5-2, **supra**. Except as these records may, in the judgment of the Environmental Improvement Board or The Director of the Environmental Improvement Agency, as the custodian of the files and records of the Board, substantially or materially disclose "processes or production techniques unique to the owner or operator" of an air contaminant emission source, they are not entitled to confidentiality and must be made available at reasonable times for public inspection.

It may be well to note, however, that notwithstanding the requirements of Section 71-5-1 and 71-5-2, **supra**, the right to inspect public records is not within qualification. **State ex rel. Youmans v. Owens'** 28 Wis. 2d 672, 137 N.W.2d 470 (1965); **MacEwan v. Holm, supra**. There may be circumstances which would justify a public agency or official withholding or postponing the inspection of an otherwise public document. See, for example, **Sanchez v. Board of Regents**, 82 N.M. 672, 486 P.2d 608 (1971); **State ex rel. Youmans v. Owens, supra**; **International Union, et al. v. Gooding**, 251 Wis. 362, 29 N.W.2d 730 (1947), Suffice it to say for purposes of this opinion that the right of inspection of public documents may not be so exercised as to frustrate or unreasonably interfere with the legitimate functions of governmental agencies or officials, such as unduly disrupting an investigatory process. See **MacEwan v. Holm, supra**. While the warrant or justification for a denial or postponement of the right of inspection of a public document must depend upon the unique circumstances of a particular case, it is only in extraordinary circumstances that the statutory policy favoring "the interest of the citizen in knowing what the servants of government are doing" may be outweighed by a contravening public {32} interest in having the affairs of a government agency conducted without undue disruption. **State ex rel. Youmans v. Owens. supra**; **MacEwan v. Holm, supra**.