

Opinion No. 72-42

September 4, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Thomas L. Dunigan,
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TO: Larry J. Gordon, Director, Environmental Improvement Agency, P. O. Box 2348,
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QUESTIONS

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1. Does Opinion of the Attorney General No. 72-17, issued April 4, 1972, apply to a county, municipal or joint county-municipal air quality control board created to administer and enforce the provisions of the Air Quality Control Act within the boundaries of a Class A county and/or a municipality within a Class A county?
2. Does the owner or operator of an air contaminant source have the burden to establish whether records or information furnished to or obtained by the Environmental Improvement Board or other air quality control board are entitled to confidentiality as specified in Section 12-14-10 (A), N.M.S.A., 1953 Comp.?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

{*70} ANALYSIS

Opinion of the Attorney General No. 72-17, issued April 4, 1972, advises that the Environmental Improvement Board is obliged, subject to the confidentiality provision of Section 12-14-10 (A), N.M.S.A., 1953 Comp., as amended, Chapter 51, Section 6, New Mexico Laws 1972, to make air contaminant emission data and information concerning the performance of emission control devices as well as other information or data pertaining to the emission of air contaminants available at reasonable times for public inspection. This obligation is derived from Section 71-5-1, N.M.S.A., 1953 Comp. which grants to citizens of this state the right to inspect, except as otherwise provided by law, documents or records which have been prepared, ordered or obtained by a public official in connection with the orderly, customary and appropriate discharge of his responsibilities, and from Section 71-5-2, N.M.S.A., 1953 Comp. which specifies:

"All officers having the custody of any state, county, school, city or town records in this state shall furnish proper and reasonable opportunities for the inspection and examination of all the records requested of their respective offices and reasonable facilities for making memoranda abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose."

Obviously this provision likewise imposes on a county, municipal or joint county-municipal air quality control board created to administer and enforce the provisions of the Air Quality Control Act within the boundaries of a Class A county and/or a municipality within a Class A county the obligation to make available for public inspection, subject to the confidentiality provision of Section 12-14-10 (A), **supra**, documents, data and records relating to the nature and amounts of air contaminant emissions and the performance of emission control devices as well as any other information or data pertaining to the emission of air contaminants.

Section 12-14-10 (A), **supra**, specifies in pertinent part:

"Any records or other information furnished to or obtained by the board concerning air contaminant sources relating to processes or production techniques unique to the owner or operator are confidential and shall not be made a part of any public record unless the person expressly agrees to its publication"

By declaring that information which relates ". . . to processes or production techniques unique to the owner or operator are confidential and shall not be made a part of any public record unless the person expressly agrees to its publication" Section 12-14-10 (A), **supra**, exempts such information from the public inspection provisions of Sections 71-5-1 and 71-5-2, **supra**. This exemption benefits the owner or operator of an air contaminant source by affording protection to his unique processes or production techniques.

Before any owner or operator of an air contaminant source may enjoy the benefit of this statutory exemption, however, he must clearly show entitlement to it. See **State ex re. Wilson v. Board of County Commissioners**, 62 N.M. 137, 306 P.2d 259 (1957); **Lujan v. Triangle Oil Company**, 38 N.M. 543, 37 P.2d 797 (1934). Any information furnished to or obtained by the Environmental Improvement Board or other air quality control agency remains a public record available for examination at any reasonable time by any person for any lawful purpose unless the owner or operator of the emission source to which the information relates satisfies the appropriate agency that the information does indeed disclose unique processes or production techniques.

The burden on the owner or operator of an air contaminant source to establish his right to the exemption specified in Section 12-14-1) (A), **supra**, is substantial. As stated by the court in **Lujan v. Triangle Oil Company, supra**:

"Any one [sic] claiming the benefit of the . . . exemption must clearly and unmistakably establish his right to its benefits. . . ." **Lujan v. Triangle Oil Company, supra**, at 545.

Accordingly, the right to inspect public records granted in Section 71-5-1, **supra**, may not be denied nor may the appropriate air quality control agency be relieved of the responsibility specified in Section 71-5-2, **supra**, to afford the opportunity for inspection of public records unless the owner or operator of an air contaminant source is able to establish, in the judgment of the Environmental Improvement Board or other air quality control agency, that records or information concerning such air contaminant source **clearly** and **unmistakably** reveal unique processes or production techniques.