STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 11, 2014

Opinion No. 14-16

Underground Storage Tank Operators' Records

QUESTIONS

1. Can the Commissioner ("Commissioner") of the Tennessee Department of Environment and Conservation ("Department"), through policy or guidance, undertake actions that are contrary to the express provisions of Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(b) without engaging in a formal rulemaking process through the Tennessee Underground Storage Tanks and Solid Waste Disposal Control Board ("Board")?

2. Do the Tennessee Petroleum Underground Storage Tank Act, Tenn. Code Ann. §§ 68-215-101 to -204 ("UST Act") and the current rules promulgated thereunder allow the State to request from an operator copies of its records specified in Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(b) in advance of an inspection, when such request will be perceived by operators to be legally required?

3. Is the Department's Division of Underground Storage Tanks ("Division") entitled to obtain and indefinitely maintain copies of such records it receives—either in advance of an inspection in response to its production request or as a result of a demand of such copies at the time of inspection—for purposes unrelated to a then-existing investigation or enforcement action by the Department, such as for future verification or tracking for future civil or criminal enforcement?

4. Does the Department's maintaining of records produced by operators for inspection as public records infringe on an operator's intellectual property rights without adequate protection against disclosure or constitute a violation of the various restrictions against making such competitive information available to competitors under applicable state and federal law and regulations?

5. Does the Department's maintaining of such records produced by operators for inspection as public records put an unreasonable burden on operators to seek protection from such disclosure?

OPINIONS

1. No. The Commissioner must follow the express provisions of Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(b). But with regard to matters not expressly

addressed in the rule, the Commissioner has the authority to develop policy or provide guidance.

2. Yes. Neither the UST Act nor the rules promulgated thereunder prevent the Department from requesting such documents in advance. But because there is no legal requirement to provide such documents in advance, operators may decline the Department's request. Declining operators will still be legally required to produce the documents at the inspection.

3. Yes. Based on the broad authority granted to the Commissioner to supervise, investigate, and inspect petroleum underground storage tanks and to ensure compliance with the UST Act and the regulations, the Department is entitled to obtain and maintain copies of records specified in the rules in furtherance of that purpose. There is nothing in the UST Act, the implementing regulations, or elsewhere that imposes a temporal limit on the Department's retention of these records.

4. No. The UST Act and the regulations promulgated thereunder set forth specific requirements of the Department to adequately protect proprietary information from disclosure as public records.

5. No. If before submitting its records, an operator can establish that its records are proprietary in accordance with the requirements of the UST Act and the regulations, then the Department will not maintain those records as public records.

ANALYSIS

1. & 2. The UST Act represents a comprehensive program for the inspection, remediation, and regulation of petroleum underground storage tank sites within the State of Tennessee. The stated purposes of the UST Act are "to protect the public health, safety and welfare, to prevent degradation of the environment, conserve natural resources and provide a coordinated statewide underground storage tank program." Tenn. Code Ann. § 68-215-102(a).

The Board was created pursuant to Tenn. Code Ann. § 68-211-111.[1] In accordance with Tenn. Code Ann. § 68-215-107(f), the Board has the authority to promulgate and adopt rules and regulations as are necessary or desirable to implement the UST Act including, but not limited to, setting forth standards for the maintenance and operation of underground storage tanks and requirements for maintaining records. For the purpose of developing or enforcing any rule or

[1] As the result of a legislatively mandated reorganization in 2012, the Board also has responsibilities with regard to solid waste disposal, processing, and management under Chapter 211 of Title 68. *See* 2012 Tenn. Pub. Acts 986, § 34.

regulation authorized by the UST Act, the Commissioner is authorized to inspect or investigate any underground storage tank or petroleum site as he deems necessary. Tenn. Code Ann. § 68-215-107(e). Thus, the Board has rulemaking authority under the UST Act, while the Commissioner has the investigative power to ensure compliance with the UST Act and the rules promulgated thereunder. The Commissioner cannot, therefore, undertake actions that are contrary to the express provisions of the rules, but that does not prevent the Commissioner from developing policy or providing guidance regarding matters not expressly addressed therein.

Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(c)2 states that "[i]f an inspection is scheduled by the division in advance of the date of that inspection, all records shall be present and available for review during the scheduled inspection." Therefore, the Commissioner may not *require* that those records be submitted in advance of the inspection. Nothing in the rules or statute, however, prevents the Commissioner from *requesting* that the documents be submitted in advance. Of course, because this is not a legal requirement, operators may decline the Department's request.[2]

3. UST owners, operators, and/or other responsible parties are required to submit and/or maintain certain records for review. Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(a) specifies which records shall be submitted to the Division, while Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(b) specifies which records shall be maintained for Division review. Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(c) then sets forth where the records must be maintained and made available to the Division. The rule is silent, however, as to whether or not the Division may obtain copies of the records. Similarly, Tenn. Comp. R. & Regs. 0400-18-01-.14 requires the Division to permanently retain certain records, which include those documents identified in Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(a). It is silent as to a retention period for all other records, including those identified in Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(b).

The rules of statutory construction apply when interpreting regulations. *Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009). When interpreting a statute, the General Assembly's intent and purpose must be given full effect "without unduly restricting or expanding a statute's coverage beyond its intended scope." *State v. Hawkins*, 406 S.W.3d 121, 131 (Tenn. 2013). The words must be construed "in the context in which they appear in the statute and in light of the statute's general purpose." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). It may be assumed that the "General Assembly used every word

[2] We have been informed by the Department that it has made a policy decision to no longer request documents in advance of an inspection. The Department itself will make copies when the original documents are produced by the operator during the inspection. There will be no undue burden on owners and operators given that the rule already requires them to maintain the records, *see* Tenn. Comp. R. & Regs. 0400-18-01-.03(2)(b), and the Department will incur the costs associated with copying.

deliberately" and did not intend an absurd result. *Id*. at 527. Thus, if the statutory language is clear and unambiguous, the courts apply the plain meaning of the text. *Hawkins*, 406 S.W.3d at 131. When the language is ambiguous, however, the courts may consider the broader statutory scheme, public policy, legislative history of the statute, or other sources to determine its meaning. *Lee*, 312 S.W.3d at 528. Remedial statutes, such as environmental statutes, are to be liberally construed. *Ass'n Concerned Over Resources & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690 at *17 (M.D. Tenn. Apr. 11, 2011). The UST Act has been held to be remedial legislation. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, No. 01A01-9305-CH-00202, 1993 WL 476292, at *7 (Tenn. Ct. App. Nov. 19, 1993). Furthermore, when dealing with a matter of first impression, such as the issue presented here, courts often "review the decisions of other states, as well as other authorities." *Hawkins*, 406 S.W.3d at 131.

Generally, courts have held that the right to inspect records includes the right to copy them. *See, e.g., Conley v. United Steelworkers of Am., Local Union No. 1014*, 549 F.2d 1122, 1124 (7th Cir. 1977) (holding that union members' right to examine financial reports extended to right to copy as "necessary to further the purpose of the Act"); *Dixon v. Club, Inc.,* 408 So.2d 76, 81-82 (Ala. 1981) (holding that private association's authorization to inspect membership list included right to copy; otherwise right to inspect would have been meaningless, considering volume of information); *Winter v. Playa del Sol, Inc.,* 353 So.2d 598, 599 (Fla. Dist. Ct. App. 1977) (finding condominium owners' statutory right to inspect condominium association's records includes right to copy records); *Lehman v. Nat'l Ben. Ins. Co.,* 53 N.W.2d 872, 877 (Iowa 1952) (observing that "[m]ost authorities agree the right to inspect the books carries with it the right to take extracts or copies therefrom"); *Owens v. Sw. Ouachita Waterworks, Inc.,* 960 So.2d 1243 (La. Ct. App. 2007) (stating that, "[f]or the right to examine to have any meaning, the right to copy, duplicate, and extract must necessarily be included in the term"); *In re Becker,* 192 N.Y.S. 754, 756 (N.Y. App. Div. 1922) (recognizing generally that "[t]he right to copy seems to be a necessary incident of the right to inspect, for otherwise the purpose of the inspection would largely be thwarted"). *But cf. Conley v. Aiello,* 276 F. Supp. 614, 616 (S.D.N.Y. 1967) (holding that right to inspect union membership lists does not include right to copy, as legislative history revealed Congress deleted proposal providing a right to copy in order to prevent improper use by employers or rival unions).[3]

When Tenn. Code Ann. § 68-215-107(a) and (e) are construed in accordance with the plain language of the statute and the legislative intent behind the UST Act as a whole, it is evident that the General Assembly's intention was to grant broad authority to the Commissioner in order to effectuate the stated purposes of the Act.

[3] As to UST records, both the Tennessee General Assembly and the Board have adopted provisions to protect the proprietary information of UST owners and operators. *See* Tenn. Code Ann. § 68-215-108 and Tenn. Comp. R. & Regs. 0400-18-01-.01(4) and (5). Hence, the concerns expressed in *Conley* would likely not prohibit copying of UST records.

Likewise, the Board in Tenn. Code Ann. § 68-215-107(f) was given broad authority to promulgate rules "necessary or desirable to implement [the UST Act]." Tenn. Comp. R. & Regs. 0400-18-01-.03(2) provides the Commissioner the authority to review certain records. The plain meaning of the text allows the Commissioner access to the information contained in those particular records. Prohibiting the Commissioner from obtaining copies of the records would lead to the absurd result of allowing only a cursory review where a more detailed examination might be necessary in order to accomplish the stated purpose of the UST Act—protection of the public health, safety, and welfare and prevention of degradation of the environment. Therefore, it is likely that a court would conclude that the right to inspect includes a right to copy in this context.

However, when the government conducts regulatory inspections and examines information derived therefrom, it must comply with the requirements of the Fourth Amendment. It has long been "recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises." *New York v. Burger*, 482 U.S. 691, 699 (1987). The fact that records are required to be kept by law "is not synonymous with the absence of a privacy interest." *McLaughlin v. Kings Island, Div. of Taft Broad. Co.*, 849 F.2d 990, 995 (6th Cir. 1988). Nevertheless, an exception to the requirement for a warrant "has been recognized *for searches of pervasively or closely regulated industries*," *id.* at 993 (emphasis in original), because "those 'industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.'" *Id.* at 994 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)).

Even with pervasively regulated industries, the exception to the warrant requirement applies only when three criteria are met. First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. *Burger*, 482 U.S. at 702. Second, the warrantless inspections must be necessary to further the regulatory scheme. *Id.* Third, the statute must provide a constitutionally adequate substitute for a warrant. *Id.* at 703. That is to say, "it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.*

In *Burger*, the Supreme Court held that an industry was pervasively regulated when it was subject to the following: the requirement of a license and payment of a fee; the maintenance and availability for inspection of certain records; the display of the operator's registration number; and the existence of criminal penalties for failure to comply with these provisions. *Burger,* 482 U.S. at 704-05. In *V-1 Oil Co. v. State of Wyo., Dep't of Envtl. Quality,* 902 F.2d 1482 (10th Cir. 1990), the court found that the gasoline industry in Wyoming was a pervasively regulated industry for Fourth Amendment purposes. The court noted that the aggregation of requirements under state and federal law to which Wyoming gas stations were

subject—the requirement of a license and payment of a fee as a prerequisite for doing business, the violation of which was punishable as a misdemeanor; the requirement that stations conspicuously display the price of gasoline; the requirement that a gasoline tax be collected; and a requirement that substantial and detailed information about underground storage tanks be furnished and inspections and monitoring be permitted—were equally as intrusive as the requirements set forth in *Burger*. *V-1 Oil,* 902 F.2d at 1486.

The gasoline industry in Tennessee likewise constitutes a pervasively regulated industry. State and federal laws regulating USTs are extensive. In fact, under authorization from the Environmental Protection Agency, Tennessee operates a UST program in lieu of the Resource Conservation and Recovery Act UST program. USTs must be registered with the Department, and annual tank fees must be paid. All Tennessee properties containing regulated USTs are subject to routine inspections, and both civil and criminal penalties may be assessed for failure to comply with the provisions of the UST Act and the regulations promulgated thereunder, including furnishing substantial and detailed information about the tanks.

The Tennessee UST regulatory scheme also meets the three-part test set forth in *Burger*. First, the General Assembly has specifically determined that there is a substantial government interest in protecting the public health, safety, and welfare and preventing degradation of the environment. *See* Tenn. Code Ann. § 68-215-102 (setting forth legislative intent). Releases from USTs pose substantial health and environmental risks. Second, frequent inspections are essential to furthering this substantial government interest. The UST Act is a self-regulating act, leaving the Department with no other way of verifying compliance other than regular and frequent inspections. Third, the statute and regulations are constitutionally adequate substitutes for a warrant. Pursuant to Tenn. Code Ann. § 68-215-107(e), owners and operators have notice that periodic inspections will be conducted. The statute limits the scope of the inspection to "reasonable times" at locations "where a petroleum underground storage tank is located or where petroleum contamination is or may be present," and the inspection may be conducted only for the "purpose of developing or enforcing" the UST Act or rules promulgated thereunder. The Department is required by federal law to conduct periodic "on-site inspections of each underground storage tank regulated . . . at least every 3 years," 42 U.S.C. § 6991d(c)(2) (2005), thus limiting an inspector's discretion as to who will be inspected and when inspections will be conducted.

Furthermore, the copies obtained by the Department do not constitute a seizure under the Fourth Amendment. A "search" takes place "when an expectation of privacy that society is prepared to consider reasonable is infringed," *United States v. Jacobsen,* 466 U.S. 109, 113 (1984), while "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id*. If the Department obtains copies of the records

specified in Tenn. Comp. R. and Regs. 0400-18-01-.03(2)(b), rather than taking the original records, there is no "meaningful interference" with "possessory interests" in the records. *See Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (recording of serial numbers on stereo equipment was not a seizure because the recording did not interfere with possession of numbers or equipment); *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (photographing visual images while lawfully searching property does not "meaningfully interfere" with possession of those items photographed).

It would be illogical to allow the Commissioner to make copies of UST records but then prohibit retention of those copies. There is nothing in the UST Act or the implementing regulations that limits the time that the Department may retain copies of UST records.[4] Moreover, as discussed, *supra*, the Fourth Amendment considerations implicated in this context do not prohibit the Department from obtaining and indefinitely maintaining copies of the records it acquires at the inspection. Accordingly, the broad statutory authority granted to the Commissioner to ensure compliance with the UST Act and the regulations promulgated thereunder authorize the Department to obtain and permanently retain copies of UST records in order to accomplish the stated purpose of the UST Act.

4. & 5. Tenn. Code Ann. § 68-215-108 authorizes the Department to use proprietary information "in connection with the responsibilities of the department or board pursuant to [the UST Act] or as necessary to comply with federal law." It further authorizes the Board to establish procedures to ensure that proprietary information is not disclosed. Tenn. Comp. R. and Regs. 0400-18-01-.01(4) defines "proprietary information" and requires that a proprietary claim be "accompanied by a written statement from such person relating the reasons why such information should be held confidential." The rule goes on to explain that the written statement must detail the potential harm that could result from disclosure and the measures that have been taken by the operator as part of its business operations to guard against disclosure. Tenn. Comp. R. & Regs. 0400-18-01-.01(4). If the records are found to be proprietary, Tenn. Comp. R. & Regs. 0400-18-01-.01(5) sets forth detailed requirements as to how the Department must handle and store the proprietary information in order to maintain the confidentiality of the records.

Thus, if operators have any confidential, intellectual property rights or are required by applicable state and/or federal law to maintain confidentiality of the records, then before the time they are required to produce those records for the Department, operators have the opportunity to satisfy the requirements of Tenn. Comp. R. & Regs. 0400-18-01-.01(4). If they do so, then the confidentiality of the records will be maintained in accordance with Tenn. Comp. R. & Regs. 0400-18-01-.01(5) when such records are submitted to the Department.

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[4] The Department also has record disposition authorizations, which have been approved by the Public Records Commission and require the permanent retention of all UST records.

The requirements set forth in Tenn. Comp. R. & Regs. 0400-18-01-.01(4) do not place an unreasonable burden on operators to seek protection from disclosure. It has been widely held that the burden to prove information as proprietary falls on the person making such an assertion. *See Hauck Mfg. Co. v. Astec Indus., Inc.*, 376 F. Supp. 2d 808, 814 (E.D. Tenn. 2005) (stating that plaintiffs are required to demonstrate that "information is not readily ascertainable by others and derives independent economic value from its secrecy"); *INSLAW, Inc. v. United States*, 40 Fed. Cl. 843, 860 (Fed. Cl. 1998) (placing burden on plaintiffs, who claimed enhancements to a computer software program were proprietary, to prove that they were indeed proprietary); *Asahi Glass Co., Ltd. v. Toledo Eng'g Co., Inc.*, 505 F. Supp. 2d 423, 433 (N.D. Ohio 2007) (placing burden on party asserting trade secret status to prove trade secret); *MedSpring Grp., Inc. v. Feng*, 368 F. Supp. 2d 1270, 1276 (D. Utah 2005) (placing burden on plaintiff to prove existence of trade secret; no presumption in his favor). Further, operators are in the best position to demonstrate what measures have been taken to prevent disclosure and how disclosure could harm their business. *See Gill v. N.J. Dept. of Banking and Ins.*, 960 A.2d 397, (N.J. Super. Ct. App. Div. 2008) (placing burden on insurer to prove proprietary nature of documents, given that insurer was in best position to show how disclosure could harm its business).

Therefore, the Department's maintaining of operators' records does not infringe on an operator's intellectual property rights or violate any restrictions against making such competitive information available to competitors, nor does it create an unreasonable burden on operators to seek protection from disclosure.

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