



November 12, 1999

Mr. Paul C. Sarahan  
Litigation Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR99-3224

Déar Mr. Sarahan:

You have asked whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 128754.

The Texas Natural Resource Conservation Commission (the “commission”) received a request for all documents associated with the 30 audits identified by the requestor. In response to the request, you submit to this office for review the information at issue.<sup>1</sup> You state that the “commission is making available to [the requestor] the portion of the requested information that TNRCC believes to be public information.” You contend that the remaining submitted information is excepted from disclosure pursuant to section 552.125 of the Government Code. We have considered your arguments and claimed exception, and reviewed the submitted information.

Section 552.125 of the Government Code excepts from disclosure “[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act.” The stated purpose of the Texas Environmental, Health, and Safety Audit Privilege Act (the “Act”), article 4447cc of Vernon’s Texas Civil Statutes, “is to encourage voluntary compliance with environmental and occupational health and safety laws.” V.T.C.S. art. 4447cc, § 2. In furtherance of its stated purpose, the Act provides for the confidentiality of environmental or health and safety audits voluntarily performed by or for the owner or operator of a facility that is regulated under an environmental or health and safety law. V.T.C.S. art. 4447cc, §§ 3, 5, 6. Section 5 of the Act provides in part:

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<sup>1</sup>Since you have only submitted records responsive to one audited entity and the corresponding “Audit Act Confidentiality Agreement,” we assume that the remaining information will be released as you have not raised any other applicable exception.

(a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to disclosure . . . .

V.T.C.S. art. 4447cc, § 5. Section 6 provides in relevant part:

(a) The privilege described by Section 5 of this Act does not apply to the extent the privilege is expressly waived by the owner or operator who prepared the audit report or caused the report to be prepared.

(b) Disclosure of an audit report or any information generated by an environmental or health and safety audit does not waive the privilege established by Section 5 of this Act if the disclosure:

. . . .

(3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.

. . . .

(d) Information that is disclosed under Subsection (b)(3) of this section is confidential and is not subject to disclosure under Chapter 552, Government Code. A public entity, public employee, or public official who discloses information in violation of this subsection is subject to any penalty provided in Chapter 552, Government Code . . . .

V.T.C.S. art. 4447cc, § 6.<sup>2</sup>

An audit report is defined as a “report that includes each document and communication, other than those set forth in Section 8 of this Act, produced from an environmental or health and

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<sup>2</sup>Section 12 states that “[t]he privilege created by this Act applies to environmental or health and safety audits that are conducted on or after the effective date of this Act,” which is September 1, 1997. V.T.C.S. art. 4447cc, § 12. *See also* Texas Environmental, Health, and Safety Audit Privilege Act, 74<sup>th</sup> Leg., R.S., ch. 219, §§ 5, 6, 1995 Tex. Gen. Laws 1963, 1965-66 (predecessor statute providing for confidentiality of audits conducted prior to September 1, 1997).

safety audit,” including “memoranda and documents analyzing” an audit report. V.T.C.S. art. 4447cc, § 4. Section 8(a) excludes the following types of information from the privilege against disclosure given by the Act:

(1) a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law;

(2) information obtained by observation, sampling, or monitoring by a regulatory agency; or

(3) information obtained from a source not involved in the preparation of the environmental or health and safety audit report.

V.T.C.S. art. 4447cc, § 8(a). Section 5(e) states that “[a]n employee of a state agency may not request, review, or otherwise use an audit report during an agency inspection of a regulated facility or operation, or an activity of a regulated facility or operation.” V.T.C.S. art. 4447cc, § 5(e).

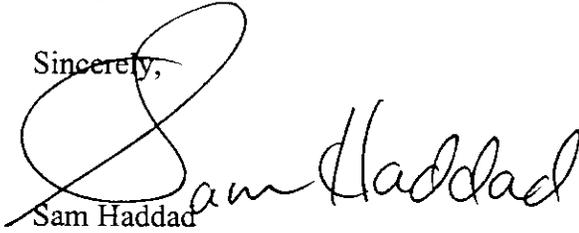
You explain that

The Commission on occasion enters into confidentiality agreements with officials of self-audited facilities. Information produced from environmental audits is shared pursuant to such confidentiality agreements and under a claim of confidentiality, both orally and by submitted portions of written audit reports for review.

You represent that the “enclosed information relevant to the subject open records request consists of handwritten notes, document communication produced from audit reports, taken by Commission employees after the signing of the enclosed confidentiality agreement.” Based on your representation, the materials contained in Exhibit C, except for the submitted “Audit Act Confidentiality Agreement,” consist of information obtained or generated pursuant to a confidentiality agreement as set forth in section 6 of the Audit Act. Upon review of the information contained in Exhibit C, we conclude that, with the exception of the confidentiality agreement, the information is privileged under the Audit Act as documents and communications produced from an environmental or health and safety audit. Thus, having reviewed the submitted confidentiality agreement and related documents, we agree that the submitted documents are confidential under section 6(d) of the Act and excepted from disclosure under section 552.125 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/ljp

Ref.: ID# 128754

Encl. Submitted documents

cc: Mr. Jim Marston  
Environmental Defense Fund  
44 East Avenue, Suite304  
Austin, Texas 78701  
(w/o enclosures)