



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 22, 1997

Mr. John A. Riley
Director
Litigation Support Division
Texas Natural Resource Conservation
Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-0130

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103103.

The Natural Resource Conservation Commission ("TNRCC") received a request for inspection and possible copying of the following records:

All documents associated with the audits identified below, including but not limited to, the notices of audit, notices of violations, results of audits, and associated correspondence:

- 1.) ARCO Chemical Company - Bayport (REC #12 of Oct. 3, 1996 Environmental Audit Log, NOA date 8/4/95)
- 2.) SGS-Thomson Microelectronics (REC #63, NOA date 9/26/95)
- 3.) Louisiana-Pacific Corp. - Cleveland Plywood (REC #88, NOA date 10/26/95)
- 4.) Capitol Cement (REC #156, NOA date 3/4/96)
- 5.) University of Texas at Austin & Pickle Research (REC #166, NOA date 3/18/96)

- 6.) Brownsville Navig. Dist. - Port of Brownsville (REC #172 date 4/3/96)
- 7.) U.S. DOE - Pantex (Mason & Hanger-Silas Mason Co.) (REC #212, NOA date 5/30/96) [and]
- 8.) Eastman Chemical Company (REC #238, NOA date 6/24/96 & REC #280, NOA date 8/21/96)[.]

You advise this office that you have released the requested documents except for three letters which you maintain are “not exempt from the public disclosure requirements of § 552.021 of the Government Code.” However, you withhold the letters from the requestor as the letters are stamped “confidential even though the information is provided to TNRCC voluntarily and within the scope of a regulatory statute.”

The Texas Environmental, Health, and Safety Audit Privilege Act (the “Audit Act”) encourages voluntary compliance with environmental and occupational health and safety laws by providing a “use” immunity. V.T.C.S. art. 4447cc, § 2. The “use” immunity prohibits the use of any audit report or information generated by the environmental or health and safety audit as evidence against the alleged violator in any civil, criminal, or administrative proceeding provided that the audit or resulting information is voluntarily disclosed to the agency in accordance with the specifications detailed in the Audit Act. *Id* §§ 2, 10(a). A person is immune from an administrative, civil, or criminal penalty for the disclosed violation only if the disclosure is made voluntarily, promptly, and prior to the initiation or detection of the violation by the agency with enforcement jurisdiction. *Id* § 10. In fact, section 10(g) provides:

In order to receive immunity under this section, a facility conducting an environmental or health and safety audit under this Act must give notice to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.

Additionally, the Audit Act provides under section 10(i):

A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

An audit report¹ or any information generated by an environmental or health and safety audit is privileged and is confidential under sections 5(a) and 6(d) of the Audit Act and section 552.124 of the Open Records Act.²

However, the privilege described in the Audit Act does not apply to a document, communication, datum, 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. *See* V.T.C.S. art. 4447cc, § 8(1). TNRCC requires a notice of audit, as those contained in Exhibit A and Exhibit C, as one of the steps in invoking immunity from prosecution and does not regard it as confidential. *Id* §10(f); *see also* TNRCC RG-172, p.10. Additionally, a violation that has been voluntarily disclosed must be identified as such in compliance history reports. Exhibit B is voluntarily disclosed and is not identified as the type of document or information which falls under the definition of an audit report. V.T.C.S. art. 4447cc, §§ 4(b), 10(i). The disclosures of violations are specifically referred to under section § 10(b)(2) as required to be delivered to the agency in writing by certified mail in order to preserve the privilege of immunity. Additionally, TNRCC prepares compliance history reports and considers them in the context of permit applications and enforcement proceedings. 30 T.A.C. § 281.21(d) and § 116.124. TNRCC also prepares summaries composed of information from a facility's disclosure of violations as demonstrated in Exhibit D. The reports and summaries are public information; therefore, the information which comprises them are likewise public information.

¹The Audit Act provides:

Section 4(a) An audit report is 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 safety audit.

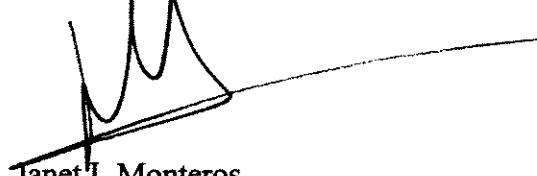
(b) General components that may be contained in a complete audit report include: (1) a report prepared by an auditor, monitor, or similar person, which may include: (A) a description of the scope of the audit; (B) the information gained in the audit and findings, conclusions, and recommendations; and (C) exhibits and appendices; (2) memoranda and documents analyzing all or a portion of the materials described by Subdivision (1) of this subsection or discussing implementation issues; and (3) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance. (c) The types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including: (1) interviews with current or former employees; (2) field notes and records of observations; (3) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda; (4) legal analyses; (5) drawings; (6) photographs; (7) laboratory analyses and other analytical data; (8) computer-generated or electronically recorded information; (9) maps, charts, graphs, and surveys; and (10) other communications associated with an environmental or health and safety audit.

²Section 552.124 reads: "Any documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act are excepted from the requirements of Section 552.021."

Accordingly, we have examined Exhibits A, B, and C and observe they are marked variously as privileged and confidential by those submitting them to the TNRCC. We also note TNRCC's position is that notices of audits and disclosures of violations submitted to the TNRCC under the Audit Act constitute public information and do not fall within the exception under section 552.124. Exceptions to disclosure must be construed narrowly in favor of disclosure. Open Records Decision No. 506 (1988). We further note that information is not confidential under the Open Records Act simply because the party submitting it marks the information confidential. Open Records Decision No. 627 (1994) at 4. Thus, we conclude that the documents submitted under Exhibits A, B, C, and D may be disclosed.

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', is written over a horizontal line. The signature is stylized with several loops and a long horizontal stroke extending to the right.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 103103

Enclosures: Submitted documents

cc: Mr. Richard Lowerre
Johnson, Hess & Frederick
202 West 17th Street
Austin, Texas 78701
(w/o enclosures)