



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 16, 1998

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

OR98-3149

Dear Mr. Sarahan:

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# 120533.

The Texas Natural Resource Conservation Commission (the "commission") received a request for the following information:

all air monitoring records, upset/maintenance notices, notices of violation, logs of verbal notices, and any and all other similar documents, reports, notes and statements in connection with any and all air discharges from any of the following [eleven] Texas City facilities during May, 1996.

You state that you have made some of this information available to the requestor. You contend that the remaining responsive information, the commission's files on the Sterling Chemicals site, is excepted from disclosure pursuant to section 552.125 of the Government Code. We have considered the exception you claim and have reviewed the documents at issue.

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:

(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, § 6.¹

¹Section 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, 74th Leg., R.S., ch. 219, §§ 5, 6, 1995 Tex. Gen. Laws 1963, 1965-66 (predecessor statute providing for confidentiality of audits

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 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 The enclosed information relevant to the subject open records request consists of handwritten notes, documenting communication produced from audit reports, taken by Commission employees after the signing of the enclosed confidentiality agreement by authorized parties.

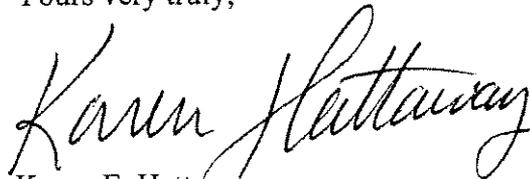
Having reviewed the submitted confidentiality agreement and documents, we agree that most of the submitted documents are confidential under section 6(d) of the Act and excepted from disclosure under section 552.125 of the Government Code. The document we have marked with a green tab summarizes the commission's inspection of Sterling Chemicals "conducted to determine the facility's compliance with applicable laws and regulations pertaining to

conducted prior to September 1, 1997).

industrial solid waste management.” Sections 8(a) states that the privilege against disclosure does not apply to this type of inspection document, and section 5(e) prohibits the commission from using information deemed privileged and confidential by the Act in this type of inspection. Therefore, the document marked with a green tab is not confidential under section 6(d) of the Act and must be released to the requestor. The remaining documents at issue are confidential under section 6(d) of the Act, and, therefore, must be withheld from disclosure pursuant to 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.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 120533

Enclosures: Marked documents

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(w/o enclosures)