



House Resolution 231 Regular Session of the Legislature 2019

Stakeholders Session II
Wednesday August 21, 2019

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

:LAW DIVISION



Privilege

- “A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. And exceptional or extraordinary power or exemption. A right, power franchise, or immunity held by a person or class against or beyond the course of law.” (Blacks law dictionary)
- There are many types of privileges recognized by law including; Attorney-Client; Executive; Journalist; Against Self incrimination, etc.



Privilege (cont.)

- Generally of two types:
 - Absolute
 - Conditional (also called qualified)
 - Absolute privileges protect the matter absolutely from legal processes. An example would be statements made in legislative debates.
 - Conditional or Qualified privileges are those that protect the information under certain circumstances. An example would be attorney-client, which would apply only when legal advice is asked for and given.



Privilege (cont.)

- Privilege is not the same as confidential. While the former is generally a rule of evidence (making some information inadmissible in court), the other is usually the result of specific statutory enactment. Both can involve legislative enactments, but privileges can exist without legislative enactment. Courts have long extended privilege to certain types of communications. The ability to hold something confidential is usually the subject of legislative enactment.



Confidentiality in Louisiana

- Louisiana is a “public records” state.
- All records are considered public unless specifically excluded.
- La. R.S. 44:1(2)(a) provides: “ All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records", except as otherwise provided in this Chapter or the Constitution of Louisiana.”



Confidentiality in Louisiana

- Additional law governing public records under the Environmental Quality Act (EQA) can be found in La. R.S. 30:2030 which provides in relevant portion:

A.(1) Department records and information obtained under this Subtitle, or by any rule, regulation, order, license, or permit term or condition adopted or issued hereunder, or by any investigation authorized thereby, shall be available to the public, unless nondisclosure is requested in writing, and such information is determined by the department to require confidentiality. Such information may be classified as confidential by the department if the secretary makes a written determination that confidentiality is necessary to:

- (a) Prevent impairment of an ongoing investigation or prejudice to the final decision regarding a violation; or
- (b) Protect trade secrets, proprietary secrets and information, and commercial or financial information.



Confidentiality in Louisiana (cont.)

(2) However, such nondisclosure shall not apply to necessary use by duly authorized officers or employees of state or federal government in carrying out their responsibilities under this Subtitle or applicable federal law, and air emission data or discharges to surface and ground waters and the location and identification of any buried waste materials shall be not construed as confidential information.

B. The department shall adopt such regulations as are necessary to effectively implement this Section in strict accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq.

C. Any employee of the department or any former employee of the department or any authorized contractor acting as a representative of the secretary or the department who is convicted of intentional disclosure or conspiracy to disclose trade secrets or other information which has been determined to be confidential pursuant to regulations applicable hereto is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars, imprisonment for up to one year, or both.



EPA Policy

- Currently—EPA Self Audit Policy does not recognize a privilege on information contained in a Self Audit.
- EPA does recognize confidentiality.
 - EPA will accept a report prepared pursuant to a Self Audit that shows non-compliance discovered in the process of the self-audit and will maintain the report and the information contained in the report confidential *until such time as an agreement is reached*. At that time, EPA will release the information.
 - EPA will generally work with DEQ during this process, but will be told not to reveal actual data on releases or emissions to the department as Louisiana's confidentiality statute requires that data involving releases be public.
 - DEQ will maintain any information given by EPA to it, other than emissions and release data, confidential under its exception for information that might impair an ongoing investigation into a violation.



Region VI States

- Arkansas
- Louisiana
- New Mexico
- Oklahoma
- Texas



Arkansas

- Arkansas Code Ann. §8-1-301 to 312
- Creates the Privilege on the communications related to voluntary internal environmental audits.
- Makes the contents of the report inadmissible in any civil or administrative legal action, including enforcement actions.
- Maintains the privilege to communications between prospective purchasers and sellers operating under a confidentiality agreement.
- Has a waiver provision allowing for total or partial waiver of information contained in the report.



Arkansas (cont.)

- Does not apply to the following:
 - Documents, communications, data, reports etc., that are required to be developed, maintained, reported, or otherwise made available to the public or regulatory agency by;
 - Federal or State law;
 - A rule or standard adopted by Arkansas' Environmental Quality Department;
 - A permit condition or order;
 - Any other federal, state, or local law, permit or order;
 - Information obtained by the regulatory agency by observation, sampling, or monitoring;
 - Information obtained from a source independent of the environmental audit.



Arkansas (cont.)

- The parties to a legal action may at any time stipulate to the entry of an order that directs that specific information contained in the audit report is not subject to the privilege (a waiver provision).
- Allows for “in-camera” review by judges and administrative tribunals when the privilege is sought to be entered into evidence. Provides grounds for a decision on the privilege.
- Provides for compliance schedule when the violation is a failure to obtain a permit.
- Provides that the privilege does not extend to criminal violations; but does state that the privilege is not waived.
- Has burden of proof provisions.



New Mexico

- New Mexico does not recognize a privilege for voluntary environmental audits.
- New Mexico does have a “Voluntary Environmental Self Evaluation Policy”
- Requires mechanisms for systemically and voluntarily discovering violations and disclosing them.
- Requires prompt remedial action and excludes repeat violations.
- Has provisions for written agreements and stipulated orders.
- Excludes serious violations that endanger human health or the environment.



New Mexico (cont.)

- Incentives include elimination of the “gravity based” penalty if all conditions of the policy are followed.
- Reduction of the “gravity based” penalty by up to 75% for the self reported is most of the policy is followed.
- No routine requests for audits can be made by inspectors.
- New Mexico’s policy is very similar to current EPA policy.



Oklahoma

- Contained in Oklahoma Code 27A O.S. §1-4-111-121; effective November 1, 2019
- Recognizes a legal privilege on the audit reports.
- Does not extend that privilege to the Notice of Audit and the Disclosure of Violation (both are required to be filed with the administrative agency) which are subject to the public records law.
- Makes the report inadmissible in any court or administrative proceeding.
- Extends the privilege to testimony of persons involved in the audit (they cannot be compelled to testify).



Oklahoma (cont.)

- Allows for testimony of a person who actually observed physical events of violation (i.e., facts actually seen).
- Exempts the audit from Oklahoma's public records law.
- Allows for waivers.
- Applies to prospective purchasers if under a confidentiality agreement.
- Allows for in "in camera" review of the audit report by judges and administrative tribunals to determine if the privilege applies and provides guidelines for when the privilege does not apply (such as if facility did not take appropriate remedial actions).
- Allows for appropriate appeals to higher courts.
- Exempts from the privilege any information that is required to be collected, developed, maintained, or reported under state or federal law; information obtained by a regulatory agency; and, information obtained from a source not involved in the audit.



Texas

- Statute found in Texas Environmental, Health, and Safety Audit Privilege Act. Title 13, Chapter 1101.
- Establishes the Privilege for the report which includes each document and communication produced for the audit and defines which are subject to the privilege.
- Is retroactive to audits conducted after May 23, 1995.
- Has technical requirement for labeling (Compliance Report: Privileged Document).
- Limits the time of the audit to be completed to six months.
- Covers sellers and purchasers that are conducting audits.
- Provides for inadmissibility in any civil action or administrative proceeding.
- Provides that party called to testify cannot be compelled to testify on material covered in the audit report.



Texas (cont.)

- Provides that the witness can testify as to events of violations that were actually observed.
- State regulators cannot request copies of the report during an inspection.
- A court or administrative tribunal may require release of the report under certain circumstances: Used for a fraudulent purpose; a portion of the report is not subject to the privilege; and or, the report shows violations that have not been corrected timely.
- The decision to release is subject to appeal rights and the report remains privileged during the appeal.
- Even if used in a criminal proceeding, it remains subject to the privilege in civil proceedings.
- If the information is required to be public by operation of state or federal law, the government authority must so inform the person supplying the audit.



Other Information

- There are currently 30 states with some form of Audit law or Policy. A chart listing them can be found at:
- <http://www.law.uh.edu/faculty/thester/courses/Environmental-Practicum-2014/State%20Audit%20Policy%20Overview.pdf>

The above contains a chart listing what each state has enacted.

- <https://www.epa.gov/compliance/state-audit-privilege-and-immunity-laws-self-disclosure-laws-and-policies>

The above contains an EPA publication listing its classification of which states have privileges.