Senate Engrossed House Bill

FILED
KEN BENNETT
SECRETARY OF STATE

State of Arizona
House of Representatives
Fifty-first Legislature
First Regular Session
2013

CHAPTER 146

HOUSE BILL 2485

AN ACT

AMENDING TITLE 12, CHAPTER 13, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 10; RELATING TO HEALTH AND SAFETY AUDIT PRIVILEGE.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 12, chapter 13, Arizona Revised Statutes, is amended by adding article 10, to read:

ARTICLE 10. HEALTH AND SAFETY AUDIT PRIVILEGE

12-2321. Definitions

IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "ACTUAL HARM" MEANS DAMAGE, LOSS OR INJURY.

2. "AUDIT REPORT" MEANS AN AUDIT REPORT, PREPARED BY AN ORGANIZATION, AS PRESCRIBED BY SECTION 12-2322.

3. "HEALTH OR SAFETY LAW" MEANS A FEDERAL, STATE OR LOCAL STATUTE, RULE, REGULATION OR ORDINANCE, OR A PERMIT ISSUED UNDER A FEDERAL, STATE OR LOCAL STATUTE, RULE, REGULATION OR ORDINANCE, THAT RELATES TO OCCUPATIONAL HEALTH, HEALTH OR SAFETY.

4. "ORGANIZATION" MEANS A PUBLIC OR PRIVATE COMPANY, CORPORATION, POLITICAL SUBDIVISION ORGANIZED UNDER TITLE 48 OF THIS CODE, FIRM, ENTERPRISE OR INSTITUTION, OR ANY PART OR COMBINATION OF THESE ENTITIES, WHETHER INCORPORATED OR NOT, THAT HAS ITS OWN FUNCTIONS AND ADMINISTRATION. IF AN ORGANIZATION HAS MORE THAN ONE OPERATING UNIT, A SINGLE OPERATING UNIT MAY BE AN ORGANIZATION.

5. "PERSON" MEANS AN INDIVIDUAL, EMPLOYEE, OFFICER, MANAGING BODY, TRUST, FIRM, JOINT STOCK COMPANY, CONSORTIUM, PUBLIC OR PRIVATE CORPORATION, INCLUDING A GOVERNMENT CORPORATION, PARTNERSHIP, ASSOCIATION, STATE, POLITICAL SUBDIVISION OF THIS STATE OR COMMISSION OR THE UNITED STATES GOVERNMENT, A FEDERAL FACILITY, AN INTERSTATE BODY OR ANY OTHER ENTITY.

6. "REGULATED FACILITY OR OPERATION" MEANS A FACILITY OR OPERATION THAT IS REGULATED UNDER A HEALTH OR SAFETY LAW.

12-2322. Audit report; contents

A. EXCEPT FOR AN ITEM DESCRIBED IN SECTION 12-2326, AN AUDIT REPORT SHALL INCLUDE EACH DOCUMENT AND COMMUNICATION THAT IS CREATED FOR AN AUDIT TO EVALUATE AN ORGANIZATION'S COMPLIANCE WITH A HEALTH OR SAFETY LAW OR AN INDUSTRY STANDARD OF EXCELLENCE WITH RESPECT TO SAFETY, RELIABILITY OR TRAINING.

B. AN AUDIT REPORT MAY INCLUDE THE FOLLOWING:

1. A REPORT PREPARED BY AN AUDITOR, CONSULTANT, MONITOR OR OTHER INDIVIDUAL ACTING IN A SIMILAR ROLE, WHICH MAY INCLUDE:

(a) A DESCRIPTION OF THE SCOPE OF THE AUDIT.

(b) THE INFORMATION GAINED IN THE AUDIT AND FINDINGS, CONCLUSIONS AND RECOMMENDATIONS.

(c) EXHIBITS AND APPENDICES.

2. MEMORANDA AND DOCUMENTS THAT ANALYZE ALL OR A PORTION OF THE MATERIALS DESCRIBED BY SUBSECTION C, PARAGRAPH 1 OF THIS SECTION OR THAT DISCUSS IMPLEMENTATION ISSUES.

3. AN IMPLEMENTATION PLAN OR TRACKING SYSTEM TO CORRECT PAST NONCOMPLIANCE, IMPROVE CURRENT COMPLIANCE OR PREVENT FUTURE NONCOMPLIANCE.

4. AN EVALUATION, ASSESSMENT OR ACCREDITATION OF AN ORGANIZATION'S FACILITIES, OPERATIONS OR TRAINING PROGRAMS RELATIVE TO THAT INDUSTRY'S STANDARDS OF EXCELLENCE IN SAFETY, RELIABILITY OR TRAINING.

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 GATHERED IN THE COURSE OF A HEALTH OR 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.
10. OTHER COMMUNICATIONS ASSOCIATED WITH A HEALTH OR SAFETY AUDIT.

D. TO FACILITATE IDENTIFICATION, EACH DOCUMENT IN AN AUDIT REPORT MAY BE LABELED "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" OR WITH WORDS OF SIMILAR IMPORT. THE FAILURE TO LABEL A DOCUMENT DOES NOT CONSTITUTE A WAIVER OF THE AUDIT PRIVILEGE OR CREATE A PRESUMPTION THAT THE PRIVILEGE DOES OR DOES NOT APPLY.

E. AN AUDIT SHALL BE COMPLETED WITHIN A REASONABLE TIME NOT TO EXCEED SIX MONTHS FROM WHEN IT IS BEGUN, UNLESS AN EXTENSION IS BASED ON REASONABLE GROUNDS.

12-2323. <u>Privilege</u>

A. EXCEPT AS PROVIDED IN SECTIONS 12-2324, 12-2325 AND 12-2326, ANY PART OF AN AUDIT REPORT CONDUCTED BY AN ORGANIZATION IS PRIVILEGED AND IS NOT ADMISSIBLE AS EVIDENCE OR SUBJECT TO DISCOVERY IN ANY OF THE FOLLOWING:

1. A LEGAL OR AN EQUITABLE CIVIL ACTION.
2. AN ADMINISTRATIVE PROCEEDING.

B. IF CALLED OR SUBPOENAED AS A WITNESS, A PERSON CANNOT BE COMPELLED TO TESTIFY OR PRODUCE A DOCUMENT RELATED TO AN AUDIT IF BOTH OF THE FOLLOWING APPLY:

1. THE TESTIMONY OR DOCUMENT DISCLOSES ANY PRIVILEGED PART OF AN AUDIT REPORT.
2. THE PERSON IS:

(a) A PERSON WHO CONDUCTED ANY PORTION OF THE AUDIT BUT WHO DID NOT PERSONALLY OBSERVE THE PHYSICAL EVENTS.

(b) A PERSON TO WHOM THE AUDIT RESULTS ARE DISCLOSED UNDER SECTION 12-2324, SUBSECTION B.

(c) A CUSTODIAN OF THE AUDIT RESULTS.

C. A PERSON WHO CONDUCTS OR PARTICIPATES IN THE PREPARATION OF AN AUDIT REPORT AND WHO HAS ACTUALLY OBSERVED PHYSICAL EVENTS OF VIOLATION MAY

TESTIFY REGARDING THOSE EVENTS BUT MAY NOT BE COMPELLED TO TESTIFY ABOUT OR PRODUCE DOCUMENTS RELATED TO ANY PRIVILEGED PART OF AN AUDIT REPORT.

D. A STATE AGENCY EMPLOYEE SHALL NOT REQUEST, REVIEW OR OTHERWISE USE ANY PRIVILEGED PART OF AN AUDIT REPORT DURING AN AGENCY INSPECTION OF A REGULATED FACILITY OR OPERATION OR AN ACTIVITY OF A REGULATED FACILITY OR OPERATION.

E. A PARTY ASSERTING THE PRIVILEGE PRESCRIBED IN THIS SECTION HAS THE BURDEN OF ESTABLISHING THE APPLICABILITY OF THE PRIVILEGE.

12-2324. Waiver; exception; penalties

A. THE PRIVILEGE PRESCRIBED IN SECTION 12-2323 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 A HEALTH OR SAFETY AUDIT DOES NOT WAIVE THE PRIVILEGE, IF THE DISCLOSURE COMPLIES WITH ANY OF THE FOLLOWING:

1. IS MADE TO ADDRESS OR CORRECT A MATTER RAISED BY THE HEALTH OR SAFETY AUDIT AND IS MADE ONLY TO:

(a) AN INDIVIDUAL EMPLOYED BY THE OWNER OR OPERATOR, INCLUDING A TEMPORARY OR CONTRACT EMPLOYEE.

(b) A LEGAL REPRESENTATIVE OF THE OWNER OR OPERATOR.

(c) AN OFFICER OR DIRECTOR OF THE REGULATED FACILITY OR OPERATION OR A PARTNER OF THE OWNER OR OPERATOR.

(d) AN INDEPENDENT CONTRACTOR RETAINED BY THE OWNER OR OPERATOR, INCLUDING THE OWNER'S OR OPERATOR'S INDEPENDENT EXTERNAL AUDITORS.

2. IS MADE UNDER THE TERMS OF A CONFIDENTIALITY AGREEMENT BETWEEN THE ORGANIZATION FOR WHOM THE AUDIT REPORT WAS PREPARED OR THE OWNER OR OPERATOR OF THE REGULATED FACILITY OR OPERATION AND ANY OF THE FOLLOWING:

(a) A PARTNER OR POTENTIAL PARTNER OF THE OWNER OR OPERATOR OF THE REGULATED FACILITY OR OPERATION.

(b) A TRANSFEREE OR POTENTIAL TRANSFEREE OF THE REGULATED FACILITY OR OPERATION.

(c) A LENDER OR POTENTIAL LENDER FOR THE REGULATED FACILITY OR OPERATION.

(d) A STATE GOVERNMENT OFFICIAL.

(e) A PERSON OR ENTITY ENGAGED IN THE BUSINESS OF INSURING, UNDERWRITING OR INDEMNIFYING THE FACILITY OR OPERATION.

3. IS MADE UNDER A CONFIDENTIALITY AGREEMENT TO A GOVERNMENT OFFICIAL OR AGENCY BY THE ORGANIZATION FOR WHOM THE AUDIT REPORT WAS PREPARED OR BY THE OWNER OR OPERATOR.

C. A PARTY TO A CONFIDENTIALITY AGREEMENT DESCRIBED IN SUBSECTION B, PARAGRAPH 2 OF THIS SECTION WHO VIOLATES THE CONFIDENTIALITY AGREEMENT IS LIABLE FOR DAMAGES CAUSED BY THE DISCLOSURE AND FOR ANY OTHER PENALTIES PRESCRIBED IN THE CONFIDENTIALITY AGREEMENT.

D. INFORMATION THAT IS DISCLOSED UNDER SUBSECTION B, PARAGRAPH 3 OF THIS SECTION IS CONFIDENTIAL AND SHALL NOT BE DISCLOSED. AN ENTITY, EMPLOYEE

OR OFFICIAL OF THIS STATE WHO KNOWINGLY OR INTENTIONALLY DISCLOSES INFORMATION IN VIOLATION OF THIS SUBSECTION IS SUBJECT TO SANCTIONS AS PRESCRIBED BY THE RULES OF CIVIL PROCEDURE OR TO A CIVIL PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS. THE LACK OF LABELING MAY NOT BE RAISED AS A DEFENSE IF THE ENTITY, EMPLOYEE OR OFFICIAL KNEW OR HAD REASON TO KNOW THAT THE DOCUMENT WAS A PRIVILEGED AUDIT REPORT.

E. THIS SECTION SHALL NOT BE CONSTRUED TO CIRCUMVENT THE PROTECTIONS PROVIDED BY FEDERAL OR STATE LAW FOR INDIVIDUALS WHO DISCLOSE INFORMATION TO ENFORCEMENT AUTHORITIES.

12-2325. Disclosure required by court or administrative hearing; appeals; sanctions

A. A COURT OR ADMINISTRATIVE HEARING OFFICER WITH COMPETENT JURISDICTION MAY REQUIRE DISCLOSURE OF A PORTION OF AN AUDIT REPORT IN A CIVIL OR ADMINISTRATIVE PROCEEDING IF THE COURT OR ADMINISTRATIVE HEARING OFFICER DETERMINES AFTER AN IN CAMERA REVIEW THAT ANY OF THE FOLLOWING APPLIES:

1. THE PRIVILEGE IS ASSERTED FOR A FRAUDULENT PURPOSE.

2. THE PORTION OF THE AUDIT REPORT IS NOT SUBJECT TO THE PRIVILEGE UNDER SECTION 12-2326.

3. THE PORTION OF THE AUDIT REPORT SHOWS EVIDENCE OF NONCOMPLIANCE WITH A HEALTH OR SAFETY LAW AND APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WITH THE LAW WERE NOT PROMPTLY INITIATED AND PURSUED WITH REASONABLE DILIGENCE AFTER THE DISCOVERY OF THE NONCOMPLIANCE.

B. A PARTY SEEKING DISCLOSURE UNDER THIS SECTION HAS THE BURDEN OF PROVING THAT SUBSECTION A OF THIS SECTION APPLIES.

C. NOTWITHSTANDING ANY OTHER LAW, A DISCLOSURE DECISION OF AN ADMINISTRATIVE HEARING OFFICER UNDER SUBSECTION A OF THIS SECTION IS DIRECTLY APPEALABLE TO A COURT OF COMPETENT JURISDICTION WITHOUT DISCLOSURE OF THE AUDIT REPORT TO ANY PERSON UNLESS DISCLOSURE IS ORDERED BY THE COURT.

D. AN ORGANIZATION CLAIMING THE PRIVILEGE IS SUBJECT TO SANCTIONS AS PRESCRIBED BY THE RULES OF CIVIL PROCEDURE OR TO A CIVIL PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS, IF THE COURT FINDS THAT THE ORGANIZATION INTENTIONALLY OR KNOWINGLY CLAIMED THE PRIVILEGE FOR NONPRIVILEGED MATERIALS PRESCRIBED IN SECTION 12-2326.

E. A COURT DETERMINATION UNDER THIS SECTION IS SUBJECT TO INTERLOCUTORY APPEAL TO THE COURT OF APPEALS.

12-2326. Nonprivileged materials

A. THE PRIVILEGE PRESCRIBED IN THIS ARTICLE DOES NOT APPLY TO:

1. A DOCUMENT, COMMUNICATION, DATUM OR REPORT OR OTHER INFORMATION REQUIRED BY A REGULATORY AGENCY TO BE COLLECTED, DEVELOPED, MAINTAINED OR REPORTED UNDER A HEALTH OR SAFETY LAW.

2. INFORMATION OBTAINED BY OBSERVATION, SAMPLING OR MONITORING BY A REGULATORY AGENCY.

3. INFORMATION OBTAINED FROM A SOURCE NOT INVOLVED IN THE PREPARATION OF THE HEALTH OR SAFETY AUDIT REPORT.

B. THIS SECTION DOES NOT LIMIT THE RIGHT OF AN ORGANIZATION TO AGREE TO CONDUCT AND DISCLOSE AN AUDIT REPORT.

12-2327. Review of privileged document by governmental authority

A. IF AN AUDIT REPORT IS OBTAINED, REVIEWED OR USED IN A CRIMINAL PROCEEDING, THE PRIVILEGE PRESCRIBED IN THIS ARTICLE IS NOT WAIVED OR ELIMINATED FOR ANY OTHER PURPOSE.

B. NOTWITHSTANDING THE PRIVILEGE PRESCRIBED IN THIS ARTICLE, A REGULATORY AGENCY MAY REVIEW INFORMATION IN AN AUDIT REPORT THAT IS REQUIRED TO BE AVAILABLE UNDER A SPECIFIC STATE OR FEDERAL LAW, BUT THAT REVIEW DOES NOT WAIVE OR ELIMINATE THE PRIVILEGE EXCEPT FOR MATERIALS PRESCRIBED IN SECTION 12-2326.

C. IF INFORMATION IS REQUIRED TO BE AVAILABLE TO THE PUBLIC BY OPERATION OF A SPECIFIC STATE OR FEDERAL LAW, THE GOVERNMENTAL AUTHORITY SHALL NOTIFY THE ORGANIZATION CLAIMING THE PRIVILEGE OF THE POTENTIAL FOR PUBLIC DISCLOSURE BEFORE OBTAINING THAT INFORMATION PURSUANT TO SUBSECTION A OR B OF THIS SECTION.

D. IF PRIVILEGED INFORMATION IS DISCLOSED UNDER SUBSECTION B OR C OF THIS SECTION, ON THE MOTION OF A PARTY, A COURT OR THE APPROPRIATE ADMINISTRATIVE OFFICIAL SHALL SUPPRESS EVIDENCE OFFERED IN ANY CIVIL OR ADMINISTRATIVE PROCEEDING THAT ARISES OR IS DERIVED FROM REVIEW, DISCLOSURE OR USE OF INFORMATION OBTAINED UNDER THIS SECTION IF THE REVIEW, DISCLOSURE, OR USE IS NOT AUTHORIZED UNDER SECTION 12-2326. A PARTY THAT HAS RECEIVED INFORMATION UNDER SUBSECTION B OR C OF THIS SECTION HAS THE BURDEN OF PROVING THAT THE EVIDENCE OFFERED DID NOT ARISE AND WAS NOT DERIVED FROM THE REVIEW OF PRIVILEGED INFORMATION.

12-2328. Construction

A. THIS ARTICLE DOES NOT PROVIDE CIVIL OR CRIMINAL IMMUNITY TO AN ORGANIZATION OR TO AFFECT ANY OTHER PRIVILEGE THAT MAY BE AVAILABLE BY LAW.

B. THIS ARTICLE DOES NOT APPLY TO A HEALTH PROFESSIONAL AS DEFINED IN SECTION 32-3201 OR A HEALTH CARE INSTITUTION AS DEFINED IN SECTION 36-401.

APPROVED BY THE GOVERNOR APRIL 29, 2013.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 30, 2013.

Passed the House March 4, 2013

by the following vote: 39 Ayes,

17 Nays, 4 Not Voting

Speaker of the House

Chief Clerk of the House

Passed the Senate April 15, 2013

by the following vote: 18 Ayes,

11 Nays, 1 Not Voting

President of the Senate

Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill received by the Governor this

_____ day of _____, 20_____

at _____ o'clock _____M.

_____
Secretary to the Governor

Approved this _____day of

_____

at _____ o'clock _____M.

_____
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill received by the Secretary of State

this _____ day of _____, 20_____

at _____ o'clock _____M.

_____
Secretary of State

H.B. 2485

HOUSE CONCURS IN SENATE AMENDMENTS AND FINAL PASSAGE

April 17, 2013,

by the following vote: 40 Ayes,

19 Nays, 1 Not Voting

Speaker of the House

Pro Tempore

Cheryl Laube

Chief Clerk of the House

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill was received by the Governor this

25 day of April, 2013,

at 3:30 o'clock P M.

Mikhaila Howard

Secretary to the Governor

Approved this 29th day of

April, 2013,

at 3:21 o'clock P. M.

Janice K. Brewer

Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State

this 30th day of April, 2013,

at 9:35 o'clock AM M.

Ken Bennett

Secretary of State

H.B. 2485