

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

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)

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

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

4 ARTICLE 10. HEALTH AND SAFETY AUDIT PRIVILEGE

5 12-2321. Definitions

6 IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

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

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

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

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

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

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

27 12-2322. Audit report; contents

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

33 B. AN AUDIT REPORT MAY INCLUDE THE FOLLOWING:

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

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

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

39 (c) EXHIBITS AND APPENDICES.

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

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

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

4 C. THE TYPES OF EXHIBITS AND APPENDICES THAT MAY BE CONTAINED IN AN
5 AUDIT REPORT INCLUDE SUPPORTING INFORMATION THAT IS COLLECTED OR DEVELOPED
6 FOR THE PRIMARY PURPOSE OF AND GATHERED IN THE COURSE OF A HEALTH OR SAFETY
7 AUDIT, INCLUDING:

- 8 1. INTERVIEWS WITH CURRENT OR FORMER EMPLOYEES.
- 9 2. FIELD NOTES AND RECORDS OF OBSERVATIONS.
- 10 3. FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, GUIDANCE, NOTES,
11 DRAFTS AND MEMORANDA.
- 12 4. LEGAL ANALYSES.
- 13 5. DRAWINGS.
- 14 6. PHOTOGRAPHS.
- 15 7. LABORATORY ANALYSES AND OTHER ANALYTICAL DATA.
- 16 8. COMPUTER GENERATED OR ELECTRONICALLY RECORDED INFORMATION.
- 17 9. MAPS, CHARTS, GRAPHS AND SURVEYS.
- 18 10. OTHER COMMUNICATIONS ASSOCIATED WITH A HEALTH OR SAFETY AUDIT.

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

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

27 12-2323. Privilege

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

- 31 1. A LEGAL OR AN EQUITABLE CIVIL ACTION.
 - 32 2. AN ADMINISTRATIVE PROCEEDING.
- 33 B. IF CALLED OR SUBPOENAED AS A WITNESS, A PERSON CANNOT BE COMPELLED
34 TO TESTIFY OR PRODUCE A DOCUMENT RELATED TO AN AUDIT IF BOTH OF THE FOLLOWING
35 APPLY:

- 36 1. THE TESTIMONY OR DOCUMENT DISCLOSES ANY PRIVILEGED PART OF AN AUDIT
37 REPORT.
- 38 2. THE PERSON IS:
 - 39 (a) A PERSON WHO CONDUCTED ANY PORTION OF THE AUDIT BUT WHO DID NOT
40 PERSONALLY OBSERVE THE PHYSICAL EVENTS.
 - 41 (b) A PERSON TO WHOM THE AUDIT RESULTS ARE DISCLOSED UNDER SECTION
42 12-2324, SUBSECTION B.
 - 43 (c) A CUSTODIAN OF THE AUDIT RESULTS.

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

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

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

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

8 12-2324. Waiver; exception; violation; classification

9 A. THE PRIVILEGE PRESCRIBED IN SECTION 12-2323 DOES NOT APPLY TO THE
10 EXTENT THE PRIVILEGE IS EXPRESSLY WAIVED BY THE OWNER OR OPERATOR WHO
11 PREPARED THE AUDIT REPORT OR CAUSED THE REPORT TO BE PREPARED.

12 B. DISCLOSURE OF AN AUDIT REPORT OR ANY INFORMATION GENERATED BY A
13 HEALTH OR SAFETY AUDIT DOES NOT WAIVE THE PRIVILEGE, IF THE DISCLOSURE
14 COMPLIES WITH ANY OF THE FOLLOWING:

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

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

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

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

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

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

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

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

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

33 (d) A STATE GOVERNMENT OFFICIAL.

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

36 3. IS MADE UNDER A CLAIM OF CONFIDENTIALITY TO A GOVERNMENT OFFICIAL
37 OR AGENCY BY THE ORGANIZATION FOR WHOM THE AUDIT REPORT WAS PREPARED OR BY
38 THE OWNER OR OPERATOR.

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

43 D. INFORMATION THAT IS DISCLOSED UNDER SUBSECTION B, PARAGRAPH 3 OF
44 THIS SECTION IS CONFIDENTIAL AND SHALL NOT BE DISCLOSED. AN ENTITY, EMPLOYEE
45 OR OFFICIAL OF THIS STATE WHO DISCLOSES INFORMATION IN VIOLATION OF THIS

1 SUBSECTION IS GUILTY OF A CLASS 1 MISDEMEANOR. IT IS AN AFFIRMATIVE DEFENSE
2 TO THE CLERICAL DISSEMINATION OF A PRIVILEGED AUDIT REPORT THAT THE REPORT
3 WAS NOT CLEARLY LABELED "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" OR WITH
4 WORDS OF SIMILAR IMPORT. THE LACK OF LABELING MAY NOT BE RAISED AS A DEFENSE
5 IF THE ENTITY, EMPLOYEE OR OFFICIAL KNEW OR HAD REASON TO KNOW THAT THE
6 DOCUMENT WAS A PRIVILEGED AUDIT REPORT.

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

10 12-2325. Disclosure required by court or administrative
11 hearing; appeals; sanctions

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

17 1. THE PRIVILEGE IS ASSERTED FOR A FRAUDULENT PURPOSE.

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

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

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

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

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

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

37 12-2326. Nonprivileged materials

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

39 1. A DOCUMENT, COMMUNICATION, DATUM OR REPORT OR OTHER INFORMATION
40 REQUIRED BY A REGULATORY AGENCY TO BE COLLECTED, DEVELOPED, MAINTAINED OR
41 REPORTED UNDER A HEALTH OR SAFETY LAW, IF THE REPORT IS REQUESTED BY THE
42 PARTICULAR REGULATORY AGENCY WITH AUTHORITY TO ADMINISTER THE HEALTH OR
43 SAFETY LAW.

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

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

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

5 12-2327. Review of privileged document by governmental
6 authority

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

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

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

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

29 12-2328. Construction

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