



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

November 27, 1996

**Jim Ryan**  
ATTORNEY GENERAL

FILE NO. 96-032

PUBLIC RECORDS:  
Log of Underground Storage Tank Removal

Thomas L. Armstead  
State Fire Marshal  
1035 Stevenson Drive  
Springfield, Illinois 62703-4259

Dear Mr. Armstead:

I have your letter wherein you inquire whether logs that are maintained by the State Fire Marshal and that pertain to the removal of underground storage tanks are exempt from disclosure under the provisions of the Freedom of Information Act (hereinafter "FOIA") (5 ILCS 140/1 et seq. (West 1994)). For the reasons hereinafter stated, it is my opinion that these logs are not generally exempt from disclosure; however, there may be specific circumstances in which part or all of the information contained in particular logs may be exempt.

According to information you have supplied, a "Log of Underground Storage Tank Removal" is a one page form completed and signed by a Storage Tank Safety Specialist. The various

Thomas L. Armstead - 2.

spaces on the form are completed to identify the owner and removal contractor for particular tanks, and the date, location, number, size and product stored in tanks that are removed, as well as those remaining in place. Further, there are spaces to check on the sheet regarding whether apparent contamination of the soil or ground water has occurred, whether the contamination was significant or minor, and for other remarks relating thereto. Your primary concern is the release of the information concerning possible environmental contamination because the storage tank safety specialist bases his or her opinion on the presence and extent of contamination solely upon observation, and not upon scientific testing. If a completed log indicates that no contamination was seen, lending institutions and buyers may be led to believe that none is present, even though appropriate testing might disclose contamination that was not apparent to the observer.

Underground storage tank removal logs are prepared pursuant to subsection 57.5(c) of the Environmental Protection Act (415 ILCS 5/57.5(c) (West 1994), as amended by Public Act 89-457, effective May 22, 1996), which provides, in pertinent part:

" \* \* \*

(c) The Office of the State Fire Marshal or a designated agent shall have an inspector on site at the time of removal, abandonment, or such other times the Office of State Fire Marshal deems appropriate. At such time, the inspector shall, upon preliminary excavation of the tank site, render an

opinion as to whether a release of petroleum has occurred and, if so, the owner or operator shall report the known or suspected release to the Illinois Emergency Management Agency. The owner or operator shall determine whether or not a release has occurred in conformance with the regulations adopted by the Board and the Office of the State Fire Marshal. Except that if the opinion of the Office of the State Fire Marshal inspector is that a release of petroleum has occurred and the owner or operator has reported the release to the Illinois Emergency Management Agency within 24 hours of removal of the tank, no such determination is required under this subsection. In the event the owner or operator confirms the presence of a release of petroleum, the owner or operator shall comply with Section 57.6. The inspector shall provide the owner or operator, or a designated agent, with an 'Eligibility and Deductibility Determination' form. The Office of the State Fire Marshal shall provide on-site assistance to the owner or operator or a designated agent with regard to the eligibility and deductibility procedures as provided in Section 57.9. \* \* \*

\* \* \*

"

The logs are, therefore, compiled as a part of the Office of the State Fire Marshal's administrative enforcement of the Leaking Underground Storage Tank (LUST) program. (415 ILCS 5/57.3 et seq. (West 1994).) The inspector's opinion provides a basis for determining the owner's eligibility for certain benefits under the program.

The logs in question are clearly public records within the definition of that term in section 2 of the FOIA (5 ILCS 140/2 (West 1994)), as they are reports prepared by, for the use of and under the control of a public body. Therefore, section 3

Thomas L. Armstead - 4.

of FOIA (5 ILCS 140/3 (West 1994)) requires that these records be made available for inspection or copying except to the extent that disclosure may be exempted under section 7 thereof.

There are two exemptions set forth in section 7 that may, in specific cases, be applicable to the logs in question. Section 7 of the Act provides, in part:

"Exemptions.

(1) The following shall be exempt from inspection and copying:

\* \* \*

(c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:

\* \* \*

(ii) interfere with pending administrative enforcement proceedings conducted by any public body;

\* \* \*

(f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. \* \* \*

\* \* \*

"

Thomas L. Armstead - 5.

Subsection 7(1)(c) of the FOIA will authorize the withholding of the logs from public disclosure only if the Office of the State Fire Marshal demonstrates that such disclosure would interfere with pending administrative enforcement proceedings. Enforcement proceedings include efforts to compel compliance, as well as those to punish violators. (Griffith Laboratories USA v. Metropolitan Sanitary District (1988), 168 Ill. App. 3d 341, 346-47, appeal denied, 122 Ill. 2d 574 (1988).) It is not apparent that disclosure of the information contained in these logs would interfere with either type of proceeding. Because the presence of an inspector at the time of tank removal is mandated by subsection 57.5(c) of the Environmental Protection Act, the prospective disclosure of information reported by such an inspector would not militate against an owner/operator of a tank complying with the requirement or providing information needed for compliance purposes. Because the information contained in a log is the basis for certain certifications and directions made directly to the owner/operator of an underground storage tank, such information will presumably be disclosed to such persons, who may reasonably be expected to be those most interested in any prosecutorial investigation. For these reasons, it does not appear that disclosure of information contained in the logs would necessarily interfere with enforcement proceedings.

Portions of the storage tank removal logs, however, may constitute preliminary recommendations or other records in which

Thomas L. Armstead - 6.

opinions are expressed, for purposes of subsection 7(1)(f) of the FOIA. As you have noted, there is a concern in releasing the documents that persons will rely upon a preliminary observation that no contamination is visible, without regard to later scientific testing. Subsection 57.5(c) of the Environmental Protection Act requires the inspector present at a preliminary excavation to render an opinion as to whether there has been a release. This information appears to be the sort of matter intended to be exempted by subsection 7(1)(f).

The mere fact that subsection 7(1)(c) or subsection 7(1)(f) may be applicable to some information contained in a log in specific instances, however, does not mean that storage tank removal logs are generally exempt. Firstly, section 8 of the FOIA (5 ILCS 140/8 (West 1994)) requires:

"If any public record that is exempt from disclosure under Section 7 of this Act contains any material which is not exempt, the public body shall delete the information which is exempt and make the remaining information available for inspection and copying."

The logs in question contain, in addition to opinions regarding contamination, basic factual information regarding the number of tanks removed, their contents and related matters. Such information is not subject to an exemption and must therefore be disclosed pursuant to a request therefor. Only exempt information may be deleted.

Thomas L. Armstead - 7.

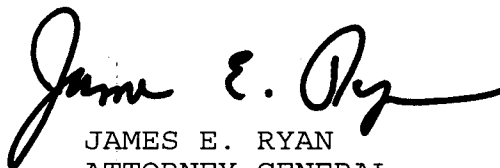
Secondly, information that was preliminary when gathered may become final with the passage of time. In Hoffman v. Dept. of Corrections (1987), 158 Ill. App. 3d 473, the plaintiff sought information regarding the drugs to be used for executions. The Department claimed that the only document containing such information was a preliminary memorandum upon which the director had not finally acted. The court ruled that since the statute authorizing executions by lethal injection had been enacted in 1983, the memorandum had been written shortly thereafter and, by 1987, a number of persons were on death row, the memorandum was no longer "preliminary" regardless of whether formal action had been taken to adopt it officially. Thus, information will not be treated as preliminary and exempt information if it is implemented or relied upon as a final decision or action.

Lastly, I note that when any exemption is claimed, the public body has the burden of showing its applicability to the particular document in question specifically, and not in a conclusory fashion. (Baudin v. City of Crystal Lake (1989), 192 Ill. App. 3d 530, 538.) Therefore, with respect to any specific request, a determination must be made whether the document requested actually contains preliminary information or opinion, or whether disclosure would interfere with an administrative proceeding. Only in those instances in which facts and circum-

Thomas L. Armstead - 8.

stances support the application of an exemption may the logs, or portions thereof, be withheld from disclosure.

Sincerely,

A handwritten signature in cursive script, reading "James E. Ryan". The signature is written in black ink and is positioned above the typed name and title.

JAMES E. RYAN  
ATTORNEY GENERAL