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May 12, 2008

**RECEIVED  
MAY 12 2008  
OPEN RECORDS DIVISION**

Ms. Amanda Crawford  
Division Chief  
Open Records Division  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711

RE: Open Records Request #308993

Dear Ms. Crawford:

Attached is Senator Shapleigh's response to the TCEQ's opinion request.

Thank you for your attention to this matter.

Sincerely,



Randall B. Wood  
Attorney for Senator Eliot Shapleigh

RBW:cb

Enclosure

cc: Sen. Eliot Shapleigh  
f:\clients\08513\L-Crawford

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**MEMORANDUM**

**TO:** Ms. Amanda Crawford, Division Chief  
Open Records Division  
Attorney General of Texas

**FROM:** Randall B. Wood

**RE:** Open Records Request #308993

**DATE:** May 12, 2008

This response is on behalf of Senator Eliot Shapleigh concerning his open records request to the Texas Commission on Environmental Quality ("TCEQ").

At the time that TCEQ made this request to the Attorney General, Senator Shapleigh was a party to the ASARCO administrative contested case before TCEQ. The TCEQ's refusal to comply with the Senator's request made pursuant to § 552.008 PIA was based almost entirely on the ground that the Senator was a party to the litigation. Senator Shapleigh has formally withdrawn his party status and is seeking this information as a member of the legislature for legislative purpose.

**A. The Plain Language of the Statute Makes all Information Requested**

**Available to Senator Shapleigh**

The TCEQ continues to assert that confidential information cannot be given to the Senator despite the clear language and long history of § 552.008. In effect, the TCEQ is

saying that § 552.008 is meaningless because under its interpretation, a member of the legislature has no more rights to information than a member of the general public.

Prior to the passage of the Open Records Act in 1973, certain officers of state government were refusing to supply the legislature or its members information when such officers considered the information to be confidential. The most prominent offender was the aptly named State Treasurer, Jesse James, who invested the State's money at that time but refused to disclose to the legislature his methodology and other relevant aspects of his official operations. When the open records bill was being drafted and going through the legislative process, the undersigned and Bill Aleshire, the assistant to the House sponsor of the bill, specifically drafted what is now § 552.008(a) to prevent state officials from using any claims of confidentiality regarding a request by the legislature, committee, or member when the information was to be used for legislative purposes. This legislature passed this provision and it has operated as intended until the TCEQ, in this case, is making the claim that any common law or other privilege overrides § 552.008(a).

There are simply no basis for TCEQ's position. The 1995 legislative amendments, adding subsection b. made it absolutely clear that legislators have access to an agency's information and records regardless of any claims of confidentiality.

#### **B. TCEQ's Claims of Privilege are Without Merit**

TCEQ's claims seem to be that its privileges of attorney-client communications and work product override the PIA's requirement that the legislature, its committees,

agencies and members are entitled to access to all such confidential information held by state agencies. As pointed out above, such an interpretation would render § 552.008 practically meaningless.

For obvious reasons TCEQ does not discuss this result, but instead attempts to divert attention from that result and by claiming that the Rules of Civil Procedure and Rules of Evidence concerning attorney client privilege and work product somehow trump § 552.008 because they constitute "other law" making the information confidential.

Interestingly, the TCEQ cites the Supreme Court case of *In re City of Georgetown and George Russell*, 535 S.W.3d 328 (Tex. 2001) as some authority for its position. In fact, *In re Georgetown* is in direct conflict with the TCEQ's legal claims. The opinion supports the Senator's position. In this case the Supreme Court did hold that the Rules of Civil Procedure was "other law" within the meaning of § 552.022 of the PIA. The Senator has no quarrel with that holding (while noting that the Chief Justice and two other justices held to the contrary). This case stands for the proposition that the legislature can waive state agency claims to attorney-client, work product or other privilege claims. It found that no such waiver was intended by the legislature regarding § 552.022. That is not the case here. (See discussion at 535 S.W.3d 333).

Section 552.008 is clearly a waiver of these privileges as to the legislature, its committees, agencies and members when such information is sought for legislative purposes. (See also *MCI Construction, LLC v. Hogen Sawyer, P.C.*, 213 FRD 268 (2003))

where the North Carolina Public Records Act is found to be a waiver of these exact same privileges). TCEQ cites no authority that the legislature is prohibited from waiving the privileges asserted here. The Texas Supreme Court has clearly held that the legislature can waive State agency privileges if it wishes. This statute is clearly such a waiver as to the legislature, its committees, agencies and members. The 1995 amendments to § 552.008 makes the legislature's intention perfectly clear.

### C. Quasi-Judicial Activities

Finally, TCEQ seems to assert that the TCEQ sometimes acts as a "quasi-judicial" body and that fact somehow acts to override § 552.008 because of some poorly articulated policy reasons. (See page 9 of TCEQ's March 4, 2008 letter to the Attorney General). TCEQ does not claim to be exempt from the PIA because it is judicial body under § 552.0035 of the Act. Instead, it advances some issues related to "separation of powers issues and perhaps issues with regard to the integrity of the judicial appeal of the matter." The Senator has no idea what the TCEQ is talking about and neither does the undersigned attorney.

The Senator is not a party to this contested case. He has sought legislation relating to the TCEQ's authority in the past and has every intention to do so in the next legislature. If the Senator uses the information for non-legislative purposes, he is subject to sanctions. Section 552.008 does not contemplate that information can be withheld because of some suspicion that the Senator would violate the law. TCEQ without citing any authority (there is none), claims that because the Senator was

previously a party in the contested case, he has waived any rights under § 552.008. The statute speaks for itself and no such waiver exists or could be implied.

#### D. Conclusion

For the reasons stated above, the Senator requests the Attorney General find that the requested information be supplied to him. The TCEQ's position is a plea for the Attorney General to amend the PIA. If there are new or other grounds asserted for denying the Senator his statutory rights, he requests that he be made aware of those grounds so that he may respond to them prior to any decision of the Attorney General becoming final. A failure to inform the Senator of any unarticulated reasons for denying his access to information could result in unnecessary litigation in the Courts. This should be avoided if at all possible.

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

TCEQ DOCKET NO. 2004-0049-AIR  
SOAH DOCKET NO. 582-05-0593

2008 APR 24 PM 4: 27

IN THE MATTER OF THE  
APPLICATION OF ASARCO, INC.  
FOR RENEWAL OF  
AIR QUALITY PERMIT NO. 20345  
EL PASO, EL PASO COUNTY

XXXXXXXXXXXX

BEFORE THE TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

NOTICE OF WITHDRAWAL AS PARTY

TO THE HONORABLE COMMISSIONERS:

Eliot Shapleigh, Protestant, hereby withdraws as a party in the above referenced matter. Protestant is withdrawing in order to fully exercise his legislative authority under Texas statute. This withdrawal does not change Protestant's strenuous objection to the issuance of the permit renewal.

Respectfully Submitted,



Senator Eliot Shapleigh  
State Bar No. 18113450

APR 25 2008 12:31 FR CAPITOL OFFICE

5124630129 TO 93281156

P.03/16

**Certificate of Service**

By my signature above, I hereby certify that on April 24, 2008, copies of Protestant Eliot Shapleigh's Notice of Withdrawal as Party were sent by mail to the following as indicated below:

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

The Honorable William G. Newchurch  
Administrative Law Judge  
300 W 15th Street, Suite 501 (78701)  
PO Box 13025  
Austin, Texas 78711-3025

The Honorable Veronica S. Najera  
Administrative Law Judge  
401 East Franklin Avenue, suite 580  
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**FOR APPLICANT ASARCO:**

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**FOR TCEO PUBLIC INTEREST COUNSEL**

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**FOR TCEO EXECUTIVE DIRECTOR**

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