

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 4, 2008

VIA HAND DELIVERY

The Honorable Greg Abbott
Attorney General, State of Texas
Price Daniels Building, 6th Floor
201 West 14th Street
Austin, Texas 78701

Attention: Greg Simpson
Division Chief, Open Records Division

- Re: 1. Public Information Act Request No. 08.02.14.08 submitted by Senator Eliot Shapleigh under Section 552.008 of the Texas Public Information Act, Chapter 552 of the Texas Government Code, requesting certain information related to ASARCO Incorporated's permit renewal application for Air Quality Permit No. 20345 and listed in the request in eight categories and defining the terms "ASARCO," "Documents," and "TCEQ"; and
2. Public Information Act Request No. 08.02.19.09 submitted by Senator Eliot Shapleigh under Section 552.008 of the Texas Public Information Act, Chapter 552 of the Texas Government Code, requesting certain similar or related information with regard to ASARCO Incorporated's permit renewal application for Air Quality Permit No. 20345 and listed in four categories and also defining the terms "ASARCO," "Documents," and "TCEQ."

Dear General Abbott:

As I previously indicated in my letter to you dated February 29, 2008, I seek your ruling on confidential and/or privileged information related to the above-described requests for public information received by the Texas Commission on Environmental Quality (TCEQ or Commission) on February 14, 2008, and February 19, 2008. I have enclosed a copy of my February 29, 2008 letter to you in **Exhibit A**, which I provided to you by certified mail and fax on Friday, February 29, 2008.

Attachment A to my February 29, 2008 letter to you in Exhibit A to this letter contains copies of the two above-described requests for public information under the Public Information Act (PIA or Act). As explained in my February 29, 2008 letter, these requests were received on February 14, 2008 and

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February 19, 2009 respectively. The agency's receipt of the requests on those dates is indicated in the dark rectangle located at the top of the first page of the attached requests. Attachment B to my February 29, 2008 letter to you in Exhibit A contains a copy of my February 29, 2008 letter to the requester forwarding certain publicly available documents to him and informing him I was requesting your ruling that I am not required to disclose certain confidential and/or privileged information. The copy of my February 29, 2008 letter to the requester in Exhibit A to this letter does not contain copies of the public information that I forwarded to him last Friday.

The confidential and/or privileged documents on which I seek your ruling are included in **Exhibits D and E** to this letter. I request your ruling: 1) that they are excepted from required public disclosure under the Public Information Act (PIA or Act) Sections 552.101, 552.103, 552.107, and/or 552.111; 2) that I am, under or by other law such as the Texas Rules of Evidence 503 and Texas Rules of Civil Procedure 192.5, prohibited from releasing to or authorized to withhold from the requester, Senator Shapleigh, the Exhibit D and Exhibit E confidential and/or privileged documents; and 3) that the Texas Legislature did not intend Section 552.008 of the PIA to compel the release of attorney-client confidential and/or privileged documents to a legislator who is a named party in a matter involving an adjudicative hearing held in accordance with an Interim Order in the matter issued by the Texas Commission on Environmental Quality (TCEQ or Commission). This matter may be appealed to District Court after the filing of motions for rehearing as deemed appropriate by the parties protesting the permit. A written final order has not yet been issued with regard to the Commission's February 13, 2008 decision on the permit renewal application for Air Quality Permit No. 20345 filed by ASARCO Incorporated (ASARCO).

The requester has been previously provided a copy of my February 29, 2008 letter to you in Exhibit A without the attachments that contain copies of his PIA requests and the February 29, 2008 letter I separately sent to him. As documented below by the courtesy copy list, I have provided the requester a copy of this March 4, 2008 letter without any of the Exhibit D or Exhibit E confidential and/or privileged documents. I did so in accordance with the requirements in PIA Section 552.301 that I provide the requester a copy of my written communication to you asking for a ruling and stating the reasons why the asserted exceptions to disclosure apply to the confidential and/or privileged documents in Exhibits D and E. I also did not provide the requester a copy of Exhibit A to this letter. The requester generated some of the documents in Exhibit A (his request letters) or separately received copies of the remaining documents in that exhibit from me, and thus, there was no need to provide him another copy of the Exhibit A documents. He did get a complete copy of the documents in Exhibits B, C and F to this letter along with the copy of this letter since those documents are publicly available and not all documents in those three exhibits had been previously sent to him.

I request that, after your office has completed its review and issued the ruling on the confidential and/or privileged documents in Exhibits D and E, the information in those two exhibits be returned directly to me and no one else at the agency. These documents are confidential and/or privileged

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from the Executive Director and his staff as well as all other third parties not included within the scope of the attorney-client privilege.

Not all agency documents are located in offices under the direction of the Commissioners. Most agency offices are under the immediate direction of the Executive Director. Accordingly, the Executive Director will respond to the requester separately with regard to any responsive documents located in agency offices under his direction. In addition, the Executive Director or his staff will make available to the requester responsive public information within his offices and/or seek a ruling from your office with respect to any confidential or privileged documents maintained by him or his staff. Thus, you may receive a separate request for a ruling from the Executive Director's attorney(s) if he possesses confidential and/or privileged information responsive to the two requests. If he does so, I request that you return his confidential and/or privileged information to him and not to me on completion of your review and ruling on that information.

Background: Commission consideration of the application filed by ASARCO Incorporated (ASARCO) to renew Air Quality Permit No. 20345 during four prior open meetings.

The Commission has taken up ASARCO's permit renewal application for Air Permit No. 20345 four times during its open meetings. During its April 28, 2004 open meeting, the Commission considered the renewal application for continued operation of ASARCO's El Paso copper smelter in the City of El Paso and related requests for hearing or reconsideration, responses to the requests and any replies to the requests, public comment, and the Executive Director's November 2003 Response to Public Comment. The responses to the hearing requests from the Executive Director, the Office of Public Interest Counsel, and ASARCO stated that all requests for contested case hearing on the ASARCO permit renewal application, including the request of Senator Shapleigh, had to be denied as matter of law under Section 382.056 of the Texas Clean Air Act (TCAA), Chapter 382 of the Texas Health and Safety Code. A copy of Section 382.056 is included in Exhibit F to this letter. A copy of the Commission's Interim Order issued May 14, 2004, with regard to its April 28, 2004 decision is included in Exhibit B and marked Exhibit B-1. The Commission's May 2004 Order referred the matter to the State Office of Administrative Hearings (SOAH) under the Commission's plenary powers for a hearing in the public interest on two issues related to whether operation of the smelter under the terms of the proposed permit will cause or contribute to a condition or air pollution and whether ASARCO's compliance history for the last five years of operation of the smelter warrant the renewal of Permit No. 20345. If you need copies of the hearing requests or responses to the requests, please let me know.

The second time the Commission considered the ASARCO permit renewal application was on February 8, 2006, when it took up the State Office of Administrative Hearings (SOAH) proposal for decision and proposed order regarding the two issues referred to SOAH in 2004 for the public interest hearing. The SOAH proposal for decision and proposed order may be viewed at the SOAH website, www.soah.tx.us, by accessing the documents through the PFD search function at the SOAH

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website. *See, e. g.,* www.soah.tx.us/pfdsearch/582/05/582-05-0593-po.pdf. The requester, Senator Shapleigh, is identified as an admitted and aligned party in Finding of Fact 8 on page 2 of the SOAH proposed order as well as in the procedural discussion in the proposal for decision at pages 2-4. Senator Shapleigh is represented by Rick Lowerre currently with regard to the ASARCO permit renewal application and was represented at the SOAH hearing by Rick Lowerre and L. Layla Aflatooni. The City of El Paso, represented by Eric Birch, is also a named party as well as the Commission's Executive Director and its Office of Public Interest Counsel and a number of other named individuals or groups.

During the February 2006 open meeting, the Commission also considered the parties' exceptions and replies as well as their oral presentations during the meeting. Access to or copying of the parties' exceptions and replies as well as oral recordings of the February 8, 2006 and other agenda meetings referenced here may be obtained by the requester contacting Brent Gurley in the Commission's Office of Chief Clerk at 512-239-3309. If you need copies of any of these materials, please let me know. Senator Shapleigh, as a named party, has had previous access to the exceptions and replies through his attorney(s), who are on the service list, for this matter, and he attended and addressed the Commission during the February 8, 2006 Commission open meeting. A copy of the Commission's Interim Order issued March 10, 2006, with regard to its February 8, 2006 decision is also included in Exhibit B, and it is marked Exhibit B-2.

The Commission most recently considered the ASARCO permit renewal application and/or matters related to the permit renewal application in open meetings on February 8, 2008, and February 13, 2008. On February 8, 2008, the Commission denied the Motion to Continue (and related Supplement to the Motion) filed by the City of El Paso seeking continuance of the Commission's consideration of the renewal application and related filings on February 13, 2008. I have enclosed in Exhibit B a copy of the marked February 8, 2008 agenda documenting the Commission's denial of the Motion to Continue and Supplement during its February 8, 2008 open meeting (Item 1). It is marked Exhibit B-3. In light of the denial, the Commission considered during its February 13, 2008 open meeting the ASARCO permit renewal application and all related filings, including the Executive Director's May 2007 Report to the Commission and the Executive Director's July 2007 Response to Comments, and the parties' oral presentations during the meeting.

The Commission website has an e-agenda for the February 8, 2008 meeting and the February 13, 2008 meeting where the key documents are located, and where they are accessible to any member of the public (many of these and other related documents that are publicly available to review or copy can be found in hard copy in the Office of Chief Clerk). The Commission website for e-agenda material can be located at www.tceq.state.tx.us/com_exec/agenda/comm/comm_agendas.html. A related agency website exists for the Executive Director's July 2007 Response to Comments and his earlier May 2007 Report to the Commission. That Commission website can be located at www.tceq.state.tx.us/agency/ed_report_permit_20345.html.

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As stated above, the Commission has not yet issued its final order for its February 13, 2008 decision. However, enclosed in Exhibit B is a copy of the written motion from which Chairman Garcia read from to make his motion during the February 13, 2008 open meeting. It is marked Exhibit B-4. His motion formed the basis of the decision unanimously approved by the Commission that day. I have enclosed an almost identical or very similar document, which is marked Exhibit B-5. The Chairman read almost all of its content during the open meeting on February 13, 2008, and the rest of it (except for two markings made by me during the 2/13/08 open meeting) is disclosed in Exhibit B-4, the document from which he read during the February 13, 2008 public meeting. The document marked Exhibit B-5 and all other documents in Exhibit B are being provided to the requester along with a copy of this letter absent the confidential and/or privileged documents in Exhibits D and E. Also enclosed in Exhibit B is a copy of the draft marked agenda for the February 13, 2008 open meeting, and a copy of the draft order I filed in the Commission's Office of Chief Clerk and mailed to the parties or their representatives on February 20, 2008, with regard to the Commission's 2/13/08 decision. Those two documents are marked Exhibit B-6 and Exhibit B-7. When a final order is issued for the Commission's February 13, 2008 decision I will forward a copy to you to be included with this matter, and I will send the requester a copy of that final order as well as all other parties and other persons on the official mailing list for this matter.

After issuance of the final February 13, 2008 order, the parties will have the right to file a Motion for Rehearing with regard to the issued order and attached permit under Chapter 80 of the Commission's rules, the agency's adjudicative hearing rules. *See* 30 Texas Administrative Code Sections 80.272 and 273; *see also* Section 50.119. The parties may thereafter seek judicial review of the Commission's final order as they deem appropriate.

I have enclosed here in **Exhibit C** copies of recent newspaper or other media publications indicating that the City of El Paso, a named party in the SOAH public interest hearing, would fight the decision to issue the permit in District Court. One of the enclosed articles indicates the City of El Paso Council also voted to appeal to the Commission to reverse its decision, and to take the Commission to court if the Commission does not reverse its decision to issue the permit. I interpret the reference to an appeal to the Commission to reverse its decision as a reference to the filing by the City of a Motion for Rehearing of the February 13, 2008 Commission decision to issue the permit as revised. Another of the newspaper articles refers to the City of El Paso's intent to file a petition for revocation of the ASARCO permit for the smelter, while another references a bankruptcy court in Corpus Christi clearing the City of El Paso to seek revocation.

The Motion to Continue and the Supplement to that Motion filed by the City of El Paso and considered and denied by the Commission during its February 8, 2008 open meeting and available at the Commission's e-agenda website mentioned above also document the intent of the City as well to file a petition for revocation once they receive permission from the U.S. Bankruptcy Court in Corpus Christi. I understand that, on February 15, 2008, the Honorable Richard S. Schmidt, the United

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States Bankruptcy Judge, Corpus Christi Division, Southern District of Texas, ordered that the automatic stay in the bankruptcy matter concerning ASARCO, LLC, *et al*, did not apply to the City's filing with the Commission a petition for revocation of the debtor's Air Quality Permit No. 20345, and further stated that to the extent the stay applied, the stay was lifted.

Texas Water Code Section 7.302(b) provides for certain Commission permit revocation proceedings, and the Commission may revoke a permit or exemption under Chapter 7 of the Water Code only after notice and hearing. Under Water Code Section 7.306, a permit revocation hearing with regard to an air quality permit issued under the TCAA, Chapter 382 would be conducted in accordance with the agency's adjudicative rules in 30 Texas Administrative Code Chapter 80 and the applicable provisions of Chapter 2001, Government Code (which includes the Texas Administrative Procedure Act contested case provisions). A review of the City of El Paso's Motion to Continue (which is available on the Commission's e-agenda website for February 8, 2008) reveals the similarity of many of the proposed bases for revoking the permit to the arguments of the protesting parties for not issuing the permit.

Documents in Exhibits D and E. I have enclosed in Exhibit D five confidential and/or privileged attorney client documents and/or attorney work product related to the Commission's consideration of the ASARCO permit renewal application in 2008 in open meeting. Two of the five documents are confidential attorney-client memoranda prepared by me in my position as Assistant General Counsel in the Commission's Office of General Counsel (and as Acting General Counsel for the ASARCO matter) and delivered to the three Commissioners as confidential attorney-client communications to assist them in their review of the large amount of materials for the February 13, 2008 open meeting on the ASARCO permit renewal application. The two memoranda contain confidential legal analysis and advice with regard to the ASARCO matter and its issues considered by the Commission during its public meetings on February 8, 2008, and February 13, 2008, when it considered the ASARCO permit renewal application and various related matters. I was and continue to be the Acting General Counsel for the Commission with regard to ASARCO's permit renewal application for Permit No. 2345 since the current General Counsel, Les Trobman, previously worked on the ASARCO permit renewal application while he was an attorney in the Executive Director's Environmental Law Division, and thus, could not represent the Office of General Counsel with regard to the application or the Commission on the matter. I have marked these two confidential/privileged attorney-client memoranda as Exhibits D-1 and D-2.

The next two documents in Exhibit D are two draft motions prepared by me as the Acting General Counsel assigned the ASARCO matter (marked Exhibits D-3 and D-4). The fifth document in Exhibit D, which is marked Exhibit D-5, was also prepared by me and contains my mental impressions, legal reasoning, opinions and advice, conclusions, and/or analysis in draft form in a document that was not distributed to any Commissioner or anyone else, but to a great extent contains information reflected in the document marked D-2 and in the two draft motions. Finally, I have

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enclosed in Exhibit E a white binder containing documents selected by me and distributed by me in confidence to the Commissioners to assist them in understanding my legal analysis and advice in the legal memorandum designated as Exhibit D-2. The binder thus constitutes both a confidential/privileged attorney-client communication and work product.

Exhibits D-1, Exhibit D-2, Exhibit D-5, and the binder in Exhibit E could be viewed as responsive information, that is, a document "related to any version, whether draft or final, of the order that was read by Chairman Buddy Garcia at the end of the February 13, 2008 hearing on ASARCO's application for renewal of Air Quality Permit No. 20345." See Item 1 in 2/18/08 request letter (Item 2 in the 2/18/08 letter could overlap to some extent with Item 1 with regard to related documents). Exhibits D-3 and D-4 are responsive to Item 1 in the 2/14/08 request letter for "all versions, whether draft or final, of the order that was read by Chairman Buddy Garcia at the end of the February 13, 2008 hearing on ASARCO's application for renewal of Air Quality Permit No. 20345." Exhibit D-5 is so closely related to Exhibit D-2 in particular that I prefer to treat it as potentially responsive as well to Item 1 in the 2/18/08 request letter, and thus, I seek your ruling on it as well. All of the documents in Exhibits D and E were prepared and distributed by me as confidential and/or privileged attorney client communications and/or work product.

Section 552.008 does not apply here to require disclosure to this requester of the documents enclosed in Exhibits D and E, and the Legislature did not intend such a result.

Both of Senator Shapleigh's requests are expressly stated to be pursuant to the special right of access in Section 552.008 of PIA. That section states in relevant part that "[t]his chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes." Assuming that this language requires me to release my attorney-client confidential and/or privileged communications or work product in accordance with Chapter 552, Section 552.008 does not expressly address the application of other law under which I must or may prevent disclosure of the documents in Exhibits D and E. It addresses only "this chapter," that is, Chapter 552 of the Government Code. Section 552.008 only elaborates further in subsection (c) to provide that the section *does not affect* the right of a legislator or legislative agency or committee to acquire the information under other law, the procedures under which the information is obtained under other law, or the use that may be made of the information obtained under other law. Thus, the Office of Attorney General and its Open Government Division should protect my confidential/privileged attorney-client communications and work product from disclosure to the requester as other law requires or permits.

The Texas Supreme Court has held that the Texas Rules of Evidence and the state's rules of civil procedure, and in particular, Texas Rule of Evidence (TRE) 503 and Texas Rule of Civil Procedure (TRCP) 192.5, which concern respectively the attorney-client privilege and attorney work product, are "other law" for purposes of Section 552.022 of the PIA. I respectfully request you conclude that it is these other laws that prevent my disclosure to or allow my withholding from Senator Shapleigh,

a named party in an adjudicative Commission hearing, the documents in Exhibits D and E. A named party should seek instead these documents through the usual discovery methods and procedures, if and where applicable. I believe the Texas Supreme Court would conclude these other laws prevent the mandatory disclosure of the documents in Exhibits D and E to the requester under Section 552.008 of the PIA.

In *County of Galveston v. Tex. Dep't of Health*, 724 S.W.2d 115 (Tex. Ct. App.-Austin, 1987, *writ ref'd n.r.e.*), which discusses the essential role agency general counsels have with regard to state agency board or commission members, the appellate court recognized the importance of not isolating non-lawyer members of state boards and commissions from all legal advice and assistance with regard to the substantive and procedural legal issues raised in adjudicative matters before state boards and commissions. The three Commissioners who form the Commission are not required to have attended law school and/or be licensed by the State Bar under the eligibility requirements in Chapter 5 of the Water Code, and two of the three current Commissioners are not licensed attorneys. The Commissioners have in the past relied upon and continue to rely on the legal advice, analysis and assistance provided them by lawyers in their Office of General Counsel. The Legislature also could not have intended to deprive these Commission members of confidential and/or privileged written legal advice, analysis, and assistance in the form of legal memoranda and motions or attorney work product when it adopted Section 552.008 of the PIA. Interpreting Section 552.998 to compel the disclosure of such information to a legislator who is a named party in a Commission adjudicative hearing would limit or otherwise negatively impact the future legal advice, analysis, and assistance provided in writing to the Commissioners from the Office of General Counsel.

I refer you also to *In re City of Georgetown and George Russell*, 53 S.W.3d 328 (Tex. 2001), in which the Texas Supreme Court stated that the court's rules of procedure "have the same force and effect as statutes." As I explain below in my discussion of Section 552.101, the Court noted that the judicial rules of procedure and evidence, as well as the statutes that preceded them, reflected the work-product and attorney-client privileges that have long been a part of the common law as expressed in both federal and Texas judicial decisions. The Court referred to the severe disadvantage governmental entities would incur or experience if they had to release attorney-client confidential or privileged information or work-product, and it concluded that the Legislature did not in Section 552.022 "intend to abrogate the State's or its political subdivisions' right to withhold from disclosure work product or matters covered by the attorney-client privilege." I do not believe the Legislature intended to discourage either the confidential receipt or use by state agency board or commission members of confidential or privileged attorney-client advice or to prevent the withholding of related attorney work product when it enacted Section 552.008 of the PIA. TR E 503 specifically protects from disclosure attorney-client communications between a client or a representative of the client and the client's lawyer or a representative of the lawyer under the attorney-client privilege, between the client and a representative of the client, or between representatives of the client. As I explain below in greater detail in my discussion of Section 552.107, the requirements of that section and TRE 503

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are satisfied with regard to the attorney-client confidential communications marked Exhibit D-1 through Exhibit D-4 and included as the binder in Exhibit E. I further explain below in my discussions of Sections 552.103 and 552.111 what "litigation" is pending or anticipated with regard to the ASARCO permit and/or the issues related to it and how the documents in Exhibits D and E constitute confidential and/or privileged attorney-client communications and/or work product prepared by me or containing my legal advice and mental impressions, conclusions and analysis developed in anticipation of litigation or trial by or for the Commission. Accordingly, the Texas Rules of Civil Procedure (TRCP 19.5) and TRE 503, which protect from disclosure attorney-client confidential and/or privileged communications or work-product, are "law" that requires or allows the withholding from the requester of the documents in Exhibits D and E.

Furthermore, the three Commissioners of the TCEQ exercise quasi-judicial, legislative, and enforcement powers in their implementation of the TCAA, Chapter 382 of the Health and Safety Code, and in their implementation of the enforcement, revocation, and permitting powers provided the Commission under other parts of that Code and the Water Code. Thus, when the Commissioners act as the decision-makers in matters involving adjudicative hearings they act as "fact-finders" and "quasi-judges" with regard to those matters in a manner similar to the Administrative Law Judges with regard to those matters. The Commissioners' decisions, if appealed, are generally reviewed by the courts under the substantial evidence rule. Therefore, the Commissioners do provide an essential fact-finding function with regard to contested cases and other adjudicative hearings. Disclosure of the Office of General Counsel's attorney-client communications and/or work product will also impact the ability of the Assistant Attorney General representing the Commission on appeal.

Accordingly, this case does implicate or raise in part separation of powers issues and perhaps issues with regard to the integrity of the judicial appeal of the matter. In this case, the adjudicative hearing involved the requesting legislator, who is a named party in the adjudicative hearing. Other parties may be disadvantaged or harmed on appeal if he is allowed special access to the confidential and/or privileged attorney-client communications or work-product related to that matter and on which the Commissioners reviewed and may have relied in reaching its decision reviewed on appeal. *See generally* OR2008-02184; Tex. Const. Art. II, § 1; and Art. V, § 5. Other parties in the matter do not have a similar statute under which to assert a special right of access to the documents in Exhibits D and E. The Legislature would not have intended such an unequal result, and thus, Section 552.008 should not be applied in a manner that could result in one party having a greater advantage before the agency with regard to its Motion for Rehearing, if one is filed, or on appeal. Finally, the requester here should be held to have waived his right to assert the special access to attorney-client confidential/privileged communications or work product in this matter where he chose to participate as a named party individually in the SOAH adjudicative hearing.

I explain next why all of the documents in Exhibits D and E are excepted from required public disclosure under PIA Sections 552.101, 552.103, 552.107, and 552.111 (and in so doing also

document the documents are protected from disclosure by other law, that is, TRE 503 and TRCP 192.5).

Applicable Exceptions. I will address first Section 552.107(1) and next in order Sections 552.103, 552.111, and Section 552.101.

I. Attorney-Client Privilege, Section 552.107. Section 552.107 provides in part that information is excepted from required public disclosure as public information under the PIA if the attorney is prohibited from disclosing the information because of a duty to the client under the Texas Rules of Evidence (TRE) or the Texas Disciplinary Rules of Professional Conduct. I am prohibited by TRE 503 from disclosing the information in Exhibits D and E to any individual outside the scope of the attorney-client privilege. *See* TRE 5.03(b) and Texas Disciplinary Rule of Professional Conduct 1.05. The documents designated Exhibits D-1 and D-2 are confidential legal memoranda (Exhibit E is a necessary supplement to the prepared by me as the Assistant General Counsel as well as the Acting General Counsel with regard to the ASARCO matter at the time of their preparation and distribution in confidence to the Commissioners.

The attorneys in the Office of General Counsel (OGC) provide confidential legal analysis, advice, and assistance to the Commissioners, their clients, with regard to items set on the Commission's open meeting agendas. The confidential legal analysis, advice and other legal assistance of the OGC attorneys, including their written communications, are provided to the Commissioners in accordance with the Texas Water Code, the Commission's rules, and Texas case law. *See, e.g.,* Tex. Water Code § 5.110; 30 Texas Administrative Code (TAC) Chapters 1 and 10, and *County of Galveston v. Tex. Dep't of Health*, 724 S.W.2d 115 (Tex. Ct. App.-Austin, 1987, *writ ref'd n.r.e.*) (discussing the unique and essential role agency general counsels have with regard to state agency board or commission members). The Commissioners, as the Governor's three appointees to the governing body of the TCEQ, form the Commission. *See* TEX. WATER CODE ch. 5, subch. C.

The OGC provided each of the three Commissioners the confidential legal memoranda marked Exhibits D-1 and D-2 and the confidential/privileged documents in Exhibits D-3, D-4 and E. As stated the three Commissioners are the OGC's clients, and no Commissioner has waived the privilege from disclosure provided them in TRE 503 with regard to any document in Exhibits D and E, including Exhibits D-1 and D-2 and the binder in Exhibit E. Nor am I authorized to waive the privilege on any of the Commissioners' behalf. The only persons other than the Commissioners who have had access to these documents are either client representatives or OGC "lawyer" representatives. Specifically, the OGC's administrative assistant, Gill Valls, formatted the documents marked Exhibits D-1 and D-2 and hand-delivered them down the hallway to the Commissioners' offices. Mr. Valls is a "lawyer representative" for purposes of the attorney-client privilege, and his work on the documents was essential to ensuring the proper formatting and delivery of the confidential memoranda in Exhibits D-1 and D-2 to the Commissioners. The client representatives who received the legal memoranda from Gill Valls in 2008 in order to ensure their

delivery to their Commissioners were either the Commissioners' administrative or executive assistants at the time of the distribution who were manning their Commissioner's reception area or office at the time Gill Valls delivered the memoranda. The distribution of the two legal memoranda through Gill Valls to the Commissioners' assistants and thus to the Commissioners was necessary in order to facilitate the rendition of professional legal services to the client Commissioners. The distribution was only between the clients, the Commissioners, and their client representatives, their assistants, and the clients' lawyer in the Office of General Counsel and the OGC's "lawyer" representative. All of these persons are included within the scope of the attorney-client privilege as set out in TRE 503.

The binder in Exhibit E contains various documents including legal citations, letters filed with the Commission on the ASARCO application, and documents from the evidentiary record of the 2005 SOAH public interest hearing. While all of those documents may be viewed separately as public information, their selection and arrangement by me in the binder as a supplement to the legal memoranda marked Exhibit D-2 constitutes not only attorney work product, but a confidential attorney-client communication. I distributed copies of the binder directly to the Commissioners' assistants in the three Commissioners' offices so that the Commissioners could use the binders in conjunction with the legal memoranda marked Exhibit D-2. Like the memoranda marked Exhibit D-1 or D-2, the only persons other than me who have had access to the binders were the Commissioners' administrative or executive assistants or the administrative assistant who made the copies for me of the binder (Kathi Terry) prior to my distribution of the binder copies in confidence to the Commissioners' offices. She, like Gill Valls, assists the attorneys in the OGC to prepare and/or distribute confidential and/or privileged materials to the Commissioners' offices. All of the individuals who copied, distributed or received copies of the documents in Exhibits D and E are either the client Commissioners, the clients' representatives, and the lawyer in or her lawyer representatives in the Office of General Counsel, and thus, they all are within the scope of the privilege as laid out in TRE 503 and contemplated by Section 552.107 of the PIA. Delivery to and/or access to the two legal memoranda and the binder by the client representatives or lawyer representatives was essential to ensuring their proper preparation and delivery to the Commissioners and their maintenance for the benefit of the Commissioners through the end of the public meetings on the ASARCO permit renewal application.

The two draft motions marked Exhibits D-3 and D-4 were prepared by me for Chairman Garcia, one of the three Commissioners, and distributed in confidence to him by me as attorney-client confidential communications directly or through his administrative or executive assistants (Becky Walker or Daniel Womack), who are client representatives for purposes of TRE 503. Chairman Garcia has not waived the attorney client privilege with regard to the two motions nor any other document in Exhibits D and E. Nor am I or any attorney in OGC authorized to waive that privilege with regard to any of the documents in Exhibit D and E. Nor have we done so. Thus, the two draft motions marked Exhibits D-3 and D-4 as well as the memoranda marked Exhibits D-1 and D-2 and

the binder in Exhibit E have not been distributed to individuals outside the scope of the attorney-client privilege. It is not unusual for one of the attorneys in the OGC, such as the case here, to assist a Commissioner in confidence in the drafting of a motion or motions for their use with regard to matters set on the Commission's agendas for consideration during open meeting.

The two memoranda marked Exhibits D-1 and D-2, the materials selected and arranged in the binder in Exhibit E, and the two draft motions marked Exhibits D-3 and D-4 are clearly protected from disclosure under Section 552.107 and TRE 503 because they meet the criteria for the attorney-client exception, as discussed in Open Record Decision (ORD) Nos. 676 (2002) and 574 (1990), and satisfy the requirements for the privilege in TRE 503. None of the documents in Exhibits D and E are included within any category of information listed in Section 552.022 of the PIA. If all of these documents are protected from required disclosure, members of the public as well as any party, including the requester, still have access to a large amount of publicly available information related to the permit renewal application, including all of the 2005 evidentiary record of the SOAH hearing available in the Office of Chief Clerk or the SOAH website and all other related publicly available information in other offices of the agency, including the Office of Public Assistance.

All of the documents in Exhibits D and E are "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client." TEX. R. EVID. 503(a)(5). Since their creation, all of the documents in Exhibits D and E have been maintained as confidential and/or privileged by the Office of General Counsel, and consistent with that practice, they have not been released to third persons not included within the attorney client privilege as set out in TRE 503, related case law, and Section 552.107. Thus, neither I nor any Commissioner, client representative, or other OGC lawyer or lawyer representative may disclose these confidential documents to anyone else other than the Commissioners absent their consent to the disclosure. *See* TEX. R. EVID. 503.

In addition, any description of facts contained in the documents in the two exhibits is not severable from the OGC's rendition of legal advice and the disclosure of which facts or materials were considered important would reveal to outside parties the nature of the OGC's confidential legal advice. Thus, I assert that the entire content of the documents are within or covered by the attorney-client exception and TRE 503. In accordance with the Attorney General's Public Information Handbook and ORD 676 at 5-6, the entire content of the privileged and/or confidential attorney-client confidential documents is excepted from disclosure under Section 552.107 of the PIA and TRE 503.

II. Litigation Exception, Section 552.103.

Section 552.103 applies to information that relates to pending or reasonably anticipated litigation. According to the Attorney General's 2006 Public Information Handbook, Section 552.103 covers a broad range of information, including both privileged information and information not subject to a

discovery privilege. All of the information in Exhibits D and E is excepted from required disclosure under Section 552.103 and/or TRCP 192.5. All of the documents in those exhibits satisfy the definition of "work product" as defined in TRCP 192.5 and all relate to pending and/or reasonably anticipated litigation. All of the documents in Exhibits D and E are material prepared, reflect or contain mental impressions, conclusions, theories, and analysis developed, or constitute confidential communications made by an Assistant General Counsel in anticipation of litigation involving the Commission.

During its public meeting on April 28, 2004, the Commission considered the requests for contested case hearing on the permit renewal application filed by the City of El Paso, Senator Eliot Shapleigh, and various individuals residing near the El Paso Plant. The written responses to the requests from the Executive Director, ASARCO, and the Office of Public Interest Counsel (OPIC) all recommended the requests be denied as a matter of law pursuant to the applicable provision, Section 382.056 of the Texas Clean Air Act (I have included a copy of the prior applicable version of that section along with the prior applicable version of Section 382.055 in Exhibit F). The OPIC, however, also recommended the Commission exercise its plenary power to hold a hearing in the public interest. The Commission did exercise its plenary power to hold such a hearing and referred the matter to SOAH as documented in its Interim Order issued May 14, 2004, with regard to its April 28, 2004 decision (see Exhibit B-1). The Applicant, ASARCO, appealed the Commission's May 14, 2004 Order to District Court, and I have included in Exhibit F a copy of the March 9, 2005 District Court order affirming the Order. ASARCO did not appeal the District Court order on the Commission's May 14, 2004 Interim Order, and the SOAH proceeded with the public interest hearing as indicated above. At that 2005 hearing as indicated above, the Administrative Law Judges (ALJs) named and/or aligned numerous parties for the hearing, including the City of El Paso and Senator Eliot Shapleigh.

As also indicated above, the Commission considered the SOAH proposal for decision and order and related filings and oral argument during its February 8, 2006 public meeting. A copy of the Commission's Interim Order issued March 10, 2006, with regard to its February 8, 2006 decision is included in Exhibit B as Exhibit B-2. The Commission recognized in its 2006 Interim Order that the matter was subject to Section 382.055 of the Texas Clean Air Act, Chapter 382 of the Texas Health and Safety Code. The applicable version of that section provided in Subsection (f) for the Commission to set out in a report its basis for its determination that the permit did not meet the requirements for renewal and a schedule for meeting the Commission's requirements for renewal. Subsection (g) of that section provided that if the applicant (ASARCO) "does not meet those requirements in accordance with the schedule the applicant must show in a contested case proceeding why the permit should not expire immediately." The Executive Director's staff thereafter prepared and issued in July 2007 the Executive Director's Report and Schedule for Commission consideration. The Commission considered, among other matters, that Executive Director Report and Schedule during its February 13, 2008 public meeting. As documented by the copy of the

motion Chairman Garcia read during the February 13, 2008 meeting, which is included in Exhibit B as Exhibit B-4, if the Executive Director hereafter determines that ASARCO has failed to complete all the requirements set forth in the Executive Director's Report in the timeframes specified, the Executive Director shall immediately refer this matter to the State Office of Administrative Hearings for a contested case hearing for ASARCO to show cause why the permit should not expire immediately, in accordance with the Texas Clean Air Act, Section 382.055(g).

The "public interest" hearing held in 2005 by the SOAH was an adjudicative hearing that was conducted in accordance with the applicable SOAH rules and the agency's rules in 30 Texas Administrative Code Chapter 80. Section 80.1 of Chapter 80 provides that, except as provided in Chapter 80, the chapter applies to and provides procedures for contested case hearings and other agency hearings held by SOAH. Subchapter C of Chapter 80 outlines the procedures applicable to and the rights of the parties, including the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of filings and notice, and otherwise fully participate as a party in the hearing. *See, e.g.*, Section 80.115; Section 80.127. Subchapter D outlines the discovery procedures applicable to the hearing, and Subchapter F contains the post-hearing procedures, including the procedures for a proposal for decision, subsequent pleadings, and oral presentations before the Commission, and motions for rehearing. *See, e.g.*, Sections 80.272 and 80.273. An Interim Order was issued in 2006 (Exhibit B-2) and a final order has not yet been issued in writing for the ASARCO matter. Thus, the period of time for filing motions for rehearing has not started nor run nor has the period for the Commission to take action on such motions started or ended. Also, even after the end of the time-periods for filing or taking action on motions for rehearing, all parties have a right to appeal the Commission's final decision to District Court. Thus, ASARCO matter is "pending litigation" before the Commission even though no individual may have had a recognizable right to a contested case hearing under Section 382.056 of the TCAA, Chapter 382 of the Health and Safety Code. In addition, the agency's Chapter 80 rules will apply to the Section 382.055(g) hearing, if one is held because ASARCO does not complete all of the Report requirements in the timeframe specified. A Section 382.055(g) hearing can be viewed as a reasonable possibility in light of the pending bankruptcy case involving the debtor in possession of Air Quality Permit No. 20345.

Thus, there is both pending and anticipated future litigation in this matter, and the documents in Exhibits D and E are excepted from required disclosure under Section 552.103 of the PIA and TRCP 192.5. Of particular concern at this time, is that the pending ASARCO matter is subject to the motion for rehearing rules in Sections 80.273 and 80.274 of Chapter 80, and Senator Shapleigh is a named individual parity entitled to file a motion for rehearing. Release of the information in Exhibits D and E would necessarily give him an advantage over the other parties in this matter even though the release was for legislative purposes under Section 552.008 of the PIA. This advantage would continue through any appeal of the matter to District Court if disclosure is mandated pursuant to Section 552.008.

Finally, the agency anticipates the City of El Paso will file a petition for revocation now that it has received approval from the Corpus Christi Bankruptcy Court to do so. As stated above, the issues in the petition for revocation are addressed to some extent in the City's Motion to Continue that was denied on February 8, 2008 by the Commission. A number of the issues described therein are similar to the issues raised in the pending ASARCO matter, and thus, release now of the confidential/privileged documents in Exhibits D and E might impact the development of the issues in the petition for revocation. The issues in the City's petition for revocation may also overlap with the issues to be addressed in the Section 382.055(g) contested case hearing, if one is held, for ASARCO to show why its permit should not expire.

Accordingly, the Office of General Counsel reasonably concludes there is both pending litigation with regard to this ASARCO matter and reasonably anticipated future litigation with regard to it either by appeal in District Court or in a subsequent contested case hearing at SOAH where ASARCO will have to address why its permit should not expire or not be revoked. *See generally* Open Records Decision No. 588 (1991), at page 2, and again in Attorney General Opinion GA-0334 (2005) at pages 4-5; *see also* OR2005-01643 (2/24/05) (discussing the litigation exception). As stated above, none of the information included in Exhibits D and E is described in Section 552.022 of the PIA.

The exhibits in Exhibit D and E all reflect the OGC's confidential attorney-client legal advice and analyses and/or constitute OGC's privileged attorney core work-product with regard to the Commission's consideration of the contested issues in this matter, including the OGC document marked Exhibit D-5. As such all of the documents in Exhibits D and E are excepted from required disclosure under Section 552.103 of the PIA and TRCP 195. Release to this requester of any document or material included in the exhibits would reveal the Office of General Counsel's or the Commissioners' legal analyses and/or position in the pending and reasonably anticipated litigation matter to a named party. *See generally* pages 4-5 of Open Records Decision No. 551 (1990) and related discussion on page 5 of OR2005-01643 (2/24/05).

III. Agency Memoranda, Section 552.111.

The documents in Exhibits D and E all embody the Office of General Counsel's attorney core-work product or constitute confidential internal memoranda or communications involving policy matters before and/or policy communications with the Commissioners. In ORD No. 677 (11/30/02), the Attorney General's office explained that Section 552.111 (as well as TRCP 192.5) protects information that would not be available to a party in litigation with the agency and here a named party seeks access to that information outside the usual discovery process. At the date of the request at issue here, the Commission had pending before it and has still pending before it a very hotly protested matter, and the Commission has been previously sued in District Court by one of the parties in this matter, ASARCO, about its power to hold a public interest hearing. The Office of

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General Counsel prepared these documents in anticipation of the pending litigation and it also reasonably anticipates future litigation in District Court over this matter brought by one or more of the parties. All of the documents included in Exhibits D and E contain confidential attorney-client communications and/or attorney core-work product, and thus, they are excepted from disclosure under Section 552.111 of the PIA and TRCP 192.5. At no time, have I acted in any role other than as an attorney for the Commissioners with regard to the ASARCO matter.

While ORD No. 677 explains that attorney core-work product does not generally extend to factual information, it further explains that a broad request that implicates an attorney's litigation file represents a different matter, and the agency may assert that the documents in the litigation file are excluded from disclosure. All of the information in Exhibits D and E are located in my confidential litigation file for this matter. Accordingly, all of the information in the exhibits are protected from disclosure under Section 552.111 and/or TRCP 192.5. As explained above, all of the information in the exhibits were developed or made in anticipation of or in light of the pending matter and the reasonably anticipated litigation in District Court or back at SOAH on this matter. Release of any of the information contained in the exhibits, whether factual or not, will release the mental impressions, conclusions, legal theories or analyses, or recommendations of the Office of General Counsel with regard to pending and/or reasonably anticipated litigation.

The enclosed confidential/privileged documents in the two exhibits are also intra-agency memoranda in part (Exhibits D-1 through D-4 and Exhibit E) to the Commissioners that provide legal advice and recommendations on matters set for Commission consideration. As such, they are also protected from disclosure under Section 552.111 of the PIA and/or TRCP 192.5.

The Commissioners are the agency's ultimate decision-makers as well as policy-makers. *See* TEX. WATER CODE ch. 5, subch. D. The documents contain OGC's legal advice to the Commissioners on important legal matters or OGC's legal analysis of such matters. Such documents were given to the Commissioners before deliberation and decision on the matters during a public meeting, and thus, the documents are internal memoranda and related materials discussing legal decisions to be made under various statutes including Section 382.055, and not the recounting of existing policy. Because these documents in the exhibits constitute or reflect advice regarding the Commission's deliberative process, they are excepted from required disclosure under Section 552.111 and TRCP 192.5.

IV. Information Considered Confidential by Law, Section 552.101.

Texas Government Code Section 552.101 excepts from disclosure information considered to be confidential by law. Section 552.101, which has not been amended since 1993, expressly provides that "[i]nformation is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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Section 552.021 provides that public information is available to the public at a minimum during the normal business hours of the government body. As explained above, the confidential and/or privileged documents in Exhibits D and E are excepted from required disclosure under TRE 503, TRCP 192.5 and/or PIA Sections 552.103, 552.107, and 552.111, and thus, they are not publicly available information. Nor are the documents at issue here included in the categories of information described as public information in Section 552.022 of the PIA.

I request you conclude as well that the documents in Exhibits D and E are confidential by law under Section 552.101 and/or TRE 503 and TRCP 192.5, and thus, not subject to required disclosure under the PIA. The Texas Supreme Court has held that the word "law" in PIA Section 552.022 is not limited to statutes, but also includes, as the term is commonly defined, judicial decisions and rules promulgated by the judiciary, such as the rules of procedure and evidence. The same term, the term "law" should not be differently defined for purposes of Section 552.101 given the absence of a specific definition of the term in the definitional section of the PIA.

In re City of Georgetown and George Russell, 53 S.W.3d 328 (Tex. 2001), the Texas Supreme Court stated that the court's rules of procedure "have the same force and effect as statutes." As stated earlier, the Court noted that the judicial rules of procedure and evidence, as well as the statutes that preceded them, reflected the work-product and attorney-client privileges that have long been a part of the common law as expressed in both federal and Texas judicial decisions. The Court referred to the severe disadvantage governmental entities would incur if they had to release attorney-client confidential information or work-product, and it concluded that the Legislature did not "intend to abrogate the State's or its political subdivisions' right to withhold from disclosure work product or matters covered by the attorney-client privilege." Thus, the Texas Supreme Court held that the Texas Rules of Civil Procedure and the Texas Rules of Evidence, including TRE 503, are "other law" for purposes of Section 552.022. TRE 503 specifically protects from disclosure communications between a client or a representative of the client and the client's lawyer or a representative of the lawyer under the attorney-client privilege, between the client and a representative of the client, or between representatives of the client. TRCP 192.5 specifically protects attorney work-product.

Accordingly, TRE 503 and TRCP 192.5, which protect from disclosure attorney-client confidential communications and work-product, are "law" for purposes of Section 552.101 of the PIA, and thus, the confidential/privileged documents in Exhibits D and E are excepted from required disclosure under Section 552.101 of the PIA as well as TRE 503 and TRCP 192.5. *See generally* OR2001-3664; OR2005-0354.

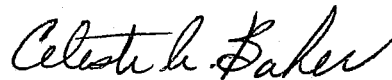
In summary, the requester has been provided copies of or access to all responsive publicly available documents in offices under the direction of the Commissioners responsive to his PIA requests. Thus, the requester and any other member of the public will have the opportunity to examine the facts as

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contained in the public record of these matters. If any part of the documents enclosed herein is disclosed to the requester, it will have a chilling effect on the ability of the Commission's Office of General Counsel to provide adequate legal counsel, especially written legal advice, to the Commission in the future. For all of the reasons cited above, I therefore request your determination that the documents forwarded to you in Exhibits D and E are excepted from disclosure under other law, that is, TRE 503 and TRCP 192.5, or under Sections 552.101, 552.103, 552.107, and/or 552.111 of the PIA. If you need any additional information, please contact me at (512) 239-5527.

As I also explained above, the documents are confidential and/or privileged Office of General Counsel legal documents, and thus, I request that they be returned to me directly, and not be returned to anyone else in the agency. Again, if you have any questions, please contact me at (512) 239-5527.

Respectfully,



Celeste A. Baker
Assistant General Counsel

Enclosures

cc: Senator Shapleigh, P.O. Box 12068, Austin, Texas 78711 (without confidential documents in Exhibits D and E, but with documents in Exhibits B, C and F; the requester already has all documents in Exhibit A) by CERTIFIED MAIL NO. 7003 0500 0002 9940 7710