

Cause No. D-1-GN-08-001855

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Plaintiff,

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IN THE DISTRICT COURT

v.

TRAVIS COUNTY, TEXAS

THE HONORABLE GREG ABBOTT,  
ATTORNEY GENERAL OF TEXAS,  
Defendant.

345<sup>th</sup> JUDICIAL DISTRICT

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S ORIGINAL PETITION**

The Texas Commission on Environmental Quality (TCEQ) files the following Original Petition pursuant to section 552.324 of the Government Code (Code), part of the Texas Public Information Act, seeking to withhold information from a requestor and seeking relief from compliance with, and challenging, Open Records letter ruling number OR2008-06742 issued by the Attorney General of Texas (Defendant or Attorney General). In the letter ruling, Defendant ruled that certain information must be released to Texas State Senator Eliot Shapleigh under Code section 552.008.

**I.**

**Discovery**

Plaintiff intends to conduct discovery, if necessary, under Level 2 of Texas Rule of Civil Procedure 190.

**II.**

**Parties and Service**

Plaintiff, the TCEQ, is the state's primary environmental agency and is charged with, among other things, granting or denying many sorts of environmental permits. The TCEQ is headquartered in Austin, Travis County, Texas.

Defendant, Greg Abbott, is the Attorney General of Texas. The Open Records Division of the Office of Attorney General issued Open Records letter ruling number OR2008-06742.

General Abbott may be served in the Price Daniel, Sr. Building, 8<sup>th</sup> Floor, 209 West 14<sup>th</sup> Street, Austin, TX 78701. Service is not necessary at this time.

## II.

### **Venue and Jurisdiction**

Venue and jurisdiction are proper in this court under the authority of the Code and general law; this is a suit pursuant to Code section 552.324.

In accordance with Code section 552.325(b), the undersigned attorneys for TCEQ will notify the requestor, Senator Shapleigh, by certified mail, return receipt requested, of the following:

- a. the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
- b. the requestor's right to intervene in the suit or to choose to not participate in the suit;
- c. the fact that the suit is against the Attorney General; and
- d. the address and phone number of the Office of the Attorney General.

## IV.

### **Factual Background**

On February 14, 2008, and on February 18, 2008, the TCEQ received written requests under Code chapter 552 from Senator Shapleigh. See Exhibits 1 and 2. Senator Shapleigh invoked Code section 552.008, titled "Information for Legislative Purposes," and sought, *inter alia*, agency documents in the possession of the agency that agency attorneys concluded were confidential by law, were related to pending or reasonably anticipated litigation, were documents that attorneys would

have a duty to a client not to disclose, and/or were intragency communications that would not be available to a party in litigation with the TCEQ. Among the documents described in Senator Shapleigh's request were ones within the attorney-client communication privilege, ones that constituted attorney work product, and/or ones within the deliberative process privilege for intra-agency communications that consist of advice, opinion, or recommendations on policymaking matters. The TCEQ withheld these documents (while providing Senator Shapleigh with copies of or access to all other requested documents<sup>1</sup>).

In accordance with Code section 552.301, the TCEQ timely requested an opinion by the Attorney General that it was not required to release the documents, citing Code sections 552.101, 552.103, 552.107 and 552.111 as the basis for its position. See Exhibits 3, 4, 5, and 6. Senator Shapleigh was timely notified and sent copies of the letters to the Attorney General.

In response to both of Senator Shapleigh's requests, the Attorney General issued a ruling, Open Records letter ruling number OR2008-06742. See Exhibit 7. Dated May 16, 2008, and received by the TCEQ May 19, 2008, the ruling held that Senator Shapleigh is entitled to the information under Code section 552.008 and that the TCEQ must disclose it to him.

The information sought by Senator Shapleigh is related to the request of Asarco, Inc., for a five-year renewal of an air emission permit required for operation of a copper smelter in El Paso, Texas. On February 13, 2008 — the day before Senator Shapleigh's first Public Information Act request — the TCEQ had granted Asarco's renewal request. This action, which will allow Asarco to reopen and operate the smelter, was and is controversial. A variety of people and entities oppose

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1. After reading the letter ruling and reconsidering the matter, the TCEQ, at the same time as it is filing this suit, is providing Senator Shapleigh with copies of a few of the previously-withheld documents.

the smelter's reopening. Among them is Senator Shapleigh.<sup>2</sup> Other opponents—the City of El Paso and the Sierra Club—have filed lawsuits against the TCEQ, seeking reversal of the renewal grant.

V.

**Grounds for Withholding the Requested Information**

This suit by the TCEQ, challenging Open Records letter ruling number OR2008-06742, is brought pursuant to Code section 552.324. It has been filed timely.

The information that was requested by Senator Shapleigh and withheld by the TCEQ is confidential and, therefore, prima facie, excepted from the disclosure requirement under Code sections 552.101, 552.103, 552.107, and 552.111.

Code section 552.008 purports to override these exceptions and require disclosure to a certain class of requestors: members, agencies, or committees of the Texas Legislature. Such a requestor is obliged merely to state that the request is for legislative purposes (and to sign a confidentiality agreement, if the governmental body requires one).

Contrary to the letter ruling, the TCEQ is entitled to withhold the requested information. If the Attorney General were correct in his interpretation of the Code sections discussed herein and in his understanding of associated law, then Code section 552.008 would be unconstitutional, both facially and as applied, because it would violate the separation of powers principle embodied in article II, section 1, of the Texas Constitution. That principle forbids excessive interference by the

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2. Senator Shapleigh was a named party to an evidentiary public interest hearing at the State Office of Administrative Hearings (SOAH) in about 2005. In March 2006, when the Commission considered SOAH's proposal for decision, he appeared and spoke. Thereafter, he filed comments with the TCEQ's Executive Director in opposition to the renewal request. At the Commission's February 13, 2008, agenda meeting on the request, he appeared and addressed the Commissioners. Within a week after the meeting, he filed the Public Information Act requests that gave rise to this suit.

legislative branch in the business of the executive branch. For a member of the Legislature to have access to agency documents like the ones involved in this lawsuit would constitute excessive interference.

**RELIEF REQUESTED**

WHEREFORE, PREMISES CONSIDERED, the TCEQ requests that this Court find that the requested information is prima facie excepted from disclosure and is, despite Code section 552.008, not subject to disclosure.

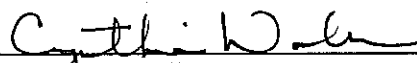
Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas


KENT C. SULLIVAN  
First Assistant Attorney General

JEFF L. ROSE  
Deputy First Assistant Attorney General

DAVID PREISTER  
Assistant Attorney General  
Acting Chief, Natural Resources Division

  
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Cynthia Woelk  
Assistant Attorney General  
Texas Bar Number 21836525

Nancy Elizabeth Olinger  
Assistant Attorney General  
Texas Bar Number 15254230

  
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Brian E. Berwick  
Assistant Attorney General  
Texas Bar Number 02258500

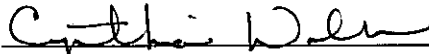
Natural Resources Division (MC-015)  
P.O. Box 12548  
Austin, Texas 78711-2548  
Tel: (512) 463 2012  
Fax: (512) 320 0052  
ATTORNEYS FOR TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing document was delivered on the 29<sup>th</sup>  
day of May, 2008, to the following, by the method shown:

Ms. Brenda Loudermilk  
Administrative Law Division  
Office of the Attorney General  
300 West 15<sup>th</sup> Street  
Austin, Texas 78701

*Hand Delivery*

  
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Cynthia Woelk

**List of Exhibits**

**to**

**Texas Commission on Environmental Quality's Original Petition**

Tab Number	Description
1	Senator Shapleigh's request letter dated February 14, 2008
2	Senator Shapleigh's request letter dated February 18, 2008
3	TCEQ's February 29, 2008, request for Attorney General opinion (letter signed by Celeste Baker)
4	TCEQ's March 4, 2008, request for Attorney General opinion (letter signed by Celeste Baker)
5	TCEQ's March 4, 2008, request for Attorney General opinion (letter signed by Robert Martinez)
6	TCEQ's March 11, 2008, request for Attorney General opinion (letter signed by Robert Martinez)
7	Attorney General Open Records letter ruling number OR2008-06742