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# State of Neglect: Private meetings cast doubt on integrity of Asarco smelter permit decision

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*For the weak and the vulnerable, Texas has long been an especially hard place. Year after year, national surveys place the state at or near the bottom in such categories as assistance to poor children and the malnourished, treatment of the mentally ill and care of the disabled. This story is part of The Dallas Morning News' 'State of Neglect' series examining how the state determines whom it protects and whom it excludes – and how special interests and their lobbyists strongly influence the writing of laws and the workings of state government.*

The law firm representing Asarco in its permit fight says private meetings between a firm lobbyist and the chairman of the Texas Commission on Environmental Quality to discuss the pending case were entirely proper.

"There is nothing impermissible about the nature of the applicant's contacts with the commission," the Houston-based firm Baker Botts said in legal filings. Opponents who suggest otherwise, the Asarco lawyers said, have "disingenuously but unsuccessfully assaulted the integrity of an open and fair TCEQ process."

However, Thomas O. McGarity, who holds an endowed chair in administrative law at the University of Texas School of Law, said the meetings raise troubling questions about transparency and fairness.

"I think it casts serious doubt on the integrity of the entire TCEQ process," said McGarity, the author of three textbooks on administrative and environmental law. "It certainly doesn't speak well of Texas justice. ... It goes to the whole notion of fair play and justice – the whole notion of due process."

Texas law and TCEQ rules prohibit private discussions between an official with decision-making authority and a party in a contested case unless all sides are given a chance to participate.

Pam Giblin, the Baker Botts lawyer who oversaw Asarco's permit request, declined to discuss the case in detail, citing pending lawsuits. Tristan Castañeda Jr., the Baker Botts lobbyist who met with TCEQ Chairman Buddy Garcia on Nov. 19 and Dec. 2, 2007, and Jan. 21, 2008, while Asarco's permit request was pending, said he was only gathering information. After each meeting, attorney billing records show, Castañeda reported to Giblin.

On Feb. 13, Garcia and the two other commissioners voted to renew the permit on Asarco's El Paso smelter.

Garcia and his executive assistant, Daniel Womack, who also attended the meetings, declined to comment on them. They cited pending lawsuits by opponents seeking to overturn the permit renewal.

"Based on an initial review of these documents, there is at least the appearance of impropriety," attorneys for El Paso wrote. They contended that such meetings would violate state law and TCEQ rules, deny the city its due process rights and "undermine the impartiality required" for a fair decision.

A fair fight?

Giblin told *The Dallas Morning News* that Asarco won the permit fight fairly. Few permit renewals have ever gotten such a tough review, she said.

"Asarco earned the privilege of having its permit renewed because the commission followed the science and the law," Giblin said.

The bills from the city's Austin law firm, Birch, Becker & Moorman, mention discussions about the case with senior TCEQ staff members such as the executive director and chief lawyer, which is allowed by law, but not with the commissioners themselves. Many words are blacked out to protect confidentiality – a tactic that Baker Botts also used often – but Erich Birch, the city's lead attorney on the Asarco case, told *The News* that his firm did not meet with commissioners about Asarco or ask to do so.

Birch said he and his partner met once with newly appointed commissioner Bryan Shaw to introduce themselves but did not discuss the case.

In legal filings, Baker Botts also said another Asarco opponent, state Sen. Eliot Shapleigh, D-El Paso, violated the ban on *ex parte* communications when he discussed Asarco during Garcia's confirmation process.

Shapleigh said he had asked Garcia about the implications of the Asarco case in a meeting in Shapleigh's office before a Senate nominations committee hearing. Shapleigh repeated those questions in public during the hearing. Garcia – who at the time was not yet a commissioner – said he would decide any case only on the official public record.

In an interview, Shapleigh, a lawyer, blasted Baker Botts' accusation that he had acted improperly in questioning the nominee.

"Asking questions in a public hearing on the Senate floor, as provided in the Texas Constitution, is my job," he said. "Meeting in secret with a commissioner for special favors in a pending case to benefit a polluter is illegal."

'Contested case'

The Texas Administrative Procedures Act, the state law governing how agencies do their jobs, puts the burden on state officials with final decision-making powers not to discuss a pending contested case privately with any party.

TCEQ rules have a slightly different emphasis, ordering outsiders not to communicate with the decision-makers – that is, the commissioners. The TCEQ rule covers a contested case when it is before either the

State Office of Administrative Hearings, which holds formal hearings and issues only recommendations, or the commissioners, who make the final decision.

In its legal filings, Baker Botts contended that the commissioner meetings did not come during a "contested case" period when communications were prohibited. SOAH judges recommended denying the permit in 2005, but instead of voting on the permit, the commissioners in 2006 instructed the TCEQ executive director to conduct more studies.

Baker Botts maintained that the contested case ended at that point. The firm cited "the uniformly shared and legally correct understanding that the remand proceeding [before the TCEQ commissioners] was not a contested case."

However, the Texas Administrative Procedures Act takes a broader view of what is a contested case: "'Contested case' means a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."

In the Asarco case, the executive director had no authority to determine whether Asarco got its permit; only the commissioners could do that. The process of making that determination did not end until the commissioners voted on Feb. 13.

Southern Methodist University law professor Elizabeth G. Thornburg said agency decision-makers should adhere to the same strict rules that govern judges.

"You want the agencies to be making the decisions based on the record and not on some conversation that somebody has with a lobbyist or a politician," she said. "In the same way that off-the-record conversations undermine our belief in the judicial system, they undermine our faith in the administrative structure of the state."

McGarity, the UT law professor, said the public's stake in the controversy doesn't hinge on a technical argument about contested cases. The vital question, he said, is whether the process is fair.

"The first and foremost element is the neutrality of the decision-maker," he said, "that you don't lobby the decision-maker outside the formal structures established by administrative law."

#### AT A GLANCE: Baker Botts

- The law firm was founded in Houston in 1840 by Peter Gray, later a Texas Supreme Court justice.
- Partners Col. W.B. Botts and Judge James A. Baker continued as Baker & Botts in 1874; the name was changed to Baker Botts LLP in 2000.
- The firm represented big farming interests and railroads in 19th-century Texas, including merchant William Marsh Rice, whose estate established Rice University.
- The legal firm flourished during the 20th century, with partners often serving as government appointees or in civic roles. Hired its first female lawyers in the 1920s.
- Its Mexico City office opened in the 1940s, Washington, D.C. in the early 1970s, Austin in the late 1970s, Dallas in 1985 and Hong Kong in 2005. The firm is still based in Houston and has about 800 lawyers in six countries.

- Baker Botts has given Texas state political candidates nearly \$1.35 million and federal candidates more than \$432,000 in donations since 2000.
- The Austin office includes two former Texas Supreme Court chief justices.
- Former Secretary of State James A. Baker III is a descendent of the founder.

SOURCES: Baker Botts LLP ([www.bakerbotts.com](http://www.bakerbotts.com)); Texas Ethics Commission ([www.ethics.state.tx.us](http://www.ethics.state.tx.us)); Federal Elections Commission ([www.fec.gov](http://www.fec.gov)).