



March 8, 2000

Mr. Chris M. Borunda  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2000-0937

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132946.

The City of El Paso (the "city") received a request for copies of the "worst case scenario" documents for all "Level III" facilities located within the city. You state that the city does not object to the release of some of the requested information, and that the city has already released this portion of the information to the requestor. You claim that the remainder of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. We have considered the exception you claim and reviewed the submitted information.<sup>1</sup>

Section 552.301 of the Government Code dictates the procedure that a governmental body must follow if it wishes to ask the attorney general for a decision determining whether requested information falls within an exception to disclosure. Among other requirements, the governmental body, "no later than the 15<sup>th</sup> business day after the date of receiving the written request," must submit to the attorney general "a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested." Gov't Code § 552.301(e)(1)(D). If the governmental body fails to do this, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

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<sup>1</sup>The submitted information consists of the materials that were apparently released to the requestor. The portions of the requested information that you believe are excepted from required disclosure have been redacted or omitted from the materials that you submitted to this office.

The facsimile notation on the request for information indicates that the city received the request on December 21, 1999. Accordingly, the city's deadline for submitting a copy of the requested information, or a representative sample thereof, expired fifteen business days later. *See* Gov't Code § 552.301(e)(1)(D). However, as of the date of this letter, the city has only submitted a redacted copy of the information which does not include all of the information at issue. Therefore, the city has missed its fifteen-day deadlines as prescribed by section 552.301. Consequently, absent a compelling reason to withhold the requested information, the information must be released.

You argue that the redacted and omitted portions of the requested information are confidential under section 552.101 in conjunction with federal law. This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will consider the city's argument for withholding portions of the requested information.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Therefore, section 552.101 encompasses confidentiality provisions such as Title 42, Section 7412(r)(7) of the United States Code. This provision restricts public access to "off-site consequence analysis information" which is defined as:

those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of 1 or more worst-case release scenarios or alternative release scenarios, and any electronic data base created by the Administrator from those portions.

42 U.S.C. § 7412(r)((7)(H)(i)(III) (1999). Such information "shall not be made available under Section 552 of title 5 United States Code [the Freedom of Information Act], during the 1 year period beginning on the date of enactment of this subparagraph." 42 U.S.C. § 7412(r)(7)(H)(iii)(I) (1999). The referenced "date of enactment" is August 5, 1999. 42 U.S.C.A § 7412(r)(7)(H)((iii)(I) (West Supp. 1999). Moreover, "a covered person," such as an "employee of a State or local government," that willfully violates this release prohibition could face criminal penalties. 42 U.S.C. §§ 7412(r)(7)(H)(i)(I)(dd), (iii)(II) (1999). Finally, this release prohibition "shall supercede any provision of State or local law that is inconsistent with this subparagraph (including the regulations). 42 U.S.C. § 7412(r)(7)(H)(x)(I) (1999).

You claim that sections 2 through 5 of the requested Risk Management Plans contain the "worst case release scenarios," and therefore are confidential under Title 42, Section 7412(r)(7) of the United States Code. Although you have not submitted these

sections for our review, you have provided us with the titles of these sections: “Section 2. Toxics: Worst Case;” “Section 3. Toxics: Alternative Release;” “Section 4. Flammables: Worst Case;” and “Section 5. Flammables: Alternative Release.” Based on your representations and on the information you have submitted, we agree that these sections qualify as “off-site consequence analysis information” which is confidential under Title 42, Section 7412(r)(7) of the United States Code as encompassed by section 552.101 of the Government Code. Therefore, the city must withhold sections 2 through 5 of the requested risk management plans.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

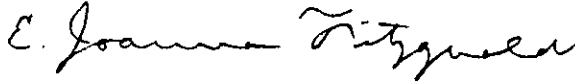
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\nc

Ref: ID# 132946

Encl: Submitted documents

cc: Mr. Patrick McDonnell  
El Paso Times  
City Hall Reporter  
P.O. Box 20  
El Paso, Texas 79999  
(w/o enclosures)