



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 3, 1996

Mr. Paul C. Isham  
City Attorney  
City of Grand Prairie  
P.O. Box 534045  
Grand Prairie, Texas 75053-4045

OR96-1579

Dear Mr. Isham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 100346.

The City of Grand Prairie (the "city") received an open records request for the following records:

1. Any and all documents pertaining to Margaret Phipps in the possession of any and all persons employed with the City of Grand Prairie. Such documents include but are not limited to personnel records, confidential files, hand or type written notes, e-mail documents generated by any computer by any persons employed by the City of Grand Prairie.
2. All hand or type written notes generated by Ade Williams, Interim Human Resources Director for the period of March 18 to May 17, 1996.
3. Pages from Ade Williams' calendar for the period of March 18 to May 17, 1996.
4. Exit interviews of [certain named individuals].
5. All e-mail documents generated or received on computers in the City of Grand Prairie Human Resources Department for the period March 26, 1996 through May 17, 1996, operated by [certain named individuals].

The individual making the open records request to the city is an attorney acting on behalf of Ms. Margaret Phipps, who was terminated from her position as the city's Employee Services Manager. You state that the city intends to release to the requestor a copy of Ms. Phipps' personnel file. You seek to withhold, however, the remaining requested documents pursuant to sections 552.102 and 552.103 of the Government Code.<sup>1</sup>

Because section 552.103 is the more inclusive exception to required public disclosure, we will address this exception first. Section 552.103(a) of the Government Code, known as the "litigation exception," excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

You contend that section 552.103(a) excepts the submitted documents from required disclosure because another attorney acting on behalf of Ms. Phipps has threatened litigation with regard to her termination.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* You have submitted to this office a copy of a letter the city received from an attorney representing Ms. Phipps alleging the city's violation of several federal and state laws in the termination of Ms. Phipps. The letter also states that "it would be prudent, at this juncture, to negotiate severance in exchange for release of claims, rather than having the City release [sic] the exposure it must face in a court of law." In this instance we believe that you have demonstrated the likelihood of litigation regarding the termination. *See* Open Records

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<sup>1</sup>You also contend that the requested exit interviews are confidential because the employees undergoing the interviews were told that records of the interviews would be kept confidential. Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement between the city and the former employees specifying otherwise.

Decision No. 452 (1986) (litigation exception properly invoked where attorney makes written demand for disputed payments and promises further legal action if payments not forthcoming).

After reviewing the documents at issue, we also agree that these records "relate" to the anticipated litigation and thus may be withheld pursuant to section 552.103, with the following exception. We note that all of the e-mail communications you submitted to this office were either created by or addressed to the potential opposing party in the litigation.<sup>2</sup> Once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Because the opposing party in the litigation has seen or had prior access to the e-mail communications, there is no justification for now withholding those records from the requestor pursuant to section 552.103(a). Accordingly, the e-mail communications must be released in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/RWP/rho

Ref.: ID# 100346

Enclosures: Submitted documents

cc: Ms. Kelli N. Arnold  
Hill, Gilstrap, Moorhead, White, Bodo & Webster  
1400 West Abram Street  
Arlington, Texas 76013  
(w/o enclosures)

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<sup>2</sup>You explain that the city's e-mail communications are automatically deleted after 13 days of origination unless the communication is specifically saved by the sender or receiver. The documents you submitted to this office consist only of documents saved by city staff.