



**THE ATTORNEY GENERAL
OF TEXAS**

June 8, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Anthony Kouneski,
General Manager
Capital Metropolitan Trans-
portation Authority
1005 Congress Avenue
P.O. Box 1943
Austin, Texas 78767

Open Records Decision No. 495

Re: Whether certified agendas
or tapes that are subject
to subsection (e) of section
2A of the Open Meetings Act,
art. 6252-17, V.T.C.S. are
subject to review by the
Attorney General under section
7 of the Open Records Act,
art. 6252-17a, V.T.C.S.
(RQ-1289)

Dear Mr. Kouneski:

The Capital Metropolitan Transportation Authority (Capital Metro) received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for a copy of the minutes or tape recording of an executive session held by the Capital Metro Board on October 26, 1987. The board kept a tape recording of the session in question. Under the Open Records Act all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. Attorney General Opinion JM-672 (1987). Capital Metro asserts that the requested information is protected from required disclosure under sections 3(a)(1), 3(a)(3), and 3(a)(7) of the Open Records Act, under sections 2A(c) and 2A(h) of the Texas Open Meetings Act, article 6252-17, V.T.C.S., and under Open Records Decision No. 60 (1974). Capital Metro has not provided a copy of the tape recording in question to this office for review because it contends that the tape recording of an executive session should be made available only to the judge of a district court in an action filed in that court pursuant to the Open Meetings Act.

Section 3(a)(1) of the Open Records Act protects from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." In Open Records Decision No. 60 (1974), the attorney general held that, to the extent that minutes of a school board

meeting reflect discussion properly held in a closed session authorized under subsection 2(g) of the Open Meetings Act, the minutes may be withheld under section 3(a)(1) of the Open Records Act. The decision reasoned that the minutes of a properly held executive session are deemed confidential by statute, specifically, section 2(g) of the Open Meetings Act. See also Decision No. 330 (1982). Both Open Records Decision Nos. 60 and 330 were limited to "properly held" executive sessions. See also Open Records Decision No. 491 (1988) (must have express provision authorizing executive session). Because of recent amendments to the Open Meetings Act, however, these decisions no longer govern this request.

A brief submitted on behalf of the Amalgamated Transit Union, Local 1091, apparently relying on these decisions, asserts that the Capital Metro Board failed to comply with the Open Meetings Act with regard to the executive session in question. The union urges that the tape of this meeting should therefore be released. The brief alleges that the board failed to post appropriate notice of the executive session, see art. 6252-17, § 3A(a), that the board failed to first convene in open session and identify the provision authorizing the executive session, see art. 6252-17, § 2(a), and that no provision of the Open Meetings Act authorized the executive session in question, which was convened to discuss general labor issues. If these allegations are supported by evidence, we agree that they raise serious questions under the Open Meetings Act. Additionally, if this executive session was not "properly held," the tape recording of the session might not be confidential under the interpretation of the Open Meetings and Open Records Acts applied in Open Records Decision No. 60.

This office, however, lacks the authority to make this determination for two reasons. First, the Open Meetings Act provides the exclusive authority and procedure for challenging the confidentiality of certified agendas and tapes of executive sessions. Additionally, the attorney general lacks authority to "enforce" the Open Meetings Act.

The 70th Legislature added section 2A to the Open Meetings Act to require governmental bodies to keep a "certified agenda" or tape recording of all meetings that are closed to the public under the Open Meetings Act's exceptions -- except meetings closed under exception 2(e). See Acts 1987, 70th Leg., ch. 549, § 3, at 4414; Attorney General Opinion JM-840 (1988). Section 2A(c) of the Open Meetings Act provides in part:

The certified agenda of closed or executive sessions shall be made available for public inspection and copying only upon court order in an action brought under this Act. (Emphasis added.)

Acts 1987, 70th Leg., ch. 549, § 3, at 4415. Section 2A(e) provides:

The certified agenda or tape shall be available for in camera inspection by the judge of a district court if litigation has been initiated involving an alleged violation of this Act. The court upon entry of a final judgment may admit the certified agenda or tape into evidence in whole or in part. The court may grant equitable or legal relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or tape of any part of a meeting that was not authorized to be closed under this Act. (Emphasis added.)

Acts 1987, 70th Leg., ch. 549, § 3, at 4415.

As indicated, section 3(a)(1) of the Open Records Act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Under the Open Records Act, the attorney general ordinarily reviews specific information that a governmental body claims is protected by the Open Records Act's specific exceptions to disclosure, including exception 3(a)(1). See art. 6252-17a, § 7(b) (information shall be supplied to attorney general for review). Section 2A(c) of the Open Meetings Act clearly makes certified agendas or tapes of executive sessions confidential within the meaning of section 3(a)(1) of the Open Records Act.¹

1. Section 2A(c) refers only to certified agendas, not to tapes. Because the governmental body may opt to keep a tape rather than a certified agenda, see art. 6252-17 § 2A(d), and because section 2A(e) refers to both "certified agenda" and "tape," however, we believe the legislature intended section 2A(c) protection to apply to both certified agendas and tapes of executive sessions.

Sections 2A(c) and 2A(e) of the Open Meetings Act indicate that the attorney general lacks the authority to review certified agendas or tapes of executive sessions to determine whether they may be withheld under section 3(a)(1) of the Open Records Act. Section 2A(c) provides that the certified agenda is a public record "only upon court order." Section 2A(e) provides for an in camera review of the certified agenda or tape "by the judge of a district court if litigation has been initiated involving an alleged violation of this Act." These provisions indicate that the courts hold the exclusive authority to order releasing to the public the certified agenda or tape of any part of a meeting improperly held or closed under the Open Meetings Act.

Thus, certified agendas and tapes are confidential under section 3(a)(1) of the Open Records Act unless a court rules otherwise in an action filed under the Open Meetings Act. This does not mean that they are not covered by the Open Records Act; the Open Records and Open Meetings Acts are separate statutes, each of which must be applied according to its own terms. See Open Records Decision No. 491. Sections 2A(c) and 2A(e) of the Open Meetings Act simply remove certified agendas and tapes of executive sessions from review by the attorney general under the Open Records Act.

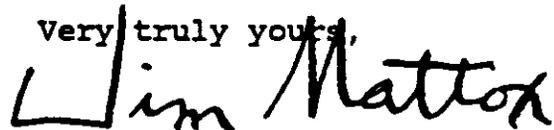
Moreover, the attorney general lacks the general statutory authority to "enforce" the Open Meetings Act. The Open Records Act requires governmental bodies to seek a decision from the attorney general on the availability of specific information, see art. 6252-17a, § 7(a), and authorizes the attorney general to enforce open records decisions through a writ of mandamus. See art. 6252-17a § 8. These provisions frequently cause confusion because the Open Meetings Act does not contain similar specific enforcement authority. Governmental bodies that are required to seek the attorney general's decision under the Open Records Act cannot necessarily request a decision on open meetings questions. The attorney general addresses questions arising under the Open Meetings Act only under the general constitutional and statutory authority authorizing the attorney general to issue legal opinions. See Tex. Const. art. IV, § 22; Tex. Gov. Code §§ 402.041-402.045. The attorney general may issue opinions on open meetings questions only to requestors listed in sections 402.042 and 402.043 of the Government Code. Further, even in an opinion to an authorized requestor, the attorney general cannot resolve disputed fact questions such as whether a particular

meeting actually complied with the Open Meetings Act, see Attorney General Opinion MW-390 (1981); see also Attorney General Opinion MW-28 (1979); whether specific notice is sufficient under the act; or whether a specific "certified agenda" actually complies with the act. The authority of the attorney general under section 7 of the Open Records Act to review information under section 3(a)(1) cannot be used as "back door" authority to enforce the Open Meetings Act.

S U M M A R Y

Certified agendas and tapes of executive sessions held under the exceptions of the Texas Open Meetings Act, article 6252-17, V.T.C.S., are deemed confidential by law within the meaning of section 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S. The attorney general lacks authority to review certified agendas or tapes of executive sessions to determine compliance with the Open Meetings Act.

Very truly yours,



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