



June 12, 2001

Mr. Joe De Los Santos
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2001-2461

Dear Mr. De Los Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148345.

The Natalia Independent School District (the "district"), which you represent, received a request for a copy of an audio tape made during the March 8, 2001 executive session of the district board of trustees, regarding the requestor's complaint against a district employee. You inquire, in light of previous decisions of this office, whether the requested tape recording is confidential under the Texas Open Meetings Act, chapter 551 of the Government Code, and thus must be withheld from the public pursuant to section 552.101 of the Government Code.¹

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 551.103(a) of the Government Code provides that a governmental body that is subject to the provisions of the Open Meetings Act "shall either keep a certified agenda or make a tape recording of the proceedings of each closed meeting, except for a private consultation permitted under Section 551.071." Section 551.104 of the Government Code addresses the preservation and

¹ Since the district did not submit a copy of the tape recording to this office, we infer that the school district considers the tape recording subject to section 551.103. *See* Open Records Decision No. 495 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions when making open records decisions).

the conditions under which the certified agenda or tape recording of an executive session may be released to the public. Section 551.104 provides in pertinent part:

(a) A governmental body shall preserve the certified agenda or *tape recording of a closed meeting* for at least two years after the date of the meeting. . . .

(b) In litigation in a district court involving an alleged violation of this chapter, the court:

. . . .

(3) may grant legal or equitable 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 required to be open under this chapter.

(c) *The certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).* [Emphasis added.]

As you point out, this office has previously addressed issues similar to that raised in the instant request. In Open Records Letter No. 99-1036 (1999), the Attorney General assumed that the tape recording of that part of an executive session relating to an employee grievance did not comply with the procedural requirements of section 551.103(d), and thus found that release of such a tape did not violate the Open Meetings Act. In Open Records Letter No. 99-3130 (1999), the Attorney General reviewed a situation where a certified agenda was made, as well as a tape of an entire executive session. In that ruling, this office stated:

[a]lthough you represent that the tape recording in question was not made pursuant to 551.103, we do not believe that a failure to satisfy the requirements of section 551.103(d) is dispositive of the inapplicability of sections 551.104 and 551.146. Furthermore . . . neither section 551.103 nor section 551.104 limit confidentiality to one choice between a certified agenda or a tape recording. Therefore, under the Open Meetings Act both a certified agenda and a tape recording of a lawfully closed meeting can be confidential pursuant to sections 551.103, 551.104, or 551.146 of the Government Code.

Id.

In contrast to the situation present in OR99-3130, but similar to the situation present in OR99-1036, the information at issue in Open Records Letter No. 2000-1080 (2000) was not

a tape recording of an entire executive session, but rather only of a portion of an executive session. In that ruling, this office concluded,

[a]fter much consideration, this office re-affirms its conclusion in Open Records Letter No. 99-3130 that the purpose for which a governmental body creates a tape recording during an executive session is not a factor in determining whether the recording is confidential under the Open Meetings Act. We also now believe that the fact that a tape recording of an executive session fails to meet the procedural requirements as set out in section 551.103(c) of the Government Code does not affect the restrictions on its release to the public as established under section 551.104(c).

Id.

Here, as in OR2000-1080, you inform us that the school board kept a certified agenda of the entire closed session, but tape recorded only the portion of the closed session pertaining to the requestor's complaint. You further state that the district "did not make the tape recording for purposes of section 551.103 [of the Government Code], but, instead, created the recording for purposes of creating a record in the event [the requestor] appeals the Board's decision or litigates the Board's decision." We conclude that the tape recording at issue in fact constitutes "a tape recording of a closed meeting" and, therefore, must be treated in the same manner as any other tape recording or certified agenda created for purposes of section 551.103: the recording must be preserved by the district "for at least two years after the date of the meeting," Gov't Code § 551.104(a), and may not be released to any individual other than an official officer of the governmental body except as provided under section 551.104(c), *see* Attorney General Opinion No. JC-0120 (1999). Furthermore, the release of the tape recording in violation of section 551.104(c) constitutes a Class B misdemeanor and may additionally result in civil penalties.² Gov't Code § 551.146(a), (b). In this instance, we conclude that the district must not release a copy of the tape recording at issue to the requestor.

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

²Section 551.146(c) provides a defense to criminal prosecution and an affirmative defense to a civil action where (1) the defendant had good reason to believe the disclosure was lawful; or (2) the disclosure was the result of a mistake of fact concerning the nature or content of the certified agenda or tape recording.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 148345

cc: Ms. Mary Helen Bowman
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