



June 4, 2002

Mr. Paul H. Sanderford
Pratt & Sanderford, P.C.
3500 Southwest H.K. Dodgen Loop, Suite 200
Temple, Texas 76504

OR2002-3021

Dear Mr. Sanderford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163898.

The Belton Housing Authority ("BHA") received a request for all documents discussed or provided to BHA relating to certain agenda items at a special meeting, minutes of the special meeting, and notes taken during a closed executive session. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by law. You inform us that the request encompasses information arising from a lawfully closed executive session. You claim that the certified agenda from the closed session is made confidential under the Open Meetings Act (the "OMA"), Chapter 551 of the Government Code. We note the requestor's contention that the meeting at issue was not a properly closed session due to the presence of an individual who was not a member or employee of BHA. If this executive session was not "properly held," the certified agenda and minutes of the session may not be confidential. However, this office lacks the authority to determine the propriety of a closed meeting, and additionally, the attorney general lacks authority to "enforce" the Open Meetings Act. Open Records Decision No. 495 (1988); *see also* Tex. Att'y Gen. Op. No. JC-0506 (2002).

A governmental body that conducts a closed meeting must keep either a certified agenda or make a tape recording of the proceeding, except for private attorney consultations. Gov't

Code §551.103. The agenda or tape is kept as potential evidence in litigation involving an alleged violation of the OMA. See Attorney General Opinion JM-840 (1988). Section 551.104(c) of the Government Code provides that “[t]he 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). Section 551.146 penalizes the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting as a Class B misdemeanor, and makes the person responsible for disclosure liable for damages to a person injured or damaged by the disclosure. Thus, such information cannot be released to a member of the public in response to an open records request. See Open Records Decision No. 495 (1988). In addition, minutes of a closed meeting are confidential. See Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under the predecessor to section 551.104); see also Open Records Decision Nos. 563 (1990) (minutes of a properly held executive session are confidential under the OMA); Open Records Decision No. 495 (1988) (providing that information protected under predecessor to section 551.104 cannot be released to a member of the public in response to an open records request). Therefore, we find that the minutes of the executive session, as well as the certified agenda, must not be disclosed under sections 552.101 and 551.104 of the Government Code. However, records discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992). Thus, the requested notes are not confidential under section 551.104(c) of the Government Code, and they must be released.

We now turn to your claim under section 552.110. You contend that the submitted proposal may be the proprietary property of the Nelrod Company, and thus, excepted from required public disclosure under section 552.110(b). However, we have no indication that you have notified the third party of its right to submit arguments to this office on its behalf pursuant to section 552.305 of the Government Code. See Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Because BHA has not submitted any arguments in opposition to disclosure under section 552.110, and because this office has not received arguments from the third party whose proprietary interests are implicated, we have no basis for finding that the information at issue may be withheld.

However, we note that the submitted proposal appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Therefore, BHA need only provide access to the copyrighted information; it need not furnish copies.

In summary, you must withhold the certified agenda and minutes of the closed session under section 552.101. The remaining requested information must be released.

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).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 "Kristen Bates".

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 163898

Enc. Submitted documents

c: Mr. David N. Deaconson
Pakis, Giotes, Page & Burlison
801 Washington Avenue, Suite 800
Waco, Texas 76701
(w/o enclosures)