



December 7, 1999

Ms. Kelli Hamm Karczewski  
Schwartz & Eichelbaum  
800 Brazos Street, Suite 870  
Austin, Texas 78701

OR99-3539

Dear Ms. Karczewski:

On behalf of the Ferris Independent School District (the “school district”), you ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 130063.

The school district received a request for a copy of the tape recording of the closed session of a school board meeting held on September 21, 1999. You assert that the requested tape recording is excepted from public disclosure under section 552.101 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure information that is made confidential by law, including information made confidential by statute. You argue that the tape is made confidential under the Open Meetings Act (the “OMA”).

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). Only a court in an OMA case may make the agenda or tape recording available to the public. Gov’t Code § 551.104; *see* Attorney General Opinion JM-995 (1988). Section 551.104 reads in relevant part as follows:

(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).

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.

You ask whether a closed session tape recording that does not comply with the procedural requirements of section 551.103 of the OMA thereby loses its confidentiality. We conclude that the legislature intended the OMA confidentiality provision to apply to tape recordings with procedural defects.

Consideration of the OMA as a whole leads to the conclusion that a recording's procedural defect cannot be cause for a tape recording to lose its confidential status. First, the attorney general lacks authority to review certified agendas or tapes of closed sessions to determine compliance with the OMA. *See* Attorney General Opinion No. JC-120 (1999), Open Records Decision No. 495 (1988). Second, the OMA contains no provision that would strip a closed session tape recording of its confidentiality on the basis of a section 551.103 procedural shortcoming. Third, the penalty provision does not permit an employee of a governmental body to release a defective closed session recording or excuse an employee of the governmental body from criminal liability for release of a defective tape recording if the employee knew of a procedural defect. Finally, the OMA contains no authority for a governmental body to release any closed session tape, including, we think, procedurally defective tapes, except by court order.

You also ask whether the fact that the school district recorded the closed session using both a certified agenda and a tape recording means that the tape recording is not confidential. Although section 551.103 states that a governmental body shall keep "either" a certified agenda or make a tape recording of a closed meeting, the provision does not prohibit a governmental body from using both types of records. To allow the release of one of the records when both are kept would thwart the purpose of the provision, to preserve the confidentiality of untampered evidence of possible OMA violations. The OMA permits the release of a closed meeting tape only as authorized by that statute. *See* Attorney General Opinions JC-0120 (1999), JM-995 (1988). Thus, we conclude that a governmental body may keep both a certified agenda and a tape recording of a closed meeting, and both records are confidential.

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

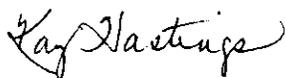
from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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,



Kay H. Hastings  
Assistant Attorney General  
Open Records Division

KHH/jc

Ref.: ID# 130063

cc: Ms. Tawny Abalos  
553 Union Hill Road  
Ennis, Texas 75119