



MISSISSIPPI ETHICS COMMISSION

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October 5, 2018

VIA U.S. MAIL

Mr. Joseph D. Rawson
701 # 1 Dearborne Rd.
Hattiesburg, MS 39401

Re: Open Meetings Case No. M-18-014; Rawson vs. Mayor & City Council, City of Hattiesburg

Dear Mr. Rawson,

Enclosed please find a copy of the Order of Dismissal in the above referenced case. This Order was issued in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission and was presented to the Ethics Commission at its open meeting on Friday, October 5, 2018.

The hearing officer presented a recommendation to the commission after fully considering all the materials submitted by the parties, as well as the applicable law. The members of the Ethics Commission reviewed the hearing officer's recommendation in advance of the commission meeting, discussed the matter at the meeting, and voted to issue the enclosed order.

Appeals of such orders are governed by Section 25-61-13, Miss. Code of 1972. If you have any questions about this matter, please feel free to contact our office.

Sincerely,

A handwritten signature in blue ink that reads "Tom Hood". The signature is stylized with a large, sweeping "T" and "H".

TOM HOOD
Executive Director & Chief Counsel,
Mississippi Ethics Commission

cc: Mr. Moran M. Pope, III.
Attorney at Law
Pope & Pope, P.A.
P.O. Box 17527
Hattiesburg, MS 39404

(Enclosure)
TH/lk

BEFORE THE MISSISSIPPI ETHICS COMMISSION

JOSEPH RAWSON

COMPLAINANT

VS.

OPEN MEETINGS CASE NO. M-18-014

CITY COUNCIL, CITY OF HATTIESBURG

RESPONDENT

ORDER OF DISMISSAL

This matter came before the Commission through an Open Meetings Complaint filed by Joseph Rawson against the City Council for the City of Hattiesburg (the “council” or “city”). The board filed a response by and through its attorney. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-41-15, Miss. Code of 1972. The hearing officer presented a Recommendation of Dismissal to the Ethics Commission at its regular meeting held on October 5, 2018 in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission. This Order of Dismissal is entered in accordance with Rule 4.6.

I. FINDINGS OF FACT

1.1 Joseph Rawson alleges the council violated the Open Meetings Act during its special called meeting on June 7, 2018 by entering executive session to interview candidates for the Clerk of Council position. Specifically, he states:

I have five distinct issues to present before the Commission, to wit:

1. Did the Council violate the Open Meetings Act when they entered into executive session to interview candidates for the Clerk of Council position?
2. Did the Council violate the Open Meetings Act when they neglected to close the meeting to determine whether they should enter executive session?
3. Did the Council violate the Open Meetings Act when they voted to enter into an executive session in an Open Meeting?
4. Did the Council violate the Open Meetings Act when they neglected to give an adequately detailed reason to enter executive session?
5. Did the Council violate the Open Meetings Act when they neglected to ensure that the doors to City Hall were unlocked?

1.2 In his complaint, Mr. Rawson asserts that the council “invited approximately three certified clerks to attend the job interview” in an executive session on June 7, 2018. He received a copy of the notice/agenda and that “[t]he agenda for the meeting contained a single item, titled ‘Consider the need to go into executive session to interview candidates for the Clerk

of Council position, in accordance with Mississippi Code Section 25-41-7(a).’ No other item of business was present on the agenda.” By way of background, Mr. Rawson states that:

The prior Clerk of Council submitted a letter of resignation to the Council, having reached an age of acceptable retirement. This letter, to the best of my knowledge, was tendered to the Council during the recessed meeting [on May 22, 2018]. The letter was accepted and acknowledged by the Council, where the clerk announced retirement effective at the end of June, 2018, while leaving the City Hall on the 1st of June and presumably spending the remainder of her term in accrued vacation time. This demonstrates that the office of Clerk of Council was not vacant at the time of the meeting on the 7th of June. With the acceptance and acknowledgement of the clerk's letter upon those terms, the position of Clerk of Council was technically and legally filled, yet effectively and practically vacant, since the Council accepted the fact that no duty would be performed by the clerk for the remainder of her term after leaving City Hall.

1.3 Mr. Rawson states that, on June 7, 2018, he arrived at the Hattiesburg City Hall “about five minutes before 6 p.m. . . .” and found the doors locked. He “jiggled the doors to gain attention and was greeted by Mr. Pope, the city attorney . . .” who let him in the building.

1.4 At the meeting, Mr. Rawson recollects that, “the Council President proceeded to call the meeting to order.” Then, “[a] motion was made to consider entering into executive session to ‘discuss the job performance, character, and professional competence of a person in a specific position.’ This motion passed unanimously. Immediately after the motion passed, and without closing the meeting, or even having open discussion to consider entering into an executive session, a motion was made to enter into executive session for the exact same reason as the prior motion to consider. This motion also passed unanimously, and immediately after passage, the President of the Council closed the meeting and the Council entered into an executive session. I then left City Hall with Mr. Pope. . . .” Mr. Rawson also states that, “[t]here was no way back into City Hall, since the doors were locked”

1.5 Mr. Rawson explains that the council failed to follow the mandatory procedure required to enter an executive session. He states, “[i]t has been a long standing practice in the city, in previous meetings of the Council, for the Council to conveniently bypass the mandatory requirements that allow them to enter into executive sessions.” He describes the routine procedure followed by the council as:

A motion to consider entering into executive session is made, and passes. There is no discussion. The meeting is not closed. Immediately after passage of the motion, being that there is no discussion, a motion is made to enter into executive session. Generally, there is also no discussion at this point either. Then the meeting is closed, and the Council enters into executive session. Generally, the reason to consider entering into executive session is identical to the reason that is given to actually enter into the session, said reason amounting to “generalized fluff,” such as “personnel matters,” “pending litigation,” or “prospective litigation.”

1.6 Mr. Rawson emphasizes that “[d]uring the meeting on the 7th of June, the reason to enter the executive session to “discuss the job performance, character, and professional competence of a person in a specific position” was clearly expressed. This is a truly general reason that neglects to inform the public, with sufficiency, the reason to enter into the executive session.”

1.7 In its response, the council denies it violated the Open Meetings Act. It does not dispute most of the facts given by Mr. Rawson in his complaint, but adds that:

Soon after receiving Ms. Bernardo's letter [of resignation], on or about April 27, 2018, the notice of the position of [Clerk of Council] was posted on the City's website and elsewhere. A number of candidates applied, and five (5) people were interviewed by the Council for the position: three (3) were interviewed on June 7, 2018, and two (2) were interviewed in June 12, 2018.

...

[The city attorney, Mr. Pope] told Mr. Rawson orally before the meeting on June 7, 2018, that the Council was conducting interviews in executive session because it was likely that some or all of the candidates might not want their current employers to know of their interest in the Hattiesburg City Council Clerk position.

...

Mr. Rawson is correct that the doors to the Hattiesburg City Hall are normally locked at 5:00 p.m. each day, and that the outside doors were locked on June 7, 2018. Council meetings normally are held at 4:00 p.m. or 5:00 p.m. and it was an oversight on the part of the Council to allow the doors to City Hall to be locked on that day given its 6:00 p.m. special meeting.

...

Recognizing the error concerning the locked City Hall door, for the June 12, 2018, special meeting, which also began at 6:00 p.m., the Council President arranged for a Hattiesburg policeman to stand at the City Hall door to open it for any member of the public who wished to come in.

1.8 Furthermore, the council states that “Mr. Rawson . . . argues, basically, that the Council did not follow the law concerning going into executive session – though he does not identify *exactly when or how* the Council failed to follow the law . . .” (emphasis in original). In support of its argument that it followed the correct procedure to enter executive session, the city attached a copy of a procedural guide prepared by the city’s attorney to the response, entitled “Going into Executive Session: A Procedural Guide for the Hattiesburg City Council.”

1.9 Finally, the agenda and minutes of the June 7, 2018 meeting are available on the city’s website, www.hattiesburgms.com. The minutes state the following actions by the council:

A MOTION was made by Council Vice President Dryden and seconded by Council member Delgado to Consider the need to go into executive session to interview candidates for the Clerk of Council position, in accordance with Mississippi Code Section 25-41-7 (a).

There being no discussion, the Motion received the affirmative vote of the Council as follows:

Yeas: 5 - George, Delgado, Carroll, Dryden and Brown
Nays: 0

A MOTION was made by Council Vice President Dryden and seconded by Council member Delgado to go into executive session to interview candidates for the Clerk of Council position, in accordance with Mississippi Code Section 25-41-7 (a).

There being no discussion, the Motion received the affirmative vote of the Council as follows:

Yeas: 5 - George, Delgado, Carroll, Dryden and Brown
Nays: 0

Those present for the Executive Session were Council members George, Delgado, Carroll, Dryden and Brown; and Attorney Pope.

No action was taken during Executive Session.

A MOTION was made by Council member George and seconded by Council member Delgado to come out of Executive Session and re-open the meeting to the public at 7:04 p.m.

There being no discussion, the Motion received the affirmative vote of the Council as follows:

Yeas: 5 - George, Delgado, Carroll, Dryden and Brown
Nays: 0

II. CONCLUSIONS OF LAW

2.1 "The Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public." Board of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp., 478 So.2d 269, 276 (Miss. 1985). In Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107 (Miss.1989), the Supreme Court summarized the Legislative intent of the Open Meetings Act as follows:

Every member of every public board and commission in this state should always bear in mind that the spirit of the Act is that a citizen spectator, including any

representative of the press, has just as much right to attend the meeting and see and hear everything that is going on as has any member of the board or commission.

Id. at 110. “However inconvenient openness may be to some, it is the legislatively decreed public policy of this state.” Mayor & Aldermen of Vicksburg v. Vicksburg Printing & Pub., 434 So.2d 1333, 1336 (Miss.1983).

A. Reasons for Executive Session

2.2 Only in limited circumstances, which are enumerated under Section 25-41-7(4) of the Mississippi Code, may a public body enter executive session and exclude the public. A public body may hold an executive session for the “[t]ransaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position.” Section 25-41-7(4)(a). A public body may also hold an executive session under Section 25-41-7(4)(k) for the “transaction of business and discussion regarding employment or job performance of a person in a specific position or termination of an employee holding a specific position.”

2.3 In Hinds County, the Mississippi Supreme Court summarized Section 25-41-7(4)(a) as a reason to enter executive session to discuss “[b]usiness related to personnel, the character, professional competence, and physical or mental health of a person.” Hinds County at 112. It summarized Section 25-41-7(4)(k) as a reason to enter executive session to discuss “[e]mployment and termination of employees, including deletion of jobs from budget.” Id. However, the Supreme Court held “that the words ‘personnel matters’ are restricted to matters dealing with employees hired and supervised by the board, not those employees of some other [public] official, and not other [public] officials themselves.” Id. at 124 (citations omitted).

2.4 As long as the discussion regarding a “specific position” is for a prospective employee and not an independent contractor, a public body may enter executive session to conduct interviews or have discussions regarding the employment of those persons. See, Miss. Att’y Gen. Op. 2009-00119, Turner (April 13, 2009) (“The board of trustees may enter into executive session to conduct interviews or discussions for the purpose of hiring of a particular individual as the new board attorney, if the individual will be an employee of the district. However, under existing law there is no authority for the school board to enter into executive session to interview or discuss the engagement of an individual as the new board attorney, if the individual will be an independent contractor.”); and Howell v. City of Water Valley, Open Meetings Case M-09-006 (discussing and interviewing an attorney for the board does not violate the Open Meetings Act when the attorney would be an employee of the city).¹ This includes

¹ The complainant points out that the Water Valley case is “quite dated,” and recalled a more recent case filed by Ellen Ciurczak, which “seemed to validate my concerns about the moral actions of the Council.” There are two cases filed by Ms. Ciurczak, M-15-011 and M-16-005, both filed against the Board of Trustees for the Hattiesburg Public School District. In case M-15-011, the commission found that the board violated the Open Meetings Act when it entered executive session to discuss a contract proposal with a company, P3 Strategies, LLC (a non-employee) and to discuss the superintendent’s recommendations for employment, where the board had failed to sufficiently identify matters to be discussed. However, the commission recognized that the school board may enter executive session to discuss the superintendent’s recommendations had the board announced the reasons enumerated in the statutes with a meaningful and sufficient specificity. In case M-16-005, the commission dismissed Ms.

entering executive session to conduct interviews of prospective employees, even if the employee position is not yet technically vacant. Accordingly, the council did not violate the Open Meetings Act when it entered executive session to interview candidates for the Clerk of Council position. As the Clerk of Council is an employee hired by the council, the council may properly enter executive session to interview and discuss potential candidates.

B. Executive Session Procedure

2.5 The Open Meetings Act also requires certain technical, procedural requirements be met in order for a public body to enter executive session and exclude the public from its deliberations. The Mississippi Supreme Court has ruled the following steps “mandatory requirements”:

1. The meeting must begin as an Open Meeting. Miss. Code Ann. § 25-41-7(1).
2. A member must make [a] motion in [an] Open Meeting for the meeting to be closed to determine whether or not the Board should declare an executive session. The statute does not require a second to this motion, but the vote on this motion is taken in Open Meeting. If a majority votes to close the meeting to make a determination on the question of an executive session, the meeting is closed for this purpose. Miss. Code Ann. § 25-41-7(2).
3. No other business during this closed interim shall be considered until a vote has been taken on whether or not to declare an executive session. Miss. Code Ann. § 25-41-7(2). In order to go into executive session, a majority of three-fifths of those present must vote in favor of it. Miss. Code Ann. § 25-41-7(1).
4. The Board must then state in Open Meeting the reason for going into executive session, and this reason and total vote thereon must thereafter be recorded on the minutes of the meeting. Miss. Code Ann. § 25-41-7(3), (5).
5. The vote to go into executive session is applicable only to that particular meeting on that particular day. Miss. Code Ann. § 25-41-7(6).

Hinds County at 110-111. The Court went on to explain that:

[T]he board meetings must begin as an open meeting, following which if some matter is either brought up or about to be discussed which any member believes should be discussed in executive session, he must make a motion to close the meeting to determine if the board should go into executive session. The member making the motion is not required at that time to disclose the reason, nor is there any need for a second, but there must be a majority vote in favor of closing the meeting to make this determination.

Ciurczak’s case, finding the board properly entered executive session to discuss qualifications of five candidates for the vacant superintendent position.

Upon majority vote the meeting is closed. The board is then permitted to discuss whether or not to go into executive session, but no other business than this particular matter may then be discussed. If a three-fifths majority of the board votes to go into executive session, the chairman must then re-open the meeting and announce publicly that the board is going into executive session, and give the reason for doing so. . . .

The board may then go into executive session to discuss this one matter and, when concluded, must re-open the meeting. No other matter may be discussed at the executive session than the announced subject.

This entire procedure and the vote on each stage must thereafter be recorded on the minutes.

Id. at 111 (citations omitted).

2.6 The complainant states that, at the June 7, 2018 meeting, the council failed to enter a closed session to determine whether to enter executive session, and instead “[i]mmediately after the motion [to consider entering executive session] passed, and without closing the meeting, or even having open discussion to consider entering into an executive session, a motion was made to enter into executive session for the exact same reason as the prior motion to consider.” He states the only reason given was during the motions, to “discuss the job performance, character, and professional competence of a person in a specific position.” The complainant asks whether the council violated the Open Meetings Act by failing to enter a closed determination, by voting to enter executive session in open session, and by failing to give an adequately detailed reason to enter executive session.

2.7 In its response, the council does not dispute the facts as described by the complainant. Further, the minutes for the June 7, 2018 meeting do not contradict the complainant’s description. The minutes reflect that the council voted to “consider the need to go into executive session” without indicating whether the council closed the meeting. The minutes also reflect that the council voted to enter executive session, again without indicating whether the vote was taken in open or closed session. However, the meeting agenda and motions made in open session clearly identify a matter to be discussed that is a proper subject for executive session. The complainant states, that “[t]he agenda for the meeting contained a single item, titled ‘Consider the need to go into executive session to interview candidates for the Clerk of Council position, in accordance with Mississippi Code Section 25-41-7(a).’ No other item of business was present on the agenda.”

2.8 Accordingly, the question is whether a “closed” determination may be made in open session when the public body clearly knows it has matters to discuss that may be properly discussed in executive session and has clearly announced those reasons to the public prior to entering executive session. In an earlier case, Mason v. City of Aberdeen, Open Meetings Case M-10-001, the Ethics Commission previously held that a “closed determination is a mandatory requirement which cannot be omitted” and found the board of aldermen for the City of Aberdeen violated the Open Meetings Act when it “failed to make any closed determination about the necessity for executive session as required in Section 25-41-7(2).” In Mason, the city’s attorney

contended that the board made an “open determination,” that is, that “the board carefully considered whether executive session was warranted, but they did so in open session rather than closed session.” The city’s attorney argued that the holding in Hinds County requires “that a public body make a considered determination, but that it need not be made in closed session.” In Mason, the Commission found this argument to be persuasive, but ultimately held that it was “bound by the Hinds County decision and is compelled to find against the board on this point.”

2.9 However, in Hinds County, the Supreme Court clearly envisions a public body whose members are unsure whether executive session is proper. The Court states:

When a member of the board believes the board needs to go into executive session, he may very well not know the precise reason or how it should be stated, or in fact that the board will agree with him, or the board attorney may advise that the matter is not a proper subject for executive session. Therefore, he is not required to give any reason for asking that the meeting be temporarily closed to determine the need for an executive session.

In a short, temporarily closed meeting, however, the board can determine the precise matter to be discussed and considered, and whether or not an executive session is appropriate. If by a three-fifths vote it is decided to go into executive session, the chairman must re-open the meeting and announce publicly that the board is going into executive session, and state the reason for doing so. The chairman then knows precisely why the board is going into executive session. He must publicly state the reason with sufficient specificity for the audience to know in fact that there is an actual, specific matter which is to be discussed and considered in executive session.

Id. at 111 (emphasis added).

2.10 Further, Section 25-41-7(3) of the Act states: “Nothing in this section shall be construed to require that any meeting be closed to the public. . . .” That is, the members of a public body will not violate the Open Meetings Act by holding a discussion in public which could have been legally held in private. For example, the Open Meetings Act allows a public body to enter an executive session for matters enumerated in Section 25-41-7(4), but does **not require** that a public body have those discussions in an executive session. For instance, Section 25-41-7(4)(b) allows a public body to enter executive session to discuss prospective litigation, when such discussion would have a detrimental effect on the litigating position of the public body. However, a public body is not required to discuss prospective litigation in an executive session, even if such a discussion would have a detrimental effect on its litigating position. Likewise, Section 25-41-7(1) allows for discussions in executive session regarding “business related to personnel,” but the Court in Hinds County recognized that “there is any number of matters of discussion involving employees of an organization which would never require an executive session.” Hinds County at 113. “Commendations, need to work overtime upon occasion, shift in hours of employment, increase in life insurance, any of these might very well come under the heading of ‘personnel matters,’ but they are hardly the stuff for which a board would trouble itself to go into executive session.” Id.

2.11 Similarly, a public body has the right, upon a motion and simple majority vote of the body, to enter a closed session to determine whether an executive session is appropriate, but a public body is not required in all circumstances to make such a determination in a closed session. This right to enter a closed session gives public bodies a rare opportunity to speak only to fellow board members and solicit the advice of their counsel to determine whether a matter is a proper subject for executive session. However, if a public body clearly knows that a matter is an appropriate subject for executive session, or is otherwise willing to make an “open determination” consistent with Section 25-41-7(3), it may surely do so.

2.12 The underlying philosophy of the Open Meetings Act is for governmental business to “be performed in an open and public manner.” Section 25-41-1. As such, the Ethics Commission modifies its prior holding in Mason and now finds that Section 25-41-7(3) of the Open Meetings Act does not prohibit a public body from making a determination in open session about whether to enter executive session and does not prohibit a public body from voting to enter executive session while in open session. Accordingly, the council did not violate the Open Meetings Act at its meeting on June 7, 2018, when it made a determination while in open session on whether to enter executive session and voted to enter executive session while in open session.

C. Reasonable Actions to Ensure Public’s Right to Attend

2.13 Finally, the complainant alleges the council violated the Open Meetings Act when it neglected to ensure that the doors to City Hall were unlocked for the meeting on June 7, 2018. The Open Meetings Act does require public bodies to take all reasonable means within their powers and resources to ensure all members of the public who attend are able to “see and hear everything that is going on” at an open public meeting. The council admits that it “was an oversight on the part of the Council to allow the doors to City Hall to be locked on that day given its 6:00 p.m. special meeting.” However, “[r]ecognizing the error concerning the locked City Hall door, for the June 12, 2018, special meeting, which also began at 6:00 p.m., the Council President arranged for a Hattiesburg policeman to stand at the City Hall door to open it for any member of the public who wished to come in.”

2.14 In this case, the complainant stated that he “jiggled the doors to gain attention and was greeted by Mr. Pope, the city attorney . . .” who let him in the building for the June 7 meeting. As such, the issue is moot since the complainant was allowed access to the meeting, states he did not seek re-entrance to the meeting after the council entered executive session and has not shown that any other member of the public was denied access to the June 7 meeting. However, it should be noted, that had no one been available to let Mr. Rawson into the building on June 7, the locked doors to the Hattiesburg City Hall at the time of the meeting would have violated the Open Meetings Act.

WHEREFORE, the complaint is hereby dismissed this the 5th day of October, 2018.

MISSISSIPPI ETHICS COMMISSION

BY:


TOM HOOD, Executive Director