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CERTIFIED MAIL **RETURN RECEIPT REQUESTED**

Mississippi Ethics Commission
P. O. Box 22746
Jackson, MS 39225-2746

Re: Open Meetings Complaint No. M-18-014, City Councilmen, City of Hattiesburg

Ladies and Gentlemen:

I represent the City of Hattiesburg, Mississippi, and am the "Randy Pope" referred to by Mr. Rawson in his Complaint. I am responding to the Complaint on behalf of the City Council of Hattiesburg.

FACTS

Most of the facts given by Mr. Rawson in his Complaint are not disputed by the City Council of Hattiesburg (hereafter "the Council"), but there are a few clarifications and additional facts not included by Mr. Rawson in his Complaint that may be helpful to the Commission as it considers the issues raised.

On or about April 17, 2018, Ms. Debbie Bernardo, Clerk of the Hattiesburg City Council, submitted a letter advising the Council of her decision to retire effective June 29, 2018.¹ Her retirement was accepted by the Council on May 22, 2018. In her letter, Ms. Bernardo told the Council that "my last day in the office will be June 1, 2018." Ms. Bernardo took accumulated leave during the month of June, 2018.

Soon after receiving Ms. Bernardo's letter, on or about April 27, 2018, the notice of the position 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.

¹ Ms. Bernardo had been the Hattiesburg City Council Clerk for several years. She was appointed pursuant to *Miss. Code Ann.* § 21-8-13 (Supp. 2017). Prior to being appointed Council clerk, Ms. Bernardo served as a deputy Council Clerk.

Relying specifically on the Ethics Commission Order of Dismissal in the case of *Howell v. Board of Mayor and Alderman, City of Water Valley*, No. M-09-006, together with the clear legislative recognition of the right of public employees—and candidates for employment—to have their privacy protected, the Council gave the proper notice that it would be having special meetings for the sole purpose of going into executive session to interview candidates for the position of City Council Clerk (Exhibits “A” and “B”).

Mr. Rawson’s memory of his conversation with the undersigned at the June 7, 2018, meeting (pp. 2-3 of the Complaint), is substantially correct, and, as Mr. Rawson, recounts, the undersigned 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 incorrect, however, in jumping to the conclusion that this decision by the Council was a “matter of convenience” for the Council (p. 6 of the Complaint).²

The undersigned told Mr. Rawson as we sat and talked before the June 7, 2018, Council meeting begun, that I had been representing public bodies such as school districts for most of my law practice,³ and that I was quite sensitive to boards going into executive session to discuss “personnel,” but then, once in executive session, veering off into other subjects not provided for in *Miss. Code Ann.* § 25-41-7 (Supp. 2017), and I have consistently advised the public boards I have represented, including the Hattiesburg City Council, to strictly follow the Mississippi law regarding Open Meetings and executive sessions.

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.,⁴ 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.

However, as Mr. Rawson states in his Complaint, the undersigned opened the outside City Hall door for him prior to the June 7, 2018, meeting beginning, and then chatted briefly with him in

² Mr. Rawson is apparently picking up language from a case he cites, *Mayor & Aldermen v. Vicksburg Printing & Publishing*, 434 So.2d 1333 (Miss. 1983), but that “jump” from what the undersigned said to him to the allegation that the Council was meeting in executive session for its own “convenience” is simply incorrect and unwarranted.

³ The undersigned has been a school board attorney for more than 30 years, including Forrest County Agricultural High School, which I have represented since 1997, and the Perry County School District, which I represented from 1999 until becoming City Attorney in 2017, and the Hattiesburg School District from 1979 until 1989. In addition, I have represented the Pine Belt Regional Solid Waste Management authority, a public body, for more than 20 years.

⁴ The Hattiesburg City Council has regular agenda-setting meetings (where most of the discussion of the items on the agenda occurs) on the first and third Mondays of the month beginning at 4:00 p.m., and a regular “voting” meeting on the first and third Tuesdays of the month, beginning at 5:00 p.m.

Council chambers before the meeting began. As he says (p. 8 of the Complaint), Mr. Rawson did leave City Hall after the Council went into executive session. He says that “There was no way back into City Hall, since the doors were locked,”⁵ but, as he also says, “I had no reason to believe that the executive session was other than the session planned and published in the Agenda.” (Complaint, p. 8)

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.

LAW

Mr. Rawson does not argue that *Howell v. Board of Mayor and Aldermen, City of Water Valley*, No. M-09-006, is not on point with the Hattiesburg situation. Rather, he essentially argues that that decision by the Ethics Commission was incorrectly decided, and that the case was “quite dated” (p. 3).⁶

Mr. Rawson cites three cases in support of his argument, but, rather than examining the substance of each case, he simply quotes language from the cases—none of which language the Council takes issue with.

In *Mayor and Alderman of Vicksburg v. Vicksburg Printing and Publishing*, 434 So.2d 1333 (Miss. 1983), the Mississippi Supreme Court held that where the Vicksburg Planning Commission met in executive session with two expert city planners to discuss an extension of the boundaries of the City of Vicksburg, and potential litigation was discussed, there was no violation of the Open Meetings Act. The issue of personnel was not involved in this case.

In *Mayor and City Council of Columbus v. The Columbus Dispatch* (No. 2016-CC-0897-SCT), the “Mayor and the City Council members for the City of Columbus held four pairs of

⁵ Mr. Rawson did not have to leave City Hall. It is not uncommon for members of the public to wait in the hall outside the Council chambers and then return once the executive session ends. There was no reason he could not have done that on this occasion.

⁶ Mr. Rawson alludes to a case involving the Hattiesburg School District (Complaint, pp. 3-4), but he does not provide any details or a citation, so it is difficult to know how to reply to this statement. If he is referring to *Ellen Ciurczak*, No. M-16-005, that case involved the Hattiesburg School District Board of Trustees going into executive session to discuss hiring the Mississippi School Boards Association to help them locate a new superintendent and what characteristics the superintendent might have as well as discussing three current employees of the Hattiesburg District who might be considered for superintendent. In that case, the Ethics Commission found that the Hattiesburg School Board did not violate the Open Meetings Act.

prearranged, nonsocial and sub-quorum gatherings over the course of two months. The gatherings were on the topics of economic development and maintenance of a public building. For each pair of gatherings, the Mayor first met with three Council members, and then later the same day, he met with the remaining three Council members on the same topic.”

The Mississippi Supreme Court in the *Columbus* case ruled that there was an attempt to *circumvent* the Open Meetings Act. But there was no issue of *personnel* involved in the *Columbus* case as there is in the case at bar. Further, in the case at bar there was no attempt to circumvent the Open Meetings Act by, for example, meeting in groups of two by the Council to interview candidates for the Council Clerk position (which might be said to be somewhat analogous to the *Columbus* case). To the contrary, the Hattiesburg City Council’s agenda, which Mr. Rawson says he received, stated very clearly the purpose of the meeting: to interview candidates for the position of Hattiesburg City Council Clerk.

In *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So.2d 107 (Miss. 1989), the Mississippi Supreme Court ruled, among other things, that when the Hinds County Board of Supervisors used the term “personnel” for its reason for going into executive session, that term, without more, was too vague, and the Court drew a distinction between employees who were “hired and supervised by the Board [of Supervisors]” and independent contractors—as the Ethics Commission did in *Howell v. Board of Mayor and Aldermen, City of Water Valley*.

That the Clerk of the City Council of Hattiesburg is an “employee” within the meaning of the Open Meetings Act is not in dispute. Mr. Rawson suggests that as long as Ms. Bernardo is still technically Council Clerk until June 30, 2018, the Council cannot fill the position of Clerk. The Council agrees that there can, statutorily, be only one Council Clerk at a time, but that does not mean, either legally or practically, that the Council could not search for Ms. Bernardo’s replacement in the meantime, and choose, if it wished, to name someone to that position *effective July 1, 2018, or thereafter*.⁷

⁷ This, in fact, was the experience of the undersigned in his appointment as City Attorney. My appointment by the Mayor of Hattiesburg was *approved* by the City Council on July 5, 2017, *to be effective August 1, 2017*. My wife and I were traveling outside the country during most of the month of July, 2017, and the then-City Attorney, Hon. Annie Amos, continued to serve as City Attorney during July, 2017. On June 19, 2018, the Council named Ronda S. Cole, the-then City Council Clerk for the City of Gulfport, to the position of City Council Clerk for the City of Hattiesburg, *with her appointment to be effective July 5, 2018*.

THE RIGHT TO PRIVACY OF PUBLIC EMPLOYEES

The Mississippi legislature has repeatedly recognized the need to protect the privacy of employees of public bodies. In addition to *Miss. Code Ann.* §§ 25-41-7 (4) (a) and 25-41-7 (4) (k) (Supp. 2017), *Miss. Code Ann.* § 25-1-100 (Supp. 2017) makes “personnel records *and* applications for employment in the possession of a public body,” “test questions and answers in the possession of a public body...which are to be used in employment examinations,” and “letters of recommendation in the possession of a public body...respecting any application for employment” exempt from public records disclosure.

To require that interviews of a prospective City Council Clerk be done in public not only undermines the legislative intent to protect the privacy of the individual employee, but also, as a practical matter, would likely deter most qualified applicants from even applying, if for no other reason than if the application becomes public, and that applicant is not chosen for the position, there may be significant negative repercussions for that applicant with his or her current employer—as the undersigned pointed out to Mr. Rawson in our brief discussion prior to the June 7, 2018, meeting.

EXECUTIVE SESSION PROCEDURE

Mr. Rawson “lumps” items 2, 3 and 4 of his Complaint together, and argues, basically, that the Council did not follow the law concerning going in to executive session--though he does not identify *exactly when or how* the Council failed to follow the law, other than saying that since he began attending Council meetings in August, 2011, the Council has not followed the correct procedure for going into executive session.⁸ He attached no copies of minutes of the Council or other documents to support his contention.

A new Council took office on July 1, 2017, and the undersigned became City Attorney on August 1, 2017. I cannot say what procedure the Hattiesburg City Council may have followed to go into executive session prior to August 1, 2017, because I was not there for those meetings.⁹

⁸ Mr. Rawson does not allege that the *reasons* given by the Council in times past were outside the scope of the statutory exemption under *Miss. Code Ann.* § 25-41-7, and in his email to Councilwoman Mary Dryden dated June 7, 2018, attached to his Complaint, Mr. Rawson appears to tell Ms. Dryden that he is basically satisfied with the procedure the Council follows in going into executive session: “the notice of intent [of the Council going into executive session] to consider going into almost all sessions have been at least moderately satisfactory.”

⁹ Though Mr. Rawson complains that the Hattiesburg City Council has not been following the statutory procedure for going into executive session since 2011, he says, in footnote 12, that despite this, he is “only directing the Commission’s attention to the June 7th meeting in question.” (p. 11 of the Complaint, footnote 12).

The undersigned has prepared a guide to assist the City Council in going into executive session (Exhibit “C”).

THE CITY HALL DOOR

Mr. Rawson spends little time on his fifth point involving the locked door to City Hall. The Council concedes this was an error, albeit inadvertent, but it did not keep Mr. Rawson from being at the June 7, 2018, meeting, and the error was corrected prior to the June 12, 2018, meeting.

CONCLUSION

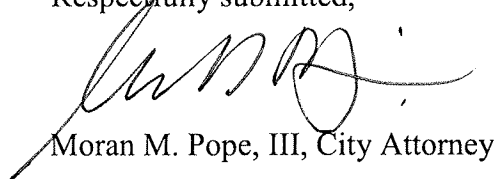
The Hattiesburg City Council agrees with the substance of Mr. Rawson’s argument that meetings of public bodies should be held in public. Where it disagrees is that Mr. Rawson does not seem to recognize that there are limited situations in which a public body, such as a City Council, may—and should—discuss matters in executive session. The case of interviewing candidates for the position of City Council Clerk is one of those situations.

In summary, the Council was justified in relying on the Ethics Commission decision in *Howell v. Board of Mayor and Aldermen, City of Water Valley* in its decision to interview candidates for the Council Clerk’s position in executive session.¹⁰

In addition, by going into executive session to interview prospective candidates for the position of Council Clerk, the Council protected the privacy of those individuals interviewed, as the legislature intended.

The Complaint against the Council should be dismissed.

Respectfully submitted,



Moran M. Pope, III, City Attorney

¹⁰ The Attorney General of Mississippi has issued two (2) opinions supporting the authority of a public body to go into executive session to discuss the hiring of a prospective employee, agreeing with the logic of the Ethics Commission in *Howell v. Board of Mayor and Alderman, City of Water Valley*. See Opinion No. 2009-00306, to Andrew Dulaney, Esq., June 25, 2009, and Opinion No. 2009-00119, to Dorian E. Turner, Esq., April 13, 2009.

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MMPIII/rp
cc: Mr. Carter Carroll, President, Hattiesburg City Council
All other City Council members
Ms. Ronda Cole, Hattiesburg City Council Clerk
Enclosures

City of Hattiesburg, MS

200 Forrest St.
P.O. Box 1898
Hattiesburg, MS 39401



Meeting Agenda

Thursday, June 7, 2018

6:00 PM

Council Chambers

City Council - Special Called Meeting

*City Council
Special Called Meeting*

Exhibit "A"

1. 2018-522 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).

City of Hattiesburg, MS

*200 Forrest St.
P.O. Box 1898
Hattiesburg, MS 39401*



Meeting Agenda

Tuesday, June 12, 2018

6:00 PM

Council Chambers

City Council - Special Called Meeting

*City Council
Special Called Meeting*

Exhibit "B"

1. 2018-538 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).

GOING INTO EXECUTIVE SESSION: A PROCEDURAL GUIDE
FOR THE HATTIESBURG CITY COUNCIL

1. A Council member makes the following motion: "I move that the Council enter into a closed determination as to whether to go into executive session." A second to the motion is not required.
2. The Council then votes on whether to enter into a closed determination. If a majority of the Council votes "Aye," the Council meeting room should then be cleared of all persons.
3. After the room has been cleared, and the doors have been closed, a Council member may make the following motion: "I move that the Council go into executive session for the following reason(s): [here quote the reason or reasons as set out in *Miss. Code Ann.* § 25-41-7 (4).]" Use the statutory language to the greatest extent possible, e.g., "I move that the Council go into executive session to discuss strategy or negotiations with respect to prospective litigation...." (this is reason (b) under § 25-41-7 (4)).
4. If there is a second to this motion, the Council may enter into executive session for **only** the reason(s) stated following an affirmative vote of a majority of all members present. *Miss. Code Ann.* §25-41-7 (1).
5. After the vote to go into executive session is completed, someone should go outside the Council chambers and announce to those in the hall (1) that the Council has gone into executive session (2) for the reason(s) given in the motion.
6. The Council may then discuss **only** the item(s) for which the Council went into executive session. The Council may vote in executive session (though my recommendation is that any votes take place in open session), but, once the Council comes out of executive session, it should announce any votes taken or that no action was taken in executive session. The "total vote on the question of entering into an executive session shall be recorded and spread upon the minutes of the [Council]." *Miss. Code Ann.* § 25-41-7 (5). The minutes should reflect how each Council member voted both on the question of going into executive session and on any decision (motion) made in executive session.

Exhibit "C"