

BEFORE THE MISSISSIPPI ETHICS COMMISSION

JOSHUA HODGE

COMPLAINANT

VS.

OPEN MEETINGS CASE NO. M-24-003

MISSISSIPPI ETHICS COMMISSION

RESPONDENT

ORDER OF DISMISSAL

This matter came before the Ethics Commission through an Open Meetings Complaint filed by Joshua Hodge against the Mississippi Ethics Commission (the “commission”). The commission filed a response by and through its attorney.

The Ethics Commission was given sole initial jurisdiction over complaints arising under the Open Meetings Act, pursuant to Section 25-41-15, Miss. Code of 1972. “It is well settled that ‘[a] complainant must exhaust available administrative remedies before resorting to the courts for resolution of his dispute.’” CLC of Biloxi, LLC v. Miss. Div. of Medicaid, 189 So.3d 726, 730 (Miss. App. 2016), citing State v. Beebe, 687 So.2d 702, 704 (Miss. 1996). Therefore, the commission is obligated to address complaints filed under the Open Meetings Act, even a complaint filed against the commission.

The hearing officer¹ presented a Recommendation of Dismissal to the Ethics Commission at its regular meeting held on September 6, 2024, at which time the commission approved this Order of Dismissal in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission.

I. FINDINGS OF FACT

1.1 Joshua Hodge alleges that the Mississippi Ethics Commission violated the Open Meetings Act at its meeting on February 2, 2024. Specifically, he alleges that the commission violated the Act by (1) failing to notice a specially called meeting; (2) failing to make agenda materials available during the meeting; and (3) failing to readmit the public after the executive session.

1.2 Specifically, he states:

... Notice of the February meeting was posted on the commission's web site to begin at 10:00 am with a Zoom link provided.... Complainant accessed the Zoom link at 10:00 am and was directed to a waiting room which also displayed the start time for the meeting as 10:00 am.... Upon admission to the meeting, complainant could discern that the meeting had been in progress for a significant period of time. It is unclear to complainant exactly what time the meeting began. Because the meeting started at some time prior to the regular date and time, the February 2 meeting should be subject to the notice requirements of a called special meeting as laid out in Section 25-41-13(1) of the Open Meetings Act.

¹ The hearing officer did not attend the February 2, 2024 meeting.

...

...Complainant requested a copy of the agenda packet via email ... through the commission's only published email address at 8:36 am on February 2. Neither the agenda or materials were made available to complainant during the meeting. Commission staff displayed some material via screen share during the meeting. Members of the public read at different speeds and want to focus on different aspects of the materials. This is not possible when commission staff is only displaying the portion of the material they want the public to see at that time. This method of display does not meet the statutory requirement that materials "shall be made available to the public at the time of the meeting."

...

During the meeting, complainant was placed in a Zoom waiting room when the commission entered executive session. When complainant was readmitted to the meeting from the Zoom waiting room, commission members were already voting on some measure which had been moved (and possibly discussed) prior to his readmission. It is unclear how long the commission had been back in open session before readmitting complainant.

1.3 The complainant adds that "[t]he commission staff's ample notice of complainant's interest in public records and commission meetings combined with the reordering of the agenda to cover public records items prior to the noticed start time give the appearance that these actions were taken with the intent of depriving complainant of the opportunity to observe and record the public records portion of the agenda."

1.4 In response, the Ethics Commission denies violating the Open Meetings Act. First, the commission states that the February 2, 2024, meeting started at 10:00 a.m. At this meeting, some commission members were physically present, and others participated by Zoom. The response explains:

... The commission has a very small staff of six employees. An employee who has duties to attend all commission meetings and draft the minutes is also required to simultaneously administer the Zoom meeting, which involves a number of tasks, especially when admitting members of the public. All Zoom participants are initially held in a Zoom waiting room before being admitted to the meeting. This feature is essential to the executive session portion described below. For every commission meeting at which one or more commission members join by Zoom, the members are admitted to the meeting by the host as they log in. At 10:00 any visitors are admitted one by one in the order they appear on screen as the meeting is convened. The respondent is unaware of any feature in the Zoom system which would allow visitors to be admitted all at once, and there is sometimes a brief delay in admitting the last visitor when multiple individuals are present.

...The relative speeds of the computers involved at all points in the Zoom connection, as well as the relative internet connection speeds, determine the exact

point in time at which any individual will actually be able to see and hear the commission members. For example, commission members may recuse themselves from certain matters from time to time for various reasons. A recusing member who is participating by Zoom is placed into the waiting room until the matter is concluded. Delays have also been noticed when readmitting commission members after a recusal. This phenomenon is a result of the current technology, the computer equipment, the internet connection used by each individual participant and is outside the control of the commission or its staff.

1.5 Secondly, the response states the following:

The commission always displays the agenda on screen during Zoom meetings, scrolling through as the discussion progresses. This is done for the benefit of any commission members who may be participating by Zoom, as well as members of the public watching on Zoom. The agenda was on display for the complainant to see throughout the meeting in question. The Open Meetings Act does not entitle the complainant to obtain a personal copy of the agenda before the meeting, and agenda materials may be made available through electronic means.

1.6 The response also states that at least one complete paper copy of all non-exempt agenda materials is made available in the meeting room at the start of its meetings. The response notes that Mr. Hodge's request for an agenda and meeting materials was treated as a request for public records, and Mr. Hodge was timely provided those materials, pursuant to the Public Records Act.

1.7 Third, the response states that the complainant was re-admitted to the meeting after the conclusion of the executive session. The response again states "[a]ny brief delays are the result of the technology available, the computer equipment and internet connection used by each individual participant and are outside the control of the commission or its staff." The response also notes that "even if the commission had adjourned in executive session without reentering open session or readmitting the public, no violation would have occurred. The Open Meetings Act does not require a public body to reenter open session to adjourn and does not prohibit a public body from adjourning during executive session."

1.8 Finally, the response explains that the agenda for the February 2, 2024, meeting was not reordered but was simply unusually brief and did not contain any cases under the Public Records Act. In support, the respondent attached a copy of the meeting agenda and minutes.

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).

2.2 The Open Meetings Act requires public bodies to take all reasonable means within their power 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 meeting. See Hinds County at 110. Section 25-41-5(2) of the Act allows public bodies to conduct meetings through “teleconference or video means” and mandates that “the equipment allows all members of the public body and members of the public who attend the meeting to hear the deliberations of the public body.” As such, a public body may (1) use the equipment to allow only board members remote access to the meeting while providing the public a physical location to attend an open meeting in person; and/or (2) provide the public the ability to remotely view the meeting through electronic means. See Shepard v. Miss. Charter School Authorizer Bd., Open Meetings Case M-22-019. Both methods ensure the public has an opportunity to observe an open meeting conducted through teleconference or video means with the equipment utilized by the public body and provides a public body the flexibility to use either method. See Shepard v. Cleveland School District, M-22-018.

2.3 During the worldwide COVID-19 pandemic, the Ethics Commission encouraged public bodies to take any additional measures within their means to ensure transparency, such as live-streaming or broadcasting meetings, recording meetings when live-streaming is not possible, and/or providing the public with other types of remote access to meetings, all to protect public health. Whatley v. Perry County, Open Meetings Case M-20-016. While the risk of infection by COVID-19 still exists today, many public health mandates have been discontinued. As a result, public bodies should consider whether it is appropriate to continue offering public access through electronic means. See Mason v. City of Aberdeen, Open Meetings Case M-23-005 M-23-008, M-23-009 M-23-010, M-23-011, M-23-012 and M-23-013 (Consolidated).

2.4 It is not a violation of the Act to encounter technological difficulties. The Act does not require that public bodies expertly understand and deploy all the tools that are available when using videoconferencing technology, only that public bodies take reasonable means within their power and resources to ensure all members of the public can see and hear what is going on. See Coursin v. Carnegie Public Library, Open Meetings Case M-21-013. While the Act does not make any specific pronouncements regarding the manner in which a public body should notify the public that it is entering or re-entering an open session, the Ethics Commission has previously held that it was “reasonable for the Board of Trustees for the Lee County School District to simply re-open the doors to the meeting room to signal to the public that an open session had resumed.” Thompson v. Lee County School District, Open Meetings Case M-18-018. “A citizen spectator or news reporter is not a participant.” Gannett River States Pub. Corp., Inc. v. City of Jackson, 866 So.2d 462, 469, (Miss. 2004). As a result, the situations described by the complainant – that the commission began and resumed an open meeting without ensuring that members of the public who were remotely accessing the meeting were in attendance – do not

violate the Open Meetings Act. It bears repeating that the Act does not require public bodies to expertly understand and deploy all the best tools available when using videoconferencing technology. See Coursin.

2.5 The complainant also alleges that the commission improperly limited access to the meeting agenda materials. Section 25-41-5(3) requires that “[a]n agenda and materials that will be distributed to members of the public body and that have been made available to the staff of the public body in sufficient time for duplication and forwarding to the members of the public body shall be made available to the public at the time of the meeting.” In this case the complainant does not allege that the materials were not made available but that, as they were shared on screen during the meeting, the display of the documents discussed was not adequate for his reading and review.

2.6 The Open Meetings Act does not require that the board provide each person in attendance with their own separate copy of the agenda and meeting materials at the time of the meeting. See L’Ecuyer v. Diamondhead Water and Sewer District, Open Meetings Case M-14-006. “In fact, materials can be made available in a number of different ways, including but not limited to providing one or more paper copies for the public to share or providing an electronic copy which is projected in the meeting room or made available through some other electronic means. The method of providing the materials is left up to the board.” Futral & Colburn v. Chickasaw County, Open Meetings Case No. M-17-016 & M-17-018.

2.7 The Open Meetings Act also does not require that the agenda materials be made available to the public in advance of the meeting. It may be impossible to provide materials if they are incomplete. Kolf v. City of Diamondhead, Open Meetings Case No. M-12-036. Furthermore, “available” means that a public body is required to provide a copy of its agenda and materials for inspection by the public and does not necessarily require a public body to provide the attending public free copies of its agenda and materials. For some public bodies, the materials it reviews during a single meeting may encompass hundreds or thousands of pages, and it is not the mandate of the Open Meetings Act to shift the cost burden of producing copies of these materials for all potential attendees. If an individual attending the meeting requests an individual copy of the agenda materials which the requestor intends to keep, the board should treat such request as a formal request for public records pursuant to the Public Records Act. See L’Ecuyer.

WHEREFORE, the complaint is hereby dismissed this 6th day of September 2024.

MISSISSIPPI ETHICS COMMISSION

BY: _____
TOM HOOD, Executive Director