

**BEFORE THE MISSISSIPPI ETHICS COMMISSION**

**LEX M. TALAMO**

**COMPLAINANT**

**VS.**

**PUBLIC RECORDS CASE NO. R-22-013**

**CITY OF PONTOTOC**

**RESPONDENT**

**FINAL ORDER**

This matter came before the Mississippi Ethics Commission through a Public Records Complaint filed by Lex M. Talamo against the City of Pontotoc, Mississippi (the “city”). The city filed a response to the complaint by and through the city attorney. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. In accordance with Rule 5.6, Rules of the Mississippi Ethics Commission, the hearing officer prepared and presented a Preliminary Report and Recommendation to the Ethics Commission at its regular meeting on November 4, 2022. The respondent did not object to the Preliminary Report and Recommendation and has thereby waived a right to a hearing on the merits. Accordingly, the hearing officer enters this Final Order in accordance with Rule 5.6, Rules of the Mississippi Ethics Commission.

**I. FINDINGS OF FACT**

1.1 On December 15, 2021, Lex Talamo submitted a written request for public records to the Pontotoc City Clerk, Jessica McLevain. Ms. Talamo requested documents from the Pontotoc Police Department regarding a certain person from January 1, 2018 through the date of the request. Ms. McLevain forwarded the request to the city attorney, Brad Cornelison, and on January 7, 2022, Mr. Cornelison responded in writing to Ms. Talamo, stating that the city requires a non-refundable \$75 deposit before beginning a search for records and provided a copy of the city ordinance.

1.2 Ms. Talamo asked about the charge, and Cici Chunn Smith, Mr. Cornelison’s paralegal, stated in an email that: (1) there is no partial refund for searches that take less than one hour, (2) there is no refund for searches that turn up no responsive records; and (3) that “I have no idea how much the estimated cost would be. We have no way of knowing how long it will take. The initial fee is \$75.00, if you are interested, please send those funds and the City will get started on the request.”

1.3 Ms. Talamo sought additional clarification about the pay scale of the person handling the request, and Ms. Smith responded that “the person handling this request makes \$200.00 per hour. His name is Honorable Brad Cornelison, the attorney for the City of Pontotoc. ...”

1.4 At this point, Ms. Talamo filed this public records complaint with the Ethics Commission alleging that the city’s ordinance violates the Mississippi Public Records Act. In response to the complaint, the city denies violating the Act, stating that the city’s process for dealing with public records requests follows the city’s ordinance. The city states, “the City was not failing and/or refusing to comply with Talamo’s request. We followed the procedure enacted by the City of Pontotoc, as we always have, to comply with her public records request. As of the

date of this letter, we still have not received any funds for the production of the records requested by Talamo.”

1.5 The city provided a copy of its public records ordinance, which was unanimously adopted by its board of aldermen on August 15, 2017. The ordinance states, in pertinent part:

WHEREAS, the Mississippi Public Records Act of 1983 outlines the duty of all state government bodies to make available Public Records to the general public upon request; and

WHEREAS, the Mississippi Public Records Act of 1983 allows for public bodies to establish and collect fees reasonable calculated to reimburse it for the actual cost of searching, reviewing and or/duplicating and, if applicable, mailing copies of public records; and

THEREFORE, pursuant to the provisions of §25-61-7 of Mississippi Code of 1972, the City of Pontotoc shall charge for the production of public records at the rate of \$75 an hour; and

FURTHER, pursuant to the provisions of §25-61-7 of Mississippi Code of 1972, the \$75 charge for the first hour shall be charged in advance of the production of any records with any additional cost due at the time of production.

## II. CONCLUSIONS OF LAW

2.1 The Mississippi Public Records Act of 1983 (the “Act”), codified at Section 25-61-1, et seq., Miss. Code of 1972, provides that public records shall be available for inspection by any person unless otherwise provided by law and places a duty upon public bodies to provide access to such records. Section 25-61-2 and Section 25-61-5. “Public records” are defined as all documents or records “having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body.” Section 25-61-3(b).

2.2 The establishment of fees by a public body to reimburse it for searching, reviewing, duplicating and mailing documents responsive to public records requests is explicitly authorized by the Act. A public body “may establish and collect fees reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of searching, reviewing and/or duplicating and, if applicable, mailing copies of public records.” Section 25-61-7(1). “Any staff time or contractual services included in actual cost shall be at the pay scale of the lowest level employee or contractor competent to respond to the request.” *Id.* “Such fees shall be collected by the public body in advance of complying with the request.” *Id.* This pre-payment, when based upon a reasonable estimate of the actual cost, is a deposit, and any unused deposit must be refunded to the requestor. See Comment 8.4(1), Mississippi Model Public Records Rules.

2.3 However, a public body may never charge more than the “actual cost” of providing access to public records. Section 25-61-7. “[A] public body should provide a *reasonable* estimate of the time and costs it will take to fully respond to the request.... To provide a ‘reasonable’ estimate, a public body should not use the same estimate for every request.” Comment 4.3(6),

Mississippi Model Public Records Rules (emphasis added). Any attempt by a public body to impose fees exceeding actual costs reasonably incurred constitutes a willful and knowing denial of access to public records that warrants the imposition of a civil penalty and the award of attorney fees and costs against the public official charging the excessive cost. Harrison County Development Commission v. Kinney, 920 So.2d 497, 503 (Miss. App. 2006). The same can be said for an estimate that is so high that it does not reasonably reflect the actual costs the public body expects to incur in responding to a records request.

2.4 Based on the record before the Ethics Commission, the city's ordinance is not reasonably calculated to reimburse it for the actual costs incurred for search, review, duplication and/or mailing of public records. The flat \$75.00/hour rate the city charges for responding to public records requests violates the Public Records Act and is both arbitrary and capricious. As was stated by Ms. Smith in her correspondence to Ms. Talamo, by following this ordinance, the city has "no idea" what an accurate estimate of the actual cost would be to search, review and duplicate public records responsive to Ms. Talamo's – or any other person's – public records request.

2.5 Moreover, that the city attorney is the "lowest level employee or contractor competent" to search for the city's public records, particularly records of the police department, is dubious, at best. If responsive public records warrant a legal review for confidential information exempt from disclosure under the Act, the city attorney may very well be the "lowest level employee or contractor competent" to undertake this task and should charge the requestor for the actual cost for his time. See Public Records Opinion No. R-12-011. However, in this case, a member of the police department's administrative or clerical staff is likely the "lowest level employee or contractor competent" to locate and copy the requested records. If no such person exists in the Pontotoc Police Department, Ms. Smith, the city attorney's paralegal, may be competent to locate and copy these requested records and is likely paid at a lower level than the city attorney. As a result, any attempt to charge for time spent searching and copying the requested records at the city attorney's hourly rate would violate the Mississippi Public Records Act.

2.6 Pursuant to Section 25-61-15 of the Act, "[a]ny person who shall deny to any person access to any public record which is not exempt from the provisions of this chapter or who charges an unreasonable fee for providing a public record may be liable civilly in his personal capacity in a sum not to exceed One Hundred Dollars (\$100.00) per violation, plus all reasonable expenses incurred by such person bringing the proceeding." Since this is the first time the Ethics Commission has found the City of Pontotoc to have violated the Public Records Act, a suspended civil penalty is recommended in this case.

2.7 Since all of the aldermen that voted to approve the August 15, 2017 ordinance are currently serving as aldermen for the City of Pontotoc, a civil penalty in the amount of \$100 each shall be levied individually on Aldermen Lena Chewe, J. Rayburn Mapp, Tommy Patterson, Dennis Ray Simmons, and Charles David White, suspended upon a showing that the city has rescinded the current ordinance and has established reasonable fees for public records requests that comport with the Mississippi Public Records Act and the Mississippi Model Public Records Rules.

### III. CONCLUSION

WHEREFORE, IT IS HEREBY ORDERED as follows:

3.1 The Ethics Commission finds that the City of Pontotoc violated Section 25-61-7 of the Mississippi Public Records Act by adopting an ordinance that charges a flat rate of \$75 per hour to produce public records.

3.2 The Ethics Commission orders the Board of Mayor and Aldermen for the City of Pontotoc to rescind its public records ordinance quoted above and adopt the Mississippi Model Public Records Rules in its place.

3.3 The Ethics Commission finds Aldermen Lena Chewe, J. Rayburn Mapp, Tommy Patterson, Dennis Ray Simmons, and Charles David White, civilly liable, in their personal capacities, in the amount of One Hundred Dollars (\$100.00) each, for adopting an ordinance that violates the Public Records Act, said fine to be suspended upon a showing that the Board of Mayor and Aldermen for the City of Pontotoc has rescinded its said public records ordinance and adopted the Mississippi Model Public Records Rules. On November 15, 2022, the Board of Aldermen for the City of Pontotoc rescinded the August 15, 2017 public records ordinance and adopted a public records ordinance that complies with the Mississippi Public Records Act, in compliance with this order. As such, the civil penalties are hereby suspended.

3.4 The Ethics Commission orders the City of Pontotoc to provide the complainant a reasonable estimate for producing documents responsive to the complainant's public records request dated December 15, 2021. This action shall occur within seven working days from the city's receipt of this final order. In correspondence dated November 14, 2022, the City of Pontotoc provided the complainant with a revised estimate of \$19.33 to provide documents responsive to her public records request, in compliance with this order.

3.5 The Ethics Commission orders the City of Pontotoc, through its officials and employees, to strictly comply with the Public Records Act, and find that further violations may result in the imposition of additional penalties, including payment of reasonable costs incurred by the person seeking public records from the city.

SO ORDERED, this the 10<sup>th</sup> day of January, 2023.

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SONIA SHURDEN, Hearing Officer  
Mississippi Ethics Commission