

BEFORE THE MISSISSIPPI ETHICS COMMISSION

GRAY MEDIA GROUP, INC., D/B/A WLBT-TV

COMPLAINANT

VS.

PUBLIC RECORDS CASE NO. R-19-054

CITY OF JACKSON

RESPONDENT

FINAL ORDER

This matter came before the Mississippi Ethics Commission through a Public Records Complaint filed by Mr. Charles D. Tobin, an attorney acting on behalf of Gray Media Group, Inc., doing business as WLBT-TV, and its employee, Mr. C. J. LeMaster. The complaint was filed against the City of Jackson, which filed a response to the complaint. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. These proceedings were held in accordance with Chapter 5, Rules of the Mississippi Ethics Commission. On July 9, 2021, the hearing officer presented a Final Report and Recommendation as required in Rule 5.8.

I. PROCEDURAL HISTORY

A. The Complaint

1.1 The complaint in this case involves seven (7) separate requests for public records addressed to the City of Jackson by WLBT Investigative Reporter C. J. LeMaster. The city requires requests for public records be submitted through the GovQA online system, which assigns a unique number to each request. The seven requests are numbered and described in the complaint as follows:

1.2 Request No. 1 (GovQA No. W006933-011019): On January 10, 2019, Mr. LeMaster requested "to view KRONOS time sheet information and overtime reports" for two Jackson Police Department employees from January 1, 2018 to the present, as well as "all reports relating to comp time" for one of the employees for the same period. The first response Mr. LeMaster received came 242 days, or eight months, later on September 9, 2019. The Office of the City Clerk told Mr. LeMaster that the "office has not received a response to this request," and that the City Clerk, Kristi Moore, was following up with the Police Department. Mr. LeMaster received documents responsive to this request from the Office of the City Clerk nearly one month after that, and 270 days after Mr. LeMaster's original request, on October 7, 2019.

1.3 Request No. 2 (GovQA No. W007801-032519): On March 25, 2019, Mr. LeMaster requested "to view monthly uniform crime reports that were submitted to the Federal Bureau of Investigation from 2016 to the present." Mr. LeMaster received an "estimate or invoice" of \$22.48 for these records on April 3, 2019, which he attempted to pay on June 25, 2019, but there was no "Pay Now" option on the GovQA website. Because the "Pay Now" button was missing, Mr. LeMaster sent an email to the Office of the City Clerk on the same day notifying them that he accepted the estimate. On July 1, 2019, Mr. LeMaster received an email from the Office notifying him that the Police Department had been "notified to proceed with fulfillment of your request."

After a great deal of delay and confusion among city employees, the records were provided to Mr. LeMaster on October 15, 2020, over 500 days after his request.

1.4 Request No. 3 (GovQA No. W008005-041719): On April 17, 2019, Mr. LeMaster filed a records request seeking "to view any and all departmental memos sent from [Jackson Deputy Police Chief] Tiny Harris to [Jackson Police Chief] James Davis between September 21, 2018 and October 10, 2018." Mr. LeMaster received an email from the Office of the City Clerk on April 29, 2019 informing him that the Office had submitted his request but had not yet received the requested information. Nearly two months later on June 25, 2019, Mr. LeMaster emailed the Office asking for a status update on the request. Nearly three months after that, on September 16, 2019, the Office responded to Mr. LeMaster saying that the City Attorney's Office would like "further clarification on whether requester is considering emails as memos." Mr. LeMaster replied the next day attempted to answer the City Attorney's question and seeking clarification about their question. The city produced some of the requested records on September 1, 2020, over 500 days after the request, but did not produce at least one record which should have been included, a memorandum which Mr. LeMaster had already obtained from a source within the Police Department.

1.5 Request No. 4 (GovQA No. W008402-052819): On May 28, 2019, Mr. LeMaster filed a records request seeking "phone and text logs (office and cell, where applicable)" for Police Chief James Davis from May 1, 2019 to May 28, 2019. Mr. LeMaster received an email from the Office of the City Clerk on June 7, 2019 informing him that the Office had submitted his request but had not yet received the requested information. Mr. LeMaster asked the Office about the status of the request on June 25, 2019, and received a response on July 1, 2019 that the Office was following up on the request. On July 9, 2019, the Office emailed Mr. LeMaster to tell him that it was "awaiting approval of cost estimate," and that "if the cost estimate is approved, it will only include cost for call log. C-Spire (the City's carrier) does not provide the actual [text] message." On January 14, 2021, nearly 600 days after the request, the city produced the incoming logs but not the outgoing logs.

1.6 Request No. 5 (GovQA No. W008582-061519): On June 15, 2019, Mr. LeMaster filed a records request seeking "all emails sent or received by Police Chief James Davis with the keywords 'resign' or 'apply' from May 1, 2019 to the date this records request is processed." After waiting more than two weeks for a response, Mr. LeMaster emailed the Office of the City Clerk to ask about the status of his request. The Office responded the next day that it had submitted his request to the Information Technology Department and was "awaiting a cost estimate regarding this request and we have notified the department." That same day, Mr. LeMaster logged in to his GovQA account and saw a cost estimate of \$46 for the documents. Following were months of delays as city employees were confused about the difference between a cost estimate and an invoice. On October 2, 2020, the City provided responsive records to Mr. LeMaster, 475 days after he submitted the request.

1.7 Request No. 6 (GovQA No. W008664-062519): On June 25, 2019, Mr. LeMaster filed a records request seeking "all emails to or from Police Chief James Davis with the keyword 'LeMaster' in either the subject or body line of the emails from January 1, 2018, to the date this request is fulfilled." Mr. LeMaster received the first responsive communication on this request more than two weeks later from the Office of the City Clerk, informing him that the Office had

submitted the request and was awaiting an approved cost estimate. On July 12, 2019, Mr. LeMaster received the cost estimate, which he paid in full on July 30, 2019. Three weeks later, after not receiving any responsive documents or further communications about his request, Mr. LeMaster emailed City Clerk Kristi Moore and City Attorney Timothy Howard on August 20, 2019 asking for an update about the status of his request. Hearing nothing in response, Mr. LeMaster again emailed Ms. Moore and Mr. Howard on August 28, 2019 and September 5, 2019 asking about the status of all seven of his then-outstanding requests. Ms. Moore responded to Mr. LeMaster on September 9, 2019 letting him know that she was "having the records reviewed now to determine what the status is today," and said she would follow-up with an update. On September 30, 2019, 97 days after his original request, Mr. LeMaster received documents responsive to this request from January 1, 2018 through July 15, 2019. Mr. LeMaster reviewed the documents and emailed the Jackson Public Records Center, Ms. Moore and Mr. Howard on October 1, 2019 alerting them to the fact that the records provided did not complete his request, as he had asked for responsive emails "to the date this request is fulfilled," and the City had provided emails only through July 15, 2019. Mr. LeMaster received no additional responsive documents or further communications from the Office of the City Clerk, Ms. Moore or Mr. Howard about this request. On January 5, 2021, during the proceedings in this case, the attorney for the city confirmed that no additional responsive documents were found.

1.8 Request No. 7 (GovQA No. W008663-062519): On June 25, 2019, Mr. LeMaster filed a records request seeking "all emails to or from Jackson Police Chief Anthony Moore with the keyword 'LeMaster' in either the subject or body line of the emails from January 1, 2018, to the date this request is fulfilled." Mr. LeMaster received the first responsive communication about this request more than two weeks later informing him that the Office of the City Clerk had submitted his request and was awaiting an approved cost estimate. On July 12, 2019 Mr. LeMaster received the cost estimate, which he paid in full on July 30, 2019. Mr. LeMaster received documents responsive to this request from the Office of the City Clerk three months later, and 98 days after Mr. LeMaster's original request, on October 1, 2019.

1.9 Additional Efforts: WLBT News Director Mark Little e-mailed Mayor Chokwe Antar Lumumba on September 26, 2019 in an attempt to resolve these issues without filing a complaint with the Ethics Commission. Mr. Little summarized for Mayor Lumumba WLBT's requests and the City's lack of response to these requests. He also requested that the city produce the requested records by October 4, 2019. Mr. Little received no response from Mayor Lumumba. Two days after Mr. Little's email, City Attorney Tim Howard called Gray Assistant General Counsel, Will Joslin, on September 28, 2019 to inform him that Mr. Howard would be speaking with the Mayor and other City officials about WLBT's outstanding requests. Mr. Howard assured Mr. Joslin that he would be in touch with more information about the requests by noon on September 30, 2019. Mr. Joslin, however, never heard back from Mr. Howard.

B. The Response

1.10 The City of Jackson responded to the complaint as follows:

1.11 Request No. 1: In response to Public Record Request W006933-011019, the City of Jackson did not claim any exemption to the public records request. Per GovQA, the request was assigned to the Jackson Police Department on January 11, 2019. Thereafter, on January 16, 2019,

the request was reassigned to a member of the City's administration. Later on June 4, 2019, the Complainant requested a status on the request. On September 9, 2019, the City Clerk's Office, provided a response saying that the City Clerk's Office had not received a response and that the City Clerk would follow up with JPD. On October 1, 2019, responsive documents were received from JPD by the City Clerk's Office, and uploaded to GovQA for legal review. On October 7, 2019, legal review was completed, and the Complainant received the information at no charge.

1.12 Request No. 2: Public Records Request W007801-032519 was submitted by the Complainant and received by the City on March 25, 2019. On April 3, 2019, the City Clerk's Office submitted a cost estimate on behalf of JPD. The fee was paid on July 1, 2019, however, no records have been attached to the request. Please note that these records are readily accessible on the City of Jackson's website, and the City of Jackson is willing to provide copies of the same to the Complainant at no charge and return to the requester the fee paid on July 1, 2019.

1.13 Request No. 3: Public Records Request W008005-041719 was submitted by the Complainant and received by the City on April 17, 2019. Request W008005-041719 was originally assigned to JPD and IT. After no response from JPD, clarification was asked by IT to verify that emails would count as memos. The customer specially asked for memos with the "City of Jackson Seal, MEMORANDUM i[n] bold letters" on September 17, 2019. The IT Department indicated in an email to relevant city personnel on September 9 and September 27, 2019 that it did not have any responsive records to complete the request and JPD should be consulted, specifically the JPD Chief's Office.

1.14 Request No. 4: Public Records Request W008402-052819 was submitted by the Complainant and received by the City on May 28, 2019. A cost estimate to fulfill the request was determined on June 21, 2019. A letter was generated by GovQA on July 1, 2019. On July 2, 2019 the cost was approved by the City. The activity was completed again on July 9, 2019 by the City. That same day an invoice was shared with the requestor. Since July 9, 2019, an invoice has remained outstanding. The City attached relevant records to its response.

1.15 Request No. 5: Public Records Request W008582-061519 was submitted by the Complainant and received by the City on June 15, 2019. A cost estimate to fulfil the request was determined on September 6, 2019. A letter was generated by GovQA on September 9, 2019. The cost was approved by the City on September 13, 2019. That same day an invoice was shared with the requestor but was unpaid at the time of the response. The City attached relevant records to its response.

1.16 Request No. 6: Public Records Request W008664-062519 was submitted by the Complainant and received by the City on June 25, 2019. A cost estimate to fulfil the request was determined on July 3, 2019. A letter was thereafter generated by GovQA on July 9, 2019. On July 11, 2019 the cost was approved by the City. On July 30, 2019, an invoice was shared with the requestor. The Complainant paid the cost associated on July 30, 2019. This request was fulfilled on September 30, 2019.

1.17 Request No. 7: Public Records Request W008663-062519 was submitted by the Complainant and received by the City on June 25, 2019. A cost estimate to fulfil the request was determined on July 3, 2019. A letter was generated by GovQA on July 9, 2019. On July 11, 2019

the cost was approved by the City. Subsequently, on July 30, 2019, an invoice was shared with the requestor. The Complainant paid the cost associated on July 30, 2019. This request was fulfilled on September 30, 2019.

C. Attempt to Mediate

1.18 Pursuant to the Ethics Commission's statutory authority to mediate disputes arising under the Public Records Act, the hearing officer asked the parties to confer on producing outstanding documents. Ultimately, no agreement could be reached, and the complainant maintains the city failed to produce all responsive records for Requests 3 and 4, as described above.

D. Pre-Hearing Phase

1.19 A scheduling conference in this case was held on October 29, 2020, and a scheduling order was entered. Numerous subpoenas were issued for testimony and for documents, including the GovQA records for all seven requests. Throughout the course of the proceedings, a great deal of testimony hinged on the GovQA logs, which are records of communications noted in the GovQA system. The city redacted certain communications between the City Attorney's Office and city employees as confidential attorney-client communications and attorney work product. The hearing officer issued a subpoena for unredacted versions of those logs and conducted an *in camera* review to establish the delay resulting from assignment to the city's legal department. The results of that review are as follows: Request 1 – 6 days; Request 2 – same day; Request 3 – 7 days; Request 4 – 1 day; Request 5 – not applicable; Request 6 – same day; Request 7 – 2 days.

II. FINDINGS OF FACT

2.1 The hearing covered five days between November 20, 2020, and January 19, 2021. In all, there were proceedings on nine separate days over the course of four months, totaling 28 hours and 47 minutes on the record. All proceedings were conducted and recorded through the Zoom videoconferencing system and are available for review. The complainant also provided the services of a certified court reporter. Nine (9) witnesses were called to testify at the hearing.

2.2 Mr. Tyrone Buckley, Deputy Chief of Police for Administration, Jackson Police Department (JPD), was the first witness. Mr. Buckley testified that responding to requests for public records addressed to JPD falls under his area of responsibility but that he does not personally fulfill requests and is not an authorized user in the GovQA system. Mr. Buckley also acknowledged that certain messages were sent to him through GovQA regarding requests in this case.

2.3 Mr. C. J. LeMaster, Chief Investigative Reporter, WLBT-TV, testified that he requires public documents to support his reporting and protect himself from defamation claims. He files numerous requests for public records on a regular basis, many with the City of Jackson. Mr. LeMaster described the GovQA system as convenient, capable and straightforward before demonstrating its use. He noted that sometimes he receives email notifications from GovQA but in other instances he does not. In those cases, he must check each individual request to find messages addressed to him which are generated within the GovQA system.

2.4 Mr. LeMaster testified that cost estimates are not emailed to him but must be looked up in GovQA. The system will show the amount owed but does not allow him to pay the estimate

online. Mr. LeMaster then listed each of the seven requests named in the complaint and the outcome or current status of each request, including his communications with city employees about those requests. Every response came more than seven days after the request. Mr. LeMaster also testified that such delays in receiving public records can make them so late that they are irrelevant to the public.

2.5 Ms. Angela Harris, City Clerk, City of Jackson, appeared on Tuesday, December 1, 2020, and testified she has served in that position for approximately five months, having served previously as deputy clerk. Ms. Harris explained the city employee primarily responsible for coordinating responses to public records requests is Deputy Clerk Pamela Palmer, who has served in that position since April 2020 when former Deputy Clerk Allice Latimore left city employment. In January 2020 the city restructured the Office of the City Clerk to bring it under the direct control of the mayor, whereas the city clerk had previously worked under the direction of the City Council.

2.6 Ms. Harris further explained the operation of the GovQA system, that requests are reviewed by the deputy clerk and forwarded to the appropriate person at the correct city department who then responds with a cost estimate. The cost estimate must be reviewed by the city's Legal Department before it is communicated to the requestor. Payment of the estimate is allowed online but only after it is converted by a city employee to an invoice. Ms. Harris testified the city received over 2,000 requests for public records in 2019, with over 1,700 of those addressed to JPD. Ms. Harris received training on GovQA when it was first implemented around 2015 and 2016, but the only current training is for new employees and only if the department requests the training. She was not personally involved in fulfilling any of the requests in this case.

2.7 Ms. Harris also noted GovQA can generate a report of all outstanding requests for public records and that the system costs about \$20,000 per year to maintain. She said the city adopted a new public records policy in July 2020 which reflects the use of GovQA, but the old policy was in place at the times relevant to the complaint. Ms. Harris also explained that each city department assigns its own GovQA users, of which there were 88 in 2019.

2.8 In answering additional questions about the GovQA system, Ms. Harris said customer support is provided remotely with no one local to help. She said she has generated a report of outstanding requests only once and shared it with all department heads, including the police chief. Each department head designates the GovQA point of contact for that department. She said she has the ability to report a JPD employee to the mayor or police chief for failing to cooperate with public records requests.

2.9 Ms. Chasitye Brinson, Records Manager, Jackson Police Department, is the primary GovQA contact at JPD. She has been responsible for public records production at JPD since GovQA was first implemented in 2015. She receives 20 to 30 public records requests per week and receives a reminder from GovQA when a request has not been fulfilled in seven days. Ms. Brinson was asked about a particular message she sent in GovQA with regard to Request No. 1 stating "per my conversation with Chief Wallace, Dr. Omari will be handling this request and has contacted city legal." See Complainant's Exhibit 2, page 10. Ms. Brinson explained that Dr. Omari is the mayor's chief of staff and that she was not sure why the request would be sent there. Ms. Brinson was directly involved in responding to two of the seven requests in this case. She thought one request was being handled by Dr. Omari, and she thought the other was closed because

the requestor did not pay the estimate. Ms. Brinson also testified she did not have access to some of the requested JPD records, such as timesheets and emails, and that responding to those requests would have been handled by someone else within JPD.

2.10 Mr. Fredrick Wilson, Deputy Director, Information Technology Department, City of Jackson, testified he is a GovQA user and has been trained in using the system. He was involved in responding to requests for certain electronic records, such as emails and cellular phone records. Mr. Wilson noted two requests had the same six digits at the end of the GovQA request number, which led to confusion about whether both requests had been fulfilled. In the course of his testimony, he came to understand the last six digits of the request number represent the date the request was submitted and that the two requests were submitted on the same day. Mr. Wilson further testified that once he calculates an estimate of the actual cost of producing requested records, he submits that estimate to the City Clerk's Office or the Legal Department and waits to hear back from them.

2.11 Ms. Kristi Smith (formerly Kristi Moore) is the former City Clerk for the City of Jackson and was in that position when the GovQA system was implemented. At that time, the Office of the City Clerk was under the authority of the City Council and had limited ability to require compliance of employees within the executive branch. She said the management at JPD was in disarray, and it became harder to get public records from JPD. When the Office of City Clerk was moved to the executive branch, she was not hired for the new position, and her employment was terminated on May 22, 2020.

2.12 Ms. Safiya Omari, Ph.D., Mayor's Chief of Staff, City of Jackson, has been in that position since June 2017. She testified she is never personally involved in responding to requests for public records, but the city clerk reports to her. Dr. Omari testified she did not tell anyone she would handle a request for public records. She said she is not satisfied with the city's responses to public records requests and would like to improve the process but has no plan to do so.

2.13 Ms. Sandra Gibson-Hodge, Public Safety Administrator, Jackson Police Department, provides administrative support to management at JPD, including drafting memoranda. Request No. 3 asked for "any and all departmental memos sent from Tiny Harris to James Davis between September 21, 2018, and October 10, 2018." On September 1, 2020, 503 days after the request, the city produced memos to the requestor. However, those records did not include an October 2, 2018, memorandum on department manpower which the requestor had separately obtained through a source. When pressed to explain why that memo had not been produced, Ms. Gibson-Hodge posited, incredulously, that the memo had not been "sent" and was, therefore, not encompassed in the request. She also testified she did not recall ever having printed that particular memo but that she produces manpower memos every week. Upon further questioning, Ms. Gibson-Hodge could not explain how the memo could have been provided by the reporter's source if it had never been printed or "sent."

2.14 Ms. Pamela Palmer, Deputy City Clerk, City of Jackson, is the person primarily responsible for assigning and monitoring requests for public records and has been in her current position since March 2020. She had no previous experience with public records requests and was not in her current position during the time outlined in the complaint. Ms. Palmer described the operation of the GovQA system, including the modes of sending messages and the ability to set

due dates past seven days. She said GovQA users must select a setting in the system to share messages with a requestor. She testified she does not provide reports of outstanding requests, and no such reports have been requested by the Office of the Mayor.

2.15 The complainant, Mr. LeMaster, returned as the last witness. He reiterated that communication from GovQA is inconsistent in that he does not always receive emails about his requests, and he tries to check GovQA at least once a week for information about his requests. Mr. LeMaster also outlined his multiple attempts to communicate with the Office of the City Clerk and the Office of the City Attorney about their failure to respond. He also provided an email from his boss, the news director at WLBT, sent directly to Mayor Chokwe Antar Lumumba, asking for information about the status of the requests. No reply was received.

III. CONCLUSIONS OF LAW

3.1 Section 25-61-2 sets the tone for the Public Records Act.

It is the policy of this state that public records shall be available for inspection by any person unless otherwise provided by [law]; furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records. As each public body increases its use of, and dependence on, electronic record keeping, each public body must ensure reasonable access to records electronically maintained, subject to records retention.

A. The memorandum proffered by the complainant and purporting to be from the city attorney is a privileged communication between attorney and client and is inadmissible.

3.2 Attached to the complaint is a memorandum purporting to be from the city attorney and addressed to department heads of the city. At the hearing, the attorney for the city objected to the introduction of the memorandum into evidence on the grounds that it constitutes a privileged communication between an attorney and a client and is attorney work product. The hearing officer allowed the complainant to question witnesses about the memorandum but withheld a ruling on the admissibility of the memo.

3.3 Rule 502 of the Mississippi Rules of Evidence establishes the Lawyer-Client Privilege, which entitles a client to protect any confidential communication made between a lawyer and a client to facilitate professional legal services to the client. Under Rule 5.7, Rules of the Mississippi Ethics Commission, the Miss. Rules of Evidence are applicable to hearings in public records cases but are relaxed. The memorandum in question is clearly covered by the privilege. The only question is whether the disclosure of the memo to the complainant constitutes a waiver of the privilege. Only the client can waive the privilege so that if it could be established that a representative of the city with authority to waive the privilege had provided the memo to the complainant, then the privilege might have been waived, and the memo might be accepted into evidence over the objection of the city's attorney.

3.4 However, upon being questioned about the source of the memo, Mr. LeMaster declined to identify his source. Therefore, the complainant failed to provide evidence sufficient to overcome the objection, and the objection is sustained. Consequently, the memorandum and all testimony related to it was disregarded by the hearing officer.

B. The City of Jackson violated Section 25-61-5(1), Miss. Code of 1972, by failing to provide records or deny records within seven days.

3.5 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 or copying by any person unless a statute or court decision “specifically declares” a public record to be confidential, privileged, or exempt. Sections 25-61-2 and 25-61-11. “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).

3.6 Section 25-61-5(1)(a) mandates that “[n]o public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than seven (7) working days from the date of the receipt of the request for the production of the record.” Section 25-61-5(1)(b) allows up to fourteen working days for production of public records when the public body provides a specific, written explanation why the records cannot be produced within seven days. Section 25-61-5(1)(b) allows production of public records beyond fourteen (14) working days from the receipt by the public body of the original request upon “mutual agreement of the parties.” The Public Records Act is clear that a public body has a duty to either provide records or a written denial after receiving a valid public records request and to do so in a timely manner. These time frames are not extended or tolled when a request or estimate is sent to the public body’s lawyer for review. Legal review, like all other functions of producing public records, must be completed within the applicable time frame.

3.7 The evidence is undisputed that the city failed to respond timely to any of Mr. LeMaster’s requests for public records. In fact, the city’s responses were woefully and appallingly late. The city took from three months to almost two years to respond to these seven requests. There is no evidence that the city offered any reasonable explanation for the delays or requested additional time from Mr. LeMaster. These delays constitute clear and obvious violations of the Public Records Act for which the City of Jackson offers no defense.

C. The City of Jackson violated Section 25-61-5(2), Miss. Code of 1972, by failing to provide all records described in Requests No. 3 and 4.

3.8 Request No. 3 (GovQA No. W008005-041719) sought “to view any and all departmental memos sent from [Deputy Police Chief] Tiny Harris to [Police Chief] James Davis between September 21, 2018 and October 10, 2018.” On September 1, 2020, over 500 days after the request was submitted, the city provided responsive documents to Mr. LeMaster. However, the documents provided did not include a memo already in Mr. LeMaster’s possession dated October 2, 2018, which was certainly encompassed in his request and should have been provided. The City of Jackson violated Section 25-61-5(2) by failing to provide all records described in Request No. 3 and failing to cite an applicable exemption for withholding records.

3.9 Request No. 4 (GovQA No. W008402-052819) sought phone and text logs for Police Chief James Davis from May 1 to May 28, 2019. Approximately 597 days after the request, the city provided the incoming logs but not the outgoing logs. While there were informal discussions about a possible exception, the record reflects no formal assertion of an exception and

no other explanation for withholding these documents. The City of Jackson violated Section 25-61-5(2) by failing to provide all records described in Request No. 4 and failing to cite an applicable exemption for withholding the records.

D. The Ethics Commission has the authority to order the City of Jackson and its officials and employees to take reasonable measures to comply with the Public Records Act.

3.10 Section 25-61-13 authorizes the Ethics Commission to enforce the Public Records Act by imposing fines, awarding expenses and ordering compliance. The commission is explicitly granted the power to order a public body, such as a municipality, and any individual employees or officials of the municipality to produce records or take other reasonable measures necessary to comply with the Public Records Act. The Ethics Commission has previously ordered the City of Jackson to take such measures, to no avail.

3.11 This is the twentieth Public Records decision the Ethics Commission has issued involving the City of Jackson since the commission was first authorized to address Public Records cases in 2008. At that time the commission could only issue nonbinding opinions. Between 2008 and 2015, the commission issued seven Public Records Opinions involving the City of Jackson and found a violation of law in five. Since Section 25-61-13 was amended, effective July 1, 2014, to give the Ethics Commission enforcement authority, the commission has issued twelve orders involving the City of Jackson. Among those cases were three dismissals and nine violations. This is the third case against the city involving Mr. LeMaster.

3.12 On January 30, 2017, the Ethics Commission issued a Final Order in the tenth case against the City of Jackson, Case No. R-16-012, Wolfe vs. City of Jackson. In that order, the commission found the city violated the Public Records Act by failing to timely respond to a request and ordered the city attorney to provide a copy of the Final Order to all city department heads with instruction for those department heads to provide a copy to any employees who regularly assist in responding to public records requests. The commission found “[c]ity officials who are responsible for responding to public records requests should be placed on notice that their failure to timely and completely respond to public records requests can result in the imposition of a civil penalty against the individuals who violate the Act.” The Ethics Commission further ordered the city attorney to provide written confirmation of compliance, which was received by the commission on March 13, 2017.

3.13 More recently, on March 19, 2020, the Ethics Commission issued two Final Orders in two separate cases finding the City of Jackson failed to timely respond to requests for public records and recommending the city designate a Public Records Officer pursuant to Rule 2 of the Mississippi Model Public Records Rules. See Case No. R-19-029, Suszan vs. City of Jackson and Case No. R-19-040, Long vs. City of Jackson, available at <https://www.ms.gov/msec/ethics/publicrecord>. The Ethics Commission has received no indication this recommendation was implemented. In numerous cases the commission has ordered the City of Jackson, its officials and employees to comply with the Public Records Act. Yet the city continues to repeatedly defy the law.

3.14 Many of the city’s problems complying with the Public Records Act stem from its rules, its practices and its employees’ lack of fluency with the GovQA system. For instance, Ms.

Palmer, the Deputy City Clerk, explained that requestors only see messages in GovQA when a registered user makes the message visible to the requestor, possibly explaining why Mr. LeMaster received some messages and not others. There was also a great deal of confusion during the hearing about “truncated messages” in the GovQA logs. City employees had to contact GovQA customer support to find out what that phrase meant, how messages became truncated and how to show those messages in the logs. There is no evidence those messages were produced, despite being covered by a subpoena duces tecum.

3.15 Additional delays were attributed to city employees’ confusion between cost estimates and invoices. Estimates cannot be paid until an invoice is created in the system. There also appears to be a communication bottleneck in the Office of the City Clerk, because all questions and requests for clarification directed to requestors must be conveyed by the City Clerk’s Office rather than coming directly from the employee asking the question, such as someone in the IT Department.

3.16 “Communication is usually the key to a smooth public records process for both requestors and agencies.” Comment to Rule 4.3(3), Miss. Model Public Records Rules. Communication between the public body and the requestor is vital. Far too often, the GovQA logs reveal city employees are asking questions of each other rather than asking the requestor directly. Moreover, the evidence in this case reveals that requestors like Mr. LeMaster are provided no point of contact or clear status updates within the GovQA system when city employees do not enter timely, clear and substantive information in the system. The city should repeal its current Public Records Rules and adopt the Miss. Model Public Records Rules. The city should also train its employees to fully operate GovQA and change settings in the system to comply with these recommendations and with the Model Rules.

3.17 The complainant also objects to the city’s policy of closing a request when payment is not made within five days of receiving an estimate. Here the Model Rules also provide helpful guidance. As outlined in Rule 4(6)(b), requests should be kept open for thirty days, and the requestor should be notified of this provision. See also Comment 4.5(1). Likewise, anyone inspecting public records is allowed to make their own reproduction of the records, so long as the method of doing so does not interfere with the public body’s duty to preserve and maintain the records, and no fee can be charged for the requestor’s reproduction. See MS AG Op. No. 2017-00016, 2017 WL 2269810 (Apr. 18, 2017).

3.18 Ultimately, the city’s failures with public records responses are largely due to a lack of training, coordination and accountability provided by city officials and employees. The city’s scattershot approach to handling requests for public records could be ameliorated by adopting a structural organization with clear, concise lines of communication and authority. For those reasons, the Ethics Commission urged the city to designate a Public Records Officer in two cases over a year ago. Now additional measures are obviously required.

3.19 It is clear from the evidence in this case that, at a minimum, the city must designate a Public Records Officer for the entire executive branch of city government, an ombudsman for issues arising under the Public Records Act, as well as a Public Records Officer for each department of city government. Jackson is the largest municipality in Mississippi by population

and likely has the largest number of employees and departments as well. It is too big for one person, like a deputy city clerk, to handle all responsibilities under the Public Records Act.

3.20 The departmental officers must be responsible for responding to requests for public records possessed or controlled by their respective departments in a timely manner, as required by law. They must be granted the authority to order individual employees to cooperate with efforts to produce public records. They must be given the ability to communicate directly with requestors to seek clarification, provide status updates and request additional time to comply. They must be accountable to the city-wide Public Records Officer, who must have the authority and require the departmental officers meet statutory deadlines, and all must ultimately be responsible to the mayor. Employees who do not provide full assistance to Public Records Officers must be subject to discipline by the city and by the Ethics Commission. This basic structure is similar to the current practice within city government in which the deputy city clerk communicates with various individuals in the various departments, but the structure must be formalized to promote organization and accountability. The city's present structure consists of finger pointing and buck-passing bureaucracy. Without personal accountability, city employees will not fulfill their obligations under the Public Records Act.

3.21 The Public Records Officers for the city and each department must be trained in the requirements of the Act and also in the operation of the GovQA system. GovQA is a capable system with many strengths and many complex settings which require advanced operational knowledge. It was announced by the city with great fanfare and held out great promise. See "Jackson to launch online records request system," The Clarion-Ledger, January 30, 2016. But the promise of transparency has been obscured by the failure of city employees to effectively use this expensive resource. In short, the best tool is of no use when the worker does not know how to use it.

3.22 Among the capabilities of GovQA revealed in the testimony is the ability to produce a report showing pending requests and the date the response was due. The city should regularly produce such reports and make them available to the public on the city's web site. A clear and honest view into the responsiveness of the city, or lack thereof, could prompt greater accountability for the city's legal obligations to act in a timely manner.

3.23 The city could also lower the massive work load on city employees by providing more records online, thereby avoiding the need for public records requests. As the Ethics Commission has previously held, when public records available on the internet are requested, the public body can respond by merely directing the requestor to the web site. See Case No. R-09-007, *Garner vs. Mississippi State Treasury, Division of Unclaimed Property*.

3.24 The reasonable, remedial measures ordered herein are based upon the city's failures uncovered in this case, as well as the city's failures in prior cases. The payments ordered hereinafter are based solely on the facts of this case and are not based on findings in previous cases.

E. The Ethics Commission has the authority to order the City of Jackson to reimburse the complainant for the reasonable expenses incurred by bringing this proceeding and to pay a civil penalty for each violation.

3.25 Section 25-61-15 provides “[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.”

3.26 The Public Records Act does not define the term “person,” but the applicable definition is found in Section 1-3-39, which reads as follows:

The term “person,” when used in any statute, shall apply to artificial as well as natural persons; and when used to designate the party whose property may be the subject of offense, shall include the United States, this state, or any other state, territory, or country, and any county, city, town or village which may lawfully own property in this state; also all public and private corporations, as well as individuals.

3.27 Clearly, the City of Jackson is a “person” within the meaning of Section 1-3-39 and, by application, Section 25-61-15. Therefore, the Ethics Commission has full statutory authority to order the City of Jackson to reimburse Gray Media Group, Inc. for all reasonable expenses incurred in bringing this proceeding and to pay a civil penalty for each violation found herein.

3.28 Moreover, there is ample precedent for awarding attorneys’ fees in Public Records cases. Fees are to be awarded only when a statute or other authority provides for them. Harrison County Development Commission v. Kinney, 920 So.2d 497, 503 (¶ 15) (Miss.Ct.App.2006), citing Miss. Dept. of Wildlife Fisheries and Parks, 740 So.2d at 937(¶ 43) (Miss.1999). The Mississippi Supreme Court has interpreted the phrase “reasonable expenses incurred” to include an award of attorneys’ fees. Id.

3.29 While those cases were decided before Section 25-61-15 was amended to allow sanctions against a person in his personal capacity, the Supreme Court has subsequently affirmed penalties imposed on a public body. In Miss. Dept. of Audit v. Gulf Publishing Co., 236 So.3d 32, 41 (¶ 49 and ¶ 57) (Miss.2017), the Court affirmed an award of attorneys’ fees and other expenses against a state agency. Section 25-61-15, as applied by the Supreme Court and Court of Appeals, clearly authorizes the Ethics Commission to award reasonable attorneys’ fees to the complainant.

3.30 In requesting an award of attorneys’ fees, counsel for the complainant provide sufficient evidence that the actual costs incurred in this proceeding were well over \$300,000, yet the complainant only seeks reimbursement in the amount of \$170,397.50. As set forth in Complainant’s Exhibit 31, the average current rate of the four lawyers with the lead firm billing the complainant in this case is \$628.75 per hour. Due to a retainer agreement with the complainant, that rate was reduced to \$480.00 per hour. Yet in keeping with rates ordinarily awarded by Mississippi courts, the complainant seeks reimbursement at a rate of \$300.00 per hour. This is also

the rate at which local counsel billed, although her services far exceeded her estimate and fee agreement, as outlined in Complainant's Exhibit 32.

3.31 As noted above, the proceedings on the record alone totaled almost 30 hours. Vastly more time was spent by counsel for both sides and the hearing officer in preparing for the hearing and briefing the case. The hearing officer has reviewed the requested fees in light of the factors outlined in Rule 1.5(a), Rules of Professional Conduct, as applied in McKee v. McKee, 418 So. 2d 764 (Miss. 1982), and Mabus v. Mabus, 910 So. 2d 486, 489 (2005). The attorneys involved are highly qualified, as shown in their curriculum vitae attached to Complainant's Exhibits 31 and 32. The amount of fees actually requested is low for the time, labor and skill required in this case. The rate at which those fees were calculated is moderate, considering the qualifications of the attorneys when viewed in light of local customary rates. Under the circumstances, the time and fees presented by counsel for the complainant are manifestly reasonable if not overly modest.

3.32 This case was completely unnecessary. If the employees of the City of Jackson had simply done their jobs as they are bound to do by the Public Records Act and if they had worked together to meet the city's legal obligations, this case would probably not have been filed. Even after WLBT and the hearing officer made every attempt to mediate this case and avoid a hearing, the city persisted in failing to comply with the law. The complainant was entitled by law to inspect or copy the requested public records and pay only the city's actual cost of producing them. Instead, the complainant was forced to expend over \$300,000 and wait more than two years to obtain only some of the records to which it is entitled. Indifference and inaction on the part of the city are the sole causes for the expenses incurred by the complainant in this case, and fairness demands that the complainant be reimbursed for at least some of the funds it should never have needed to expend. The award of attorneys' fees is based upon the city's failures in this case and not the city's failures in other cases, especially the difficulty of obtaining the records requested in this case, despite the numerous attempts described above to obtain the records prior to the hearing, and the delays necessitated by the City of Jackson. Many of those difficulties and delays are outlined in the affidavits labeled Complainant's Exhibits 31, 32 and 33.

3.33 The city's failures in this case also warrant punitive consequences. The Ethics Commission has imposed civil penalties in cases where the record showed individuals violated the Public Records Act. See Case No. R-19-022, Lesure vs. City of Holly Springs; Case No. R-17-062, Bomgar vs. Mississippi Department of Public Safety; Case No. R-17-013, Aasand vs. City of Starkville; Case No. R-16-012, Wolfe vs. City of Jackson; Case No. R-15-042, Foster, et al. vs. City of Ruleville; Case No. R-15-038, Bryant vs. Alcorn State University; and Case No. R-15-026, Nash vs. City of Ruleville.

3.34 Rather than showing any individual was fully culpable in wrongfully denying or delaying the production of public records, the evidence in this case reflects the violations are primarily based upon institutional and organizational failings by the City of Jackson. Therefore, the Ethics Commission concludes the City of Jackson is a "person" which wrongfully denied Mr. C. J. LeMaster access to public records which were not exempt by delaying and failing to produce requested records without legal justification, as outlined above in Paragraphs 3.5 through 3.9.

IV. SUMMARY OF FINDINGS AND CONCLUSIONS

4.1 The Legislature has declared, and the courts and Ethics Commission have reiterated, that providing access to public records is a duty of each public body. It is a duty imposed by law, equal to all other duties owed by the government to its citizens. After two years of work on this case and nearly twenty-nine hours of testimony by witnesses and arguments by counsel, it is painfully clear that the City of Jackson, its officials and employees do not take seriously the duties required of them by the Public Records Act. That attitude seems to be just another of the city's myriad fundamental problems.

4.2 In the last year alone the city has experienced a municipal water shutdown which left most of the city without running water for weeks and garnered national attention, shock and empathy. For decades the city has struggled with deteriorating infrastructure that make it difficult for its citizens to travel around the city and obtain basic services. The city has endured a much-publicized and long-running battle with a utility supplier over water meters and has been unable to consistently bill water customers correctly, resulting in drastic drops in revenue and funding for the city's water system. The city has been repeatedly cited by the U.S. Environmental Protection Agency for wastewater violations. The city is perpetually burdened with crushing poverty and a steadily declining tax base. The past year has also brought record levels of violent crime in the city. See "In 2020, Jackson surpassed a 28-year-old homicide record. In 2021, it could break that record." The Clarion-Ledger, April 22, 2021.

4.3 Crime is arguably the most serious problem the City of Jackson faces as so many of Jackson's residents have lost their lives, their health, their property, their liberty and their livelihoods to its effects. The Jackson Police Department is responsible for protecting Jacksonians from crime. Many of Jackson's residents rely on JPD to protect their property and their very lives on a daily basis. The responsibility faced by JPD and its officers is daunting and at times likely crushing. Essential to JPD's mission is the support of the community it serves. Without confidence in the community, JPD faces an even more difficult task. See "Jackson council members call on police chief to address surge in homicides," The Clarion-Ledger, April 20, 2021.

4.4 But confidence must be based upon trust which can only come from transparency. JPD and the rest of city government must be open and honest with the people it serves. That is the civic bargain codified in the Public Records Act. While law enforcement agencies are armed with exceptions to the Public Records Act which protect the integrity of their investigations, the administrative records of law enforcement agencies are generally not exempt. See Case No. R-10-008, *Webster vs. City of Southaven Police Dept.* Moreover, the city's officials and employees, especially those in JPD, need to learn that the Public Records Act is not a nuisance. Rather, it is a fundamental obligation of municipal government just like police protection, fire protection, water and sewer services. Without transparency in government there can be no confidence among the governed, and without the support of the community, those in government cannot succeed. The Public Records Act enshrines the fundamental right of citizens in a democracy to be informed about the operations of government.

4.5 This is the fifteenth time over nearly thirteen years that the Ethics Commission has found the City of Jackson violated the Public Records Act. The commission and its hearing officers have given the city more than enough warnings and guidance, more than enough chances to

comply. Yet the city and its elected officials and, therefore, its employees, have continued to ignore the law and persistently failed to meet legal obligations with no reasonable explanation. The city's failures constitute deliberate indifference to its obligations under the Public Records Act. The Ethics Commission is legally obligated to enforce the Public Records Act, and the commission must take all measures within its authority to ensure the City of Jackson will comply with the Act in the future.

WHEREFORE, THE ETHICS COMMISSION HEREBY ORDERS as follows:

1. Within seven days of the final order in this case, the Police Chief of the City of Jackson, Mr. James Davis, shall cause to be produced unto Mr. C. J. LeMaster the following documents:
 - a. The October 2, 2018 memorandum and any additional memoranda from Deputy Chief Harris to Chief Davis drafted from September 21 to October 10, 2018, as encompassed in Request 3; and
 - b. The outgoing phone and text logs for Chief Davis from May 1 to May 28, 2019, as encompassed in Request 4.
2. The mayor of the City of Jackson, Mr. Chokwe Antar Lumumba, in his official capacity, shall
 - a. Designate a Public Records Officer for the city and for each of the ten departments in city government and
 - b. Order and ensure each individual so designated shall annually undergo at least two hours of training on the Public Records Act, the curriculum for which must be approved by the Executive Director of the Ethics Commission, and
 - c. Order and ensure each individual so designated shall annually undergo at least one hour of training in the GovQA system for as long as the city uses that system.
3. The mayor of the City of Jackson, Mr. Chokwe Antar Lumumba, in his official capacity, shall order the city's Public Records Officer to generate a weekly report from the GovQA system showing all pending requests for public records, including the number of the request, the requestor's description of the records and the date of the request, and to make that report available on the city's internet website.
4. Within thirty (30) days of a final order in this case, the mayor, or his designee, shall report to the Ethics Commission that the above ordered actions have been taken and provide a list of the Public Records Officers named by the mayor and the proposed courses of training.
5. The City of Jackson shall pay unto Gray Media Group, Inc. the sum of \$170,397.50 to partially reimburse it for the reasonable expenses incurred by bringing this proceeding.

6. The City of Jackson shall pay unto the General Fund of the State of Mississippi a civil penalty of \$900.00, which represents \$100.00 for each of the nine violations of law outlined above in Paragraphs 3.5 through 3.9.
7. The Ethics Commission hereby urges the mayor and city council for the City of Jackson to adopt the Mississippi Model Public Records Rules and implement them across city government as outlined herein.

SO ORDERED, this the 6th day of August 2021.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director