

BEFORE THE MISSISSIPPI ETHICS COMMISSION

MICHAEL NOTTER

COMPLAINANT

VS.

PUBLIC RECORDS CASE NO. R-24-002

HARRISON COUNTY TAX ASSESSOR'S OFFICE

RESPONDENT

ORDER OF DISMISSAL

This matter came before the Mississippi Ethics Commission through a Public Records Complaint filed by Michael Notter against the Harrison County Tax Assessor's Office. The Harrison County Tax Assessor filed a response by and through her attorneys. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. The hearing officer 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 5.6, Rules of the Mississippi Ethics Commission.

I. FINDINGS OF FACT

1.1 Michael Notter alleges the Harrison County Tax Assessor's Office violated the Mississippi Public Records Act by improperly denying his requests for public records. Specifically, on January 3, 2024, Mr. Notter filed a public records request with the Tax Assessor's Office for "Postage cost for letter sent by tax assess office 'BPQY Letter' requesting updated disability information for homestead" and "Labor cost associated or projected to process request by county." On January 5, 2024, after being advised that his first public records request was denied as requests for information, Mr. Notter filed a public records request for "any and all records pertaining to BPQY letters sent for homestead year 2024." This second request was also denied.

1.2 Mr. Notter contends that:

[T]he County is aware of exactly which records I am requesting. The County is attempting to usurp the public records law as to not provide the requested information that I am legally entitled to. ...

It is important to remember that I am not seeking anything more than records for the number of letters sent and the records for the associated mailing cost of each letter. I broadened the scope of my request at the county attorneys direction. I do not wish for the county to provide protected health information of any sort.

This is a very simple request. The County Attorney acknowledges he is aware of what letter I am referring to. I am asking for the documentation or "record" on how many of the same mailings did the Harrison County Tax Assessor send to other county residences in total, and the records for how much it cost per letter.

1.3 By way of background, Mr. Notter states that he received a letter from the Tax Assessor stating that his homestead exemption was under review and that he needed to provide

proof of disability status or age to retain the additional homestead exemption credit allowed for disabled residents or residents over the age of 65. This letter stated that he could provide “an updated BPQY (Benefits Planning Query) statement from the Social Security office, or two different doctor’s letters that state that you or your spouse is 100% disabled.[or] proof of age, such as a driver license or birth certificate, vehicle tag numbers and an updated phone number.” Mr. Notter expressed in communications to the Tax Assessor, Paula Ladner, and the County Attorney, Tim Holleman, that the process of verifying a disability could be simplified by importing Social Security records, instead of requesting disabled individuals to provide proof of their disability in person at the Tax Assessor’s office.¹ Mr. Notter states he sought “records for the number of letters sent and the records for the associated mailing cost of each letter” in order to demonstrate an unnecessary waste of resources by the Tax Assessor’s office.

1.4 In response to Mr. Notter’s complaint, the tax assessor’s office states that the board attorney emailed at length with Mr. Notter to assist him and explain the denials. After receiving the January 3, 2024, request, Mr. Holleman emailed Mr. Notter on January 5 to explain that “Public records requests are to ask for ‘identifiable public records’ and not to answer questions. Your request is not for documents but are questions you want answered, therefore the same is denied as improper.” Mr. Holleman then went on to state “as a courtesy, ... I understand the postage is approximately \$.50 for the letter. As to the ‘labor costs’ there is simply no way to measure the ‘labor cost’ to send a single letter and there are no public records to produce showing such. Such is not a proper public records request and we do not have the ‘labor costs’ for a single letter. It would not be much I believe.” Finally, the email states “If you still want ‘identifiable public records’ then you will need to submit a proper request asking for ‘identifiable public records’ not use it to ask questions. When such is received the county will provide you an estimate of the cost to search, copy and review such records and provide you with such. Once the estimate is paid, the county will then begin the search and produce the records.”

1.5 Mr. Notter clarified via email that “am looking for the records pertaining to the mailing performed, whether that be postage records or an output of all letters mailed. I am not asking for the cost associated with just my letter but for a cost associated with the entire mailing for everyone who received that letter. I understand on the labor cost, however I believe that can be estimated once I receive the total number of letters mailed.” Mr. Notter then clarified that “If you would like me to modify my request to ask for a record or receipt of mailing and all associated invoices or bills associated with the ‘BPQY’ mailing county wide I can, however I feel this should be unnecessary as I believe you to be clear on what I am asking for. Let me know if I need to modify my request.”

1.6 In response Mr. Holleman stated that since the Mr. Notter’s clarified request was different than the original request, that he would need to resubmit a new request. However, Mr. Holleman also explained that Mr. Notter’s clarified request “is also not a request for ‘identifiable public records’ [and] you are asking questions to be answered. I do not believe there are any ‘identifiable public records’ responsive to your request. The tax collector has a budget which may include amounts for postage and/or letterhead and/or salaries, but it will not be specific to the “cost associated with the entire mailing for everyone who received that letter”. There are no documents which will break those costs down as to the ‘pertaining to the mailing performed.’ You are asking

¹ However, Miss. Code Section 27-33-67(2) requires that “the homeowner must present proper proof....”

the county to figure such out for you and that is not a proper request for ‘identifiable public records’.” Mr. Notter then stated “I am simply asking for the data source record of the mail merge that generated these letters.”

1.7 However, after exchanging several more cordial emails with Mr. Holleman about the tax assessor’s process regarding collecting information for the additional homestead exemption, Mr. Notter then submitted the January 5, 2024, request for “any and all records pertaining to BPQY letters sent for homestead year 2024.” On January 9, the County Minutes Clerk, Henrietta Caranna, acknowledged Mr. Notter’s public records request and denied it, stating “Please be advised that under the Mississippi Public Records Act, county resources cannot be expended to conduct ‘research’ for the public. Your request is not a request to produce an identifiable public record but is a request for a county department to conduct research to collect the information you seek; therefore we cannot comply with same.” Mr. Holleman followed up on the denial to explain to Mr. Notter:

Again your request does not ask the county for “identifiable public records” but broadly ask for “any and all records pertaining to BPQY letters sent for homestead year 2024”. First, the county does not have any records relating to BPQY, as that is a term from the Social Security Administration. ... There are no “BPQY letters” sent by the County as such are Social Security Administration term not the county and the county has no records pertaining to BPQY letters as requested.

I assume by previous communications what you are actually asking for is letters sent to taxpayers, such as you received, to produce evidence of continuing disability which would allow a continuation of exemption from taxation.

Since these letters may contain information regarding a person’s claim of disability (and medical information as the basis for disability) which may be privileged under Miss. Code Ann. § 13-1-21, or the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other statutes, in my opinion they are not public records, subject to production under the Public Records Act.

1.8 In its response to the complaint, the Tax Assessor’s Office asserts the denials of Mr. Notter’s requests did not violate the Public Records Act. The Tax Assessor’s Office argues that Mr. Notter’s January 3, 2024, request was not a request for identifiable records and was properly denied. The Tax Assessor’s Office states that the request was one “of the county to answer his questions regarding separating the postage costs and labor costs for sending the disability letters. Such postage and labor costs for the disability letters are not separated in any identifiable public records which could be produced.”

1.9 The Tax Assessor’s Office also asserts that Mr. Notter’s January 5, 2024, request was validly denied, since “the county does not have any identifiable records relating to ‘BPQY letters’, as that is a term used by the Social Security Administration and not the County” However, the response goes on to state that “[ultimately] it is believed [Mr. Notter] was seeking copies of the letters sent to all taxpayers requesting verification of the disability status for exemption purposes.” The Tax Assessor’s office states “Mr. Notter is not entitled to the identities and personal information of other taxpayers and certainly not entitled to their private information

regarding being 100% disabled” and notes that “any and all records” would include copies of the doctor’s letters or Social Security statements submitted to the Tax Assessor’s office as proof of disability. The Tax Assessor’s office states that, upon the advice of the County Attorney, the request was denied because releasing private information of homeowners’ disability status could expose the Tax Assessor’s office to liability for the intentional tort of invasion of privacy.

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). However, Section 25-61-11 states that the Public Records Act “shall not be construed to conflict with, amend, repeal or supersede any constitutional law, state or federal statutory law, or decision of a court of this state or the United States which ... specifically declares a public record to be confidential or privileged, or ... exempt from the provisions of this chapter.”

2.2 A person who requests public records must request an identifiable record or class of records before a public body can comply with the request. An “identifiable record” is one that staff of the public body can reasonably locate. An “identifiable record” is not a request for “information.” Public records requests are not interrogatories. For example, asking “what policies” a public body has for handling discrimination complaints is merely a request for “information.” See, Laster v. City of Grenada, Public Records Case No. R-16-035. The Tax Assessor’s Office correctly denied Mr. Notter’s January 3, 2024, public records request as a request for information. Public bodies are not obligated to answer questions or requests for information, but the Tax Assessor’s Office and County Attorney, acting in good faith, communicated with the complainant to clarify which documents Mr. Notter was actually seeking.

2.3 However, Mr. Notter’s January 5, 2024, public records request was a request for identifiable records, and in light of the email discussions between Mr. Holleman and Mr. Notter, it is clear that Mr. Notter was seeking copies of the letters sent to all individuals by the Tax Assessor’s Office to verify their eligibility for an additional homestead exemption due to disability. Mr. Holleman acknowledges Mr. Notter’s request for “letters sent to taxpayers, such as you received, to produce evidence of continuing disability which would allow a continuation of exemption from taxation.” The Tax Assessor’s Office argues that these letters are exempt from the Public Records Act as privileged under Miss. Code Ann. Section 13-1-21 or the Health Insurance Portability and Accountability Act of 1996.

2.4 Mississippi Code Section 13-1-21 provides that [a]ll communications made to a physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor by a patient under his charge or by one seeking professional advice are hereby declared to be privileged...” and Section 25-61-11 of the Act recognizes that privileged records are exempt from the Public Records Act. As such, any and all records provided to the Tax Assessor’s Office as proof of disability in the form of physician’s letters should be exempt from the Public Records

Act. However, Mr. Notter clarified he was not seeking the letter provided by homeowners as proof of their disability, but the letters sent by the Tax Assessor's Office requesting that homeowners provide proof of their disability for the 2024 tax year. These letters are not shielded by the doctor-patient privilege described in Section 13-1-21.

2.5 The Health Insurance Portability and Accountability Act of 1996 (HIPAA) specifically preempts state law (45 CFR, Subpart B, §160.201, et seq.), and the HIPAA Privacy Rule (45 C.F.R. § 164) prohibits the disclosure of health information by "covered entities" unless such information has been "deidentified." Under HIPAA a "covered entity means: (1) A health plan, (2) A health care clearinghouse. (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 CFR § 160.103. The Tax Assessor's office is not a "covered entity" under HIPAA, such that the letters sent by the Tax Assessor's Office are not exempt from disclosure pursuant to HIPAA.

2.6 Nonetheless, while not raised as a defense by the Tax Assessor's Office, the letters sent by the Tax Assessor's Office requesting that homeowners provide proof of their disability for the 2024 tax year are exempt from the Public Records Act pursuant to Section 27-3-77 of the Mississippi Code. Section 27-3-77 exempts tax records in the possession of a public body and states:

Records in the possession of a public body, as defined by paragraph (a) of Section 25-61-3 which would disclose information about a person's individual tax payment or status, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

2.7 That is, records in the possession of a public body which disclose information about an individual's tax status, including the letters sent by the Tax Assessor's Office requesting that homeowners provide proof of their disability for the 2024 tax year, are exempt from the Public Records Act. Section 25-61-5(2) of the Act states, "[i]f any public record contains material which is not exempted under this chapter, the public agency shall redact the exempted material and make the nonexempted material available for examination." However, Section 27-3-77 exempts the entire record, and the Tax Assessor's Office may not produce copies of the letters to Mr. Notter, even if the homeowner's identifying information is redacted. Accordingly, the denial of Mr. Notter's public records request did not violate the Public Records Act.

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

MISSISSIPPI ETHICS COMMISSION

BY: _____
TOM HOOD, Executive Director