

MISSISSIPPI ETHICS COMMISSION

Council of School Board Attorneys
Annual Seminar on School Law
MSBA Offices, Ridgeland
May 12, 2022

Ethics in Government Law and
Open Meetings Act

MISSISSIPPI ETHICS COMMISSION

Administers and enforces the **Ethics in Government Law** by

- Keeping Statements of Economic Interest;
- Investigating alleged violations of law;
- Issuing written advisory opinions.

The Commission also enforces the

- **Open Meetings Act** and
- **Public Records Act**

The Commission also issues advisory opinions on the **Campaign Finance Law** and levies fines for late filing of campaign finance reports.

ETHICS IN GOVERNMENT LAW

Ethics Complaint Process

- Sworn complaint must be filed alleging a violation of law by a public servant before an investigation can be conducted.
- If investigation is authorized by Commission, it is conducted before respondent is notified.
- Respondent has 30 days to file a response.
- All investigative proceedings and records are strictly confidential, and breach of confidentiality constitutes a crime.

Ethics Enforcement

- Commission will hold hearings to determine guilt and to impose penalties.
- Appeals go to Hinds County Circuit Court.
- Commission can impose fines up to \$10,000, order public servant to repay all money received, and order equitable remedies.
- Commission can *recommend* that Hinds County Circuit Court remove an official or suspend or demote an employee

Ethics Advisory Opinions

- Commission issues anonymous advisory opinions every month to public servants who need advice about complying with the Ethics Law.
- Opinion must be requested in writing by a public servant or candidate for elected office.
- If you get an opinion from the Ethics Commission, and you follow it, you are immune from liability under the Ethics Law.
- Commission's staff gives informal guidance based on past opinions, but the only way to be protected from liability is to obtain an official written opinion.

Eight Basic Prohibitions

- Board Member Contracts
- Use of Office
- Contracting
- Purchasing Goods and Services
- Purchasing Securities
- Insider Lobbying
- Post Government Employment
- Insider Information

Section 109, Miss. Constitution of 1890

No public officer or member of the legislature shall be

- **interested, directly or indirectly,** in any
- **contract** with the state, or any district, county, city, or town thereof,
- **authorized** by any law passed or order made by any board of which he may be or may have been a member,
- **during the term** for which he shall have been chosen, **or within one year** after the expiration of such term.

Section 109, Miss. Constitution of 1890

- Section 109 only applies to members of boards and the Legislature.
- There must be some sort of contract but does not have to be a written contract.
- The conflict arises when the board funds or otherwise authorizes the contract. Even if the individual member does not vote, he or she may be in violation.
- Notice the prohibition is against an interest, not against an act.
- The prohibition continues until a board member has been out of office for one year.

Advisory Opinion

19-024-E A candidate for school board may not continue to be employed by the school district. If elected, he or she must resign the employment position before he or she takes office on the school board to ensure no violation of Section 109 and Section 25-4-105(2) occurs.

Advisory Opinion

17-080-E The spouse of a school board member may not be employed as a substitute teacher by a company which contracts with the school board to provide substitute teachers to the school district. The school board member would have a prohibited interest in the contract in violation of Section 109 and Section 25-4-105(2).

Advisory Opinion

17-025-E A business partially owned by a school board member may not serve as a vendor to the school district. Section 109 and Section 25-4-105(2) prohibit a school board member from having a direct or indirect interest in any contract which is funded or otherwise authorized by the school board during that board member's term or for one year thereafter.

Advisory Opinion

13-024-E A school board member may have an interest in a Sixteenth Section lease **only** when the lease was authorized **before** the school board member took office, and the school board will **take no action** on the lease during the board member's term or for one year thereafter.

Section 25-4-105(1)

(1) No **public servant** shall **use his official position** to obtain, or attempt to obtain, **pecuniary benefit** for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any **relative** or any **business with which he is associated**.

Section 25-4-105(1)

- The statute does not require a public servant misuse his or her position.
- To avoid a violation, a public servant must totally and completely **recuse** himself or herself from the matter giving rise to the conflict.
- A board member must leave the board meeting before the matter comes up for discussion, may only return after the matter is concluded, and must not discuss the matter with anyone.
- An abstention is considered a vote with the majority and is not a recusal. The minutes of the meeting should accurately reflect the recusal.
- **Recusal does not prevent other violations.**

Section 25-4-105(1)
"Relative" is the public servant's

- spouse,
- child,
- parent,
- sibling (brothers and sisters) or
- spouse of a relative (in-laws).

Advisory Opinion
10-035-E A school board member whose **financially independent** relative is employed by the school district may not participate in discussions and actions approving the **annual school district budget**. Only when a board member's recusal would result in the **loss of a quorum** and render the board unable to act may board member participate in approving district budget.

Advisory Opinion
14-028-E If new school board member and sibling are indeed **financially independent**, then sibling can remain employed by district and no violation of Section 109 or Section 25-4-105(2) should occur, but the board member **must recuse** himself or herself from any matter which would result in a pecuniary benefit to the relative, in compliance with Section 25-4-105(1).

Section 25-4-105(1)

'Business with which he is associated'

means public servant or his relative is

- officer, director, owner, partner, employee
- holder of more than ten percent (10%) of the fair market value or
- from which he or his relative derives more than \$2,500 in annual income or
- over which such public servant or his relative exercises control.

Advisory Opinion

12-091-E A school board may contract with a nonprofit corporation when a member of the school board also serves as an **uncompensated** director of the nonprofit, but the nonprofit is a "business with which [the trustee] is associated," and the trustee **must recuse** from any action by the school board which would benefit the nonprofit, as required by Section 25-4-105(1).

Subsection (3)(a) – The Contractor Prohibition

(3) No public servant shall: (a) Be a **contractor, subcontractor or vendor with the governmental entity** of which he is a member, officer, employee or agent, other than in his contract of employment, **or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity** of which he is a member, officer, employee or agent.

Advisory Opinion

14-008-E A business owned by a school teacher may not serve as a contractor to the school district which employs the teacher. Section 25-4-105(3)(a) prohibits a teacher from having a material financial interest in a business that serves as a contractor to his or her own school district.

Advisory Opinion

11-054-E School district employees may be assigned additional duties and paid additional compensation. While they cannot hold two separate positions with the same district, positions may be combined and employees may accept additional duties without violating Section 25-4-105(3)(a).

Advisory Opinion

16-066-E A school district may calculate the compensation for its board attorney in two different ways. A public servant may be assigned multiple duties under one contract of employment, even when the public servant's compensation is calculated in more than one manner, without violating Section 25-4-105(3)(a).

***Subsection (3)(b) –
The Purchaser Prohibition***

(3) No public servant shall: (b) Be a **purchaser, direct or indirect**, at any sale made by him in his official capacity **or by the governmental entity of which he is an officer or employee**, except in respect of the sale of goods or services when provided as public utilities or offered to the general public on a uniform price schedule.

***Section 25-4-105(4) –
Exceptions to Subsection (3)***

- These exceptions only apply to Subsection (3) and not to any other provisions of law.
- Can apply to a government employee but does not protect a board member from a violation of Section 109 or Section 25-4-105(2). The employee would still have to recuse himself or herself from any action which might otherwise violate Section 25-4-105(1).

OTHER LAWS

Not part of Ethics Law
but do relate to schools.

§ 37-9-17: Step-Aside in Hiring

- Principal or superintendent **cannot** recommend employment of relative.
- Board may designate someone else to recommend relative.
- Cannot be used for central office staff.
- Limited to 2 jobs per school.
- Noninstructional employee must have been previously employed and cannot be paid more than statewide average.

Advisory Opinion

17-004-E The superintendent may not recommend a relative for continued employment, and the "step-aside" provision set out in Section 37-9-17 does not apply to employees of the central office.

§ 37-9-21: School Nepotism

- Cannot hire licensed employee if related within third degree to majority of board.
- Board member cannot vote on licensed employee related within third degree.
- Contract is null and void if it violates this statute.

§ 37-7-333: Bank Contracts

- If school board member has connection to a bank which bids on depository contract, then don't open any of the bids.
- Superintendent sends all sealed bids to state treasurer, who opens bids and selects depository.

OPEN MEETINGS ACT

OPEN MEETINGS Enforcement

- Complaint is filed with Commission. Complaint is sent to public body, which can respond. Commission may dismiss complaint, make preliminary finding or hold a hearing.
- Ethics Commission may order public body to comply with law.
- **Ethics Commission may impose \$500 fine for first offense, \$1,000 for subsequent offense.**
- Ethics Commission can mediate disputes.
- Either party may appeal *de novo* or enforce Ethics Commission order in local chancery court.

OPEN MEETINGS ACT The Basics

- Public meetings must be open to public.
- Executive session must follow specific procedure and only for certain reasons.
- Notice of meeting must be given, and minutes must be kept.
- Social gatherings are not "meetings" unless official business is discussed.
- Act never requires executive session.

WHAT IS A MEETING?

Columbus v. Commercial Dispatch Miss. Sup. Ct.; Sept. 7, 2017

- Deliberations of a quorum must take place in a proper public meeting.
- When a quorum splits into separate groups and discusses the same matter of city business with the same person, a quorum is deliberating, and a "meeting" has occurred.

Case No. M-12-020
McGovern vs. Starkville

- Retreats conducted by the Board of Aldermen are meetings subject to the Open Meetings Act
- Even if no official action is taken at a meeting, minutes must be kept
- Committees established by the board to conduct business of the city are subject to the Open Meetings Act

Case No. M-12-023
Gilmore v. Holmes Co. Sch. Dist.

- A panel established by the superintendent to assist the superintendent in performing his or her job is not a "public body" subject to the Open Meetings Act
- While the school board of trustees and any committee thereof qualify as a "public body" under the Open Meetings Act, there was no evidence the panel was created by the board or at the direction of the board.

WHAT ABOUT EMAIL?

Case No. M-17-012
Neely vs. Yazoo County CVB

- Email exchange among a quorum of a board about a matter under their authority can violate the Open Meetings Act.
- A quorum of a board should deliberate board business ONLY in a properly noticed public meeting.
- Board members should avoid using email to communicate with each other about board business.

Telephonic Meetings
Section 25-41-5

- All members can participate by phone.
- They can be in different locations, so long as one location is open to the public.
- Equipment (speaker phone) must be located in place where board normally meets and allow members of board and public to hear deliberations.
- Votes must be clearly audible or visible to members of the board and public.

EXECUTIVE SESSION
PROCEDURE

Hinds County Bd. v. Common Cause (1989)

The purpose ... is to discourage private meetings of public bodies.... The technical requirements of the Act not only enlighten the public that there exists a specific, valid reason for going into executive session, **but also make it somewhat onerous and time consuming for the board to do so.** A board required by law to follow the procedure of ... § 25-41-7 will no doubt be less inclined to go into executive session.... [551 So.2d 107, 112]

Executive Session Procedure:

Hinds County Bd. of Sup. v. Common Cause,
551 So.2d 107, 110-111 (Miss. 1989).

1. The meeting **must begin as an Open Meeting.** Miss. Code Ann. § 25-41-7(1).
2. A member must make a **motion for the meeting to be closed** to determine whether or not the Board should declare an executive session. The statute does not require a second to this motion, but the vote on this motion is taken in open meeting. If majority votes to close meeting to make determination on the question of executive session, the meeting is closed for this purpose. Miss. Code Ann. § 25-41-7(2).

Executive Session Procedure (continued)

3. No other business during this closed interim shall be considered until a vote has been taken on whether or not to declare an executive session. Miss. Code Ann. § 25-41-7(2). In order to go into executive session, a majority of **three-fifths** of those present must vote in favor of it. Miss. Code Ann. § 25-41-7(1).
4. The **Board must then state in open meeting the reason for going into executive session,** and this **reason and total vote thereon must thereafter be recorded on the minutes** of the meeting. Miss. Code Ann. § 25-41-7(3), (5).
5. The vote to go into executive session is **applicable only to that particular meeting on that particular day.** Miss. Code Ann. § 25-41-7(6).

EXECUTIVE SESSION REASONS

Announce Specific Reasons

- Reasons for executive session must be announced in open meeting and recorded in minutes. **Must state a meaningful reason with sufficient specificity so that audience will later be able to check it out.**

To simply say, "personnel matters," or "litigation," tells nothing. The reason stated must be of sufficient specificity to inform those present that there is in reality a specific, discrete matter or area which the board had determined should be discussed in executive session.

Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 111 (Miss. 1989).

Executive Session Reasons

Executive session may be held for these reasons only:

- (a) Personnel matters relating to person in specific position
- (b) Litigation, where open discussion would have detrimental effect on litigating position
- (c) Security matters
- (d) Investigations regarding misconduct or violations of law
- (e) Legislature may enter executive session for any reason
- (f) Extraordinary emergency posing irrevocable harm
- (g) Prospective purchase, sale or leasing of lands
- (h) **School board discussions about problems of students, parents or teachers**
- (i) Preparation of professional licensing exams
- (j) Location, relocation or expansion of a business
- (k) Budget matter which may lead to termination of employee
- (l), (m) (n) certain PERS investments and hospital matters

Executive Session Reasons

Case No. M-19-012

Comm. Disp. vs. Lowndes Co. Sch. Bd.

- Board may enter executive session under personnel reason to conduct job interviews.
- Board may allow select members of the public to remain in executive session to help conduct and observe job interviews.

**OPEN MEETINGS ACT
Notice**

- Times and places of regular meetings should be set in minutes. (no statute)
- For recess, adjourned, interim or special meetings, notice must be posted in building where board normally meets within one hour of calling the meeting.
- Copy of the notice must be placed in the minutes.

Minutes

- Minutes must be kept for all meetings, whether in open or executive session.
- Minutes must be "recorded" within 30 days after meeting. (Section 37-6-9 requires minutes be "adopted by the board at the next regular meeting, or within thirty (30) working days, whichever occurs later.")
- Minutes must be available for public inspection.

Content of Minutes

Minutes must show:

- Members present and absent;
- Date, time and place of meeting;
- Accurate recording of any final actions;
- Record, by individual member, of all votes taken;
- Any other information requested by the public body.

PUBLIC PARTICIPATION

Case No. M-10-007

Townes vs. Leflore Co. Sch. Bd.

- Public body may make and enforce reasonable rules for conduct of persons attending meetings, including length of time allowed to comment.
- Public body is not required to allow members of the public to speak at meetings.

PUBLIC PARTICIPATION

Case No. M-10-004

Cockrell vs. Canton Bd. of Ald.

- Public body may not ban cameras or other recording devices from an open meeting.
- Public body may make and enforce reasonable rules for conduct of persons attending meetings, including placement and use of recording devices.

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