

Open Meetings Act

Mississippi's Open Meetings Act, statutorily set forth in Miss. Code Ann. §§25-41-1, et seq. (1975), as amended, has been given a very broad interpretation by our State Supreme Court.

The policy of the Open Meetings Act is set forth in §25-41-1:

It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

Public Policy

In *Mayor and Aldermen of City of Vicksburg v. Vicksburg Printing & Publishing Co.*, 434 So. 2d 1333 (Miss. 1983), the Mississippi Supreme Court said:

Our Legislature has decreed that its acts ought be conceived in the open air.... Openness in government is the public policy of this state. It is conducive to good government and heroic deeds.

We are acutely aware that we live in an age when secrecy in government generates suspicion and mistrust on the part of our citizenry. Government which does not have the confidence of the people can never govern effectively. However inconvenient openness may be to some, it is the legislatively decreed public policy of this state.

Deliberative Stages Open to Public

The Open Meetings Act declares a policy that public business be performed in an open and public manner. *Burleson v. Hancock County Sheriff's Department*, No. 2002-CC-00411-COA (Miss.App. 2003). Reflecting the Act's broad statement of public policy, the Mississippi Supreme Court emphasized in *Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corporation*, 478 So. 2d 269 (Miss. 1985):

[A]ll the deliberative stages of the decision-making process that lead to "formation and determination of public policy" are required to be open to the public.... Official acts include actions relating to formation and determination of public policy.

Executive Sessions

A public body, which includes a Board of Supervisors, may hold an executive session for one or more of the following reasons, set forth in §25-41-7(4):

- (a) Transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position.
- (b) Strategy sessions or negotiations with respect to prospective litigation, litigation or issuance of an appealable order when an open meeting would have a detrimental effect on the litigation position of the public body.
- (c) Transaction of business and discussion regarding the report, development or course of action regarding security personnel, plans or devices.
- (d) Investigative proceedings by any public body regarding allegations of misconduct or violation of law.
- (e) Any body of the Legislature which is meeting on matters within the jurisdiction of such body.
- (f) Cases of extraordinary emergency which would pose immediate or irrevocable harm or damage to persons and/or property within the jurisdiction of such public body.
- (g) Transaction of business and discussion regarding the prospective purchase, sale or leasing of lands.
- (h) Discussion between a school Board and individual students which attend a school within the jurisdiction of such school Board or the parents or teachers of such students regarding problems of such students or their parents or teachers.
- (i) Transaction of business and discussion concerning the preparation of tests for admission to practice in recognized professions.
- (j) Transaction of business and discussions or negotiations regarding the location, relocation or expansion of a business or an industry.
- (k) Transactions of business and discussions regarding employment or job performance of a person in a specific position or determination of an employee holding a specific position. The exemption provided by this paragraph includes the right to enter into executive session concerning a line item in a budget which might affect the termination of an employee or employees. All other budget items shall be considered in open meetings and final budgetary adoption shall not be taken in executive session.

Procedure for Executive Session

In *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107 (Miss. 1989), the Court really put some teeth in the Open Meetings Act and greatly clarified the procedure for going into executive session:

When a member of the Board believes the Board needs to go into executive session, he may very well not know the precise reason or how it should be stated, or in fact that the Board will agree with him, or the Board attorney may advise that the matter is not a proper subject for executive session. Therefore, he is not required to give any reason for asking that the meeting

be temporarily closed to determine the need for executive session. In a short, temporarily closed meeting, however, the Board can determine the precise matter to be discussed and considered, and whether or not an executive session is appropriate. If by a three-fifths vote it is decided to go into executive session, the chairman must reopen the meeting and announce publicly that the Board is going into executive session, and state the reason for doing so. The chairman then knows precisely why the Board is going into executive session. He must publicly state the reason with sufficient specificity for the audience to know in fact that there is an actual, specific matter which is to be discussed and considered in executive session.

When a Board chairman tells a citizen he may not hear the Board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act.

Litigation Exception

The litigation exception, §25-41-7(4)(b), was at the heart of the Mississippi Supreme Court's decision in *Vicksburg v. Vicksburg Printing & Publishing*, 434 So. 2d 1333 (Miss. 1983). In this case, the City's Planning Commission, while subject to the Open Meetings Law, properly went into executive session to discuss certain matters which were important subjects of proof in an annexation confirmation proceeding, including police and fire protection, ad valorem taxes, health hazards, sewage plans, population growth and recreational facilities. As the Court noted, "it was in a very real sense a strategy session in which plans for successful annexation confirmation litigation were discussed."

In *Vicksburg*, the lower court had held that the litigation exception did not apply because no attorneys were present at the meeting. The Mississippi Supreme Court disagreed:

Strategy sessions or negotiations with respect to prospective litigation may be, and no doubt frequently are, held by public bodies in the absence of attorneys. Conversely, the mere presence of an attorney in no way insulates from public disclosure and openness meetings which are not strategy sessions related to litigation. No doubt in many cases the role of an attorney may be a factor to be considered in determining whether the litigation exception applies. It is not, however, outcome-determinative. The question must ultimately and always be answered by reference to the statute.

The Mississippi Supreme Court also rejected the lower court's construction of the phrase "prospective litigation" as used in §25-41-7(4)(b) to mean "imminent litigation." Finding this construction too restrictive, the Mississippi Supreme Court emphasized that "prospective litigation" means "litigation reasonably likely to occur in the reasonably foreseeable future." (Emphasis added.). See generally *Anno.*, pending or prospective litigation exception under state law making proceedings by public bodies open to the public, 35 A. L. R. 5th 113.

Personnel Matters Exception

One of the specified reasons for a public body to enter into an executive session is to discuss personnel matters. The specific language of the personnel matters exception appears in §25-41-7(4)(a). In *Board of Trustees v. Mississippi Publishers Corp.*, 478 So. 2d 269 (Miss. 1985), the Court was dealing with a former statutory definition of “personnel,” which at the time of that appeal allowed a public body to transact business and discuss personnel matters relating to the job performance, character, professional competence, or physical or mental health “of a person.” Under this former statutory definition, the lower court in Board of Trustees had to find “personnel” matters as dealing with the hiring, promotion, demotion, dismissal, assignment or resignation of any individual public employee. The Board of Trustees of Institutions of Higher Learning, supported by an amicus curiae brief submitted on behalf of Mississippi Association of Supervisors, asked the Supreme Court to define the word “personnel” to include more than one person and to authorize discussion of matters concerning groups of personnel. The Supreme Court reversed the lower court on its definition of personnel, stating:

This Court agrees that the term “personnel” cannot be interpreted to rob the Open Meetings Act of its meaning. However, to state that “all Board discussions with institutional executive officers do not involve ‘personnel matters’” is to narrow the verbiage of the Act. The term “personnel” is not defined within the Act. When a word is statutorily undefined, its use is of its common and ordinary acceptance and meaning.... It appears that this Court can only adopt the ordinary definition of the term “personnel,” in the absence of a statutory definition.

Any further definition must be addressed by this Court on a case-by-case development guided by our general rules of statutory definition together with the legislative intent of the Act and its declared policy. To the extent that the Chancellor’s comments are inconsistent with this opinion, he is reversed on the definition of personnel. This Court adopts the verbiage of the Act regarding “personnel” matters.

In *Hinds County Board of Supervisors v. Common Cause of Miss.*, *infra*, the Court placed substantial restrictions on the definition of “personnel matters,” stating:

We have no difficulty holding that the words “personnel matters” are restricted to matters dealing with employees hired and supervised by the Board, not those employees of some other County official, and not other County officials themselves. Nor, would a member of the Board of supervisors be classified “personnel”.... Moreover, an independent contractor such as an accountant, lawyer or architect is not an employee of the Board and would not come under “personnel.”

The Court also emphasized that not all “personnel matters” are an appropriate basis for executive session, such as “commendations, need to work overtime upon occasion, shifts in hours of employment, increase in life insurance....”

Finally, the Court made it clear that hiring persons or firms who are independent contractors will almost never be “personnel matters”:

In the first place, retaining architects or any other professional firm to do public work is not a personnel matter.... Moreover, it is in the public interest that discussions with architect applicants, or any other applicant proposing to render public services or engage in a public contract, be entirely open.

The definition of “personnel matters” was amended by Laws of 1990, Chap. 541, §1, codified in Miss. Code Ann. Section 25-41-7 (4) (1990), which added the qualifying words “holding a specific position,” so that the statutory definition now reads:

Transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position.

It is apparent that the Mississippi Legislature amended the statute to reflect a more restrictive definition of “personnel matters” consistent with the way that term was defined by the lower court in *Board of Trustees v. Mississippi Publishers Corp.*, *supra*.

Triggering Coverage Under the Open Meetings Act

It is the long-standing position of the Attorney General’s office that social gatherings or chance meetings are not covered by the Open Meetings Act. AG Opinion to Sipes, February 15, 1995. This is assuming that no official business is discussed and no official actions are taken.

The Mississippi Court of Appeals has had occasion to consider the applicability of the Open Meetings Act to boards and commissions other than city boards and county boards of supervisors. In *Citizens for Equal Property Rights v. Board of Supervisors of Lowndes County*, 1998 Miss. App. LEXIS 172 (Miss. App. 1998), for example, the Court of Appeals held that the Open Meetings Act applied to an Airport Zoning Commission Board. The Attorney General’s office has also clarified the types of meetings which are contemplated by Section 25-41-5, which provides that the Open Meetings Act applies to “all official meetings of a public body.”

(a) In AG Opinion No. 2003-0139 to Clanton, April 4, 2003, the Attorney General pointed out that Miss. Code Ann. §25-41-3 defines meeting as "an assemblage of members of a public body at which official acts may be taken upon a matter over which the public body has supervision, control jurisdiction, or advisory power," and then opined that the attendance of more than one supervisor at a meeting organized and called by a state or federal economic development agencies whose sole purpose is to disseminate information of available grants and favorable loans for public projects, is not in violation of Open Meetings Act. However, this only remains true if the members of Board of Supervisors refrain from discussing official business and no official actions are taken.

(b) In AG Opinion No. 2002-0249 to Ladner, May 24, 2002, the Attorney General opined that social gatherings, athletic events, meetings of clubs and/or civic organizations in the city (Lions, Booster Club, Economic Development Council) and conferences of local governmental organizations, where no local government or municipal business is conducted, are the types of gatherings that would normally be classified as

being of a social or civic nature, and that as long as the elected local government officials (in this opinion request, members of a city board of aldermen) refrain from discussing municipal affairs, they would not be in contravention of the Open Meetings Act. “To require that no three members of a public body be in the same place at the same time for any reason would require too strict an interpretation of the Act, and in many small towns would lead to an absurd result.” *Id.*

Summary of Requirements

The following summarizes the technical requirements for a Board of Supervisors to go into executive session, based on the Court’s holding in *Hinds County Board of Supervisors v. Common Cause of Mississippi*, *supra*:

- (1) The meeting must begin as an open meeting.
- (2) A member must make a motion in open meeting for the meeting to be closed in order 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 must be taken in open meeting. If a majority votes to close the meeting to make a determination on the question of executive session, the meeting is closed for this purpose.
- (3) No other business during this closed interim shall be considered until the vote has been taken on whether or not to declare an executive session. In order to go into executive session, a three-fifths majority of the Board must vote in favor of it.
- (4) The President of the Board must then reopen the meeting and announce publicly that the Board is going into executive session and give the reason for doing so, and this reason and the total vote on it must thereafter be recorded on the minutes of the meeting.
- (5) The vote to go into executive session applies only to that particular meeting on that particular day, and no other matter may be discussed at the executive session than the announced subject.³

The Attorney General’s office has helped clarify the procedural requirements of the Open Meetings Law in several opinions issued since the Hinds County case was decided, summarized as follows:

•A governing authority holding a public meeting may enter into an executive session to discuss more than one topic at a time if the governing authority complies with the statutory procedures for entering into executive session and spreads upon the minutes the specific reasons for entering into executive session as required by *Hinds County Board of Supervisors v. Common Cause*, *supra*. AG Opinion No. 91-0541 to Stewart, August 22, 1991.

•When the governing authorities decide in an executive session to make an offer of settlement of a lawsuit or to authorize the attorney to negotiate within a certain range, the governing authority should state in the minutes only that the attorney is authorized to negotiate with the respective individuals to settle the lawsuit.

³An example of a Board Order and Minutes of an Executive Session is set forth in Appendix A.

When the governing authorities finally approve an amount which has been accepted for settlement of the lawsuit, then the governing authorities should state in the minutes the amount which they have approved for settlement of the lawsuit. AG Opinion No. 92-0767 to Donald, November 18, 1992.

- When the governing authorities agree in executive session to make an offer to a prospective employee for a certain salary or to authorize an official of the governing body to negotiate within a certain salary range, the minutes should state that the appropriate official is authorized to negotiate an employment contract with the individual. When the governing authorities reach an agreement with the prospective employee, the governing authorities should state in the minutes the salary approved for the position. AG Opinion No. 92-0767, *supra*.

- Local emergency management agencies created pursuant to §33-15-17 are public bodies governed by the Open Meetings Act, and must employ a procedure of notification reasonably calculated to ensure that a person could find out when and where a special meeting will be held. In an emergency the local emergency management organization may call a special meeting provided the required notice is posted within one hour and the procedure of notification is reasonably calculated to ensure that a person could find out when and where the special meeting will be held. AG Opinion No. 92-0004 to Maher, February 20, 1992.

- A private citizen may tape record all discussions taking place at an open meeting of any public body, subject to such reasonable rules and regulations which the public body may enact pursuant to §25-41-9. A public body cannot flatly prohibit such a practice. AG Opinion No. 93-0340 to Warren, May 12, 1993.

- Unless the Board finds, consistent with fact, that the presence and use of a camera or several cameras would be disruptive, then the Board cannot prohibit cameras at a public meeting. The determination of the disruptiveness of cameras is one of fact in each case which must be made by each governmental entity. AG Opinion No. 93-0484 to Lee, August 11, 1993.

- Although there is no statutory requirement that the Sheriff of the County remain or be excused during a closed executive session, it is within the discretion of the Board of Supervisors to determine whether the Sheriff should be present during any executive session. AG Opinion No. 93-0992 to Davis, January 20, 1994.

- While a public body may hold an executive session in cases of extraordinary emergency posing immediate or irreparable harm or damage to persons or property within the jurisdiction of the public body, such a finding would need to be made and declared in open session, and it would be entirely within the discretion of the public body conducting the meeting to determine who is allowed to remain during an executive session. AG Opinion No. 95-0163 to Bradshaw, April 20, 1995.

- When an executive session is properly convened by the Board of Supervisors, the question of who may attend the executive session is a matter entirely within the discretion of the Board, and generally those persons who are not members of the Board are automatically excluded from executive session unless they are requested by the Board to attend. AG Opinion No. 95-0183 to Ross, April 12, 1995.

Liberal Construction

It is also helpful to keep in mind that the Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public, and the philosophy of the Open Meetings Act, which is to make open to the public “all deliberations, decisions and business of all governmental Boards and commissions, unless specifically excluded by statute,” has been broadly and liberally adhered to by our Mississippi Supreme Court. As the Court in Hinds County stated:

Every member of every public Board and commission in this state should always bear in mind that the spirit of the Act is that a citizen spectator, including any representative of the press, has just as much right to attend the meeting and see and hear everything that is going on as has any member of the Board or commission.

Dealing With the Media

As an attorney representing elected officials on the grassroots level of government, it is sometimes difficult to know exactly when to say “no comment,” or whether and to what extent a discussion with the media can or should be “off the record.”

Former MAS Information Director Clifton Lusk summed up the watchdog role of the press in the political system and the need for public officials to adopt a team-player attitude:

Categorized as an adversarial role, the press as a watchdog is critical of government--and critical of those who hold power within the government. It is important to note that this role is not one of an enemy of government, rather it is one of critical review.... An open- door policy with the media, and a personal friendship with the people who comprise the media, is almost the only way the watchdog can be tamed. Keep in mind that I’m not saying the watchdog will up and run away, but such an approach can minimize its attack. By approaching the press with a team-player attitude--that is, both of you are on the same team--many miscommunications and misunderstandings can be foregone. It’s all just common sense. Be nice to the reporters and editors, and they’ll be nice to you--most of the time.⁴

President Carter’s Attorney General Griffin Bell learned to approach the press with common sense:

I found that one of the most useful skills to develop was to be able to put myself in the place of a reporter and see how a particular set of facts or statements would look to one who was observing, not participating.⁵

Clearly, there are times when the Board members will need to handle sensitive matters which deal with a person’s character or some investigation which for the time being should not be publicly discussed, and on

⁴“Relationships With the Press Are Nothing More Than Common Sense Approaches,” **Mississippi Supervisor** (Oct. 1991).

⁵C. Lusk, **Mississippi Supervisor** (June 1991)

these occasions there are certainly valid and legitimate reasons to decline to comment publicly on such sensitive matters. See, e.g., *Maxey v. Smith*, *infra*. We have to recognize, however, that when a newspaper or TV reporter's inquiry is met with "no comment," just as when a Board goes into executive session to discuss a matter, this may very well excite the curiosity of the media who may get more interested in determining what the real scoop might be, and all the rest of the business of the Board openly discussed at the meeting may become secondary. In short, there is no hard and fast rule on dealing with the media, but only a flexible rule of common sense, fairness and practicality.