BEFORE THE MISSISSIPPI ETHICS COMMISSION

THE COMMERCIAL DISPATCH **COMPLAINANT**

VS. **CASE NO. M-15-008**

MAYOR AND CITY COUNCIL, CITY OF COLUMBUS **RESPONDENT**

PRELIMINARY REPORT AND RECOMMENDATION

This matter came before the Commission through an Open Meetings Complaint filed by the Commercial Dispatch against the Mayor and City Council for the City of Columbus, Mississippi (the council). The council filed a response by and through its attorney.

The Ethics Commission has jurisdiction over this matter pursuant to Section 25-41-15, Miss. Code of 1972. This Preliminary Report and Recommendation of the hearing officer is prepared in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission. Within five (5) business days of receiving a copy of this Preliminary Report and Recommendation, any party may file specific written objections to this Preliminary Report and Recommendation. Failure by the respondent to file an objection waives the respondent's right to a hearing on the merits.

I. PROPOSED FINDINGS OF FACT

1.1 The City of Columbus is a special charter city whose governing body consists of six councilmen and a mayor. The mayor is a member of the governing body, which by its charter is styled "the mayor and city council of the City of Columbus." Revised Charter of the City of Columbus, Section 2. However, the mayor has the authority to vote only when the city council's vote results in a tie. Id., Section 16. A quorum of the city council consists of four members of the council.

1.2 The complainant, The Commercial Dispatch newspaper, states that Mayor Robert E. Smith of the City of Columbus issued a letter dated April 28, 2015, to Harry Sanders, the President of the Lowndes County Board of Supervisors. The complainant alleges that the council circumvented the Open Meetings Act by issuing this letter without prior discussion in an open meeting. Specifically, the letter proposes that the city operate a jointly owned (between the city and the county) new small arms firing range. In the letter, the Mayor states (in part, emphasis added):

> As you know, you and I met with the Sheriff, the Columbus Police Chief and others a few weeks ago to discuss the operation and management of the new Small Arms Firing Range. Since then, the Police Chief and Sheriff have met and discussed the idea of joint management of the facility. ***Additionally, I have discussed this matter with each member of the Columbus City Council.***
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> ***I am advising by this letter that it is the unanimous opinion of the Columbus City Council, and I totally agree with them,*** that the Small Arms Range should be operated and managed by the City of Columbus.

> ***We propose*** that Chief Tony Carleton assign an experienced, firing range-trained officer to manage the new facility, the City be responsible for maintenance, upkeep and utilities for the facility, and we will then bill the County for one-half (1/2) of all costs, including personnel costs, at the end of each fiscal year.

1.3 In its response, the council confirms that Mayor Smith separately communicated with members of the Columbus City Council. The council purports that these communications were informal, and that "[t]he Open Meetings Act does not prohibit the Mayor from informally discussing a matter with individual members of the Council to ascertain their opinion on a matter and writing a letter containing a proposal for possible future action." The council describes mayor's conversations with city council members as follows:

> 4. After a ribbon cutting for the new walking track, Council Member Gene Taylor approached Mayor Smith and told him that it was his opinion that the City should operate the gun firing range since it was in the City limits and that the Supervisors should share equally in the operating expenses of the range.
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> 5. Council Member Joseph Mickens of Ward 2 came by City Hall to check his official mail. On the way in, he saw Mayor Smith in his office and told him that he felt the City should be the lead agent.
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> 6. Following a town-hall meeting at a local community center, Ward 5 Council Member Kabir Karriem talked to Mayor Smith and said he would defer to what the other council members wanted but he had no problem with the City being the lead agent.
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> 7. In separate telephone calls made over a couple of days, the Mayor talked to Charlie Box, Council Member for Ward 3, Marty Turner, Council Member for Ward 4, and Bill Gavin, Council Member for Ward 6. These three members of the City Council said their opinions were generally that the City should operate the gun range and share the costs of same evenly with the County. Of course, the decision could not be approved in the absence of an agreement between the County and the City since the city and the county are joint tenants in the land where the range is located. Notably, none of the members of the council met at any time in any manner which would have construed a quorum of the board in private to discuss or act on the matter of who should operate the gun range and no attempt to take any action occurred at all.
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> 8. Following these informal discussions, where the individual members expressed their opinions about which entity ought to operate the gun range, Mayor Smith penned a letter to the President of the Board of Supervisors stating that all of the council members and the Mayor are of the opinion that the City should operate the gun range and that the City and the County split the cost of operating it on a 50/50 basis. The Mayor then asked the Supervisors to let him hear from them about the proposal, so that if they were in general agreement the City Attorney could draft a proposed agreement spelling out the terms for the two governmental entities to consider.

1.4 The council argues that, due to the absence of a quorum, the separate, informal discussions between the mayor and each council member do not constitute a "meeting" as defined by Section 25-41-3(a). As such, the mayor's action in issuing a letter to the Lowndes County Board of Supervisors proposing an agreement over how to run the joint facility, could not fall under the purview of the Mississippi Open Meetings Act.

1.5 Additionally, the city provided an affidavit from Mayor Smith, dated July 13, 2015, wherein he states:

> [A]s between the Mayor and Members of the City Council, none of us met at any time in any manner which would have construed a quorum of the Council in private to discuss or act on issues related to the police firing range. All of our actions as a public body took place in open meetings with the press and public in attendance. The decision to send [the letter to] Harry Sanders, President of the Board of Supervisors was my decision alone as Chief Executive Officer of the City. It was not prepared or sent by me as a result of any action or vote of the council or attempt by them to cause me to do so.

II. PROPOSED CONCLUSIONS OF LAW

2.1 "The Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public." Board of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp., 478 So.2d 269, 276 (Miss. 1985). In Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107 (Miss.1989), the Supreme Court summarized the Legislative intent of the Open Meetings Act as follows:

> 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.

Id. at 110. "However inconvenient openness may be to some, it is the legislatively decreed public policy of this state." Mayor & Aldermen of Vicksburg v. Vicksburg Printing & Pub., 434 So.2d 1333, 1336 (Miss.1983)

2.2 Specifically, the Legislative declarationt of the Open Meetings Act states:

> 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.

Section 25-41-1. Section 25-41-5 of the Act mandates that all official meetings of public bodies are public meetings and shall be open to the public. In Hinds County, the Supreme Court further clarified that "[t]he philosophy of the Open Meetings Act is that *all* deliberations, decisions and business of *all* governmental boards and commissions, unless specifically excluded by statute, shall be open to the public." Hinds County at 110 (emphasis in original).

2.3 The council asserts the "informal one-on-one discussions between the Mayor and individual members of the Council at separate times, through separate mediums of communication, at separate locations does not meet the definition of 'meeting'" under the Act. As a result, the council argues that since a meeting of the council requires a quorum of its members (at least 4 members) to be present, such informal discussions do not come within the purview of the Open Meetings Act.

2.4 As noted by the council, the Open Meetings Act defines a "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." Section 25-41-3. "'[O]fficial acts' includes action relating to formation and determination of public policy . . . ." Gannett River States Pub. Corp., Inc. v. City of Jackson, 866 So.2d 462, 466 (Miss. 2004), quoting Bd. Of Trustees at 278. "The Legislature does not indicate that official acts must be taken in order for the gathering to be considered a meeting." Gannett at 466. Official acts may only be taken when a quorum of the public body is assembled. Id.

2.5 Furthermore, the Open Meetings Act does "not apply to chance meetings or social gatherings of members of a public body." Section 25-41-17. Not every "informal or impromptu meeting" is subject to the Open Meetings Act. Hinds County at 122.

> A public board should be available for social functions with charities, industries and businesses, at which no action is taken and their only function is to listen, without being subjected to the Act. Therefore, a function attended by a public board, whether informal or impromptu, is a meeting within the meaning of the Act only when there is to occur "deliberative stages of the decision-making process that lead to formation and determination of public policy."

Id. at 123, quoting Bd. of Trustees at 278.

2.6 The council relies on three opinions issued by the Office of Attorney General and two decisions rendered by the Ethics Commission. While the council's citations to the Act and opinions are accurate, neither the Act, these opinions nor these decisions support the argument that the council's actions herein are not subject to the Open Meetings Act.[1]

[1] In a January 2014 opinion cited by the council, the Attorney General advised the State Board of Education that no violation of the Open Meetings Act would occur if the Chairman of the Board and perhaps one other board member met with employees of the Office of Educational Accountability to discuss complaints concerning the office's director who is appointed by the Board of Education. See Miss. Atty. Gen. Op. 2013-00499 (Jan. 10, 2014). The council also cites an April 1999 opinion where the Attorney General advised that less than a quorum of members of the board of supervisors could attend a Council of Governments meeting that included less than a quorum of mayors and aldermen of various municipalities. See Miss. Atty. Gen. Op. No. 1999-0126 (Apr. 9, 1999). In each of these

2.7 The facts show that the mayor was approached separately, in person, by three council members, who shared their opinions on the city's future involvement in operating the small arms firing range. If the discussions ended here, the meetings between the mayor and these council members would have simply been chance or impromptu encounters, as allowed under Section 25-41-17.

2.8 However, the facts show that the mayor then actively solicited, by telephone, the opinion of the three remaining council members with regard to the operation of the small arms firing range. The Supreme Court has condemned the practice of polling members of a public body outside of a properly noticed public meeting "insofar as such telephone polls in fact circumvent the act by preventing public disclosure of deliberation and conduct of business." Bd. of Trustees at 278. The Court further stated that "all 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." Id. Moreover, due to statutory amendments subsequent to the Board of Trustees case, voting by telephone must now take place only during a properly noticed telephonic meeting, pursuant to Section 25-41-5, rendering all such "telephone polling" entirely illegal. See Section 25-41-5(2); House Bill 583, 2003 Regular Session.

2.9 The council argues that "[n]o effort was made to take official action and nor could official action have been taken. First, it could not have been taken because there was never a "meeting." Second it could have not been taken with regard to the gun range because the City as a joint tenant and [sic] could not act independently of the County regardless of its unanimity. So, informal discussions such as those at issue cannot be considered a 'meeting' especially under the facts at issue in this case." The council additionally provided an affidavit from the mayor where he asserts that the decision to send the letter was his alone, and "not prepared or sent by me as a result of any action or vote of the council or attempt by them to cause me to do so."

2.10 Nonetheless, the Mississippi Supreme Court has held that "official acts" include all deliberative stages of the decision-making process. While the council argues that it "did not attempt to bind the city to a contract or for the City to take a particular action," the mayor purposefully gathered the opinions of all council members in support of his proposal before sending the letter. Though the decision to send the letter may have been the mayor's alone, the

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opinions, the Attorney General "strongly advised" the individuals who attended the meetings to consider the Mississippi Supreme Court's admonitions in Common Cause: The philosophy of the Open Meetings Act is that all deliberations, decisions and business of all governmental boards and commissions, unless specifically excluded by statute, shall be open to the public. Common Cause, 551 So.2d at 109.

In a 2010 opinion cited by the council, the Attorney General advised that, in the absence of a quorum, no statutory authority to take official action exists. See Miss. Atty. Gen. Op. No. 2010-00438 (July 30, 2010).

The Ethics Commission's decision in Mason v. Board of Aldermen, City of Aberdeen, M-10-001, involved an impromptu meeting and not a prearranged meeting of the aldermen. The purpose of the meeting was for the mayor, with the vice mayor attending, to suspend an employee. The evidence in that case indicated other aldermen were present during the meeting by chance and that their attendance was not prearranged. In Griffin v. Board of Mayor and Aldermen, City of Crystal Springs, M-10-012, the Ethics Commission dismissed the complaint where the request by the complainant was that the Commission "open an investigation" based on suspicions of secret meetings that had occurred concerning a beer ordinance. The evidence introduced by the city conclusively established that the mayor and board of aldermen had discussed the ordinance in numerous public meetings and had not conducted any secret meetings concerning the ordinance.

letter itself contradicts that assertion, where he states that it is the "unanimous opinion of the Columbus City Council, and I totally agree with them, that the Small Arms Firing Range should be operated and managed by the City of Columbus."

2.11 The mayor assembled a de-facto quorum of the board when he telephoned the three remaining council members and discussed with them a matter of city business, after having addressed the same issue informally with the other members of the council. Together, these discussions resulted in a quorum of the board "assembling" privately and allowed the mayor to issue a letter proposing action on behalf of the city, with the backing of the unanimous support of the council. It does not matter that the mayor had separate conversations with each of the council members or that the mayor polled less than a quorum of the council. Assembling a quorum in piecemeal fashion by polling the remaining members of the council circumvents the Act just as much as polling the entire council. What matters is that the opinions of a quorum of the council – and in fact in this case, the entire council – were assembled by the mayor in order to deliberate a subject under their control, outside an open meeting. As such, those conversations constitute a "meeting" as defined in the Act and as previously interpreted by the Supreme Court. As a result, a violation occurred when the positions or opinions of a quorum of the council – about a matter under their authority – were solicited for the purpose of authorizing subsequent action on behalf of the city outside an official, open meeting of the governing body. The mayor did this when he reached out to the remaining three council members to solicit their opinions on the small arms firing range, and referenced the "unanimous opinion" of the council in his letter to the Lowndes County Board.

2.12 Again, the mayor and the city council members are not prohibited from discussing matters of city business with each other where the total number of participants in the conversation or conversations is less than a quorum, such as the mayor having a conversation with one council member. The violation occurs when a quorum has discussed the same matter of city business outside of a properly noticed public meeting, whether assembled together at the same time or in separate conversations. The letter dated April 28, 2015 clearly states that the mayor "discussed this matter with each member of the Columbus City Council. . . . [and] that it is the unanimous opinion of the Columbus City Council . . ." to propose to the Lowndes County Board that the City of Columbus operate the small arms firing range.

2.13 By utilizing a telephone poll of the three council members that did not informally approach him, combined with the previous informal discussions the other three council members, the mayor circumvented the Open Meetings Act. Without convening a quorum of the council in an open meeting, he discussed and deliberated matters of city business with all of the council members as evidenced in the April 28, 2015 letter.

PRELIMINARY RECOMMENDATION

The undersigned hearing officer proposes to make the following recommendation to the Ethics Commission:

1. The commission should find that Mayor Smith knowingly and willfully violated Section 25-41-5 of the Open Meetings Act when he called council members to solicit opinions on a proposal for the operation of a small arms firing range.

2. The undersigned hearing officer further proposes to recommend the Ethics Commission order Mayor Smith to refrain from using telephone polling to discuss any matter over which the city council has supervision, control, jurisdiction or advisory power, except during a properly called, noticed and recorded public meeting.

NOTICE OF PROPOSED HEARING DATE

Pursuant to Rule 4.6, Rules of the Mississippi Ethics Commission, within five (5) business days of receiving a copy of the preliminary report and recommendation, any party may file specific written objections to the Preliminary Report and Recommendation. In the event either party files an objection to the Preliminary Report and Recommendation that would necessitate a hearing before the hearing officer, the undersigned hearing officer proposes to set this matter for hearing at 10:00 a.m., on Wednesday, June 22, 2016, at the offices of the Mississippi Ethics Commission in Jackson, Mississippi.

SUBMITTED this the 6th day of May 2016.

SONIA SHURDEN, Hearing Officer
Mississippi Ethics Commission