BEFORE THE MISSISSIPPI ETHICS COMMISSION

MISSISSIPPI JUSTICE INSTITUTE	COMPLAINANT
v.	CASE NO. M-18-010
CITY OF NATCHEZ, MISSISSIPPI	RESPONDENT

REPLY TO THE CITY OF NATCHEZ'S RESPONSE TO
OPEN MEETINGS ACT COMPLAINT

INTRODUCTION

The City of Natchez's response to the complaint in this case spends considerable time discussing the Mississippi Public Records Act and the procedures Natchez used for receiving garbage collection proposals. But this is an Open Meetings Act case, and a simple one at that. When one strips away the irrelevant public records arguments, the City's response boils down to two contentions: 1) that the executive session at issue in this case was about whether a garbage company would locate an office in the City (it was not) and 2) that the Ethics Commission should ignore the plain language of the Open Meetings Act and instead create a new, implied exception to the Open Meetings Act (it should not). The Commission should find in favor of the Mississippi Justice Institute.

ARGUMENT

I. The City's meeting was about garbage collection, not the location of an office, so there was no lawful reason for their May 3 executive session.

The City's first and primary argument is that their executive session on May 3, 2018, was proper under the exception that allows for closed-door meetings when the discussion is about the "[t]ransaction of business and discussions or negotiations regarding the location, relocation or

expansion of a business, medical service or an industry." Miss. Code Ann. § 25-41-7(4)(j). The City argued that its executive session fell under this exception because the executive session was about "the various Proposals submitted by companies desiring to **locate an office in the City of Natchez** for the purposes of handling the waste collection and recycling in the City of Natchez." Natchez Resp. at 2 (emphasis added). The City repeats the "office" justification several times in its Response, saying the executive session was about "the **location** of a business" (*id*. at 3), "**locating an office** in the City of Natchez to conduct the business of waste collection and recycling" (*id*.), and "having companies to **locate offices** in the City of Natchez" (*id*. at 7). (emphasis added).

Repeating this does not make it true. The truth is that there is nothing about locating an office in Natchez in the RFP for garbage collection, so the executive session discussion could not be about the location of an office. The RFP's cover page says the RFP is about "solid waste collection," not the location of an office. See Natchez Resp. Ex. A at 1. The "Subject" of the RFP lists the "services" sought in the RFP, and it never mentions locating an office in the City. *Id*. at 2. The "Scope of Work" section in the RFP lists detailed actions required of the winning bidder. *Id*. at 9. The section requires things like "one 8 cu. Yd. dumpster and 65-gallon recycling bins with lids free of charge" for the City, a "65 gallon recycling cart" for each household, and an "8 cu. yd. dumpster at the river docking site on Silver Street." *Id*. at 9, 10, 15. Despite all that detail, the RFP never mentions the need to locate an office in the City.

In short, the RFP is not about the location of an office. It is about garbage collection. The City is simply claiming its meeting the RFP was about an office location to justify its actions, after the fact.

The City knows this argument is a stretch, so it claims that the "location of a business" exception to the Open Meetings Act is "very broad in its terms"—so broad, in fact, that it captures discussions of its garbage collection RFP. Natchez Resp. at 6. The notion that exceptions to the Open Meetings Act are "very broad" flies in the face of settled Mississippi law. Mississippi's Supreme cannot be any clearer: "**While the exceptions to the statute are to be construed narrowly**, the statute is to be construed liberally to keep public meetings open." *Gannett River States Pub. Corp. v. City of Jackson*, 866 So. 2d 462, 469 (Miss. 2004) (emphasis added). The principle is important, so the Court has said it multiple times. *See Hinds Cty. Bd. of Sup'rs v. Common Cause of Mississippi*, 551 So. 2d 107, 125 (Miss. 1989) ("We also hold that within the framework of the statutory language itself **all statutory exceptions must, under the spirit and philosophy of the Act, be strictly construed against executive sessions**.") (emphasis added).

If properly (i.e., "narrowly") construed, the exception cannot justify Natchez's closed-door meeting. The City cannot make the round peg of its executive session on the RFP fit into the square hole of the exception.

Faced with that difficulty, the City makes a half-hearted, last-ditch effort in a single sentence to argue that their discussion was, in some sense, about "economic development." Natchez Resp. at 7. But if a discussion about who should win a city service contract is about economic development, then nearly *any* conversation could be said to be about economic development. Levels of taxation, roads and bridges spending, beautification initiatives, repair of water and sewer facilities—all these things could trigger the expansion of a business. One simply cannot read the "expansion of a business" exception to protect all these kinds of conversations because of the explicit instructions of the Court: to read the exceptions "narrowly." Allowing the

exception to be read "very broad[ly]," as the City wishes, would create a large loophole that public bodies around the state would use to blanket many functions of government in secrecy.

II. The City cannot invent a new, implied exception to the Open Meetings Act.

Its first argument insufficient, the City is forced to go outside the exceptions listed in the Open Meetings Act in order to justify its executive session. It asks the Commission to create a new exception to the Act, and the exception it hopes to create is one where discussion of proposals for a service contract can be done in private. The City argues that it is "inconceivable" that this exception does not naturally exist. Natchez Resp. at 7.

But the City cannot create new exceptions. The exceptions to the Open Meetings Act that allow for executive sessions are exclusive. *Bd. of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*, 478 So. 2d 269, 277 (Miss. 1985). No public body can add to them. *Id*. ("The proper forum to address additional exemptions to the Open Meeting Law is the state legislature.").

Thus, any discussion of the public records laws where the City attempts to surmise a new exception to the Open Meetings Act is a fruitless exercise. The City jaunts around the codebook—citing the public records 21-day rule, quoting the Best Practices for RFPs (which does not apply to municipalities, only state agencies, per Miss. Code Ann. § 31-7-401), and describing state agencies' auction techniques in Miss. Code Ann. § 31-7-419—all to create a Rube Goldberg machine that will spit out a justification for their executive session.

All the while, the simple answer in this case lies in plain sight in the City's response: "[T]here is not a statute that explicitly states that public bodies can meet in executive session to discuss the contents of competitive sealed Proposals . . ." Natchez Resp. at 9.

Even if the Commission read the Best Practices for RFPs to apply to municipalities, and even if the Commission read the Best Practices to somehow create a new implied exception to the Open Meetings Act, the City still did not follow the procedures of the Best Practices that it says gave it the right to hold its closed-door meeting. The Best Practices require that, "Any discussions that take place under the provisions of this section shall be recorded and the recordings shall be made public upon award of the contract." Miss. Code. Ann. § 31-7-419. The City has acknowledged no such recording of the May 3 executive session. In other words, under the City's preferred reading of the statutes—a reading so generous it does not even conform to the plain language of the law—the City did not uphold its responsibility to transparency.

In any event, creating new implied exceptions to the Open Meetings Act is a dangerous—and unlawful—game. The Mississippi Supreme Court wisely barred such implied exceptions in its *Bd. of Trustees of State Institutions of Higher Learning* ruling. 478 So. 2d at 277.

All these rulings from the Court are what inspired the Attorney General to opine that no discussions of "contract negotiations for sporting events, concerts and theatrical auditions qualify for an exemption under the Open Meetings Act." Anthony Nowak, 2002 WL 1833281, at *2 (Miss. A.G. July 10, 2002); *see also* MJI Complaint at 2. The City claims this AG opinion is inapposite because Natchez's contract discussions "possibly" involved "confidential information" while the contract discussions in the Nowak opinion (the City claims) did not. *See* Natchez Resp. at 8. But nothing in the Nowak opinion suggests the Nowak contract discussions were any more or less sensitive than the discussions the City is having about its garbage collection. And the Desoto County Convention and Visitors Bureau, the public body in the Nowak opinion, used nearly identical justifications for its executive session that the City is using here. Desoto County said that negotiations with its potential vendors should be secret and would

be hampered if it had to discuss the negotiations in public. *Id*. at *1 ("the publication of potential event contract negotiations prior to reaching a final contract would be detrimental to [our] solicitations"). The cases are substantially similar, and the Attorney General's guidance should be followed here.

All told, the City's strained legal argument is really just a policy argument in disguise. The City believes that an open meeting would "negate the ability [of the City] to negotiate with various persons submitting proposals to gain the most favorable contract for [the City]." Natchez Resp. at 5. True or not, that policy judgment is not for the City or the Mississippi Ethics Commission to make. The Legislature has already established the public policy of Mississippi in favor of open government, and the Mississippi Supreme Court has been clear: "Although not requiring meetings to be open could allow for more frank conversation or be preferable for the Council, it is of far greater importance . . . that all public business be open to the public." *Mayor & City Council & City of Columbus v. Commercial Dispatch*, 234 So. 3d 1236, 1240 (Miss. 2017) (internal quotations removed).

CONCLUSION

The City should not be allowed to read exceptions of the Open Meetings Act "very broadly" and should not be allowed to create a new, implied exception. Both contravene rulings by Mississippi's highest court. And both would allow the City to hide discussions of how it is spending taxpayers'—not the Mayor or Board of Aldermen's—money. Allowing the City to expand or create an exception in the way they have asked would create a powerful precedent that would curb transparency in other public bodies across Mississippi. The Commission should refuse to create such a precedent and instead rule in favor the Mississippi Justice Institute.

This the 31st of May, 2018.

Respectfully submitted,

COMPLAINANT

By: /s/*Shadrack T. White*

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Certificate of Service

I, Shadrack T. White, do hereby certify that I have on this date filed the foregoing with the Mississippi Ethics Commission and sent a copy to all counsel of record.

This the 31st of May, 2018.

/s/*Shadrack T. White*
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