

THE MISSISSIPPI ETHICS COMMISSION

LANA TAYLOR NOONAN

COMPLAINANT

VS.

CASE NO. M-15-001

BAY SAINT LOUIS-WAVELAND SCHOOL DISTRICT

RESPONDENT

PRELIMINARY REPORT AND RECOMMENDATION

This matter came before the Commission through an Open Meetings Complaint filed by Lana Taylor Noonan against the Board of Trustees for the Bay Saint Louis-Waveland School District (the “board”). The board 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.

PROPOSED FINDINGS OF FACT

The complainant, Ms. Noonan, alleges that the Board of Trustees of the Bay Saint Louis-Waveland School District violated the Mississippi Open Meetings Act at its special meeting on February 19, 2015, by improperly entering executive session. Ms. Noonan attended the special meeting and noted that the board entered executive session for the sole purpose of interviewing potential architects in response to a solicitation by the board. During this meeting, Ms. Noonan addressed the board, asking “if they were aware that discussing business with a private contractor was not a permitted reason for going into Executive Session according to the Mississippi Open Meetings Law, Section 25-41-7(4).” She further states that the board attorney responded that this was a “special circumstance because it would not be fair for the architects to have to speak in front of each other.” At this point, as reflected by the board’s minutes, the board voted to consider going into executive session “for the sole purpose of interviewing potential architects in response to the solicitation by the Board of Trustees.” The motion passed, with four trustees voting “yea” and one trustee voting “nay.” The board then unanimously voted to go into executive session. In executive session, the board conducted separate interviews of four architecture firms.

In response to Ms. Noonan’s complaint, the board stated the facts as follows:

The Board authorized to solicit statements of qualifications for architectural services for the District. The Board publicly advertised the request for statements of qualifications from licensed architects in *The Sea Coast Echo* The Board was attempting to procure these professional services as openly, fairly and competitively as possible by publication and open request for qualifications,

rather than just simply selecting a particular firm for professional services directly. Ten architectural firms responded to the District's publicly advertised request for statements of qualifications. The Board members received and reviewed all of the proposals that were submitted and ranked the top four firms. It was the Board's intention to then conduct further due diligence on the top candidates, check references, past performances and conduct direct interviews of the top four firms in order to make a final selection from face to face interaction, rather than just from a written submission.

In an attempt to make the procurement process as competitive and fair as possible, the board had to give each proposer an opportunity to be interviewed, to present differentiating information about them and to answer questions that contained potential proprietary information and competitive financial information. . . . There was no way to conduct this due diligence and obtain answers to necessary selection questions in front of the other proposers, without creating a potentially prejudicial situation. The Board therefore schedules independent interviews, in thirty-minute intervals, for each of the four finalists. . . .

The board did in fact conduct separate interviews of the four firms, with full and open disclosure to all proposers of the process in advance. Not one firm questioned the process, but rather concurred that the process utilized would prevent one firm from gaining an advantage over another. The Board did not take any action whatsoever in closed session to contract with nor hire an architectural firm. . . . In fact, as of the writing of this response, the board still does not have a contract with any of the firms interviewed and none of the four finalists have been placed under contract to date. The Board has no intention of, nor will it authorize a contract without doing so in open session, with full public disclosure of all terms.

In sum, . . . the Board acted in good faith to conduct an open, fair and competitive process for the selection of professional architectural services, and only approved and discussed the contract for services in the open session of a public meeting. No executive session was held with a District contractor under the purpose of discussing "personnel."

PROPOSED CONCLUSIONS OF LAW

"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).

Only in limited circumstances, which are enumerated under Section 25-41-7(4) of the Mississippi Code, may a public body enter executive session and exclude the public. The reason or reasons for holding an executive session must be announced to the public in an open meeting and recorded in the minutes. Section 25-41-7(3). Furthermore, the reason provided by a public body to the public must be “meaningful” and stated with “sufficient specificity.” Hinds County at 111.

The board correctly recognizes that it cannot go into executive session to discuss non-employee contractors under the personnel exemption for executive sessions in Section 24-41-7(4)(a), and does not claim this exemption as the reason for going into executive session on February 19, 2015. Unfortunately, entering executive session “for the sole purpose of interviewing potential architects in response to the solicitation by the Board of Trustees” is not allowed under any of the categories for which an executive session is permitted under the Mississippi Open Meetings Act. In Hinds County, the Mississippi Supreme Court specifically discussed a public body’s inappropriate utilization of executive sessions to discuss hiring architects. 551 So.2d at 114. The Court stated “it is in the public interest that discussion with architect applicants, or any other applicant proposing to render public services or engage in a public contract, be entirely open.” Id.

In its efforts to make the interview process competitive and fair to the architectural firms, the board could have considered delegating the face-to-face interview process to the school district’s Superintendent or to another member of the board’s staff, who would not be required to deliberate or meet in an open forum pursuant to the Open Meetings Act. The delegate could have conducted the due diligence the board desired – avoiding the possibility of giving one architectural firm an unfair advantage over another and keeping the firms’ competitive or proprietary information confidential to the extent allowed under the Mississippi Public Records Act – and reported his or her findings and/or recommendation to the board.

“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.” Id. at 110. As such, without a specific exemption allowing a confidential or executive session, regardless of the impact of discussions or interviews conducted in open session on third parties, the board was not permitted to exclude the public from their discussions with the architectural firms, and to enter executive session to do so was a violation of the Open Meetings Act.

PRELIMINARY RECOMMENDATION

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

1. The commission should find the Board of Trustees for the Bay Saint Louis-Waveland School District violated Sections 25-41-5 and 25-41-7, Miss. Code of 1972, by improperly entering executive session at its special meeting on February 19, 2015.

2. The undersigned hearing officer further proposes to recommend the Ethics Commission order the Board of Trustees for the Bay Saint Louis-Waveland School District to refrain from further violations and comply strictly with Section 25-41-5 and Section 25-41-7, Miss. Code of 1972.

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, August 19, 2015, at the offices of the Mississippi Ethics Commission in Jackson, Mississippi.

SUBMITTED this the 10th day of July 2015.


SONIA SHURDEN, Hearing Officer
Mississippi Ethics Commission