

**IN THE SUPREME COURT OF MISSISSIPPI
NO: 2014-CA-00894**

**MELISSA C. PATTERSON, STACY PICKERING,
INDIVIDUALLY, DAVID HUGGINS,
INDIVIDUALLY, CHRIS LOTT, INDIVIDUALLY,
MISSISSIPPI DEPARTMENT OF AUDIT,
STACEY PICKERING IN HIS OFFICIAL
CAPACITY AS STATE AUDITOR FOR THE
STATE OF MISSISSIPPI, HAROLD E. PIZZETTA,
III, MISSISSIPPI DEPARTMENT OF MARINE
RESOURCES, JOSEPH A. RUNNELS, JR.,
SANDRA CHESNUT AND JIM HOOD**

APPELLANTS

VERSUS

GULF PUBLISHING COMPANY, INC.

APPELLEE

**CONSOLIDATED WITH
NO: 2013-CA-02002**

MISSISSIPPI DEPARTMENT OF AUDIT

APPELLANT

VERSUS

GULF PUBLISHING COMPANY, INC.

APPELLEE

**ON APPEAL FROM
THE CHANCERY COURT FOR THE SECOND JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI**

PETITION OF GULF PUBLISHING COMPANY, INC. FOR WRIT OF CERTIORARI

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INTRODUCTION

This is a Mississippi Public Records Act (“Act”) case. § 25-61-1 *et. seq.* Mississippi Code. By finding records generated in the ordinary course of business of a state agency to be exempt under the Mississippi Public Records Act (§§ 25-61-1 *et. seq.* Mississippi Code) as criminal investigative reports, the Court of Appeals has eviscerated the openness requirement of § 25-61-1 and completely ignored this Court’s requirement that any doubt about public records being exempt from disclosure must be resolved in favor of openness. *Miss. Dep’t of Wildlife v. Miss. Wildlife Enforcement Officers’ Assoc., Inc.* 740 So. 2d 925, 936 (Miss. 1999).

Sometime before midnight November 4, 2013, Stacey Pickering, as State Auditor, and the Mississippi Department of Audit blatantly refused to comply with the bench opinion and the order entered by the Chancery Court for the Second Judicial District of Harrison County, Chancellor Jennifer Schloegel presiding, by surreptitiously loading thousands of pages of Mississippi Department of Marine Resources (“DMR”) business records into a U-Haul truck and bringing them to Jackson, Mississippi to comply with a federal subpoena issued after the bench opinion. Chancellor Schloegel had ruled the records were public records and not subject to Mississippi’s Public Records Act criminal investigative report exemption and ordered the Department of Audit to copy them for Gulf Publishing and DMR. Moreover, Mr. Pickering and the Department of Audit completely disregarded the directive from the Chancellor and advice from counsel for Gulf Publishing Company, Inc. (“Gulf Publishing”) to file a motion to quash the federal subpoena or to obtain a protective order so that the Chancery Court’s bench opinion and order could be complied with by copying the public records for inspection by Gulf Publishing.

MISSISSIPPI RULE OF APPELLATE PROCEDURE 17

Gulf Publishing's petition for writ of certiorari meets the requirements of Mississippi Rule of Appellate Procedure 17(a)(1) because the Court of Appeals decision conflicts with prior decisions of that Court and the Mississippi Supreme Court. The Court of Appeals narrowly and strictly construed the Mississippi Public Records Act in deciding the public records at issue were exempt under the Act as criminal investigative reports. Both this Court and the Court of Appeals have held that the Mississippi Public Records Act is to be construed openly and liberally in favor of records being public records. Exemptions to the Act, including the criminal investigative report exemption, must be interpreted strictly and narrowly in favor of openness.

An open and liberal construction of this exemption demands that the records at issue do not fall within the exemption.

This strong public policy of openness must be again recognized by this Court granting certiorari and thereafter reversing the Court of Appeals.

The petition for writ of Certiorari also meets the requirement Mississippi Rule of Appellate Procedure 17(a)(3) since this case should have been decided by the Mississippi Supreme Court because Gulf Publishing's public records request involves fundamental issues of broad public importance of assuring that the public has access to its records.

THE PROCEEDINGS BELOW

The Chancery Court correctly ruled that pursuant to the Act the *Sun Herald* newspaper published by Gulf Publishing was entitled to receive public records created by and maintained in the ordinary course of business of DMR. Both DMR and the Auditor denied Gulf Publishing access to these records on the ground they were exempt from disclosure since they were criminal investigative reports.

The Chancery Court awarded attorneys fees in the amount of \$36,783.50, reasonable and necessary expenses in the amount of \$1,249.95 and the \$100.00 civil penalty provided by § 25-61-15 Mississippi Code against DMR, Department of Audit, and Stacey Pickering, State Auditor (“State Auditor”). The Chancery Court found that State Auditor, Stacey Pickering, was in civil contempt of the Chancery Court bench opinion and order requiring the Department of Audit to produce the requested public records for inspection and copying by the *Sun Herald*. Instead, the Department of Audit upon being served with a federal grand jury subpoena, violated the bench opinion and order and without filing any motion to quash or for protection, delivered the records under cover of night to a federal grand jury sitting in Jackson, Mississippi.

While the *Sun Herald* did not so request, the Chancery Court also awarded attorneys fees and the \$100.00 civil penalty provided by § 25-61-15 Mississippi Code against Jim Hood, David Huggins, Chris Lott, Melissa Patterson, Joseph Runnels, Sandra Chesnut, and Harold Pizzetta.

All Appellants perfected their appeals to the Mississippi Supreme Court, which referred the case to the Court of Appeals.

On March 29, 2016 the Court of Appeals reversed and rendered the Chancery Court Judgment in a six – one decision with three judges abstaining. Attached as Appendix “1” to this Petition is a copy of the Court of Appeals opinion.

On April 11, 2016 Gulf Publishing filed its motion for rehearing in the Court of Appeals, a copy of which is attached to this Petition as Appendix “2”.

On August 30, 2016 the Court of Appeals denied Gulf Publishing’s Motion in a six - one decision with three judges abstaining.

THE COURT OF APPEALS DECISION

Petitioner lifts the following findings of the Court of Appeals for consideration by this Court.

In 2012 the Department of Marine Resources (DMR) was being investigated by a joint federal and state task force for misappropriation of funds. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *1 (Miss.Ct.App. 2016).

The Auditor subpoenaed the DMR business records in a Harrison County Circuit Court grand jury proceeding.

The subpoena clearly stated that it could be satisfied by mailing or delivering a certified copy of said records.¹ *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *1 (Miss.Ct.App. 2016). DMR did neither. It simply released carte blanche all of the public records to the Auditor.²

The Chancellor conducted a hearing into whether Gulf Publishing was entitled to the public records on October 30 and 31, 2013. During the hearing, the Chancellor ordered the Auditor to bring the records to the courthouse. However, by the time the records arrived, the Chancellor had ruled from the bench that the records did not fall under the investigative-report exemption. Thus, the Chancellor allowed the documents to be taken from the courthouse, and ordered the Auditor to copy the records or put DMR in a position to comply with Gulf Publishing's requests. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *2 (Miss.Ct.App. 2016).

¹ DMR gave the Auditor all of the subpoenaed records even though the subpoena allowed DMR to give the Auditor only certified copies. DMR therefore no longer had those records (or copies) to comply with Gulf Publishing's previously served public records request.

² This violates § 25-59-15(b)(c) Mississippi Code (Mississippi Archives and Management Law of 1984).

Before the Chancellor's bench ruling was reduced to writing, the United States District Court for the Southern District of Mississippi issued a subpoena, commanding the Auditor's lead investigator, David Huggins, to appear the next day, November 5, 2013 at 9 a.m., at the federal building in Jackson to the grand jury — and bring all the DMR records in the Auditor's possession. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *2 (Miss.Ct.App. 2016).

Around 2:40 p.m. on November 4, 2013 Investigator Huggins informed the Auditor's attorney, Melissa Patterson, of the federal subpoena. And around 5 p.m., Patterson notified the Chancellor. Subsequently, Patterson and Gulf Publishing's attorney, Henry Laird, had a telephonic hearing with the Chancellor. Laird suggested that Patterson seek a motion to quash or a protective order, but Patterson represented that she thought Investigator Huggins could, instead, appear before the grand jury and explain why he was unable to bring the records. The Chancellor ended the hearing by ordering Patterson to produce the records to the Chancery Court, by 9 a.m. on November 5, 2013. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *2 (Miss.Ct.App. 2016)

Shortly before midnight, the Chancellor electronically filed an emergency order immediately seizing the records and ordering they be delivered to the Chancery Court so that they could be copied and Bates stamped before the Auditor complied with the federal subpoena. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *2 (Miss.Ct.App. 2016).

The next morning on November 5, 2013 Patterson contacted Department of Audit Investigator Chris Lott to arrange transportation of the records to the Chancery Court but learned

Investigator Huggins had instead decided to transport the records to Jackson. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *2 (Miss.Ct.App. 2016).

That same day the state grand jury and federal grand jury indicted several individuals. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *3 (Miss.Ct.App. 2016).³

According to Investigator Huggins, John Dowdy, the Assistant United States Attorney who was running the federal side of the DMR investigation, contacted him on November 1, 2013. Dowdy asked Investigator Huggins to come by the federal building on November 4, causing Investigator Huggins to suspect that he might be issued a subpoena. Already concerned about a federal subpoena, Investigator Huggins had spoken with Attorney General Hood, who advised, hypothetically, should a federal subpoena come down, Investigator Huggins should comply with it. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *3 (Miss.Ct.App. 2016)

Unbeknownst to Patterson, around 6 p.m., on November 4, 2013 Investigator Huggins decided that he had to show up at the federal grand jury — or face federal penalties. This decision was based on his conversation with Attorney General Hood as well as a conversation with Dowdy. Investigator Huggins told Dowdy his plan to try to comply with both the Chancery Court's ruling and the federal subpoena, but Dowdy advised Investigator Huggins to comply with the subpoena. Investigator Huggins then directed Investigator Lott to transport the records to Jackson. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *4 (Miss.Ct.App. 2016)

³ Any reasonable person must ask whether there was ever any real need by the federal grand jury for the DMR records since the grand jury returned indictments the same day it got the thousands of pages of subpoenaed records without reviewing them. It had no time to do that.

On December 5, 2013, the Auditor filed a motion with the federal district court seeking permission to release the records to Gulf Publishing. On December 20, the district court ruled the records were not subject to federal grand-jury secrecy and, therefore, would be released. See *United States v. Walker*, No. 1:13-CR-89-KS-MTP, 2013 WL 6805121, at *7 (S.D. Miss. Dec. 20, 2013). *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *4 (Miss.Ct.App. 2016)

Almost one year after its written request, GP obtained the DMR public records. *Department of Audit et al v. Gulf Publishing Company, Inc.*, 2016 WL 12695 *4 (Miss.Ct.App. 2016).

The Court of Appeals cited Mississippi Ethics Commission Public Records Opinion Number R-13-017 which provides:

The Mississippi Ethics Commission stated in Public Records Opinion No. R-13-017:

[T]he term "public records" under the [MPRA] includes records obtained from a third party and possessed or retained by a law enforcement agency in the course of investigation of criminal matters under the agency's jurisdiction. While those records may not belong to the law enforcement agency, those records, while in possession of the law enforcement agency, are subject to the [MPRA].

Department of Audit et al v. Gulf Publishing Company, Inc., 2016 WL 12695 *4 (Miss.Ct.App. 2016).⁴

Finally, the Court of Appeals ruled that the records sought by Gulf Publishing were investigative reports that were exempt under the Mississippi Public Records Act.

⁴ The Court of Appeals did not cite any case law supporting its decision that the DMR business records were exempt under the Public Records Act.

**BASIS FOR GRANTING THE WRIT OF CERTIORARI PURSUANT
TO MISSISSIPPI RULE OF APPELLATE PROCEDURE 17(a)(1) AND (3)**

1. THE COURT OF APPEALS' STRICT INTERPRETATION OF THE CRIMINAL INVESTIGATIVE REPORTS EXEMPTION DEFEATS THE PURPOSE OF THE MISSISSIPPI PUBLIC RECORDS ACT.

“It is the policy of this state that public records shall be available for inspection by any person unless otherwise provided by this chapter....” § 25-61-2 Mississippi Code (Mississippi Public Records Act).

The Mississippi Public Records Act is to be construed liberally in favor of records being “public records”, and exemptions to disclosure are to be construed strictly and narrowly against secrecy. *Miss. Dep't of Wildlife v. Miss. Wildlife Enforcement Officers' Assoc., Inc.* 740 So. 2d 925, 936 (Miss. 1999). Any doubt considering the records being exempt should be resolved in favor of Gulf Publishing under the Public Records Act, something the Court of Appeals failed to recognize. *Wildlife Fisheries and Parks*, 936.

“In interpreting [the Mississippi Public Records Act] our supreme court has held that any questions of disclosure must be construed liberally, while a standard of strict construction must be applied to any exceptions to disclosure.” *Harrison County Development Commission v. Kinney*, 920 So. 2d 497, 502 (Miss.Ct.App. 2006).

The exemption to the Public Records Act misconstrued by the Court of Appeals is the “criminal investigative reports” exemption found at § 25-61-3(f)(i). That exemption provides

Records that are **compiled** in the process of detecting and investigating any unlawful activity or alleged unlawful activity, the disclosure of which would harm the investigation.... (Emphasis added.)

The ordinary business records sought by Gulf Publishing were not “compiled” by the State Auditor. Instead, they were “compiled” by DMR and long thereafter subpoenaed by the State Auditor and even later by the federal grand jury.

2. AFTER GULF PUBLISHING MOVED TO HOLD THE STATE AUDITOR IN CONTEMPT OF THE CHANCERY COURT’S BENCH OPINION AND SUBSEQUENTLY ENTERED ORDER, THE STATE AUDITOR MOVED THE FEDERAL DISTRICT COURT WHICH ISSUED THE SUBPOENA TO RETURN THE DMR RECORDS TO THE CHANCERY COURT.

The Federal District Court returned the records to the Chancery Court and found that “If the State Auditor is not permitted to comply with the Chancery Court’s Order, a substantial goal of Mississippi public policy will be thwarted – a public policy generally shared by the federal government. ...” *United States v. Walker*, 2013 WL 6805121 (S.D. Miss.). Ironically the federal district court recognized the cherished right of the public to openness in government, which the state appellate court failed to do.

3. EVEN IF THE PUBLIC RECORDS WERE EXEMPT AS CRIMINAL INVESTIGATIVE REPORTS, THE DEPARTMENT OF MARINE RESOURCES AND THE AUDITOR SHOULD HAVE REDACTED THOSE RECORDS FROM THE THOUSANDS OF PAGES OF RECORDS THAT THE AUDITOR TURNED OVER PURSUANT TO THE FEDERAL GRAND JURY SUBPOENA.

Section 25-61-9(2) Mississippi Code (Public Records Act), provides:

- (2) If any public record which is held to be exempt from disclosure pursuant to this chapter contains material which is not exempt pursuant to this chapter, the public body shall separate the exempt material and make the nonexempt material available for examination and/or copying as provided for in this chapter.

Therefore both DMR and the Auditor should have redacted any criminal investigative reports rather than simply deny access wholesale.

4. GULF PUBLISHING IS ENTITLED TO ATTORNEY'S FEES.

Pursuant to § 25-61-15 Mississippi Code (Public Records Act), if the Supreme Court reverses the Court of Appeals Decision, Gulf Publishing should receive the attorney's fees awarded by the Chancery Court.⁵

5. THE STATE AUDITOR AND DEPARTMENT OF AUDIT WERE IN CIVIL CONTEMPT OF THE CHANCERY COURT'S BENCH OPINION AND SUBSEQUENT ORDER.

The Chancery Court correctly found at § 89 of its Judgment:

It comes down to this: If... a party could disobey a judgment and upon that disobedience defend on the ground that in his opinion the judgment was erroneous, we would be well to do away with courts and allow men with all of their differences and diversities of opinion, just and unjust, to take what they could by force. **We would cease to have the rule of law; we would have the rule of the jungle.** (Emphasis added.)

CONCLUSION

For the above stated reasons Gulf Publishing respectfully requests the Supreme Court to grant the writ of certiorari. If the Court of Appeals decision is not reversed, the Mississippi Public Records Act's guarantee that the citizens of Mississippi have a right to access state government records is severely eroded. If the decision is allowed to stand, any public record created by a state or local governmental agency becomes an exempt criminal investigative report simply by going into the possession of a law enforcement agency.

Respectfully submitted this the 2nd day of September, 2016.

GULF PUBLISHING COMPANY, INC.

By: S/ Henry Laird
Henry Laird, Mississippi Bar No. 1774

⁵ The misconduct by the Auditor and Department of Audit also more than justifies the Chancery Court award of the Act's \$100.00 civil penalty. § 25-61-15 Mississippi Code.

CERTIFICATE OF SERVICE

I Henry Laird, do hereby certify that I have electronically filed the foregoing Petition for Writ of Certiorari by using the ECF-System which sent notification of same to all counsel of record:

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This the 2nd day of September, 2016.

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