



MISSISSIPPI ETHICS COMMISSION

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November 15, 2018

VIA U.S. MAIL

Mr. David Wells
109 Janelle Drive
Bay St. Louis, MS 39520

Re: Open Meetings Case No. M-18-017; Wells vs. Mayor & City Councilmen, City of Bay St. Louis

Dear Mr. Wells,

Enclosed please find a copy of the Order of Dismissal in the above referenced case. This Order was issued in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission and was presented to the Ethics Commission at its open meeting on Friday, November 15, 2018.

The hearing officer presented a recommendation to the commission after fully considering all the materials submitted by the parties, as well as the applicable law. The members of the Ethics Commission reviewed the hearing officer's recommendation in advance of the commission meeting, discussed the matter at the meeting, and voted to issue the enclosed order.

Appeals of such orders are governed by Section 25-61-13, Miss. Code of 1972. If you have any questions about this matter, please feel free to contact our office.

Sincerely,

A handwritten signature in black ink that reads "Tom Hood".

TOM HOOD
Executive Director & Chief Counsel,
Mississippi Ethics Commission

cc: Ms. Heather L. Smith
City Attorney, City of Bay St. Louis
P.O. Box Drawer 4248
Gulfport, MS 39502

(Enclosure)
TH/ik

BEFORE THE MISSISSIPPI ETHICS COMMISSION

DAVID WELLS

COMPLAINANT

VS.

CASE NO. M-18-017

MAYOR AND CITY COUNCIL, CITY OF BAY ST. LOUIS

RESPONDENT

ORDER OF DISMISSAL

This matter came before the Commission through an Open Meetings Complaint filed by David Wells against the Mayor and City Council for Bay Saint Louis (the "council"). The council filed a response to the complaint by and through its attorney. The Ethics Commission has jurisdiction over this matter pursuant to Section 25-41-15, Miss. Code of 1972. The hearing officer presented a Recommendation of Dismissal to the Ethics Commission at its regular meeting held on November 15, 2018 in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission. This Order of Dismissal is entered in accordance with Rule 4.6.

I. FINDINGS OF FACT

1.1 Mr. David Wells alleges two violations of the Open Meetings Act by various members of the Mayor and City Council for the City of Bay Saint Louis. First, he states that during the city's regular meeting on July 24, 2018, the members of the council discussed rescinding an agreement with the Water Company of America and possibly entering an agreement with Delta Water, LLC. During that discussion, when Councilman Gary Knoblock asked "where and when did the negotiations with Delta Water take place?" Councilman Josh DeSalvo responded "at my office." After more conversation, Mr. Wells recalls Mayor Michael Favre asking "Are you saying we did something wrong?" Specifically, Mr. Wells complains that "no notice went out to the public of the meeting Councilman DeSalvo stated took place at his office where city business was discussed as required in the Miss. Open Meetings Act, Section 25-41-13(1)." He further states, "I would also like to know exactly who was in attendance. Who are the 'we' Mayor Favre referred to, and where are the minutes?"

1.2 In its response, the city denies it violated the Open Meetings Act. With regard to Mr. Wells' first allegation, the city states:

On July 18, 2018, DeSalvo met with representatives from [Delta Water, LLC] at his business office in Bay St. Louis. No other councilman attended the meeting at DeSalvo's business office; therefore, no Open Meetings Act violation occurred. .
.. In fact, the other councilmen were not invited to or aware of the specifics of this meeting. . .

Upon meeting with the company, DeSalvo thought it was in the best interest of the City to pursue a contract with this company for utility auditing services. DeSalvo then reached out to the Mayor to inform him that the company could be beneficial to the City. DeSalvo asked if a meeting could be set up for the company to talk with the Mayor. On July 19, 2018, a meeting took place at Bay St. Louis

City Hall. DeSalvo invited fellow Councilmen Larry Smith and Buddy Zimmerman to the meeting with the Mayor and Delta Water. At no time did DeSalvo, Smith, or Zimmerman discuss the meeting with any of the other councilmen. Additionally, at no time did DeSalvo, Smith, or Zimmerman engage in contract negotiations with Delta Water. In fact, a draft contract was never presented or discussed at any of the above mentioned meetings or otherwise. The meeting was simply for informational purposes to determine if the company should be invited to attend a Council meeting to make a full presentation....

DeSalvo, Smith, Zimmerman and the Mayor were pleased with the information received from Delta Water and felt that a presentation should be brought before the Council for consideration. The company was invited to make a presentation at a legally scheduled and noticed budget workshop later the same evening on July 19, 2018.

1.3 Mr. Wells second allegation is that in early June, a quorum of the council and the Mayor attended a "pre-arranged, complimentary lunch . . . to discuss a development project of [a local business developer]." Mr. Wells states that the lunch was attended by Mayor Favre, Councilmen Gene Hoffman, Larry Smith, Josh DeSalvo and Gary Knoblock." Mr. Wells argues:

This pre-arranged meeting of these public officials was also not advertised to the public, and was arranged for the discussion of city business. Were any minutes taken at this meeting? I can see no reason why this business venture could not be discussed at a regular Council meeting in front of the public.

1.4 In its response, the city again denies it violated the Open Meetings Act. With regard to Mr. Wells' second allegation, the city states:

The City assumes that Wells is referring to a lunch that occurred on May 9, 2018, at 200 North Beach restaurant in Bay St. Louis. A local developer did host a gathering for the Mayor, certain Councilmen, and officials from a local community college. The City Zoning/Building Administrator . . . handled the invitations to the lunch. She invited the Mayor along with Councilman Larry Smith, Councilman Gary Knoblock, and Councilman Gene Hoffman. The Mayor was present at the start of the lunch along with Councilman Larry Smith, Councilman Gary Knoblock, and Councilman Gene Hoffman. The developer wanted to discuss the possibility of bringing the community college into one of his properties located within the City limits. Ultimately, Councilman Larry Smith, not realizing who was already invited to attend the lunch, invited Councilman Josh DeSalvo to join the lunch. Councilman Josh DeSalvo was the last to arrive at the lunch and in fact entered the restaurant after the others had ordered.

Multiple Councilmen immediately noticed that if he joined the lunch group, a quorum of Councilmen would be present. Even though City business or actions were not being discussed, Councilman DeSalvo thought it would be best to avoid the appearance of an improper and unnoticed meeting. For this reason, Councilman DeSalvo stated to his fellow Councilmen, "I thank you all for the

invite, however, we have too many Councilman here, and I am leaving. We can't have a quorum." Councilman DeSalvo turned to leave, and the Mayor asked him to grab lunch with him at a separate table. Councilman DeSalvo and the Mayor proceeded to eat lunch at a separate table across the room and completely separated from the group. Councilman DeSalvo never joined the lunch that took place with the local business owner and never engaged with the other table. Councilman DeSalvo's conversation was limited to greeting his fellow Councilmen and dismissing himself from the situation. Not long after Councilman DeSalvo arrived, Councilman Hoffman had to leave the restaurant. However, even with Councilman Hoffman leaving, Councilman DeSalvo and the Mayor did not return to the table with the developer. The officials from the community college, other Councilmen, and the developer concluded their lunch and exited the building prior to Councilman DeSalvo and the Mayor leaving the building.

A quorum was never present and an official meeting did not occur. At no point was any individual from the City attempting to circumvent the Open Meetings Act. For the same reasons as stated above, there was no need for the lunch with the developer to be noticed to the public.

II. 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 Section 25-41-5(1) of the Open Meetings Act directs that all official meetings of public bodies are public meetings and shall be open to the public. Section 25-41-3, Miss. Code of 1972, 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; 'meeting' also means any such assemblage through the use of video or teleconference devices." "[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. Official acts may be taken when a quorum of the public body assembles. Gannett at 466.

2.3 Accordingly, discussions or deliberations among a quorum of board members outside a properly noticed open meeting, whether physically or electronically assembled, can violate the Mississippi Open Meetings Act, if such deliberations concern matters over which the public body has supervision, control, jurisdiction or advisory power. See, City of Columbus v. The Commercial Dispatch, 234 So.3d 1236, 1240 (Miss. 2017) (“If deliberations that ‘go into making’ or ‘lead to’ public policy occur at a gathering of board members, the Act unequivocally states that those gatherings are ‘public business and shall be conducted at open meetings.’ The Act carves out exceptions only for “chance meetings or social gatherings of members of a public body” or “executive sessions.”); see also, Bd. of Trustees at 278. (“[T]his Court holds 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.”)

2.4 However, no violation occurs when information is merely conveyed to members of a public body, even if more than a quorum of the board is receiving that information from, for example, a city employee. Such communication is essential to the proper administration of governmental functions. Likewise, individual board members are free to communicate with other individual board members, so long as these communications do not involve a quorum of the public body. See, e.g. Williams v. Lauderdale County Bd. of Supervisors, Miss. Ethics Comm. Open Meetings Case, Final Order M-14-001.

2.5 Finally, the Open Meetings Act does “not apply to chance meetings or social gatherings of members of a public body.” Section 25-41-17. Moreover, 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 with 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 (emphasis added).

2.6 This case involves the governing body of the City of Bay Saint Louis, which is organized under the mayor-council form of government. The governing body is comprised of a seven-member council and a mayor. “The mayor may attend meetings of the council and may take part in discussion of the council but shall have no vote except in the case of a tie on the question of filling a vacancy in the council, in which case he may cast the deciding vote.” Section 21-8-17. Further, “a majority of the members [of the council] shall constitute a quorum, and the affirmative vote of a majority of the quorum at any meeting shall be necessary to adopt any motion, resolution or ordinance, or to pass any measure whatever unless otherwise provided in this chapter.” Section 21-8-11. As a result, the mayor is not a member of the council, and his presence is not counted when determining whether a quorum of the council has assembled.

2.7 Since the council has seven members, a gathering of at least four (4) councilmen constitutes a quorum. With regard to the complainant’s first allegation, it appears that only Councilman DeSalvo met with representatives of Delta Water, LLC on July 18, 2018. It appears

that Mayor Favre and three (3) councilmen, DeSalvo, Smith and Zimmerman, met with Delta Water, LLC on July 19, 2018.

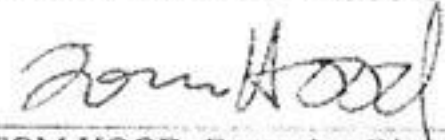
2.8 Again, the mayor and the council members are not prohibited from discussing matters of city business with each other where the total number of participants in the conversation or conversations is less than a quorum. Further, the city states, “[a]t no time did DeSalvo, Smith, or Zimmerman discuss the meeting with any of the other councilmen.” If the mayor or one of these councilmen had telephoned and discussed the matters with any of the other four council members, these discussions could have resulted in assembling a quorum of the board in piecemeal fashion, circumventing the Open Meetings Act. However, these two meetings with Delta Water cannot be found to collectively constitute a “meeting” of the council within the meaning of the Act. A gathering including the mayor and three council members is not prohibited under the Open Meetings Act.

2.9 With regard to the complainant’s second allegation, the Open Meetings Act does “not apply to chance meetings or social gatherings of members of a public body.” Section 25-41-17. The facts in this case show that three (3) councilmembers attended a lunch hosted by a local developer. When a fourth councilman (DeSalvo) appeared, he realized that his presence at the lunch meeting would constitute a quorum of the council, so he and Mayor Favre ate lunch separately, but at the same time and in the same restaurant. The mere continued physical presence of a quorum within the restaurant does not violate the Open Meetings Act. This gathering of the council was a chance, informal or impromptu gathering where no policy matters were deliberated by a quorum of the council. While a quorum was physically present within the restaurant, members of the council were at separate tables, such that a quorum was not present at any one table, and there was no interaction i.e., “deliberation,” between the tables. As such, this is not a “meeting” under the Act, and no violation of the Open Meetings Act occurred.

WHEREFORE, the complaint is hereby dismissed this the 9th day of November, 2018.

MISSISSIPPI ETHICS COMMISSION

BY:



TOM HOOD, Executive Director