



Ethics in Government

2021 Joint Solid Waste Management
& Recycling Conference

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Disclaimer

- This is not legal advice. This presentation will be a general discussion of legal topics relevant to interactions with state and local government.
- If you need legal advice on a specific topic, please contact me after the presentation

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Mississippi Ethics Commission

Administers and enforces the **Ethics in Government Law** by

- Keeping Statements of Economic Interest;
- Investigating alleged violations of law;
- Issuing written advisory opinions.

The Commission also enforces the

- **Open Meetings Act** and
- **Public Records Act**

The Commission also issues advisory opinions on the **Campaign Finance Law** and levies fines for late filing of campaign finance reports.

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Mississippi Ethics in Government Act

- **Section 25-4-101 – Declaration of Public Policy**
- The Legislature declares that elective and public office and employment is a **public trust** and any effort to realize **personal gain** through **official conduct**, other than as provided by law, or as a natural consequence of the employment or position, is a **violation of that trust**. Therefore, public servants shall endeavor to **pursue a course of conduct which will not raise suspicion among the public** that they are likely to be engaged in acts that are in **violation of this trust** and which will **not reflect unfavorably upon the state and local governments**.

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Mississippi Ethics in Government Act

- **WHO ARE PUBLIC OFFICIALS AND GOVERNMENTAL ENTITIES?**
- **“Public servant”** means:
 - i. Any elected or appointed official of the government;
 - ii. Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the State of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or
 - iii. Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

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Mississippi Ethics in Government Act

- **“Government”** means the state and all political entities thereof, both collectively and separately, including, but not limited to:
 - i. Counties;
 - ii. Municipalities;
 - iii. All school districts;
 - iv. All courts; and
 - v. Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

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Mississippi Ethics in Government Act

- **“Governmental Entity”** means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.
 - All definitions are found in Miss. Code Section 25-4-105(3).

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Mississippi Ethics in Government Act: Eight Basic Prohibitions

1. Board Member Contracts
2. Use of Office
3. Contracting
4. Purchasing Goods and Services
5. Purchasing Securities
6. Insider Lobbying
7. Post-Government Employment
8. Insider Information

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OPEN MEETINGS ACT

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OPEN MEETINGS ACT The Basics

- Public meetings must be open to public.
- Executive session must follow specific procedure and only for certain reasons.
- Notice of meeting must be given, and minutes must be kept.
- Social gatherings are not “meetings” unless official business is discussed.
- Act never requires executive session.

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OPEN MEETINGS ACT The Basics

- Commission may order public body to comply with law.
- Commission may impose \$500 fine for first offense, \$1,000 for subsequent offense.
- Commission can mediate disputes.
- Either party may appeal *de novo* or enforce Ethics Commission order in local chancery court.

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WHAT IS A MEETING?

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Columbus v. Commercial Dispatch

Miss. Sup. Ct.; Sept. 7, 2017

- Deliberations of a quorum must take place in a proper public meeting.
- When a quorum splits into separate groups and discusses the same matter of city business with the same person, a quorum is deliberating, and a “meeting” has occurred.
- 2-2-1 Rule for County Government

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Case No. M-12-020

McGovern vs. Starkville

- Retreats conducted by the Board of Aldermen are meetings subject to the Open Meetings Act
- Even if no official action is taken at a meeting, minutes must be kept
- Committees established by the board to conduct business of the city are subject to the Open Meetings Act

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Telephonic Meetings Section 25-41-5

- All members can participate by phone.
- They can be in different locations, so long as one location is open to the public.
- Equipment (speaker phone) must be located in place where board normally meets and allow members of board and public to hear deliberations.
- Votes must be clearly audible or visible to members of the board and public.

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WHAT ABOUT EMAIL or TEXT?

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Case No. M-17-012
Neely vs. Yazoo County CVB

- Email exchange among a quorum of a board about a matter under their authority can violate the Open Meetings Act.
- A quorum of a board can deliberate board business **ONLY** in a properly noticed public meeting.
- Board members should avoid using email to communicate with each other about board business.

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EXECUTIVE SESSION PROCEDURE

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Hinds County Bd. v. Common Cause (1989)

- The purpose ... is to discourage private meetings of public bodies.... The technical requirements of the Act not only enlighten the public that there exists a specific, valid reason for going into executive session, but also make it somewhat onerous and time consuming for the board to do so. A board required by law to follow the procedure of ... § 25-41-7 will no doubt be less inclined to go into executive session.... [551 So.2d 107, 112]

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OPEN MEETINGS ACT Notice

- Times and places of regular meetings should be set in minutes.
- For recess, adjourned, interim or special meetings, notice must be posted in building where board normally meets within one hour of calling the meeting.
- Copy of the notice must be placed in the minutes.

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MINUTES

- Minutes must be kept for all meetings, whether in open or executive session.
- Minutes must be “recorded” within 30 days after meeting.
- Minutes must be available for public inspection

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CONTENT OF MINUTES

Minutes must show:

- Members present and absent;
- Date, time and place of meeting;
- Accurate recording of any final actions;
- Record, by individual member, of all votes taken;
- Any other information requested by the public body

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PUBLIC PARTICIPATION

Case No. M-10-007

Townes vs. Leflore Co. Sch. Bd.

- Public body may make and enforce reasonable rules for conduct of persons attending meetings, including length of time allowed to comment.
- Public body is not required to allow members of the public to speak at meetings.

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PUBLIC PARTICIPATION

Case No. M-10-004

Cockrell vs. Canton Bd. of Ald.

- Public body may not ban cameras or other recording devices from an open meeting.
- Public body may make and enforce reasonable rules for conduct of persons attending meetings, including placement and use of recording devices.

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PUBLIC BID LAWS

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Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**
 - All agencies and governing authorities shall purchase
 - Their commodities and printing;
 - Contract for garbage collection or disposal;
 - Contract for solid waste collection and disposal;
 - Contract for sewage collection and disposal;
 - Contract for public construction; and
 - Contract for rentals

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Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**
 - Purchases of \$5,000 and less, exclusive of freight and shipping charges
 - i. No competitive bids required;
 - ii. No advertising required;
 - iii. Does not prohibit from seeking bids or advertising

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Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**
 - Purchases of over \$5,000 but not over \$50,000, exclusive of freight and shipping charges
 - i. May be made from the **lowest and best bidder** without publishing or posting advertisement for bids; provided that;
 - ii. Obtain two competitive written bids
 - Governing Authorities purchasing commodities may authorize its purchasing agent or clerk, or his designee, to accept the lowest and best competitive written bid.
 - Authorization shall be made in writing by the governing authority
 - Purchasing agent or clerk shall be liable for any penalties or damages imposed by law for a violation of this act.

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Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**

- Purchases over \$50,000
 - May be made from the **lowest and best bidder** after
 - Advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper
 - Counting days do not include the day of publication or the day of the opening
 - Designee may be appointed to open bids
 - If no bids are received, must rebid
 - Reverse Auction, shall be primary method for receiving bids during the bidding process.
 - If purchasing entity determines that a reverse auction is not in the best interest of the state, then the Public Procurement Review Board must approve that determination.

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Public Bidding Laws

- **LOWEST AND BEST BIDS**

- If a governing authority accepts a bid other than the lowest bid actually submitted, then it must place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid.
- Shall include freight and shipping charges
- Life-cycle costing, total cost, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation.
- Shall not accept a bid based on items not included in the specifications

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Public Bidding Laws

- **COMPETITIVE BIDS**

- Bids are developed based upon comparable identification of the needs and are developed independently and without knowledge of other bids or prospective bids

- **Best Bid Negotiations – Apply to Construction Only**

- If the lowest and best bid is not more than 10% above the amount of funds allocated, then the governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the funds allocated.

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Public Bidding Laws

- **Lease Purchase**

- Includes equipment, furniture and software
- Financing may also be obtained from the vendor or from a third party source after having solicited and obtained at least two written competitive bids without advertising
- All lease purchases are exempt from State sales tax, use and ad valorem taxes
- Interest paid on any lease purchase shall be exempt from State income taxes

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Public Bidding Laws

• EMERGENCY PURCHASE PROCEDURE

- If an emergency exists regarding the purchase of commodities or repair contracts, and the delay to conduct competitive bidding would be detrimental to the interests of the state, the governing authority has authority to approve the bill.
- At the next board meeting, documentation of the contract, including a description of the purchase, the price and the nature of the emergency must be presented to the board and placed on the minutes of the board.
- Total purchases shall only be for the purpose of meeting needs created by the emergency situation

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Violations and Penalties

▪ Civil and Criminal Liability

- Unlawful to fail to make purchases without complying with the public purchasing law – Sections 31-7-55 & 31-7-57
 - Misdemeanor – fine and/or imprisonment in county jail
 - If intentional, willful or knowing, public officials can be removed from office.
 - If divert benefits to personal use, then depending on amount can be a misdemeanor or felony [if over \$500].
 - Public official of a governing authority, executive head or employee who authorizes the expenditure of money to an object not authorized by law can be personally liable for the amount misappropriated.

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ETHICS IN GOVERNMENT LAW

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ETHICS PROHIBITIONS

- Two Prohibitions
 - Constitutional Prohibition
 - Section 109
 - Legislative Prohibition
 - Miss. Code Section 25-4-105

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Section 109, Miss. Constitution of 1890

- No public officer or member of the legislature shall be
 - **interested, directly or indirectly**, in any
 - **contract** with the state, or any district, county, city, or town thereof,
 - **authorized** by any law passed or order made by any board of which he may be or may have been a member,
 - **during the term** for which he shall have been chosen, **or within one year** after the expiration of such term.

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SECTION 109

- Section 109 only applies to members of boards and the Legislature.
- There must be some sort of contract but does not have to be a written contract.
- The conflict arises when the board funds or otherwise authorizes the contract.
 - Even if the individual member does not vote, he or she may be in violation.
 - Recusal or absentee does not cure a Section 109 Violation
- The prohibition continues until a board member has been out of office for one year.

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Basic Prohibitions for Public Servants Miss. Code Ann 25-4-105

- Use of Office
- Contracting
- Purchasing Goods and Services
- Purchasing Securities
- Insider Lobbying
- Post Government Employment
- Insider Information

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USE OF OFFICE

- No **public servant** shall **use his official position** to obtain, or attempt to obtain, **pecuniary benefit** for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any **relative** or any **business with which he is associated**.

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USE OF OFFICE

- No person may intentionally **use or disclose information** gained in the course of or by reason of his official position or employment as a public servant in any way that could result in **pecuniary benefit for himself, any relative, or any other person**, if the information has not been communicated to the public or is not public information.

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USE OF OFFICE

“**Relative**” is the public servant’s

- spouse,
- child,
- parent,
- sibling (brothers and sisters) or
- spouse of a relative (in-laws).

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USE OF OFFICE

'Business with which he is associated' means public servant or his relative is

- officer, director, owner, partner, employee
- holder of more than ten percent (10%) of the fair market value or
- from which he or his relative derives more than \$2,500 in annual income or
- over which such public servant or his relative exercises control.

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CONTRACT PROHIBITION

- No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member

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CONTRACTOR PROHIBITION

- No public servant may be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment
- No public servant may have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

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INFLUENCE OF GOVERNMENT DECISION

- Perform any service for any compensation during his term of office or employment by which he attempts to influence a decision of the authority of the governmental entity of which he is a member

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POST GOVERNMENT EMPLOYMENT

- No public servant shall perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was **directly concerned or in which he personally participated during the period of his service or employment.**

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IMPACT OF VIOLATION

- Any contract made in violation of this section may be declared **void** by the governing body of the contracting or selling authority of the governmental subdivision or a court of competent jurisdiction and
- The contractor or subcontractor shall retain or receive only the reasonable value, with no increment for profit or commission, of the property or the services furnished prior to the date of receiving notice that the contract has been voided.

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IMPACT OF VIOLATION

- Upon a finding by clear and convincing evidence that any Person has violated any provision of this article, the commission may:
 - Censure the person or
 - Impose a civil fine of not more than Ten Thousand Dollars (\$ 10,000.00), or both.
 - May further recommend to the Circuit Court for Hinds County that
 - Elected public servant be removed from office.
 - Non-elected public servant be removed from office, suspended, or subjected to a demotion or reduction in pay.

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IMPACT OF VIOLATION

- The commission may order restitution or other equitable or legal remedies to recover public funds or property unlawfully taken, as well as unjust enrichment, although not public funds.
- Any pecuniary benefit received by a public servant in violation of this article may be declared forfeited by the commission for the benefit of the governmental entity injured.

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EXISTING EXCEPTIONS TO PUBLIC BIDDING LAWS

• EXCEPTIONS TO BIDDING REQUIREMENTS

- Outside equipment repairs
- In House equipment repairs
 - Parts may be purchased; however, cannot purchase an entire engine or transmission
- Intergovernmental sales and transfers
- Governmental Equipment Auctions
 - Purchased from federal, state or local government
- Single source items