BEFORE THE MISSISSIPPI ETHICS COMMISSION

STEVE ROGERS **COMPLAINANT**

VS. **OPEN MEETINGS CASE NO. M-16-017**

LOWNDES COUNTY BOARD OF SUPERVISORS **RESPONDENT**

ORDER OF DISMISSAL

This matter came before the Mississippi Ethics Commission through an Open Meetings Complaint filed on September 19, 2016, by Mr. Steve Rogers against the Lowndes County Board of Supervisors (hereinafter referred to as the "board" or the "county"). On September 30, 2016, the Board filed a response to the complaint by and through its attorneys.

The hearing officer presented a Recommendation of Dismissal to the Ethics Commission at its regular meeting held on July 14, 2017, in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission. The Ethics Commission approved entry of this Order of Dismissal at that meeting.

I. FINDINGS OF FACT

1.1 Mr. Steve Rogers asserts the Lowndes County Board of Supervisors violated the Mississippi Open Meetings Act, alleging that various members of the Lowndes County Board of Supervisors met in non-quorum groups and discussed hiring a consultant for the county to evaluate its parks and recreation programs outside a properly noticed open meeting. He contends that "[t]he President of the Lowndes County Board of Supervisors, Harry Sanders, organized a number of non-quorum gatherings with the apparent purpose of keeping the discussions from being held in public in order that the stages of the deliberative process be concealed from the public in violation of the Mississippi Open Meetings Act." [Complaint, Para. 1.] That is, that these non-quorum discussions amounted to a de-facto or piecemeal gathering of a quorum of the board in violation of the Mississippi Open Meetings Act.

1.2 The complainant asserts that these "discussions, and possibly the letter from the Board President with copies to the entire board, appear to have involved deliberative stages of the decision making process that ultimately concluded with the formation and determination of public policy, the retention by the County of a consultant." [Complaint, Para. 6.] Specifically, even though each discussion may have been limited to two supervisors (less than a quorum of the board); all of the discussions should be considered collectively together, in essence involving more than a quorum of the board, thus violating the Act.

1.3 The board, in its response, does not dispute that several non-quorum discussions occurred between supervisors, but denies the board violated the Open Meetings Act. The board asserts that "no official action [was] taken nor could [have] been taken under the circumstances." [Response, Para. 5.] Further, aside from the conversation between Board President Sanders, Supervisor Bill Brigham and a consulting firm; all of the discussions between supervisors were

characterized as simply as efforts to inform board members "that Supervisor Sanders was considering placing the employment of a consultant on the agenda for the Board's consideration." Id. The conversation between Supervisors Sanders, Brigham and the consulting firm was described solely as a "fact-finding encounter" whose purpose was to "gather information on the cost and feasibility of a study concerning parks and recreation in Lowndes County." Id.

1.4 Central to this case then, is whether these discussions should be considered collectively, as a series of non-quorum discussions intentionally arranged to circumvent the Open Meetings Act. The conversations are described below.[1] Specific dates for each conversation is unknown, but each likely took place between the Lowndes County Board of Supervisors meetings on June 6, 2016 and June 17, 2016.

1. Two discussions between Board President Harry Sanders and Supervisor Jeff Smith, as described below:

    - During the June 17, 2016 meeting, Board President Sanders recounted: "I have talked to [Smith] twice, I went to him on two separate times, once at the county administrator's office, and at the back of the board meeting [room] after our last [board meeting]. I told him exactly what I was thinking about doing and he said he had no problem with it whatsoever."

    - During the June 17, 2016 meeting, Supervisor Smith recollected that: "I voiced my frustration with recreation. We talked about the possibility of bringing someone in to look at our recreation, but I was also at the same time told we were just looking at it, and there was nothing concrete yet, so don't bring it up. It wasn't my desire to try to hide anything or be deceptive. I was asked not to mention it because we as a board had not talked about it openly."

    - In an affidavit dated June 2, 2017, Smith clarified: "Sometime last year I was at the Administration Building and heard Supervisor Harry Sanders discussing the evaluation of the Park and Recreation Board with the County Administrator. It was a very general discussion, and Supervisor Sanders told me he was considering bringing the matter before the Board of Supervisors for discussion in the future. At no time did Supervisor Sanders ask me to vote a certain way. He said he was making me aware of the issue."

    - In his June 1, 2017 affidavit, Board President Sanders clarified "I never had a formal meeting with any Supervisor but feel sure I mentioned to some, if not all, of the Supervisors that I was considering

[1] The descriptions of these discussions were obtained from the information attached to the complaint, including the news articles published by the Commercial Dispatch on June 15 and 18, 2016, the Packet on June 23, 2016 and the video of the June 17, 2016 Lowndes County Board of Supervisors meeting.

bringing the matter of hiring a consultant before the Board. A decision as to any board action was never discussed prior to reviewing the consultant's report as I had no idea what, if any, findings would be offered. I only recall one conversation with Supervisor Smith, and I do not recall ever discussing the opinions of Supervisors who were not in my presence as I did not know their opinions."

2. A discussion between Board President Sanders, Supervisor Bill Brigham and the consultant, characterized by the county as a fact-finding endeavor, to "gather information on the cost and feasibility of a study concerning parks and recreation in Lowndes County."

   - In an affidavit dated June 1, 2017, Board President Sanders clarified: "I set up a meeting to discuss the scope and cost of this endeavor and asked Supervisor Brigham to accompany me to the meeting. At this meeting we discussed the depth of the evaluation, what we expected to learn, the costs involved and the time frame."

   - In a June 1, 2017 affidavit, Supervisor Brigham stated: "At the request of Supervisor Harry Sanders we met with a consultant from Jackson, Mississippi concerning an evaluation and assessment of our Park and Recreation operation. We spoke about the extent of the assessment and the estimated cost involved."

3. A discussion between Supervisor Brigham and Supervisor Leroy Brooks. During the June 17, 2016 board meeting, Board President Sanders stated he asked Supervisor Brigham to let Supervisor Brooks know that Board President Sanders and Supervisor Brigham had met with the consultant.

   - During the June 17, 2016 meeting Supervisor Brooks stated: "[Brigham] came and talked to me and I was very adamant about this. I said that since we were going this route that there should have been a joint meeting with the city and the CLRA and the board to say exactly what you said. I'm having a problem with this stuff happening and we're being told afterward. You [Sanders and Brigham] made a trip to meet with the guy, and that's fine, but I think we had an ample opportunity last week to bring this up and say look here guys, there are some issues with the park and [Sanders and Brigham] are going to venture out and we're going to inform y'all. [Smith] and I get told the details after it's been decided."

   - In an affidavit dated June 1, 2017, Supervisor Brooks clarified: "Sometime during the latter part of May or early June 2016, [Supervisor] Brigham stopped by my office. . . . We talked about a variety of issues as we always do during our visits with one another. . . . During our discussion, Bill mentioned the Columbus-Lowndes County Recreation Authority and asked how I felt about the county

and city splitting up. I advised him that I wasn't really for it, however, I would remain open minded about the matter. He further stated his interest in hiring a consultant to make a recommendation to the Board of Supervisors. I told him I wasn't really interested in going that route and probably would not support it. That was the end of the conversation."

- In his affidavit dated June 1, 2017, Supervisor Brigham recalled: "In a [this] general conversation with Supervisor Leroy Brooks, I mentioned the possibility of the county operating its own Park and Recreation Program. Mr. Brooks stated he would look at any report and consider same in deciding whether he would support same. I do not recall discussing the opinions of any Supervisors who were not present, but I knew Supervisor Sanders was concerned with the operation of the Park and Recreation Board and this is why he was seeking a professional evaluation."

4. Board President Sanders also sent a letter to Columbus Mayor Robert E. Smith dated June 9, 2016, advising the mayor that he would "bring before the Lowndes County Board of Supervisors a proposal to hire a consultant to explore the organization, design, efficiency, and feasibility of the current Park and Recreation operations." A copy of the letter was distributed to each of the Lowndes County Supervisors.

- During the June 17, 2016 meeting, Board President Sanders recounted: "I asked [Brigham] to go by and see you [Brooks], and you made one suggestion. You suggested I send a letter to the mayor and the city council and let them know what my plans were and what we were going to do. I did that."

- In his June 1, 2017 affidavit, Board President Sanders clarified: "I recall discussion concerning notification to the City and Supervisor Brooks suggested it. I do not recall specifically when this occurred, but I was in agreement that if we decided to do an evaluation we certainly should make the City aware.

- In his June 1, 2017 affidavit, Supervisor Brigham stated: "Concerning a letter to the City, I remember Mr. Brooks bringing the matter up, but it was in the nature of if it is decided to hire a consultant, we should promptly notify the City."

- In his June 1, 2017 affidavit, Supervisor Brooks recollected: "As to discussions concerning a letter notifying the city of the evaluation; I do recall being of the opinion the city should be made aware of any evaluation, but I do not recall specifically when I stated this."

1.5 On June 17, 2016, the Lowndes County Board of Supervisors met in a properly noticed open meeting and voted 3 to 2 to hire a consulting firm to conduct a study of the Columbus-Lowndes Recreation Authority, compensation to the consultants not to exceed $4,000.00. The motion to hire a consultant was vigorously discussed by the board members for almost 35 minutes during the board meeting. The rest of the June 17, 2016 board meeting was conducted in about 15 minutes. Board President Sanders, and Supervisors Brigham and John Holliman voted in favor of the motion. Supervisors Smith and Brooks voted against.

1.6 During the discussion of this motion, Supervisor Brooks expressed his frustration with how supervisors are informed about county business, and that he would have preferred earlier notification from Board President Sanders that he was planning to meet with the consultants. He initially stated that "[w]hat I want to see is us come to this board room collectively and talk about the issues, and say this is the direction you want to go, and say this is ok, but not after the fact." Supervisor Brooks described his conversation with Supervisor Brigham:

> When [Brigham] came to me, it was like 'this is what we're going to do' and the decision had already been made. It shouldn't be like that. When an idea comes into your head, we should sit down at this table and talk about it. If I'm not going to be part of the washing, I don't want to be part of the rinsing.

He went on to state:

> I asking as humbly as I can, when an idea go off in your head, wherever I am, send me an email, text or call and say we're getting ready to do this, let's talk about it. . . . My only concern is not being at the table.

1.7 Board President Sanders responded that, "I think there's been transparency about this and there's been communication going on about this. I've tried to be transparent about this and I don't want to get in trouble like the [City of Columbus] did by having illegal meetings and have the Ethics Commission [fine us]. I'm not paying $500. . . .There's been as much communication and transparency about this as you can have."

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 25-41-3, 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. "The Legislature does not indicate that official acts must be taken in order for the gathering to be considered a meeting." Gannett at 466.

2.3 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).

2.4 In this case, there were four separate non-quorum discussions between various supervisors. It appears the first two were conversations between Board President Sanders and Supervisor Smith, where Supervisor Smith expressed his frustration with the county's current handling of its recreation facilities, and Board President Sanders said that the county should explore hiring a consultant to look at the county's recreation program. Next, Board President Sanders and Supervisor Brigham then had a conversation with a recreation consultant, RF Outdoor Consulting, LLC, which was described as a fact-finding encounter "to gather information on the cost and feasibility of a study concerning parks and recreation in Lowndes County." Finally, there was a discussion between Supervisors Brigham and Brooks, to inform Supervisor Brooks that "Supervisor Sanders was considering placing the employment of a consultant on the agenda for the Board's consideration." It does not appear that any of these discussions were purposefully arranged to circumvent the Open Meetings Act.

2.5 Clearly, a violation of the Open Meetings Act can occur when a quorum of the board (outside a properly noticed open meeting), shares information or opinions about a matter under their authority. The exchange of communications about such matters between or among board members is a "deliberation." Deliberations are "official acts," within the meaning of the Open Meetings Act. Gannett at 466, ¶ 15-16. Therefore, board members are prohibited from deliberating matters of county business with each other when the total number of participants is at least a quorum.

2.6 However, no violation occurs when information is merely conveyed to members of the board, even if more than a quorum of the board is receiving that information from, for example, a county 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 members.

2.7 The evidence in this case shows that the members of the Lowndes County Board of Supervisors appear to be very cognizant of strictures of the Open Meetings Act. As such, the initial fact-finding conversation with the consultant was limited to only two board members. This case is unlike either Williams v. Lauderdale County Board of Supervisors, Miss. Ethics Comm. Open Meetings Case, Final Order M-14-001[2] or Gregory v. City of Columbus, Miss. Ethics Comm. Open Meetings Case, Final Order M-14-002[3] where multiple pre-arranged non-quorum meetings of board members were purposefully arranged so that a quorum of the board could meet with consultants outside a properly noticed open meeting. In Williams and Gregory, these non-quorum gatherings involved the "deliberative stages of the decision-making process that lead to formation and determination of public policy" regarding matters under the authority of the board.

2.8 In Williams, the Lauderdale County Board of Supervisors set up pre-arranged meetings between a consultant and the members of the board of supervisors, whereby a quorum of the board (albeit in separate meetings of less than a quorum) intended to discuss and determine matters squarely within the control and jurisdiction of the board. The central facts of that case are that the board members divided into two separate groups of less than a quorum of the board and conducted separate meetings about the same subject, with the same consultant, on the same day. The purpose of the meeting was to consider information presented by the consultant regarding the amount of money the county could borrow through a bond issue without raising taxes and without precluding another bond issue at the beginning of the next term of office. The consultant discussed this same topic with all four supervisors. These two separate pre-arranged meetings circumvented the Open Meetings Act by avoiding a physical gathering of a quorum at the same place at the same time. These private gatherings were clearly intended to exclude the public from the deliberations by the board members about a matter of public concern and should have only occurred at a properly noticed public meeting of the Board.

2.9 In Gregory[4], on four separately identified occasions, the mayor purposefully arranged several meetings where the city council was divided into two groups and conducted

[2] An appeal of the Final Order was filed with the Chancery Court of Lowndes County, Cause No. 1:14-CV-00716-KMB. The Chancery Court affirmed the Final Order of the Ethics Commission in its order on May 24, 2016. The City of Columbus filed an appeal of the Chancery Court's decision with the Mississippi Supreme Court, Cause No. 2016-CA-00897, which is still pending..

[3] An appeal of the Final Order was filed with the Chancery Court of Lauderdale County, Cause No. 15-052-M, which is still pending.

[4] On appeal, the Lowndes County Chancery Court upheld the Ethics Commission's Final Order in Gregory, distinguishing Gregory from another Open Meetings case, Mason v. City of Aberdeen, Miss. Ethics Comm. Open Meetings Case, Final Order M-10-001. In Mason, the Ethics Commission held that there was no violation of the Open Meetings Act when a quorum of the city's aldermen were together in an impromptu gathering. The Chancery Court stated "The meeting [in the Mason case] was not pre-arranged like the meetings in this case by Columbus. The meetings held by Columbus in this case were specifically held with a non-quorum present to avoid the

meetings each involving less than a quorum of the council. These meetings were pre-arranged and, while conducted separately; all involved the mayor, the same consultants, the same subject-matters and were held on the same days. Since these meetings included deliberations by the council members concerning matters specifically under the jurisdiction of the council, these pre-arranged gatherings each collectively constituted a "meeting" of the council within the meaning of the Act, as they were clearly intended to circumvent the Act and exclude the public from the deliberations by councilmembers about a matter of public concern.

2.10 Contrarily, in this case, there is insufficient evidence that the one-on-one discussions between the supervisors were purposefully arranged to circumvent the Open Meeting Act. This case is more analogous to Commercial Dispatch v. City of Columbus, Miss. Ethics Comm. Open Meetings Case, Final Order M-15-008. In Commercial Dispatch, the mayor had six separate conversations with each of the city's councilmembers regarding the operation of a small arms firing range within the city. The mayor acknowledged that he called three councilmembers to solicit their opinions, but stated that he specifically limited his calls to three councilmembers, as to avoid deliberating an issue of public concern with a quorum of the city council. After these calls, the mayor had impromptu discussions with the remaining three councilmembers, when he was approached by these councilmembers, and in each discussion, the topic of the small arms firing range was raised.

2.11 The facts of the Commercial Dispatch case revealed that the instances where the mayor was approached, separately, in person, by three councilmembers, were chance or impromptu encounters as allowed under Section 25-41-17. In that case, it was established that the mayor did not discuss the opinions of the council members with other council members at any time, and that none of the council members knew that the mayor had discussed the operation of the small arms firing range with the other council members. No evidence was offered to show that a quorum of the council had communicated with each other regarding the operation of the small arms firing range, either directly or indirectly through the mayor. The lack of discussion among the council members precluded a finding that the "deliberative stages of the decision-making process that lead to formation and determination of public policy" took place outside a properly noticed open meeting.

2.12 In this case, the two discussions between Board President Sanders and Supervisor Smith occurred prior to the discussion with the consultant and appear to have been chance or impromptu encounters with Supervisor Smith conveying his ongoing frustration with the county's current recreation system and Board President Sanders expressing his idea of finding a consultant for the county to help the supervisors with the county's recreation system.

2.13 The next question then, is whether the discussion between Board President Sanders, Supervisor Brigham and the consultants should be considered together with the prior discussions between Board President Sanders and Supervisor Smith. If considered together, these discussions would collectively involve a quorum of the Lowndes County Board of Supervisors. However, as noted above, the discussions between Board President Sanders and Supervisor

---

consequences of the Open Meetings Act. The discussions not open to the public led to official action by the Columbus quorum when they met." Gregory, Cause No. 1:14-CV-00716-KMB, p. 11. "Significant to the Court is that the City admits that the Mayor and other officials met with a quorum of the Council on the days in question, but divided into groups with less than a quorum of the Council so the public could be excluded." Id, p. 4.

Smith appear to have been chance or impromptu. It does not appear that the discussions with Smith were intentionally arranged so as to circumvent the Open Meetings Act. In fact, there is no indication that Supervisor Smith was provided any information regarding the meeting with the consultants until the June 17, 2016 board meeting, where the supervisors discussed employing the consultants in an open session. The lack of discussion among the supervisors at this point precludes a finding that the "deliberative stages of the decision-making process that lead to formation and determination of public policy" took place between Supervisors Sanders, Brigham and Smith.

2.14 It also needs to be determined whether the discussion between Supervisor Brooks and Supervisor Brigham should be considered together with the discussion between Board President Sanders, Supervisor Brigham and the consultants. These discussions are more troubling, as Board President Sanders asked Supervisor Brigham to speak with Supervisor Brooks regarding the hiring of recreation consultants. However, the statements made by Supervisor Brooks that he felt a "decision has already been made" prior to his conversation with Supervisor Brigham, his perception that he was not included in any discussions prior to the meeting with the consultant, and his dissatisfaction with his lack of access to information regarding the entire process; all do *not* support a finding that the discussions should be considered collectively and that the "deliberative stages of the decision-making process that lead to formation and determination of public policy" took place.

2.15 Unlike the situations in Williams and Gregory, the Lowndes County Board of Supervisors did not purposefully arrange non-quorum meetings of board members so that a quorum of the board could meet and deliberate county business outside a properly noticed open meeting. In fact, the entire board discussed the issue of whether to hire recreation consultants in an open meeting for almost 35 minutes at a meeting that lasted 50 minutes and covered nine other agenda items. As such, there is insufficient evidence in this case to establish a finding that a piecemeal quorum of the board was assembled, i.e., that discussions were organized with the purpose of concealing the deliberative process from the public in violation of the Mississippi Open Meetings Act.

2.16 Finally, the letter, addressed to the mayor of the City of Columbus and copied to all of the members of the Lowndes County Board was clearly informational only, in that the employment of consultant by the county would be raised at the June 17, 2016 meeting, and discussed at that time. The lack of discussion among the board members again precludes a finding that the "deliberative stages of the decision-making process that lead to formation and determination of public policy" took place outside a properly noticed open meeting. As such, the Lowndes County Board of Supervisors cannot be found to have violated the Mississippi Open Meetings Act.

WHERFORE, the complaint is hereby dismissed this the 14th day of July, 2017.

MISSISSIPPI ETHICS COMMISSION

BY: _____
TOM HOOD, Executive Director