March 8, 2013

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-61-13(1)(b), Mississippi Code of 1972, as reflected upon its minutes of even date.

I. FACTS/PROCEDURAL HISTORY

1.1 This opinion was requested by Mr. William Brian Atchison, who simultaneously filed an identical request numbered R-12-004, which is consolidated herewith. The responding public body is the Police Department of the City of Picayune, which filed a response by and through the city attorney, Nathan S. Farmer.

1.2 On December 27, 2011, Mr. Atchison sent two letters to the city, one addressed to the police chief and one to the city manager, requesting the same records, as outlined in the list below. The complaints allege Mr. Atchison received no response to these requests.

   a) Standards Manual Text and comprehensive plan on Internal Affairs Investigations.
   b) Sample internal affairs forms used for notifications to officer(s) and complainant(s) of any kind, including but not limited to, complaint form, notice of complaint to officer, status report(s) and final disposition.
   e) Current comprehensive plan and sample forms for recruiting new Police Officers.
   f) Current comprehensive plan and sample forms on performance and improvement policy for Police Officers.
   g) Community Surveys of the Picayune City Police Officers and Police Department taken within the last 24 months.
h) CALEA certification report(s) for most recent past certification period.

i) Company Name, address, phone number, contact agent and policy number(s) of any and all liability insurance coverage carried by the incorporated City of Picayune Mississippi in the last 12 months.

1.3 In its response, the city asserts exemptions for each of the records requested as listed above. The city alleges its policy and procedure manuals are copyrighted and therefore exempt from disclosure. The city cites Section 25-61-9, Miss. Code of 1972, which addresses records furnished by third parties, including trade secrets and confidential commercial information. The city does not allege that it ever notified the third party as required in Section 25-61-9(1).

1.4 With regard to internal affairs and recruitment forms, community surveys and certification documents, the city alleges they are exempt under Section 25-61-3(f)(iv)&(vii) because they would disclose investigatory techniques or pertain to quality control within the police department. The city provided contact information for its liability insurance carrier and an incident report along with its response. The response also provides background for the request and an explanation of the incident report. That information, while helpful in providing a context for the request, is not relevant to this decision.

II. ANALYSIS

2.1 The Mississippi Public Records Act of 1983 declares that public records shall be available for inspection or copying by any person unless otherwise provided by law. Section 25-61-2, Miss. Code of 1972. “Public records” are defined as all documents or records “having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body.” Section 25-61-3(b). The term “public body” includes “any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and any municipal corporation.” Section 25-61-3(a).

2.2 The Picayune Police Department is a “public body,” and all of the records requested by Atchison are certainly “public records.” The only question in this matter is whether any of the records are wholly or partially exempt from disclosure under the Public Records Act. A public body must provide access to public records upon request of any person, unless a statute or court decision “specifically declares” a public record or part of it to be confidential, privileged, or exempt. Section 25-61-11. “If any public record contains material which is not exempted under this chapter, the public agency shall redact the exempted and make the nonexempted material available for examination.” Section 25-61-5(2).

2.3 Section 25-61-5(1)(a) requires the city to produce or deny production of a public record no later than seven (7) working days from the date of the receipt of the request. The act further requires a public body denying a requestor the right to inspect or copy public records to provide the requestor with a written denial which “shall contain a statement of the specific reasons for the denial.” Section 25-61-5(3). It appears the city did not respond to the written requests for public records and only responded when this matter was filed with the Ethics Commission. That failure is a clear violation of Section 25-61-5.
2.4 The city asserts that it obtained many of its policy and procedure manuals and forms from the Commission on Accreditation for Law Enforcement Agencies, Inc., or CALEA, and that those materials are copyrighted. The city argues copyrighted materials are exempt from disclosure under the Public Records Act. The Ethics Commission has no authority to opine on copyright law and will not attempt to interpret copyright law in this opinion. Section 25-61-11 makes clear that other laws may create exemptions to the Public Records Act. However, the commission is unaware of any exemption created by copyright law, and the city has cited no such authority in support of its position. Therefore, the commission rejects the assertion that all copyrighted materials in the possession of a public body are exempt from disclosure under the Public Records Act.

2.5 Section 25-61-3(f) defines an “investigative report” as a record of a law enforcement agency containing information beyond the scope of the matters contained in an incident report, which will generally include the following:

(i) 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 which may include crime scene reports and demonstrative evidence;

(ii) Records that would reveal the identity of informants and/or witnesses;

(iii) Records that would prematurely release information that would impede the public body's enforcement, investigative or detection efforts;

(iv) Records that would disclose investigatory techniques and/or results of investigative techniques;

(v) Records that would deprive a person of a right to a fair trial or an impartial adjudication;

(vi) Records that would endanger the life or safety of a public official or law enforcement personnel, or confidential informants or witnesses;

(vii) Records pertaining to quality control or peer review activities; or

(viii) Records that would impede or jeopardize a prosecutor's ability to prosecute the alleged offense.

2.6 Items “a” through “f” in the list of requested records set forth above all describe written policies, procedures or blank forms. The nature of those public records do not appear to fall within any of the enumerated examples of investigative reports. Moreover, the city has provided no facts in support of its argument that the records are investigative reports. Therefore, the commission concludes none of the records requested in items “a” through “f” are investigative reports as defined in Section 25-61-3(f), and the exemption codified in Section 25-61-12(2)(a) does not apply to those records.
2.7 In the event that portions of those records do contain information consistent with an investigative report, then the city could redact the exempt information and produce the redacted records, pursuant to Section 25-61-5(2). This finding is consistent with the commission’s previous position on investigative reports in Public Records Opinions No. R-10-008 and R-08-002.

2.8 Mr. Atchison also requested “Community Surveys of the Picayune City Police Officers and Police Department taken within the last 24 months.” This description is ambiguous, but the city did not deny possessing such records. Those records, if they exist, may constitute “records pertaining to quality control or peer review activities” as outlined in Section 25-61-3(f)(vii). Likewise, “CALEA certification report(s) for [the] most recent past certification period” could also be exempted under Section 25-61-3(f)(vii) if they contain peer review or quality control information. Finally, the city does not contend that the insurance information requested in Item “i” is exempt, and the city provided the information with its response.

2.9 In summary, the Picayune Police Department violated Section 25-61-5 by failing to provide a timely response to the request for public records. The city should have provided access to the items listed above as “a” through “f.” The city’s failure to do so also violated Section 25-61-5. Likewise, the city should have provided the insurance information requested under Item “i.” The records requested under Items “g” and “h” may be exempt under Section 25-61-3(f)(vii). If portions of the records are exempt, then the city may be required to redact the exempt portions and produce the redacted documents, as mandated in Section 25-61-5(2). If those records do not contain exempt material, then they must be produced in their entirety.

MISSISSIPPI ETHICS COMMISSION

BY:

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