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## MISSISSIPPI ETHICS COMMISSION

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### PUBLIC RECORDS OPINION NO. R-13-023

April 11, 2014

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 On November 25, 2014, Robbie Ward (“Ward”) of the Northeast Mississippi Daily Journal requested the City of Tupelo (the “city”) provide “digital copies of all text messages Mayor Jason Shelton sent in his role as Mayor from [a cell phone number] between October 23, 2013 and October 26, 2013.”

1.2 On December 9, 2013, the city attorney timely responded to Ward and denied the request. The city attorney explained that the mayor maintains a personal cell phone over which the city has no possession or control. The city also stated that the records of the city do not include the individual records of appointed or elected public officials. Finally, the city asserted that text messages containing governmental subject matter but stored on private hardware are not public records.

1.3 Ward filed this public records opinion request claiming that the mayor utilizes his personal cell phone to conduct official city business through text messaging. Additionally, Ward notes that the city has created a cell phone list of elected leaders and other officials. Ward asserts that the city has utilized this list since at least 2002, providing the city “a reasonable length of time to comply with laws related to public and electronic records including text messages.”

1.4 In response to the public records opinion request, the city reiterates that the mayor’s cell phone is a personal cell phone and that the city does not pay or reimburse the mayor for the cost of the cell phone. The city also recognizes this request presents a question of first impression in Mississippi and requests guidance from the Commission. The response also states the city maintains sixty (60) city-owned cell phones. The city asserts that “[o]f the remaining

400-plus employees [of the city], it can be inferred that most own their own private cell phones and conduct some manner of city business throughout the day. . . .” As it relates to the specific public records request at issue in this matter, the city does not deny that the mayor utilizes his cell phone to conduct city business.

1.5 The city also discusses the difficulty in differentiating between personal text messages and text messages concerning official city business. The city urges the Commission to differentiate text messages from more widely accepted methods of electronic communication such as email. The city points out that accessing text messages is more difficult than other forms of electronic communication. The city also explains that text messaging is widely used for “transitory communications” which are casual and routine messages that are not required to be maintained under guidelines applicable to email messaging. Ultimately, the city posits that treating texts messages as public records will “have a chilling and burdensome effect on the use of a now universally-utilized means of instant and efficient communication of transitory information.”

## II. ANALYSIS

2.1 At issue in this matter is whether text messages concerning city business but stored on a personal cell phone belonging to a mayor are subject to disclosure under the Mississippi Public Records Act of 1983 (the “Act”), codified at Section 25-61-1, et seq., Miss. Code of 1972. The Commission is asked to opine on this subject in the abstract because the city has not requested the mayor search his cell phone and provide any text messages responsive to the request.

2.2 The Act provides that public records shall be available for inspection by any person unless otherwise provided by law and places a duty upon public bodies to provide access to such records. Section 25-61-2 and Section 25-61-5, Miss. Code of 1972. The term “public records” is defined by the Act as follows:

"Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, 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, or required to be maintained by any public body.

See Section 25-61-3(b). 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 to be confidential, privileged, or exempt. Section 25-61-11.

2.3 Text messages, similar to other electronic records, constitute documentary materials. The Act applies equally to paper and electronic records and provides that documentary materials are records “regardless of physical form or characteristics.” The Legislature has instructed that “[a]s each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention.” See Section 25-61-1 and 25-61-2.

2.4 Mr. Ward's public records request is inexact and broad in that it does not request a specific text message or even a category of text messages. Instead, the request broadly seeks all text messages sent by the mayor in his role as mayor for a specific time period. The City of Tupelo operates under the mayor-council form of government. The mayor serves as the chief executive officer of the city and is charged with supervising all departments of the municipality, as well as enforcing the charter and ordinances of the city. Notwithstanding the inexact and broad nature of the request, text messages concerning city business that are sent by the mayor in his role as chief executive officer of the city qualify as public records subject to the Act. The city should direct the mayor to forward any responsive documents to the city for review and production.

2.5 The fact that text messages reside on the mayor's personal cell phone is not determinative as to whether text messages must be produced.<sup>1</sup> Rather, it is the purpose or use of the text message that is determinative. Any text message used by a city official "in the conduct, transaction or performance of any business, transaction, work, duty or function of [the city], or required to be maintained by [the city]" is a public record subject to the Act, regardless of where the record is stored. However, purely personal text messages having absolutely no relation to city business are not subject to production under the Act. Documents described by the city as "transitory communications" should be reviewed for production on a case-by-case basis. Any doubt about whether records should be disclosed should be resolved in favor of disclosure. Harrison County Development Commission v. Kinney, 920 So.2d 497, 502 (Miss. App. 2006).

2.6 As the city notes in its response, the Mississippi Department of Archives and History (MDAH) has not developed records retention requirements specifically for text messages as it has for emails. However, MDAH's Local Government Records Office website states that "[e]lectronic [r]ecords are subject to the same retention guidelines as paper records and existing retention schedules apply to all records regardless of format unless noted otherwise in the approved retention period."<sup>2</sup> The city should instruct city officials that all public records, regardless of where they are created or stored, should eventually be stored on city equipment or in city files if those records are subject to an applicable retention schedule. All questions concerning retention requirements should be directed to MDAH.

MISSISSIPPI ETHICS COMMISSION

BY: \_\_\_\_\_

Tom Hood, Executive Director and  
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<sup>1</sup> See Comments to Rule 3, Mississippi Model Public Records Rules, [http://www.ethics.state.ms.us/ethics/ethics.nsf/webpage/A\\_records](http://www.ethics.state.ms.us/ethics/ethics.nsf/webpage/A_records) (March 5, 2010).

<sup>2</sup> See <http://mdah.state.ms.us/recman/electronic.php> (April 11, 2014). MDAH has developed records retention schedules applicable to municipalities, pursuant to Section 39-5-9. See <http://mdah.state.ms.us/recman/schedulemain.php> (April 24, 2012). Additionally, MDAH has also developed specific guidelines for retention of emails pursuant to Section 39-5-9 and the Mississippi Archives and Records Management Law (Sections 25-59-1 through 25-59-31). The email standards cite Section 29-59-3 for the proposition that work-related emails "must be managed the same way that other public records, whether paper or electronic, are managed." See [http://mdah.state.ms.us/recman/email\\_guidelines.pdf](http://mdah.state.ms.us/recman/email_guidelines.pdf) (emphasis added). Section 29-59-3 defines "public records" as "documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency or by any appointed or elected official." (emphasis added).