The Use of Mississippi's Public Records Act in the Procurement Process

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Public records requests are often a part of the procurement process. These requests can offer a fast and affordable method for obtaining the information needed to support a protest. Furthermore, and perhaps more importantly, they may allow a bidder to obtain its competitors' confidential information and trade secrets. In Mississippi, amendments to the Mississippi Public Records Act have made it easier for losing bidders to obtain what was previously considered the winning bidder's confidential information. Even absent a bid protest, obtaining what amounts to the winning bidder's trade secrets often provides valuable information to losing bidders that can be used in future bids.

Mississippi Public Records Act

Like other states, Mississippi has a public records act that, with limited exceptions, makes public records available for inspection and copying.[1] The Mississippi Public Records Act of 1983 (Public Records Act) states that it is the policy of the Mississippi Legislature that public records must be available for inspection by any person and that providing access to public records is a duty of each public body.[2]

Definition of Public Body

A public body is broadly defined in the Public Records Act as "any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof . . . created by the Constitution or by law, executive order, ordinance or resolution."[3] The only case interpreting the definition of a "public body" in section 25-61-5 involved a public university.[4] Obviously, a public university is a public body. There are, however, numerous quasi-public entities where the answer to the question of whether the entity is a "public body" is less clear.

The Mississippi Ethics Commission (Ethics Commission) has issued an opinion holding that the Central Mississippi Planning & Development District is not a "public body" as defined by the statute.[5] The commission reasoned that Planning and Development districts are not public bodies as defined by the Public Records Act because they "are not entities of the state or entities created by statute or executive order."[6] Interestingly, after their creation as nonprofit civic organizations in 1968, Planning and Development districts were officially "designated and recognized" by executive order in 1970.[7] The Ethics Commission strictly construed the definition of "public body" in section 25-61-3, which does say "created by," to not include an entity that was subsequently "designated and recognized" by executive order.

Although the Mississippi Windstorm Underwriting Association (the Windpool) was created by statute, it has taken the position in response to public records requests that it is not a public body. The Windpool has done so in reliance on *Association Casualty Insurance Co. v. Allstate Insurance Co.*[8] In *Ass'n Casualty*, the Windpool sought to be dismissed from a lawsuit on the basis of sovereign immunity. The Windpool "is composed of all insurers who write property insurance on a direct basis anywhere in Mississippi. Insurers are required by statute to participate in the [Windpool] as a condition of transacting insurance anywhere in the state."[9] The court recognized that the Windpool is a "private partnership . . . financed entirely by premiums paid by policyholders and by assessments to its members"; accordingly, the court found that the Windpool was not a "state agency."[10] The Windpool nonetheless argued it was created by statute and serves a public function and, therefore, is entitled to sovereign immunity under the Mississippi Tort Claims Act (MTCA) as an "instrumentality" of the government.[11] The court rejected the Windpool's argument.[12]

It is somewhat shocking that the Windpool can in one breath claim to be immune from suit as an instrumentality of the government and in the other claim to be immune from answering public records requests because it is not a

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state agency. However, the definition of "instrumentality" in the MTCA is arguably broader than the definition of "public body" in the Public Records Act. One should be aware that there is a wide body of law on what types of entities are entitled to Eleventh Amendment immunity and/or immunity under the MTCA. Because there is no binding authority defining the scope of "public body" in the Public Records Act, one should be prepared to examine cases in these other contexts for potential arguments.

Definition of Public Records

The Public Records Act defines "public records" as

> 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.[13]

In determining whether documents are "public records," the Mississippi Supreme Court has held that "any questions of disclosure must be construed liberally, while a standard of strict construction must be applied to any exceptions to disclosure."[14] Furthermore, the court held that "any doubt about disclosure of the requested information by the public body should be resolved in favor of disclosure."[15] Given this "any doubt" language, it is difficult to imagine any document not being a "public record" under section 25-61-3. As discussed below, however, simply because a document is a "public record" does not mean it must be produced; a public body must first determine whether any exemptions from disclosure apply.

Timing and Cost of Production

The Public Records Act requires quick production of requested documents. If production will take more than seven working days, the public body must explain why in writing.[16] Absent agreement between the public body and the requesting party, the production cannot take longer than fourteen working days.[17] A requesting party is required to pay for the cost of producing the requested documents; however, the cost must be "reasonably calculated" to reimburse the public body for its actual expenses incurred in producing the documents.[18] The fee must be paid before the public body has any obligation to comply with the request.[19] In short, absent an objection by the public body or a third party, obtaining public records in Mississippi is as simple as writing a letter and paying the reasonable costs of production.

It is worth noting that some have reported that certain public bodies have tried to discourage public records requests by charging unreasonable fees; therefore, it is a best practice to ask for an estimate of the expected fees when making a public records request.[20] As explained below, public bodies that charge unreasonable fees for public records requests potentially face penalties.

Compelling Production of Public Records

Section 25-61-13 provides the procedures for compelling access to public records. This statute gives the Ethics Commission the authority to enforce the provisions of the Public Records Act.[21] Once the Ethics Commission receives a complaint, it forwards the complaint to the head of the public body involved.[22] The public body has fourteen days from receipt of the complaint to file a response.[23] Thereafter, the Commission can either dismiss the complaint or set a hearing.[24] If the Ethics Commission orders a public body to produce records for private review by the commission, the commission is required to complete its private review of the records within thirty days of receiving them.[25] The Commission is empowered to impose penalties for noncompliance with the Public Records Act as called for in section 25-61-15. Decisions of the Ethics Commission are appealable, de novo, to the chancery court in the county where the public body is located.[26]

Those wishing to compel access to public records are not required to bring their complaint to the Ethics Commission. Section 25-61-13 states that "[n]othing in this chapter shall be construed to prohibit any party from filing a complaint in any chancery court having jurisdiction, nor shall a party be obligated to exhaust administrative remedies before filing a complaint."[27] Thus, the petitioner can choose either the Ethics Commission or the appropriate chancery court to initially bring a claim. However, a party filing a complaint in chancery court must "serve written notice upon the Ethics Commission at the time of filing the complaint."[28]

Penalties

Section 25-61-15 provides for the recovery of penalties and reasonable expenses for wrongfully denying public records to a requesting party. Section 25-61-15 provides:

> Any person who shall deny to any person access to any public record which is not exempt from the provisions of this chapter or who charges an unreasonable fee for providing a public record may be liable civilly in his personal capacity in a sum not to exceed One Hundred Dollars ($100.00) per violation, plus all reasonable expenses incurred by such person bringing the proceeding.[29]

There are few reported cases awarding penalties and expenses. In *Harrison County Development Commission v. Kinney*, the Mississippi Court of Appeals upheld the decision of a chancellor to award penalties and attorneys' fees under section 25-61-15.[30] This case was brought under an older (and arguably weaker) version of the penalty statute. That statute read:

> Any person *who shall willfully and knowingly* deny to any person access to any public record which is not exempt from the

> provisions of this chapter shall be liable civilly in a sum not to exceed one hundred dollars ($100.00), plus all reasonable expenses incurred by such person bringing the lawsuit.[31]

In upholding the chancellor's decision to award fees, the Court of Appeals held that the public body's requirement that the requesting party pay a $65.00 per hour "staff fee" to search the public records was unreasonable.[32] The court noted that the public body's policy did not impose a fee for gathering and/or searching for documents and that section 25-61-7(1) only allows the public body to collect fees "reasonably calculated to reimburse the body for the actual cost of searching."[33] In order to collect such a fee, the court held the public body would have to amend its public records policy.[34] The public body argued that, because it was acting on the advice of counsel, it did not "willfully and knowingly" overcharge the requesting party.[35] The Court of Appeals rejected this argument, holding that attorney's advice contrary to the plain language of a statute does not necessarily exempt a client from sanctions.[36]

Section 25-61-15 has been amended to omit the "willfully and knowingly" language of the prior versions and to specify that the person denying access to the record or charging an unreasonable fee is liable "in his personal capacity."[37] The *Kinney* court awarded attorneys' fees against the public body, but it did so under the prior version of the statute. Now that the statute contains the "personal capacity" limitation, there is a good argument that only the individuals and *not* the public body can be liable for expenses, including attorneys' fees. There are, however, no cases interpreting this aspect of the statute since its amendment. The recent case of *Mississippi Department of Audit v. Gulf Publishing Co.*, however, set aside fines imposed on individual public employees under section 25-61-15.[38] The court held that, because the public employees were not parties to the suit or given notice that they could potentially be fined, the fines violated the Fourteenth Amendment.[39]

Protection of Confidential Information

In Mississippi, following the award of a public contract, it is common for interested parties (most often losing bidders) to make public records requests for the proposals of the other bidders. This is regularly done despite the fact that the Public Records Act specifically protects certain information provided by third parties from disclosure. Section 25-61-9 states that "[r]ecords furnished to public bodies by third parties which contain trade secrets or confidential commercial or financial information shall not be subject to inspection, examination, copying or reproduction under this chapter until notice to third parties has been given, but the records shall be released within a reasonable period of time unless the third parties have obtained a court order protecting the records as confidential." Thus, after someone requests a third party's information, the burden is on the party seeking protection of its confidential information to seek and obtain a court order protecting its information.

In practice, following receipt of a request for a third party's information, public bodies in Mississippi typically send a letter to the third party containing form language like the following from the Mississippi Office of the Governor, Division of Medicaid:

> If you intend to seek court-ordered protection, we must receive proof of actions being taken to obtain court-ordered protection in our office by March __, 20__. If we do not receive proof of actions being taken to obtain court-ordered protection by this date, we will release the requested information.

Failure of a third party to respond to such a letter with proof that it filed suit to protect its confidential information will result in production of the requested information to the requesting party.

Many requests for proposals ask bidders to predesignate what information is confidential by providing for redacted and unredacted versions of the proposal at the time of submission. There is no authority in Mississippi holding failure to redact confidential information at this stage waives confidentiality.[40] However, some requests for proposals specifically state that failure to mark waives confidentiality, and it is easy to see how someone seeking information would make that argument. Bidders asked to provide a redacted proposal at the time of bid submissions would be well advised to take an expansive position regarding confidentiality. Information can always be unredacted and released. Once information is released, however, it can never again be made confidential.

What Constitutes Protected Information?

As stated before, section 25-61-9 protects records "which contain trade secrets or confidential commercial or financial information." Section 79-23-1 provides additional protection for "[c]ommercial and financial information of a proprietary nature required to be submitted to a public body … by a firm, business, partnership, association, corporation, individual or other like entity." Under sections 25-61-9 and 79-23-1, a party seeking to protect its confidential or proprietary information submitted to a public body need only establish that its information is "confidential commercial and financial information" or "commercial and financial information of a proprietary nature"; it need not demonstrate that the information constitutes a trade secret.[41]

The *Caldwell* case is the most instructive case in Mississippi involving requests for a bidder's confidential information. This case involved a request for the winning proposal for the operation of twenty-four coin-operated laundry facilities at the University of Southern Mississippi. The trial court, relying solely on an in camera inspection, held that the documents in question did not constitute trade secrets and ordered them produced. The Mississippi Court of Appeals reversed, holding that the trial judge

"erred when he applied the strict definition of a trade secret found in the Uniform Trade Secrets Act as the *sole* standard to measure the availability of [the winning bidder's] proposal to the general public under the Public Records Act."[42] The court noted that, on its face, "the Public Records Act protects a broader range of information than just that covered under the above-quoted definition from the Trade Secrets Act. The Public Records Act protects from disclosure documents in the hands of a public body 'which contain trade secrets *or confidential commercial or financial information*.'"[43]

Because trade secrets are also specifically protected from production in Mississippi, whether a third party's information sought in a public records request must be produced often turns on whether the information requested constitutes a trade secret. The Mississippi Uniform Trade Secrets Act (MUTSA) governs what constitutes a trade secret in Mississippi. That Act defines a "trade secret" as

> [i]nformation, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[44]

Thus, to determine if information is a "trade secret," the following two-prong test is applied: first, it must have actual or potential independent economic value from not being known or readily ascertainable by other persons who could gain value from its use; and second, the information was subject to reasonable attempts to preserve its secrecy.[45]

Prong one: whether the information has independent economic value from being unknown or not readily ascertainable. The following Mississippi cases have held that the plaintiff met the first prong of the MUTSA (that the information has actual or potential independent economic value from not being known or readily ascertainable by other persons who could gain value from its use): *Union National Life Insurance Co. v. Tillman*;[46] *Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.*;[47] *Tom James Co. v. Hudgins*;[48] and *J.T. Shannon Lumber Co. v. Gilco Lumber, Inc.*[49] *Union National Life* is vague on the exact information misappropriated, but the case implies that the information was life insurance customer lists. *Fred's Stores* dealt with a pharmacy's customer lists, which included information showing how much money customers spent. *Tom James Co.* involved customer lists for custom-made clothing. *J.T. Shannon Lumber* found that although the identity of lumber customers was readily ascertainable and not a trade secret, a customer's preferences were confidential, as was a document showing how to set up a Chinese branch office. Requests for proposals often require a bidder to provide references, supplier lists, the methods of delivering the requested goods and services, and the resumes of key employees. These cases holding that the first prong for a trade secret was met are instructive and useful.

A key case holding that the first prong of the MUTSA was not met is *Marshall v. Gipson Steel, Inc.*[50] *Marshall* held that a steel fabricator's bid process was readily ascertainable because it could be easily determined from reverse engineering.[51] The Northern District of Mississippi took this a step further in *Pepper v. International Gaming Systems, LLC*, and granted summary judgment against a plaintiff claiming that his former business partners stole his bingo software because the plaintiff failed to present an expert witness showing the information could not be reverse-engineered.[52] Obviously, the key to these cases is establishing that the information sought is neither known nor readily ascertainable.

The newly-enacted statute passed to provide more transparency and a fairer bid process is being used by some bidders to gain an unfair advantage.

Prong two: the information sought was subject to reasonable attempts to preserve the secrecy. The second prong of the trade secret test is more lax. Courts considering the question have generally found this prong satisfied or that at least a question of fact on this issue existed. A nondisclosure or confidentiality agreement is sufficient.[53] In fact, a federal magistrate judge found that a nondisclosure agreement met this prong even though the former employee had been told to share customer information with potential customers as a marketing strategy.[54] Plaintiffs in Mississippi have also satisfied this prong by keeping the information limited to a small number of employees, keeping it in a controlled area, or password protecting it.[55]

Recent amendment to the Public Records Act

Mississippi has recently amended its Public Records Act. New paragraph seven to section 25-61-9 states that

> [f]or all procurement contracts awarded by state agencies, the provisions of the contract which contain the commodities purchased or the personal or professional services

> provided, the price to be paid, and the term of the contract shall not be deemed to be a trade secret or confidential commercial or financial information under this section, and shall be available for examination, copying or reproduction as provided for in this chapter.[56]

Due to a corruption scandal involving the Mississippi Department of Corrections, a number of contracts are being rebid. In at least one instance, some of the losing bidders have requested the winning bidder's contract, citing to the newly enacted section 25-61-9(7). The winning bidder and the State of Mississippi both objected to this request arguing that it destroys the competitive bidding process and unfairly harms the winning bidder. So, ironically, the newly enacted statute passed to provide more transparency and a fairer bid process is first being used by some bidders to gain an unfair advantage in the rebidding process.[57]

Losing bidders in Mississippi should consider, like the losing bidders in the Department of Corrections contract, using section 25-61-9(7) as a sword to obtain their competitors' trade secrets through public records requests. By doing so, they can potentially obtain valuable information at little cost. Winning bidders seeking to protect this information can make several arguments.

What is a procurement contract? Mississippi classifies some contracts as "net-of-fee" contracts. These contracts involve a vendor providing goods or services directly to persons other than the state. In exchange for the right to provide these services (usually the exclusive right), the vendors pay a fee to the public body. Examples of these types of contracts might include soft drink providers at a school, providers of coin-operated laundry machines in university dorms, and commissary contracts at a correctional facility.

On April 1, 2016, a chancery court held that a net-of-fee contract is not a procurement contract. The court reasoned that the Mississippi Personal Service Contract Review Board (PSCRB) has jurisdiction over procurement contracts in which the state is procuring services. Miss. Code Ann. § 25-9-120. The PSCRB Rules and Regulation section 3-101.05 states, "Net-of-fee contracts do not involve expenditures of state funds; they do not come under PSCRB purview." Therefore, according to the public body in charge of service contracts, a net-of-fee contract is not a procurement contact. The court held that because section 25-61-9(7) specifically states that it is for "all procurement contracts," it does not apply to net-of-fee contracts.

What is price? Another argument a winning bidder seeking to protect its confidential information should make revolves around the definition of "price." For example, in the case of a food services contract, the argument would be that the cost of a hamburger is the cost that must be disclosed. But what percentage of the proceeds from the sale of the hamburger are paid to the state is not price. That is a commission and the commission is not the price. Because section 25-61-9(7) says nothing of commission, that information should not be produced if it were otherwise protectable. And because the formula by which a company determines what it pays in commission is a trade secret under section 75-26-3, the commission should be protected.

Losing bidders desiring the winning bidder's information for a bid protest should counter the winning bidder's arguments by noting the need to discover the commission to determine the value of the winning bid. To deny this information is to deny the right to contest the bid. Because section 25-61-9(7) is so new (amended January 1, 2016), there is no guidance regarding how a court will rule.

Conclusion

Different states take very different approaches to public record requests in the procurement context. Some states have taken measures to publish awarded contracts on government websites. Others, like Mississippi, have specifically declared that certain information, such as contract price, is not exempt from disclosure. Still others have not addressed the balance between the protection of trade secrets and the disclosure of public records.

Because Mississippi law requires those wishing to protect their information to file suit to do so, many companies request their competitors' information as a matter of policy. Undoubtedly, companies submitting bids or proposals occasionally fail to protect their information (either due to neglect or to avoid the cost of filing suit). Thus, in Mississippi, for the cost of writing a letter and some copy costs, companies occasionally obtain their competitors' confidential information. PL

Endnotes

1. Miss. Code Ann. §§ 25-61-1 *et seq.*
2. *Id.* §§ 25-61-1, -2.
3. *Id.* § 25-61-3(a).
4. *See* Miss. State Univ. v. People for the Ethical Treatment of Animals, Inc., 992 So. 2d 595, 605 (Miss. 2008) (holding there is no question that Mississippi State University is a public body). While there are no other cases interpreting section 25-61-5, there are numerous cases where courts define a "public body" in the context of other statutes such as Mississippi's Little Miller Act (Miss. Code Ann. **§§ 31-5-**51 *et seq.*). For example, in the context of the Little Miller Act, a drainage district is a public body. *See* Standard Oil Co. v. Nat'l Sur. Co., 107 So. 559, 560 (Miss. 1926).
5. Public Records Opinion No. R-12-019 (Miss. Ethics Comm'n Nov. 2, 2012), *available at* http://tinyurl.com/zaxeyea. The opinions of the Ethics Commission are published at http://tinyurl.com/zp76lmx.
6. Public Records Opinion No. R-12-019.
7. *Id.*
8. No. 3:07cv525-KS-JCS, 2008 U.S. Dist. LEXIS 54197, at *19–20 (S.D. Miss. July 15, 2008).
9. *Id.* at *7 (citation omitted).
10. *Id.* at *18–19, 25–26 (citing *In re* Miss. Judicial Info. Sys., 533 So. 2d 1110, 1111 (Miss. 1988)).
11. *Id.*
12. *Id.* at *25–26.
13. Miss. Code Ann. § 25-61-3(b).
14. Miss. State Univ. v. People for the Ethical Treatment of Animals, Inc., 992 So. 2d 595, 605 (Miss. 2008) (citing Miss.

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Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n, 740 So. 2d 925, 936 (Miss. 1999)).

15. *Id.*

16. Miss. Code Ann. § 25-61-5(1).

17. *Id.*

18. *Id.* § 25-61-7.

19. *Id.*

20. *See, e.g.*, Mollie Bryant, *Public Information Out of Reach in Mississippi?*, Clarion-Ledger (Mar. 15, 2016), http://tinyurl.com/hs66s3b.

21. Miss. Code Ann. § 25-61-13.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* § 25-61-15.

30. 920 So. 2d 497, 503–04 (Miss. Ct. App. 2006). As noted by the court of appeals, Mississippi courts have interpreted "reasonable expenses incurred" to mean an award of attorney's fees.

31. Miss. Code Ann. § 25-61-15 (2003) (amended 2011) (emphasis added).

32. *Harrison Cnty.*, 920 So. 2d at 503.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (citing Murphree v. Fed. Ins. Co., 707 So. 2d 523, 532–33 (Miss. 1997)).

37. Miss. Code Ann. § 25-61-15.

38. Nos. 2013-SA-02002-COA, 2014-SA-00894-COA, 2016 WL 1212695, at *9 (Miss. Ct. App. Mar. 29, 2016).

39. *Id.*

40. As more fully explained below, taking steps to protect the secrecy of information is prong two of the definition of a trade secret. If a party is seeking to protect a trade secret, failure to redact could constitute a failure of this prong of the Mississippi Uniform Trade Secrets Act.

41. Caldwell & Gregory, Inc. v. Univ. of S. Miss., 716 So. 2d 1120, 1123 (Miss. Ct. App. 1998).

42. *Id.* at 1122.

43. *Id.*

44. Miss. Code Ann. § 75-26-3(d).

45. Marshall v. Gipson Steel, Inc., 806 So. 2d 266, 270–71 (Miss. 2002).

46. 143 F. Supp. 2d 638, 641–42 (N.D. Miss. 2000).

47. 725 So. 2d 902, 908–11 (Miss. 1998).

48. 261 F. Supp. 2d 636, 641–42 (S.D. Miss. 2003).

49. No. 2:07CV119-SA-SAA, 2010 WL 234996, at *4–6 (N.D. Miss. Jan. 15, 2010).

50. 806 So. 2d 266.

51. *Id.* at 271–72.

52. 312 F. Supp. 2d 853, 861–62 (N.D. Miss. 2004); *see also* Body Support Sys., Inc. v. Blue Ridge Tables, Inc., No. 1:96CV161-D-A, 1997 WL 560920, at *6–7 (N.D. Miss. Aug. 12, 1997) (denying summary judgment on trade secret claim where genuine issue of material fact existed on whether defendant reverse-engineered product or used trade secret).

53. *See* Union Nat'l Life Ins. Co. v. Tillman, 143 F. Supp. 2d 638, 644 (N.D. Miss. 2000).

54. Tom James Co. v. Hudgins, 261 F. Supp. 2d 636, 641–42 (S.D. Miss. 2003).

55. Fred's Stores of Miss., Inc. v. M & H Drugs, Inc., 725 So. 2d 902, 908–11 (Miss. 1998) (finding keeping list in an unlocked file cabinet and protecting computer version with password sufficient).

56. Miss. Code Ann. § 25-61-9(7).

57. On April 1, 2016, a chancery court denied the losing bidders' motion to compel production of the winning bidder's contract, holding that the contract in question was a "net-of-fee" contract and, therefore, not a procurement contract. This argument is more fully explained *infra*.