

MISSISSIPPI PUBLIC RECORDS ACT – MODEL RULES

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Table of Contents

<u>Rule No.</u>		<u>Page No.</u>
	INTRODUCTORY COMMENTS	2
	Statutory authority and purpose.....	2
	Format of model rules.....	3
	Model rules and comments are nonbinding.....	3
	Training is critical.....	3
	Additional resources.....	3
	AUTHORITY AND PURPOSE	4
	1. Authority and purpose.....	4
	Comments to Rule No. 1.....	4
	1.1. Scope of coverage of Public Records Act.....	4
	1.2. Requirement to adopt reasonable written public records procedures.....	5
	1.3. Construction and application of act.....	5
	PUBLIC BODY DESCRIPTION--CONTACT INFORMATION--PUBLIC RECORDS OFFICER	5
	2. Public body description--Contact information--Public records officer.....	5
	Comments to Rule No. 2.....	6
	2.1. Public body must publish its procedures.....	6
	2.2. Public records officers.....	6
	AVAILABILITY OF PUBLIC RECORDS	7
	3. Availability of public records.....	7
	Comments to Rule No. 3.....	8
	3.1. "Public record" defined.....	8
	3.2. Times for inspection and copying of records.....	9
	3.3. Index of records.....	9
	3.4. Organization of records.....	10
	3.5. Retention of records.....	10
	3.6. Form of requests.....	11
	PROCESSING OF PUBLIC RECORDS REQUESTS--GENERAL	12
	4. Processing of public records requests--General.....	12
	Comments to Rule No. 4.....	14
	4.1. Introduction.....	14
	4.2. Obligations of requestors.....	15
	4.3. Responsibilities of agencies in processing requests.....	16
	4.4. Responsibilities of public body in providing records.....	19
	4.5. Inspection of records.....	23
	4.6. Closing request and documenting compliance.....	24
	4.7. Later-discovered records.....	25
	PROCESSING OF PUBLIC RECORDS REQUESTS - ELECTRONIC RECORDS	25
	5. Processing of public records requests--Electronic records.....	25
	Comments to Rule No. 5.....	25
	5.1. Access to electronic records.....	25
	5.2. Reasonably locatable and reasonably translatable electronic records.....	26
	5.3. Parties should confer on technical issues.....	28
	5.4. Customized access.....	29
	5.5. Relationship of Public Records Act to court rules on discovery of "electronically stored information.".....	29
	EXEMPTIONS AND THIRD PARTY INFORMATION	29
	6. Exemptions.....	29
	Comments to Rule No. 6.....	30
	6.1. Public body should publish list of common exemptions.....	30

1	6.2. Summary of exemptions.....	3130
2	7. Third Party Information.....	33
3	Comments to Rule No. 7.....	34
4	7.1. Notice to affected third parties.....	34
5	7.2. Trade secrets.....	34
6	COSTS OF PROVIDING PUBLIC RECORDS	35
7	8. Costs of providing public records.....	35
8	Comments to Rule No. 8.....	36
9	8.1. General rules for charging for copies.....	36
10	8.2. Charges for electronic records.....	37
11	8.3. Waiver of copying charges.....	37
12	8.4. Pre-payment required.....	3837
13	8.5. Charges for searching, reviewing and redacting.....	38
14	REVIEW OF DENIALS OF PUBLIC RECORDS	40
15	9. Review of denials of public records.....	40
16	Comments to Rule No. 9.....	40
17	9.1. Public body internal procedure for review of denials of requests.....	4140
18	9.2. Ethics Commission review of denials.....	41
19	9.3. Alternative dispute resolution.....	41
20	9.4. Judicial review.....	41

INTRODUCTORY COMMENTS

Statutory authority and purpose.

These model rules are promulgated by the Mississippi Ethics Commission in furtherance of the Commission's statutory responsibilities set forth in Section 25-61-13, Miss. Code of 1972. The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, Section 25-61-1 through 25-61-17, Miss. Code of 1972 ("the act"). Furthermore, the Ethics Commission has promulgated these rules to establish the factors the Commission will consider when evaluating public records disputes. Incorporated throughout these rules is an expectation that all public bodies will retain and organize public records so that they may be produced upon request in an efficient and economical manner. The overall goal of the model rules is to encourage an attitude of compliance among public bodies and a spirit of cooperation among requestors by standardizing best practices throughout the state. The Ethics Commission encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.

The act applies to all state agencies and local units of government. The model rules use the terms "public body" and sometimes "agency" to refer to either a state or local public body. Upon adoption, each public body would change that term to name itself (such as changing references from "name of public body" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the Ethics Commission's web site, www.ethics.state.ms.us.

1 The model rules are the product of an extensive outreach project to obtain the
2 views of requestors and agencies. The model rules reflect many of the points and
3 concerns presented by those stakeholders.

4 The model rules provide one approach (or, in some cases, alternate approaches)
5 to processing public records requests. Agencies vary enormously in size, resources,
6 and complexity of requests received. Any "one-size-fits-all" approach in the model rules,
7 therefore, may not be best for requestors and agencies.

8 **Format of model rules.**

9 The model rules are published with comments. The comments have multiple-digit
10 paragraph numbers which correspond to the single-digit model rule numbers.

11 The comments are designed to explain the basis and rationale for the rules
12 themselves as well as provide broader context and legal guidance. To do so, the
13 comments may contain many citations to statutes, cases, and formal Ethics
14 Commission opinions.

15 **Model rules and comments are nonbinding.**

16 The model rules, and the comments accompanying them, are advisory only and
17 do not bind any public body. Accordingly, many of the comments to the model rules use
18 the word "should" or "may" to describe what a public body or requestor is encouraged to
19 do. The use of the words "should" or "may" are permissive, not mandatory, and are not
20 intended to create any legal duty.

21 While the model rules and comments are nonbinding, they should be carefully
22 considered by requestors and agencies. The model rules and comments were adopted
23 after extensive commentary from a wide variety of interested parties.

24 **Training is critical.**

25 The act is complicated, and compliance requires training. Training can be the
26 difference between a satisfied requestor and expensive litigation. The Ethics
27 Commission strongly encourages agencies to provide thorough and ongoing training to
28 public employees and officials on public records compliance. All public body employees
29 should receive basic training on public records compliance and records retention; public
30 records officers should receive more intensive training.

31 **Additional resources.**

32 Several web sites provide information on the act. The Ethics Commission's web
33 site on public records is www.ethics.state.ms.us. The Office of the Attorney General
34 provides opinions and other information at www.ago.state.ms.us. A requestor's
35 organization, the Mississippi Center for Freedom of Information, has materials on its site
36 at www.mcfoi.org.

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AUTHORITY AND PURPOSE

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1. Authority and purpose.

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"It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act. Furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records." Section 25-61-1, Miss. Code of 1972.

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"[A]ll public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body in accordance with reasonable written procedures adopted by the public body concerning the cost, time, place and method of access, and public notice of the procedures shall be given by the public body." Section 25-61-5, Miss. Code of 1972.

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The act defines "public record" to include any "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." Section 25-61-3(b).

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The purpose of these rules is to establish the procedures (name of public body) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of public body) and establish processes for both requestors and (name of public body) staff that are designed to best assist members of the public in obtaining such access.

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The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of public body) will be guided by the provisions of the act describing its purposes and interpretation.

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Comments to Rule No. 1.

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1.1. Scope of coverage of Public Records Act.

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The act applies to any "public body," which 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 and

1 any other entity created by the Constitution or by law, executive order, ordinance or
2 resolution." Section 25-61-3(a).

3 **1.2. Requirement to adopt reasonable written public records procedures.**

4 The act imposes a duty on all public bodies to adopt "reasonable written
5 procedures ... concerning the cost, time, place and method of access [to public records],
6 and [to give] public notice of the procedures." Section 25-61-5. Therefore, all public
7 bodies must adopt and publish, in accordance with the Mississippi Administrative
8 Procedures Law or other applicable requirements, "reasonable" written procedures
9 providing for access to public records.

10 **1.3. Construction and application of act.**

11 The act declares: "[A]ll public records are hereby declared to be public property,
12 and any person shall have the right to inspect, copy or mechanically reproduce or obtain
13 a reproduction of any public record of a public body." Section 25-61-5(1). The act further
14 provides that it "shall not be construed to conflict with, amend, repeal or supersede any
15 constitutional or statutory law or decision of a court of this state or the United States
16 which ... specifically declares a public record to be confidential or privileged, or provides
17 that a public record shall be exempt from the [act]." Section 25-61-11.

18 Because the purpose of the act is to allow people to be informed about
19 governmental decisions (and therefore help keep government accountable) while at the
20 same time recognizing certain exemptions, it should not be used to obtain records
21 containing purely personal information that has absolutely no bearing on the conduct of
22 government.

23 Any doubt about whether records should be disclosed should be resolved in
24 favor of disclosure. Harrison County Development Commission v. Kinney, 920 So.2d
25 497, 502 (Miss. App. 2006). Likewise, exceptions should be strictly construed. Id. The
26 act also encourages disclosure by providing penalties to be assessed against any
27 person violating the act, including a civil fine of \$100.00, " plus all reasonable expenses
28 incurred by such person bringing the proceeding." Section 25-61-15.

29 30 **PUBLIC BODY DESCRIPTION--CONTACT INFORMATION--PUBLIC RECORDS 31 OFFICER** 32

33 **2. Public body description--Contact information--Public records officer.**

34 (1) The (name of public body) (describe services provided by public body). The
35 (name of public body's) central office is located at (describe). The (name of public body)
36 has field offices at (describe, if applicable).

1 (2) Any person wishing to request access to public records of (public body), or
2 seeking assistance in making such a request should contact the public records officer of
3 the (name of public body):

4 Public Records Officer

5 (Public body)

6 (Address)

7 (Telephone number)

8 (fax number)

9 (e-mail)

10 Information is also available at the (name of public body's) web site at (web site
11 address).

12 (3) The public records officer will oversee compliance with the act but another
13 (name of public body) staff member may process the request. Therefore, these rules will
14 refer to the public records officer "or designee." The public records officer or designee
15 and the (name of public body) will provide the "fullest assistance" to requestors; create
16 and maintain for use by the public and (name of public body) officials an index to public
17 records of the (name of public body, if applicable); ensure that public records are
18 protected from damage or disorganization; and prevent fulfilling public records requests
19 from causing excessive interference with essential functions of the (name of public
20 body).

21 **Comments to Rule No. 2.**

22 **2.1. Public body must publish its procedures.**

23 A public body must publish its public records policies, which should include
24 organizational information, and methods for requestors to obtain public records. A state
25 public body must publish its procedures in accordance with the Mississippi
26 Administrative Procedures Law and a local public body should prominently display and
27 make them available at the central office of such local public body. A public body should
28 also post its public records rules on its web site, if it has one. A public body may not be
29 able invoke a procedure if it did not publish or display it as required.

30 **2.2. Public records officers.**

31 A public body should appoint a public records officer whose responsibility is to
32 serve as a "point of contact" for members of the public seeking public records. The
33 purpose of this requirement is to provide the public with one point of contact within the
34 public body to make a request. A state public body should provide the public records
35 officer's name and contact information by publishing it in the state administrative

1 bulletin. A state public body is encouraged to provide the public records officer's contact
2 information on its web site. A local public body should publish the public records officer's
3 name and contact information in a way reasonably calculated to provide notice to the
4 public such as posting it on the public body's web site.

5 The public records officer is not required to personally fulfill requests for public
6 records. A request can be fulfilled by a public body employee other than the public
7 records officer. If the request is made to the public records officer, but should actually
8 be fulfilled by others in the public body, the public records officer should route the
9 request to the appropriate person or persons in the public body for processing. A public
10 body is not required to hire a new staff member to be the public records officer.

11 12 **AVAILABILITY OF PUBLIC RECORDS** 13

14 **3. Availability of public records.**

15 (1) **Hours for inspection of records.** Public records are available for inspection
16 and copying during normal business hours of the (name of public body), (provide hours,
17 e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records
18 must be inspected at the offices of the (name of public body).

19 (2) **Records index.** *(If public body keeps an index.)* An index of public records is
20 available for use by members of the public, including (describe contents). The index
21 may be accessed on-line at (web site address). (If there are multiple indices, describe
22 each and its availability.)

23 (3) **Organization of records.** The (name of public body) will maintain its records
24 in a reasonably organized manner. The (name of public body) will take reasonable
25 actions to protect records from damage and disorganization. A requestor shall not take
26 (name of public body) records from (name of public body) offices without the permission
27 of the public records officer or designee. A variety of records is available on the (name
28 of public body) web site at (web site address). Requestors are encouraged to view the
29 documents available on the web site prior to submitting a records request.

30 (4) **Making a request for public records.**

31 (a) Any person wishing to inspect or copy public records of the (name of public
32 body) should make the request in writing on the (name of public body's) request form, or
33 by letter, fax, or e-mail addressed to the public records officer and including the
34 following information:

- 35 • Name of requestor;
- 36 • Address of requestor;

- 1 • Other contact information, including telephone number and any e-mail address;
- 2 • Identification of the public records adequate for the public records officer or designee
3 to locate the records; and
- 4 • The date and time of day of the request.

5 (b) If the requestor wishes to have copies of the records made instead of simply
6 inspecting them, he or she should so indicate and make arrangements to pay for copies
7 of the records or a deposit. Pursuant to section (insert section) of this policy, standard
8 photocopies will be provided at (amount) cents per page.

9 (c) A form is available for use by requestors at the office of the public records
10 officer and on-line at (web site address).

11 (d) The public records officer or designee may accept requests for public records
12 that contain the above information by telephone or in person. If the public records officer
13 or designee accepts such a request, he or she will confirm receipt of the information and
14 the substance of the request in writing.

15 **Comments to Rule No. 3.**

16 **3.1. "Public record" defined.**

17 The statutory definition of a "public record" contains at least three main elements.
18 The document must be: A "documentary material" "used" "in the conduct" of some
19 governmental function.

20 (1) **Documentary materials.** A "public record" can be any "documentary
21 materials, regardless of physical form or characteristics." Section 25-61-3(a). Public
22 records include "all books, records, papers, accounts, letters, maps, photographs, films,
23 cards, tapes, recordings or reproductions thereof." Id. E-mails are "documentary
24 materials."

25 (2) **"Used" by a public body.** A "public record" is a record "having been used,
26 being in use, or prepared, possessed or retained for use" by a public body. Id.

27 (3) **The "conduct" of a governmental function.** To be a "public record," a
28 document must relate to the "conduct, transaction or performance of any business,
29 transaction, work, duty or function of any public body, or required to be maintained by
30 any public body." Id. Almost all records held by a public body relate to the conduct of
31 government; however, some do not. A purely personal record having absolutely no
32 relation to the conduct of government is not a "public record." Even though a purely
33 personal record might not be a "public record," a record of its existence might be. For
34 example, a record showing the existence of a purely personal e-mail sent by a public
35 body employee on a public body computer would probably be a "public record," even if
36 the contents of the e-mail itself were not.

1 A record can be "used" by a public body even if the public body does not actually
2 possess the record. If a public body uses a record in its decision-making process it is a
3 "public record." For example, if a public body considered technical specifications of a
4 public works project and returned the specifications to the contractor in another state,
5 the specifications would be a "public record" because the public body "used" the
6 document in its decision-making process. The public body could be required to obtain
7 the public record, unless doing so would be impossible. A public body should not send
8 its only copy of a record to a third party for the sole purpose of avoiding disclosure.

9 Sometimes public body employees work on public body business from home
10 computers. These home computer records (including e-mail) were "used" by the public
11 body and relate to the "conduct" of public business so they are "public records" and are
12 subject to disclosure (unless exempt). Agencies should instruct employees that all
13 public records, regardless of where they were created, should eventually be stored on
14 public body computers. Agencies should ask employees to keep public body-related
15 documents on home computers in separate folders and to routinely blind carbon copy
16 ("bcc") work e-mails back to the employee's public body e-mail account. If the public
17 body receives a request for records that are solely on employees' home computers, the
18 public body should direct the employee to forward any responsive documents back to
19 the public body, and the public body should process the request as it would if the
20 records were on the public body's computers.

21 **3.2. Times for inspection and copying of records.**

22 A public body should make records available for inspection and copying during
23 the regular office hours of the public body. If the public body is very small and does not
24 have regular office hours, the records should be made available at the earliest possible
25 opportunity. The public body and requestor can make mutually agreeable arrangements
26 for the times of inspection and copying.

27 **3.3. Index of records.**

28 State agencies are required by the Mississippi Administrative Procedures Law to
29 provide an index for certain categories of records. A public body is not required to index
30 every record it creates. Since agencies maintain records in a wide variety of ways,
31 public body indices will also vary. A public body should post its index on its web site, if it
32 has one.

33 A state public body must index three categories of records:

34 (1) Rules promulgated by a state agency must be indexed and filed with the
35 Office of the Secretary of State, which publishes them in an administrative bulletin; and

36 (2) Final orders and

37 (3) Declaratory opinions issued by state agencies must be indexed and made
38 available for public inspection. Section 25-43-2.101, 25-43-2.102 and 25-43-2.103.

1 Technology allows public bodies to map out, archive, and then electronically
2 search for electronic documents. Public body resources vary greatly so not every public
3 body can afford to utilize this technology. However, public bodies should explore the
4 feasibility of electronic indexing and retrieval to assist both the public body and
5 requestor in locating public records.

6 **3.4. Organization of records.**

7 A public body owns public records (subject to the public's right, as defined in the
8 act, to inspect or copy nonexempt records) and must maintain custody of them.
9 Therefore, a public body should not allow a requestor to take original public records out
10 of the public body's office. A public body may send original records to a reputable
11 commercial copying center to fulfill a records request if the public body takes
12 reasonable precautions to protect the records.

13 The Ethics Commission encourages public bodies to electronically store and
14 provide public records. Broad public access to state and local government records and
15 information has potential for expanding citizen access to that information and for
16 providing government services. Electronic methods of locating and transferring
17 information can improve communication between and among citizens and governments.

18 Subject to limited public resources, state and local governments should develop,
19 store, and manage their public records and information in electronic formats to meet
20 their missions and objectives. Further, state and local governments should set priorities
21 for making public records widely available electronically to the public. A public body
22 could fulfill its obligation to provide "access" to a public record by providing a requestor
23 with a link to a public web site containing an electronic copy of that record. Public
24 bodies are encouraged to do so. For those without access to the internet, a public body
25 could provide a computer terminal at its office.

26 **3.5. Retention of records.**

27 A public body is not required to retain every record it ever created or used. The
28 state and local records committees of the Mississippi Department of Archives and
29 History (MDAH) approve general retention schedules for state and local public records
30 which apply to records common to most agencies. See Section 25-59-1, *et seq.*, Miss.
31 Code of 1972. Individual agencies seek approval from MDAH for retention schedules
32 that are specific to their public body, or that, because of particular needs of the public
33 body, must be kept longer than provided in the general records retention schedule. The
34 retention schedules for state and local agencies are available at
35 www.mdah.state.ms.us.

36 Retention schedules vary based on the content of the record. For example,
37 documents with no value such as internal meeting scheduling e-mails can be destroyed
38 when no longer needed, but documents such as periodic accounting reports must be
39 kept for a period of years. Because different kinds of records must be retained for
40 different periods of time, a public body is prohibited from automatically deleting all e-

1 mails after a short period of time (such as thirty days). While many of the e-mails could
2 be destroyed when no longer needed, many others must be retained for several years.
3 Indiscriminate automatic deletion of all e-mails after a short period may prevent a public
4 body from complying with its retention duties and could complicate performance of its
5 duties under the Public Records Act. A public body should have a retention policy in
6 which employees save retainable documents and delete nonretainable ones. A public
7 body is strongly encouraged to train employees on retention schedules.

8 The lawful destruction of public records is governed by retention schedules. The
9 unlawful destruction of public records can be a crime. See Section 25-59-23.

10 A public body should never destroy a public record, even if it is about to be
11 lawfully destroyed under a retention schedule, if a public records request has been
12 made for that record. Additional retention requirements might apply if the records may
13 be relevant to actual or anticipated litigation. The public body must retain the record until
14 the record request has been resolved.

15 **3.6. Form of requests.**

16 There is no statutorily required format for a valid public records request. A
17 request can be sent in by mail. A request can also be made by e-mail, fax, or orally. A
18 request should be made to the public body's public records officer. A public body may
19 prescribe means of requests in its rules. A public body is encouraged to make its public
20 records request form available on its web site.

21 A number of agencies routinely accept oral public records requests (for example,
22 asking to look at a building permit). Some agencies find oral requests to be the best way
23 to provide certain kinds of records. However, for some requests such as larger ones,
24 oral requests may be allowed but are problematic. An oral request does not memorialize
25 the exact records sought and therefore prevents a requestor or public body from later
26 proving what was included in the request. Furthermore, a requestor should provide the
27 public body with reasonable notice that the request is for the disclosure of public
28 records; oral requests, especially to public body staff other than the public records
29 officer or designee, may not provide the public body with reasonable notice. Therefore,
30 requestors are strongly encouraged to make written requests. If a public body receives
31 an oral request, the public body staff person receiving it should immediately reduce it to
32 writing and then verify in writing with the requestor that it correctly memorializes the
33 request.

34 A public body should have a public records request form. A public body request
35 form should ask the requestor whether he or she seeks to inspect the records, receive a
36 copy of them, or to inspect the records first and then consider selecting records to copy.
37 A public body request form should recite that inspection of records is free and provide
38 the per-page charge for standard photocopies.

39 A public body request form should require the requestor to provide contact
40 information so the public body can communicate with the requestor to, for example,

1 clarify the request, inform the requestor that the records are available, or provide an
2 explanation of an exemption. Contact information such as a name, phone number, and
3 address or e-mail should be provided. Requestors should provide an e-mail address
4 because it is an efficient means of communication and creates a written record of the
5 communications between them and the public body. A public body should not require a
6 requestor to provide a driver's license number, date of birth, or photo identification. This
7 information is not necessary for the public body to contact the requestor and requiring it
8 might intimidate some requestors.

9 A public body may ask a requestor to prioritize the records he or she is
10 requesting so that the public body is able to provide the most important records first. A
11 public body is not required to ask for prioritization, and a requestor is not required to
12 provide it.

13 A public body cannot require the requestor to disclose the purpose of the
14 request, with two possible exceptions. First, a "public body may establish a standard fee
15 scale to reimburse it for the costs of creating, acquiring and maintaining ... electronically
16 accessible data.... In determining the fees or charges under this subsection, the public
17 body may consider the type of information requested, the purpose or purposes for which
18 the information has been requested and the commercial value of the information."
19 Section 25-61-7(2).

20 Second, a public body may seek information sufficient to allow it to determine if
21 another statute prohibits disclosure. For example, some statutes allow a public body to
22 disclose a record only to a claimant for benefits or his or her representative. In such
23 cases, a public body is authorized to ask the requestor if he or she fits this criterion.

24 25 **PROCESSING OF PUBLIC RECORDS REQUESTS--GENERAL** 26

27 **4. Processing of public records requests--General.**

28 (1) **Providing access.** The (name of public body) acknowledges that "providing
29 access to public records is a duty" and that "any person shall have the right to inspect,
30 copy or mechanically reproduce or obtain a reproduction of any public record" in
31 accordance with these policies. Sections 25-61-1 and 25-61-5. The public records
32 officer or designee will process requests in the order allowing the most requests to be
33 processed in the most efficient manner.

34 (2) **Acknowledging receipt of request.** Within five business days of receipt of
35 the request, the public records officer will do one or more of the following:

36 (a) Make the records available for inspection or copying;

37 (b) If copies are requested and payment of a deposit for the copies, if any, is
38 made or terms of payment are agreed upon, send the copies to the requestor;

1 (c) Provide a reasonable estimate of when records will be available; or

2 (d) If the request is unclear or does not sufficiently identify the requested records,
3 request clarification from the requestor. Such clarification may be requested and
4 provided by telephone. The public records officer or designee may revise the estimate
5 of when records will be available; or

6 (e) Deny the request.

7 (3) **Consequences of failure to respond.** If the (name of public body) does not
8 respond in writing within five business days of receipt of the request for disclosure, the
9 requestor should consider contacting the public records officer to determine the reason
10 for the failure to respond.

11 (4) **Protecting rights of others.** In the event that the requested records contain
12 information that may affect rights of others and may be exempt from disclosure, the
13 public records officer may, prior to providing the records, give notice to such others
14 whose rights may be affected by the disclosure. Such notice should be given so as to
15 make it possible for those other persons to contact the requestor and ask him or her to
16 revise the request, or, if necessary, seek an order from a court to prevent or limit the
17 disclosure. The notice to the affected persons will include a copy of the request.

18 (5) **Records exempt from disclosure.** Some records are exempt from
19 disclosure, in whole or in part. If the (name of public body) believes that a record is
20 exempt from disclosure and should be withheld, the public records officer will state the
21 specific exemption and provide a brief explanation of why the record or a portion of the
22 record is being withheld. If only a portion of a record is exempt from disclosure, but the
23 remainder is not exempt, the public records officer will redact the exempt portions,
24 provide the nonexempt portions, and indicate to the requestor why portions of the
25 record are being redacted.

26 (6) **Inspection of records.**

27 (a) Consistent with other demands, the (name of public body) shall promptly
28 provide space to inspect public records. No member of the public may remove a
29 document from the viewing area or disassemble or alter any document. The requestor
30 shall indicate which documents he or she wishes the public body to copy.

31 (b) The requestor must claim or review the assembled records within thirty days
32 of the (name of public body's) notification to him or her that the records are available for
33 inspection or copying. The public body will notify the requestor in writing of this
34 requirement and inform the requestor that he or she should contact the public body to
35 make arrangements to claim or review the records. If the requestor or a representative
36 of the requestor fails to claim or review the records within the thirty-day period or make
37 other arrangements, the (name of public body) may close the request and refile the
38 assembled records. Other public records requests can be processed ahead of a
39 subsequent request by the same person for the same or almost identical records, which
40 can be processed as a new request.

1 (7) **Providing copies of records.** After inspection is complete, the public records
2 officer or designee shall make the requested copies or arrange for copying.

3 (8) **Providing records in installments.** When the request is for a large number
4 of records, the public records officer or designee will provide access for inspection and
5 copying in installments, if he or she reasonably determines that it would be practical to
6 provide the records in that way. If, within thirty days, the requestor fails to inspect the
7 entire set of records or one or more of the installments, the public records officer or
8 designee may stop searching for the remaining records and close the request.

9 (9) **Completion of inspection.** When the inspection of the requested records is
10 complete and all requested copies are provided, the public records officer or designee
11 will indicate that the (name of public body) has completed a diligent search for the
12 requested records and made any located nonexempt records available for inspection.

13 (10) **Closing withdrawn or abandoned request.** When the requestor either
14 withdraws the request or fails to fulfill his or her obligations to inspect the records or pay
15 the deposit or final payment for the requested copies, the public records officer will
16 close the request and indicate to the requestor that the (name of public body) has
17 closed the request.

18 (11) **Later discovered documents.** If, after the (name of public body) has
19 informed the requestor that it has provided all available records, the (name of public
20 body) becomes aware of additional responsive documents existing at the time of the
21 request, it will promptly inform the requestor of the additional documents and provide
22 them on an expedited basis.

23 **Comments to Rule No. 4.**

24 **4.1. Introduction.**

25 Both requestors and public bodies have responsibilities under the act. The public
26 records process can function properly only when both parties perform their respective
27 responsibilities. A public body has a duty to promptly provide access to all nonexempt
28 public records. A requestor has a duty to request identifiable records, inspect the
29 assembled records or pay for the copies, and be respectful to public body staff.

30 Requestors should keep in mind that all agencies have essential functions in
31 addition to providing public records. Agencies also have greatly differing resources.
32 Public records procedures should prevent excessive interference with the other
33 essential functions of the public body. Therefore, while providing public records is a duty
34 of a public body, it is not required to abandon its other, nonpublic records functions.
35 Agencies without a full-time public records officer may assign staff part-time to fulfill
36 records requests, provided the public body is providing the fullest assistance and the
37 most timely possible action on the request. The proper level of staffing for public records
38 requests will vary among agencies, considering the complexity and number of requests
39 to that public body, public body resources, and the public body's other functions.

1 Agencies are encouraged to use technology to provide public records more
2 quickly and, if possible, less expensively. A public body is allowed, of course, to do
3 more for the requestor than is required by the letter of the act. Doing so often saves the
4 public body time and money in the long run, improves relations with the public, and
5 prevents litigation. For example, agencies are encouraged to post many nonexempt
6 records of broad public interest on the internet. This may result in fewer requests for
7 public records.

8 **4.2. Obligations of requestors.**

9 (1) **Reasonable notice that request is for public records.** A requestor must
10 give a public body reasonable notice that the request is being made pursuant to the act.
11 Requestors are encouraged to cite or name the act but are not required to do so. A
12 request using the terms "public records," "public disclosure," "FOIA," or "Freedom of
13 Information Act" (the terms commonly used for federal records requests) should provide
14 a public body with reasonable notice in most cases. A requestor should not submit a
15 "stealth" request, which is buried in another document in an attempt to trick the public
16 body into not responding.

17 (2) **Identifiable record.** A requestor must request an identifiable record or class
18 of records before a public body can respond to it. An "identifiable record" is one that
19 agency staff can reasonably locate. The act does not allow a requestor to search
20 through public body files for records which cannot be reasonably identified or described
21 to the public body. However, a requestor is not required to identify the exact record he
22 or she seeks. For example, if a requestor requested a public body's "2001 budget," but
23 the public body only had a 2000-2002 budget, the requestor made a request for an
24 identifiable record.

25 An "identifiable record" is not a request for "information" in general. For example,
26 asking "what policies" a public body has for handling discrimination complaints is merely
27 a request for "information." A request to inspect or copy a public body's policies and
28 procedures for handling discrimination complaints would be a request for an "identifiable
29 record."

30 Public records requests are not interrogatories. A public body is not required to
31 conduct legal research for a requestor. A request for "any law that allows the county to
32 impose taxes on me" is not a request for an identifiable record. Conversely, a request
33 for "all records discussing the passage of this year's tax increase on real property" is a
34 request for an "identifiable record."

35 When a request uses an inexact phrase such as all records "relating to" a topic
36 (such as "all records relating to the property tax increase"), the public body may
37 interpret the request to be for records which directly and fairly address the topic. When
38 a public body receives a "relating to" or similar request, it should seek clarification of the
39 request from the requestor.

1 (3) **"Overbroad" requests.** A public body cannot deny a request for identifiable
2 public records based solely on the basis that the request is overbroad. However, if such
3 a request is not for identifiable records or otherwise is not proper, the request can still
4 be denied. When confronted with a request that is unclear, a public body should seek
5 clarification.

6 **4.3. Responsibilities of agencies in processing requests.**

7 (1) **Similar treatment and purpose of the request.** The act provides: "*any*
8 *person* shall have the right to inspect, copy or mechanically reproduce or obtain a
9 reproduction of any public record." (emphasis added) Therefore, requestors should be
10 treated similarly, regardless of the purpose of the request or the identity of the
11 requestor. However, treating requestors similarly does not mean that agencies must
12 process requests strictly in the order received because this might not be providing the
13 most timely possible action for all requests. A relatively simple request need not wait for
14 a long period of time while a much larger request is being fulfilled. Agencies are
15 encouraged to be flexible and process as many requests as possible even if they are
16 out of order.

17 A public body cannot require a requestor to state the purpose of the request (with
18 limited exceptions). See Comment 3.6 above. However, in an effort to better understand
19 the request and provide all responsive records, the public body can inquire about the
20 purpose of the request. The requestor is not required to answer the public body's inquiry
21 (with limited exceptions as previously noted).

22 (2) **Provide fullest assistance and most timely possible action.** The act
23 requires agencies to adopt "reasonable written procedures" concerning access to public
24 records, which are "declared to be public property." Section 25-61-5(1). In keeping with
25 this requirement, public bodies should provide the fullest assistance possible in dealing
26 with requests for public records. The "fullest assistance" principle should guide agencies
27 when processing requests. In general, a public body should devote sufficient staff time
28 to processing records requests, provided that fulfilling requests should not be an
29 excessive interference with the public body's other essential functions. The public body
30 should recognize that fulfilling public records requests is one of the public body's duties,
31 along with its others.

32 The act also prohibits public bodies from adopting procedures "which will
33 authorize the public body to produce or deny production of a public record later than
34 fourteen (14) working days from the date of request." Section 25-61-5(1). Consistent
35 with this requirement, public bodies should take the most timely possible action on
36 requests. This principle should guide public bodies when processing requests. It should
37 be noted that this principle requires the most timely "possible" action on requests. This
38 recognizes that a public body is not always capable of fulfilling a request as quickly as
39 the requestor would like.

40 (3) **Communicate with requestor.** Communication is usually the key to a
41 smooth public records process for both requestors and agencies. Clear requests for a

1 small number of records usually do not require predelivery communication with the
2 requestor. However, when a public body receives a large or unclear request, the public
3 body should communicate with the requestor to clarify the request. If the request is
4 modified orally, the public records officer or designee should memorialize the
5 communication in writing.

6 For large requests, the public body may ask the requestor to prioritize the
7 request so that he or she receives the most important records first. If feasible, the public
8 body should provide periodic updates to the requestor of the progress of the request.
9 Similarly, the requestor should periodically communicate with the public body and
10 promptly answer any clarification questions. Sometimes a requestor finds the records
11 he or she is seeking at the beginning of a request. If so, the requestor should
12 communicate with the public body that the requested records have been provided and
13 that he or she is canceling the remainder of the request. If the requestor's cancellation
14 communication is not in writing, the public body should confirm it in writing.

15 **(4) Failure to provide initial response within five business days.** Public
16 bodies should strive to provide an initial response to a requestor within five business
17 days of receiving a request. The initial response should do one of four things:

18 (a) Provide the record;

19 (b) Acknowledge that the public body has received the request and provide a
20 reasonable estimate of the time it will require to fully respond, not to exceed fourteen
21 working days;

22 (c) Seek a clarification of the request; or

23 (d) Deny the request. A public body's failure to provide a written denial is a
24 violation of the act. See Section 25-61-5(3).

25 **(5) No duty to create records.** A public body is not obligated to create a new
26 record to satisfy a records request. However, sometimes it is easier for a public body to
27 create a record responsive to the request rather than collecting and making available
28 voluminous records that contain small pieces of the information sought by the requestor
29 or find itself in a controversy about whether the request requires the creation of a new
30 record. The decision to create a new record is left to the discretion of the public body. If
31 the public body is considering creating a new record instead of disclosing the underlying
32 records, it should obtain the consent of the requestor to ensure that the requestor is not
33 actually seeking the underlying records. Making an electronic copy of an electronic
34 record is not "creating" a new record; instead, it is similar to copying a paper copy.
35 Similarly, eliminating a field of an electronic record can be a method of redaction; it is
36 similar to redacting portions of a paper record using a black pen or white-out tape to
37 make it available for inspection or copying.

38 **(6) Provide a reasonable estimate of the time to fully respond.** Unless it is
39 providing the records or claiming an exemption from disclosure within the fourteen-
40 business day period, a public body should provide a reasonable estimate of the time it

1 will take to fully respond to the request, not to exceed fourteen days. Fully responding
2 can mean processing the request (assembling records, redacting, preparing a
3 withholding index, or notifying third parties named in the records who might seek an
4 injunction against disclosure) or determining if the records are exempt from disclosure.
5 An estimate should be reasonable.

6 To provide a "reasonable" estimate, a public body should not use the same
7 estimate for every request. A public body should roughly calculate the time it will take to
8 respond to the request and send estimates of varying lengths, as appropriate. Some
9 very large requests can legitimately take months or longer to fully provide. There is no
10 standard amount of time for fulfilling a request so reasonable estimates should vary.

11 **(7) Seek clarification of a request or additional time.** A public body may seek
12 a clarification of an unclear request. A public body should only seek a clarification when
13 the request is objectively unclear. Seeking a "clarification" of an objectively clear
14 request delays access to public records.

15 If the requestor fails to clarify an unclear request, the public body should use its
16 best efforts acting in good faith to interpret the unclear request in favor of disclosure. A
17 public body may take additional time to provide the records or deny the request if it is
18 awaiting a clarification. After providing the initial response and perhaps even beginning
19 to assemble the records, a public body might discover it needs to clarify a request. A
20 clarification could also affect a reasonable estimate of time to comply with a request.

21 **(8) Preserving requested records.** If a requested record is scheduled shortly for
22 destruction, and the public body receives a public records request for it, the record must
23 not be destroyed until the request is resolved. Once a request has been closed, the
24 public body can destroy the requested records in accordance with its retention
25 schedule.

26 **(9) Searching for records.** A public body must conduct an objectively
27 reasonable search for responsive records. A requestor is not required to "ferret out"
28 records on his or her own. A reasonable public body search usually begins with the
29 public records officer for the public body or a records coordinator for a department of the
30 public body deciding where the records are likely to be and who is likely to know where
31 they are. One of the most important parts of an adequate search is to decide how wide
32 the search will be. If the public body is small, it might be appropriate to initially ask all
33 public body employees if they have responsive records. If the public body is larger, the
34 public body may choose to initially ask only the staff of the department or departments
35 of a public body most likely to have the records.

36 For example, a request for records showing or discussing payments on a public
37 works project might initially be directed to all staff in the finance and public works
38 departments if those departments are deemed most likely to have the responsive
39 documents, even though other departments may have copies or alternative versions of
40 the same documents. Meanwhile, other departments that may have documents should
41 be instructed to preserve their records in case they are later deemed to be necessary to

1 respond to the request. The public body could notify the requestor which departments
2 are being surveyed for the documents so the requestor may suggest other departments.
3 It is better to be over inclusive rather than under inclusive when deciding which staff
4 should be contacted, but not everyone in a public body needs to be asked if there is no
5 reason to believe he or she has responsive records. An e-mail to staff selected as most
6 likely to have responsive records is usually sufficient. Such an e-mail also allows a
7 public body to document whom it asked for records.

8 Agency policies should require staff to promptly respond to inquiries about
9 responsive records from the public records officer.

10 After records which are deemed responsive are located, a public body should
11 take reasonable steps to narrow down the number of records to those which are
12 responsive. In some cases, a public body might find it helpful to consult with the
13 requestor on the scope of the documents to be assembled. A public body cannot "bury"
14 a requestor with nonresponsive documents. However, a public body is allowed to
15 provide arguably, but not clearly, responsive records to allow the requestor to select the
16 ones he or she wants, particularly if the requestor is unable or unwilling to help narrow
17 the scope of the documents.

18 (10) **Expiration of reasonable estimate.** If a public body gives a reasonable
19 estimate of time required to produce records, then the public body should provide the
20 records within that time or communicate with the requestor that additional time is
21 required to fulfill the request based on specified criteria.

22 (11) **Notice to affected third parties.** Sometimes a public body receives a
23 request for all or a part of a public record furnished by a third party. The third party can
24 file an action to obtain an injunction to prevent a public body from disclosing it, but the
25 third party must prove the record or portion of it is exempt from disclosure. Section 25-
26 61-9. Before sending a notice, a public body should have a reasonable belief that the
27 record is arguably exempt or have been notified by the third party of its contention that
28 the record is exempt. Notices to affected third parties when the records could not
29 reasonably be considered exempt might have the effect of unreasonably delaying the
30 requestor's access to a disclosable record. This procedure is discussed further in the
31 section below entitled "Exemptions and Third Party Information."

32 (12) **Later discovered records.** If the public body becomes aware of the
33 existence of records responsive to a request which were not provided, the public body
34 should notify the requestor in writing and provide a brief explanation of the
35 circumstances.

36 **4.4. Responsibilities of public body in providing records.**

37 (1) **General.** A public body may simply provide the records or make them
38 available within the fourteen-business day period of the initial response. When it does
39 so, a public body should also provide the requestor a written cover letter or e-mail briefly
40 describing the records provided and informing the requestor that the request has been

1 closed. This assists the public body in later proving that it provided the specified records
2 on a certain date and told the requestor that the request had been closed. However, a
3 cover letter or e-mail might not be practical in some circumstances, such as when the
4 public body provides a small number of records or fulfills routine requests.

5 A public body can, of course, provide the records sooner than fourteen business
6 days. Providing the fullest assistance to a requestor would mean providing a readily
7 available record as soon as possible. For example, a public body might routinely
8 prepare a premeeting packet of documents three days in advance of a city council
9 meeting. The packet is readily available so the public body should provide it to a
10 requestor on the same day of the request so he or she can have it for the council
11 meeting.

12 **(2) Means of providing access.** A public body must make nonexempt public
13 records available for inspection or provide a copy. Section 25-61-5(1). A public body is
14 only required to make records available and has no duty to explain the meaning of
15 public records. Making records available is often called "access."

16 Access to a public record can be provided by allowing inspection of the record,
17 providing a copy, or posting the record on the public body's web site and assisting the
18 requestor in finding it (if necessary). A public body must mail a copy of records if
19 requested and if the requestor pays the actual cost of postage and the mailing
20 container. The requestor can specify which method of access (or combination, such as
21 inspection and then copying) he or she prefers. Different processes apply to requests
22 for inspection versus copying (such as copy charges) so a public body should clarify
23 with a requestor whether he or she seeks to inspect or copy a public record.

24 A public body can provide access to a public record by posting it on its web site.
25 If requested, a public body should provide reasonable assistance to a requestor in
26 finding a public record posted on its web site. If the requestor does not have internet
27 access, the public body may provide access to the record by allowing the requestor to
28 view the record on a specific computer terminal at the public body open to the public. A
29 public body is not required to do so. Despite the availability of the record on the public
30 body's web site, a requestor can still make a public records request and inspect the
31 record or obtain a copy of it by paying the appropriate per-page copying charge.

32 **(3) Providing records in installments.** A public body may provide records on a
33 partial or installment basis as records that are part of a larger set of requested records
34 are assembled or made ready for inspection or disclosure. This approach allows
35 requestors to obtain records in installments as they are assembled and allows agencies
36 to provide records in logical batches. The practice also allows a public body to only
37 assemble the first installment and then see if the requestor claims or reviews it before
38 assembling the next installments.

39 Not all requests should be provided in installments. For example, a request for a
40 small number of documents which are located at nearly the same time should be
41 provided all at once. Installments are useful for large requests when, for example, a

1 public body can provide the first box of records as an installment. A public body cannot
2 use installments to delay access by, for example, calling a small number of documents
3 an "installment" and sending out separate notifications for each one. The public body
4 should provide the fullest assistance and the most timely possible action on requests
5 and should always act in good faith.

6 (4) **Failure to provide records.** A "denial" of a request can occur when a public
7 body:

8 Does not have the record;

9 Fails to respond to a request;

10 Claims an exemption of the entire record or a portion of it; or

11 Without justification, fails to provide the record.

12 (a) **When the public body does not have the record.** A public body is only
13 required to provide access to public records it has or has used. A public body is not
14 required to create a public record in response to a request.

15 A public body must only provide access to public records in existence at the time
16 of the request. A public body is not obligated to supplement responses. Therefore, if a
17 public record is created or comes into the possession of the public body after the
18 request is received by the public body, it is not responsive to the request and need not
19 be provided. A requestor must make a new request to obtain subsequently created
20 public records.

21 Sometimes more than one public body holds the same record. When more than
22 one public body holds a record, and a requestor makes a request to the first public
23 body, the first public body cannot respond to the request by telling the requestor to
24 obtain the record from the second public body. Instead, a public body must provide
25 access to a record it holds regardless of its availability from another public body.

26 A public body is not required to provide access to records that were not
27 requested. A public body does not "deny" a request when it does not provide records
28 that are outside the scope of the request because they were never asked for.

29 (b) **Claiming exemptions.**

30 (i) **Redactions.** If a portion of a record is exempt from disclosure, but the
31 remainder is not, a public body generally is required to redact (black out) the exempt
32 portion and then provide the remainder. Section 25-61-5(2). Withholding an entire
33 record where only a portion of it is exempt violates the act. Some records are almost
34 entirely exempt but small portions remain nonexempt. For example, information
35 revealing the identity of a crime victim is exempt from disclosure. Section 25-61-
36 12(2)(d). If someone requested a police incident report which contains information that
37 would reveal the identity of the victim, the public body must redact the victim's

1 identifying information but provide the rest of the report. See Miss. Ethics Commn.
2 Opinion No. R-08-002.

3 Statistical information not descriptive of any readily identifiable person or persons
4 is generally not subject to redaction or withholding. See Public Records Opinion No. R-
5 09-001. For example, if a statute exempted the identity of a person who had been
6 assessed a particular kind of penalty, and a public body record showed the amount of
7 penalties assessed against various persons, the public body must provide the record
8 with the names of the persons redacted but with the penalty amounts remaining.

9 Originals should not be redacted. For paper records, a public body should redact
10 materials by first copying the record and then either using a black marker on the copy or
11 covering the exempt portions with copying tape, and then making a copy. It is often a
12 good practice to keep the initial copies which were redacted in case there is a need to
13 make additional copies for disclosure or to show what was redacted. For electronic
14 records such as data bases, a public body can sometimes redact a field of exempt
15 information by excluding it from the set of fields to be copied. However, in some
16 instances electronic redaction might not be feasible and a paper copy of the record with
17 traditional redaction might be the only way to provide the redacted record. If a record is
18 redacted electronically, by deleting a field of data or in any other way, the public body
19 should identify the redaction and state the basis for the claimed exemption. See (b)(ii) of
20 this subsection.

21 (ii) **Brief explanation of withholding.** Withholding or redacting public records
22 constitutes a partial denial of a public records request. Denials "shall be in writing and
23 shall contain a statement of the specific reasons for the denial." Section 25-61-5(3).
24 When a public body claims an exemption for an entire record or portion of one, it must
25 inform the requestor of the exemption and provide a brief explanation of how the
26 exemption applies to the record or portion withheld. The brief explanation should cite
27 the statute or other legal authority the public body claims grants an exemption from
28 disclosure. The brief explanation should provide enough information for a requestor to
29 make a threshold determination of whether the claimed exemption is proper.
30 Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

31 One way to properly provide a brief explanation of the withheld record or
32 redaction is for the public body to provide a withholding index. It identifies the type of
33 record, its date and number of pages, and the author or recipient of the record (unless
34 their identity is exempt). The withholding index need not be elaborate but should allow a
35 requestor to make a threshold determination of whether the public body has properly
36 invoked the exemption.

37 (5) **Notifying requestor that records are available.** If the requestor sought to
38 inspect the records, the public body should notify him or her that the entire request or an
39 installment is available for inspection and ask the requestor to contact the public body to
40 arrange for a mutually agreeable time for inspection. The notification should recite that if
41 the requestor fails to inspect or copy the records or make other arrangements within
42 thirty days of the date of the notification that the public body will close the request and

1 refile the records. A public body might consider on a case-by-case basis sending the
2 notification by certified mail to document that the requestor received it.

3 If the requestor sought copies, the public body should notify him or her of the
4 projected costs and whether a copying deposit is required before the copies will be
5 made. The notification can be oral to provide the most timely possible response.

6 **(6) Documenting compliance.** A public body should have a process to identify
7 which records were provided to a requestor and the date of production. In some cases,
8 a public body may wish to number-stamp or number-label paper records provided to a
9 requestor to document which records were provided. The public body could also keep a
10 copy of the numbered records so either the public body or requestor can later determine
11 which records were or were not provided. However, the public body should balance the
12 benefits of stamping or labeling the documents and making extra copies against the
13 costs and burdens of doing so.

14 If memorializing which specific documents were offered for inspection is
15 impractical, a public body might consider documenting which records were provided for
16 inspection by making an index or list of the files or records made available for
17 inspection.

18 **4.5. Inspection of records.**

19 **(1) Obligation of requestor to claim or review records.** After the public body
20 notifies the requestor that the records or an installment of them are ready for inspection
21 or copying, the requestor must claim or review the records or the installment. If the
22 requestor cannot claim or review the records him or herself, a representative may do so
23 within the thirty-day period. Other arrangements can be mutually agreed to between the
24 requestor and the public body.

25 If a requestor fails to claim or review the records or an installment after the
26 expiration of thirty days, a public body may stop assembling the remainder of the
27 records or making copies. If the request is abandoned, the public body is no longer
28 bound by the records retention requirements of the act prohibiting the scheduled
29 destruction of a requested record.

30 If a requestor fails to claim or review the records or any installment of them within
31 the thirty-day notification period, the public body may close the request and refile the
32 records. If a requestor who has failed to claim or review the records then requests the
33 same or almost identical records again, the public body, which has the flexibility to
34 prioritize its responses to be most efficient to all requestors, can process the repeat
35 request for the now-refiled records as a new request after other pending requests.

36 **(2) Time, place, and conditions for inspection.** Inspection should occur at a
37 time mutually agreed (within reason) by the public body and requestor. A public body
38 should not limit the time for inspection to times in which the requestor is unavailable.
39 Requestors cannot dictate unusual times for inspection. The public body is only

1 obligated to allow inspection during the public body's customary office hours. Often a
2 public body will provide the records in a conference room or other office area.

3 The inspection of records should not create excessive interference with the other
4 essential functions of the public body. Similarly, copying records at public body facilities
5 should not unreasonably disrupt the operations of the public body.

6 A public body may have a public employee observe the inspection or copying of
7 records by the requestor to ensure they are not destroyed or disorganized. A requestor
8 cannot alter, mark on, or destroy an original record during inspection. To select a paper
9 record for copying during an inspection, a requestor must use a nonpermanent method
10 such as a removable adhesive note or paper clip.

11 Inspection times can be broken down into reasonable segments such as half
12 days. However, inspection times cannot be broken down into unreasonable segments to
13 either harass the public body or delay access to the timely inspection of records.

14 **4.6. Closing request and documenting compliance.**

15 (1) **Fulfilling request and closing letter.** A records request has been fulfilled
16 and can be closed when a requestor has inspected all the requested records, all copies
17 have been provided, a web link has been provided (with assistance from the public body
18 in finding it, if necessary), an unclear request has not been clarified, a request or
19 installment has not been claimed or reviewed, or the requestor cancels the request. A
20 public body should provide a closing letter stating the scope of the request and
21 memorializing the outcome of the request. A closing letter may not be necessary for
22 smaller requests. The outcome described in the closing letter might be that the
23 requestor inspected records, copies were provided (with the number range of the
24 stamped or labeled records, if applicable), the public body sent the requestor the web
25 link, the requestor failed to clarify the request, the requestor failed to claim or review the
26 records within thirty days, or the requestor canceled the request. The closing letter
27 should also ask the requestor to promptly contact the public body if he or she believes
28 additional responsive records have not been provided.

29 (2) **Returning assembled records.** A public body is not required to keep
30 assembled records set aside indefinitely. This would unreasonably disrupt the
31 operations of the public body. After a request has been closed, a public body should
32 return the assembled records to their original locations. Once returned, the records may
33 be destroyed in accordance with the applicable retention schedule.

34 (3) **Retain copy of records provided.** In some cases, it may be wise for the
35 public body to keep a separate copy of the records it copied and provided in response
36 to a request. This allows the public body to document what was provided. A growing
37 number of requests are for a copy of the records provided to another requestor, which
38 can easily be fulfilled if the public body retains a copy of the records provided to the first
39 requestor. The copy of the records provided should be retained for a period of time

1 consistent with the public body's retention schedules for records related to disclosure of
2 documents.

3 **4.7. Later-discovered records.**

4 A public body has no obligation to search for records responsive to a closed
5 request. Sometimes a public body discovers responsive records after a request has
6 been closed. A public body should provide the later-discovered records to the requestor.

8 **PROCESSING OF PUBLIC RECORDS REQUESTS - ELECTRONIC RECORDS**

10 **5. Processing of public records requests--Electronic records.**

11 (1) **Requesting electronic records.** The process for requesting electronic public
12 records is the same as for requesting paper public records.

13 (2) **Providing electronic records.** When a requestor requests records in an
14 electronic format, the public records officer will provide the nonexempt records or
15 portions of such records that are reasonably locatable in an electronic format that is
16 used by the public body and is generally commercially available, or in a format that is
17 reasonably translatable from the format in which the public body keeps the record.
18 Costs for providing electronic records are governed by Rule No. 13.

19 (3) **Customized access to data bases.** With the consent of the requestor, the
20 (public body) may provide customized access if the record is not reasonably locatable
21 or not reasonably translatable into the format requested. The (public body) may charge
22 the actual cost for such customized access.

23 **Comments to Rule No. 5.**

24 **5.1. Access to electronic records.**

25 The Public Records Act does not distinguish between paper and electronic
26 records. Instead, the act explicitly includes electronic records within its coverage. The
27 definition of "public record" includes all types of materials, "regardless of physical form
28 or characteristics." Section 25-61-3(b). Many public body records are now in an
29 electronic format. Many of these electronic formats such as Windows® products are
30 generally available and are designed to operate with other computers to quickly and
31 efficiently locate and transfer information. Providing electronic records can be cheaper
32 and easier for a public body than paper records. Furthermore, Sections 25-61-1 and
33 25-61-1 mandate: "providing access to public records is a duty of each public body and
34 automation of public records must not erode the right of access to those records." In
35 general, a public body should provide electronic records in an electronic format if
36 requested in that format. Technical feasibility is the touchstone for providing electronic

1 records. A public body should provide reasonably locatable electronic public records in
2 either their original generally commercially available format (such as an Acrobat PDF®
3 file) or, if the records are not in a generally commercially available format, the public
4 body should provide them in a reasonably translatable electronic format if possible. In
5 the rare cases when the requested electronic records are not reasonably locatable, or
6 are not in a generally commercially available format or are not reasonably translatable
7 into one, the public body might consider customized access. A public body may recover
8 its actual costs for providing electronic records, which in many cases is de minimis.
9 What is technically feasible in one situation may not be in another. Not all agencies,
10 especially smaller units of local government, have the electronic resources of larger
11 agencies and some of the generalizations in these model rules may not apply every
12 time. If a public body initially believes it cannot provide electronic records in an
13 electronic format, it should confer with the requestor and the two parties should attempt
14 to cooperatively resolve any technical difficulties. It is usually a purely technical question
15 whether a public body can provide electronic records in a particular format in a specific
16 case.

17 **5.2. Reasonably locatable and reasonably translatable electronic records.**

18 (1) **Reasonably locatable electronic records.** A public body can only produce
19 public records if the public body can locate the records based on a description provided
20 by the requestor. Thus, staff of the public body can only produce records which it can
21 reasonably locate. This does not mean that a public body can decide if a request is
22 "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept
23 for analyzing electronic records issues.

24 In general, a "reasonably locatable" electronic record is one which can be located
25 with typical search features and organizing methods contained in the public body's
26 current software. For example, a retained e-mail containing the term "XYZ" is usually
27 reasonably locatable by using the e-mail program search feature. However, an e-mail
28 search feature has limitations, such as not searching attachments, but is a good starting
29 point for the search. Information might be "reasonably locatable" by methods other than
30 a search feature. For example, a request for a copy of all retained e-mails sent by a
31 specific public body employee for a particular date is "reasonably locatable" because it
32 can be found utilizing a common organizing feature of the public body's e-mail program,
33 a chronological "sent" folder. Another indicator of what is "reasonably locatable" is
34 whether the public body keeps the information in a particular way for its business
35 purposes. For example, a public body might keep a data base of permit holders
36 including the name of the business. The public body does not separate the businesses
37 by whether they are publicly traded corporations or not because it has no reason to do
38 so. A request for the names of the businesses which are publicly traded is not
39 "reasonably locatable" because the public body has no business purpose for keeping
40 the information that way. In such a case, the public body should provide the names of
41 the businesses (assuming they are not exempt from disclosure) and the requestor can
42 analyze the data base to determine which businesses are publicly traded corporations.

1 (2) **"Reasonably translatable" electronic records.** The act requires a public
2 body to provide a "copy" of nonexempt records (subject to the actual cost of
3 reproduction). Section 25-61-5 and 25-61-7. To provide a photocopy of a paper record,
4 a public body must take some reasonable steps to mechanically translate the public
5 body's original document into a useable copy for the requestor such as copying it in a
6 copying machine. Similarly, a public body must take some reasonable steps to prepare
7 an electronic copy of an electronic record or a paper record. Providing an electronic
8 copy is analogous to providing a paper record: A public body must take reasonable
9 steps to translate the public body's original into a useable copy for the requestor.

10 The "reasonably translatable" concept typically operates in three kinds of
11 situations:

12 (a) A public body has only a paper record;

13 (b) A public body has an electronic record in a generally commercially available
14 format (such as a Windows® product); or

15 (c) A public body has an electronic record in an electronic format but the
16 requestor seeks a copy in a different electronic format.

17 The following examples assume no redactions are necessary.

18 (i) **Public body has paper-only records.** When a public body only has a paper
19 copy of a record, an example of a "reasonably translatable" copy would be scanning the
20 record into an Adobe Acrobat PDF® file and providing it to the requestor. The public
21 body could recover its actual cost for scanning. Providing a PDF copy of the record is
22 analogous to making a paper copy. However, if the public body lacked a scanner (such
23 as a small unit of local government), the record would not be "reasonably translatable"
24 with the public body's own resources. In such a case, the public body could provide a
25 paper copy to the requestor.

26 (ii) **Public body has electronic records in a generally commercially available**
27 **format.** When a public body has an electronic record in a generally commercially
28 available format, such as an Excel® spreadsheet, and the requestor requests an
29 electronic copy in that format, no translation into another format is necessary; the public
30 body should provide the spreadsheet electronically. Another example is where a public
31 body has an electronic record in a generally commercially available format (such as
32 Word®) and the requestor requests an electronic copy in Word®. A public body cannot
33 instead provide a WordPerfect® copy because there is no need to translate the
34 electronic record into a different format. In the paper-record context, this would be
35 analogous to the public body intentionally making an unreadable photocopy when it
36 could make a legible one. Similarly, the WordPerfect® "translation" by the public body is
37 an attempt to hinder access to the record. In this example, the public body should
38 provide the document in Word® format. Electronic records in generally commercially
39 available formats such as Word® could be easily altered by the requestor. Requestors

1 should note that altering public records and then intentionally passing them off as exact
2 copies of public records might violate various criminal and civil laws.

3 (iii) **Public body has electronic records in an electronic format other than**
4 **the format requested.** When a public body has an electronic record in an electronic
5 format (such as a Word® document) but the requestor seeks a copy in another format
6 (such as WordPerfect®), the question is whether the public body's document is
7 "reasonably translatable" into the requested format. If the format of the public body
8 document allows it to "save as" another format without changing the substantive
9 accuracy of the document, this would be "reasonably translatable." The public body's
10 record might not translate perfectly, but it was the requestor who requested the record
11 in a format other than the one used by the public body. Another example is where a
12 public body has a data base in a unique format that is not generally commercially
13 available. A requestor requests an electronic copy. The public body can convert the
14 data in its unique system into a near-universal format such as a comma-delimited or
15 tab-delimited format. The requestor can then convert the comma-delimited or tab-
16 delimited data into a data base program (such as Access®) and use it. The data in this
17 example is "reasonably translatable" into a comma-delimited or tab-delimited format so
18 the public body should do so. A final example is where a public body has an electronic
19 record in a generally commercially available format (such as Word®) but the requestor
20 requests a copy in an obscure word processing format. The public body offers to
21 provide the record in Word® format but the requestor refuses. The public body can
22 easily convert the Word® document into a standard text file which, in turn, can be
23 converted into most programs. The Word® document is "reasonably translatable" into a
24 text file so the public body should do so. It is up to the requestor to convert the text file
25 into his or her preferred format, but the public body has provided access to the
26 electronic record in the most technically feasible way and not attempted to hinder the
27 requestor's access to it.

28 (3) **Public body should keep an electronic copy of the electronic records it**
29 **provides.** An electronic record is usually more susceptible to manipulation and
30 alteration than a paper record. Therefore, a public body should keep, when feasible, an
31 electronic copy of the electronic records it provides to a requestor to show the exact
32 records it provided. Additionally, an electronic copy might also be helpful when
33 responding to subsequent electronic records requests for the same records.

34 **5.3. Parties should confer on technical issues.**

35 Technical feasibility can vary from request to request. When a request for
36 electronic records involves technical issues, the best approach is for both parties to
37 confer and cooperatively resolve them. Often a telephone conference will be sufficient.
38 This approach is consistent with the effort that agencies provide the fullest assistance to
39 a requestor. Furthermore, if a requestor files an action under the act to obtain the
40 records, the burden of proof is on the public body to justify its refusal to provide the
41 records. If the requestor articulates a reasonable technical alternative to the public
42 body's refusal to provide the records electronically or in the requested format, and the

1 public body never offered to confer with the requestor, the public body will have difficulty
2 proving that its refusal was justified.

3 **5.4. Customized access.**

4 When locating the requested records or translating them into the requested
5 format cannot be done without specialized programming, a public body may charge
6 actual fees for "customized access." Public bodies should not offer customized
7 electronic access services as the primary way of responding to requests or as a primary
8 source of revenue. Most public records requests for electronic records can be fulfilled
9 based on the "reasonably locatable" and "reasonably translatable" standards. Resorting
10 to customized access should not be the norm. An example of where "customized
11 access" would be appropriate is if a state public body's old computer system stored data
12 in a manner in which it was impossible to extract the data into comma-delimited or tab-
13 delimited formats, but rather required a programmer to spend more than a nominal
14 amount of time to write computer code specifically to extract it. Before resorting to
15 customized access, the public body should confer with the requestor to determine if a
16 technical solution exists not requiring the specialized programming.

17 **5.5. Relationship of Public Records Act to court rules on discovery of** 18 **"electronically stored information."**

19 The December 2006 amendments to the Federal Rules of Civil Procedure
20 provide guidance to parties in litigation on their respective obligations to provide access
21 to, or produce, "electronically stored information." See Federal Rules of Civil Procedure
22 26 and 34. The obligations of state and local agencies under those federal rules (and
23 under any state-imposed rules or procedures that adopt the federal rules) to search for
24 and provide electronic records may be different, and in some instances more
25 demanding, than those required under the Public Records Act. The federal discovery
26 rules and the Public Records Act are two separate laws imposing different standards.
27 However, sometimes requestors make public records requests to obtain evidence that
28 later may be used in non-Public Records Act litigation against the public body providing
29 the records. Therefore, it may be prudent for agencies to consult with their attorneys
30 regarding best practices of retaining copies of the records provided under the act so
31 there can be no question later of what was and what was not produced in response to
32 the request in the event that electronic records, or records derived from them, become
33 issues in court.

34 **EXEMPTIONS AND THIRD PARTY INFORMATION**

35 **6. Exemptions.**

36 The Public Records Act, as well as other statutes and court decisions, provide
37 that a number of types of documents are exempt from public inspection and copying. In
38 addition, other statutes or rules of law, such as various privacy restrictions, may prohibit
39 disclosure. Requestors should be aware of the following exemptions, outside the Public

1 Records Act, that restrict the availability of some documents held by (name of public
2 body) for inspection and copying:

- 3 • Academic records exempt from public access, see § 37-11-51.
- 4 • Appraisal records exempt from access, see § 31-1-27.
- 5 • Archaeological records exempt from public access, see § 39-7-41.
- 6 • Attorney work product, examination, exemption, see § 25-1-102.
- 7 • Birth Defects Registry, see § 41-21-205.
- 8 • Bureau of vital statistics, access to records, see § 41-57-2.
- 9 • Charitable organizations, registration information, exemption from public access, see
10 § 79-11-527.
- 11 • Concealed pistols or revolvers, licenses to carry, records, exemption, see § 45-9-
12 101.
- 13 • Confidentiality, ambulatory surgical facilities, see § 41-75-19.
- 14 • Defendants likely to flee or physically harm themselves or others, see § 41- 32-7.
- 15 • Environmental self-evaluation reports, public records act, exemption, see § 49-2-71.
- 16 • Hospital records, Mississippi Public Records Act exemption, see § 41-9-68.
- 17 • Individual tax records in possession of public body, exemption from public access
18 requirements, see § 27-3-77.
- 19 • Insurance and insurance companies, risk based capital level requirements, reports,
20 see § 83-5-415.
- 21 • Judicial records, public access, exemption, see § 9-1-38.
- 22 • Jury records exempt from public records provisions, see § 13-5-97.
- 23 • Licensure application and examination records. exemption from Public Records Act,
24 see § 73-52-1.
- 25 • Medical examiner, records and reports, see § 41-61-63.
- 26 • Personnel files exempt from examination, see § 25-1-100.
- 27 • Public records and trade secrets, proprietary commercial and financial information,
28 exemption from public access, see § 79-23-1.
- 29 • Workers' compensation, access to records, see § 71-3-66.

30 31 **Comments to Rule No. 6.**

32 **6.1. Public body should publish list of common exemptions.**

33 A public body should publish and maintain a list of exemptions from disclosure
34 (that is, those exemptions found outside the Public Records Act) that it believes
35 potentially exempt records it holds from disclosure. The list is for informational purposes
36 only, and a public body's failure to list an exemption would not affect the efficacy of any
37 exemption.

38 A relatively comprehensive list of statutory exemptions is provided above within
39 the model policy. Many of the records addressed in the statutes listed above would not
40 be held by a particular agency. The agency may wish to delete those statutes from its
41 list of statutory exemptions.

1 **6.2. Summary of exemptions.**

2 **(1) General.** The act and other statutes contain many exemptions from
3 disclosure and numerous court cases interpret them. A full treatment of all exemptions
4 is beyond the scope of the model rules. Instead, these comments to the model rules
5 provide general guidance on exemptions and summarize a few of the most frequently
6 invoked exemptions. However, the scope of exemptions is determined exclusively by
7 statute and case law; the comments to the model rules merely provide guidance on a
8 few of the most common issues.

9 An exemption must be narrowly construed in favor of disclosure. Harrison County
10 Development Commission v. Kinney, 920 So.2d 497, 502 (Miss. App. 2006). A court
11 must specifically declare a record or portion of a record exempt from disclosure. Section
12 25-61-11. An exemption will not be inferred.

13 A public body cannot broaden or otherwise define the scope of a statutory
14 exemption through rule making or policy. An agreement by a public body or promise not
15 to disclose a record cannot make a disclosable record exempt from disclosure. Any
16 contract involving a public body and regarding the disclosure of records should recite
17 that the act controls.

18 A public body must describe why each withheld record or redacted portion of a
19 record is exempt from disclosure. Section 25-61-5(3). One way to describe why a record
20 was withheld or redacted is by using a withholding index.

21 After invoking an exemption in its response, a public body may revise its original
22 claim of exemption in a subsequent proceeding before the Ethics Commission or a
23 court.

24 Exemptions are permissive rather than mandatory. Therefore, a public body has
25 the discretion to provide an exempt record. However, in contrast to a waivable
26 exemption, a public body cannot provide a record when a statute makes it confidential
27 or otherwise prohibits disclosure. For example, the federal Health Insurance Portability
28 and Accountability Act of 1996 (HIPAA) generally prohibits the disclosure of medical
29 information without the patient's consent. If a statute classifies information as
30 "confidential" or otherwise prohibits disclosure, a public body has no discretion to
31 release a record or the confidential portion of it. Some statutes may provide penalties
32 for the release of particular protected records.

33 **(2) "Personnel Records" exemption.** Some public records are exempt from
34 disclosure as "personnel records" under Section 25-1-100, Miss. Code of 1972. That
35 statute mandates "personnel records and applications for employment in the possession
36 of a public body ... shall be exempt from the provisions of the [Public Records Act]."
37 However, the term "personnel records" is not defined in that statute or within the Public
38 Records Act. Furthermore, no statute dictates what information is to be contained in the
39 personnel files of all state and local government employees. Certain information
40 contained in personnel files, such as gross salary and accrued leave time, is subject to

1 disclosure. Harrison County Development Commission v. Kinney, 920 So.2d 497, 502
2 (Miss. App. 2006), citing Mississippi Dep't of Wildlife, Fisheries and Parks v. Mississippi
3 Wildlife Enforcement Officers' Assn., Inc., 740 So.2d 925, 936 (¶ 32) (Miss.1999).

4 Therefore, the determination is not solely dependent upon whether the governmental
5 employer places the documents in a personnel file. Rather, the determination is based
6 upon the nature of the documents.

7 The public employment contracts of public employees, which form the basis for
8 their compensation with public funds, are not exempted personnel records as described
9 in Section 25-1-100. See Miss. Ethics Commn. Opinion No. R-08-009. However,
10 statements and any other documents created during an internal affairs investigation by
11 a municipal police department and solely for the investigation are personnel records and
12 are not subject to disclosure. See Miss. Ethics Commn. Opinion No. R-08-001.

13 **(3) Attorney-client privilege and attorney work product.** The attorney-client
14 privilege and attorney work product statute, Section 25-1-102, is another statutory
15 exemption from disclosure which is found outside the Public Records Act. The exact
16 boundaries of the attorney-client privilege and work-product doctrine is beyond the
17 scope of these comments. However, in general, the attorney-client privilege covers
18 records reflecting communications transmitted in confidence between a public official or
19 employee of a public body acting in the performance of his or her duties and an attorney
20 serving in the capacity of legal advisor for the purpose of rendering or obtaining legal
21 advice, and records prepared by the attorney in furtherance of the rendition of legal
22 advice.

23 **(4) Investigative reports.** Section 25-61-3 of the act defines two types of law
24 enforcement records: "incident report" and "investigative report." See also reports
25 related to criminal investigations - Section 45-29-1.

26 An "incident report" is a narrative description of an alleged offense if such
27 description (1) exists and (2) does not contain investigative information. See Section 25-
28 61-3(e). The statutory definition also specifies that an incident report includes, at a
29 minimum, the name and identification of each person charged with and arrested for the
30 alleged offense, the time, date and location of the alleged offense, and the property
31 involved, to the extent the information is known. Nothing in the act requires a public
32 body to create a document labeled "incident report" and it is clear from the act that the
33 contents of a document determine whether it is an incident report. In other words, the
34 title of a document is of very little, if any, significance when compared to the contents of
35 the document.

36 An "investigative report" is defined under the act as a record of a law
37 enforcement agency containing information beyond the scope of the matters contained
38 in an incident report. See Section 25-61-3(f). The act delineates certain types of records
39 that are considered investigative reports if those records are "beyond the scope of the
40 matters contained in an incident report." Id. The act also defines a "law enforcement
41 agency." See Section 25-61-3(g).

1 The statutory definitions of "incident report" and "investigative report" are
2 important because documents that are investigative reports are clearly exempt from
3 production under the act, while documents containing a narrative description meeting
4 the definition of an incident report are clearly public records subject to production. See
5 Section 25-61-12(2)(a) & (c). Nothing in the act prohibits a public body from producing
6 investigative reports, and the act states a preference for production of all public records.
7 See Section 25-61-12(2)(a) & (c); Section 25-61-1; and Section 25-61-2.

8 Once a public body has produced an "incident report," the agency should not be
9 required to redact otherwise exempt documents to reproduce multiple copies of the
10 "incident report." The Commission encourages all law enforcement agencies to develop
11 a form incident report that contains, at a minimum, the information described in Section
12 25-61-3(e). To that end the Commission has published a uniform incident report which
13 meets the minimum requirements of the act and posted that form on the Commission's
14 Internet web site.

15 (5) **Deliberative process exemption.** The deliberative process privilege exists in
16 federal law and applies to predecisional deliberations of federal agencies. See DCP
17 Farms v. Espy, 1995 WL 1945518 (N.D. Miss. 1995). The deliberative process privilege
18 has not been recognized under Mississippi law. Buford v. Holladay, 133 F.R.D. 487
19 (S.D. Miss., 1990).

20 (6) **"Overbroad" and "privacy" exemptions.** There are no "overbroad" or
21 "privacy" exemptions recognized under Mississippi law.

22 7. Third Party Information

23 When any person files or submits documents with the (public body) which the
24 filer contends are exempt from disclosure under the Public Records Act, the filer shall
25 provide a written statement at the time of filing which shall describe the documents filed
26 and which shall fully explain why the documents are designated as exempt from
27 disclosure and must specifically cite any statute or other legal authority in support of
28 such designation. Such written statement shall itself be a public record subject to
29 disclosure.

30 Any document filed with the (public body) which contains trade secrets or
31 confidential commercial or financial information subject to the protection of any
32 applicable law or court decision shall be clearly designated as such on its face and
33 accompanying cover letter at the time of filing and shall be placed in an envelope other
34 than white. Each page of each document shall be marked confidential. Upon request to
35 inspect or copy any document so designated, the (public body) shall notify the person
36 who filed the document. Thirty (30) days after such notice, the document will be made
37 available for public inspection or copying unless the filer shall have obtained a court
38 order protecting such records as confidential pursuant to Section 25-61-9, Miss. Code of
39 1972.

1 Any person filing documents with the (public body) shall, prior to filing, redact
2 from the documents any social security numbers, account numbers or dates of birth not
3 required to be listed. The (public body) shall determine on a case-by-case basis
4 whether similar information may be redacted by the filer to prevent identity theft. In no
5 event will the (public body) bear any responsibility for a filer's failure to redact such
6 information which leads to or may lead to identity theft or other crime or loss.

7 **Comments to Rule No. 7.**

8 **7.1. Notice to affected third parties.**

9 Sometimes a public body receives a request for all or a part of a public record
10 furnished by a third party. The third party can file an action to obtain an injunction to
11 prevent a public body from disclosing it, but the third party must prove the record or
12 portion of it is exempt from disclosure. Section 25-61-9. Before sending a notice, a
13 public body should have a reasonable belief that the record is arguably exempt or have
14 been notified by the third party of its contention that the record is exempt. Notices to
15 affected third parties when the records could not reasonably be considered exempt
16 might have the effect of unreasonably delaying the requestor's access to a disclosable
17 record.

18 The act provides that public records provided by third parties "which contain
19 trade secrets or confidential commercial or financial information shall not be subject to
20 inspection, examination, copying or reproduction under [the act] until notice to said third
21 parties has been given". Section 25-61-9(1). The act goes on to direct "such records
22 shall be released within a reasonable period of time unless the said third parties shall
23 have obtained a court order protecting such records as confidential." *Id.* Thus, the public
24 body has a duty to notify the third party that the records in question will be released if
25 the third party does not obtain a protective order from a court within a "reasonable
26 period of time." The model policy establishes a period of thirty days as a reasonable
27 time in which to obtain a protective order.

28 The notice informs the third party that release will occur on the stated date unless
29 he or she obtains an order from a court enjoining release. The requestor has an interest
30 in any legal action to prevent the disclosure of the records he or she requested.
31 Therefore, the public body's notice should inform the third party that he or she should
32 name the requestor as a party to any action to enjoin disclosure. If an injunctive action
33 is filed, the third party or public body should name the requestor as a party or, at a
34 minimum, must inform the requestor of the action to allow the requestor to intervene.

35 **7.2. Trade secrets.**

36 Many agencies hold sensitive proprietary information of businesses they
37 regulate. For example, a public body might require an applicant for a regulatory
38 approval to submit designs for a product it produces. A record is exempt from disclosure
39 if it constitutes a "trade secret" under the Mississippi Uniform Trade Secrets Act,
40 Sections 75-26-1 through 75- 26-19. However, the definition of a "trade secret" can be

1 very complex and often the facts showing why the record is or is not a trade secret are
2 only known by the potential holder of the trade secret who submitted the record in
3 question.

4 As with confidential commercial or financial information, a public body should
5 have a reasonable belief that the record is arguably a trade secret or have been notified
6 by the third party of its contention that the record is a trade secret. When a public body
7 receives a request for a record that might be a trade secret, often it does not have
8 enough information to determine whether the record arguably qualifies as a "trade
9 secret." When a public body cannot determine whether a requested record contains a
10 "trade secret," it should notify the third party that the records in question will be released
11 if the third party does not obtain a protective order from a court within thirty days. The
12 matter should follow the same process as that described above for confidential
13 commercial or financial information.

14 15 **COSTS OF PROVIDING PUBLIC RECORDS**

16 17 **8. Costs of providing public records.**

18 (1) **Costs for paper copies.** A requestor may obtain standard black and white
19 photocopies for (amount) cents per page and color copies for (amount) cents per page.

20 (If public body decides to charge more than fifteen cents per page, use the
21 following language:) The (name of public body) charges (amount) per page for a
22 standard black and white photocopy of a record selected by a requestor. A statement of
23 the factors and the manner used to determine this charge is available from the public
24 records officer.

25 Before beginning to make the copies, the requestor must pre-pay all reasonably
26 estimated costs of copying all the records selected by the requestor. The public records
27 officer or designee may also require the payment of the remainder of the copying costs
28 before providing all the records in an installment before providing that installment. The
29 (name of public body) will not charge sales tax when it makes copies of public records.

30 (2) **Costs for electronic records.** The cost of electronic copies of records shall
31 be (amount) for information on a CD-ROM. (If the public body has scanning equipment
32 at its offices: The cost of scanning existing (public body) paper or other nonelectronic
33 records is (amount) per page.) There will be no charge for e-mailing electronic records
34 to a requestor, unless another cost applies such as a scanning fee.

35 (3) **Costs of mailing.** The (name of public body) may also charge actual costs of
36 mailing, including the cost of the shipping container.

1 copying charges for the request. A public body should not assemble a large number of
2 records, fail to inform the requestor of the right to inspect the records prior to copying,
3 and then attempt to charge for copying all the records.

4 Sometimes a requestor will choose to pay for the copying of a large batch of
5 records without inspecting them. This is allowed, provided that the requestor is informed
6 of the right to inspect the records prior to copying. Informing the requestor on a request
7 form of the right to inspect the records prior to copying is sufficient.

8 **(4) Use of outside vendor.** A public body is not required to copy records at its
9 own facilities. A public body can send the project to a commercial copying center and
10 bill the requestor for the amount charged by the vendor. A public body is encouraged to
11 do so when an outside vendor can make copies more quickly and less expensively than
12 a public body. A public body can arrange with the requestor for him or her to pay the
13 vendor directly. A public body cannot charge the default fifteen cents per page rate
14 when its "actual cost" at a copying vendor is less. The default rate is only for public
15 body-produced copies.

16 **(5) Sales tax.** A public body cannot charge sales tax on copies it makes at its
17 own facilities.

18 **(6) Costs of mailing.** If a requestor asks a public body to mail copies, the public
19 body may charge for the actual cost of postage and the shipping container (such as an
20 envelope).

21 **8.2. Charges for electronic records.**

22 Providing copies of electronic records usually costs the public body and
23 requestor less than making paper copies. Agencies are strongly encouraged to provide
24 copies of electronic records in an electronic format. As with charges for paper copies,
25 "actual cost" is the primary factor for charging for electronic records. In many cases, the
26 "actual cost" of providing an existing electronic record is de minimis. For example, a
27 requestor requests a public body to e-mail an existing Excel® spreadsheet. The public
28 body should not charge for the de minimis cost of electronically copying and e-mailing
29 the existing spreadsheet. The public body cannot attempt to charge a per-page amount
30 for a paper copy when it has an electronic copy that can be easily provided at nearly no
31 cost. However, if the public body has a paper-only copy of a record and the requestor
32 requests an Adobe Acrobat PDF® copy, the public body incurs an actual cost in
33 scanning the record (if the public body has a scanner at its offices). Therefore, a public
34 body can establish a scanning fee for records it scans. Agencies are encouraged to
35 compare their scanning and other copying charges to the rates of outside vendors.

36 **8.3. Waiver of copying charges.**

37 A public body has the discretion to waive copying charges. For administrative
38 convenience, many agencies waive copying charges for small requests. For example,
39 some public bodies do not charge copying fees if the request is for one hundred or
40 fewer pages of standard photocopies.

1 **8.4. Pre-payment required.**

2 (1) **Copying deposit.** Fees must be collected by the public body in advance of
3 complying with the request. Section 25-61-7(1). This pre-payment, when based upon a
4 reasonable estimate of the actual cost, is a deposit. The estimate must be reasonable.
5 A public body can require the payment of the deposit before copying an installment of
6 the records or the entire request. The deposit applies to the records selected for
7 copying by the requestor, not all the records made available for inspection. A public
8 body might find a deposit burdensome for small requests where the deposit might be
9 only a few dollars. Any unused deposit must be refunded to the requestor.

10 (2) **Copying charges for each installment.** If a public body provides records in
11 installments, the public body may charge and collect all applicable copying fees for each
12 installment. The public body may agree to provide an installment without first receiving
13 payment for that installment.

14 **8.5. Charges for searching, reviewing and redacting.**

15 (1) **Searching for records.** A public body may "establish and collect fees
16 reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of
17 searching" for public records. Section 25-61-7(1). To comply with any request for public
18 records, a public body must first search for and locate the records requested. In most
19 instances, especially where records are properly organized and stored, the search for
20 the records will be very brief. Public bodies are encouraged to waive charges for routine
21 searches, as providing public records is a duty of every public body. Sections 25-61-1
22 and 25-61-2.

23 However, some requests may be exceedingly voluminous or seek archival
24 records which are not readily available. In such cases the public body may collect
25 reimbursement for the actual cost of performing the search. The public body should limit
26 the cost of the search by delegating it to the lowest paid employee qualified to perform
27 the task. Yet all public bodies have a duty to organize and store their records in a logical
28 and orderly manner in anticipation of public records requests. If a public body fails to
29 properly organize and store public records, the public body may not charge for costs of
30 searching which could have been avoided through proper document management
31 methods.

32 (2) **Reviewing records.** A public body may "establish and collect fees
33 reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of ...
34 reviewing" public records. Section 25-61-7(1). Often times a public body must review
35 requested records before producing them in order to determine whether some
36 exemption may be exerted or whether some confidentiality must be protected. That
37 determination must be based on the content of the records and the use for which it was
38 intended.

39 Some public records are designed and intended to provide the general public
40 with information about the operations of government. One example of such documents

1 are the Statements of Economic Interest filed by public officials with the Ethics
2 Commission. The statement is intended to publicly disclose the sources of public
3 officials' income. Another example is the various materials posted on the internet by
4 public bodies. Such records should never contain confidential or privileged information
5 and rarely contain information which might be exempt. Consequently, it would almost
6 always be unreasonable to review such records before disclosing them.

7 Other public records, such as internal memoranda and correspondence, are not
8 intended to disseminate information to the public and may or may not contain exempt or
9 protected information. For example, an email containing information about a personnel
10 matter may be a "personnel record" exempt from disclosure, even though it is not
11 contained in the employee's personnel file. A broad request for emails which includes
12 that particular email would require that the email be reviewed and a determination made
13 regarding the potential exemption. That determination involves legal analysis and
14 advice and should probably be made by an attorney. The public body may collect
15 reimbursement for the actual cost of the attorney's time.

16 In cases where a large volume of records is requested, a preliminary review may
17 be performed by non-attorney personnel in order to lower the cost to the requestor. A
18 non-attorney review should only be conducted in an effort to lower the cost and must
19 never duplicate services or raise the cost to the requestor. As with searching charges,
20 public bodies are encouraged to waive charges for routine document review, as
21 providing public records is a duty of every public body. Sections 25-61-1 and 25-61-2.

22 To the extent possible, public bodies should endeavor to label or otherwise
23 identify public records which are likely to contain exempt material, and those records
24 should be segregated from records which are not likely to contain exempt material.
25 Public bodies should not "commingle" exempt and non-exempt records. All public
26 bodies have a duty to organize and store their records in a logical and orderly manner in
27 anticipation of public records requests. If a public body fails to properly organize and
28 store public records, the public body may not charge for costs of reviewing those
29 records which could have been avoided through proper document management
30 methods.

31 **(3) Redacting exempt information from records.** When a public record
32 contains exempt material but the entire record is not exempt, the public body must
33 "redact the exempted and make the nonexempted material available for examination."
34 Section 25-61-7(2). The public body is "entitled to charge a reasonable fee for the
35 redaction of any exempted material, not to exceed the agency's actual cost." Id.

36 Redaction, or removing exempt material, from a public record is closely
37 associated with reviewing the record for exemptions and, when possible, should be
38 done concurrently with document review. When review and redaction are performed by
39 the same person, the charges may be combined and calculated together. Sometimes
40 document review may raise legal or factual questions which must be answered before a
41 decision can be made regarding redaction. For instance, a non-attorney employee may
42 encounter an unusual exemption question while performing a routine review of records.

1 The employee may need to seek legal advice from agency counsel on the question. In
2 such cases, costs for review and redaction are incurred by different personnel and must
3 be calculated and invoiced separately. As with searching and review charges, public
4 bodies are encouraged to waive charges for routine redaction, as providing public
5 records is a duty of every public body. Sections 25-61-1 and 25-61-2.

6 (4) **Excessive costs deemed illegal denial.** A public body may never charge
7 more than the "actual cost" of providing access to public records. Section 25-61-7. Any
8 attempt by a public body to impose fees exceeding actual costs reasonably incurred
9 constitutes a willful and knowing denial of access to public records that warrants the
10 imposition of a civil penalty and the award of attorney fees and costs against the public
11 official charging the excessive cost. Harrison County Development Commission v.
12 Kinney, 920 So.2d 497, 503 (Miss. App. 2006).

14 REVIEW OF DENIALS OF PUBLIC RECORDS

16 9. Review of denials of public records.

17 (1) **Petition for internal administrative review of denial of access.** Any person
18 who objects to the initial denial or partial denial of a records request may petition in
19 writing (including e-mail) to the public records officer for a review of that decision. The
20 petition must include a copy of or reasonably identify the written statement by the public
21 records officer or designee denying the request.

22 (2) **Consideration of petition for review.** The public records officer must
23 promptly provide the petition and any other relevant information to (public records
24 officer's supervisor or other public body official designated by the public body to conduct
25 the review). That person will immediately consider the petition and either affirm or
26 reverse the denial within two business days following the (public body's) receipt of the
27 petition, or within such other time as (name of public body) and the requestor mutually
28 agree to.

29 (3) **Review by the Ethics Commission.** Pursuant to Section 25-61-13, if the
30 (name of public body) denies a requestor access to public records, the requestor may
31 ask the Ethics Commission to review the matter. The Ethics Commission has adopted
32 rules on such requests. They may be found at www.ethics.state.ms.us.

33 (4) **Judicial review.** Any person whose request for public records was denied
34 may institute a suit in the chancery court of _____ County (the county in which the
35 public body is located), seeking to reverse the denial, as set forth in Section 25-61-13.

36 Comments to Rule No. 9.

1 **9.1. Public body internal procedure for review of denials of requests.**

2 Each public body should establish mechanisms for the most prompt possible
3 review of decisions denying records requests. A public body internal review of a denial
4 need not be elaborate. It could be reviewed by the public records officer's supervisor, or
5 other person designated by the public body.

6 **9.2. Ethics Commission review of denials.**

7 The Ethics Commission is authorized to review a public body's actions and
8 provide a written opinion to the requestor. Section 25-61-13. A requestor may initiate
9 such a review by completing a request for public records opinion, which is available on
10 the Ethics Commission's web site at www.ethics.state.ms.us.

11 **9.3. Alternative dispute resolution.**

12 Requestors and public bodies are encouraged to resolve public records disputes
13 through alternative dispute resolution mechanisms such as mediation and arbitration.
14 The Ethics Commission is authorized to mediate public records disputes, which can be
15 done without filing a formal request for opinion. Section 25-61-13(1)(b)(ii). Nevertheless,
16 parties are encouraged to resolve their disputes without litigation.

17 **9.4. Judicial review.**

18 (1) **Seeking judicial review.** Any person denied the right granted by Section 25-
19 61-5 to inspect or copy public records may institute a suit in the chancery court of the
20 county in which the public body is located, and the court shall determine whether such
21 public record is exempt from the act. In making such determination the court shall take
22 into consideration any constitutional or statutory law or decision of any court of this state
23 or the United States, any rule of common law, or any public records opinion of the
24 Mississippi Ethics Commission. Process must be served on the proper officials
25 according to law. Section 25-61-13(1)(a).

26 (2) **Expedited procedure.** Lawsuits arising under the act take precedence on the
27 docket over all other matters and must be assigned for hearing and trial at the earliest
28 practicable date and expedited in every way. Section 25-61-13(3). Such suits may be
29 heard in term time or in vacation. Id.

30 (3) **Injunctive relief.** In any suit filed under the act, the court has the authority to
31 prohibit the public body from withholding the public records, to order the production of
32 any public records improperly withheld from the person seeking disclosure, and to grant
33 such other equitable relief as may be proper. Section 25-61-13(2).

34 (4) **"In camera" review by court.** The act authorizes a court to review withheld
35 records or portions of records "in camera." Section 25-61-13(2). "In camera" means a
36 confidential review by the judge alone in his or her chambers. Courts conduct an in
37 camera review because it is often the only way to determine if an exemption has been
38 properly claimed.

1 A public body should prepare an in camera index of each withheld record or
2 portion of a record to assist the judge's in camera review. This is a second index, in
3 addition to a withholding index provided to the requestor. The in camera index should
4 number each withheld record or redacted portion of the record, provide the unredacted
5 record or portion to the judge with a reference to the index number, and provide a brief
6 explanation of each claimed exemption corresponding to the numbering system. The
7 public body's brief explanation should not be as detailed as a legal brief because the
8 opposing party will not have an opportunity to review it and respond. The public body's
9 legal briefing should be done in the normal course of pleadings, with the opposing party
10 having an opportunity to respond.

11 The in camera index and disputed records or unredacted portions of records
12 should be filed under seal. The judge should explain his or her ruling on each withheld
13 record or redacted portion by referring to the numbering system in the in camera index.
14 If the trial court's decision is appealed, the in camera index and its attachments should
15 be made part of the record on appeal and filed under seal in the appellate court.

16 **(5) Attorneys' fees, costs, and penalties to prevailing requestor.** Any person
17 who shall willfully and knowingly deny access to any public record which is not exempt
18 from the act shall a civil fine not to exceed \$100.00, plus all reasonable expenses
19 incurred by such person bringing the proceeding. Section 25-61-15. The act requires a
20 public body to pay a prevailing requestor's reasonable attorneys' fees and costs.
21 Harrison County Development Commission v. Kinney, 920 So.2d 497 (Miss. App.
22 2006), and Mississippi Dep't of Wildlife, Fisheries and Parks v. Mississippi Wildlife
23 Enforcement Officers' Ass'n, Inc., 740 So.2d 925 (Miss.1999). Only a requestor can be
24 awarded attorneys' fees and costs; a public body or a third party resisting disclosure
25 cannot. Caldwell & Gregory, Inc., v. University of Southern Mississippi, 716 So.2d 1120
26 (Miss. App. 1998).

27 The purpose of the act's attorneys' fees, costs, and penalty provisions is to
28 reimburse the requestor for vindicating the public's right to obtain public records, to
29 make it financially feasible for requestors to do so, and to deter agencies from
30 improperly withholding records. However, a court is only authorized to award
31 "reasonable" attorneys' fees. A court has discretion to award attorneys' fees based on
32 an assessment of reasonable hourly rates and which work was necessary to obtain the
33 favorable result.