# MISSISSIPPI MODEL PUBLIC RECORDS RULES
## with comment

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## INTRODUCTORY COMMENTS

### Statutory authority and purpose.

The Mississippi Ethics Commission has developed these model rules 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, these model rules 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.

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

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

**Format of model rules.**

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

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

**Model rules and comments are nonbinding.**

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

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive commentary from a wide variety of interested parties. These model rules have no legal effect unless they are adopted by a public body. These model rules serve as templates which public bodies may utilize in whole or in part, modified as needed, when the public body adopts its own procedures under Section 25-61-5, Miss. Code of 1972.

**Training is critical.**

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

**Additional resources.**

Several web sites provide information on the act. The Ethics Commission's web site on public records is www.ethics.state.ms.us. The Office of the Attorney General

provides opinions and other information at www.ago.state.ms.us. A requestor's organization, the Mississippi Center for Freedom of Information, has materials on its site at www.mcfoi.org.

## AUTHORITY AND PURPOSE

**RULE 1. Authority and purpose.**

"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.

"[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.

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).

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.

The purpose of the act is to provide the public full access to public records concerning the conduct 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.

### Comments to Rule No. 1.

**1.1. Scope of coverage of Public Records Act.**

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

### 1.2. Requirement to adopt reasonable written public records procedures.

The act strongly encourages all public bodies to adopt "reasonable written procedures ... concerning the cost, time, place and method of access [to public records], and [to give] public notice of the procedures." Section 25-61-5. Therefore, all public bodies should adopt and publish "reasonable" written procedures providing for access to public records.

### 1.3. Construction and application of act.

The act declares: "[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." Section 25-61-5(1). The act further provides that it "shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which ... specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the [act]." Section 25-61-11.

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

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

## PUBLIC BODY DESCRIPTION--CONTACT INFORMATION--PUBLIC RECORDS OFFICER

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

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

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

Public Records Officer

(Public body)

(Address)

(Telephone number)

(fax number)

(e-mail)

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

(3) The public records officer will oversee compliance with the act but another (name of public body) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of public body) will provide the "fullest assistance" to requestors; ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of public body).

## Comments to Rule No. 2.

### 2.1. Public body must publish its procedures.

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

### 2.2. Public records officers.

A public body should appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. The purpose of this requirement is to provide the public with one point of contact within the public body to make a request. A state public body should provide the public records officer's name and contact information by publishing it in the state administrative bulletin. A state public body is encouraged to provide the public records officer's contact information on its web site. A local public body should publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the public body's web site.

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

## AVAILABILITY OF PUBLIC RECORDS

**RULE 3.** **Availability of public records.**

(1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of public body), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of public body). The time, place and manner of inspection and copying of records will not be allowed to interfere with other essential duties of the (name of public body).

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

(3) **Organization of records.** The (name of public body) will maintain its records in a reasonably organized manner. The (name of public body) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of public body) records from (name of public body) offices. A variety of records is available on the (name of public body) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

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

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

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

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

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

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

## Comments to Rule No. 3.

### 3.1. "Public record" defined.

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

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

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

(3) **The "conduct" of a governmental function.** To be a "public record," a document must be used 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." Id. Almost all records held by a public body relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record."

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

Sometimes public body employees work on public body business from home computers. These home computer records (including e-mail) were "used" by the public body and relate to the "conduct" of public business so they are "public records" and are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on public body computers. Agencies should ask employees to keep public body-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's public body e-mail account. If the public body receives a request for records that are solely on employees' home computers, the

public body should direct the employee to forward any responsive documents back to the public body, and the public body should process the request as it would if the records were on the public body's computers.

### 3.2. Times for inspection and copying of records.

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

### 3.3. Index of records

The Public Records Act does not require the creation of an index for public records. However, other laws may require the creation of an index for certain records. For example, state agencies are required by the Mississippi Administrative Procedures Law to provide an index for certain categories of records. A public body is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, public body indices will also vary. A public body should post its index on its web site, if it has one.

A state public body must index three categories of records:

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

(2) Final orders and

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

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

### 3.4. Organization of records.

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

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

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

### 3.5. Retention of records.

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

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

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

### 3.6. Form of requests.

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

A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize

the exact records sought and therefore prevents a requestor or public body from later proving what was included in the request. Furthermore, a requestor should provide the public body with reasonable notice that the request is for the disclosure of public records; oral requests, especially to public body staff other than the public records officer or designee, may not provide the public body with reasonable notice. Therefore, requestors are strongly encouraged to make written requests.

A public body should have a public records request form. A public body request form should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. A public body request form should provide the per-page charge for standard photocopies.

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

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

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

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

## PROCESSING OF PUBLIC RECORDS REQUESTS — GENERAL

**RULE 4. Processing of public records requests – General.**

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

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

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

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

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

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

(e) Deny the request.

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

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

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

(6) **Inspection of records.**

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

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

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

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

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

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

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

## Comments to Rule No. 4.

### 4.1. Introduction.

Both requestors and public bodies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. A public body has a duty to promptly provide access to all nonexempt

public records. A requestor has a duty to request identifiable records, inspect the assembled records or pay the actual costs of complying with the request, and be respectful to public body staff.

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. Public records procedures should prevent excessive interference with the other essential functions of the public body. Therefore, while providing public records is a duty of a public body, it is not required to abandon its other, nonpublic records functions. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that public body, public body resources, and the public body's other functions.

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

**4.2. Obligations of requestors.**

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

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

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

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

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the public body may interpret the request to be for records which directly and fairly address the topic. When a public body receives a broad or vague request, it should seek clarification of the request from the requestor. The requestor should clarify the request in a good faith attempt to describe identifiable records. Both parties must work together to properly identify and produce responsive records.

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

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

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

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

(2) **Provide fullest assistance and most timely possible action.** The act strongly encourages public bodies to adopt "reasonable written procedures" concerning access to public records, which are "declared to be public property." Section 25-61-5(1). In keeping with this requirement, public bodies should provide the fullest assistance possible in dealing with requests for public records. The "fullest assistance" principle should guide agencies when processing requests. In general, a public body should devote sufficient staff time to processing records requests, provided that fulfilling requests should not be an excessive interference with the public body's other essential

functions. The public body should recognize that fulfilling public records requests is one of the public body's duties, along with its others.

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

(3) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when a public body receives a large or unclear request, the public body should communicate with the requestor to clarify the request. If the request is modified orally, the public records officer or designee should memorialize the communication in writing.

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

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

(a) Provide the record;

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

(c) Seek a clarification of the request; or

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

(5) **No duty to create records.** A public body is not obligated to create a new record to satisfy a records request. However, sometimes it is easier for a public body to

create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the public body. If the public body is considering creating a new record instead of disclosing the underlying records, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records. Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. Similarly, eliminating a field of an electronic record can be a method of redaction; it is similar to redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying.

(6) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the fourteen-business day period, a public body should provide a reasonable estimate of the time and costs it will take to fully respond to the request, not to exceed fourteen days. Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure. An estimate should be reasonable.

To provide a "reasonable" estimate, a public body should not use the same estimate for every request. A public body should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

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

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

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

(9) **Searching for records.** A public body must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own. A reasonable public body search usually begins with the

public records officer for the public body or a records coordinator for a department of the public body deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the public body is small, it might be appropriate to initially ask all public body employees if they have responsive records. If the public body is larger, the public body may choose to initially ask only the staff of the department or departments of a public body most likely to have the records.

For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The public body could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments. It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in a public body needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows a public body to document whom it asked for records.

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

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

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

(11) **Notice to affected third parties.** Sometimes a public body receives a request for all or a part of a public record furnished by a third party. The third party can file an action to obtain a protective court order preventing a public body from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure. Section 25-61-9. Before sending a notice, a public body should have a reasonable belief that the record is arguably exempt or have been notified by the third party of its contention that the record is exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably

delaying the requestor's access to a disclosable record. This procedure is discussed further in the section below entitled "Exemptions and Third Party Information."

(12) **Later discovered records.** If the public body becomes aware of the existence of records responsive to a request which were not provided, the public body should notify the requestor in writing and provide a brief explanation of the circumstances. This paragraph does not refer to records created or obtained after the request, only to pre-existing records which should have been provided but were overlooked. A request for public records does not impose a continuing duty on the public body to provide responsive records obtained or created after the date of the request. See also Comment 4.4(4)(a) below.

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

(1) **General.** A public body may simply provide the records or make them available within the appropriate time frame. When it does so, a public body should also provide the requestor a written cover letter or e-mail briefly describing the records provided and informing the requestor that the request has been closed. This assists the public body in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or e-mail might not be practical in some circumstances, such as when the public body provides a small number of records or fulfills routine requests.

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

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

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

A public body can provide access to a public record by posting it on its web site. If requested, a public body should provide reasonable assistance to a requestor in

finding a public record posted on its web site. If the requestor does not have internet access, the public body may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the public body open to the public. A public body is not required to do so.

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

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, a public body can provide the first box of records as an installment. A public body cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The public body should provide the fullest assistance and the most timely possible action on requests and should always act in good faith.

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

Does not have the record;

Fails to respond to a request;

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

Without justification, fails to provide the record.

(a) **When the public body does not have the record.** A public body is only required to provide access to public records it has in its possession or over which it has control. A public body is not required to create a public record in response to a request.

A public body must only provide access to public records in existence at the time of the request. A public body is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the public body after the request is received by the public body, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records. However, if a record is requested on a continuing basis, e.g. - weekly municipal court dispositions, both the public body and requestor may be best served by agreeing that the records will be provided based on one continuing request which includes an agreed basis for payment of the agency's actual cost in providing the records.

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

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

(b) **Claiming exemptions.**

(i) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, a public body generally is required to redact (black out) the exempt portion and then provide the remainder. Section 25-61-5(2). Withholding an entire record where only a portion of it is exempt violates the act. Some records are almost entirely exempt but small portions remain nonexempt. For example, information contained in a police report revealing the identity of a crime victim is exempt from disclosure. Section 25-61-12(2)(d). If someone requested a police incident report which contains information that would reveal the identity of the victim, the public body must redact the victim's identifying information but provide the rest of the report. See Miss. Ethics Commn. Opinion No. R-08-002. (Incident reports should not contain victim information. Please see Comment No. 6.2(4) for further explanation.)

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

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

(ii) **Brief explanation of withholding.** Withholding or redacting public records constitutes a partial denial of a public records request. Denials "shall be in writing and shall contain a statement of the specific reasons for the denial." Section 25-61-5(3).

When a public body claims an exemption for an entire record or portion of one, it must inform the requestor of the exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. The brief explanation should cite the statute or other legal authority the public body claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

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

(5) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the public body should notify him or her that the entire request or an installment will be available for inspection upon payment of costs, if any, and ask the requestor to contact the public body to arrange for a mutually agreeable time for inspection. The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the public body will close the request and refile the records. A public body might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

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

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

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

**4.5. Inspection of records.**

(1) **Obligation of requestor to claim or review records.** After the public body notifies the requestor that the records or an installment of them are ready for inspection

or copying, the requestor must claim or review the records or the installment. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the public body.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, a public body may stop assembling the remainder of the records or making copies. If the request is abandoned, the public body can proceed with the scheduled destruction of a requested record.

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

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the public body and requestor. A public body should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The public body is only obligated to allow inspection during the public body's customary office hours. Often a public body will provide the records in a conference room or other office area.

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

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

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

### 4.6. Closing request and documenting compliance.

(1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the public body in finding it, if necessary), an unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. A public body should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests. The outcome described in the closing letter might be that the

requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the public body sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the public body if he or she believes additional responsive records have not been provided.

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

(3) **Retain copy of records provided.** In some cases, it may be wise for the public body to keep a separate copy of the records it copied and provided in response to a request. This allows the public body to document what was provided. A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the public body retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for a period of time consistent with the public body's retention schedules for records related to disclosure of documents.

**4.7. Later-discovered records.**

A public body has no obligation to search for records responsive to a closed request. Sometimes a public body discovers responsive records after a request has been closed. A public body should provide the later-discovered records to the requestor. See also Comment 4.3(12) and 4.4(4)(a) above.

PROCESSING OF PUBLIC RECORDS REQUESTS – ELECTRONIC RECORDS

RULE 5. **Processing of public records requests – Electronic records.**

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

(2) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the public body and is generally commercially available, or in a format that is reasonably translatable from the format in which the public body keeps the record. Costs for providing electronic records are governed by Rule No. 8.

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

## Comments to Rule No. 5.

### 5.1. Access to electronic records.

The Public Records Act does not distinguish between paper and electronic records. Instead, the act explicitly includes electronic records within its coverage. The definition of "public record" includes all types of materials, "regardless of physical form or characteristics." Section 25-61-3(b). Many public body records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for a public body than paper records. Furthermore, Sections 25-61-1 and 25-61-1 mandate: "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." In general, a public body should provide electronic records in an electronic format if requested in that format. Technical feasibility is the touchstone for providing electronic records. A public body should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the public body should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the public body might consider customized access. A public body may recover its actual costs for providing electronic records, which in many cases is de minimis. What is technically feasible in one situation may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If a public body initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. It is usually a purely technical question whether a public body can provide electronic records in a particular format in a specific case.

### 5.2. Reasonably locatable and reasonably translatable electronic records.

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

In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the public body's current software. For example, a retained e-mail containing the term "XYZ" is usually reasonably locatable by using the e-mail program search feature. However, an e-mail search feature has limitations, such as not searching attachments, but is a good starting

point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained e-mails sent by a specific public body employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the public body's e-mail program, a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the public body keeps the information in a particular way for its business purposes. For example, a public body might keep a data base of permit holders including the name of the business. The public body does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the public body has no business purpose for keeping the information that way. In such a case, the public body should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the data base to determine which businesses are publicly traded corporations.

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

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

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

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

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

The following examples assume no redactions are necessary.

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

(ii) **Public body has electronic records in a generally commercially available format.** When a public body has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the public body should provide the spreadsheet electronically. Another example is where a public body has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. A public body should not instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the public body intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect® "translation" by the public body could be an attempt to hinder access to the record. In this example, the public body should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

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

(3) **Public body should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, a public body should keep, when feasible, an electronic copy of the electronic records it provides to a requestor to show the exact

records it provided. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

### 5.3. Parties should confer on technical issues.

Technical feasibility can vary from request to request. When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the effort that agencies provide the fullest assistance to a requestor. Furthermore, if a requestor files an action under the act to obtain the records, the burden of proof may be on the public body to justify its refusal to provide the records. If the requestor articulates a reasonable technical alternative to the public body's refusal to provide the records electronically or in the requested format, and the public body never offered to confer with the requestor, the public body may have difficulty proving an affirmative defense that its refusal was justified.

### 5.4. Customized access.

When locating the requested records or translating them into the requested format cannot be done without specialized programming, a public body may charge actual fees for "customized access." Public bodies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue. Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards. Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state public body's old computer system stored data in a manner in which it was impossible to extract the data into comma-delimited or tab-delimited formats, but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it. Before resorting to customized access, the public body should confer with the requestor to determine if a technical solution exists not requiring the specialized programming. Nevertheless, a public body is not required to create a record which did not previously exist. See Comment No. 4.3(5).

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

The December 2006 amendments to the Federal Rules of Civil Procedure provide guidance to parties in litigation on their respective obligations to provide access to, or produce, "electronically stored information." See Federal Rules of Civil Procedure 26 and 34. The obligations of state and local agencies under those federal rules (and under any state-imposed rules or procedures that adopt the federal rules) to search for and provide electronic records may be different, and in some instances more demanding, than those required under the Public Records Act. The discovery rules and the Public Records Act are two separate laws imposing different standards. However, sometimes requestors make public records requests to obtain information that later may be used in non-Public Records Act litigation against the public body providing the

records. Therefore, it may be prudent for agencies to consult with their attorneys regarding best practices of retaining copies of the records provided under the act so there can be no question later of what was and what was not produced in response to the request in the event that electronic records, or records derived from them, become issues in court.

## EXEMPTIONS AND THIRD PARTY INFORMATION

**RULE 6.** **Exemptions.**

The Public Records Act, as well as other statues and court decisions, provide that a number of types of documents are exempt from public inspection and copying. In addition, other statutes or rules of law, such as various privacy restrictions, may prohibit disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of public body) for inspection and copying:

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

## Comments to Rule No. 6.

### 6.1. Public body should publish list of common exemptions.

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

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

### 6.2. Summary of exemptions.

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

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

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

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

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

Exemptions are permissive rather than mandatory. Therefore, a public body has the discretion to provide an exempt record. However, in contrast to a waivable exemption, a public body cannot provide a record when a statute makes it confidential or otherwise prohibits disclosure. For example, the federal Health Insurance Portability

and Accountability Act of 1996 (HIPAA) generally prohibits the disclosure of medical information without the patient's consent. If a statute classifies information as "confidential" or otherwise prohibits disclosure, a public body has no discretion to release a record or the confidential portion of it. Some statutes may provide penalties for the release of particular protected records.

(2) **"Personnel Records" exemption.** Some public records are exempt from disclosure as "personnel records" under Section 25-1-100, Miss. Code of 1972. That statute mandates "personnel records and applications for employment in the possession of a public body ... shall be exempt from the provisions of the [Public Records Act]." However, the term "personnel records" is not defined in that statute or within the Public Records Act. Furthermore, no statute dictates what information is to be contained in the personnel files of all state and local government employees. Certain information contained in personnel files, such as gross salary and accrued leave time, is subject to disclosure. Harrison County Development Commission v. Kinney, 920 So.2d 497, 502 (Miss. App. 2006), citing Mississippi Dep't of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement Officers' Assn., Inc., 740 So.2d 925, 936 (¶ 32) (Miss. 1999). Therefore, the determination is not solely dependent upon whether the governmental employer places the documents in a personnel file. Rather, the determination is based upon the nature of the documents.

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

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

(4) **Investigative reports.** Section 25-61-3 of the act defines two types of law enforcement records: "incident report" and "investigative report." An "incident report" is a narrative description of an alleged offense if such description (1) exists and (2) does not contain investigative information. See Section 25-61-3(e). An "incident report" is not exempt under the Public Records Act. The statutory definition also specifies that an incident report includes, at a minimum, the name and identification of each person charged with and arrested for the alleged offense, the time, date and location of the alleged offense, and the property involved, to the extent the information is known.

Nothing in the act requires a public body to create a document labeled "incident report" and it is clear from the act that the contents of a document determine whether it is an incident report. In other words, the title of a document is of very little, if any, significance when compared to the contents of the document.

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

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

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

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

(6) **"Overbroad" and "privacy" exemptions.** There are no "overbroad" or "privacy" exemptions recognized under Mississippi law. However, state and federal statutes separate from the Public Records Act may require public bodies to withhold certain information on privacy grounds. E. g. – HIPAA (private medical information) and FERPA (private student/educational information). See Comment No. 6.2(1) above.

RULE 7. **Third Party Information**

When any person files or submits documents with the (public body) which the filer contends are exempt from disclosure under the Public Records Act, the filer shall provide a written statement at the time of filing which shall describe the documents filed and which shall fully explain why the documents are designated as exempt from disclosure and must specifically

cite any statute or other legal authority in support of such designation. Such written statement shall itself be a public record subject to disclosure.

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

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

## Comments to Rule No. 7.

### 7.1. Notice to affected third parties.

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

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

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor may have an

interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the public body's notice should provide the third party with contact information for the requestor so that the third party filer can name the requestor as a party to any action to enjoin disclosure or allow the requestor to intervene if the third party chooses to do so.

7.2. **Trade secrets.**

Many agencies hold sensitive proprietary information of businesses they regulate. For example, a public body might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Mississippi Uniform Trade Secrets Act, Sections 75-26-1 through 75- 26-19. However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.

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

## COSTS OF PROVIDING PUBLIC RECORDS

**RULE 8. Costs of providing public records.**

(1) **Costs for paper copies.** Section 25-61-7(1), Miss. Code of 1972, reads as follows: "Except as provided in subsection (2) of this section, each public body may establish and collect fees reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of searching, reviewing and/or duplicating and, if applicable, mailing copies of public records."

A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page. Copy charges for some specific types of records are set by statute and may exceed the amount stated above. Examples of specific copy charges include, but are not limited to, the following:

(Here list the type of document and the statutory authority for the charge; e.g. – Copies from Office of Chancery Clerk, Section 25-7-9; or Copies from Office of Circuit Clerk, Section 25-7-13.)

(If public body decides to charge more than fifteen cents per page, use the following language:) The (name of public body) charges (amount) per page for a standard black and white

photocopy of a record selected by a requestor. A statement of the factors and the manner used to determine this charge is available from the public records officer.

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

(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the public body has scanning equipment at its offices: The cost of scanning existing (public body) paper or other non-electronic records is (amount) per page.) There will be no charge for e-mailing electronic records to a requestor, unless another cost applies such as a scanning fee or system costs allowed under Section 25-61-7(2), Miss. Code of 1972.

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

(4) **Payment.** Payment may be made by cash, check, or money order to the (name of public body).

(5) **Charges for searching, reviewing and redacting.** The actual cost of searching for and reviewing and, if necessary, redacting exempt information from public records shall be based upon the hourly rate of compensation for the lowest paid agency employee qualified to perform the task, which shall be multiplied by the actual time to complete the task.

(6) (Name of public body) may require payment in advance for all costs before providing copies or access to records.

## Comments to Rule No. 8.

### 8.1. General rules for charging for copies.

(1) **Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. A public body can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.

If it attempts to charge more than fifteen cents per page for photocopies, a public body should establish a statement of the actual cost of the copies it provides, which should include a statement of the factors and the manner used to determine the actual per page cost. A public body may include the costs directly incident to providing the copies such as paper, copying equipment, and staff time to make the copies, but, in such case, no per page charge would apply.

If it charges more than the default rate of fifteen cents per page, a public body should provide its calculations and the reasoning for its charges. A price list with no

analysis is insufficient. A public body's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor, the Ethics Commission or a court to determine if the public body has properly calculated its copying charges. A public body should generally compare its copying charges to those of commercial copying centers.

If a public body opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs.

(2) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. A public body can charge its actual costs for nonstandard photocopies. For example, when a public body provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The public body can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.

(3) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. However, charges can be made for searching, reviewing and redacting records not copied.

The requestor should specify whether he or she seeks inspection or copying. If the requestor seeks copies, then the public body should inform the requestor of the copying charges for the request. A public body should not assemble a large number of records, fail to inform the requestor of the right to inspect the records prior to copying, and then attempt to charge for copying all the records.

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

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

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

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

### 8.2. Charges for electronic records.

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

### 8.3. Waiver of copying charges.

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

### 8.4. Pre-payment required.

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

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

### 8.5. Charges for searching, reviewing and redacting.

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

searches, as providing public records is a duty of every public body. Sections 25-61-1 and 25-61-2.

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

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

Some public records are designed and intended to provide the general public with information about the operations of government. One example of such documents are the Statements of Economic Interest filed by public officials with the Ethics Commission. The statement is intended to publicly disclose the sources of public officials' income. Another example is the various materials posted on the internet by public bodies. Such records should never contain confidential or privileged information and rarely contain information which might be exempt. Consequently, it would almost always be unreasonable to review such records before disclosing them.

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

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

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

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

Redaction, or removing exempt material, from a public record is closely associated with reviewing the record for exemptions and, when possible, should be done concurrently with document review. When review and redaction are performed by the same person, the charges may be combined and calculated together. Sometimes document review may raise legal or factual questions which must be answered before a decision can be made regarding redaction. For instance, a non-attorney employee may encounter an unusual exemption question while performing a routine review of records. The employee may need to seek legal advice from agency counsel on the question. In such cases, costs for review and redaction are incurred by different personnel and must be calculated and invoiced separately. As with searching and review charges, public bodies are encouraged to waive charges for routine redaction, as providing public records is a duty of every public body. Sections 25-61-1 and 25-61-2.

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

## REVIEW OF DENIALS OF PUBLIC RECORDS

**RULE 9. Review of denials of public records.**

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

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

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

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

## Comments to Rule No. 9.

### 9.1. Public body internal procedure for review of denials of requests.

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

### Ethics Commission review of denials.

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

### 9.2. Alternative dispute resolution.

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

### 9.3. Judicial review.

(1) **Seeking judicial review.** "Any person denied the right granted by Section 25-61-5 to inspect or copy public records may institute a suit in the chancery court of the county in which the public body is located, and the court shall determine whether such public record is exempt from the act. In making such determination the court shall take into consideration any constitutional or statutory law or decision of any court of this state or the United States, any rule of common law, or any public records opinion of the

Mississippi Ethics Commission. Process must be served on the proper officials according to law." Section 25-61-13(1)(a).

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

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

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

The judge will have full authority over the timing, manner and format of records submitted for in camera review, subject to the applicable rules of court. The procedure outlined below is merely one suggested approach to the submission of records for in camera review. A public body should consult its attorney regarding the best practice to follow in a specific case.

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

The in camera index and disputed records or un-redacted portions of records should be filed under seal. If this indexing system is followed, the judge may choose to explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments can be made part of the record on appeal and filed under seal in the appellate court.

(5) **Attorneys' fees, costs, and penalties to prevailing requestor.** Any person who shall willfully and knowingly deny access to any public record which is not exempt from the act shall be subject to a civil fine not to exceed $100.00, plus all reasonable expenses incurred by such person bringing the proceeding. Section 25-61-15. The act

requires a public body to pay a prevailing requestor's reasonable attorneys' fees and costs. Harrison County Development Commission v. Kinney, 920 So.2d 497 (Miss. App. 2006), and Mississippi Dep't of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement Officers' Ass'n, Inc., 740 So.2d 925 (Miss. 1999). Only a requestor can be awarded attorneys' fees and costs; a public body or a third party resisting disclosure cannot. Caldwell & Gregory, Inc., v. University of Southern Mississippi, 716 So.2d 1120 (Miss. App. 1998).

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