BEFORE THE MISSISSIPPI ETHICS COMMISSION

THE MISSISSIPPI FREE PRESS and NICK JUDIN **COMPLAINANTS**

VS. **OPEN MEETINGS CASE NO. M-22-004**

HOUSE OF REPRESENTATIVES **RESPONDENT**

PRELIMINARY REPORT AND RECOMMENDATION

This matter came before the Ethics Commission through an Open Meetings Complaint filed by Mr. Nick Judin, a reporter with an online news publication, The Mississippi Free Press, which subsequently filed a supplemental complaint and other pleadings through counsel. The complaints were filed against the Mississippi House of Representatives. Responses and other pleadings have been filed by Speaker Philip Gunn on behalf of the House and by the House Republican Caucus through their attorneys.

The Ethics Commission has jurisdiction over this matter pursuant to Section 25-41-15, Miss. Code of 1972. This Preliminary Report and Recommendation is presented in accordance with Rule 4.6, Rules of the Mississippi Ethics Commission.

I. PROCEDURAL HISTORY

1.1 Mr. Nick Judin filed a complaint alleging that on February 1, 2022, he sent an email to the office of House Speaker Philip Gunn asking to attend a meeting of the House Republican Caucus but received no response. Mr. Judin describes the Caucus as "a public body comprising a majority of legislators in the Mississippi House of Representatives that meets regularly to discuss and determine policy and law." Mr. Judin further alleges he attempted to attend a House Republican Caucus meeting on March 14, 2022, but his entry was blocked, and the meeting was temporarily put on hold. Mr. Judin states he identified himself as a member of the press and informed those present that he was attending under the Open Meetings Act. Mr. Judin also says he "inquired [of] several staffers and legislators, including Speaker Gunn himself, if the meeting was subject to the Open Meetings Act, and their response was that it is not."

1.2 The Mississippi Free Press later filed a supplemental complaint through counsel, joining with Mr. Judin in the original complaint. The supplemental complaint incorporates all the allegations of the original complaint and explicitly alleges "the Caucus's membership is composed of a majority of the members of the Mississippi House of Representatives, which is a public body, and these meetings contain a quorum of the House. The meetings include discussions and deliberations regarding legislation coming before the Mississippi House of Representatives." The supplemental complaint also quotes a news story from a separate publication alleging "'[t]he weekly closed-door Republican caucus meetings are usually the first place rank-and-file House Republicans are informed of details about major policies that Gunn and a handful of other House leaders determine privately. In the caucus meetings, Gunn asks the group of Republicans for support.'"

1.3 As noted above, responses to the complaints were filed by Speaker Gunn on behalf of the House and by the House Republican Caucus through its attorneys. Subsequent pleadings were filed by the complainant, the House and the Caucus. None of those pleadings allege any additional facts but make purely legal arguments which are discussed below.

II. PROPOSED CONCLUSIONS OF LAW

2.1 The primary question of law in this case is whether the House of Representatives is a "public body," as defined in Section 25-41-3(a), Miss. Code of 1972. The respondent also contends the complaints raise "nonjusticiable political questions" which are not within the authority of the Ethics Commission to resolve. Another question of law implied in the pleadings is whether the House Republican Caucus is a public body.

A. The question of whether the House of Representatives is a "public body" under the Open Meetings Act is a question of law within the authority of the Ethics Commission and the courts to answer and is not a nonjusticiable political question.

2.2 The House and Caucus also contend this case raises "nonjusticiable political issues" which cannot be addressed by the commission or the courts. They especially rely upon the case of Gunn v. Hughes, 210 So.3d 969 (Miss. 2017), in which a member of the House alleged the reading of bills by a computer at high speed violated Section 59 of the Miss. Constitution of 1890, which allows any member to demand bills be read aloud. The Court concluded it did not have authority, under the Separation of Powers Doctrine, to interfere in the internal procedural affairs of the Legislature. Yet the case was not about legislative rules, which truly are internal. Rather, the case was about a provision in the state constitution, which is squarely within the authority of the Court to interpret. Moreover, the Open Meetings case now before the commission involves a statute which the Legislature has assigned to the Ethics Commission to enforce, not a legislative rule. Section 25-41-15.

2.3 Additionally, the respondents assert that any application of the Open Meetings Act to the House by the Ethics Commission or the courts would also violate the Separation of Powers Doctrine. This question was clearly answered when the Supreme Court held the Board of Trustees of Institutions of Higher Learning was subject to the Open Meetings Act and to judicial review even though it is a Constitutional body. Board of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp., 478 So.2d 269, 277 (Miss. 1985). This principle has been further settled by the Ethics Commission previously adjudicating an Open Meetings case against the Legislature without objection or appeal. See Open Meetings Case No. M-21-014, ACLU of Miss. vs. Standing Joint Legislative Committees on Reapportionment and Congressional Redistricting. Therefore, the contention that this Open Meetings case involves issues outside the authority of the Ethics Commission is meritless.

B. The House Republican Caucus is not a "public body" under the Open Meetings Act.

2.4 The supplemental complaint names the Speaker of the House and the House Republican Caucus, as well as the House of Representatives, which apparently prompted the Caucus to file its own response through separate counsel. The complainant alleges and the respondents acknowledge that the House Republican Caucus is comprised of all members of the

House who are Republicans, which currently includes 75 of the 122 members. See House roster at http://www.legislature.ms.gov/legislators/house-roster/.

2.5 As noted in the response filed by the House Republican Caucus, a caucus is "a closed meeting of a group of persons belonging to the same political party or faction usually to select candidates or to decide on policy." (https://www.merriam-webster.com/dictionary/caucus) Legislative caucuses are common at the federal and state level, and several exist in Mississippi, including the Mississippi House Democratic Caucus (https://www.facebook.com/mshouse dems/), Mississippi Legislative Sportsmen's Caucus (https://congressionalsportsmen.org/state/ ms), Mississippi Freedom Caucus (https://www.freedomcaucus.ms/members/) and the Mississippi Legislative Black Caucus (https://msblackcaucus.org/).

2.6 Section 25-41-3(a) defines a "public body" in pertinent part as follows:

> [A]ny executive or administrative board, commission, authority, council, department, agency, bureau or any other policymaking entity, or committee thereof, of the State of Mississippi, or any political subdivision or municipal corporation of the state, whether the entity be created by statute or executive order, which is supported wholly or in part by public funds or expends public funds, and any standing, interim or special committee of the Mississippi Legislature.

2.7 Clearly, a legislative caucus does not meet the criteria in the statutory definition. It is not an entity of the state created by law and is not supported by public funds. Consequently, the Caucus is not a "public body," is not a party to this case, and its pleadings are treated as *amicus* filings and given due consideration. Yet, as noted below, when the assembled members of a legislative caucus constitute a majority of the House or Senate, a violation of the Open Meetings Act can occur.

C. The House of Representatives is a "public body" and is subject to the Open Meetings Act.

2.8 The House of Representatives contends the Open Meetings Act does not apply to it because the House is not a "public body" as defined in Section 25-41-3(a). As noted above, a "public body" is defined as "any executive or administrative board, commission, authority, council, department, agency, bureau or any other policymaking entity, or committee thereof, of the State of Mississippi … which is supported wholly or in part by public funds or expends public funds, and any standing, interim or special committee of the Mississippi Legislature." (Emphasis added.)

2.9 Section 25-41-3(a)(vi) explicitly exempts "Legislative subcommittees and legislative conference committees." If, as the House contends, it is not a "public body," then it seems pointless to explicitly exclude any of its committees. Under the House interpretation, all of its committees would be exempt by implication. Section 25-41-11(3) lists relaxed requirements for the minutes of legislative committees, and Section 25-41-13(4) specifies notice requirements for legislative committees. Thus, standing, interim and special committees of the Legislature are explicitly included within the Open Meetings Act, while subcommittees and conference

committees of the Legislature are explicitly excluded from the Act. The entire House and Senate are not explicitly named in the definition.

2.10 Both the complainant and respondent have presented competing rules of statutory interpretation in an attempt to determine whether the statutory definition of "public body" applies to the House of Representatives. The parties have cited numerous cases from Mississippi and other states in which those rules have been applied. However, none of those authorities are compelling since none of them interpret Mississippi's Open Meetings Act.

2.11 The only compelling guidance on this question comes from the Mississippi Supreme Court, which has instructed that whenever the Open Meetings Act is unclear, the question should be decided in favor of openness. "The Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public. 'Openness in government is the public policy of this State.'" Board of Trustees at 276, quoting Mayor & Aldermen of Vicksburg v. Vicksburg Printing & Pub., 434 So.2d 1333 (Miss.1983).

2.12 In Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107 (Miss.1989), the Supreme Court summarized the Legislative intent of the Open Meetings Act as follows:

> Every member of every public board and commission in this state should always bear in mind that the spirit of the Act is that a citizen spectator, including any representative of the press, has just as much right to attend the meeting and see and hear everything that is going on as has any member of the board or commission.

Id. at 110. "However inconvenient openness may be to some, it is the legislatively decreed public policy of this state." Vicksburg at 1336.

2.13 While the Mississippi Supreme Court has not published a decision on this exact question, it has been addressed by the Office of the Attorney General. In 1989 Rep. Jim Simpson requested an opinion asking whether "the Legislature, by adopting rules, after the enactment of a statute, [may] declare itself above the law which governs all public bodies as to open meetings." The Attorney General opined as follows:

> It is clear the Legislature has properly determined by express statutory language enacted into law that its own business falls squarely within the purview of the open meetings law. It is well settled, and this office is of the opinion, neither legislators nor the state legislative body can, by passage of its rules of procedure, exempt itself from the requirements of our state and federal constitutions, or state law.

2.14 This finding may be contrasted with certain provisions of a related "Sunshine Law," the Public Records Act, in which the Legislature explicitly created a loophole for itself. Section 25-61-17 reads, "[n]othing in this chapter [the Public Records Act] shall be construed as denying the Legislature the right to determine the rules of its own proceedings and to regulate public access to its records. However, notwithstanding the provisions of this section, the Legislature shall be subject to the provisions of Sections 27-104-151 through 27-104-159 [the Mississippi Accountability and Transparency Act of 2008]." Relying on this statute, the House and Senate

have, at times, denied requests for public records, but the Legislature cannot exempt itself from the Transparency Act.

2.15 The only similar exception for the Legislature in the Open Meetings Act may be found in Section 25-41-7(3)(e), which allows "[a]ny body of the Legislature which is meeting on matters within the jurisdiction of that body" to enter executive session for any reason. (Emphasis added.) It is difficult to identify a reason the Legislature would include such broad language as "any body of the Legislature" if the House and Senate were not covered by the Act. If the only "bodies" of the Legislature covered were the explicitly included standing, interim and special committees, then it seems they would have been named in this section as they were in the preceding statute. Thus, the entire House can enter executive session for any reason upon a three-fifths vote and exclude the public from their deliberations, but nowhere in the Open Meetings Act has the Legislature created a blanket exemption for an entire chamber as it did in the Public Records Act.

2.16 This is not the first case in which the commission has been confronted with statutory ambiguity in the Open Meetings Act. In Gregory vs. City of Columbus, Case No. M-14-002, another case of first impression, the commission was confronted with whether a city council violated the Act when it divided into two groups and conducted separate meetings involving less than a quorum. The commission began its order in that case by quoting Section 25-41-1, the public policy section of the Act.

> It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

2.17 The commission also relied heavily on language from Mississippi Supreme Court decisions which stress the importance of leaning toward openness in cases of statutory ambiguity. In affirming the Ethics Commission's decision, the Supreme Court quoted the same public policy section and many of the same prior cases. City of Columbus v. The Commercial Dispatch, 234 So.3d 1236, 1240 (Miss. 2017). In that decision, the Supreme Court reaffirmed that a "meeting" occurs under the Open Meetings Act whenever a quorum of a public body gathers and deliberates a matter under their authority. Columbus at ¶16. The Court also provided the most direct and compelling guidance on interpreting the Open Meetings Act when it held the language of Section 25-41-1 is "plain and unambiguous." Columbus at ¶11. In so doing, the Court confirmed that the clear language of the public policy section is the touchstone by which all questions of law arising from the Open Meetings Act are to be measured.

2.18 The House and Senate, as coequal bodies of our bicameral Legislature, are the foremost policy making entities of the State of Mississippi. They are supported by public funds and expend public funds. Their constitutional function is to deliberate, decide and make public policy in the form of adopting bills which become laws, public revenues and appropriations of public funds. The Legislature has the power to explicitly exempt itself from the Open Meetings

Act, as it has done in the Public Records Act, yet it has not done so. The Legislature has granted itself complete discretion to exclude the public from its deliberations by a three-fifths vote to enter executive session for any reason, but it has explicitly exempted only subcommittees and conference committees, not the entire House or Senate.

2.19 In the absence of any express statutory language excluding the House of Representatives from the provisions of the Open Meetings Act, the Ethics Commission cannot create such an exemption in light of the "plain and unambiguous" public policy language codified in Section 25-41-1. Arguments to the contrary regarding the statutory construction of the definition of "public body" are tortured, misplaced and fail to recognize the overarching public policy declared by the Legislature at the outset of the Open Meetings Act. It is essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business undertaken by a quorum of the House of Representatives be performed in an open and public manner. The formation and determination of public policy by a quorum of the House is public business and must be conducted at open meetings.

2.20 A quorum of the House of Representatives numbers at least 62 of it 122 members. The Republican Caucus currently includes 75 of those members. Whenever 62 or more House members assemble and deliberate a matter under their authority, such as legislation, then a meeting has occurred under the Open Meetings Act. Unless the members vote by a three-fifths majority to enter executive session, the meeting must be open to the public. At this point in these proceedings, there are no facts in evidence to determine whether a quorum of the House has gathered during a Caucus meeting or, if so, whether they discussed legislation or some other matter under their authority. Consequently, further proceedings are necessary regarding these two questions of fact.

III. RECOMMENDATIONS

The undersigned hearing officer makes the following recommendations to the Ethics Commission:

3.1 The Ethics Commission should find that the Mississippi House of Representatives is a "public body," as defined in Section 25-41-3(a) of the Open Meetings Act.

3.2 The Ethics Commission should set this case for hearing before the undersigned hearing officer at 10:00 a.m., on Tuesday, April 18, 2023 at the commission's offices in Jackson, Mississippi, to determine whether a majority of House members have assembled during a House Republican Caucus meeting and, if so, whether those members discussed a matter under their authority, such as legislation.

3.3 The Ethics Commission should authorize the undersigned hearing officer to enter scheduling orders or other procedural orders and to issue subpoenas, pursuant to Chapter 4, Rules of the Mississippi Ethics Commission.

SUBMITTED, this the 2nd day of December 2022.

TOM HOOD, Hearing Officer
Mississippi Ethics Commission