

## **Mississippi Public Records Act of 1983**

In 1983 the Mississippi Legislature enacted the Mississippi Public Records Act, codified in Miss. Code Ann. §§25-61-1 through 25-61-17 (Supp. 1983).

The Act provides that all public records are public property and that any person has the right to inspect or obtain a copy thereof subject to certain procedures concerning costs, time, place and method of access. The Act provides public access to records, subject to certain exemptions. Certain of these exemptions include judicial records, jury records, certain personnel records, attorney's work product, documents from third parties containing confidential information, certain appraisal records, academic records, archeological records, hospital records, investigative and criminal justice records, and certain commercial and financial records.

A specific exemption is provided for "test questions and answers in the possession of a public body...which are to be used in employment examinations," Miss. Code Ann. §25-1-100(2) (Supp. 1983), and a similar exemption is made for "personnel records and applications for employment in the possession of a public body" except those released to or with the prior written consent of the person who made the application. Miss. Code Ann. §25-1-100(1) (Supp. 1983).

It is important to note that if a public body has not adopted such written procedures, the statute provides that the "right to inspect, copy or mechanically produce or obtain a production of a public record of the public body shall be provided within one (1) working day after a written request for a public record is made."

The public body may adopt procedures<sup>52</sup> to authorize the production or denial of production of public records up to fourteen (14) days from the date of the request for the production of such record. Miss. Code Ann. §25-61-5(1) (Supp. 1983).

### **Public Records Cases**

The public's right to have meaningful access to public records is substantial, and the Act carries with it a civil penalty of One Hundred (\$100.00) Dollars plus reasonable expenses for willful and knowing violations. Miss. Code Ann. §25-61-15 (Supp. 1983). This right of meaningful access has been described as follows:

Any person need only make a request to inspect, copy, mechanically reproduce or obtain a reproduction of a public record, and, if the record is in existence, the custodian must supply it. The reasons for the making of the request are not material and the custodian may not inquire into the reason for the request. The choice of which option to employ for obtaining access to the record rests with the person requesting the record, not with the custodian. The vested right

---

<sup>52</sup>A copy of County procedures for implementation of the Public Records Act is set forth in Appendix B.

of persons to obtain records must be balanced against the duty of the custodian to preserve such records so as to insure their integrity, but the exercise of custodial duties must be in a manner least intrusive to access.<sup>53</sup>

### **Fees Not Set at Profit-Making Level**

In *Roberts v. Mississippi Republican Party Executive Committee*, 465 So. 2d 1050 (Miss. 1985), the Mississippi Republican Party made a request for access to the complete drivers license records contained on computer tape from the Commissioner of Public Safety, whose response demanded a fee of \$75,000.00 based on a \$250.00 run charge plus 5 cents per name for 1.7 million names. The Mississippi Republican Party tendered \$500.00 for the reasonable actual cost of providing the records and then filed suit, arguing that it was required to pay no more than the actual cost of providing copies of the requested records. The Commissioner of Public Safety invoked a statute, §45-1-21, which authorizes the Department of Public Safety to furnish certain records and services and “collect for such services a proper fee, commensurate with the service rendered and the costs of such service for the furnishing of any record or abstract thereof....” The Mississippi Supreme Court reconciled the Public Records Act and the cited statute, holding that the latter statute “does not mandate that the Commissioner set the fee at a profit-making level. To the contrary, the fee can only be one which compensates or makes up for the actual cost of furnishing the records or the services provided.” Since there was no irreconcilable conflict between the two statutes, the Court held that both statutes refer to the same thing, the actual cost of providing copies of the records.

### **No Constitutional Right of Access**

In *Mississippi Publishers Corp. v. Coleman*, 515 So. 2d 1163 (Miss. 1987), the Court rejected Mississippi Publishers’ claim that it had a constitutional right of access to public records, with reference to access to the transcript of a criminal proceeding involving Marion “Mad Dog” Pruett. The Court held:

No one has rights under the Public Records Act which would deprive one criminally accused of his constitutionally created right to a fair trial. Where common law or statutory rights of the petitioner conflict with Pruett’s Sixth Amendment rights, under the supremacy clause the former must yield.

---

<sup>53</sup>Ruling of the Court on Motions, *Delta Democrat Publishing Co., Inc., et al. vs. City of Greenville, et al.*, No. 47014, Chancery Court of Washington County, Mississippi, Chancellor Nathan P. Adams, November 13, 1986, pp. 5-6. See generally *Mississippi Dept. of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement Officers’ Ass’n*, 740 So. 2d 925 (Miss. 1995)(\$100 civil penalty plus expenses properly assessed against Department for willfully and knowingly denying public records request, despite Department’s expressed concerns about the implications of the request on the privacy rights of Department employees, where Department acted against opinions of the Mississippi Attorney General and did not follow authority from other jurisdictions which should have guided it to the same conclusion reached by the chancery court.)

## Investigative and Criminal Justice Reports

An example of records exempted or privileged by law from disclosure would be investigative offense reports and other documents containing witness statements, police radio logs, taped communications or officers' daily reports. A.G. Op. No. 92-0793 to Whitmore dated October 14, 1992.

Specific statutory exemptions that relate to records in criminal investigative matters and proceedings are provided under several statutes, one of which applies to certain investigative and criminal justice records under Miss. Code Ann. §45-29-1 (1983), which provides:

- (1) Records in the possession of a public body, as defined by paragraph (a) of section 25-61-3, which are not otherwise protected by law, that (i) are compiled in the process of detecting and investigating any unlawful activity or alleged unlawful activity, the disclosure of which would harm such investigation; (ii) would reveal the identity of Informants; (iii) would prematurely release information that would impede the public body's enforcement, investigative or detection efforts in such proceedings; (iv) would disclose investigatory techniques; (v) would deprive a person of a right to a fair trial or an impartial adjudication; (vi) would endanger the life or safety of a public official or law enforcement personnel; ... shall be exempt from the provisions of the Mississippi Public Records Act of 1983.
- (2) Nothing in this section shall be construed to prevent any and all public bodies from having among themselves a free flow of information for the purpose of achieving a coordinated and effective detection and investigation of unlawful activity. Where the confidentiality of records covered by this section is being determined in a private hearing before a judge as provided for by subsection (2) of section 25-61-13, the public body may delete or separate from such records the identity of confidential informants or the identity of the person or persons under investigation.

Under §45-29-1, a criminal affidavit and warrant are exempt until the warrant is served. A.G. Op. No. 93-0210 to Erby dated April 14, 1993. As to whether traffic tickets turned in by a law enforcement office to the Justice Court and entered into the computer become public records, the Attorney General's office has made it clear that the records contained in the Justice Court Clerk's office, including traffic tickets, are public records unless exempt by statutory provision. Under §45-29-1 there are exemptions provided for records that would harm investigations, reveal the identity of informants, impede a public body's law enforcement or investigative efforts, deprive a person of a right to a fair trial, endanger the life or safety of public officials or law enforcement officers, etc. As stated in the Erby opinion, the criminal affidavit and warrant generally would be exempt under this provision until the warrant is served. A.G. Op. to Aldridge dated June 28, 1995, 1995 WL 398274.

Other statutory exemptions are provided under Miss. Code Ann. § 45-29-3 (1990), entitled "Exemptions from Mississippi Public Records Law," which states:

The following records shall be exempt from the provisions of the Mississippi Public Records Law of 1983:

Records which are in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, that performs as one of its principal functions activities pertaining to the enforcement of criminal laws, the apprehension of criminal offenders or the investigation of criminal offenders and/or criminal activities, and which records consist of information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual.

Under this exemption, a law enforcement complaint report having sensitive information, i.e., names of victims, witnesses, and narratives, may be withheld from the press, regardless of whether the criminal charge is a felony or a misdemeanor; however, a sheriff may release those complaint reports after determining on case-by-case basis that the complaint reports do not contain sensitive information protected by statute or court rule. (A.G.Op. No. 90-0656 to Hatcher dated September 6, 1990.)

Another related statutory exemption appears to prohibit disclosure by law enforcement agencies of information identifying persons arrested for misdemeanors, but the same statute immunizes from liability any political subdivision or its employee who makes such a disclosure. This exemption is set forth in Miss. Code Ann. § 25-1-109 (Supp.1997):

No law enforcement agency shall disclose the name of any person arrested for any misdemeanor, issued a citation, or being held for any misdemeanor unless such person shall be formally charged and arrested for the offense, except to other law enforcement agencies or to the Mississippi Department of Human Services or child day care providers where such information is used to help determine suitability of persons to serve as child care providers or child service workers. No political subdivision nor any employee thereof shall be held liable for the disclosure of any information prohibited by this section.

### **Public Access to Computerized Information**

The Mississippi Legislature enacted the Digital Signature Act of 1997, Miss. Code Ann. §§25-63-1, et seq. (1998), with an effective date of July 1, 1998. The legislative intent of this Act is to “facilitate economic development and efficient delivery of government services by means of reliable electronic messages; to foster the development of electronic commerce through the use of digital signatures to assure authenticity and integrity of writings in any electronic medium; to enhance public confidence in the use of digital signatures; and to minimize the incidence of forged digital signatures and fraud in electronic commerce.”

Records exempt from Public Records Act include:

A. Records containing information that would disclose, or might lead to the disclosure of, private keys, or the mathematical formulas or other systems used to develop or confirm private keys or key systems; and,

B. Records the disclosure of which might jeopardize the security of an issued certificate or a certificate to be issued.

“Private key” is defined in §25-63-5(e) as a “computer program, known only by its rightful owner, used to create a digital signature,” and the term “digital signature” is defined as

a message or part of a message which has been transformed using a computer program called a “private key” such that a person receiving the message can use a related computer program referred to as the signer’s “public key”.

To determine whether the transformation was created using the private key that corresponds to the public key and whether the original message has been altered since the transformation was made.

### **Trade Secrets and Confidential Commercial or Financial Information**

Protection against disclosure of trade secrets is one of the several protections prescribed by the Open Meetings Act in Miss. Code Ann. §§25-61-9 (1) - (4) (1996). Even more specific protection for trade secrets is spelled out in Miss. Code Ann. §§75-26-1 through 75-26-19 (1990), known as the Mississippi Uniform Trade Secrets Act. Beyond trade secrets, moreover, the Public Records Act extends protection to “private parties who may be in possession of information regarding their financial status and business practices that they would legitimately consider confidential, even though that information might not meet the strict test of being a trade secret as that term is defined in the Trade Secrets Act or previous judicial opinions.”<sup>54</sup> It thus protects a broader range of information than the Trade Secrets Act.

§25-61-9 (1) provides that records furnished to public bodies by third parties which contain trade secrets or confidential commercial or financial information “shall not be subject to inspection, examination, copying or reproduction” until notice to the third parties has been given, “but such records shall be released within a reasonable period of time” unless the third parties obtain a court order protecting such records as confidential.

§25-61-9 (3) expressly protects from disclosure under the Public Records Act “trade secrets and confidential commercial and financial information of a proprietary nature developed by a college or university under a contract with a firm, business, partnership, association, corporation, individual or other like entity.”

The Mississippi Uniform Trade Secrets Act similarly but with much greater specificity provides for protection of trade secrets from misappropriation, authorizing injunctive relief against actual or threatened misappropriation of trade secrets, §75-26-5, damages for misappropriation, §75-26-7, protection of trade secrets during the pendency of a lawsuit, §75-26-11. The Act also allows the court under §75-26-7 to award a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret, and under §75-26-9 to award reasonable attorneys fees incident to either a bad faith claim of misappropriation or a willful and malicious misappropriation. Definitions of key terms such as trade secret, improper means, and misappropriation are set forth in 75-26-3.

### **Broader Protection Provided under Public Records Act**

---

<sup>54</sup>*Caldwell & Gregory, Inc. v. Univ. of Southern Miss.*, 716 So. 2d 1120, 1122 (Miss. 1998)

The Mississippi Public Records Act governs the extent to which information held by a public body may be accessed by members of the public. Comparing its provisions and the breadth of its protection to that provided under the Mississippi Uniform Trade Secrets Act, it was enacted to address somewhat different issues.

In *Caldwell & Gregory, Inc. v. University of Southern Mississippi*, 716 So. 2d 1120 (Miss. 1998), an unsuccessful bidder requested a public university to furnish a copy of the successful bid on a contract to provide coin-operated laundry machines on campus, and after the university granted the request, the successful bidder brought an action for a protective order to prohibit disclosure of the contract. The chancellor applied a strict definition of “trade secret” found in 76-26-3 (d) as the sole standard to measure the availability under 25-61-9 to the general public of a proposal to operate the coin-operated laundry facility for the university. Reversing and rendering, the Mississippi Supreme Court held that this was error, since the Public Records Act on its face protects a broader range of information than just that covered under the definition contained in the Mississippi Uniform Trade Secrets Act. The Court reasoned that the Public Records Act protects from disclosure documents in the hands of a public body “which contain trade secrets or confidential commercial or financial information,” §25-61-9 (1), and the two laws “were enacted to address different issues and there is no indication in either statute or in prior case law that the subsequent enactment of the Trade Secrets Law was intended to narrow the focus of the Public Records Act.” *Id.* at 1122. In this case, the Public Records Act provides significantly broader protection, and “[a] business that develops marketing and business plans to compete effectively in the commercial world is entitled to consider the fruits of such effort confidential [and] should be able to reasonably resist disclosure of such information even if it is not so unique as to rise to the high level of being a trade secret.” *Id.* at 1123.

The Court in *Caldwell* also addressed the argument that sharing such confidential information with a public agency like a university somehow works a forfeiture of its confidentiality, stating at 1123:

The fact that, in the course of seeking a business arrangement with a public agency, the business is willing to share that sort of confidential information with the agency itself (from whom it can reasonably expect no competition) in the hope of securing a business relation with the public body does not mean, necessarily, that the information ought to fall into the hands of the general public. ...

There is no preference or heightened standing given to a business competitor seeking a copy of a rival’s business proposal under the Public Records Act. A conclusion that all unsuccessful competitors for a public agency contract ought, as a matter of law, to be entitled to a copy of the successful entity’s proposal is a matter for legislative, not judicial, action.

Alleged theft of customer lists was at issue in *Fred’s Stores, Inc. v. M & H Drugs, Inc.*, 725 So. 2d 902 (Miss. 1998). There the Mississippi Supreme Court held that a claim for relief other than misappropriation of trade secrets (such as a claim of unfair competition, intentional interference with a business relationship, intentional interference with a lawful trade, and intentional interference with a business interest) is not preempted or displaced by the Mississippi Uniform Trade Secrets Act, since each of those other claims could stand alone and withstand summary judgment even without proof that a stolen customer list was a trade secret.

## **Data Processing Software As Trade Secret**

Under Miss. Code Ann. §25-61-9(6) (Supp. 1996), a statutory amendment exempts from disclosure certain “sensitive” data processing software produced by a public body:

Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret...and data processing software produced by a public body which is sensitive must not be subject to inspection, copying or reproduction under [the Mississippi Public Records Act].

The word “sensitive” as used in §25-61-9(6) means only that portion of the data processing software, specifications and documentation used to collect, process, store and retrieve information that is exempt under the Public Records Act or disclosure of which would “require a significant intrusion into the business of the public body,” and also includes those portions of the data processing software used to control and direct access authorizations and security measures for automated systems.

If a public body uses sensitive software or proprietary software, it “must not thereby diminish the right of the public to inspect and copy a public record.” Miss. Code Ann. §25-61-10(1) (Supp. 1996). In this context a public body that uses sensitive software or proprietary software to store, manipulate or retrieve a public record will not be deemed to have diminished the right of the public if it either

(A) if legally obtainable, makes a copy of the software available to the public for application to the public records stored, manipulated or retrieved by the software, or

(B) insures that the software has the capacity to create an electronic copy of each public record stored, manipulated or retrieved by the software in the common format such as, but not limited to, the American Standard Code for Information Interchange [ASCII].

Miss. Code Ann. §25-61-10(2) requires a public body to provide a copy of the record in the format requested if it maintains the record in that format, and authorizes the public body to charge a fee for that copy.

Miss. Code Ann. §25-61-10(3) requires a public body to make adequate plans to provide public access and redaction of exempt or confidential information in its information technology system, equipment or software before it acquires or makes a major modification to that system used to store, retrieve or manipulate a public record.

Finally, Miss. Code Ann. §25-61-10(4) prohibits a public body from entering into a contract to create or maintain a public records data base “if that contract impairs the ability of the public to inspect or copy the public records of that agency, including public records that are online or stored in an information technology system used by the public body.”

## **AG Opinions on Public Records Act**

The Attorney General's office has issued a number of opinions interpreting the Open Records Act and its application in a variety of factual contexts.

AG Op. No. 2000-0279 to Johnson, June 9, 2000, stated that there is no specific exemption for inmate social security numbers contained in files maintained by the MDOC, nor is there a general exemption from the Public Records Act for information regarding present or former inmates.

AG Op. No. 01-0100 to Carter, March 2, 2001, said that criminal case files and any records related to those cases in the office of a district attorney are exempt from the Public Records Act.

AG Op. No. 02-0479 to Gough, Sept. 20, 2002, opined that the budgets and any proposed budgets of regional libraries are public records subject to inspection.

AG Op. No. 02-0334 to Crook, Sept. 13, 2002, found no statutory authority for chancery clerks to charge flat monthly fees to abstractors for the use of the fax machine in the clerk's office or to charge fees for sending faxed to members of the public.

AG Op. No. 01-0111 to Allen, March 9, 2001, stated that a county tax assessor and collector should follow the procedure set out in the statute before releasing information collected about a real estate sales transaction with regard to an individual who notified the tax assessor and collector that he considered such information to be confidential.

AG Op. No. 91-0922 to Stebbins, April 3, 1992, which predated §25-61-9(6) discussed above, stated that in view of the nature and characteristics of computer software programs, to the extent that software programs do contain confidential file access information, such software programs are not subject to public disclosure under the Mississippi Public Records Act of 1983.

AG Op. No. 93-0975 to Rimmer, January 10, 1994, said that computerized data is to be treated like any other public record in the possession or control of the public body, and is subject to disclosure under the Public Records Act. The public body may not restrict access to the data unless the data is protected under the Act or by other statute. The public body must, when reasonably possible, provide the public record or information in the format requested provided that format is reasonably available, but it is not required to do so if such would require a significant intrusion into the business of the public body, provided the information can be made available in some other medium.

AG Op. No. 94-0244 to Cruber, May 2, 1994, said there is nothing known to the Attorney General that would exempt the Justice Court Civil Docket, kept on computer, from the Public Records Act. A request under the Public Records Act for computer records may be met by printing out the requested information.

AG Op. No. 94-0407 to Harper, July 18, 1994, stated that lists of names and addresses in possession of a public body must be made available upon appropriate written request under the Public Records Act, although it is not the public body's responsibility to compile a list that did not already exist.

AG Op. No. 94-0582 to Lavigne, September 14, 1994, opined that since it was the Department of Data Processing, a part of the Office of the Board of Supervisors, that did the searching, reviewing and duplicating of records, the money collected for this information would go to the General Fund of the County.

AG Op. No. 94-0643 to Gex, October 5, 1994, opined that the Public Records Act only allows a governmental entity to collect fees to reimburse it for, but in no case to exceed, the actual costs of searching, reviewing and/or duplicating, and, if applicable, mailing copies of the public records, which fees may be collected in advance before complying with the request. In this instance, maps owned by a County and compiled through aerial photography for use by the County Tax Assessor's office, would constitute public records. If the mapping company or the County had a copyright on the material in question, then federal copyright law would govern reproduction of the materials.

A.G. Op. No. 95-0378 states that records in Justice Court, including traffic tickets, are public records unless exempt by statutory provision. Criminal affidavits and warrants are exempt until the warrant is served. Miss. Code Ann. §45-29-1 (1972).

A.G. Op. No. 94-0244 provides that records maintained in a computer database are public record under Miss. Code Ann. §25-61-3 (Supp. 1996), and the Attorney General is not aware of anything that would exempt the Justice Court civil docket from the Public Records Act.

A. G. Op. No. 91-0910 to Watts dated December 18, 1991, states that the docket must be available and open to inspection by the public at all times, whether in printed form or by computer.

A.G. Op. No. 97-0218 to Rayborn dated April 11, 1997, states that under §§9-10-11 and 9-11-13, a Justice Court Judge must sign a court record of each case and a court docket, and the docket must be maintained in paper form, but this does not preclude a Justice Court from also maintaining a docket on computer in addition to the paper docket.

A.G. Op. No. 93-0210 provides that individuals have a right to examine public records in the Clerk's Office during regular office hours but may not disturb the work of the Clerk and staff.

A.G. Op. No. 94-0342 states that a clerk is not required to gather documents from other courts for prosecutor; however, the clerk must upon written request and pursuant to the Public Records Act provide copies of or access to public records in her custody.

A.G. Op. No. 96-0407 to Maness dated June 21, 1996, states that, based on Miss. Code Ann. §99-33-2 (2)(1991), the Clerk must forward a certified copy of the case file to the Judge within two days after the case has been recorded and assigned and all necessary process has been issued, and if there are any significant additions to or changes in the case file prior to the court date, those additions or changes should be forwarded to the judge prior to court. To the extent that such documents are public records, anyone may request a copy of the documents subject to the Public Records Act and the public records policy.

A.G. Op. No. 97-0534 to Mullen dated August 22, 1997, states that the Justice Court docket need

not be maintained in paper form, but may instead be maintained on computer so long as the public has access to the docket by way of printed copies or access to the computer itself.

AG Op. No. 91-0922 to Stebbins, April 3, 1992, stated that in view of the nature and characteristics of computer software programs, to the extent that software programs do contain confidential file access information, such software programs are not subject to public disclosure under the Mississippi Public Records Act of 1983.

AG Op. No. 93-0975 to Rimmer, January 10, 1994, opined that computerized data is to be treated like any other public record in the possession or control of the public body, and is subject to disclosure under the Public Records Act of 1983 as amended. The public body may not restrict access to the data unless the data is protected under the Public Records Act or by other statute. The public body must, when reasonably possible, provide the public record or information in the format requested provided that format is reasonably available, but it is not required to do so if such would require a significant intrusion into the business of the public body, provided the information can be made available in some other medium.

AG Op. No. 94-0244 to Cruber, May 2, 1994, reiterated the earlier opinion that records maintained in a computer database are public record, and that there is nothing known to the Attorney General that would exempt the Justice Court Civil Docket, kept on computer, from the Public Records Law. A request under the Public Records Act for computer records may be met by printing out the requested information.

AG Op. No. 94-0407 to Harper, July 18, 1994, stated that lists of names and addresses in possession of a public body must be made available upon appropriate written request under the Public Records Act, although it is not the public body's responsibility to compile a list that did not already exist.

AG Op. No. 94-0582 to Lavigne, September 14, 1994, opined that since it was the Department of Data Processing, a part of the Office of the Board of Supervisors, that did the searching, reviewing and duplicating of records, the money collected for this information would go to the General Fund of the County.

AG Op. No. 94-0643 to Gex, October 5, 1994, opined that the Public Records Act only allows a governmental entity to collect fees to reimburse it for, but in no case to exceed, the actual costs of searching, reviewing and/or duplicating, and, if applicable, mailing copies of the public records, which fees may be collected in advance before complying with the request. In this instance, maps owned by a County and compiled through aerial photography for use by the County Tax Assessor's office, would constitute public records. If the mapping company or the County had a copyright on the material in question, then federal copyright law would govern reproduction of the materials.