

IN THE SUPREME COURT  
STATE OF GEORGIA

R.W. PAGE CORP. d/b/a  
COLUMBUS LEDGER ENQUIRER and  
MEDIA GENERAL OPERATIONS, INC.  
d/b/a WRBL NEWS 3,

Appellants,

v.

MUSCOGEE COUNTY SHERIFF'S  
OFFICE, SHERIFF RALPH JOHNSON,  
THE COLUMBUS POLICE  
DEPARTMENT, CHIEF WILLIE  
DOZIER,

Appellees.

Case No. S04A1538

**BRIEF OF AMICUS CURIAE**

**GEORGIA FIRST AMENDMENT FOUNDATION**

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**INTRODUCTION**

Amicus curiae Georgia First Amendment Foundation respectfully submits the following brief asking that this Court reverse the holding of the Superior Court of Muscogee County in the case below. Personnel documents are subject to the open records act pursuant to O.C.G.A. § 50-18-72(a)(5). These records, which must be disclosed pursuant to the act, cannot be withheld from disclosure simply because they are relevant to an O.C.G.A. § 50-18-72(a)(4) pending investigation. Additionally, 911 tapes are public records subject to disclosure, akin to initial arrest and incident reports, regardless of the status of any alleged pending investigation.

## STATEMENT OF INTEREST

The Georgia First Amendment Foundation is a Georgia non-profit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public's access to public institutions is threatened.

## STATEMENT OF FACTS

**Substantive facts.** News media seeking to cover a fatal shooting that took place during a traffic stop, Appellant twice requested records under the open records act, to wit: a deputy's personnel file, video and audiotapes made during the subject traffic stop, and 911 tapes memorializing the subject traffic stop. **R-3, exhibits A, B, E.** Citing O.C.G.A. § 50-18-72(a)(4) ("pending investigation exception"), Appellee law enforcement agencies refused to release any of the requested information, and still have not to date. **R-3, exhibits D, F.**

**Procedural facts.** Appellant media submitted open records requests on December 12, 16, and 29, 2003. **R-3, exhibits A, B, E.** Appellee law enforcement agencies refused to release the requested records. **R-3, exhibits D, F.**

On December 31, 2003, Appellant media filed an action in the Superior Court of Muscogee County to force compliance with the Open Records Act. **R-3.** The trial court denied the request at that time, and stated, "[p]etitioner's request is premature

until the conclusion of the pending investigation." **R-3.**

Because the subject investigations had not yet concluded, on March 4, 2004, Appellant media asked for reconsideration. **R-11.** The trial court denied the motion for reconsideration, and entered a final order denying Appellant media's request. **R-5.** Appellant media subsequently appealed to the Georgia Court of Appeals, and this case was transferred to the Georgia Supreme Court.

The trial court's final order is the subject of this Appeal, and amicus curiae respectfully asks this Court to hold that Deputy Glisson's personnel file is subject to disclosure, and, that 911 tapes are public records subject to disclosure, akin to initial arrest and incident reports, regardless of the status of any alleged pending investigation under O.C.G.A. § 50-18-72(a)(4).

#### **ARGUMENT AND CITATION OF AUTHORITY**

This case addresses the extent to which O.C.G.A. § 50-18-72(a)(4) prohibits release of public records during a pending investigation. Nondisclosure of public records routinely subject to the open records act, simply and solely because an (a)(4) investigation begins, undermines the entire act. Under the trial court's interpretation, to the extent a records custodian classifies a document as part of an (a)(4) investigation, it becomes exempt from disclosure regardless of

whether that same document was available for inspection the prior day. For these reasons, the ruling of the trial court should be reversed.

**A. This case is the source of tremendous public interest.**

Georgia's open records act encourages public access to public information so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions. Also, the open records act seeks to foster confidence in government through openness to the public. See *Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 66 (1980). This case has generated tremendous public interest, and the release of the documents requested by the Appellants is consistent with the purpose and policy belying the open records act. See **EX. A**, hereto.

**B. Deputy Glisson's personnel file is subject to disclosure.**

It is well-established that there is no "personnel records" exception to Georgia's open records act. *Hackworth v. Board of Education*, 214 Ga. App. 17, 22 (1994); see *Irvin v. Macon Telegraph Publishing Co.*, 253 Ga. 43 (1984); *Richmond County Hospital Authority d/b/a University Hospital v. Southeastern Newspapers Corp.*, 252 Ga. 19 (1984); *Athens Observer, Inc. v. Anderson*, 245 Ga. 63 (1980); 1965-66 Op. Att'y Gen. 66-88. As *Hackworth* explained:

[T]he legislature was aware of the language of the federal statute and yet chose to omit personnel records from the Georgia exemption, and applying the venerable construction *maxim expressio unius est, exclusio alterius*, we conclude it was not the intent of the legislature to create a 'blanket' exclusion for personnel records.

*Id.* at 22; see also *Fincher v. State*, 231 Ga. App. 49, 51 (1998).

Deputy Glisson's personnel file existed prior to the law enforcement investigation initiated on or around December 11, 2003, and, was subject to disclosure and public inspection under O.C.G.A. § 50-18-72(a)(5) at that time. Just because these same records now are characterized by the records custodian as (a)(4) documents does not make them subject to non-disclosure.

As Appellants argue and Appellees concede, the personnel file of Deputy Glisson was subject to disclosure on December 9, 2003. See Appellants' Brief at 8, Appellee's Brief at 11. What the parties dispute is whether or not the personnel file was subject to disclosure on December 11, 2003, **the day after** the traffic stop took place and **the day on or after** which the pending investigation began. See Appellees' Brief at 5 ("several investigations were immediately instigated" after 12/10).

If there are records within Deputy Glisson's personnel file that were specifically created for a now pending investigation,

these records may, at least for now, be withheld.<sup>1</sup> However, other records within his personnel file, such as prior investigations concerning his conduct, must be disclosed. See O.C.G.A. § 50-18-72(a)(5).

Personnel records that are subject to disclosure do not become secret because allegations have been made against the subject employee. Appellees cannot reclassify Deputy Glisson's personnel file as part of an alleged (a)(4) investigation file, and withhold it from disclosure. See *Irvin v. Macon Telegraph Publishing Co.*, 253 Ga. 43 (1984). This Court should reverse the order of the trial court and require that these records be released.

**C. Like initial arrest and incident reports, 911 tapes are subject to disclosure under the Open Records Acts regardless of the existence or status of any pending investigation.**

In the limited exception to disclosure under the Open Records Act for law enforcement investigations, there is an exception to the exception providing for disclosure of initial

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<sup>1</sup> [O.C.G.A. § 50-18-72(a)(5)] prohibits from public disclosure 'records consisting of material obtained in investigations related to the suspension, firing, or investigation of complaints against public officers or employees until ten days after the same has been presented to the agency or an officer for action of the investigation is otherwise terminated or concluded ... ' *Fincher v. State*, 231 Ga. App. 49, 52 (1998).

arrest and incident reports. Public disclosure shall not be required for records that are:

(4) Records of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, **other than initial police arrest reports and initial incident reports**; provided, however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated.

O.C.G.A. § 50-18-72(a)(4) (emphasis supplied).<sup>2</sup>

911 tapes maintain the same status as initial arrest and incident reports.

O.C.G.A. § 50-18-72(a)(4), says the incident report is not exempted and can be disclosed. When the initial call comes in to "911" there is no pending investigation. 'Statements, memoranda, narrative reports, etc. made and maintained in the course of a pending investigation should not in most cases, in the public interest, be available for inspection by the public.' *Houston v. Rutledge*, 237 Ga. 764 (1976). The initial call to "911" is not made and maintained in the course of a pending investigation.

*Allen v. Athens-Clarke County et al.*, Superior Court of Athens-Clarke County, Case No. SU-99-CV-1112-J (1999), **EX. B** hereto; see also *The Bainbridge Post Searchlight v. Decatur County, Georgia, et al.*, Superior Court of Decatur County, Case No. 96-

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<sup>2</sup>This sub-section exempts records from disclosure to the extent they are part of a pending investigation, and "cannot otherwise be characterized as the initial arrest... or incident report." *Atlanta Journal & Constitution v. City of Brunswick*, 265 Ga. 413(1995).

V-302 (1996) ("The 9-1-1 Incident Cards are public records. "Public records" as that term is defined by O.C.G.A. § 50-18-70(a)."), **EX. C** hereto.

Moreover, in 2003, the Georgia General Assembly passed legislation acknowledging the holdings of *Allen* and *The Bainbridge Post-Searchlight* cases. See O.C.G.A. § 50-18-72(a)(16) (exempting 911 records from disclosure only in certain specified circumstances). 911 tapes, like initial police arrest and incident reports are subject to disclosure regardless of the existence of a pending investigation.

Because the statute dictates disclosure, this Court should reverse the holding of the trial court and order that Appellees produce the 911 tapes for public inspection. See Appellee's Brief at 4, footnote 3; **R-3, EX. D, F.**

#### **CONCLUSION**

For all the foregoing reasons, amicus curiae respectfully asks this Court to reverse the holding of the Superior Court of Muscogee County.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on this \_\_\_\_ day of August, 2004, I perfected service upon all counsel of record before the filing of **BRIEF OF AMICI CURIAE** by placing a copy of same in the United States mails, adequate first-class postage affixed thereon, to:

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