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GEORGIA ATTORNEY GENERAL LETTER RULINGS

1998

The Augusta-Richmond County Commission-Council

September 16, 1998

BY FACSIMILE TRANSMISSION TO (706) 722-7125 AND BY U.S. MAIL

Mr. Julian Miller

General Manager

The Augusta Chronicle

PO Box 1928

Augusta, Georgia 30903-1928

RE:Enforcement of the Georgia Open Meetings Act: The Augusta-Richmond County Commission-Council.

Dear Mr. Miller:

On August 26, 1998, you wrote requesting assistance regarding a possible violation of the Georgia Open Meetings Act by the Augusta-Richmond County Commission-Council during a meeting on August 24, 1998. Your request was made pursuant to the 1998 amendments to the Open Meetings and Open Records Acts that I sponsored and which gave my office enforcement authority with respect to violations of those acts. I sought this statutory change because of my firm commitment to open government in Georgia, and I thank you for the opportunity to review the serious question that you have presented in your request.

On September 2, 1998, my office contacted the attorney for the Commission-Council, Mr. James Wall, and sent him a copy of your request. We asked Mr. Wall to respond by September 15th to the matters raised in your letter. On September 9th, Mr. Wall responded and provided a copy of his response to you. On September 10th, you wrote again, with the assistance of your counsel, to respond to Mr. Wall's letter. Your letter was received and reviewed by my office on September 14th. My analysis of the questions presented, based upon the facts as represented both by you and Mr. Wall, is as follows.

1.The Governmental Entities Involved

In 1996, the City of Augusta and Richmond County were consolidated into a single government under the direction of a Commission-Council. 1995 Ga. Laws 3648; 1996 Ga. Laws CCCXXXIX. As a part of its duties and responsibilities, the consolidated government owns and operates Bush Field, a local airport. The Commission-Council has chosen to delegate its operational control of Bush Field to the Augusta Aviation

Commission, a county agency or entity created by ordinance and act of the Commission-Council. Ordinance § 1-3-1et seq.

The Aviation Commission functionally operates independently of the consolidated government Commission-Council. Ordinance § 1-3-5. It has taken charge of Bush Field and all other property incidental to the operation of the airport and is authorized to enter into contracts with commercial airlines and other aircraft operators for the use of the airport. Id. This power to contract includes entering into contracts with the federal government for airmail services. Id. The Aviation Commission may also enter into other revenue producing operations at the airport. Id. However, the Aviation Commission's contracting authority is limited to contracts of less than one year. Id. Contracts of greater than one year must be approved by the Commission-Council. Id.

The Aviation Commission has the authority to employ an airport manager and may set the manager's salary without review of the consolidated government Commission-Council. Id. This airport manager is considered a temporary employee of the Aviation Commission and is not an employee of Augusta-Richmond County. Id. The Commission-Council does not review or approve the hiring of this manager. Id.

The Aviation Commission is also empowered to make its own rules with reference to meetings, but must make a monthly report to the Commission-Council itself. Id. However, all minutes and documents of the Aviation Commission must be readily available to the Commission-Council at all times. Id.

The consolidated government Commission-Council appoints 10 members of the Aviation Commission. Ordinance § 1-3-1. Two additional members may be appointed by the Richmond County Legislative Delegation and the Chairperson-Mayor of the consolidated government serves as an ex officio member of the Aviation Commission. Id. The Aviation Commissioners serve for staggered, four-year terms and the Commission-Council does not have the authority to remove any of these commissioners from office. Id. However, should a vacancy occur on the Aviation Commission, the Commission-Council may fill that vacancy by appointment for the unexpired term affected. Ordinance § 1*3*1. The Aviation Commission elects its own chairman annually. Ordinance § 1-3-3. That selection is not subject to review by the Commission-Council. Id.

The Aviation Commission and airport manager apparently rely upon the consolidated government to provide their staff and for administrative support. The airport employees are actually employees of Augusta-Richmond County and are subject to its personnel policies and procedures. The consolidated government provides purchasing and billing services and security is provided through the office of the Sheriff. The Augusta-Richmond County Risk Management Department handles tort or other claims against the airport. The Commission-Council reviews and approves the budget for the Aviation Commission.

2. The Facts Surrounding the August 24 Meeting

In 1995, the City of Augusta was sued under the Federal Clean Water Act. This matter was resolved in 1997 by the consolidated government, which entered into a consent order with the plaintiffs requiring the construction of certain artificial "wetlands" to aid in the treatment of waste. There is a specific schedule that the city-county must meet to comply with the consent order. The failure to meet the requirements of the settlement may subject the city to monetary penalties.

The city-county has proposed to construct these artificial wetlands in an area near Bush Field. In December of 1997, the Federal Aviation Administration notified the city-county that the siting of these wetlands could create a hazard to commercial aviation by attracting birds into the paths of commercial traffic. Should this occur, the FAA has indicated that it could suspend commercial aviation traffic to the airport.

The city-county government in September 1997 entered into a grant agreement with the FAA for improvements valued at \$1,000,000 at Bush Field. The FAA could use its objection to the proximity of the wetlands to the airport to affect the city's ability to obtain such federal grant money in the future. It is possible that the same reasoning could be used to challenge the award of these and other federal grant moneys in the past. However, there is no indication that any of these adverse actions by the FAA in relation to the grant moneys have occurred or even have been threatened by that agency.

Additional state law requirements amending O.C.G.A. § 12-5-23.3 provide that a city must meet certain wastewater treatment standards or be forced to contract out its wastewater treatment operations for a minimum of ten years. There is no indication that Augusta-Richmond County has been threatened with such a regulatory action or that its failure to meet wastewater standards is imminent.

On August 24th, the Commission-Council for Augusta-Richmond County met and discussed the aforementioned issues. This meeting was initially conducted as an open meeting, but was closed after approximately one hour on advice of counsel. The proper procedures for closing a meeting, as outlined under O.C.G.A. § 50-14-4, were followed in doing so. The stated reasons for closing the meeting were to receive legal advice regarding the Commission-Council's legal rights, to discuss strategies regarding the aforementioned issues and to discuss the risks associated with these issues. At some point during this closed meeting, the Commission-Council invited into the closed meeting the members of the Aviation Commission. The meeting was not otherwise opened to the public. There has been no indication that any "action" was taken in or after the meeting. Instead, it appears that the sole activity conducted in the closed meeting was a discussion of the issues outlined above.

James Wall has indicated that he serves as counsel for both the consolidated government of Augusta-Richmond County and for the Aviation Commission. This representation of the consolidated government is authorized pursuant to O.C.G.A. § 45-9-21. The representation of the Aviation Commission itself by Mr. Wall is also apparently authorized under local Ordinance § 1-7-2, which provides for the representation by this

attorney of members of the Commission-Council, department heads, other elected and appointed officials and employees of the Commission-Council. I have not been provided with any information that contradicts the existence of this attorney-client relationship as outlined by Mr. Wall. It also appears that, regardless of whether the members of the Aviation Commission itself are considered either employees or appointed county officials, they would fall within the scope of this ordinance and the representation by Mr. Wall. It also appears that any other employees of the consolidated government would also fall within Mr. Wall's representation.

3. The Issue Presented

There does not appear to be any significant dispute regarding the facts as outlined above. It is not contested that an agency, as defined under the Open Meetings Act, may close a meeting pursuant to O.C.G.A. § 50-14-2, 50-14-3 and 50-14-4. Initially, you indicated that the potential threat of FAA action, including the threat to withhold federal grant moneys, may indeed be a sound basis for closing a meeting to permit an agency to consult with its attorney pursuant to O.C.G.A. § 50-14-2(1). However, in your September 10th letter you questioned whether the possible future actions of the FAA provide a basis for invoking the "potential litigation" exception to the Open Meetings Act. Finally, you have asked whether the attorney-client privilege was waived or abrogated by the presence of the Aviation Commissioners in the August 24th meeting with the Augusta-Richmond County Commission-Council.

4. The Applicable Law

The Georgia Open Meetings Act applies to all governmental agencies, including every county and every county or municipal department, agency, board, bureau, commission, authority or similar body. O.C.G.A. § 50-14-1(a)(1)(B, C). The Act applies to all "meetings" of such entities, where a meeting is defined to include:

[T]he gathering of a quorum of the members of the governing body of an agency or any committee of its members . . . pursuant to schedule, call, or notice of or from such governing body or committee . . . at a designated time and place at which official business or policy of the agency is to be discussed or at which official action is to be taken or [where] recommendations on official business or policy to the governing body are to be formulated or discussed.

O.C.G.A. § 50-14-1(a)(2). All such meetings must be open to members of the public. O.C.G.A. § 50-14-1(b). A meeting may be closed only by following a specific statutory procedure and based solely upon exclusions defined by law. O.C.G.A. § 50-14-3, 50-14-4. The requirement that a meeting be open must be read broadly and any exclusion must be narrowly construed. *Kilgore v. R.W. Page Corporation*, 261 Ga. 410, 411 (1991); *Jersawitz v. Fortson*, 213 Ga. App. 796, 798 (1994); 1998 Op. Att'y Gen. U98-3. However, even though an exclusion from the requirements of the Open Meetings Act exists, there is no requirement that the exclusion be invoked by an agency. An agency may choose, especially where matters of public concern are involved, to keep a meeting open that could otherwise be legally closed.

One specific exclusion from the requirement that a meeting be open is where, under certain specified circumstances, the meeting is covered by the attorney-client privilege. O.C.G.A. § 50-14-2(1). This statute specifically provides:

The attorney-client privilege recognized by state law [is a basis to close a meeting] to the extent that a meeting otherwise required to be open to the public under this chapter may be closed in order to consult and meet with legal counsel pertaining to pending or potential litigation, settlement, claims, administrative proceedings, or other judicial actions brought by or against the agency or any officer or employee or in which the agency or any officer or employee may be directly involved; provided, however, the meeting may not be closed for advice or consultation on whether to close a meeting.

O.C.G.A. § 50-14-2(1) (emphasis added). The attorney-client privilege is provided for in O.C.G.A. § 24-9-21(2) and 24-9-24. Generally, communications between an attorney and his or her client are secret and cannot be made public by the attorney. *Id.*

This privilege may be waived where a communication that would otherwise be privileged is made in the presence of a person who is not a party to the attorney-client relationship. See *Bedford, Kirschner & Venker, P.C. v. Goodman*, 197 Ga. App. 858 (1990); *Griffin v. Williams* 179 Ga. 175 (1934). However, the privilege is not generally waived where an attorney represents more than one client and communicates with both clients at the same time on the same legal matter. See *Peterson v. Baumwell*, 202 Ga. App. 283, 284-85 (1991); *Gearhart v. Etheridge*, 232 Ga. 638 640 (1974).

I have also previously opined that the attorney-client privilege is not waived where an attorney communicates with representatives or employees of a governmental client in a closed meeting, provided that the presence of the specific persons attending the meeting is consistent with the purpose for closing the meeting. 1998 Op. Att’y Gen. U98-3, § 1. Conversely, this means that if a governmental agency closes its meeting pursuant to O.C.G.A. § 50-14-2 and permits the attendance of persons at the meeting who are not appropriately within the attorney-client relationship, the privilege would be waived. This would, therefore, also undermine the action closing the meeting in question.

5. The Closure of the August 24th Meeting

It is unquestioned by all parties involved that both the Augusta-Richmond County Commission-Council and the Aviation Commission are “agencies” within the meaning of the Georgia Open Meetings Act. O.C.G.A. § 50-14-1(a)(1). Therefore, any meeting conducted by either of these agencies must be open unless there is a specific statutory exclusion providing to the contrary. O.C.G.A. § 50-14-1(b). The requirement that these agencies meet in the open must be read broadly and any exception must be read narrowly.

The exclusion that has been invoked by the agencies involved is the attorney-client privilege, as outlined in O.C.G.A. § 50-14-2. The agencies maintain, in essence, that they both may invoke this exception because the same counsel represents them both. Therefore they can meet jointly to consult with their counsel without waiving the

privilege. This joint-representation claim is a reasonable interpretation of the Augusta-Richmond County Ordinance § 1-7-2. The presence of both the Commission-Council and Aviation Commission members at the same closed meeting for the purpose of consulting with counsel on this particular matter does not appear to waive the attorney-client privilege. The presence of additional staff, such as the Airport Administrator or the City Utility Director, does not necessarily change this conclusion, provided that their presence was consistent with the invoking of the attorney-client privilege.

However, the exclusion of O.C.G.A. § 50-14-2(1) must be narrowly read so as to give the greatest opportunity for the public to attend a meeting which would ordinarily be open. 1998 Op. Att’y Gen. U98-3; Kilgore v. R. W. Page Corp, supra. This statutory exclusion permits closure of a meeting only to discuss with counsel “pending or potential litigation, settlement, claims, administrative proceedings or other judicial actions” involving the agency or its employees. The Commission-Council has not indicated that there is any pending litigation regarding the establishment of the artificial wetlands near Bush Field. There was no settlement agreement discussed nor was there any “claim” discussed by the Commission-Council. Finally, there was no administrative proceeding or other judicial action under way which would permit the closure of this meeting.

Reading the statutory exception of O.C.G.A. § 50-14-2(1) narrowly, the sole exclusion that may have been present in this circumstance is the possibility of litigation being filed in the future regarding the artificial wetlands and airport expansion in question. Augusta-Richmond County has been sued in the past regarding the creation of these wetlands and has apparently agreed to locate the wetlands pursuant to a previous consent order. The failure to comply with the consent order could theoretically subject the consolidated government to legal action to enforce the order or to hold the members of the Commission-Council in contempt for failing to comply with a lawful court order. These facts are significant in light of the fact that FAA opposition to the expansion of Bush Field could lead the City-County to question what its legal rights and obligations are to both comply with the earlier consent order while addressing the FAA’s concerns.

I am troubled by the questions raised by this matter. It is clear that a government agency, whether it is state or local, will always be subject to the threat of some “potential litigation.” Indeed, in our litigious society virtually any action taken by a government entity could potentially lead to litigation. To construe the “potential litigation” exemption found in O.C.G.A. § 50-14-2(1) broadly, however, would emasculate Georgia’s Open Meetings Act and do irreparable damage to the jurisprudence developed in this area. Thus, a narrow reading of the exclusion of O.C.G.A. § 50-14-2(2) requires that the closure of a meeting to discuss “potential litigation” be based on more than a mere unrealized possibility of a lawsuit. There should be a realistic and tangible threat of litigation facing an agency before it may invoke this legal provision which excludes members of the public from attending a meeting.

In this particular case, I find the “realistic and tangible threat of litigation” to be tenuous at best, but the existence of the previous consent order combined with the issuance of the FAA opposition to the expansion of Bush Field, appears to raise a

question of “potential litigation” which at least goes beyond speculation or a mere “fear of being sued.” For this reason alone, I do not believe the Commission-Council or its attorney acted in bad faith in closing the meeting in question.

Nevertheless, and as a matter of prospective application, I believe meetings such as the one at issue here should be open and I advise the Commission-Council that future meetings concerning this issue, where no greater threat of litigation exists than that which exists now, should be open. The very closeness of the issue demands no less. The Supreme Court of Georgia has indicated, and I agree, that where there is any doubt as to whether a meeting should be closed, open government must prevail. See *Steel v. Honea*, 261 Ga. 644, 647 (1991) (Fletcher, J., concurring.).

Finally, I note that the amendment to the Open Meetings Act under which your request was filed gave this office the authority to seek enforcement remedies already provided for in the Act. The amendment did not provide additional remedies. Generally, an alleged violation of the Open Meetings Act must be pursued in superior court within 90 days of the alleged illegal meeting. If a meeting is determined to have been held in violation of the Act, any action taken at that meeting may be declared void. However, as noted above, it appears that no “action” was taken at the meeting in question. Therefore, in light of the analysis set forth above and based on the facts as presented by both the county and you, it appears that little tangible benefit would be gained by taking further legal action at this time. This letter, however, is intended to provide prospective direction to local governments throughout the state, and to serve as this office’s official interpretation of the “potential litigation” exemption to the Open Meetings Act.

If you believe that any of the facts set forth herein are incorrect, or if you are aware of additional material facts that you believe would affect the outcome of this review, please do not hesitate to contact me. Of course, this decision in no way precludes you from taking any legal action you might feel is appropriate under the Open Meetings Act.

Sincerely,
THURBERT E. BAKER
Attorney General
TEB/DRD/me

CC: James B. Wall, Esq.
Georgia Municipal Association
Association of City and County Governments

1998
City of Atlanta

November 20, 1998
Mr. John W. Walter

Managing Editor
The Atlanta Journal-Constitution
P.O. Box 4689
Atlanta, Georgia 30302
RE: The Georgia Open Records Act.
Dear Mr. Walter:

On October 23, 1998, you wrote regarding the Georgia Open Records Act and difficulties that have occurred in the past in relation to requests under the Act made to the City of Atlanta. Your counsel, Peter C. Canfield, has provided my office documentation regarding those earlier incidents and has asked that I help clarify for all involved the requirements of the Act, especially in relation to the need for quick and meaningful responses to requests for public documents. This request is appropriately directed to me given that the General Assembly has recently, at my request, provided my office with the authority to enforce both the Open Records and Open Meetings Acts. O.C.G.A. § 50-14-5(a); O.C.G.A. § 50-18-73(a).

As you know, I have always been a strong advocate of openness in government and believe that both the Open Records and Open Meetings Acts are the most essential tools we have for guaranteeing the free and appropriate flow of information to the public and the press. In relation to a citizen's right to review government records, the Supreme Court of Georgia has long ago noted that the policy favoring openness in government has been clearly established by the General Assembly. *Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 66 (1980). The Open Records Act not only encourages public access to government information to permit the public to evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also fosters confidence in the government through openness to the public. *Id.*

The analysis necessary to carry out this mandate of public openness is not difficult to follow or understand. All public records are open records unless there is a specific statutory exception that provides otherwise. O.C.G.A. § 50-18-70. A "public record" is broadly defined to include all forms of information gathered by the government including, in addition to traditional papers and documents, tapes, photographs and computer based and generated information. O.C.G.A. § 50*18-70(a). Any exception to this doctrine of openness must be read narrowly. O.C.G.A. § 50-18-72(g); *Hardaway Company v. Rives*, 262 Ga. 631, 634-35 (1992).

One of the most crucial aspects of the Open Records Act is the requirement that a governmental agency receiving a request must determine within a reasonable time whether the documents in question are subject to access under the Act. O.C.G.A. § 50-18-70(f). The General Assembly has determined that a "reasonable time" is no more than three business days. *Id.* This three-day limit represents the most time that should ever be taken in determining whether records are covered under the Act. If possible, and in good faith compliance with the Act, this determination should be made sooner than this maximum time limit.

Of course, this does not mean that the actual documents covered by the request must be made available for inspection or copied and distributed within that three-day time frame. The General Assembly has provided processes for either reviewing documents or providing for their copying, certainly in anticipation of this being done outside of the three-day limit. O.C.G.A. § 50-18-71, 50-18-71.2. However, if documents covered by the request can be made available within the time frame, no governmental entity should delay their review or copying in reliance upon the provision of the three-day time limit. A government agency should, in good faith compliance with the statute, attempt to make any covered document available as soon as possible, even if that means the documents should be made available immediately. While the Act does not specifically require that an agency state a place and time certain for the review or production of the documents, it is certainly good public policy and one that fosters confidence in the government to provide this type of information in any response.

In responding within the three-day time limit, a government agency must also determine whether any exception to the Open Records Act applies. O.C.G.A. § 50-18-72. If the agency determines that an exception does apply, keeping in mind that any such exception must be narrowly interpreted, the agency must state with specificity what the exception is and why it is applicable to the documents in question. In applying the exceptions narrowly, it should also be remembered that an exception may apply to only a portion of a document and not to the entire document, so that a limited redaction of information is the appropriate action to take rather than withholding an entire document. *AtlantaJournal & Constitution v. City of Brunswick*, 266 Ga. 413, 414 (1995). Finally, it should be noted that the exceptions to the Open Records Act themselves do not bar the release of a covered document. These narrow exceptions only provide that an agency may not be compelled to disclose a covered document that is otherwise exempt under O.C.G.A. § 50-18-72. In the interests of open government and to fulfill the purposes outlined above, an agency may still choose to release covered documents to the extent that there is no other legal authority requiring that such documents be kept confidential.

My discussion of these issues should not be considered as a determination that the City of Atlanta has in any way chosen to violate the Open Records Act. As Mr. Canfield noted in his letter, the difficulties outlined in the correspondence to our office represent examples of actions taken in various situations. We have not undertaken a separate, independent investigation of these incidents. However, a member of my staff has met with the City Attorney regarding your concerns and discussed with her the requirements of the Open Records Act. The City Attorney has been very open and cooperative in these discussions. We have also offered to meet with both the City Attorney and your counsel in the future if both of you think it would be helpful in bettering the lines of communication and resolving any future difficulties that arise.

I hope this has been responsive to your inquiry. I remain firmly committed to the strong and fair enforcement of both the Open Meetings and Open Records Acts.

Sincerely,
THURBERT E. BAKER

Attorney General
CC: Peter C. Canfield, Esq.
Susan Pease Langford, Esq.
Gary W. Clark, Associated Press
Robin Rhodes, Georgia Press Association