

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

NORMARENE MERRITT and)	
JOHNNIE STORY,)	
)	
Petitioners,)	
)	CIVIL ACTION FILE
vs.)	NO. 2002CV50640
)	
RANDY TRAVIS and)	
NEW WORLD COMMUNICATIONS)	
OF ATLANTA, INC. a/k/a WAGA FOX 5,)	
)	
Respondents and Third Party Applicants,)	
)	
vs.)	
)	
RAINES CARTER,)	
)	
Custodian of records for the Atlanta Solicitor's)	
office, Third Party Respondent.)	
_____)	

**BRIEF OF AMICI CURIAE
IN SUPPORT OF MOTION FOR RECONSIDERATION**

Amici Curiae the Georgia First Amendment Foundation, the American Civil Liberties Union, the Associated Press, The Atlanta Journal-Constitution, Creative Loafing, the Georgia Press Association, and WSB-TV respectfully submit the following brief in support of WAGA Fox 5's Motion for Reconsideration.

On April 4, 2002, this Court issued an Order finding that the records at issue in this case were "revised by [two City of Atlanta employees] on City time using City computers." It further found the City administrator that requested her subordinates prepare and revise these documents "usurped" the City's personnel and equipment in doing so. Nevertheless, the Court held that the records were not subject to the Open Records Act.

Amici Curiae respectfully submit that the Georgia Supreme Court has reiterated time and again that the Open Records Act is to be construed broadly, both so that the public may evaluate the expenditure of public funds and to foster the public's confidence in government. These purposes would be squarely served by the disclosure of documents such as these, and are patently frustrated under the present injunction. Because this Court's April 4 decision conflicts the plain language of the Act and the Georgia Supreme Court's repeated admonitions regarding its construction, Amici Curiae respectfully submit this brief in support of reconsideration.

STATEMENT OF INTEREST

The Georgia First Amendment Foundation

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.

The American Civil Liberties Union

The American Civil Liberties Union is a non-profit corporation founded in 1920 for the purpose of maintaining and advancing civil liberties in the United States. The ACLU is composed of nearly 300,000 members nationwide. The ACLU of Georgia is a state affiliate of the ACLU, with over 2,600 members. The ACLU has long supported openness in government and the state sunshine laws which make this possible. The ACLU participates in this amicus curiae because of the impact this case may have upon the public accountability of city government in the State of Georgia.

The Associated Press

The Associated Press, the world's largest newsgathering organization, is a cooperative distributing news to 1,783 American newspapers and other newspapers abroad, in addition to 6,000 radio and TV outlets worldwide. The AP reports and transmits news from Georgia to

every daily newspaper in the state and many major radio and TV outlets. In addition, news from Georgia of broader interest is transmitted nationally and internationally.

The Atlanta Journal-Constitution

The Atlanta Journal-Constitution publishes and circulate general interest newspapers throughout the State of Georgia on a daily basis. It is vital to the Journal-Constitution's news-gathering function that public documents remain free and open so that the newspaper can collect and provide information on stories of public interest and fulfill its constitutionally-protected role as surrogate for the public in monitoring Government, including the judicial system.

Creative Loafing

[tktk]

The Georgia Press Association

The Georgia Press Association is an organization comprised of 111 weekly newspapers and 33 daily newspapers located throughout Georgia. The Association and each member newspaper are committed to preserving for the people of Georgia maximum access to and oversight of public affairs and the performance of those charged with carrying out public responsibilities.

WSB-TV

WSB-TV (Channel 2), based in Atlanta, is the State's largest local television station and broadcasts to North Georgia over 40 hours of news programming each week produced by WSB-TV and ABC, of which WSB-TV is an affiliate. WSB-TV Channel 2 gathers news on matters of local, state, and national interest on a daily basis and is vitally interested in protecting the public and press right of access to public documents.

ARGUMENT

I. THE OPEN RECORDS ACT IS TO BE BROADLY CONSTRUED.

It is beyond dispute that Georgia has a “strong public policy . . . in favor of open government.” Richmond County Hospital Authority v. Southeastern Newspapers Corp., 252 Ga. 19, 20 (1984). With respect to government records this policy finds its expression in the State’s Open Records Act. O.C.G.A. § 50-18-70, et seq.; see, e.g., Harris v. Cox Enterprises, Inc., 256 Ga. 299, 302 (1986) (“The language of the code provides a public policy in favor of open government”); Richmond County Hospital Authority, 252 Ga. at 20.

“The overriding purpose of the Open Records Act . . . is to encourage the evaluation of and to posture confidence in our government by providing access to public records.” Parker v. Lee, 259 Ga. 195, 198 (1989). The Supreme Court has explained that:

The public policy of this State has been clearly expressed by the legislature in adopting the Open Records Act. *The purpose is not only to encourage access to such information in order that the public can evaluate the expenditure of public funds and the efficient and proper function of its institutions, but also to foster confidence in government through openness through the public.* That the information may comment upon certain public officials’ performance of their official duties does not warrant suppression by the courts.

Athens Observer, Inc. v. Anderson, 245 Ga. 63, 66 (1980) (emphasis added).

Accordingly, the Act provides that citizens have a right of access to “all documents, papers, letters, maps, books, tapes, photographs, or similar material prepared and maintained or received in the course of the operation of a public office or agency.” O.C.G.A. § 50-18-70(a). See also O.C.G.A. § 50-18-70(b) (“All public records . . . shall be open for public inspection by any citizen of this state . . . and those in charge of such records shall not refuse as privilege to any citizen”).

The Act is a legislative recognition that under our system of self-government public access to government records is inherently valuable.¹ Thus, citizens bear no burden to demonstrate that the public disclosure would further some important public interest. “If there has been a request for identifiable public records within the possession of a custodian thereof, the burden is cast on that party to explain why the record should not be furnished.” Napper v. Georgia Television Co., 257 Ga. 156, 161 (1987). Indeed, the Supreme Court has made clear that once a request for public records has been made, the party objecting to disclosure bears a heavy burden of “persuasive(ly)” justifying this non-disclosure. See e.g. Parker v. Lee, 259 Ga. 195, 198 (1989) (contention that the disclosure of investigatory records would prejudice right to retry a defendant for rape insufficient to overcome public right of access); Board of Regents v. Atlanta Journal, 259 Ga. 214, 216-17 (1989) (contention that disclosure of identities of university presidential candidates would lower quality of applicants and infringe right of privacy insufficient to overcome public’s right of access).

Recognizing the critical importance of Georgia’s Open Records Act to informed self-government, the Georgia Supreme Court has repeatedly held that the Act must be “broadly

¹ Thomas Jefferson stated in 1816 that “If the Nation expects to be both ignorant and free, it expects what never was and never will be.” Speaking of a Free Press, American Newspapers Publishers Association Foundation (1987); see id. (noting Abraham Lincoln’s statement, “Let the people know the facts, and the country will be safe”). As James Madison explained:

“Nothing could be more irrational than to give the people power, and to withhold from them information without which powers abuse. The people who mean to be their own government must arm themselves with the power which knowledge gives. A popular government, without popular information, are the means of acquiring it, is but a prolog to a farce, or a tragedy, or perhaps both.”

Letter of James Madison to W.T. Barbee (August 4, 1822), Writings of James Madison 103 (G. Hunt AD. 1910).

construed” to give effect to its twin purposes: protecting against potential abuse of government power and maintaining the public’s confidence in its officials. See, e.g., Red & Black Pub. Co. v. Board of Regents, 262 Ga. 848 (1993); McFrugal Rental of Riverdale, Inc. v. Garr, 262 Ga. 369 (1992); Hardaway Co. v. Rives, 262 Ga. 631 (1992); Dooley v. Davidson, 260 Ga. 577 (1990); Cremins v. Atlanta Journal, 261 Ga. 496 (1991); Dortch v. Atlanta Journal, 261 Ga. 350 (1991); Georgia Hospital Ass’n v. Ledbetter, 260 Ga. 477 (1990); Board of Regents v. Atlanta Journal, 259 Ga. 214 (1989); Parker v. Lee, 259 Ga. 195 (1989); Atlanta Journal v. Long, 258 Ga. 410 (1988); Atlanta Journal v. Hill, 257 Ga. 398 (1987); Napper v. Georgia Television Co., 257 Ga. 156 (1987); Harris v. Cox Enterprises, Inc., 256 Ga. 299 (1986); Macon Telegraph Pub. Co. v. Board of Regents, 256 Ga. 443 (1986); Richmond County Hospital Auth. v. Southeastern Newspapers Corp., 252 Ga. 19 (1984); Athens Observer, Inc. v. Anderson, 245 Ga. 63 (1980); Houston v. Rutledge, 237 Ga. 764 (1976).

Interpreting the Act broadly to achieve its purposes is no hollow mandate. The Supreme Court has repeatedly interpreted that Act in a manner that rejects cramped interpretations of its language. Indeed, over twenty-five years ago, the Georgia Supreme Court dispensed with any distinction between what were kept as “official” and “unofficial” records for purposes of the Act. Houston v. Rutledge, 237 Ga. 764 (1976). In Houston, newspapers sought files maintained by a sheriff relating to death rates in jails under his supervision. The sheriff contended that the files were not public records because they were maintained by him solely as a matter of administrative discretion. Id. at 764. The trial court agreed and dismissed the newspapers’ complaint. The Georgia Supreme Court, however, vacated the order finding that it was immaterial that the files were not required to be prepared and maintained by law. Id. The Court explained:

[I]n our construction of this statute, we have attempted to apply First Amendment principles which favor open, unfettered communication and disclosure except where some limitation is required in the public interest.

Since Houston, the Court has repeatedly rejected narrow interpretations of the Act. See, e.g., Hardaway Co. v. Rives, 262 Ga. 631 (1992) (rejecting narrow reading of Act in context of “state secrets” exception); Board of Regents v. Atlanta Journal, 259 Ga. 214 (1989) (rejecting narrow of reading of “public agency” to which Act applies); Parker v. Lee, 259 Ga. 195 (1989) (rejecting narrow reading of Act in context of exception for investigative records). As former Chief Justice Weltner noted in his last, posthumous opinion as a member of the Georgia Supreme Court, the courts’ broad enforcement of Georgia’s public access laws is essential to our system of government: “Because public men and women are amenable ‘at all times’ to the people, they must conduct the public’s business out in the open.” Davis v. City of Macon, 262 Ga. 407, 408 (1992) (quoting Ga. Const. Art. I, Sec. II, Par. I).

II. THE COURT’S ORDER IMPROPERLY CONSTRUED THE OPEN RECORDS ACT IN A MANNER THAT CONFLICTS WITH ITS PLAN LANGUAGE AND PURPOSE.

The Open Records Act defines “public records” quite simply to mean “all documents, papers, letters, maps, books, tapes, photographs, or similar material prepared and maintained or received in the course of the operation of a public office or agency.” O.C.G.A. § 50-18-70(a). Despite holding the office of Deputy City Solicitor, Petitioner claims that none of the documents requested were prepared or maintained in the course of the operation of a public office or agency. After stating its distaste for the result, this Court followed Petitioner’s lead, ultimately concluding that the documents “were not prepared and maintained in the course of the business of the City Solicitor’s office.” (Order at 2 (emphasis in original)). This conclusion, however, is untenable on a variety of levels.

First, purely as a matter of statutory construction, the Court has strayed from the plain language of the Act. Contrary to the language used in the Court’s order, the Open Records Act is not limited to “documents prepared and maintained in the course of the business” of the City Solicitor’s office. The language of the Act itself encompasses “material prepared and maintained or received in the course of the operation of a public office or agency.” Compare Order at 2 with O.C.G.A. § 50-18-70(a). Accordingly, even if the Court’s conclusion regarding the preparation and maintenance of these records were correct (and the Act’s history makes clear it is not), access to the records is still required because these records were received by employees of the Solicitor’s Office during the “operation” of the office. Indeed, given that the Court has already held that these documents were “revised by [City employees] on City time using City computers” it is untenable to contend that these records were not at least “received” during the “operation” of a public office. The narrow language used by the Court is a radical departure from the broad language of the Act.²

Secondly, the Court’s interpretation of the Act is utterly contrary to the purpose of the Open Records Act, which is to promote inquiry into government and “those employed by it,” so

² For this reason as well, The Court should not be misled by cases such as Dooley v. Davidson, 260 Ga. 577 (1990), which Petitioner erroneously relied in seeking the injunction. In contrast to the records in the instant case, the records in Dooley had never been “received” by a public agency. To the contrary, they were instead retained in the private premises of the coaches involved in the case and the offices of the Athletic Association, itself a private organization. See, e.g., id. at 582, n. 7 (“neither the board nor the university has insisted on the filing of certain reports”). Where records are in the custody of private organizations, it is appropriate to inquire into the content of such records to determine whether they nevertheless pertain to the operation of a public agency. Where, as here, the custody of the records makes it clear that they were “received” in the course of the operation of a public agency, such an inquiry is unnecessary. “The underlying implication of [the Act] is that *all* records of all state, county and municipal authorities are open to public inspection unless closed by a specific exception.” Doe v. Sears, 245 Ga. 83, 85, 263 S.E.2d 119, 122 (1980).

that “the public can evaluate the expenditure of public funds in the efficient and proper function of its institution.” Athens Observer, Inc. v. Anderson, 245 Ga. 63, 66 (1980). As this Court found, Petitioner “usurped” City employees, on City time, using City computers. Under even less egregious circumstances, the Georgia Supreme Court has repeatedly held that it would be inconsistent with a broad interpretation of the Act to allow an agency employee to shield their work product from public disclosure. As explained above, the Georgia Supreme Court expressly rejected a similar effort in Houston v. Rutledge, 237 Ga. 764 (1976), finding that a sheriff could not shield records by contending they were not official business, but rather the result of “administrative discretion.” Similarly, in Dortch v. The Atlanta Journal and The Atlanta Constitution, 261 Ga. 350 (1991), the Georgia Supreme Court rejected the contention that employees who used city cell phones for personal business could to shield telephone records reflecting such transactions. The lesson of these cases is further reinforced by the fact that the Georgia Supreme Court has specifically cited as a purpose of the Act the need for public monitoring of the expenditure of public resources. See, e.g., Red & Black Pub. Co., 262 Ga. at 850; Dortch, 261 Ga. at 47; Irvin v. Macon Telegraph Pub. Co., 253 Ga. 43, 45 (1984).

If this Court does not reconsider its order, public officials such as Petitioner will be able to abuse the power and resources of their offices, including their authority over subordinate employees, while hiding behind claims of “personal business” when they are asked to account for such behavior to the public. The Open Records Act has proven to be an effective check on such abuses, but only because it has been consistently construed to prevent such manipulation.

CONCLUSION

For the reasons stated, the Georgia First Amendment Foundation respectfully requests that given the undisputed record, the language of the Open Records Act, and its purpose as repeatedly stated by the Georgia Supreme Court, this Court reconsider its Order granting Petitioner's request for a preliminary injunction and instead order that the records be immediately produced.

DATED this 25th day of April, 2002.

Respectfully submitted,

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