Georgia State University Law Review

Volume 9
Issue 1 *October 1992*

Article 2

10-1-1992

STATE GOVERNMENT State Printing and Documents: Amend Open Meeting and Open Record Requirements of State Agencies

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Recommended Citation
Frye, Blake (1992) "STATE GOVERNMENT State Printing and Documents: Amend Open Meeting and Open Record Requirements of State Agencies," *Georgia State University Law Review*: Vol. 9: Iss. 1, Article 2.
Available at: http://digitalarchive.gsu.edu/gsulr/vol9/iss1/2

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STATE GOVERNMENT

State Printing and Documents: Amend Title 50 of the Official Code of Georgia Annotated, Relating to Exceptions and Exemptions to Requirements for Disclosure of Public Records, so as to Clarify an Exception; Provide that Public Disclosure Shall Not Be Required for Records that are Specifically Required by Federal Statute or Regulation to be Kept Confidential; Provide that Disclosure to the News Media Shall Not be Required for Social Security Numbers or the Day and Month of Birth of Public Employees; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTION:	O.C.G.A. § 50-18-72 (amended)
BILL NUMBER:	HB 39
SUMMARY:	The bill would have clarified an exception to the requirement for disclosure of public records. A public record need not be disclosed if a federal statute or regulation specifically prohibits such disclosure.
EFFECTIVE DATE:	N/A

History

In 1988 DeKalb County received federal approval to expand the runway at DeKalb-Peachtree Airport (PDK).[1] Neighborhood activists filed open records requests for years thereafter, worried that the airport would become "Hartsfield North," with increased traffic, noise, and pollution.[2] Specifically, residents were concerned about a contract between PDK and the Federal Aviation Administration (FAA) that purportedly waived the required environmental impact study in exchange for the airport's agreement to limit most use of

1. Corey Dade, *FAA May Restrict Data to DeKalb*, ATLANTA J.-CONST., Aug. 17, 2005, at B1, *available at* 2005 WLNR 12922849.

2. Corey Dade, *Gadflies Get Wings: Critics of Growing Air Traffic at DeKalb-Peachtree Airport Hope the County Finally Will be Forced to Take Them Seriously*, ATLANTA J.-CONST., March 16, 2005, at B1, *available at* 2005 WLNR 4056100.

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PDK to aircraft weighing less than 66,000 pounds.[3] Aircraft weighing up to 100,000 pounds are allowed to land at the airport with special permission.[4]

The neighborhood activists sought to examine the airport's records for evidence of oversized planes using the airport in violation of the weight limit, and for "violations of federal environmental standards regarding noise abatement and air and soil quality."[5] The activists also sought aircraft identification numbers to use in identifying airplane owners with unpaid property tax bills, a problem that allegedly cost DeKalb County more than two million dollars in lost annual revenue.[6] Charles "Mickey" Feltus and other local citizens filed more than 100 open-records requests aimed at finding proof of the alleged violations.[7] DeKalb County consistently refused to comply with the requests, on grounds that it was prohibited from doing so by its contractual confidentiality agreement with the FAA.[8]

In August 2005, Feltus, supported by activist group PDK Watch, won the long-running battle with DeKalb County. Superior Court Judge Robert Castellani ordered the county to release undisclosed records regarding the aircraft using PDK.[9] In its order granting summary judgment to the plaintiffs, the court found uncontested evidence that the county failed to comply with Georgia's open records law:

> [S]pecifically, the defendants failed to make the memoranda at issue available to the plaintiff, or to submit to the plaintiff a written description of the unavailable memoranda, together with a timetable for inspection and copying, all within three (3)

3. *Atlanta Citizen's Fight for Open Government Finally Gets its Day in Court, as supported by Open DeKalb, Inc.*, PR NEWSWIRE, June 1, 2005, *available at* http://goliath.ecnext.com/coms2/summary_0199-4333467_ITM (subscription required) (on file with the Georgia State University Law Review).

4. Dade, *supra* note 1.

5. Corey Dade, *Jones: Airport Files Will be Open, Residents Sued to Gain Access*, ATLANTA J.-CONST., Aug. 16, 2005, at B1, *available at* 2005 WLNR 12863900.

6. *Id.*

7. Richard Halicks, *Open Government: Citizen Hero/Charles 'Mickey' Feltus Activist Outwits Airport Turbulence*, ATLANTA J.-CONST., Mar. 12, 2006, at C4, *available at* 2006 WLNR 4129459.

8. Dade, *supra* note 2.

9. *Judge Says DeKalb County Violated Open Records Act*, ASSOCIATED PRESS, Aug. 11, 2005, *available at* http://www.accessnorthga.com/news/ap_newfullstory.asp?ID=63772.

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> business days; to specify in writing, within three (3) business days, the specific legal authority exempting such documents from disclosure pursuant to O.C.G.A. § 50-18-72(h); [or] to obtain, within three (3) business days, an order based on an exception in Article 4 of Georgia ORA [Open Records Act] from a superior court of the State of Georgia staying or refusing the Memoranda.[10]

The court ruled that the airport's contract with the FAA "should not be used to subvert the letter and spirit of the Georgia ORA in contravention of this state's stated policy of openness in government and, further, that no specific federal or state law has been cited by the defendants in support of the non-disclosure directive contained in the [contract]."[11]

In response to the order, DeKalb County CEO Vernon Jones announced that the county would not appeal the ruling.[12] As the County began efforts to comply with the court order, the FAA considered cutting off DeKalb's access to future flight information, citing security concerns in the "post-9/11 environment."[13] Jones criticized the FAA for taking an adversarial position after not participating directly in the litigation.[14]

In April 2006, DeKalb County residents continued to express frustration regarding the airport.[15] Complaints included private jets skimming treetops, jet fuel sifting onto residential property, and windows and dishes rattling.[16] Susan Gouinlock, an airport neighbor and attorney who participated in the open records challenge, noted that:

> [W]e are frankly still fighting with the county to get all the records . . . . The good news is we have received enough records

10. Order at 5-6, Feltus v. DeKalb County, No. 04CV5630-1 (Super. Ct. DeKalb County Aug. 8, 2005) (on file with the Georgia State University Law Review).

11. *Id.* at 14.

12. Dade, *supra* note 5.

13. Dade, *supra* note 1.

14. *Id.*

15. Ernie Suggs, *Little Headway Made in Meeting on Airport*, ATLANTA J.-CONST., Apr. 6, 2006, at JB3, *available at* 2006 WLNR 5753006.

16. *Id.*

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> from them to know that everything the community thought was happening at PDK is in fact happening at PDK. That includes proof that significant numbers of jets in excess of the 66,000-pound size limit are in fact using the airport on a regular, daily basis; that there has still been no environmental impact analysis of air, water or other pollution around PDK. [17]

PDK director Lee Remmel responded that the airport made "every effort possible to turn over these documents," but the information repeatedly overloaded and crashed the airport's computer system.[18] Remmel also continued to discount PDK Watch's argument about oversized planes, denying any 66,000-pound limit.[19]

In the 2005, 2006, and 2007 legislative sessions, Representative Jill Chambers (R-81st) introduced an amendment to clarify the statutory language of the Open Records Act.[20] The amendment, based on state Attorney General Thurbert Baker's unofficial opinion issued in the PDK case,[21] would clarify the exception to the Open Records Act, such that state government would be allowed to withhold documents as required by federal statute or regulation, but not by federal policy or by contractual obligations with federal agencies.[22] In other words, "contracts with the federal government do not by themselves permit secrecy; rather, some federal law must be cited."[23]

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17. Halicks, *supra* note 7.

18. *Id.*

19. *Id. But see* Dade, *supra* note 1 (FAA spokesperson "confirmed a 66,000-pound limit for aircraft at PDK.").

20. *See* Video Recording of House Judiciary Committee Meeting, Jan. 30, 2007 at 3 min., 23 sec. (remarks by Rep. Jill Chambers (R-81st)), http://www.legis.state.ga.us/legis/2007_08/house/Committees/judiciary/judyArchives.htm [hereinafter House Judiciary Video].

21. Dade, *supra* note 2.

22. *See* House Judiciary Video, *supra* note 20, at 2 min., 33 sec. (remarks by Rep. Jill Chambers (R-81st)).

23. Cory Dade, *Bill Would Open Airport Records*, ATLANTA J.-CONST., Mar. 4, 2005, at D1, *available at* 2005 WLNR 3299352 (referring to the proposed amendment to House Bill 340 in 2005).

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Bill Tracking

Consideration and Passage by the House

Representatives Jill Chambers (R-81st), Mike Jacobs (R-80th), Fran Millar (R-79th), Wendell Willard (R-49th), Edward Lindsey (R-54th), and Mack Crawford (R-127th) sponsored House Bill 39.[24] On January 10, 2007, the House first read HB 39 and Speaker of the House Glenn Richardson (R-19th) assigned it to the Judiciary Committee.[25] Without any substantive changes, the House Judiciary Committee favorably reported the bill to the House floor on January 30, 2007.[26]

The House unanimously passed HB 39 on February 2, 2007.[27]

Consideration and Amendment by the Senate

The Senate read the bill for the first time on February 8, 2007, and Senate President Pro Tempore Eric Johnson (R-1st) assigned it to the Senate Judiciary Committee.[28] The Committee attached SB 212, a bill to ensure that Social Security numbers of public employees are not public records.[29] The committee favorably reported the bill to the Senate floor on March 27, 2007.[30]

The Senate read the bill for the second time on March 28, 2007.[31] The bill was then recommitted.[32]

24. *See* HB 39, as introduced, 2007 Ga. Gen. Assem.

25. *See* State of Georgia Final Composite Status Sheet, HB 39, June 5, 2007.

26. *See* State of Georgia Final Composite Status Sheet, HB 39, June 5, 2007. The House Judiciary Committee briefly considered amending the bill with a proposal regarding a requirement that open records requests be made in writing, but voted favorably on the bill without changes. *See* House Judiciary Video, *supra* note 20, at 4 min., 12 sec.

27. Georgia House of Representatives Voting Record, HB 39 (Feb. 2, 2007); State of Georgia Final Composite Status Sheet, HB 39, June 5, 2007.

28. State of Georgia Final Composite Status Sheet, HB 39, June 5, 2007.

29. *See* Telephone Interview with Rep. Jill Chambers (R-81st) (Apr. 4, 2007) [hereinafter Chambers Interview]; HB 39 (SCS), 2007 Ga. Gen. Assem.

30. *See* State of Georgia Final Composite Status Sheet, HB 39, June 5, 2007.

31. *Id.*

32. *Id.*

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The Bill

The bill would have amended Code section 50-18-72(a)(1) of Georgia's Open Records Act, "to provide that public disclosure shall not be required for records that are specifically required by federal statute or regulation to be kept confidential."[33]

The bill provides an exception for open records requests of public records "required by federal statute or regulation to be kept confidential," updating the previous exception for public records "required by the federal government to be kept confidential."[34]

Analysis

Though the PDK litigation was the impetus for the "clarifying cleanup language," the bill could apply wherever an open records request is denied under the federal government exception without a statute or regulation on point.[35] Under the existing statutory language, "you could have a bureaucrat withhold records because he is part of the federal government," said Representative Jill Chambers (R-81st). "This makes [the exception] much more crisp, much more declarative."[36]

After similar measures passed the House but "bottled up in the Senate" the past two years,[37] Representative Chambers said she was agreeable to the Senate's proposed amendment.[38] However, she felt the protection of Social Security numbers, embodied in SB 220, was more of a privacy issue than an open records issue, and that the situation was likely covered by HB 39.[39] The House Judiciary Committee also reported favorably on a related Open Records Act amendment to provide that certain requests for public records may be

33. HB 39 (SCS), 2007 Ga. Gen. Assem.

34. *Id.*

35. House Judiciary Video, *supra* note 20, at 1 min., 37 sec. (remarks by Rep. Jill Chambers (R-81st)); *id.* at 2 min., 33 sec.

36. Greg Bluestein, *House Approves Bill Designed to Tighten Open Records Exception*, ASSOCIATED PRESS NEWSWIRES, Feb. 2, 2007, *available at* FACTIVA, Doc. No. APRS000020070202e322003ha (quoting Rep. Jill Chambers (R-81st)) (on file with the Georgia State University Law Review).

37. *Id.*

38. Chambers Interview, *supra* note 29.

39. *Id.*

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required to be in writing, but subsequently withdrew and recommitted the bill.[40]

In 2007, the Act was again a victim of the "funnel process" as time ran short in the legislative session. It died because it was not imperative to the State of Georgia, not because of any particular objection or opposition.[41] According to the First Amendment Foundation, the amended section of the Code is "infrequently in dispute"[42] and the change is "slight."[43] The two constituencies most frequently invoking the Open Records Act are public interest groups and members of the press.[44] Representatives of both constituencies supported HB 39.[45] Georgia Press Association attorney David Hudson called the bill a "positive enactment" and noted that the exception could be used any time the federal government tries to withhold information as a matter of contract, in any context.[46]

Looking forward, it is likely that in light of the DeKalb County judicial precedent, supported by an opinion from the Attorney General, and the legislative history surrounding three attempts to amend the Open Records Act in accordance with that opinion,[47] future disputes over the scope of the federal government exception to the Act will be resolved as if HB 39 had passed.

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40. *See* Jeremy Redmon, *Legislature 2007: Subcommittee Clears Bill on Open Records Change*, ATLANTA J.-CONST., Mar. 14, 2007, at B4, *available at* 2007 WLNR 4774326; State of Georgia Final Composite Status Sheet, HB 283, June 5, 2007.

41. *See* Chambers Interview, *supra* note 29 (noting that the only negative vote in the Senate Judiciary Committee was by Senator John Wiles (R-37th)).

42. Telephone Interview with Hollie Manheimer, First Amendment Foundation, Mar. 21, 2007 [hereinafter Manheimer Interview].

43. Greg Bluestein, *Georgia House Approves Measure to Free Government Agency Records*, AUGUSTA CHRON., Feb. 3, 2007, at B7, *available at* http://chronicle.augusta.com/stories/020307/met_115133.shtml (registration required).

44. Manheimer Interview, *supra* note 42.

45. *Id.*; Telephone Interview with David Hudson, Georgia Press Association, Apr. 4, 2007 [hereinafter Hudson Interview].

46. Hudson Interview, *supra* note 45.

47. *See supra* text accompanying notes 20-21.

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