

## SUMMARY

### OPEN MEETINGS/OPEN RECORDS

#### HOUSE BILL 397 SUBSTITUTE

(LC 29 5274ERS – Passed House

Favorably Reported by Senate Judiciary Committee 3/23/12)

#### ***Key Proposed Changes to Georgia's Open Meeting and Open Records Laws***

In addition to substantive changes, the HB 397 substitute significantly reorganizes current law, eliminates some inconsistencies, incorporates settled case law, and in some cases, reverses case law. This summary focuses on the substantive changes applicable to counties. Note that the terms “county” or “counties” are used throughout the summary for convenience, but the changes in the bill generally affect all agencies that are subject to the open meetings and open records acts. **Note that changes from the House-passed version are highlighted.**

#### **SECTION I. OPEN MEETINGS**

**Agency Definition.** The current definition is expanded such that in addition to every department, agency, board, bureau, commission, authority or similar body being a covered agency, an “office” of the county or city is an agency subject to the open meetings act [§ 50-14-1 (a)(1)(C)].

**Meeting Definition.** A meeting subject to the open meetings law is defined as a gathering of a quorum where official business, policy, or a public matter of the county is presented, discussed or voted upon [§ 50-14-1 (a)(3)(A)(i)]. *Note that the proviso in current law--“at a designated time and place”--is deleted.*

**Committees.** Committees created by the county are subject to the open meetings law. If a quorum of a committee gathers for official business, that constitutes a meeting subject to the open meetings law [§ 50-14-1 (a)(3)(A)(ii)].

#### **Not a Meeting:**

- Inspecting facilities or property where no other official action is discussed or taken [§ 50-14-1 (a)(3)(B)(i)].
- Attending statewide or regional meetings or training where no official action taken [§ 50-14-1 (a)(3)(B)(ii)].
- Meetings with state or federal legislative or executive officials where no official action taken [§ 50-14-1 (a)(3)(B)(iii)].
- Traveling together where no official business, policy, or public matter is formulated, presented, discussed or voted on [§ 50-14-1 (a)(3)(B)(iv)].
- Attending social, civic, ceremonial or religious events where no official business,

policy, or public matter is formulated, presented, discussed or voted on [§ 50-14-1 (a)(3)(B)(v)].

However, regarding exceptions (i) through (v) above, if it can be shown that the primary purpose of the gathering is to avoid the requirements of the open meetings law, then the gathering would be deemed a meeting where all notice, access, agenda, summary and minutes requirements must be met [§ 50-14-1 (a)(3)(B)].

**Voting.** With a couple of exceptions, explained elsewhere, all votes must be taken in public after due notice to the public [§ 50-14-1 (b)(1)].

**Decisions Not Binding.** Decisions that are made outside a meeting that meets the requirements of the act are not binding. Any challenge must be brought within 90 days of the action occurring or being discovered, but in no case more than six months after the date of the contested meeting [§ 50-14-1 (b)(2)].

**Notice:**

- Regular meetings, including those of the commissioners or any committee appointed, must be posted at least one week in advance and must be posted on county website if the county has one [§ 50-14-1 (d)(1)].
- Specially called meetings and emergency meetings with less than 24 hours' notice are authorized [§ 50-14-1 (d)(2) and(3)].

**Minutes-Summaries-Agendas:**

- Meeting agendas, summaries of meetings and minutes must be prepared for the board of commissioners as well as for committee meetings [§ 50-14-1 (e)(2)(B)].
- Minutes must identify the persons making and seconding all votes and the name of each person voting for or against each proposal [§ 50-14-1 (e)(1) and (2)].
- Executive session minutes must be kept, but are confidential unless reviewed by a court in chambers. The executive session minutes will have to specify each issue discussed in executive session. If matters are discussed subject to the attorney-client privilege, the fact that an attorney-client discussion occurred and the subject shall be identified, but the substance of the discussion need not be recorded or identified in the minutes [§ 50-14-1 (e)(2)(C)].

**Meetings via Teleconference.** Currently allowed only for agencies with statewide jurisdiction, they will now be allowed for all other agencies under limited circumstances, including for emergency or health reasons [§ 50-14-1 (g)].

**Mediation.** Mediation proceedings are exempt from the open meetings act. Decisions, however, must be voted on in public and records related to the mediation are subject to disclosure [§ 50-14-3 (a)(5)]. Arbitration not exempted.

**Incidental Conversation.** Conversations unrelated to the business of the county will not trigger an open meeting [§ 50-14-3 (a)(7)].

**Email Communications.** Emails among commissioners do not violate the act. However, the emails will be considered documents subject to disclosure under the open records act [§ 50-14-3 (a)(8)]. Note that telephone communications are not addressed.

## **Executive Sessions:**

- Executive session is defined as a meeting lawfully closed [§ 50-14-1 (a)(2)].
  - Acquisition, disposal or lease of property may be discussed in executive session [§ 50-14-3 (b)(1)].
  - In contrast to the general rule, votes may be taken in executive session regarding the following [§ 50-14-3 (b)(1)]:
    - to authorize settlement of any matter relative to the attorney-client privilege per OCGA § 50-14-2 (1) -- *clarified in the Senate Substitute.*
    - to authorize negotiations to acquire, dispose or lease property.
    - to authorize an appraisal relative to the acquisition or disposal of real estate.
    - to contract to purchase, dispose or lease property.
    - to enter into an option to purchase, dispose or lease real estate.
- However, no vote to acquire, dispose or lease real estate or to settle a claim is binding until subsequently voted on in open meeting.
- Applicants for the position of executive head of an agency, presumably to include county managers and department heads, may be interviewed in executive session [§ 50-14-3 (b)(2)].
  - Discussion in executive session of records that are otherwise protected from disclosure under the open records act is authorized [§ 50-14-3 (b)(4)].
  - If a non-exempt topic is brought up in executive session, the chairman must immediately rule the discussion out of order. If the non-exempt discussion continues, the chairman must adjourn the meeting. The commissioners may adopt a policy that all commissioners must sign the affidavit under oath swearing that only exempt topics were discussed in the executive session rather than just the chairman [§ 50-14-4 (b)].

**Penalties/Enforcement/Defense.** Criminal penalties for violation of the open meetings act increase from \$500 to \$1000. However, the bill also authorizes a court, as an alternative, to impose civil penalties of up to \$1000 against any person violating the open meetings act. The penalties will increase to \$2500 for subsequent violations in the same calendar year. A criminal violation of the act requires the person to have knowingly and willfully violated the law. There is a good faith defense to such charges. On the other hand, civil penalties can be sought if someone negligently violates the requirements of the act. There is no good faith defense if civil penalties are sought [§ 50-14-6].

## **SECTION II. OPEN RECORDS**

**Records Defined.** Expands the definition of public record to include "data" and "data fields" [§ 50-18-70 (b)(2)].

**Who Is Entitled to Access?** Expands right to access to public records to individuals

outside the Georgia. Language in current law providing that public records shall be open for inspection "*by any citizen of this state*" is deleted on line 384 [§ 50-18-70 (b)(2)].

**Records Retention.** Records by local governments must be maintained in accordance with the state records retention act found at § 50-18-90 *et seq.* [§ 50-18-71 (a)].

**Timeline.** No change. Records still must be produced within 3 business days if possible. If not, the response must be made within 3 business days as to when the records will be produced [§ 50-18-71 (b)(1)(A)].

**Records Not in Existence at the Time of the Request.** Counties will not be required to produce documents not in existence at the time of the request. I.e., a requestor is not entitled to make standing requests for the production of documents in the future if and when they are produced [§ 50-18-71 (b)(1)(A)].

**Requests Orally or in Writing/Enforcement.** Requests can be made orally or in writing. [§ 50-18-71 (b)(1)(B)]. However, only requests made in writing are subject to the criminal and civil enforcement proceedings and penalties in the law [§ 50-18-71 (b)(3)].

#### **Records Custodian or Officer:**

- County can specify that all written requests go to a records custodian [§ 50-18-71 (b)(1)(B)].
- The custodian can be the chairman, chief executive, agency head, a clerk, or other person [§ 50-18-71 (b)(1)(B)].
- The records custodian must be designated in writing by the county, the legal organ must be notified, and the custodian must be posted on the county's website if it has one [§ 50-18-71 (b)(2)].
- Written requests may be made by mail, fax or email [§ 50-18-71 (b)(2)].
- Three-day response period starts when the custodian gets the request—not when it arrives at the courthouse mailroom or when some county employee or official gets it that is not actual keeper of the records. [§ 50-18-71 (b)(2)].

**Access to Records/Copies of Records.** Generally, requestors may inspect records. At the time of inspection, the requestor may make photographic copies or other electronic copies using portable devices brought in to the place of inspection. However, the county in its discretion may provide copies in lieu of access if the records contain personal information subject to redaction [§ 50-18-71 (b)(1)(B)].

#### **Fees for Responding to Records Requests/Redaction:**

- Charges for search, retrieval and production of copies continues to be allowed at the rate of the lowest paid full time employee able to respond [§ 50-18-71 (c)(1)].
- In addition, HB 397 would, for the first time, expressly authorize counties to charge for the cost of redacting records by a full time employee [§ 50-18-71 (c)(1)].
- Fees for copying records is reduced from \$.25/page to \$.10/page for letter or legal size documents. For odd-size printed documents, the **actual cost of producing the**

**documents** can be charged. For electronic records, a county can charge the actual cost of the media on which the records or data are produced. [§ 50-18-71 (c)(2)].

- County can charge for records--even if not picked up [§ 50-18-71 (c)(3)].
- If estimated cost of producing records is over \$25.00, the county must notify the requestor within three business days of the request as to the estimated amount. The county can defer search and retrieval until the requestor agrees to pay the estimated amount [§ 50-18-71 (d)].
- If estimated cost of producing records is over \$500, the county may require prepayment before the search, retrieval, review or production of records [§ 50-18-71 (d)].
- If costs not paid to the county for prior requests, the county may require prepayment for all new requests, regardless of amount, until the previous charges are paid [§ 50-18-71 (d)].

**Discovery.** If records are sought as part of ongoing litigation, the request must be in writing and copied to the county attorney simultaneously. The county would have to prepare a duplicate set of the requested documents produced that must be provided to the county attorney unless the county attorney elects not to receive them [§ 50-18-71 (e)].

**Requests for Emails or other Electronic Messages.** Requests for emails should contain information about the requested messages that is reasonably calculated to allow the records custodian to locate the requested messages such as name, title, office or specific data base to be searched to assist the custodian in finding the emails [§ 50-18-71 (g)].

#### **Electronic Records/County Website:**

- Counties must produce electronic copies, or if the requestor prefers, printouts of electronic records or data from database fields used by the county [§ 50-18-71 (f)].
- Counties cannot refuse to produce electronic records, data or data fields on the grounds that exporting data or redaction of exempted data will require inputting range, search, filter, report parameters, or similar commands or instructions into the agency's computer system [§ 50-18-71 (f)].
- A requestor may request that electronic records, data and data fields be produced in the format in which such data or records are kept by the county, or in a standard export format in which case the data or records are to be downloaded in such format onto suitable electronic media by the county [§ 50-18-71 (f)].
- **No county can be required to prepare new reports, summaries, or compilations not in existence at the time of the request [§ 50-18-71 (j)].**
- In lieu of providing printouts, a county may provide access to records through a website accessible by the public. However, if the request is for data fields, the county cannot refuse to comply on the grounds that the data is available on the website [§ 50-18-71 (h)].

- A county cannot use private vendors to limit access data maintained by the vendor for the county and **must ensure that the vendor does not impede access to public records** [§ 50-18-71 (h)].

**Exemptions from Disclosure.** Other than those noted below, generally the exemption provisions in § 50-18-72 are rewritten for clarity and consistency with no intent to broaden and limit their application:

- Pending, rejected or deferred sealed bids or proposals and related **detailed** cost estimates are exempt from disclosure, but must be released after the final award of the contract is made, the project is terminated or abandoned, **or the county takes a public vote on the bids or proposals, whichever occurs first** [§ 50-18-72 (a)(10)].
- Personal emails addresses, unlisted phone numbers, cell phone numbers found in public records are exempted and must be redacted before the underlying document is released [§ 50-18-72 (a)(20)(A)].
- The exemption for personal information regarding public employees, such as home address, home telephone numbers, social security numbers, birthdates, credit card information, bank account information, and similar personal data **is extended to former employees as well as current employees** [§ 50-18-72 (a)(21)].
- The burden for determining whether or not records may include information that would reveal trade secrets is substantially shifted from the public agency to the private entity claiming the exemption [§ 50-18-72 (a)(34)].
- **Records pertaining to rating plans, underwriting rules and similar proprietary information used to administer self-insurance to a county are exempt** [§ 50-18-72 (a)(45)].
- **Records of the Department of Economic Development pertaining to an economic development project until the project is secured by a binding commitment or has been terminated; and records related to state training programs for economic development projects** [§ 50-18-72 (a)(46) and (47)].
- Exhibits tendered to a court in a civil or criminal trial are not open to disclosure without the approval of the court. Where disclosure is allowed, it is done under circumstances provided for in the law. Where the exhibits relate to criminal charges relating to sexual exploitation of children, violation of this confidentiality provision is punishable by up to 20 years in jail, a fine of up to \$100,000, or both [§ 50-18-72 (c) and (d)].

**Attorney-Client Privilege.** The attorney-client privilege is broadened to include all records containing communications subject to the attorney-client privilege recognized by state law, with one exception. The privilege does not extend to factual findings related to an investigation conducted by an attorney on behalf of the county, so long as such investigation does not pertain to pending or potential litigation, settlement, claims or other judicial actions. Where records are withheld under this provision, the requestor make seek an *in camera* review of the records to determine whether or not the records were properly withheld [§ 50-18-72 (a)(41)].

**Confidential Attorney Work Product.** Attorney work product continues to be

generally protected. However, the protection does not extend to factual findings related to the investigation conducted by an attorney on behalf of the county, so long as such investigation does not pertain to pending or potential litigation, settlement, claims or other judicial actions. Where records are withheld under this provision, the requestor make seek an *in camera* review of the records to determine whether or not the records were properly withheld

**Enforcement/Penalties/Defense.** Criminal penalties for an open records violation increase from \$500 to \$1000. However, the bill also authorizes a court, as an alternative, to impose civil penalties of up to \$1000 against any person violating the open records act. The penalties will increase to \$2500 for subsequent violations in the same calendar year. A criminal violation of the act requires the person to have knowingly and willfully violated the law. There is a good faith defense to such charges. On the other hand, civil penalties can be sought if someone negligently violates the requirements of the act. There is no good faith defense if civil penalties are sought [§ 50-18-73 and § 50-18-74].

**Enforcement/Arrest Warrants.** Any prosecution to enforce the open records act can be commenced only by issuance of a citation served on the accused public official or employee. The defendant cannot be arrested prior to the time of trial, unless the defendant fails to appear for arraignment or trial (*current law which was deleted in previous versions of the bill were was reinstated in the Senate Substitute*).

**ACCG**

**March 23, 2012**