

OPEN RECORDS FOR GA-VDRS WORKSHOP

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LEGISLATIVE INTENT OF THE OPEN RECORDS ACT, OCGA 50-18-70 et. seq.

- Access to public records is encouraged in order to foster public confidence in government
- PUBLIC POLICY IS OPEN, TRANSPARENT GOVERNMENT

LEGISLATIVE INTENT OF THE ORA

OCGA 50-18-70 et. seq.

- The ORA is to be broadly construed
- The exceptions must be interpreted narrowly

IMPORTANT DEFINITIONS

- “Agency” means state, county and municipal:
 - Department, agency, board, bureau, office, authority commission, public corporation, school district or similar body or other political subdivision established pursuant to Georgia law, and
 - has the same meaning as that under Georgia’s Open Meeting law, OCGA § 50-14-1

IMPORTANT DEFINITIONS

- “Public record” means:
 - All documents, papers, letters, maps, books, tapes, photographs, computer based data, or similar material
 - prepared and maintained or received by an agency or private person or entity on behalf of an agency, or
 - when such documents have been transferred to a private person or entity by an agency for storage or future use

CORONERS AND MEDICAL EXAMINERS

- In death investigations, books, records and papers received via a subpoena are privileged and exempted from disclosure under the ORA.

OCGA 45-16-27(c)

CORONERS AND MEDICAL EXAMINERS

- Autopsy photographs are exempt from disclosure, except:
 - Law enforcement and prosecutors for law enforcement purposes
 - Medical schools, medical facilities, and physicians for medical purposes – but only in **closed** criminal investigations

CORONERS AND MEDICAL EXAMINERS

- Autopsy photographs are exempt from disclosure, except:
 - “Next of kin” or an individual with a written release from the deceased’s next of kin
 - There is a hierarchy of “next of kin” (e.g. spouse, then adult child, etc.)
 - Requestor has responsibility to show proof of familial relationship

OCGA 45-16-27(d)

CORONERS AND MEDICAL EXAMINERS

- Crime scene photos and videos depicting graphic or sexual images are exempt from disclosure, except:
 - “Next of kin” or an individual with a written release from the deceased’s next of kin
 - There is a hierarchy of “next of kin” (spouse, then adult child, parent)
 - Requestor has responsibility to show proof of familial relationship

CORONERS AND MEDICAL EXAMINERS

- Crime scene photos and videos depicting graphic or sexual images are exempt from disclosure, except:
- In a closed criminal case, with a superior court order
 - Custodian must give next of kin two weeks notice prior to release.

CORONERS AND MEDICAL EXAMINERS

- Crime scene photos and videos depicting graphic or sexual images are exempt from disclosure, except:
- To counsel of a convicted defendant in state or federal habeas proceedings or an extraordinary motion for new trial
 - Counsel's request must clearly state it is for the purpose of preparing to file and litigate such a proceeding.

OCGA 50-18-71: Access, timing, denials and fees

- Agency may require written requests be submitted to a designated Open Record Officer(s):
 - Designation must be in writing and provided upon request
 - Must prominently identify designee(s) on its website
 - Must notify legal organ of the county of the designee(s)
 - Cannot delay response if designee is unavailable

OCGA 50-18-71: Access, timing, denials and fees

- Requests may be made orally or in writing
 - Advisable to keep a record of ORR
 - Civil/Criminal penalties for noncompliance only apply when the ORR is in writing

OCGA 50-18-71: Access, timing, denials and fees

- Records that exist and are subject to public disclosure:
 - If available, must be produced within 3 business days
 - If unavailable, a written description of the records and a timetable for production must be provided within 3 business days
 - Must allow portable copying/recording devices OR provide copies if portions of a record require redaction in lieu of access

OCGA 50-18-71: Access, timing, denials and fees

- All that is required is to provide reasonable **access** to the files or records that are sought
- No requirement to comb through the files or records searching for documents requested

Felker v. Lukemire, 267 Ga. 296 (1996)

OCGA 50-18-71: Access, timing, denials and fees

- No requirement to produce records that don't exist
- No requirement to create a report, summary or compilation just to be responsive
- No requirement to perform computer database search if need to develop new protocols for searching

OCGA 50-18-71(j); *Schulten, Ward & Turner, LLP v. Fulton-Dekalb Hosp. Auth.*, 272 Ga. 725 (2000)

OCGA 50-18-71: Access, timing, denials and fees

- Electronic Records
 - Agencies are required to produce electronic or paper copies per requestor's preference.
 - The responsive records must be produced in the format maintained by the agency on suitable electronic media.

OCGA 50-18-71: Access, timing, denials and fees

■ Electronic Records

- An agency cannot deny an ORR because fulfilling the request requires use of range, search, filter, and parameter commands so long as they are compatible with existing software.

OCGA 50-18-71: Access, timing, denials and fees

- Electronic Records – Specificity
 - Requests for electronic messages (e-mails, texts, etc.) should contain information about the messages that is reasonably calculated to allow the agency to locate the messages sought, including, if known,
 - The name, title, or office of the specific person or persons whose electronic messages are sought and,
 - To the extent possible, specific data bases to be searched for such messages.

OCGA 50-18-71(g)

OCGA 50-18-71: Access, timing, denials and fees

- In lieu of providing copies of records or data, an agency may provide access to records through a website accessible by the public, but
 - Not if the requester seeks the data in the electronic format in which it is kept.

OCGA 50-18-71: Access, timing, denials and fees

- If an agency contracts with a private vendor to collect or maintain public records, the agency must ensure that the arrangement does not
 - limit public access to those records, and
 - the vendor does not impede public record access.

OCGA 50-18-71: Access, timing, denials and fees

■ Fees and Costs

- Agencies may impose a reasonable charge for the search, retrieval, or redaction of records
- The charge must not exceed the prorated hourly salary of the lowest paid full-time employee who has the necessary skill and training to perform the request; but
- No charge shall be made for the first quarter hour.

OCGA 50-18-71: Access, timing, denials and fees

■ Fees and Costs

- Agencies may charge up to \$.10/page for letter/legal copies, plus the actual costs of copying other sizes, plus the cost of media.
- A fee may not be imposed when the requestor seeks only to inspect records (e.g. deeds, city ordinances or zoning maps). *McFrugal Rental of Riverdale, Inc. v. Garr*, 262 Ga. 369 (1992)

OCGA 50-18-71: Access, timing, denials and fees

■ Fees and Costs

- There is no provision in OCGA 50-18-71 for the excusal of the payment of fees upon filing a pauper's affidavit.
McBride v. Wetherington, 199 Ga. App. 7 (1991)

OCGA 50-18-71: Access, timing, denials and fees

- Fee Notification Requirement
 - If the estimated costs are over \$25.00, the agency must notify the requester within 3 business days, and
 - May defer search and retrieval of the records until the requester agrees to pay the estimated costs, unless
 - The requester has stated a willingness to pay an amount that exceeds the search and retrieval costs.

OCGA 50-18-71: Access, timing, denials and fees

- Fee Notification Requirement
 - If the estimated costs for producing the records exceeds \$500, the agency may insist on prepayment prior to beginning search, review, or production.

OCGA 50-18-71: Access, timing, denials and fees

- Fee Notification Requirement
 - If requestor has not paid the cost for search, retrieval, redaction, or copying of such records when such charges have been lawfully incurred, an agency may require prepayment for compliance with all future requests until the dispute regarding payment is resolved.

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(3): Confidential Information
 - Disclosure not required for records compiled for law enforcement or prosecution purposes that are reasonably likely to disclose:
 - The identity of a confidential source
 - Confidential investigative or prosecution material which would endanger the life or physical safety of any person
 - The existence of a confidential surveillance or investigation

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(4): Pending Cases
 - Disclosure not required for records of law enforcement, prosecution or regulatory agencies:
 - In any **pending** investigation or prosecution of criminal or unlawful activity, other than initial police arrest/incident reports

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(4): Pending Cases
 - The investigation or prosecution no longer pending when direct litigation has become final or otherwise terminated
 - Pending Prosecution means imminent adjudicatory proceedings of finite duration. *Parker v. Lee*, 259 Ga. 195 (1989)
 - An affirmed conviction likely concludes prosecution

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(4): Pending Cases
 - An investigation is “pending” until it is concluded and the case is closed.
 - An inactive investigation which has not produced an arrest or prosecution is “pending” until the investigation is concluded and the case is closed. *Unified Gov’t. v. Athens Newspapers, LLC*, 284 Ga. 192 (2008)

OCGA 50-18-72: Exemptions from Disclosure

■ 50-18-72(a)(4): Pending Cases

■ Investigative notes are exempt from disclosure:

“[E]xamining OCGA 50-18-72(a) (4), we conclude ‘investigative notes’ are not within that category of law enforcement and prosecutorial documents authorized for release under the Georgia Open Records Act. Investigative notes are ‘notes’ not ‘reports,’ and cannot be classified as police arrest reports, accident reports, or incident reports.” *Lebis v. State*, 212 Ga. App. 481, 483 (5) (1994)

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(4): Pending Cases
 - Exception does not apply if the Agency is the subject of the pending investigation or prosecution
 - Release of booking photographs only permissible in accordance with OCGA 35-1-18

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(4): Pending Cases

- Coroners are **NOT** law enforcement and thus, cannot assert this exemption.

See Schick v. Bd. Of Regents of the Univ. Sys. Of Ga., 334 Ga. App. 425, 430 n. 7 (2015) citing *Kilgore v. R. W. Page Corp.*, 261 Ga. 410, 411 (2) (1991)

Open Records and Invasion of Privacy

- 50-18-72(a)(1): Disclosure not required for records that are specifically required by federal statute or regulation to be kept confidential
 - This has been interpreted “to apply only to federal records required to be kept confidential which are in the hands of a state agency.” *Ga. Hosp. Ass’n v. Ledbetter*, 260 Ga. 477, 478 (1990)

Open Records and Invasion of Privacy

- 50-18-72(a)(1):
 - There is no rule in Georgia that a public record of a State agency is exempt because it would be confidential under Federal Law
 - e.g. FOIA exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 USCS 552(b)(6)

Open Records and Invasion of Privacy

- 50-18-72(a)(2): Disclosure not required for “medical, veterinary records and similar files....which would be an invasion of personal privacy”
 - This has been interpreted to forbid disclosure of public records to the general public that would invade the constitutional, statutory, or common law rights of privacy. *Hackworth v. Bd. Of Educ.*, 214 Ga. App. 17, 22 (1994)

Open Records and Invasion of Privacy

- 50-18-72(a)(2):
 - When the public has, in fact and in law, no legitimate concern, public records are not subject to disclosure under the ORA because they are not the subject of legitimate public inquiry
 - e.g. *Hackworth* – ORR for personnel records of school bus drivers.
 - Transportation of school children is a legitimate public concern

Open Records and Invasion of Privacy

- *Hackworth*, cont'd
 - Court found that drivers' and agency's privacy rights cannot outweigh public interest in the disclosure of information regarding the drivers' job performance, disciplinary actions, accidents on the job, and the like.

Open Records and Invasion of Privacy

■ *Hackworth*, cont'd

- However, other information in personnel files may be exempt because they are medical records or contain information the disclosure of which would constitute a tort of invasion of privacy
 - Personal information regarding drivers' private affairs
 - Tax information, credit histories

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(20)(A): personal identifiers, acct. information
 - Disclosure not required for:
 - SSN, DOB, mother's maiden name, credit/banking/account #s, personal email and cell #s, utility accounts of private customers
 - BUT PUBLICLY FUNDED CELL PHONES AND BILLS, including numbers assigned to city cellular telephones are not exempt from disclosure *Dortch v. Atlanta Journal*, 261 Ga. 350 (1991).

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(20)(A) Disclosure exceptions cont'd:
 - MEDIA EXCEPTION
 - Request must be made in writing and under oath
 - Must be for news gathering and reporting
 - Limited to SSNs and day and month of birth
 - Not applicable to (a) (21) exemption (Public Employees)

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(20)(B) Disclosure exceptions cont'd:
 - Court records
 - Disclosure to court, prosecutor or LEO in official capacity
 - Public employees for administrative purposes
 - Disclosure authorized by court order
 - Where person consents to disclosure to authorized agent

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(20)(B) Disclosure exceptions cont'd:
 - DOB and mother's birth name of a deceased person
 - Payment history to consumer credit reporting agency
 - Records disclosed when public agency uses collection agency
 - Compliance with legal/regulatory requirements for LE
 - DOB if contained in a criminal record (CHRI)

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(20)(D) and (E):
 - These records may be used only by authorized recipient for authorized purpose or it's a high and aggravated misdemeanor PLUS cause of action for invasion of privacy
 - If custodian believes in good faith that the request is fraudulent, made under false pretenses or via false swearing, custodian can apply to superior court for protective order for records

OCGA 50-18-72: Exemptions from Disclosure

- 50-18-72(a)(21): personal information of public employees
 - Disclosure not required for:
 - Home address, home phone, SSN, DOB, bank/financial/utility information, passwords, and identity of family members and dependents
 - Applies to state, county and municipal and other political subdivision employees, including former employees

Addressing requests under the Open Records Act:

- Are the requested records in the Agency's custody
 - If NO, STOP and send a letter within 3 days stating same
 - If YES, continue
- Are the records requested "public records"
 - If NO, STOP and send 3 day response stating so

Addressing requests under the Open Records Act:

- Are the records requested “public records”
 - If YES, are the records exempt from disclosure by law?
 - If YES, send 3 day letter and cite the exact Code Section
 - If NO, should they be protected by court order under 50-18-70 because the disclosure of the public records would invade individual privacy

Hardaway Co. v. Rives, 262 Ga. 631, 632-33 (1992)

OCGA 50-18-74: Penalties and Prosecution

- Person or entity who knowingly and willfully violates the statute by:
 - Failing to provide access to records not subject to exemption
 - Failing to provide access to records in 3 days, or
 - Intentionally making records difficult to obtain
 - Guilty of a misdemeanor - \$1,000 for 1st violation; \$2,500. for 2nd violation within 12 months from imposition of 1st fine imposed

OCGA 50-18-74: Penalties and Prosecution

- Prosecution commenced via personally served citation.
- Defendant shall not be arrested unless FTA for arraignment or trial
- Alternatively, a civil penalty may be imposed of up to \$1000 for negligently violating terms of the ORA (\$2,500. for 2nd violation within 12 months from imposition of 1st penalty imposed)

OCGA 50-18-73: Jurisdiction and Fees

- If a superior court determines a party acted without **substantial justification**
 - In not complying with the ORA, or
 - In instituting litigation
- The court **shall**, absent special circumstances, assess in favor of the complaining party reasonable attorney's fees and other litigation costs reasonably incurred

OCGA 50-18-73: Jurisdiction and Fees

- OCGA 9-15-14(b), actions that lack “substantial justification” are:
 - Substantially frivolous
 - Substantially groundless
 - Substantially vexatious
- Don't assert foolish, meritless reasons for non-compliance!
- Don't run up costs, hide records, or ignore requests!

QUESTIONS? ? ?



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