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## STATE GOVERNMENT State Debt, Investment, and Depositories: Prohibit Access to Certain Records of the Office of Treasury and Fiscal Services by Exempting Them from the Open Records Act; Authorize the Director of the Office of Treasury and Fiscal Services to Invest in Specified Securities by Selling or Purchasing Such Obligation Under Agreement to Resell or Repurchase the Obligations

W. Kent Davis

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## STATE GOVERNMENT

***State Debt, Investment, and Depositories: Prohibit Access to Certain Records of the Office of Treasury and Fiscal Services by Exempting Them from the Open Records Act; Authorize the Director of the Office of Treasury and Fiscal Services to Invest in Specified Securities by Selling or Purchasing Such Obligations Under Agreements to Resell or Repurchase the Obligations***

**CODE SECTIONS:** O.C.G.A. §§ 50-5A-11 (new), 50-17-2, -63 (amended)  
**BILL NUMBER:** HB 558  
**ACT NUMBER:** 213  
**GEORGIA LAWS:** 1997 Ga. Laws 569  
**SUMMARY:** The Act exempts certain records of the Office of Treasury and Fiscal Services—particularly records involving electronic fund transfers—from the Open Records Act by stating that they are not public and are not subject to inspection by the general populace. The Act also specifies which securities the Director of the Office of Treasury and Fiscal Services may invest in by selling and purchasing obligations under agreements to later resell or repurchase the obligations.  
**EFFECTIVE DATE:** July 1, 1997

### *History*

In 1988, an infamous computer hacker named Robert Riggs illegally accessed the BellSouth computer system in Atlanta, stealing a proprietary memorandum on the 911 telephone system.<sup>1</sup> Riggs later electronically transferred the stolen memorandum to fellow members of a loose-knit organization of hackers known as “The Legion of Doom.”<sup>2</sup> In response, the U.S. Secret Service initiated the largest computer hacker crackdown in the nation’s history and began the difficult task of tracking the distribution of the stolen BellSouth memorandum throughout the country.<sup>3</sup>

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1. See Gregory E. Perry & Cherie Ballard, *A Chip By Any Other Name Would Still Be a Potato: The Failure of Law and Its Definitions to Keep Pace with Computer Technology*, 24 TEX. TECH L. REV. 797, 803 (1993).

2. See *id.*

3. See *id.* at 804.

In 1993, the Georgia General Assembly created a separate Office of Treasury and Fiscal Services (OTFS) in the state government.<sup>4</sup> This office was charged with the duty “[t]o receive and keep *safely* all moneys which shall from time to time be paid to the treasury of [Georgia].”<sup>5</sup> One of the specific “moneys” to be administered by this new entity was the local government investment pool,<sup>6</sup> “consisting of the aggregate of all funds from local governments and all funds from other bodies created for a public purpose . . . that are placed in the custody of the state for investment and reinvestment. . . .”<sup>7</sup> The purpose of the local government investment pool was to encourage local governments to combine their investment funds, with the highest rate of return as the objective.<sup>8</sup>

By the time the OTFS became a separate agency in 1993, computer crime had grown so rampant that the U.S. Justice Department considered it a top priority.<sup>9</sup> In fact, the Attorney General of the United States at that time, William P. Barr, called the problem “one of the top three of our white collar priorities.”<sup>10</sup> Moreover, a well-respected accounting firm estimated the cost of computer crime to American businesses at \$3 to \$5 billion per year.<sup>11</sup> Recognizing this growing problem, Georgia was one of the first states to take legislative action by enacting a statute that provided legal causes of action for compensatory damages, thereby encouraging victims of such crimes to step forward.<sup>12</sup>

By 1997, the OTFS was responsible for investing \$4 to \$5 billion for the state.<sup>13</sup> With growing computer technology, the vast majority of the transactions required for these investments were handled by electronic funds transfers.<sup>14</sup> These two factors seemed to present a tempting target to perpetrators of computer crimes. Scott Charney, the Chief of

4. See 1993 Ga. Laws 1402, § 2, at 1404 (codified at O.C.G.A. § 50-5A-1 (1994)).

5. *Id.* at 1406 (codified at O.C.G.A. § 50-5A-7(1) (1994)) (emphasis added).

6. See 1980 Ga. Laws 1715, § 8, at 1719 (codified at O.C.G.A. § 36-83-8(b)(2) (1993)); 1993 Ga. Laws 1402, § 18, at 1417-22 (codified at O.C.G.A. § 36-83-8(b)(2) (1993)).

7. 1986 Ga. Laws 205, § 3, at 206 (codified at O.C.G.A. § 36-83-8(a) (1993)).

8. See 1980 Ga. Laws 1715, § 4, at 1717 (codified at O.C.G.A. § 36-83-4(c) (1993)); *id.* § 6, at 1717 (codified at O.C.G.A. § 36-83-6(a) (1993)).

9. See Glenn D. Baker, *Trespassers Will Be Prosecuted: Computer Crime in the 1990s*, 12 *COMPUTER/L.J.* 61, 62 (1993).

10. *Id.*

11. See *id.* at 61.

12. See Xan Raskin & Jeannie Schaldach-Paiva, *Eleventh Survey of White Collar Crime: Computer Crimes*, 33 *AM. CRIM. L. REV.* 541, 564 (1996) (citing O.C.G.A. § 16-9-93 (1992)). For comments on a later Georgia attempt to curb the growing problem of computer crime, see *Legislative Review*, 13 *GA. ST. U. L. REV.* 112 (1996).

13. See Telephone Interview with Rep. A. Richard Royal, House District No. 164 (Apr. 21, 1997) [hereinafter Royal Interview].

14. See Telephone Interview with Steve Caffarelli, Assistant Director, Office of Treasury and Fiscal Services (Apr. 21, 1997) [hereinafter Caffarelli Interview].

the U.S. Department of Justice's Computer Crime and Intellectual Property Section, and Kent Alexander, the U.S. Attorney for the Northern District of Georgia, called the number of incidents and financial losses from computer crimes "staggering"; they argued that "the current number of intrusions detected drastically underrepresents the scope of the problem," and warned that "laws must be updated to address this reality."<sup>15</sup>

The OTFS, however, faced a unique roadblock while attempting to solve the potential problem. The Georgia Open Records Act deemed all public records "open for a personal inspection by any citizen of [the] state" unless "specifically exempted."<sup>16</sup> The Act further defined public records to include "computer based or generated information, or similar material."<sup>17</sup> This created a dilemma for the OTFS, because the Open Records Act potentially allowed someone to request all the wiring instructions for its investment accounts, as well as account numbers, and use the information fraudulently.<sup>18</sup> In an attempt to solve this dilemma, the OTFS needed to "specifically exempt" many of its records from public disclosure, as the Open Records Act allowed.<sup>19</sup>

A second historical development had also overtaken the OTFS by 1997, namely the growing range of investment sources available. One provision of the Georgia Code allowed the OTFS to invest in "bonds, bills, certificates of indebtedness, notes, or other obligations of the United States and its subsidiary corporations and instrumentalities."<sup>20</sup> However, an enormous investment potential could be found in entities that did not neatly fit within this definition, particularly in the Federal Government Corporations (FGCs).<sup>21</sup>

FGCs are separate legal entities chartered directly by the U.S. Congress or by persons acting pursuant to Congressional delegation.<sup>22</sup> They include more than forty corporations, with such familiar names as the Federal National Mortgage Association (Fannie Mae) and the Tennessee Valley Authority.<sup>23</sup> The U.S. government is not legally responsible for the debts of an FGC unless there is a specific law

15. Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 935, 936, 954 (1996).

16. 1992 Ga. Laws 1061, 5, at 1064 (codified at O.C.G.A. § 50-18-70(a) (1994)).

17. *Id.* (codified at O.C.G.A. § 50-18-70(a) (1994)).

18. See Caffarelli Interview, *supra* note 14.

19. See *id.*; Royal Interview, *supra* note 13.

20. 1993 Ga. Laws 1402, § 17, at 1417 (formerly found at O.C.G.A. § 50-17-63 (1994)).

21. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 549-50 (1995).

22. See *id.* at 552.

23. See *id.* at 549-50.

stating otherwise.<sup>24</sup> Thus, there is sometimes confusion over whether the FGCs are legally considered investments in the "United States" or "its subsidiary corporations and instrumentalities."<sup>25</sup> Approximately one-fifth of the FGCs, known as Government Sponsored Enterprises (GSEs), possess specialized lending powers.<sup>26</sup> These GSEs alone have approximately \$1 trillion in obligations,<sup>27</sup> an enormous source for potential investment by the OTFS. Not surprisingly, by 1997, Fannie Mae securities alone constituted thirty percent of all outstanding securities held by the OTFS.<sup>28</sup> But the question remained: Were these investments technically allowable under the existing language of the Georgia Code? Even the State Attorney General's Office had interpreted the existing Code sections as prohibiting the use of Fannie Mae securities in certain instances, such as use for repurchase agreement collateral.<sup>29</sup>

These concerns led to the introduction of HB 558. The language of the bill was drafted by the OTFS, with input from the State Auditor's office, the Attorney General's office, the Depository Board, and the Governor's Executive Counsel.<sup>30</sup> The aim of the drafters was to present a finished product to the General Assembly, with no further drafting work necessary by the General Assembly's Office of Legislative Counsel.<sup>31</sup> Although the original intention was to include the bill as part of the Governor's legislative package, the bill was not submitted before the deadline for inclusion.<sup>32</sup> Thus, the drafters approached Representative Richard Royal, a member of the House Ways and Means Committee, to sponsor the bill.<sup>33</sup>

### *HB 558*

When introducing the bill, Representative Royal placed letters from the OTFS explaining its provisions before the House.<sup>34</sup> The bill proved

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24. See *id.* at 553.

25. Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 ADMIN. L.J. 395, 400-01 (1991); see also Paula C. Murray & Beverly L. Hadaway, *Mortgage-Backed Securities: An Investigation of Legal and Financial Issues*, 11 J. CORP. L. 203, 207-08 (1986).

26. See Froomkin, *supra* note 21, at 555-56. For example, Fannie Mae is one such GSE. See *id.*

27. See *id.* at 556.

28. See Caffarelli Interview, *supra* note 14.

29. See *id.*

30. See *id.*; Royal Interview, *supra* note 13.

31. See Telephone Interview with Joe Scheuer, Legislative Counsel for HB 558 (Apr. 22, 1997) [hereinafter Scheuer Interview].

32. See Royal Interview, *supra* note 13.

33. See *id.*

34. See *id.*

to be notable for its lack of controversy.<sup>35</sup> Representative Royal could not recall any questions from House members afterward.<sup>36</sup> In fact, the only inquiry he received was from a newspaper reporter concerned about the open records exemption in the bill.<sup>37</sup> The bill was referred to the House Ways and Means Committee, which recommended passage without amendment or substitution.<sup>38</sup> The bill was subsequently passed unanimously by the House.<sup>39</sup> It received identical treatment in the Senate, having been referred to the State and Local Governmental Operations Committee.<sup>40</sup> Members of the OTFS attended the hearings in both houses to ensure that any concerns could be addressed.<sup>41</sup>

The Act has been called a "housekeeping" measure because of its seemingly minor, but necessary, corrections to the law.<sup>42</sup> The Act addresses two issues: access to records held by the OTFS,<sup>43</sup> and delineation of the types of securities that the OTFS may invest in.<sup>44</sup> The Act addresses the records access issue by exempting four categories of information from disclosure under the Open Records Act based on time limitations.<sup>45</sup> The four categories, contained in the new Code section 50-5A-11, are as follows:

- (1) No time limit; forever exempt from public disclosure: participant account balances in the local government investment pool; all instructions concerning electronic funds transfer; account analysis statements received or prepared by the Office of Treasury and Fiscal Services; any record of bank account numbers possessed by the Office; all proprietary software held by the Office; all security codes and other procedures related to physical, electronic, or other access to the Office, its systems, and its software.<sup>46</sup>
- (2) Exempt from disclosure from the time bank accounts are opened until they are closed: local government investment pool resolutions which pertain to the accounts.<sup>47</sup>

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35. *See id.*

36. *See id.*

37. *See id.*

38. Treatment of the bill while in the House and Senate can be found at the General Assembly's Internet site, as follows: <http://www.state.ga.us/Legis/>; *see also* WESTLAW, Georgia Bill Tracking, 1997 GA H.B. 558.

39. *See* Georgia House of Representatives Voting Record, HB 558 (Mar. 17, 1997).

40. *See id.*

41. *See* Scheuer Interview, *supra* note 31.

42. *See* Caffarelli Interview, *supra* note 14.

43. O.C.G.A. § 50-5A-11 (Supp. 1997).

44. *Id.* §§ 50-17-2, -63.

45. *Id.* § 50-5A-11.

46. *Id.* § 50-5A-11(a).

47. *Id.* § 50-5A-11(b).

(3) Exempt from disclosure from the time the record is created until the end of the calendar quarter: investment trade tickets; bank statements of the Office.<sup>48</sup>

(4) Exempt from disclosure from the time of their creation until 30 days after adoption: bank fee payment schedules.<sup>49</sup>

The purpose of this first major provision is computer security.<sup>50</sup> It should be noted, however, that the Act specifically waives the access restrictions when the records are required by law or are needed for performance of official government functions (for example, subpoena, regulatory supervision, or disclosure to participants in the local government investment pool).<sup>51</sup>

The second major provision of the Act specifies the investments that the OTFS may make. It does this by amending Code section 50-17-2 to allow the Director of the OTFS to sell and purchase obligations under agreements to resell or repurchase the obligations at a later date, referring to a list of the allowed investments in Code section 50-17-63.<sup>52</sup> At the same time, the Act amends the list by adding the following specific items of permissible investments in Code section 50-17-63: bankers' acceptances and commercial paper of the U.S. government; and investments offered by FGCs such as Banks for Cooperatives, the Commodity Credit Corporation, Farm Credit Banks, Federal Assets Financing Trusts, the Federal Financing Bank, Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Financial Assistance Corporation, the Government National Mortgage Association, the Import-Export Bank, Production Credit Associations, the Resolution Trust Corporation, and the Tennessee Valley Authority.<sup>53</sup>

In commenting on the Act after its passage, Representative Royal stressed its noncontroversial nature. He stated that there was never a question of an attempt to hide information from the public, noting that citizens can still get access to their local government's records concerning the deposit of public funds in the local government investment pool.<sup>54</sup> As he adds, the aim of the bill was "primarily for

48. *Id.* § 50-5A-11(c).

49. *Id.* § 50-5A-11(d).

50. See Royal Interview, *supra* note 13; Caffarelli Interview, *supra* note 14; Scheuer Interview, *supra* note 31.

51. O.C.G.A. § 50-5A-11(e) (Supp. 1997).

52. See *id.* § 50-17-2(b).

53. See *id.* § 50-17-63(b). Mr. Caffarelli indicated that the new provision for investment in bankers' acceptances and commercial paper of the U.S. government was urged by the Depository Board for diversity of investment opportunities. Caffarelli Interview, *supra* note 14. The Act also notes that the list of authorized FGC investments is not all-inclusive. O.C.G.A. § 50-17-63(b) (Supp. 1997).

54. Royal Interview, *supra* note 13.

security.”<sup>55</sup> This understanding, along with the “housekeeping” nature of the other provisions, has subjected this Act to no ascertainable controversy or criticism thus far.<sup>56</sup>

*W. Kent Davis*

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55. *Id.*

56. *See id.*; see also Caffarelli Interview, *supra* note 14; Scheuer Interview, *supra* note 31.