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## STATE GOVERNMENT Open and Public Meetings: Provide a New Exclusion from Open Meeting Requirements; Provide a New Exemption from Public Records Inspection for Certain Records of an Agency Engaged in a Program of Economic Development; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

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## STATE GOVERNMENT

***Open and Public Meetings: Provide a New Exclusion from Open Meeting Requirements; Provide a New Exemption from Public Records Inspection for Certain Records of an Agency Engaged in a Program of Economic Development; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

**BILL NUMBER:**

**HB 218**

**SUMMARY:**

The bill would have created a new exemption from the open records requirements for records of agencies that were engaged in a economic development program and a parallel exclusion from open meeting requirements for agency meetings that discuss any of the newly exempted records. The bill excluded records that would identify or reveal entities contacted or solicited by the agency for development, records that included terms of any agreements being negotiated between the agency and any other entity, and records or data produced in the process of study or research on commercial, economic, or marketing aspects of an economic development program.

### *History*

Representative Ron Stephens of the 164th district introduced HB 218 after the Department of Economic Development submitted it to him as a means of protecting Georgia's "playbook" (incentives offered to companies for relocation) from other states that compete with Georgia for jobs and businesses.<sup>1</sup> Recruitment of businesses and

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1. See Telephone Interview with Rep. Ron Stephens, House District No. 164 (Apr. 13, 2005)

industries is increasingly competitive between states.<sup>2</sup> In the past, recruiters from other states have come to Atlanta to look for records to obtain a competitive edge.<sup>3</sup> These states almost universally exclude access to information on economic development projects from their open records laws.<sup>4</sup> HB 218 was an attempt to make Georgia more competitive during business negotiations by providing the same protections as most states in the Southeast, with the exception of West Virginia which does not exempt economic development information from open records requests.<sup>5</sup>

### *Bill Tracking of HB 218*

#### *Consideration by the House*

Representative Ron Stephens of the 164th district introduced HB 218, and Representatives Billy Horne, Mike Cheokas, and Larry Parrish of the 71st, 134th, and 156th districts, respectively, joined as sponsors after committee approval.<sup>6</sup> The House first read the bill on January 31, 2005, and the Economic Development and Tourism Committee favorably reported on the bill, as amended, on February 2, 2005.<sup>7</sup>

#### *The Bill, As Introduced*

The current law in Georgia allows agencies to hold closed meetings for several reasons and provides a few specific agencies with additional exclusions.<sup>8</sup> The current law also provides a series of

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[hereinafter Stephens Interview].

2. See Audio Recording of Senate Proceedings, Feb. 24, 2005 (remarks by Sen. Jeff Mullis), <http://mediar1.gpb.org/ramgen/leg/2005/sv022405.rm?usehostname> [hereinafter Senate Audio].

3. See *id.* (remarks by Sen. John Douglas) (“Right now, the state of Virginia is in town looking for records . . . , [and] [j]ust a couple of weeks ago the state of Florida was in town . . . .”).

4. See Audio Recording of House Proceedings, Feb. 9, 2005 (remarks by Rep. Ron Stephens), <http://mediar1.gpb.org/ramgen/leg/2005/hv020905.rm?usehostname> [hereinafter House Audio] (noting that states that exempt certain economic development information from open records requests have a “distinct advantage”).

5. See Senate Audio, *supra* note 2 (remarks by Sen. Jeff Mullis).

6. See HB 218, as introduced, 2005 Ga. Gen. Assem.; HB 218 (HCS), 2005 Ga. Gen. Assem.

7. See State of Georgia Final Composite Status Sheet, HB 218, Jan. 31, 2005 (May 11, 2005); State of Georgia Final Composite Status Sheet, HB 218, Feb. 2, 2005 (May 11, 2005).

8. See O.C.G.A. §§ 50-14-2 to -3 (Supp. 2005).

patchwork exemptions from the open records requirements.<sup>9</sup> HB 218, as introduced, would have added exemptions to the open records requirements for “[r]ecords of an agency engaged in a program of economic development that” would “[i]dentify or reveal private persons, businesses, any other agency or entities contacted or being solicited by the agency in carrying out the development functions of the agency[,]” or that would “[r]evele the terms of any agreement or proposed agreement being negotiated by and between an agency and any private persons, businesses, any other agency or entities in carrying out such program.”<sup>10</sup> The bill would have added a parallel provision for the closing of agency meetings that discussed such records, “or [that discussed] any information a record of which would be exempt from public inspection or disclosure” under this provision.<sup>11</sup>

### *Committee Substitute*

The Committee substitute slightly modified the original bill.<sup>12</sup> The substitute added a third exemption from the open records requirements for records of an agency engaged in economic development that would “[c]ontain data, records, or information of a proprietary nature, produced or collected by or for the agency or other governmental agencies, in the conduct of or as a result of, study or research on commercial, economic, or marketing aspects of the economic development program.”<sup>13</sup> An amendment to the Committee substitute added a paragraph prohibiting records related to zoning, environmental permitting, or comprehensive plans from inclusion in the open records exemption (making them subject to open records requests and open meeting requirements).<sup>14</sup>

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9. See O.C.G.A. § 50-18-72 (Supp. 2005).

10. HB 218, as introduced, 2005 Ga. Gen. Assem.

11. *Id.*

12. Compare HB 218 (HCS), 2005 Ga. Gen. Assem., with HB 218, as introduced, 2005 Ga. Gen. Assem.

13. Compare HB 218 (HCS), 2005 Ga. Gen. Assem., with HB 218, as introduced, 2005 Ga. Gen. Assem.

14. See HB 218 (HCSFA), 2005 Ga. Gen. Assem.

*Floor Debate*

Representative Ron Stephens of the 164th district discussed the challenge of recruiting new businesses and jobs to Georgia in the face of competition from other Southeastern states, the exemption from open records laws in other states for information related to economic development negotiations, and the fact the bill would not exempt zoning and permitting.<sup>15</sup> Representative Al Williams of the 165th district discussed the mistrust that secrecy creates, the importance of aggressively courting industry, the importance of openness when handling the public's money, and closed by supporting both the Committee amendment and the bill.<sup>16</sup> Representative Burke Day of the 163rd district questioned Representative Williams and made the point that the public cannot know certain things.<sup>17</sup> Representative Buddy Carter from the 159th district spoke of his experience as the mayor of the City of Pooler and the way in which the bill would help smaller communities attract businesses.<sup>18</sup> Representative Chuck Martin of the 47th district spoke about his experience with economic development as the Mayor of Alpharetta and the difficulty, due to companies' confidentiality concerns, of complying with the current open records rules while attracting businesses to Georgia, even when companies do not want incentives.<sup>19</sup>

Representative Stephanie Stuckey Benfield of the 85th district spoke on the breadth of the bill, the secrecy power that it would give to a large number of local governments, the lack of improvements to the bill that the amendment provided, the likelihood that courted companies would themselves share confidential information on deals with other states, the lack of any evidence of lost deals as a result of openness, and the importance of an informed public before businesses make deals.<sup>20</sup> Representative DuBose Porter of the 143rd district spoke on the areas of Georgia that developers preyed on in the

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15. See House Audio, *supra* note 4 (remarks by Rep. Ron Stephens).

16. See *id.* (remarks by Rep. Al Williams).

17. See *id.* (remarks Rep. Burke Day). Representative Williams responded that "there's a big difference between national security and the atomic bomb" and trying to bring economic development and industry to Georgia counties. *Id.* (remarks by Rep. Al Williams).

18. See *id.* (remarks by Rep. Buddy Carter).

19. See *id.* (remarks by Rep. Chuck Martin).

20. See House Audio, *supra* note 4 (remarks by Rep. Stephanie Stuckey Benfield).

past, the need for an informed public before completion of the deal, the capabilities that local governments already have to keep negotiations and deals confidential, and that the bill actually hinders economic development instead of helping it.<sup>21</sup> Representative Mark Hatfield of the 177th district discussed the amount of discretion that authorities will have in economic development, noted the bill would create an atmosphere that breeds corruption, pointed out misperceptions of those voting for the bill because it will provide their localities with leverage over others, and asserted that Georgia's economic good-footing already allows the State to compete adequately with other states for businesses.<sup>22</sup>

The House passed the Committee substitute, as amended, by a vote of 118 to 52.<sup>23</sup>

### *Consideration by the Senate*

The Senate first read HB 218 on February 10, 2005.<sup>24</sup> The Economic Development Committee favorably reported the bill on February 16, 2005.<sup>25</sup>

### *Floor Debate and Amendments*

During the floor debate in the Senate, several Senators spoke in support of the bill.<sup>26</sup> Senator Jeff Mullis of the 53rd district discussed the challenge of recruiting business and industry to Georgia, the importance of creating jobs, the importance of confidentiality in business negotiations, and reiterated that the bill did not exempt zoning changes or environmental permitting.<sup>27</sup> He also discussed a proposed amendment (Senate Amendment 2) to ensure environmental permitting would stay under open records law, and another proposed amendment (Senate Amendment 1) that removed local development agencies from the bill.<sup>28</sup> Senator John Douglas of

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21. *See id.* (remarks by Rep. DuBose Porter).

22. *See id.* (remarks by Rep. Mark Hatfield).

23. *See Georgia House Voting Record*, HB 218 (Feb. 9, 2005).

24. *See State of Georgia Final Composite Status Sheet*, HB 218, Feb. 10, 2005 (May 11, 2005).

25. *See State of Georgia Final Composite Status Sheet*, HB 218, Feb. 16, 2005 (May 11, 2005).

26. *See Senate Audio*, *supra* note 2.

27. *See id.* (remarks by Sen. Jeff Mullis).

28. *Id.*

the 17th district mentioned the editorials in the newspapers criticizing the bill, reiterated that Georgia and West Virginia were the only two states in the South without these laws, asserted that South Carolina used the Atlanta Journal-Constitution to get records, noted that Georgia did not offer incentives for toxic waste dumps, and stated that it required political backbone to vote for the bill against the media criticism.<sup>29</sup> Senator Seth Harp of the 29th district spoke about his previous reservations about the bill, which the proposed amendments alleviated, the large incentives states such as Alabama offered companies, the importance of confidentiality as seen through his law practice, and the competitive environment in the Southeast.<sup>30</sup> Senator James Whitehead of the 24th district spoke about companies that could not negotiate with Georgia counties due to a lack of confidentiality protections, other companies that needed to keep relocation plans secret, the criticism in the newspapers about the bill, and the trust citizens place in their legislators.<sup>31</sup> Senator Eric Johnson of the 1st district discussed the original narrow intent of the bill (not to apply to local governments and local economic groups), reiterated Georgia and West Virginia are the only states in the Southeast without these protections, and asserted that companies demand confidentiality.<sup>32</sup>

After just under an hour of debate, Senator Mullis asked for unanimous consent to table HB 218.<sup>33</sup> No one objected, and the Senate tabled the bill.<sup>34</sup> For the Senate to discuss a tabled bill, a majority of senators must vote to untable the bill.<sup>35</sup> The Senate did not remove HB 218 from the table before the 2005 session ended.<sup>36</sup>

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29. *See id.* (remarks by Sen. John Douglas).

30. *See id.* (remarks by Sen. Seth Harp).

31. *See id.* (remarks by Sen. James Whitehead).

32. *See* Senate Audio, *supra* note 2 (remarks by Sen. Eric Johnson).

33. *See id.* (remarks by Sen. Jeff Mullis).

34. *See id.*

35. Georgia State Senate Rules 6-3.1 to 6-3.5, [http://www.legis.state.ga.us/legis/2005\\_06/senate/senaterules2005.pdf](http://www.legis.state.ga.us/legis/2005_06/senate/senaterules2005.pdf) (last visited Jan. 10, 2005).

36. *See* State of Georgia Final Composite Status Sheet, HB 218 (May 11, 2005).

### *Analysis*

No one anticipated constitutional problems with the bill for two reasons.<sup>37</sup> First, other states have implemented and upheld laws similar to HB 218.<sup>38</sup> Second, Georgia's open meetings and open records provisions, as in most states, are statutory creations, and the legislature may discretionarily abrogate them.<sup>39</sup>

The core question regarding HB 218 is whether the bill's positive impact outweighs the acknowledged negative impact of removing public access to governmental information.<sup>40</sup> The legislature drafted the bill to avoid two possible ways that Georgia might lose jobs due to a lack of confidentiality: another state making an open records request of Georgia and using those records to secure a bid, and a company's refusal to do business with a jurisdiction that does not provide confidentiality.<sup>41</sup>

As for the Open Records Act requests, from 2000 through February 2005, one state requested information that HB 218 would have kept public—a copy of the contract between Georgia and DaimlerChrysler (made a year after the deal's announcement). Therefore, it is unlikely that Georgia has lost any deals as a direct result of Georgia's open records law.<sup>42</sup> Companies often reveal the competitive bidding information to competing states, eliminating the need for an open records request and lowering the probability that the

37. See Telephone Interview with Charlie Gatlin, Chief of Staff, Georgia Department of Economic Development (Apr. 14, 2005) [hereinafter Gatlin Interview]; Telephone Interview with David Hudson, Legal Counsel, Georgia Press Association (Apr. 13, 2005) [hereinafter Hudson Interview].

38. See generally Senate Audio, *supra* note 2; House Audio *supra* note 4. Kentucky's exemption is very close to the language of HB 218, excluding:

Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state.

KY. REV. STAT. ANN. § 61.878(d) (West 2004).

39. See GA CONST. art. III, § IV, para. XI. The only mention of openness in the Georgia Constitution is a requirement that General Assembly sessions and committee meetings be open to the public, and even then, each House is given total discretion to create exceptions to the requirement. *Id.*

40. See Senate Audio, *supra* note 2 (remarks by Sen. Jeff Mullis).

41. See House Audio, *supra* note 4 (remarks by Rep. Ron Stephens).

42. See Walter Woods, *State's Secrets Haven't Spilled: Lawmakers Fear Prying Eyes on Industry Deals, But Where Are They?*, ATLANTA J. CONST., Feb. 12, 2005, at A1. One Senator asserted during the Senate floor debate that Florida and Virginia, for example, have recently made such requests. See Senate Audio, *supra* note 2 (remarks by Sen. John Douglas).



Open Records Act has caused Georgia to lose out in the bidding process.<sup>43</sup>

It is extremely difficult to prove that businesses avoid taking their business to Georgia due to a lack of confidentiality because companies do not disclose when they opt not to do business with Georgia.<sup>44</sup> As a result of this difficulty, the only available information is many anecdotal assertions.<sup>45</sup> Balancing open government interests against anecdotal assertions of lost business will answer the core policy question of HB 218.<sup>46</sup>

*Richard Campbell*

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43. See Woods, *supra* note 42, at A1; House Audio, *supra* note 4 (remarks by Rep. David Lucas).

44. See generally Gatlin Interview, *supra* note 44 (lamenting companies' unwillingness to come forward).

45. See generally House Audio, *supra* note 4; Senate Audio, *supra* note 2. Approximately one-half of the speakers in favor of the bill asserted that companies were avoiding bringing their business to Georgia due to lack of confidentiality. House Audio, *supra* note 4; Senate Audio, *supra* note 2.

46. See *supra* notes 1-5, 37-45 and accompanying text.