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STATE GOVERNMENT Public Records: Provide Definitions, Privileges, and Exemptions Relating to Inspection of Public Records

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STATE GOVERNMENT

Public Records: Provide Definitions, Privileges, and Exemptions Relating to Inspection of Public Records

CODE SECTIONS:	O.C.G.A. §§ 50-18-70 to -73 (amended), 50-18-75 (new)
BILL NUMBER:	SB 435
ACT NUMBER:	918
SUMMARY:	The Act defines public records, provides procedures, and sets fees for obtaining access to public records. The Act provides that public disclosure shall not be required for certain records and specifically exempts from the Act records containing particular types of information. The Act provides for attorney's fees and expenses of litigation in certain circumstances. Further, the Act creates a privilege of confidentiality between the Office of Legislative Counsel and members of the General Assembly; however, the privilege may be waived by the legislator.
EFFECTIVE DATE:	July 1, 1988

History

The Public Records Act provides for public access to state, county, and municipal records.[1] The first Public Records Act, adopted by the Georgia General Assembly in 1959, contained provisions which established that all public records shall be available for public inspection, except for records protected by court order or law.[2] The 1959 Act also established procedures for inspections of records and fees for copies.[3]

In 1967 the legislature made the Act inapplicable to "records which are required by the federal government to be kept confidential and medical records and similar files, the disclosure of which would be an invasion of personal privacy."[4] The 1967 amendment further stated that hospital au-

1. O.C.G.A. § 50-18-70(b) (Supp. 1988).
2. 1959 Ga. Laws 88.
3. *Id.*
4. 1967 Ga. Laws 455. This amendment may have been an attempt by the General Assembly to anticipate the effects of the Freedom of Information Act on the Georgia

thorities are not exempt from the 1959 Act's disclosure requirements.[5]

In 1970 the General Assembly amended the Act to exempt from disclosure "the identity of any person who has furnished medical or other similar information which has or will become incorporated into any medical or public health investigation, study or report of the Georgia Department of Public Health."[6] In 1982 the General Assembly further exempted from disclosure information contained in records of applications for the licensing and possession of firearms.[7] The 1982 amendment gave the state superior courts jurisdiction over actions brought to enforce the Act and gave "any person, firm, or corporation, or other entity" standing to bring suit to enforce the Act.[8] The 1982 amendment also added Code section 50-18-74 to make the refusal "to allow the examination and copying of records" a misdemeanor.[9]

In 1986 the legislature amended the personal privacy exemption of Code section 50-18-72(a)(2) to include veterinary records.[10] In 1987 the General Assembly exempted information such as trade secrets or confidential commercial data obtained from a business or individual, or information of a "proprietary nature" collected by the faculty of state educational institutions as a result of scientific or scholarly research.[11]

The Public Records Act was intended to foster an environment of openness to facilitate public evaluation of the integrity, economy, and efficiency of the activities of public institutions.[12] Competing with this need for openness in government is the interest of an individual in personal privacy. As early as 1904, the Georgia courts recognized an individual's right of privacy as "a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state by the constitutions of the United States and of the State of Georgia."[13]

Public Records Act. The Freedom of Information Act, passed by Congress in 1966, recognized a citizen's right to obtain copies of government records under certain circumstances. *See* 5 U.S.C. § 552 (1966 & Supp. 1987).

5. 1967 Ga. Laws 455.

6. 1970 Ga. Laws 163.

7. 1982 Ga. Laws 1790.

8. *Id.* at 1791. *See* Atchison v. Hospital Auth., 245 Ga. 494, 265 S.E.2d 801 (1980) (Georgia citizen may not be prohibited from inspection of public records because he might be employed by a nonresident employer and might share the information with that employer).

9. 1982 Ga. Laws 1790.

10. 1986 Ga. Laws 1090. This amendment was intended to reconcile the Act with Code section 24-9-29, amended by the 1986 General Assembly to create a privilege for information relating to veterinary care. *See* O.C.G.A. § 24-9-29 (Supp. 1988).

11. 1987 Ga. Laws 377. Criminal liability may be imposed on those who misappropriate trade secrets through unauthorized use or disclosure. *See* O.C.G.A. § 16-8-13(b) (1988).

12. Athens Observer v. Anderson, 245 Ga. 63, 66, 263 S.E.2d 128, 130 (1980).

13. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E.2d 68, 71 (1904). For a discussion of the judicial history of the right of privacy in Georgia, see Quarles, *Informational Privacy Under the Open Records Act*, 32 MERCER L. REV. 393 (1980).

However, this privacy right is often in conflict with the standard of governmental accountability as set forth in the Georgia Constitution.[14]

The Public Records Act saw little judicial activity in its first seventeen years; however, the Attorney General issued a number of opinions to various state agencies in response to requests for advice regarding disclosure under the Act.[15] Since the 1976 decision in *Houston v. Rutledge*,[16] litigation involving the Act rapidly increased.[17]

In *Houston*, a sheriff refused to make available to newspapermen certain files pertaining to the deaths of jail inmates, claiming that the records were not public records within the meaning of the Georgia Public Records Act because preparation of the records was not mandatory.[18] The Georgia Supreme Court determined that the sheriff's files were "public records" even though preparation of the records by the sheriff was discretionary.[19] The court defined "public records" as "documents, papers, and records prepared and maintained in the course of the operation of a public office."[20] In addition, the court stated that "once an investigation is concluded," then the records prepared and maintained in such an investigation "should be available for public inspection."[21] The *Houston* court also articulated a balancing test intended to resolve the conflict between

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14. "All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them." GA. CONST. art. I, § 2, ¶ 1.

15. 1975 Op. Att'y Gen. 434 (investigative reports); 1974 Op. Att'y Gen. 510 (trade secrets); 1973 Op. Att'y Gen. 130 (prison medical files); 1973 Op. Att'y Gen. 88 (daily records of Department of Transportation); 1972 Op. Att'y Gen. 337 (parent's inspection of children's records); 1971 Op. Att'y Gen. 288 (public record defined); 1967 Op. Att'y Gen. 509 (grand jury lists); 1967 Op. Att'y Gen. 465 (suits on account, notes, mortgage foreclosure, and garnishment); 1965—66 Op. Att'y Gen. 423 (use of copyrighted records on file); 1965—66 Op. Att'y Gen. 310 (personnel records of state employees); 1965—66 Op. Att'y Gen. 151 (licensure of nursing home programs); 1963—65 Op. Att'y Gen. 277 (public utilities tax information); 1962 Op. Att'y Gen. 101 (justice of the peace records).

16. 237 Ga. 764, 229 S.E.2d 624 (1976).

17. Since 1984 Georgia appellate courts have decided at least nine cases which involve issues arising under the Public Records Act: City of Atlanta v. Pacific & S. Co., 257 Ga. 587, 361 S.E.2d 484 (1987); R.W. Page Corp. v. Kilgore, 257 Ga. 179, 356 S.E.2d 870 (1987); Napper v. Georgia Television Co., 257 Ga. 156, 356 S.E.2d 640 (1987); Macon Tel. Publishing Co. v. Board of Regents, 256 Ga. 443, 357 S.E.2d 23 (1986); Harris v. Cox Enter., Inc., 256 Ga. 299, 336 S.E.2d 448 (1986); Richmond County Hosp. Auth. v. Richmond County, 255 Ga. 183, 336 S.E.2d 562 (1985); Irvin v. Macon Tel. Publishing Co., 253 Ga. 43, 316 S.E.2d 449 (1984); Pensyl v. Peach County, 252 Ga. 450, 314 S.E.2d 153 (1984); Richmond County Hosp. Auth. v. Southeastern Newspapers Corp., 252 Ga. 19, 311 S.E.2d 806 (1984); Price v. Fulton County Comm'n, 170 Ga. App. 736, 318 S.E.2d 434 (1984).

18. Houston v. Rutledge, 237 Ga. 764, 229 S.E.2d 624 (1976).

19. *Id.* at 765, 229 S.E.2d at 626.

20. *Id.*

21. *Id.*

the public's right to know and the individual's right of privacy.[22] Instead of framing the balancing test in terms of private interest versus public interest, the court chose to balance the public interest in favor of disclosure against the public interest in favor of nondisclosure.[23] The court gave no list of factors which might affect the balance. The *Houston* court did establish a presumption in favor of disclosure.[24]

SB 435

SB 435 is the result of two years of collaboration by state officials, legislators, lawyers, and the Georgia Press Association.[25] The bill was an attempt to draw together statutory and common law involving the Public Records Act.[26] SB 435 passed the Senate with only minor changes.[27] The bill, as introduced, specifically incorporated the *Houston* balancing test and pronounced public policy in favor of full disclosure of governmental affairs.[28] When the bill came before the House, members of the House Rules Committee expressed concern that the Senate had not thoroughly considered SB 435's impact on the daily operation of state government.[29] To remedy this perception and to ascertain public concerns surrounding SB 435, public hearings were held. The hearings resulted in a House committee substitute which was presented two days before the end of the 1988 session.[30] The House committee substitute omitted the original bill's statements of public policy[31] and the *Houston* balancing test from the

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22. *Id.*

23. *Id.*

24. *Id.* at 766, 229 S.E.2d at 627.

25. Atlanta J., Mar. 12, 1988, at 20A, col. 1.

26. *Id.*

27. *Compare* SB 435 (SCS), 1988 Ga. Gen. Assem. *with* O.C.G.A. §§ 50-18-70 to -75 (Supp. 1988).

28. SB 435, as introduced, 1988 Ga. Gen. Assem.

29. Telephone interview with Paul Bolster, Director of Government Relations, Georgia Hospital Association (Apr. 8, 1988) [hereinafter Bolster Interview].

30. Telephone interview with Representative Tommy Chambless, House District No. 133 (Apr. 8, 1988) [hereinafter Chambless Interview].

31. *Compare* SB 435, as introduced *with* SB 435 (HCS), 1988 Ga. Gen. Assem. The original bill provided:

> The public's right of access to records pertaining to the responsibilities of government and the individual's right of dignity and privacy are both recognized to be principles of utmost importance in a free society. The General Assembly declares that it is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of their government and the official acts of those who represent them but with due regard to the public interest in the protection of the individual from disclosure of information which would constitute an unwarranted invasion of personal privacy or an infringement of the individual's constitutional rights.

SB 435, as introduced, 1988 Ga. Gen. Assem.

section of the bill dealing with exemptions.[32] The House committee substitute also strengthened the language concerning exempt matters, added an exemption for hospital authorities' proprietary information, and created a privilege for communications between the Office of Legislative Counsel and members of the General Assembly.[33] The only substantive change made by the conference committee substitute was the elimination of the *Houston* balancing of the public interest in disclosure versus the public interest in nondisclosure of information relative to the performance and hiring of public employees or officials.[34]

Code section 50-18-70(a) incorporates the *Houston* definition of public records.[35] Section 50-18-70(b) provides for public access to all public records "except those which by order of a court of this state or by law are prohibited or specifically exempted from being open to inspection by the general public."[36] The House Rules Committee added the words "specifically exempted" in an attempt to eliminate judicial discretion in the enforcement of the Act.[37]

Such court discretion was exercised in *Napper v. Georgia Television Co.*[38] to enforce the Public Records Act in the absence of clear direction from the Code. In *Georgia Television*, certain information from motor vehicle records was incorporated into law enforcement investigatory files regarding the Atlanta Child Murders.[39] By law, records of issuance of certificates of title to motor vehicles are exempt from disclosure to the public except to certain categories of persons named in the statute.[40] In reply to

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32. *Compare* SB 435, as introduced, *with* SB 435 (HCS), 1988 Ga. Gen. Assem. SB 435, as introduced, provided: "Notwithstanding anything to the contrary in this Code section, no exception created under this Code section shall apply where the public interest in disclosure of the document outweighs the public interest in nondisclosure of the document."

33. SB 435 (HCS), 1988 Ga. Gen. Assem.

34. *Compare* SB 435 (CCS) *with* SB 435 (HCS), 1988 Ga. Gen. Assem.

35. O.C.G.A. § 50-18-70(a) (Supp. 1988). " '[P]ublic record' shall mean all documents, papers, letters, maps, books, tapes, photographs, or similar material prepared and maintained or received in the course of the operation of a public office or agency." *Id.*

36. O.C.G.A. § 50-18-70(b) (Supp. 1988).

37. Chambless Interview, *supra* note 30. *See* SB 435 (HCS), 1988 Ga. Gen. Assem.

38. 257 Ga. 156, 356 S.E.2d 640 (1987) The suit was filed under the Public Records Act by news organizations to gain access to investigatory files compiled during the investigation of the murders of 30 black youths. The case was pronounced closed upon the conviction of Wayne Williams for two of the murders, leaving the rest unsolved. On remand the court decided that the public interest in satisfying itself that justice was done outweighed the public interest in nondisclosure. Georgia Television Co. v. Napper, Fulton County Daily Rep., July 21, 1987, at 1, col. 1 (Fulton County Super. Ct. July 17, 1987).

39. Napper v. Georgia Television Co., 257 Ga. 156, 166, 356 S.E.2d 640, 648 (1987).

40. O.C.G.A. § 40-3-24(d) (1985) (provides for inspection of motor vehicle records by any law enforcement officer, the owner of the vehicle, judgment creditor of the owner of the vehicle upon presentation of a *fi. fa.*, an operator, pedestrian or passenger in-

Napper's argument that the motor vehicle information in the investigatory files should be exempted from disclosure, the court held that once the motor vehicle information found its way legitimately into an investigatory file, the exemption no longer applied.[41] The court reasoned that since motor vehicle information in the investigatory files was legitimately obtained and placed in the files by law enforcement officers, the information was thus subject to disclosure.[42]

Further, the *Georgia Television* court allowed files containing information regarding child abuse, molestation, or neglect, which are confidential under Code section 49-5-40, to be disclosed.[43] However, Code section 49-5-41(a)(2) allows such files to be disclosed by court order if disclosure is "necessary for the resolution of an issue before it."[44] The *Georgia Television* court apparently interpreted the statute to authorize wide judicial discretion over Department of Human Resources (DHR) records. The court reasoned that the information regarding child abuse, molestation, or neglect was placed in the files as part of an ongoing criminal investigation of the child murders, and was, therefore, necessary for the resolution of an issue before the court.[45]

The *Georgia Television* court cited *Ray v. Department of Human Resources*,[46] in support of its decision to disclose DHR records in the child murder files.[47] In *Ray*, the DHR denied a mother access to records which would enable her to pursue her attempt to regain custody of her child. Earlier, the DHR placed the child in foster care with the mother's consent when the mother was unable to care for her.[48] Without the DHR records the mother would be unable to establish that her consent to relinquish the child was in the interest of the child rather than because she was a neglectful or abusive parent as the DHR claimed.[49] However, in the *Georgia Television* case, neither party to the original issue was involved and the immediate issue before the court did not pertain to the solution of a crime against a child but to the correctness of police investigatory activities.[50] In addition, *Ray* was not a Public Records Act case. The *Ray*

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volved in a motor vehicle accident, licensed car dealers, representative of a manufacturer's recall, and tax collector, tax receiver or tax commissioner).

41. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 648.

42. *Id.*

43. *Id. See* O.C.G.A. § 49-5-40 (Supp. 1988).

44. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 648.

45. *Id.* The DHR records were obtained to aid in the resolution of a murder investigation. Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983). Although the issue before the *Georgia Television* court was whether the police conducted the investigation of the murders properly, the court held that the records were necessary to resolve an issue before that court. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 648.

46. 155 Ga. App. 81, 270 S.E.2d 303 (1980).

47. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 648.

48. Ray v. Department of Human Resources, 155 Ga. App. at 83, 270 S.E.2d at 305.

49. *Id.*

50. *Georgia Television*, 257 Ga. 156, 356 S.E.2d 640.

court was motivated by due process concerns rather than by public interest considerations.[51]

While public benefit may be great if disclosure of the DHR information provides some evidence of whether or not the actual investigation was conducted properly, the *Georgia Television* court's failure to address the differences between the two cases created confusion about how broadly and under what circumstances *Ray* will be applied to Public Records Act requests in the future.

The *Georgia Television* court also ordered disclosure of information in the investigatory files obtained from the Georgia Crime Information Center (GCIC).[52] This information included the criminal histories of various individuals and is generally exempt from disclosure.[53] The court based its decision on Code section 35-3-33(10) which authorizes access to such records by criminal justice agencies in the "performance of their official duties" and Code section 35-3-34(a) which allows private persons and businesses access to GCIC information under certain circumstances.[54] The criminal histories in the investigatory files were legitimately obtained by the police in the course of the child murder investigation.[55] However, the statute clearly limits access to this information to certain uses and bars disclosure if an unwarranted invasion of personal privacy results.[56]

Although the *Georgia Television* court did not have to rule on Napper's objection to the release of juvenile arrest records because all references to juvenile records were already deleted from the files,[57] it is possible that language in the statute which permits inspection by law enforcement officers "when necessary for the discharge of their official duties"[58] also could be construed broadly enough to require disclosure of the information once it becomes incorporated into a criminal investigatory file.

Given the court's reasoning regarding the release of information gained from motor vehicle records, agency records of child abuse and molestation, and criminal histories, it appears that if a law enforcement officer or agency official obtains information while within the scope of his employment, that information, even though protected from disclosure by statute, may become a "public record" subject to disclosure under the Act regard-

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51. *Ray*, 155 Ga. App. at 84, 270 S.E.2d at 306.

52. *Georgia Television*, 257 Ga. at 167, 356 S.E.2d at 648—49.

53. O.C.G.A. § 35-3-37 (1987).

54. *Georgia Television*, 257 Ga. at 167, 365 S.E.2d at 648—49. *See* O.C.G.A § 35-3-34(a) (Supp. 1988) (GCIC may release records of adjudications of guilt to private employers for background checks when the employee will be placed in a work situation which requires honesty, and when the records would aid an employer determining whether to press charges against that employee); *see also* O.C.G.A. § 35-3-33(10) (1987).

55. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 649.

56. *See supra* notes 13—14 and accompanying text.

57. *Georgia Television*, 257 Ga. at 168, 356 S.E.2d at 649.

58. O.C.G.A. § 15-11-59(c)(4) (1985).

less of the legislators' intent in enacting the exemptions.

The court did, however, fail to find that information gained through wiretaps could be disclosed based on language in the statute simply because the wiretap information was contained in investigatory files.[59] Code section 16-11-64(b)(8) specifically prohibits release of wiretap information unless it is "necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant."[60] The court held that the information obtained under a warrant authorizing a wiretap should have been deleted before disclosure of the files.[61] The conference committee eliminated a proposed statement of public policy that all persons are entitled to full disclosure of governmental acts, unless disclosure would result in an "unwarranted invasion of personal privacy."[62] The legislators felt that the clause was potentially confusing because all of the issues in the eliminated clause were incorporated elsewhere in the Act and the amended provisions of the Act were a clear indication of the legislators' intent.[63]

Code section 50-18-71 provides for the assessment of copying fees and administrative costs of the custodian in making the records available.[64] A criticism of the bill is that allowing agencies to charge for administrative costs, over and above copying costs, could make access to public records unaffordable for some.[65] However, even at its inception, the Act allowed the custodian to charge a person for the services of the necessary personnel to produce the records for the citizen.[66] There is no indication either in the case law or in the opinions of the Attorney General that such charges have restricted the public's access to these records.

The new Act almost doubles the number of records exempt from disclosure as compared to the previous Act.[67] The new Act adds two provisions exempting information in files compiled for law enforcement purposes. First, Code section 50-18-72(a)(3) exempts from disclosure the identity of a confidential source, and confidential material if disclosure would endanger a person's safety, or if the disclosure would reveal the

59. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 648.
60. O.C.G.A. § 16-11-64(b)(8) (1988).
61. *Georgia Television*, 257 Ga. at 166, 356 S.E.2d at 648.
62. SB 435 (CCS), 1988 Ga. Gen. Assem.
63. Chambless Interview, *supra* note 30.
64. O.C.G.A. § 50-18-71 (Supp. 1988).
65. Atlanta J., Mar. 12, 1988, at 20A, col. 1.
66. 1959 Ga. Laws 88.
67. Exemptions retained from the old Act are: (1) records specifically required by the federal government to be kept confidential, O.C.G.A. § 50-18-72(a) (Supp. 1988); (2) medical, veterinary, and similar files, the disclosure of which would be an invasion of personal privacy, O.C.G.A. § 50-18-72(a) (Supp. 1988); (3) the identity of persons who have furnished medical information to public health officials, O.C.G.A. § 50-18-72(c)(2) (Supp. 1988); (4) certain information relating to firearms licensing, O.C.G.A. § 50-18-72(d) (Supp. 1988); (5) trade secrets and academic research, excluding athletic association records, O.C.G.A. § 50-18-72(b) (Supp. 1988).

existence of a confidential investigation.[68] Second, Code section 50-18-72(a)(4) exempts information compiled for law enforcement purposes from disclosure until "all *direct* litigation involving said investigation and prosecution has become final or otherwise terminated."[69] This provision codifies the holding of *Napper v. Georgia Television Co.* that the pending habeas corpus petition of Wayne Williams did not prevent the public disclosure of the Atlanta Child Murders Task Force investigative files concerning the murders because such collateral litigation would unreasonably delay disclosure of records and thereby circumvent the intent and purpose of the Act.[70]

Code section 50-18-72(a)(5) provides that materials connected with an examination, evaluation, or investigation of public officials not be released until ten days after the information has been presented to the agency for action or the investigation is concluded or terminated.[71] The exemption protects both the individual who is the subject of the investigation from an unwarranted invasion of privacy, and the agency or official conducting the investigation from jeopardizing legitimate government objectives by the precipitous release of such information.[72] Unlike Code section 50-18-72(a)(4), which does define "concluded" for purposes of releasing investigatory files,[73] subsection (a)(5) does not determine when an investigation ends. The courts, however, have been liberal in deeming an investigation of public officials or employees ended so that records may be disclosed under the Public Records Act. For example, Georgia Bureau of Investigation (GBI) investigatory records were released under the Public Records Act despite a pending federal investigation in which the GBI records would be used.[74] Also, in another situation, the GBI investigated several employees of the State Farmers' Market in Macon. Although no criminal charges were filed and no summation of the investigation was made, the court concluded that the investigation was complete.[75]

The conference committee rejected the House committee substitute which would have allowed an agency to withhold information which it deemed "unverified, scandalous, or totally without foundation."[76] The House committee substitute would have placed the burden on the party requesting disclosure to prove that the public interest in disclosure outweighed the agency's reasons for nondisclosure.[77] The conference committee felt that the House committee substitute was redundant and confus-

68. O.C.G.A. § 50-18-72(a)(3) (Supp. 1988).
69. O.C.G.A. § 50-18-72(a)(4) (Supp. 1988) (emphasis added).
70. *Georgia Television*, 257 Ga. at 165, 356 S.E.2d at 647.
71. O.C.G.A. § 50-18-72(a)(5) (Supp. 1988).
72. Chambless Interview, *supra* note 30.
73. O.C.G.A. § 50-18-72(a)(4) (Supp. 1988).
74. Harris v. Cox Enters., Inc., 256 Ga. 299, 300 n.1, 348 S.E.2d 448, 449 n.1 (1986).
75. Irvin v. Macon Tel. Publishing Co., 253 Ga. 43, 45, 316 S.E.2d 449, 450 (1984).
76. *See* SB 435 (HCS), 1988 Ga. Gen. Assem.
77. *Id.*

ing.[78] If material is scandalous and baseless, the individual has a cause of action in tort for invasion of privacy.[79] Moreover, placing the burden on the plaintiff negates the policy of open government which underlies the Act.[80]

Code section 50-18-72(a)(6) exempts real estate appraisals made for the acquisition of property by the state or an agency until the transaction has been completed or abandoned.[81] This exemption was contained in the bill as introduced.[82]

Code section 50-18-72(c)(1) exempts hospital records of a proprietary nature.[83] The General Assembly believed that since public hospitals must compete with privately run hospitals, requiring disclosure of planning information or internal controls puts the public hospital at a competitive disadvantage.[84] On the other hand, some believe that since public hospitals are not operated for profit but rather to benefit the individual taxpayer, hospital records of this nature should be subject to "rigorous scrutiny."[85] Unlike the real estate appraisal for property acquisition exemption, the hospital exemption does not contain a provision for the disclosure of hospital authority information after the confidentiality of the information is no longer necessary for effective hospital planning.[86] However, it is possible that hospital planning records for the future acquisition of real property may be disclosable under subsection (a)(6). In addition, information compiled to meet the requirements for a certificate of need is only protected until the application for the certificate is filed.[87] Moreover, information gathered for "the potential expansion of health-related services" would probably be disclosable once the expansion is actual rather than "potential."[88]

Information relating to "marketing, . . . the promotion of quality assurance, peer review, and security systems, [or] matters involving medical staff recruitment" are categorically exempt from disclosure.[89] The hospital exemption originated in the House committee substitute as an exemption for "information of a proprietary nature" but did not include the provisions regarding allocation of funds, sale of a hospital, termination of services by an authority-owned health care facility, or salary data about

78. Chambless Interview, *supra* note 30.
79. Athens Observer v. Anderson, 245 Ga. 63, 263 S.E.2d 128 (1980).
80. Harris v. Cox Enters., Inc., 256 Ga. 299, 302, 348 S.E.2d 448, 450 (1986).
81. O.C.G.A. § 50-18-72(a)(6) (Supp. 1988).
82. SB 435, as introduced, 1988 Ga. Gen. Assem.
83. O.C.G.A. § 50-18-72(c)(1) (Supp. 1988).
84. Chambless Interview, *supra* note 30.
85. Atlanta J., Mar. 12, 1988, at 20A, col. 1.
86. O.C.G.A. § 50-18-72(c)(1) (Supp. 1988).
87. *Id.*
88. *Id.*; Bolster Interview, *supra* note 29.
89. *Id.*

authority employees.[90]

Code section 50-18-72(e)(1) affirms the legislators' intent that the attorney-client privilege relating to communications between government officials and employees and the attorney representing the agency be upheld except in a proceeding under the Public Records Act to compel disclosure.[91] In that case, a judge may view the records *in camera* to determine if disclosure of the record itself is necessary for the resolution of the issue.[92]

Code section 50-18-72(f) provides that the Code be interpreted narrowly in order to exclude only portions of materials for which an exemption directly applies and to provide all other portions for public inspection.[93] Code section 50-18-73(b) changes the prior law regarding the discretionary award of attorney's fees and other litigation expenses to the prevailing party[94] to make mandatory the award of fees to the prevailing party when the losing party's case is "completely without merit as to law or fact."[95] This change was made in order to make the Public Records Act and the Open Meeting Act consistent in this regard.[96]

Code section 50-18-75 was created at the request of the Office of Legislative Counsel, which was concerned that the work of the General Assembly could be inhibited if communications between it and the Legislative Counsel were subject to public disclosure.[97] This section establishes a privilege for communications between the legislators and persons acting on their behalf unless the affected official waives the privilege.[98] The section originated in the House committee substitute, and the House version included the Governor as one of the persons included in the privilege.[99] The Governor, however, requested that his office not be included in the privilege because the Office of Legislative Counsel technically works for the legislature not the Governor's office.[100] The Governor characterized

90. SB 435 (HCS), 1988 Ga. Gen. Assem. *See* Richmond County Hosp. Auth. v. Southeastern Newspapers, 252 Ga. 19, 311 S.E.2d 806 (1984) (hospital authority ordered to produce records of all employees earning over $28,000). However, the conference committee, at the urging of the Governor's office, provided a more particularized list of exemptions. Bolster Interview, *supra* note 29.

91. *See* O.C.G.A. § 50-18-72(e) (Supp. 1988).

92. O.C.G.A. § 50-18-72(e)(1) (Supp. 1988).

93. O.C.G.A. § 50-18-72(f) (Supp. 1988).

94. 1982 Ga. Laws 1790.

95. O.C.G.A. § 50-18-73(b) (Supp. 1988).

96. Chambless Interview, *supra* note 30.

97. *Id.*

98. O.C.G.A. § 50-18-75 (Supp. 1988).

99. SB 435 (HCS), 1988 Ga. Gen. Assem.

100. Chambless Interview, *supra* note 30.

the new Public Records Act as "very, very close to being a good piece of legislation, maybe not total, but that's just part of the process."[101]

A. Jones

101. News from the Georgia Senate, No. 5390, Mar. 12, 1988, at 9 (quoting Georgia Governor Joe Frank Harris).