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SB 323 - State Printing and Documents

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STATE GOVERNMENT

State Printing and Documents: Amend Chapter 18 of Title 50 of the Official Code of Georgia Annotated, Relating to State Printing and Documents, so as to Change Certain Providing Relating to Open Records; Extend the Deadline for Responses to Requests for Certain Records Relating to Intercollegiate Sports Programs; Provide for Public Disclosure not to be Required for any Documents Pertaining to an Economic Development Project by any Agency; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

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| CODE SECTIONS: | O.C.G.A. §§ 50-18-71, -72 (amended) |
| BILL NUMBER: | SB 323 |
| ACT NUMBER: | 323 |
| GEORGIA LAWS: | 2016 Ga. Laws 6 |
| SUMMARY: | The Act exempts economic development project documents, maintained by any state government agency, from public disclosure until the project is secured by binding commitment. The Act also allows any state university's athletic department ninety days to return open records requests. |
| EFFECTIVE DATE: | July 1, 2016 |

History

In 2012, Georgia overhauled its Open Records Act in an effort to make the statutory scheme more accurately reflect judicial decisions while also promoting public policy and economic concerns.¹ The 2012 update to the Open Records Act (the 2012 Act), provided detailed changes to open meetings and open records requirements,

1. Han C. Choi, *Georgia's Open Records Act Undergoes Major Update*, BALLARDSPAHR, LLP (Apr. 23, 2012), http://www.ballardspahr.com/alertspublications/legalalerts/2012-04-23_georgias_open_records_act_undergoes_major_update.aspx.

and enhanced penalties for violations.² More significantly, the 2012 Act attempted to increase Georgia's competitiveness in attracting new business by exempting the Georgia Department of Economic Development from disclosure requirements.³ The 2012 Act allowed the state to withhold documents pertaining to pending deals or development projects until the projects were secured by a binding commitment.⁴ Prior to the 2012 Act, competing states could view incentives offered by Georgia, giving them a competitive advantage in the deal-making process.⁵

Aside from the exemption for economic development projects, the 2012 Act added language establishing a "strong presumption" that public records should be made available for inspection without delay.⁶ It further allowed the portion of the 2012 Act pertaining to public records to be broadly construed to allow inspection, and for any exceptions provided by the Act to be interpreted narrowly.⁷

The Open Records Act of 2012 was one of many legislative and policy decisions that resulted in Georgia receiving the highest ranking for "Business Climate in the Nation" by Site Selection magazine, one of the nation's top economic development trade publications.⁸ Georgia held on to that ranking in 2014 and 2015, and hopes to continue its image as the ideal place for companies of all types to conduct business.⁹ Even with "eighteen Fortune 500 headquarters and more than 440 Fortune 500 companies [calling] Georgia home," state lawmakers continue to feel pressure to remain competitive.¹⁰

2. *Id.*

3. *Id.*

4. O.C.G.A. § 50-18-72 (2012).

5. *Id.*

6. O.C.G.A. § 50-18-70 (2012); *see also* Choi, *supra* note 1.

7. Choi, *supra* note 1.

8. *Georgia Leads in Workforce Training, Global Access, and Infrastructure*, GA. DEP'T OF ECON. DEV., <http://www.georgia.org/competitive-advantages/pro-business/number-1-for-business/> (last visited Sept. 30, 2016). A survey of corporate site selectors determines fifty percent of the annual business climate rankings. *Id.* An index of seven criteria determines the other fifty percent: performance in Site Selection's annual Competitiveness ranking; total New Plant Database compliant facilities; total new facilities per capita; total new projects year to date; total projects year to date per capita; state tax burdens on mature firms and on new firms according to the Tax Foundation and KPMG Location Matters analysis. *Id.*

9. *Id.* The magazine releases its annual ranking each November, thus they have not released awards for 2016 at the time of publication.

10. *Id.*

Accordingly, during Georgia's 2016 legislative session, Senator Mike Dugan (R-30th) introduced Senate Bill (SB) 323 to broaden the Open Records Act's exemptions for disclosing documents related to economic development projects.¹¹ Senator Dugan's bill purported to extend the disclosure exemption applicable to the Department of Economic Development to any government agency working on an economic development project.¹²

Senator Dugan indicated that the purpose of the bill was to put Georgia on equal footing with other Southeastern states with respect to job growth.¹³ Under the previous law, the Georgia Department of Economic Development could keep ongoing negotiations confidential as it dealt with a business looking to move into the state.¹⁴ However, when the Georgia Department of Economic Development interacted with any other agencies, like QuickStart, the other agencies were not afforded the same protections.¹⁵ Thus, SB 323 aims to ensure that these other agencies receive the same protections the Georgia Department of Economic Development enjoys when responding to a request from the Georgia Department of Economic Development.¹⁶ This mirrored the kinds of protection available in competing states.¹⁷

To ensure open deliberation about the bill, Senator Dugan and other proponents engaged press organizations early on in the legislative process to get feedback on the bill and to explain its purposes and objectives.¹⁸ The media outlets that Senator Dugan and other proponents of the bill engaged treated the bill favorably.¹⁹ One notable Georgia press organization that the proponents did not include in this effort, however, was the Atlanta Journal Constitution (AJC).²⁰ Senator Dugan explained that the bill supporters left the AJC out of the vetting process because it is not a member of the

11. SB 323, as introduced, 2016 Ga. Gen. Assemb.

12. *Id.*

13. Interview with Sen. Mike Dugan (R-30th) (July 5, 2016) [hereinafter Dugan Interview].

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Dugan Interview, *supra* note 13.

20. *Id.*

Georgia Press Association.²¹ Finally, Senator Dugan pointed out that the provisions related to athletic departments were not part of the original bill, but were added by the House.²² Overall, he did not foresee the bill facing any legal obstacles.²³

Bill Tracking of SB 323

Consideration and Passage by the Senate

Senators Dugan, Bill Jackson (R-24th), Butch Miller (R-49th), P.K. Martin IV (R-9th), Jeff Mullis (R-53rd), and Brandon Beach (R-21st) sponsored SB 323.²⁴ The Senate read the bill for the first time on February 4, 2016, and referred the bill to the Senate Economic Development and Tourism Committee.²⁵ The Senate Committee favorably reported the bill on February 19, 2016.²⁶ The Senate read the bill for a second time on February 22, 2016.²⁷ On February 23, 2016, the Senate read the bill for a third time and passed it by a vote 47 to 4.²⁸

Consideration and Passage by the House

Representative Robert Dickey (R-140th) sponsored SB 323 in the House.²⁹ The House first read SB 323 on February 24, 2016, and assigned it to the House Governmental Affairs Committee.³⁰ The House read SB 323 for a second time on February 25, 2016.³¹ The House Committee favorably reported the bill on March 15, 2016.³²

21. *Id.*

22. *Id.*

23. *Id.*

24. Georgia General Assembly, SB 323, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/SB/323>.

25. State of Georgia Final Composite Status Sheet, SB 323, May 5, 2016.

26. *Id.*

27. *Id.*

28. *Id.*; Georgia Senate Voting Record, SB 323 (Feb. 23, 2016).

29. Georgia General Assembly, SB 323, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/SB/323>.

30. State of Georgia Final Composite Status Sheet, SB 323, May 5, 2016.

31. *Id.*

32. *Id.*

On March 22, 2016, the House read the bill for a third time, and it went to the floor for a vote.³³

Representatives Earl Ehrhart (R-36th), Calvin Smyre (D-135th), and Terry Rogers (R-10th) proposed a floor amendment.³⁴ The amendment “[extended] the deadline for responses to requests for certain records relating to intercollegiate sports programs” on line two.³⁵ Sections 1 and 2 of the amendment were designated as Sections 2 and 3 of the bill, respectively.³⁶ The amendment further revised Code section 50-18-71, relating to access to public records and the timing of responses to requests.³⁷ The amendment adds a new subsection to Code section 50-18-71, and provides the University System of Georgia ninety days to respond to an open records request on any record except those related to the salary information of nonclerical staff of college sports programs.³⁸

On March 23, 2016, the House passed SB 323 as amended, by a vote of 166 to 2.³⁹ On March 31, 2016, the Senate agreed to the House amendment and passed the bill by a vote of 31 to 22.⁴⁰ The Senate sent the bill to Governor Nathan Deal (R) on March 31, 2016; the Governor signed the bill into law on April 11, 2016, and became effective on July 1, 2016.⁴¹

The Act

The Act has three stated purposes. First, it extends the deadline for responses to certain records relating to intercollegiate sports programs.⁴² Second, it provides that no public disclosure is required for any records involving an economic development project for any

33. *Id.*

34. SB 323 (HCSFA), 2016 Ga. Gen. Assemb.

35. *Id.* p. 1, ll. 3–4.

36. *Id.* p. 1, l. 5.

37. *Id.* p. 1, ll. 8–11.

38. *Id.* p. 1, ll. 12–17.

39. Georgia House of Representatives Voting Record, SB 323 (Mar. 22, 2016).

40. Georgia Senate Voting Record, SB 323 (Mar. 23, 2016).

41. State of Georgia Final Composite Status Sheet, SB 323, May 5, 2016.

42. 2016 Ga. Laws 6, § 1, at 6.

agency.⁴³ Third, it stipulates the repeal of any laws that conflict with the changes in SB 323.⁴⁴

The provisions relating to intercollegiate sports only applies to organizations within the University System of Georgia, and includes athletic departments and related private athletic associations.⁴⁵ Agencies covered by these provisions now have ninety business days to produce documents and information after they receive a request.⁴⁶ This does not apply to information requested on salaries for nonclerical staff.⁴⁷

For economic development projects, no information need be disclosed until there is a binding commitment.⁴⁸ At that time, documents must be disclosed upon proper request or when the project has been terminated.⁴⁹ When the Department of Economic Development obtains a binding commitment and there is a commitment to use state funds, the department will have five business days to give such notice and post the information on its website.⁵⁰ The information on the website must also include the bidding commitment associated with the project and the participants in the legal organ of each county where the project will take place.⁵¹ Under the language of the bill, an economic development project is one that involves a plan to locate or expand a business that involves expenditure of more than twenty-five million dollars or the hiring of more than fifty employees.⁵²

Analysis

The exemption in the state's public records law for economic development will help place Georgia on more equal footing with other states and prevent other states from interfering with business

43. *Id.* § 2, at 7.

44. *Id.* § 3, at 7.

45. *Id.* § 1, at 6.

46. *Id.*

47. *Id.*

48. 2016 Ga. Laws 6, § 2, at 7.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

negotiations.⁵³ The legislation aims “to keep other states from learning what Georgia offered companies” as part of negotiations “and to provide companies protection about sensitive corporate secrets.”⁵⁴ This was exactly the situation that occurred when retailer Kmart was looking to do business in Georgia and the Open Records Act was used to infiltrate private negotiations.⁵⁵ In addition, because this Act offers greater protection for business negotiations, the law will facilitate greater economic opportunities for Georgia and remove potential barriers to securing those opportunities.⁵⁶

The law, however, is not without criticism. Opponents worry that the law is written too broadly and creates the opportunity for abuse in the future.⁵⁷ As Senator Vincent Fort (D-39th) explained: “[t]o me it’s an obvious matter of transparency. The prying eyes of competitors are excluded, but also the public and the media is excluded from knowing, and I don’t think that is ever good to exclude the public from knowing what is being done with their money.”⁵⁸ Critics insist that whenever restrictions on the public gaining access to public records are written, they should be drawn as narrowly as possible.⁵⁹ One proposed change is to alter the wording of the law to make clear that it only applies to projects under consideration by the Georgia Department of Economic Development.⁶⁰ This proposed change would address concerns that the law could be used to apply to any number of economic projects under the claim that they will create jobs.⁶¹

The provision related to intercollegiate athletics was inserted, allegedly, at the behest of the University of Georgia’s head football coach, Kirby Smart.⁶² Smart appeared at the Capitol to speak with

53. See J. Scott Trubey, *Advocates: Bill Could Shield Too Much from Georgia Open Records Law*, ATLANTA J.-CONST. (Mar. 1, 2016, 4:52 PM), www.myajc.com/news/local-govt-politics/advocates-bill-could-shield-too-much-from-georgia/nqbft/ [hereinafter *Advocates*].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Trubey, *Advocates*, *supra* note 53.

60. *Id.*

61. *Id.*

62. Jason Butt, *Gov. Nathan Deal Signs SB 323, with Amendment Influenced By Kirby Smart, into Law*, TELEGRAPH (Apr. 11, 2016, 4:38 PM), <http://www.macon.com/sports/college/university-of-georgia/bulldogs-beat/uga-football/article71208842.html>.

legislators about the law in February, but downplayed the significance he had in its passage.⁶³ Smart stated, “I shouldn’t get any credit for that. When I went over to the Capitol, I was asked what’s the difference in our program and some programs I’ve been at in the past. One of the things I brought up—there’s a difference. That was the extent of my conversation”⁶⁴ Smart’s name became connected to the amendment when Tom Krause, Chief of Staff to Senator Bill Cowsert (R-46th), mentioned that Smart had been the “inspiration” behind the law.⁶⁵

Whatever Smart’s role in the legislation, the intercollegiate athletics amendment helps university athletic departments that are currently overwhelmed with Open Records requests.⁶⁶ According to Representative Earl Ehrhart, athletic departments lack the staff to handle the huge number of requests and the law will give them time to fulfill the demands placed upon them.⁶⁷ This is particularly true for requests that are related to recruiting. Other states limit that information and this law will help ensure that sensitive, personal information about recruits is not divulged to the public.⁶⁸ According to Ehrhart, the law “just allows us to play on the same field as Alabama and everybody else.”⁶⁹

Critics of the intercollegiate athletics amendment complain that it limits access to important information vital to the public interest. For example, it delays information about the University of Georgia’s \$30 million indoor practice facility and the amount of money coaches are spending on recruiting.⁷⁰ Other critics take issue with how the amendment was inserted into the law at the last minute. Hollie Manheimer, the executive director of the Georgia First Amendment Foundation, states “this amendment—at the eleventh hour of the legislative session—is an affront to the purpose of Georgia’s open

63. *Id.*

64. *Id.*

65. *Id.*

66. See J. Scott Trubey, *Bill Would Slow Access to Records for UGA, Other Athletic Departments*, ATLANTA J.-CONST., <http://www.ajc.com/news/state—regional-govt—politics/bill-would-slow-access-records-for-uga-other-athletic-departments/13KJITSWjJQuDrxoMFednL/> (last updated Mar. 23, 2016) [hereinafter *Bill Would Slow Access*].

67. *Id.*

68. *Id.*

69. Butt, *supra* note 62.

70. Trubey, *Bill Would Slow Access*, *supra* note 66.

records act and all citizens should be disturbed.”⁷¹ A delay in receiving information could allow universities to make important and controversial decisions regarding their athletic programs and the public would be given no time to object because of receiving the information too late.

This Act potentially creates tension between Georgia’s interest in promoting economic development and “the strong public policy . . . in favor of open government; that open government is essential to a free, open, and democratic society”⁷² Potential challengers of the Act could underpin their case on the policy ideals set forth above in O.C.G.A. § 50-18-70. However, it is a fundamental principle of statutory interpretation in Georgia that statutes must be construed in harmony with one another, and must not be found to contradict each other unless absolutely necessary.⁷³ The Act amended O.C.G.A. § 50-18-72, which sets forth fifty-two exemptions to the general principles in O.C.G.A. § 50-18-70.⁷⁴ A court would be hard-pressed to distinguish between the public interest in promoting economic development by ensuring confidentiality of negotiations and the other public interests promoted through exemption to public disclosure requirements. While collegiate athletic programs play a central role in the state’s shared cultural identity, proponents of this section may have to articulate a more rational state interest if this portion of the Act is challenged. Ultimately, the economic development provisions of this Act will serve as a valuable tool in the state’s effort to maintain its place as a premier location to do business.

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71. *Id.*

72. O.C.G.A. § 50-18-70(a) (Supp. 2016).

73. *Chase v. State*, 285 Ga. 693, 696 681 S.E.2d 116, 118 (2009).

74. O.C.G.A. § 50-18-72 (Supp. 2016).