



Georgia's Open Meetings and Open Records Acts in light of HB 397

The New Law – HB 397

- The Open Records and Open Meetings Acts were substantially revised during the 2012 term of the General Assembly through the leadership of the Attorney General.
- Despite the changes many provisions of the law remain the same – the law was primarily rewritten to make it clearer.
- The changes to the law are effective now.

The Role of the AG

- The Attorney General has the power to enforce the law in civil or criminal actions.
- Our goal in most cases is to obtain compliance not to sanction; we have an informal open government mediation program to try to resolve disputes between local governments and their citizens.
- The mediation program does not apply to our State clients; we advise clients about the law.

Sanctions

- Violations of the law can lead to a \$1000 fine for a first violation and a \$2500 fine for each additional violation within 12 months.
- The standard for a civil violation is negligence. The standard for a criminal violation (a misdemeanor) is willfulness.
- Citizens have the right to bring actions.
- Attorney's fees can also be awarded.

Open Meetings

(3)(A) 'Meeting' means:

- (i) The gathering of a quorum of the members of the **governing body of an agency** at which any official business, policy, or public matter of the agency is formulated, presented, discussed, or voted upon; or
- (ii) The gathering of a quorum of **any committee** of the members of the governing body of an agency or a quorum of any committee created by the governing body at which any official business, policy, or public matter of the committee is formulated, presented, discussed, or voted upon.

O.C.G.A. § 50-14-1(a)(3)(A)(emphasis added).

What's Not a "Meeting"

- inspections of physical facilities or property
- state-wide meetings or training
- meetings with other agencies
- travel
- social or ceremonial events

No official business is permitted at these gatherings.

O.C.G.A. § 50-14-1(a)(3)(B). Note – the above are summary; see the statute.

Open Meetings – Open Access

- Meetings must be open to the public and the press – the public and the press can observe and record the meeting.
- Members of the public do not have the right to participate in the meeting, just to observe. You can give them the right to participate through public comment.
- Votes taken in violation of the law are void.
- Court action to challenge must be taken within 90 days, with six month tolling period if action concealed.

O.C.G.A. § 50-14-1(b), (c).

Open Meetings – Notice and Agenda

- Notice must be posted at least one week in advance of regular meetings. Post it at the place of the meeting and on your website and let the press know.
- Special meetings usually require at least 24 hours notice, though there are special situations where less than 24 hours notice is permitted if the circumstances demand it. Immediately give notice to the “legal organ” for meetings that are not regular meetings.
- Agendas for meetings should be specific enough to advise the public of the matters expected to come before the agency. Matters outside of the agenda can be addressed if they were not anticipated before the meeting.

O.C.G.A. § 50-14-1(d), (e)(1).

Open Meetings -- Minutes

- Summary minutes, final minutes, and executive session minutes are required for every meeting. That includes committee meetings.
- Final minutes must state what agency members were present, describe each motion, state who made and seconded a motion, and record all votes. If the vote is not unanimous, the votes of the participants must be recorded. They must also show executive sessions.
- Executive session minutes are not released to the public. They are used in court if there is a dispute.

O.C.G.A. §§ 50-14-1(e)(2), 50-14-4(a).

Open Meetings Exceptions

- **Attorney-client privilege** to consult with counsel on actual or potential litigation with a “tangible threat of litigation.”
- Confidential tax matters.
- Real property transactions.
- Staff meetings.
- Pardons & Paroles, GBI, law enforcement agencies, and grand jury proceedings.
- Mediations.
- **Email** (even to a quorum) but it is open under the ORA.
- Personnel discussions or deliberations about specific people or positions or to interview for the agency’s head executive.
- Public retirement system meetings discussing investments.
- Discussions of portions of records not open under the ORA.

O.C.G.A. § 50-14-2, 50-14-3.

Open Meetings – Personnel Exception

“...executive sessions shall be permitted for:

* * *

“Meetings when discussing or deliberating upon the appointment, employment, compensation, hiring, disciplinary action or dismissal, or periodic evaluation or rating of a public officer or employee or interviewing applicants for the position of the executive head of an agency. This exception shall not apply to the receipt of evidence or when hearing argument on personnel matters, including whether to impose disciplinary action or dismiss a public officer or employee or when considering or discussing matters of policy regarding the employment or hiring practices of the agency. The vote on any matter covered by this paragraph shall be taken in public and minutes of the meeting as provided in this chapter shall be made available. Meetings by an agency to discuss or take action on the filling of a vacancy in the membership of the agency itself shall at all times be open to the public as provided in this chapter”

O.C.G.A. § 50-14-3(b)(3) (emphasis added).

Open Meetings – Executive Session Requirements

- Going into executive session requires a vote. The regular minutes must show the specific reason for closing the meeting, those present, and those voting for closing the meeting.
- Going into executive session also requires the chair execute a sworn affidavit showing the basis for the executive session and that the closed part of the meeting was limited to these provisions.
- The chair has the duty to keep the meeting limited to the proper purposes of the closed meeting, and if it is not, to adjourn the closed meeting.

O.C.G.A. § 50-14-4.

Open Records

The Open Records Act (as well as the Open Meetings Act) is always interpreted in favor of openness. When in doubt the law requires openness. Exceptions are always narrowly construed.

See O.C.G.A. § 50-18-70(a)(1).

What is a Document?

“Public record’ means all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or 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 governmental use.”

O.C.G.A. § 50-18-70(b)(2).

Form of the Request

- Requests must be in writing to an open records officer if one has been designated by the agency.
- An agency may also designate the its director, chair, or CEO; senior officials at a satellite offices; and clerks specifically designated by an agency as records custodians to receive requests.
- Oral requests are permitted but not enforceable: a request must be written to take it to court.

O.C.G.A. § 50-18-71(b).

Immediate Access

- Documents must be available within three business days from receipt of the request.
- When some documents are available and some are not immediate access must be permitted to the ones that are available. This is rolling access.
- When in doubt about what is sought, the agency should confer with the requester.

O.C.G.A. § 50-18-71(a), (b)(1)(A).

3 Day Letters

- When some documents are not available or the agency estimates it is going to charge more than \$25 to produce the records or there are exceptions an the agency relies upon, it must send a letter within 3 business days from receipt of the request.
- The three-day letter states:
 1. When the documents will be available
 2. An estimate of how much production will cost
 3. What exceptions the agency relies upon including citing the specific portions of the law.

O.C.G.A. § 50-18-71(b)(1)(A), (d).

Costs

- Costs are 10 cents per page if copies are made.
- In addition the agency may charge for the “search, retrieval, redaction, and production or copying costs for the production of records....”
- The rate charged for time is “the lowest paid full-time employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request” with the first 15 minutes free.
- The agency must “utilize the most economical means reasonably calculated to identify and produce responsive, nonexcluded documents....”

O.C.G.A. § 50-18-71(c)(1), (2).

Prepayment and Nonpayment

- The agency may not require prepayment of estimated costs unless they exceed \$500.
- The agency may require prepayment if a requester did not pay for a previous request where the costs were properly estimated.
- If a requester refuses to pay properly estimated costs, the agency may enforce payment like an unpaid tax.

O.C.G.A. § 50-18-71(c)(3), (d).

Electronic Data

- The agency must provide access to electronic data it keeps. The proper way to do this is to download the file with the data or to email the data to the requester.
- The agency does not have to provide access to computer programs. Only the data files or data are open. The agency's staff should produce data in the format kept or, if the requester asks, in a standard format like ASCII.
- If redaction is necessary, doing so is often easy with electronic data by blocking certain data fields or searching and blocking specific data. We do not expect most electronic data to be expensive to redact.

O.C.G.A. §§ 50-18-70(b)(2), 50-18-71(f), 50-18-72(a)(44).

Email and Web

- All email and text messages concerning the agency's business are open.
- All email and text messages created or kept on the system's equipment or devices are open.
- Email once sent is usually kept on a number of different servers and hard drives. Requesters must be sufficiently specific in their requests to allow the material to be found.
- It's legitimate to provide access to data through the web as long as the full data sets are also available.

O.C.G.A. § 50-18-71(g), (h).

Investigative Exceptions

- Investigative records of “law enforcement, prosecution, or regulatory agencies” may be kept sealed, except for the complaint or initial incident report, under the investigation and prosecution is over.
- Investigative records of complaints against public employees are closed until 10 days after the complaint is presented for action.

O.C.G.A. §§ 50-18-72(a)(4), (8). *See also* O.C.G.A. §§ 50-18-72(a)(5) (accident reports) and (7) (confidential evaluations for hiring).

Open Records – Personnel Files

- There's no question that personnel files, with the limited redactions covered above, are open.
- The following related exceptions exist in the ORA:
 - “(7) Records consisting of confidential evaluations submitted to, or examinations prepared by, a governmental agency and prepared in connection with the appointment or hiring of a public officer or employee;
 - “(8) Records consisting of material obtained in investigations related to the suspension, firing, or investigation of complaints against public officers or employees until ten days after the same has been presented to the agency or an officer for action or the investigation is otherwise concluded or terminated, provided that this paragraph shall not be interpreted to make such investigatory records privileged”

O.C.G.A. §§ 50-18-72(a)(7), (8) (emphasis added).

Citizens' Personal Information

For all citizens the following can be redacted:

- social security number
- mother's birth name
- credit card information, debit card information, bank account information, account numbers, utility account numbers, and password used to access accounts
- financial data or information
- insurance or medical information in all records
- unlisted telephone number if so designated in a public record
- personal e-mail address
- cellular telephone number
- day and month of birth
- information regarding public utility, television, Internet, or telephone accounts held by private customers

Public Employee Information

For public employees (including teachers) the following can be redacted:

- home address
- home telephone number
- day and month of birth
- social security number
- insurance or medical information
- mother's birth name
- credit card information
- debit card information
- bank account information, account numbers, utility account numbers, passwords used to access accounts,
- financial data or information other than compensation by a government agency
- unlisted telephone number if so designated in a public record
- identity of the public employee's immediate family members or dependents

Open Records – Trade Secrets

- The law now exempts trade secrets from the ORA as follows:

Any trade secrets obtained from a person or business entity that are required by law, regulation, bid, or request for proposal to be submitted to an agency. An entity submitting records containing trade secrets that wishes to keep such records confidential under this paragraph shall submit and attach to the records an affidavit affirmatively declaring that specific information in the records constitute trade secrets pursuant to Article 27 of Chapter 1 of Title 10. If such entity attaches such an affidavit, before producing such records in response to a request under this article, the agency shall notify the entity of its intention to produce such records as set forth in this paragraph. If the agency makes a determination that the specifically identified information does not in fact constitute a trade secret, it shall notify the entity submitting the affidavit of its intent to disclose the information within ten days unless prohibited from doing so by an appropriate court order. In the event the entity wishes to prevent disclosure of the requested records, the entity may file an action in superior court to obtain an order that the requested records are trade secrets exempt from disclosure. The entity filing such action shall serve the requestor with a copy of its court filing. If the agency makes a determination that the specifically identified information does constitute a trade secret, the agency shall withhold the records, and the requester may file an action in superior court to obtain an order that the requested records are not trade secrets and are subject to disclosure ...

Open Records – Trade Secrets

- The law now exempts trade secrets from the ORA as follows:

Any trade secrets obtained from a person or business entity that are **required by law, regulation, bid, or request for proposal to be submitted to an agency**. An entity submitting records containing trade secrets that wishes to keep such records confidential under this paragraph shall submit and attach to the records an **affidavit** affirmatively declaring that specific information in the records constitute trade secrets pursuant to Article 27 of Chapter 1 of Title 10. If such entity attaches such an affidavit, before producing such records in response to a request under this article, the agency shall notify the entity of its intention to produce such records as set forth in this paragraph. If the agency makes a determination that the specifically identified information does not in fact constitute a trade secret, **it shall notify the entity submitting the affidavit of its intent to disclose the information within ten days** unless prohibited from doing so by an appropriate court order. In the event the entity wishes to prevent disclosure of the requested records, the entity may file an action in superior court to obtain an order that the requested records are trade secrets exempt from disclosure. **The entity filing such action shall serve the requestor with a copy of its court filing**. If the agency makes a determination that the specifically identified information does constitute a trade secret, the agency shall withhold the records, and the requester may file an action in superior court to obtain an order that the requested records are not trade secrets and are subject to disclosure ...

Conclusion

- The Attorney General has a strong commitment to open government and, when appropriate, will aggressively address violations of the law.
- We look to citizens and officials to act in good faith under the law and to work first together to resolve disputes. It is not our Office's role to become involved in petty or political squabbles.