Seyfarth

Development Authority Board Member and Staff Training

Ethics, Liabilities, Open Meetings, and Open Records

Kevin T. Brown

Seyfarth Shaw LLP

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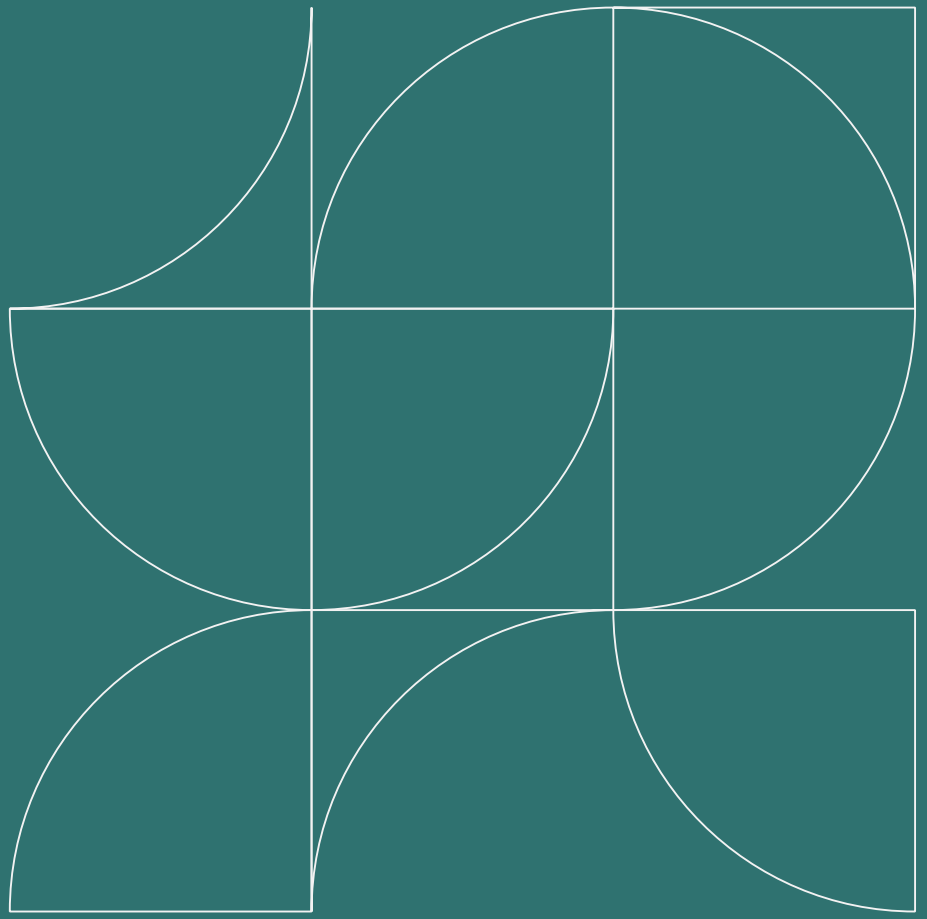
I. Ethical Issues



I. ETHICAL ISSUES

Notwithstanding any provisions of law to the contrary, each member of all boards, commissions, and authorities created by general statute shall:

(1) Uphold the Constitution, laws, and regulations of the United States, the State of Georgia, and all governments therein and never be a party to their evasion;

(2) Never discriminate by the dispensing of special favors or privileges to anyone, whether or not for remuneration;

(3) Not engage in any business with the government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties;

(4) Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit;

(5) Expose corruption wherever discovered;

I. ETHICAL ISSUES (cont.)

(6) Never solicit, accept, or agree to accept gifts, loans, gratuities, discounts, favors, hospitality, or services from any person, association, or corporation under circumstances from which it could reasonably be inferred that a major purpose of the donor is to influence the performance of the member's official duties;

(7) Never accept any economic opportunity under circumstances where he knows or should know that there is a substantial possibility that the opportunity is being afforded him with intent to influence his conduct in the performance of his official duties;

(8) Never engage in other conduct which is unbecoming to a member or which constitutes a breach of public trust; and

(9) Never take any official action with regard to any matter under circumstances in which he knows or should know that he has a direct or indirect monetary interest in the subject matter of such matter or in the outcome of such official action.

O.C.G.A. § 45-10-3 (emphasis added)

I. ETHICAL ISSUES (cont.)

- The provisions of paragraph (9) of Code Section 45-10-3 and of paragraph (1) of this subsection shall be deemed to have been complied with and any such authority may purchase from, sell to, borrow from, loan to, contract with, or otherwise deal with any director or member or any organization or person with which any director or member of said authority is in any way interested or involved, provided (1) that any interest or involvement by such director or member is disclosed in advance to the directors or members of the authority and is recorded in the minutes of the authority, (2) that any interest or involvement by such director with a value in excess of $200.00 per calendar quarter is published by the authority one time in the legal organ in which notices of sheriffs' sales are published in each county affected by such interest, at least 30 days in advance of consummating such transaction, (3) that no director having a substantial interest or involvement may be present at that portion of an authority meeting during which discussion of any matter is conducted involving any such organization or person, and (4) that no director having a substantial interest or involvement may participate in any decision of the authority relating to any matter involving such organization or person. As used in this subsection, a 'substantial interest or involvement' means any interest or involvement which reasonably may be expected to result in a direct financial benefit to such director or member as determined by the authority, which determination shall be final and not subject to review.

O.C.G.A. 36-62A-1(a)(2); Virtually Identical to O.C.G.A. § 36-62-5(e)

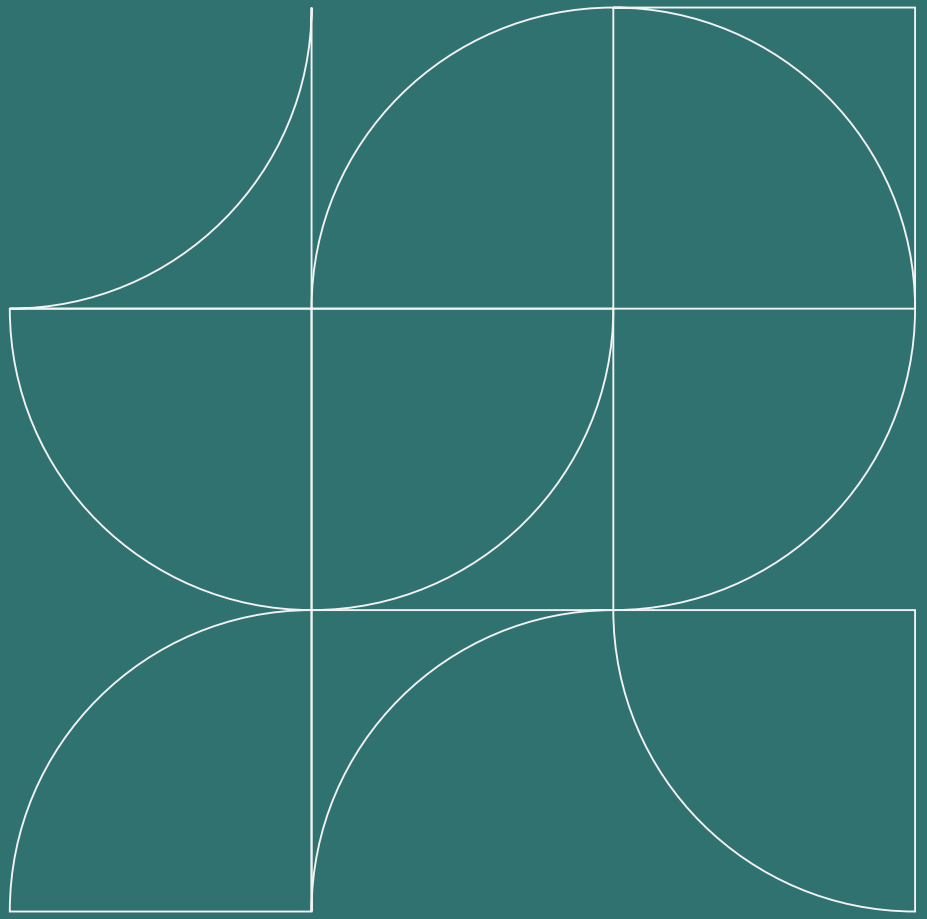
I. ETHICAL ISSUES (cont.)

- ASK THE QUESTION!
  - BEFORE the subject matter, resolution, or action is to be discussed, ask whether any member has reason to believe that he or she may have a conflict of interest.
  - Who should ask?
    - Counsel to the Authority;
    - Executive Director or staff; or
    - Chairman, Vice-chair or other members.
  - What question to ask?
    - Counsel and staff need to know enough about the authority's members and project to be able to assist.
    - "Code names" may make ascertaining conflict more difficult; try to give members sufficient information about a prospect so that they can identify possible conflicts.

I. ETHICAL ISSUES (cont.)

- The penalties are set forth in O.C.G.A. § 45-10-4.
- A complaint or formal charge of the violation must be made to the Governor's Office to set review and possibility of penalty into motion.
- Review and hearing of actions of member and authority as a whole.
- Upon a hearing, if the member who participated in the transaction with the authority is found to have had a conflict of interest and the scheme has NOT been followed, that member may be removed from the board at the discretion of the Governor.
- Possible civil actions and loss of immunity; see Section II, below.
- If the actions are egregious enough, criminal liability and civil fines may also follow.

II. Liability Issues



II. LIABILITY ISSUES

- Official Immunity for authority members is premised upon O.C.G.A. §51-1-20, which reads in pertinent part:
  - A person serving with or without compensation as a member, director, or trustee, or as an officer of the board without compensation, . . .of any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.
- O.C.G.A. § 51-1-20(a)

II. LIABILITY ISSUES (cont.)

- Official Immunity has been interpreted under this Code section to provide immunity from suit and damages so long as the alleged actions were taken in good faith and were not wanton and willful in nature. See Atlanta Airmotive, Inc. v. Royal, 214 Ga. App. 760, 449 S.E.2d 315 (1994).
- Official Immunity can be lost, however; one of the main ways that this type of immunity can be lost is through the existence of a conflict of interest that was not revealed and sanctified by the various procedures outlined above.
- Official Immunity cannot be lost for failure to follow the Georgia Open Meetings Act. See Atlanta Airmotive, Inc. v. Royal, 214 Ga. App. 760, 449 S.E.2d 315 (1994). (However, there are other penalties for such a failure. In this regard, see section III, below.)
- Official Immunity cannot be lost because a member negligently performs his/her duties on an authority. See Dyches v. McCorkle, 212 Ga. App. 209, 441 S.E.2d 518 (1994).

II. LIABILITY ISSUES (cont.)

- What Types of Liability Situations Can Authorities Expect to Encounter?
  - Bonded Debt or Revenue Bonds.
  - General Liability for Personal Injury, Wrongful Death, or Damage to Property.
  - Legal Compliance with State Laws (such as Open Meetings violations)
  - Condemnation of Property.
  - Many Other Types of Liability Yet to Be Dreamed up by Innovative Lawyers.

II. LIABILITY ISSUES (cont'd)

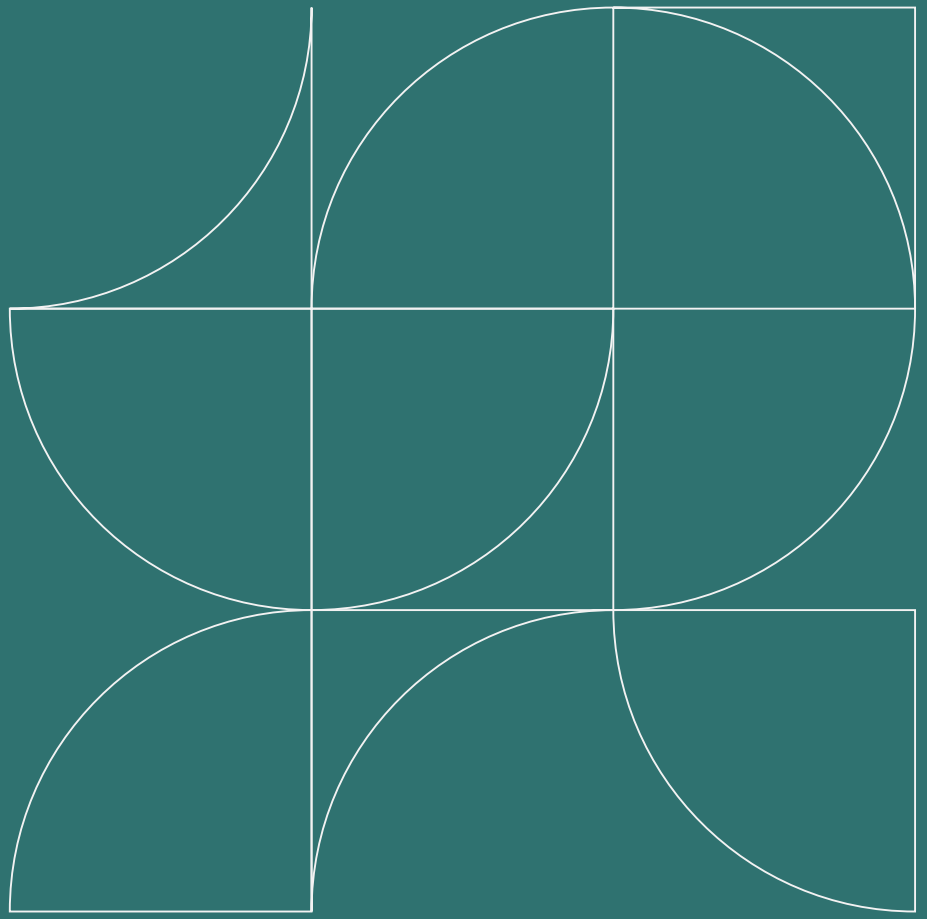
- What Do Authorities Need to Do to Protect Themselves from Liability?
  - Obtain Commercial General Liability ("CGL") Insurance. This type of insurance protects against damages to person and property that may occur in the course of the authority carrying out of its business.
  - Obtain Automobile Liability Insurance. Typically, CGL policies exclude damages that arise out of the operation, use, or collision involving the use of an automobile. Therefore, either the authority should maintain a rider to its CGL policy adding automobile liability insurance or require that employees carry adequate insurance to cover any liability that may arise; this is true even if employees typically use authority vehicles.

II. LIABILITY ISSUES (cont'd)

- What Do Authorities Need to Do to Protect Themselves from Liability? (continued)
  - Obtain Public Officials/Directors Liability Insurance.
    - Protects and insulates members AND staff from having to pay damages as a result of their actions on behalf of the authority.
    - Most D&O policies EXCLUDE and DO NOT COVER actions of members or staff that violate any law, including the conflicts of interests provisions of O.C.G.A. §§ 45-10-3 and 50-8-60 et seq., Open Meetings or Open Records statutes, as well as other general and or criminal statutes.
    - D&O insurance provides one very important protection above Official Immunity: The insurer will provide and/or pay for attorney representation of the authority, staff and/or board member in connection with any alleged liability.
    - Many insurers require that the agency also maintain a CGL policy.

III. Open Meetings Act

(with current State of Emergency guidance)



III. OPEN MEETINGS ACT

- A “meeting” is defined as:
  - 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
  - the gathering of 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)(i) & (ii)

III. OPEN MEETINGS ACT

- The definition of a “meeting” does NOT include:
  - (i) the gathering of a quorum of the members of the governing body or committee for the purpose of making inspections of physical facilities or property under the jurisdiction of such agency at which no other official business of the agency is to be discussed or official action is to be taken;
  - (ii) the gathering of a quorum of the members of a governing body or committee for the purpose of attending state-wide, multijurisdictional, or regional meetings to participate in seminars or courses of training on matters related to the purpose of the agency or to receive or discuss information on matters related to the purpose of the agency at which no official action is to be taken by the members;
  - (iii) the gathering of a quorum of the members of a governing body or committee for the purpose of meeting with officials of the legislative or executive branches of the state or federal government at state or federal offices and at which no official action is to be taken by the members;

O.C.G.A. § 50-14-1(a)(3)(B)(i), (ii) & (iii)

III. OPEN MEETINGS ACT

- The definition of a “meeting” does NOT include (continued):
  - (iv) the gathering of a quorum of the members of a governing body of an agency for the purpose of traveling to a meeting or gathering as otherwise authorized by this subsection so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum; or
  - (v) the gathering of a quorum of the members of a governing body of an agency at social, ceremonial, civic, or religious events so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum.

O.C.G.A. § 50-14-1(a)(3)(B)(iv) & (v)

- BUT… these listed exclusions from the definition of the term 'meeting' do not apply if it is shown that the primary purpose of the gathering or gatherings is to evade or avoid the requirements for conducting a meeting while discussing or conducting official business.

III. OPEN MEETINGS ACT (Cont.)

- An “agency” under the OMA is defined to include “every city, county, regional, or other authority established pursuant to the laws of this state” O.C.G.A. § 50- 14-1(a)(1)(D).
  - There are numerous other entities included in the definition of covered agencies, including a “nonprofit organization to which there is a direct allocation of tax funds made by the governing body of any agency as defined in this paragraph which constitutes more than 33 1/3 percent of the funds from all sources of such organization.” O.C.G.A. § 50-14-1(a)(E).
  - Some authorities throughout the state contract with and utilize the services of non-profit entities, such as chambers of commerce, or other local non-profits to assist in their activities. Those authorities and non-profit entities should be aware of the possible inclusion of the non-profit entities under the OMA and assess whether the criteria are met as defined above.

III. OPEN MEETINGS ACT (Cont.)

- General Rules:
  - – All Meetings of a Development Authority Must be Open to the Public.
  - – All meetings must have pre-posted agendas.
  - – Minutes of Meetings Must Be Maintained.

  O.C.G.A. § 50-14-1(b)(1)

  Case law: all votes at any meeting must be taken in public AND minutes must record the names of persons voting against a proposal or abstaining when a vote is take by roll-call and not unanimous. *See* Cardinale v. City of Atlanta, 290 Ga. 521 (2012) *(portions subsequently overturned on other grounds)* .

III. OPEN MEETINGS ACT (Cont.)

- "Closed Meeting," is now referred to as an "Executive Session":
  - "Executive session" means a portion of a meeting lawfully closed to the public.
  - In order for an authority to enter into and have an executive session, the subject matter of the item(s) to be discussed must be solely within one of the statutory exceptions provided, and for Development Authorities, commonly include:
    - Matters encompassed by the attorney-client privilege
    - Matters involving of Real Estate (big change from previous law)
    - Deliberations Regarding Employees, Agents, or Members
    - Incidental conversation unrelated to the business of the agency
    - E-mail communication among the members of an agency, provided that such emails must be disclosed under the Open Records Act.

III. OPEN MEETINGS ACT (Cont.)

- Matters encompassed by the attorney-client privilege

  "Portions of a meeting during which the Authority is to "consult and meet with legal counsel pertaining to pending or potential litigation, settlement, claims, administrative proceedings, or other judicial actions brought or to be brought by or against the agency or any officer or employee or in which the agency or any officer or employee may be directly involved," may be closed to the public."

  O.C.G.A. § 50-14-2(1).

  – Cannot enter executive session to discuss whether executive session is appropriate.

  – Previously, the law did not require any minutes to be kept during an executive session of an authority to consult with counsel under this exception; now, however limited minutes required:

    - "In the case of executive sessions where matters subject to the attorney-client privilege are discussed, the fact that an attorney-client discussion occurred and its subject shall be identified, but the substance of the discussion need not be recorded and shall not be identified in the minutes." O.C.G.A. § 50-14-1(e)(1)(C).

  – Voting during a closed session on recommendations of counsel with regard to pending or potential litigation was previously allowed. *See* Schoen v. Cherokee County (2000). However, **NOW**, based on the current statute, ALL votes must be made in open meeting. O.C.G.A. § 50-14-1(b)(1)

III. OPEN MEETINGS ACT (Cont.)

- Matters encompassed by the attorney-client privilege

  Case law: A meeting may not be closed to discuss potential litigation under the attorney-client privilege UNLESS the authority can show a realistic and tangible threat of legal action against it or its officer or employee (i.e., a threat that goes beyond a mere fear or suspicion of being sued. A realistic and tangible threat of litigation is one that can be characterized with reference to objective factors that may include, but are not limited to, the following:

  - a formal demand letter or some comparable writing that presents the party's claim and manifests a solemn intent to sue;
  - previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims; or
  - proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.

Claxton Enterprise v. Evans Co. Bd. of Commissioners, 248 Ga. App. 870 (2001).

III. OPEN MEETINGS ACT (Cont.)

- Matters involving Real Estate
  - Previously under the OMA, only matters related to the ACQUISITION of real estate were allowed to be discussed in executive session.
  - **NOW**, meetings may be closed under the OMA relating to real estate if they are:
    - Meetings when any agency is discussing or voting to:
      - (A) Authorize the settlement of any matter which may be properly discussed in executive session under the attorney-client exception;
      - (B) Authorize negotiations to purchase, dispose of, or lease property;
      - (C) Authorize the ordering of an appraisal related to the acquisition or disposal of real estate;
      - (D) Enter into a contract to purchase, dispose of, or lease property subject to approval in a subsequent public vote; or
      - (E) Enter into an option to purchase, dispose of, or lease real estate subject to approval in subsequent public vote.

O.C.G.A. § 50-14-3(b)(1)

III. OPEN MEETINGS ACT (Cont.)

- Matters Relating to Real Estate.

  "No vote in executive session to acquire, dispose of, or lease real estate, or to settle litigation, claims, or administrative proceedings, shall be binding on an agency until **subsequent vote** is taken in an open meeting where the identity of the property and the terms of the acquisition, disposal, or lease are disclosed before the vote or where the parties and principal settlement terms are disclosed before the vote."

  O.C.G.A. § 50-14-3(b)(1)

  – This overturns prior court rulings that an agency can vote in closed session on matters encompassed within the real estate exception.

  – When is the "subsequent vote" required to be made? Before entering into a contract? Closing? After Closing? Will others parties to contracts for real estate conveyance be comfortable to close unless the governmental agency has voted in open session to approved the details of the deal?

III. OPEN MEETINGS ACT (Cont.)

- Deliberations Regarding Employees, Agents, or Members
  - Executive Session is appropriate (but not required) for "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. . ." (EXCEPT, if interviews are conducted in executive session, 14 day delay is required after release of applicant information. *See* **O.C.G.A. § 50-18-72(b)(11)**.
  - This exception does 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.
  - As with all matters discussed in executive sessions, the vote on any matter covered by this paragraph must 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 must at all times be open to the public.

  O.C.G.A. § 50-14-3(b)(2).

III. OPEN MEETINGS ACT (Cont.)

How to Comply with the OMA When an Agency Intends to Enter into Executive Session Pursuant to a Relevant Exception.

- The Authority must discuss in open session whether the meeting is to be closed to the public and the reason(s) for executive session. Acceptable to have the authority's counsel state the reason(s) that executive session is appropriate or opine, as required.
- The meeting may then enter executive session; minutes must be taken of the executive session.
- The meeting must be reopened after discussions are over in order for a vote to be taken on the issue.
- After reopening the meeting, a vote may be taken on the matter discussed in executive session, the motion containing sufficient information to place the public on notice of the nature of action, even if identifying information is left out.
- After the meeting is concluded the chairman or other member of the authority presiding over the meeting (or all members, if the Authority so decides by policy) must execute an affidavit regarding the reasons for the executive session and certifying that only those matters within the stated exception were discussed during the executive session. O.C.G.A. § 50-14-4(b)(1). The affidavit must be filed with the official minutes. *See* O.C.G.A. § 50-14-4(b).

III. OPEN MEETINGS ACT (Cont.)

How to Comply with the OMA When an Agency Intends to Enter into Executive Session Pursuant to a Relevant Exception (continued).

> "In the event that one or more persons in an executive session initiates a discussion that is not authorized pursuant to Code Section 50-14-3, the presiding officer shall immediately rule the discussion out of order and all present shall cease the questioned conversation. If one or more persons continue or attempt to continue the discussion after being ruled out of order, the presiding officer shall immediately adjourn the executive session. The meeting may then enter executive session; minutes must be taken of the executive session."

O.C.G.A. § 50-14-4(b)(2)

FORM OF EXECUTIVE SESSION AFFIDAVIT

[NAME OF GOVERNMENT AGENCY]
RECORD OF AND AFFIDAVIT FOR EXECUTIVE SESSION

Date: _____

Type of Meeting (chose one): Full Board / Committee (_____)

Reason for Executive Session (*Please check one, or more, as appropriate*):

___ Consultation with legal counsel pertaining to: 1) potential or pending litigation, settlement, claims, administrative proceedings or judicial proceedings to be brought by or against the [agency] or any officer or employee of the [agency], or 2) any of the above-described proceedings in which the [agency] or any officer or employee may be directly involved. [O.C.G.A. § 50-14-2(1)]

___ Discussions regarding real estate by the [agency]. [O.C.G.A. § 50-14-3(b)(1)]

___ Discussions/deliberations regarding public officer, employee, or agent. [O.C.G.A. § 50-14-3(b)(2)]

___ New hire or appointment ___ Disciplinary action/dismissal ___ Job performance

___ Other_____legal citation: _____

Signatures of members present at meeting and Members' votes regarding entering into executive session and the matters discussed therein (by signing below, each member is in agreement with and subscribes to the certification below):

	Yea/Nay/Abstain		Yea/Nay/Abstain
1_____	/_____	2_____	/_____
3_____	/_____	4_____	/_____
5_____	/_____	6_____	/_____
7_____	/_____		

COUNTY, STATE OF GEORGIA

I and each of the above signed members hereby certify and state under oath that the subject matter of the executive session was devoted to matters within the exception(s) provided by law as identified above and that no other matter except as described above was discussed during the closed session.

_____

CHAIRPERSON / VICE-CHAIRPERSON

Each signature above sworn and subscribed before me

this _____day of _____ , 20_____.

_____

Notary Public

III. OPEN MEETINGS ACT (Cont.)

- Notice to the Public of Meetings of the Authority
  - Every agency subject to this chapter shall prescribe the time, place, and dates of regular meetings of the agency. Such information shall be available to the general public and a notice containing such information shall be posted at least one week in advance and maintained in a conspicuous place available to the public at the regular place of an agency or committee meeting subject to this chapter as well as on the agency's website, if any. Meetings shall be held in accordance with a regular schedule, but nothing in this subsection shall preclude an agency from canceling or postponing any regularly scheduled meeting.
  - For any meeting, other than a regularly scheduled meeting of the agency for which notice has already been provided pursuant to this chapter, written or oral notice shall be given at least 24 hours in advance of the meeting to the legal organ in which notices of sheriff's sales are published in the county where regular meetings are held or at the option of the agency to a newspaper having a general circulation in such county at least equal to that of the legal organ; provided, however, that in counties where the legal organ is published less often than four times weekly, sufficient notice shall be the posting of a written notice for at least 24 hours at the place of regular meetings and, upon written request from any local broadcast or print media outlet whose place of business and physical facilities are located in the county, notice by telephone, facsimile, or email to that requesting media outlet at least 24 hours in advance of the called meeting.

O.C.G.A. § 50-14-1(d)(1)

III. OPEN MEETINGS ACT (Cont.)

- Notice to the Public of Meetings of the Authority
  - When special circumstances occur and are so declared by an agency, that agency may hold a meeting with less than 24 hours' notice upon giving such notice of the meeting and subjects expected to be considered at the meeting as is reasonable under the circumstances including notice to such county legal organ or a newspaper having a general circulation in the county at least equal to that of the legal organ, in which event the reason for holding the meeting within 24 hours and the nature of the notice shall be recorded in the minutes.

O.C.G.A. § 50-14-1(d)(3)

III. OPEN MEETINGS ACT (Cont.)

Conference Calls

Can development authorities hold meetings by conference call?

Can members participate by conference call?

Is a conference call with a quorum of members on the call an Open Meeting?

What about video and web conferencing?

Discussion – *under normal conditions*

- Only certain named and statewide authorities may hold a meeting by pure conference call (e.g. – without having a quorum of members in a physical location). *O.C.G.A. § 50-14-1(f)*. Development authorities are not included in this group.
- Development authorities may have certain members participate by conference call, so long as quorum of members are present at the location noticed for the meeting, subject to certain conditions (e.g. – member cannot attend due to absence from the jurisdiction or for health reasons, etc.) *O.C.G.A. § 50-14-1(g).*
- Because development authorities cannot have a meeting by conference call, having a quorum of members participate on a conference call does not result in an "Open Meeting," however, the use of such calls to avoid the discussion or consideration of matters at a public meeting must be avoided, and no consensus or decision reached during a conference call is binding or effective.

III. OPEN MEETINGS ACT (Cont.)

Open Meetings in Conjunction With COVID-19 (Coronavirus) Measures

- Review: where were we in 2020 and first half of 2021:
- On March 14, 2020, to contain and prevent the spread of COVID-19, Governor Kemp issued "Declaration of Public Health State of Emergency" (the "**State of Emergency**"), which among other matters, limited many public gatherings during the State of Emergency. The State of Emergency was amended and extended by the Governor several times, and continued through July 1, 2021. As part of the State of Emergency, the Governor strongly recommended physical separation ("**social distancing**") for people who must be in contact with others. When combined, these restrictions were at odds with in-person, public meeting requirements under the OMA, as conducting such meetings could inadvertently expose members, staff, guests, or public attendees to COVID-19.

III. OPEN MEETINGS ACT (Cont.)

COVID-19 Virtual Meetings (2020 and first half of 2021):

- Development authorities needed to continue their business, and like most local governments, many development authorities turned to “virtual meetings” to continue their affairs.
- Virtual meetings were not only permitted, but for prevention of spread of COVID-19, often became the preferred alternative.
- A “**virtual meeting**” refers to a meeting which complies with all other requirements of the OMA, but which is held by teleconference (or other technologically advanced forms of conferencing, such as video conference, web conference, or live-streaming) of the board members without the physical presence of a quorum (or any) of the members and/or public at the meeting place of the agency.

III. OPEN MEETINGS ACT (Cont.)

COVID-19 Virtual Meetings (2020 and first half of 2021):

- Prior to its amendment by the General Assembly in 2021, the OMA stated in pertinent part:
  - Under circumstances necessitated by emergency conditions involving public safety or the preservation of property or public services, agencies or committees thereof not otherwise permitted . . . to conduct meetings by teleconference may meet by means of teleconference so long as the notice required by this chapter is provided and means are afforded for the public to have simultaneous access to the teleconference meeting.
  - O.C.G.A. § 50-14-1(g).
- The unprecedented effects and attempts to address COVID-19, coupled with the declared State of Emergency and other federal and local related restrictions, satisfied requirements of the OMA to trigger the ability of governmental bodies to conduct virtual meetings through the language above.
- Virtual hearings, including bond validation hearings, were instituted and conducted pursuant to Order Declaring Statewide Judicial Emergency by the Chief Justice Melton of the Georgia Supreme Court.

III. OPEN MEETINGS ACT (Cont.)

COVID-19 Virtual Meetings (Statutory Changes in 2021):

- The 2021 amendment to Georgia's Open Meetings Act made by **House Bill 98** went in effect on July 1, 2021, and codified some of the practical responses development authorities and other public bodies had adopted in order to operate in the COVID-19 environment.
- While the OMA already allowed virtual (teleconference) meetings under circumstances necessitated by emergency conditions noted above, HB 98 expounded on the underlying justification of emergency condition, defining it to include:
  - Declarations of federal, state or local states of emergency; and/or
  - An emergency condition found by an agency (such as a development authority) to exist and to necessitate meeting virtually.

House Bill 98 (2021) / O.C.G.A. § 50-14-1(g)(1).

III. OPEN MEETINGS ACT (Cont.)

COVID-19 Virtual Meetings (Statutory Changes in 2021):

- **HB 98** also clarified:
  - Virtual participation by a member of the agency is the same as being at the meeting in person.
  - A virtual meeting can also be a virtual (teleconference) public hearing (such as a bond validation proceeding).
  - In a virtual public hearing, members of the public must be afforded the means to participate fully in the same manner as if such members of the public were physically present.

  HB 98 / O.C.G.A. § 50-14-1(g)(2).

- HB 98 specifically included hearings as a matter which could be held virtually, providing further statutory support for the Judicial SOE.
- Georgia is now in a transition, since the Governor ended the Public Health State of Emergency on July 1, 2021.

III. OPEN MEETINGS ACT (Cont.)

COVID-19 Virtual Meetings (What is in Effect Now):

- The Governor's last applicable State of Emergency with limited declarations, directed primarily at "the impacts of COVID-19 on the economy, supply chain, and healthcare infrastructure" (the "**Economic Recovery SOE**") terminated on April 15, 2022.
- To legally hold a virtual meeting under the current paradigm, there must be:
  - An emergency condition must involve public safety or the preservation of property or public services;
  - The meeting notice required by the OMA must be given; and
  - The public must be afforded means to have simultaneous virtual (teleconference) access to the meeting
- President Biden's Public Health State of Emergency still remains in place, and while technically applicable, may have concerns in meshing with the OMA requirements on its own.
- Justification to hold a meeting virtually will require some sort of SOE to be in place, so long as circumstances still locally exist. An appropriate indicator certainly would be a declaration of emergency by the authority's local government. The development authority could also adopt its own finding that emergency conditions exist necessitating a virtual meeting, but should support its finding by citing as many facts as possible, such as the local government still may require that masks be worn, COVID-19 screening take place for admission to public buildings (such as the agency's meeting place), social distancing, etc.

III. OPEN MEETINGS ACT (Cont.)

Meeting Location

Can development authorities hold meetings in locations other than their normal meeting place?

How is the meeting place of a development authority determined if its jurisdiction crosses over boundary lines?

How about regional development authorities? Where should they hold their meetings?

Discussion

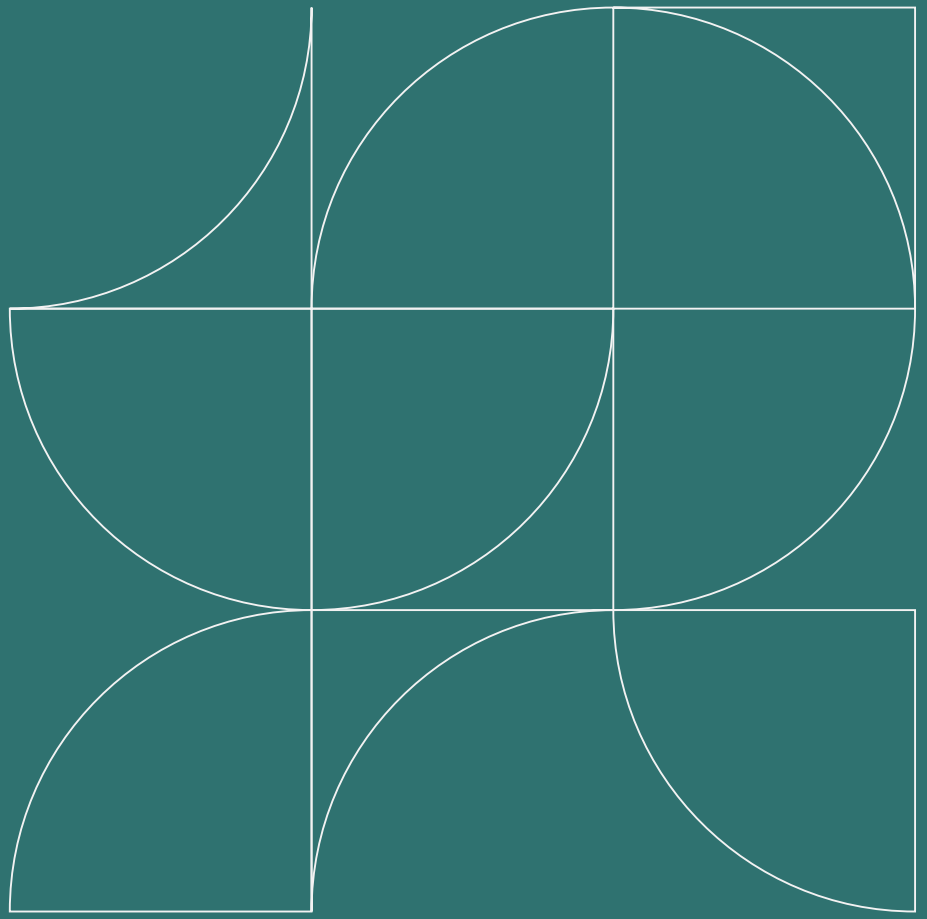
- Meetings are required to be at publicly accessible location. *O.C.G.A. § 50-14-1(c)*
- Regular meetings are required to be held at the "at the regular place of an agency." *O.C.G.A. § 50-14-1(d)(1).*
- Called meetings can be held at other locations within the jurisdiction of the development authority, so long as notice is posted on the authority's website and at the "place of regular meetings" and the "meeting site." *O.C.G.A. § 50-14-1(d)(2) & (e)(1). See also notice requirements, supra.*
- Some constitutional or local act development authorities may have specialized requirements above or beyond the Open Meetings Act.
- Not every situation is covered under the Open Meetings Act . . .

III. OPEN MEETINGS ACT (Cont.)

- Penalties for Violations of the OMA
  - The action taken may be voided or nullified.
  - Both members and the authority may be subject to civil suit and civil fines ($1,000 for initial violations; $2,500 for additional violations) as well as actions filed by the Attorney General to enforce the OMA. See O.C.G.A. § 50-14-5(a).
  - Attorney's fees of the party bringing the action to show or rectify the violation of the OMA may be assessed against the authority if the court finds the authority's actions in not complying with the OMA were without "substantial justification." O.C.G.A. § 50-14-5(b).
  - If the affidavit required by O.C.G.A. is falsified and the falsification is more than an oversight or mistake, but is intentional and egregious, the person signing the affidavit may be prosecuted for the crime of "false swearing," which is a felony punishable by imprisonment for not less than one or more than five years or a fine of not more than $5,000.00. O.C.G.A. § 16-10-71.

IV. Open Records Act

(with 2012 HB 397 Changes)



IV. OPEN RECORDS ACT

- “Records” are defined as:
  - (2) 'Public record' means 'public record' shall mean 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(a)(2)

IV. OPEN RECORDS ACT (cont.)

Social Media

<u>FaceBook, Twitter, Instagram, et al</u>: Are postings and comments made and published on these platforms "Open Records"?

Must a development authority maintain archives of social media postings and/or comments?

Is a development authority required to post its meeting on its social media page(s)?

Discussion

- Facebook, Twitter, Instagram, etc. posts, tweets, and comments *by a development authority* (not by others) would be considered "records" of that agency under the Open Records Act. *O.C.G.A. § 50-18-71(h).*
- Social media providers are "private vendors" through which an agency contracts (via acceptance of terms of service) to provide social comments, information, posts, etc. The vendors' terms of service govern how long the information is maintained. If prior posts, comments, or information become unavailable under a social media platform due to the providers' terms of service, it is as if the records are no longer available due to destruction or loss under retention schedule.
- If the agency takes steps to proactively maintain the information, then the normal provisions of the Open Records Act would apply, and the agency would need to retain and make the self-retained information available via archive (PDFs, electronic formats, etc.), versus via the social media provider's website or publically available app/platform.

IV. OPEN RECORDS ACT (cont.)

Cell Phones, Texts, and Email

Are text messages records of a development authority? Any difference between members and staff messages?

Should text messages be preserved? If so, how?

Are emails sent to a development authority member's business or private email Open Records?

Discussion

- Text messages (and other forms of mobile application messages) can be records of development authority.
- The definition of "public record" does not explicitly refer to emails or text messages, but is broad enough to include both:
  - 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 . . .

    § 50-18-70(b)(2)
- The use of text messages to communicate regarding matters of a development authority should be discouraged unless the authority takes proactive measures to keep records of the messages (e.g. – group messages regarding meeting reminders, questions about topics at upcoming meetings).
- If a text message is used to communicate information relative to the business of the authority, screenshot and email it to the appropriate representative of the authority so that it can be handled like emails.

IV. OPEN RECORDS ACT (cont.)

- What Must an Authority Do in Response to an Open Records Request?
  - Provide for review and reproduction by the requesting entity all records in the possession of the authority or its agents (including its attorneys) and not subject to an exception from provision.
  - **Case law:** A request is NOT required to be made in writing, and a request must be complied with, even if it is only an oral request, so long as the request does not contain unreasonable requirements (i.e., provision of voluminous records in a very limited time, immediately, at no cost). *See,* Howard v. Sumter Free Press, Inc., 272 Ga. 521, 531 S.E.2d 698 (2000).
  - Oral requests are specifically not enforceable by court action under the OMA, however.
  - **Case law:** An authority is NOT required to sift through its records involving a specific subject in order to locate the information sought by the requesting entity. "[A] thorough reading of the ORA makes it clear that the legislature did not intend for a custodian of public records to comb through his files in search of documents sought by a public citizen. To the contrary, all that is required of a public records custodian is that he provide reasonable access to the files that are sought." Felker v. Lukemire, 267 Ga. 296, 299, 477 S.E.2d 23 (1996). *See also* O.C.G.A. § 50-18-70(d).
  - Unde the OMA, an agency may designate one person or position to receive all request by running a legal ad to that extent – requests not sent specifically to that person will not begin the running of time to respond until properly sent by the requestor.

IV. OPEN RECORDS ACT (cont.)

- What Must an Authority Do in Response to an Open Records Request?
  - Provide the requested records for inspection within a reasonable period of time following the request, said period of time not to exceed three (3) business days. **O.C.G.A. § 50-18-70(f)**.
  - If the records are not subject to an exception and the request asks for the records in electronic form, the records must be provided in electronic form if available in that format. **O.C.G.A. § 50-18-70(g)**. However, an authority is never required to type in, scan, or otherwise convert records in electronic format pursuant to a request in order to comply with the ORA.
  - The records must be provided for the requesting entity to copy or reproduce; the authority and its staff is not required to actually make the copies, but merely must provide the requested records.

IV. OPEN RECORDS ACT (Cont.)

- Records Relevant to Statutory and Constitutional Development Authorities That Are Excepted from Provision to the Public under the ORA.
  - "Real estate appraisals, engineering or feasibility estimates, or other records made for or by the state or a local agency relative to the acquisition of real property until such time as the property has been acquired or the proposed transaction has been terminated or abandoned . . . ."

  O.C.G.A. § 50-18-72(a)(10).

  - "Records subject to the attorney-client privilege or produced by the commission's or agency's attorney or his/her agents and considered to be work product."

  O.C.G.A. § 50-18-72(a)(41). This would include correspondence with counsel, memos, and other information generated by the agency's attorney, whether or not involving pending or potential litigation, which is a broader exception than found in the OMA.

IV. OPEN RECORDS ACT (Cont.)

- Records Relevant to Statutory and Constitutional Development Authorities That Are Excepted from Provision to the Public under the ORA.
  - "Records that consist 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; and 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).

  - "Pending, rejected, or deferred sealed bids or sealed proposals and detailed cost estimates related thereto until such time as the final award of the contract is made, the project is terminated or abandoned, or the agency in possession of the records takes a public vote regarding the sealed bid or sealed proposal, whichever comes first."

  O.C.G.A. § 50-18-72(a)(10).

IV. OPEN RECORDS ACT (Cont.)

- Special Procedures and Rules under the Personnel Exception When Interviewing and Hiring Applicants for the Head of the Agency or Authority.
  - "Records which identify persons applying for or under consideration for employment or appointment as executive head of an agency . . . [are exempt from disclosure]"; provided, however, that at least 14 calendar days prior to the meeting at which final action or vote is to be taken on the position of executive head of an agency . . . , all documents concerning as many as three persons under consideration whom the agency has determined to be the best qualified for the position shall be subject to inspection and copying. Prior to the release of these documents, an agency may allow such a person to decline being considered further for the position rather than have documents pertaining to such person released. In that event, the agency shall release the documents of the next most qualified person under consideration who does not decline the position. If an agency has conducted its hiring or appointment process without conducting interviews or discussing or deliberating in executive session in a manner otherwise consistent with [the OMA], it shall not be required to delay final action on the position. The agency shall not be required to release such records of other applicants or persons under consideration, except at the request of any such person. Upon request, the hiring agency shall furnish the number of applicants and the composition of the list by such factors as race and sex. The agency shall not be allowed to avoid the provisions of this paragraph by the employment of a private person or agency to assist with the search or application process."

O.C.G.A. § 50-18-72(a)(11).

IV. OPEN RECORDS ACT (cont.)

Confidential Prospect Information

Can prospects utilize Trade Secrets Affidavits and rules to protect information submitted to a development authority?

Discussion

- "[T]rade secrets obtained from a person or business entity that are required by law, regulation, bid, or request for proposal to be submitted to" a development authority are exempt from public disclosure. ***O.C.G.A. § 50-18-72(a)(34)***.
- For the exemption to apply, prospects must "submit and attach to the records an affidavit affirmatively declaring that specific information in the records constitute trade secrets pursuant to [the Trade Secrets Act]." ***§ 50-18-72(a)(34)***.
- Under the Trade Secrets Act, a "trade secret" is defined as "information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:

  (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

  (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

O.C.G.A. § 10-1-761(4).

IV. OPEN RECORDS ACT (cont.)

Confidential Prospect Information (*cont'd*)

What is a Non-Disclosure Agreement (NDA)? Can a development authority staff member and/or member legally sign an NDA?

Discussion

- Non-Disclosure Agreements (NDA's) are commonly requested by prospects in competitive projects. NDA's come in many forms, with a multitude of different provisions and terms.
- The Open Records Act does not address NDA's. NDA's typically *do not* met the requirements of information protected by the "trade secret" exemption because the prospect often does not submit the information under affidavit and mark it appropriately.
- NDA's are a "gray" area, and arguably not enforceable as often presented. However, with minor revisions, development authorities can revise an NDA form sufficiently to allow staff and members to be able to sign and carry out its precepts in good faith:
  - Add as appropriate, "to the extent disclosure is not otherwise required under the Georgia Open Records Act."
  - Ensure that NDA's contain provisions which require *the prospect* to take all required actions, including obtaining court orders (similar to the trade secrets exception), at its costs, and agree to reimburse the authority for its reasonable costs and expenses, including attorney's fees, in the course of any such action.

IV. OPEN RECORDS ACT (cont.)

Confidential Prospect Information (*cont'd*)

Can a development authority use a project code name in an Inducement Resolution or MOU? How about a bond resolution?

Does the use of project code names present any other issues?

Discussion

- It is common for State-led and local projects to use or be assigned code names to accommodate prospects' desire for privacy or secrecy relating to a planned new facility or expansion.
- Prospects have numerous and legitimate reasons for avoiding premature public disclosure of a potential new project including:
  - Preventing competitors from obtaining information in the competitive marketplace;
  - Legal and moral concerns of the prospect's workers in other locations which may be disaffected by the new project;
  - Negotiations with other potential communities for project location; and
  - Many other reasons unique to each prospect or location.
- It is generally accepted (though not ideal) for project code names to be used at the adoption of inducement agreements and MOUs. At the time of the bond resolution adoption, however, a project code name will no longer suffice; the name of the prospect which will be carrying out the project is required.
- Watch out for members' conflict of interests! If a project code name is all development authority members have to go on, it could lead to unwittingly stumbling into a conflict situation.

IV. OPEN RECORDS ACT (cont.)

Confidential Prospect Information

Does the GDEcD Open Records exclusion to protect information from disclosure if contained in records held by a development authority?

Discussion

- "Documents maintained by [a State department], which pertain to an economic development project until the economic development project is secured by binding commitment," are exempt from disclosure. ***O.C.G.A. § 50-18-72(a)(46)***. GDEcD is the contemplated and referenced department, but also specifically includes DCA/OneGeorgia Authority and other executive branches.
- The term "economic development project" is defined as "a plan or proposal to locate a business, or to expand a business, that would involve an expenditure of more than $25 million by the business or the hiring of more than 50 employees by the business." ***O.C.G.A. § 50-18-72(a)(46)***.
- State Projects almost always involve cooperation through the involved development authority; however, the exemption specifically only applies to records held by *State* entities . . . .

IV. OPEN RECORDS ACT (cont.)

- What Must an Authority Do in Response to an Open Records Request?
  - "In all cases where an interested member of the public has a right to inspect or take extracts or make copies from any public records, instruments, or documents, any such person shall have the right of access to the records, documents, or instruments for the purpose of making photographs or reproductions of the same while in the possession, custody, and control of the lawful custodian thereof, or his authorized deputy. Such work shall be done under the supervision of the lawful custodian of the records, who shall have the right to adopt and enforce reasonable rules governing the work. The work shall be done in the room where the records, documents, or instruments are kept by law. While the work is in progress, the custodian may charge the person making the photographs or reproductions of the records, documents, or instruments at a rate of compensation to be agreed upon by the person making the photographs and the custodian for his services or the services of a deputy in supervising the work."

O.C.G.A. § 50-18-71

IV. OPEN RECORDS ACT (cont.)

- What Must an Authority Do in Response to an Open Records Request?
  - Respond within three days with records, exemptions asserted, and/or reasons why records cannot be produced within the 3-day period, along with a timeline for provision.
  - Where no fee is otherwise provided by law, the agency may charge and collect a uniform copying fee not to exceed 10 cents per page; must supply an estimate for any amount over $25.00 to be charged beforehand and receive confirmation to proceed from requester.
  - An agency can insist on prepayment if amount to comply exceeds $500.00, and refuse to comply with future requests from an entity that fails to pay a prior properly billed invoice relating to a previous request.
  - In addition, a reasonable charge may be collected for search, retrieval, and other direct administrative costs for complying with a request under this Code section. The hourly charge shall not exceed the salary of the lowest paid full-time employee who, in the discretion of the custodian of the records, has the necessary skill and training to perform the request; provided, however, that no charge shall be made for the first quarter hour.
  - An agency is required to utilize the most economical means available for providing copies of public records.

O.C.G.A. § 50-18-71

IV. OPEN RECORDS ACT (cont.)

- Penalties for Violations of the ORA
  - Both members and the authority may be subject to civil suit and civil fines as well as actions filed by the Attorney General to enforce the ORA. *See* **O.C.G.A. §§ 50-18-73 & 50-18-74**.
  - Attorney's fees and expenses of litigation of the party bringing the action to rectify the violation of the ORA may be assessed against the authority if the court finds the authority's actions in not complying with the ORA were without "substantial justification." **O.C.G.A. § 50-18-73.** *See also* Howard v. Sumter Free Press, Inc., 272 Ga. 521, 531 S.E.2d 698 (2000) (where the trial court awarded attorney's fees to the requesting newspaper).
  - If tried and found guilty, the person or persons responsible for wrongfully or willfully violating the ORA may be found guilty of a misdemeanor and punished by being fined not more than $1,000.00 first violation, $2,500.00 thereafter.

Kevin T. Brown
Seyfarth Shaw LLP
www.seyfarth.com

1075 Peachtree Street, N.E., Suite 2500,
Atlanta, GA 30309

515 Mulberry Street, Suite 200, Macon,
Georgia, 31201

Direct Dial: 404-885-6768

Direct Fax: 404-724-1768
Cell: 478-714-5364

Email: kbrown@seyfarth.com