



# OPEN MEETINGS OPEN RECORDS OMG!

**OPEN MEETINGS AND OPEN RECORDS AFTER  
HB 397**

June 2012



# IT'S NOT SO BAD

“Yesterday (April 17, 2012) Gov. Nathan Deal signed HB 397 into law. The law is a comprehensive re-write of Georgia’s Open Meetings and Open Records Acts. The bill won sweeping, bipartisan approval by the General Assembly this year. The new law is now in effect.”

(from a statement by Attorney General Sam Olens)

- The bill as introduced in 2011 would have made numerous additional legal changes.
- From the point of view of local governments and local authorities, many of these proposed changes were not necessarily for the better.
- As passed, the new law makes a number of attractive changes and its problematical provisions are, on balance- not so bad.



# Agency Definition

- OPEN MEETINGS LAW APPLIES TO EACH COVERED “AGENCY”
- WHAT’S AN “AGENCY”? THE TERM INCLUDES-
  - ▶ Every county, municipal corporation, school district, or other political subdivision of this state;
  - ▶ Every department, agency, board, bureau, office, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of the state;
  - ▶ Every city, county, regional, or other authority established pursuant to the laws of this state
  - ▶ Any nonprofit organization to which there is a direct allocation of tax funds made by the governing authority body of any agency and which allocation constitutes more than 33 1/3 percent of the funds from all sources of such organization; provided, however, that this subparagraph shall not include hospitals, nursing homes, dispensers of pharmaceutical products, or any other type organization, person, or firm furnishing medical or health services to a citizen for which they receive reimbursement from the state whether directly or indirectly; nor shall this term include a subagency or affiliate of such a nonprofit organization from or through which the allocation of tax funds is made

Source: O.C.G.A. Sec. 50-14-1 (a)(1)(C);.



# Office

---

The current definition is expanded such that an office of the agency is an agency subject to the open meetings act

Source: O.C.G.A. Sec. 50-14-1 (a)(1)(C); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Meeting Definition

“A meeting subject to the open meetings law is defined as a gathering of a quorum where official business, policy, or a public matter of the agency is presented, discussed or voted upon.”

- Key element of definition in prior law was- “at a designated time and place”
  - ▶ This element deleted by HB 397
    - List of exemptions in HB 397 mitigates loss of this element
- These earlier proposals are not in final bill-
  - ▶ Emails among a quorum are a meeting.
  - ▶ Two members or more constitute a quorum.

O.C.G.A. Sec. 50-14-1 (a)(3)(A)(i); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Committees

- Committees created by the agency are subject to the open meetings law.
- “If a quorum of a committee gathers for official business, that constitutes a meeting subject to the open meetings law.”
  - ▶ New- Not necessary for any member of the agency to be a member of the committee in order for it to be covered!

Sources: O.C.G.A. Sec. 50-14-1 (a)(3)(A)(ii); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Exemptions

- **THESE GATHERINGS ARE NOT LEGALLY A “MEETING”-**
  - ▶ Inspecting facilities or property where no other official action is discussed or taken
  - ▶ Attending statewide or regional meetings or training where no official action taken
  - ▶ Meetings with state or federal legislative or executive officials where no official action taken
  - ▶ Traveling together where no official business, policy, or public matter is formulated, presented, discussed or voted on
  - ▶ Attending social, civic, ceremonial or religious events where no official business, policy, or public matter is formulated, presented, discussed or voted on
- **HOWEVER, IF IT CAN BE SHOWN THAT THE PRIMARY PURPOSE OF THE GATHERING IS TO AVOID THE REQUIREMENTS OF THE OPEN MEETINGS LAW, THEN THE GATHERING WOULD BE DEEMED A MEETING WHERE ALL NOTICE, ACCESS, AGENDA, SUMMARY AND MINUTES REQUIREMENTS MUST BE MET**

Sources: O.C.G.A. Sec.s 50-14-1 (a)(3)(B)(i), 50-14-1 (a)(3)(B)(ii), 50-14-1 (a)(3)(B)(iii), 50-14-1 (a)(3)(B)(iv), 50-14-1 (a)(3)(B)(v), 50-14-1 (a)(3)(B); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Voting

“With few exceptions (noted below), all votes must be taken in public after due notice to the public”

- ▶ 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, A11A0217 (March 22, 2012).

Sources: O.C.G.A. Sec. 50-14-1 (b)(1); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).





# Decisions Not Binding

- “Decisions that are made outside a meeting that meets the requirements of the act are not binding. Any challenge must be brought within 90 days of the action occurring or being discovered, but in no case more than six months after the date of the contested meeting.”
  - ▶ In other words, action must be contested, if at all, “within 90 days from the date the party alleging the violation knew or should have known about the alleged violation so long as such date is not more than six months after the date the contested action was taken.”

Sources: O.C.G.A. Sec. 50-14-1 (b)(2); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Notice

- Regular meetings, including those of the agency or any committee appointed, must be posted at least one week in advance and must be posted on agency website if the agency has one
  - ▶ Website posting is important new requirement
- “Specially called meetings and emergency meetings with less than 24 hours notice are authorized.”

Sources: O.C.G.A. Sec. 50-14-1 (d)(1); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Minutes-Summaries-Agendas

- Meeting agendas, summaries of meetings and minutes must be prepared for the agency as well as for committee meetings
- “Executive session minutes must be kept, but are confidential unless reviewed by a court in chambers. The executive session minutes will have to specify each issue discussed in executive session. If matters are discussed subject to the attorney-client privilege, the fact that an attorney-client discussion occurred and the subject shall be identified, but the substance of the discussion need not be recorded or identified in the minutes”
  - ▶ new provision
  - ▶ Previously, voting during a closed session was permitted on recommendations of counsel with regard to pending or potential litigation. See *Schoen v. Cherokee County*, 242 Ga. App. 501, 530 S.E.2d 226 (2000).

Sources: O.C.G.A. Sec.s 50-14-1 (e)(2)(B), 50-14-1 (e)(1) and (2), 50-14-1 (e)(2)(C); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Attorney-Client Privilege

- ▶ A meeting cannot be closed to discuss whether or not to close a meeting, even when an attorney is being consulted.
- ▶ The attorney must be the authority's attorney, retained to represent the authority, and not the attorney of a prospect or other entity; otherwise, the attorney-client privilege does not exist and the meeting cannot be closed.
- ▶ In order to go into executive session to discuss potential litigation under the attorney-client privilege, the agency must 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.

Sources: O.C.G.A. Sec. 50-14-2(1).



# Meetings via Teleconference

- Previously allowed only for agencies with statewide jurisdiction, they will now be allowed for all other agencies under limited circumstances, including for emergency or health reasons

- ▶ “Under circumstances necessitated by emergency conditions involving public safety or the preservation of property or public services, agencies or committees thereof not otherwise permitted by [law] 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.
- ▶ On any other occasion of the meeting of an agency or committee thereof, and so long as a quorum is present in person, a member may participate by teleconference if necessary due to reasons of health or absence from the jurisdiction so long as the other requirements of this chapter are met.
- ▶ Absent emergency conditions or the written opinion of a physician or other health professional that reasons of health prevent a member's physical presence, no member shall participate by teleconference pursuant to this subsection more than twice in one calendar year.”

Sources: O.C.G.A. Sec. 50-14-1 (g); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Mediation

- “Mediation proceedings are exempt from the open meetings act. Decisions, however, must be voted on in public and records related to the mediation are subject to disclosure
  - ▶ Arbitration not exempted.”

Sources: O.C.G.A. Sec. 50-14-3 (a)(5); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Incidental Conversation

Conversations unrelated to the business of the agency will not trigger an open meeting

Sources: O.C.G.A. Sec. 50-14-3 (a)(7); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Email Communications

- Emails among agency members do not violate the act. “However, the emails will be considered documents subject to disclosure under the open records act”
  - ▶ Attorney General previously took position that emails constituted a meeting
    - HB 397 reverses this
  - ▶ telephone communications are not addressed.

Sources: O.C.G.A. Sec. 50-14-3 (a)(8); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012)GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).





# Executive Sessions

- “Executive session is defined as a meeting lawfully closed”
  - ▶ former term (proper usage) was “closed session”

Sources: O.C.G.A. Sec.s 50-14-1 (a)(2), 50-14-3 (b)(1), 50-14-3 (b)(1); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Voting in Executive Session

- “In contrast to the general rule, votes may be taken in executive session regarding the following
  - ▶ --to authorize settlement of any matter relative to the attorney-client privilege per OCGA § 50-14-2 (1)
  - ▶ --to authorize negotiations to acquire, dispose or lease property.
  - ▶ --to authorize an appraisal relative to the acquisition or disposal of real estate.
  - ▶ --to contract to purchase, dispose or lease property.
  - ▶ --to enter into an option to purchase, dispose or lease real estate.
- However, no vote to acquire, dispose or lease real estate or to settle a claim is binding until subsequently voted on in open meeting.
  - ▶ reverses recent court ruling that an agency can vote in closed session on matters encompassed within the real estate exception for purchases. See Johnson v. Board of Commissioners of Bibb County, A1 0A0398, (2010).
  - ▶ issues exist about timing of subsequent vote
- Exemptions relating to the disposal of property/real estate are new.

Sources: O.C.G.A. Sec.s 50-14-1 (a)(2), 50-14-3 (b)(1), 50-14-3 (b)(1); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Executive Sessions

- “Applicants for the position of executive head of an agency may be interviewed in executive session”
  - ▶ reverses Attorney General’s prior position on this issue
  - ▶ no exemption for 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.
    - significant change
- “Discussion in executive session of records that are otherwise protected from disclosure under the open records act is authorized”
  - ▶ provides needed clarity
- If a non-exempt topic is brought up in executive session, the presiding officer must immediately rule the discussion out of order.
  - ▶ If the non-exempt discussion continues, the presiding officer must adjourn the meeting.
- The agency may adopt a policy that all agency members must sign the affidavit under oath swearing that only exempt topics were discussed in the executive session rather than just the agency head

Sources: O.C.G.A. Sec.s 50-14-3 (b)(2), 50-14-3 (b)(4), 50-14-4 (b); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Penalties/Enforcement/Defense

- “Criminal penalties for violation of the open meetings act increase from \$500 to \$1000. However, the bill also authorizes a court, as an alternative, to impose civil penalties of up to \$1000 against any person violating the open meetings act. The penalties will increase to \$2500 for subsequent violations in the same calendar year. A criminal violation of the act requires the person to have knowingly and willfully violated the law. There is a good faith defense to such charges.
- On the other hand, civil penalties can be sought if someone negligently violates the requirements of the act. There is no good faith defense if civil penalties are sought”

Sources: O.C.G.A. Sec. 50- 14-6; ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# OPEN RECORDS

- “The new law does the following:
  - ▶ Clarifies and streamlines how government officials must respond to a request; ...
  - ▶ Lowers the cost of records from 25 cents to 10 cents a page; ...
  - ▶ Updates language regarding trade secrets and electronic documents to ensure transparency is not compromised by technological advances; ....”

(from a statement by Attorney General Sam Olens)
- But it also does much more...



# Records Defined

- “Records” are defined this way:
  - ▶ (2) '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.

Source: O.C.G.A. Sec. 50-18-70(a)(2)



# Data/Data Fields

“Expands the definition of public record to include ‘data’ and ‘data fields’”

Sources: O.C.G.A. Sec. 50-18-70 (b)(2); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Who Is Entitled to Access?

- “Expands right to access to public records to individuals outside the State of Georgia.
- Language in current law providing that public records shall be open for inspection “by any citizen of this state” was deleted”
  - ▶ This is only a change in the statute. The Attorney General already interpreted the law this way.

Sources: O.C.G.A. Sec. 50-18-70 (b)(2); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).





# Records Retention

HB 397 specifies that records “shall be maintained by agencies to the extent and in the manner required by” the Georgia Records Act, O.C.G.A. Sec. 50-18-90 et seq.

- ▶ HB 397 also provides that, in addition to other penalties, “persons or entities that destroy records for the purpose of preventing their disclosure under this article may be subject to prosecution under Code Section 45-11-1.”

Sources: O.C.G.A. Sec. 50-18-71 (a); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Timeline

- “Records must be produced within 3 business days if possible. If not, the response must be made within 3 business days as to when the records will be produced”

Sources: O.C.G.A. Sec. 50-18-71 (b)(1)(A); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Records Not in Existence at the Time of the Request

- Agencies will not be required to produce documents not in existence at the time of the request.
  - ▶ A person is not entitled to make standing requests for the production of documents in the future if and when they are produced.

Sources: O.C.G.A. Sec. 50-18-71 (b)(1)(A); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Requests Orally or in Writing/ Enforcement

- “Requests can be made orally or in writing.
  - ▶ However, only requests made in writing are subject to the criminal and civil enforcement proceedings and penalties in the law”

Sources: O.C.G.A. Sec. 50-18-71 (b)(1)(B), 50-18-71(b)(3); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Records Custodian or Officer

- Agency can specify that all written requests go to a records custodian
  - ▶ choices for custodian: “the agency's director, chairperson, or chief executive officer, however denominated; the senior official at any satellite office of an agency; a clerk specifically designated by an agency as the custodian of agency records; or a duly designated open records officer of an agency
- The records custodian must be designated in writing by the agency, the legal organ must be notified, and the custodian must be posted on the agency's website if it has one
  - ▶ Agency must provide notice of this designation to a person requesting records
- Written requests may be made by mail, fax or email
- Three-day response period starts when the custodian gets the request
  - ▶ For example, response period doesn't begin when the request arrives at the agency mailroom or when some agency employee or official gets it that is not actual keeper of the records.

Sources: O.C.G.A. Sec.s 50-18-71 (b)(1)(B), 50-18-71 (b)(1)(B), 50-18-71 (b)(2), 50-18-71 (b)(2), 50-18-71 (b)(2); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Access to Records/Copies of Records

- “Generally, requestors may inspect records.
- At the time of inspection, the requestor may make photographic copies or other electronic copies using portable devices brought in to the place of inspection.”
  - ▶ However, the agency in its discretion may provide copies in lieu of access if the records contain personal information subject to redaction

Sources: O.C.G.A. Sec. 50-18-71 (b)(1)(B); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Fees for Responding to Records Requests/Redaction

- “Charges for search, retrieval and production of copies continues to be allowed at the rate of the lowest paid full time employee able to respond”
  - ▶ New provision- agency is legally authorized to charge for the cost of redacting records by a full time employee
- “Fees for copying records is reduced from \$.25/page to \$.10/page for letter or legal size documents.”
  - ▶ For odd-size printed documents, the actual cost of producing the documents can be charged.”
  - ▶ For electronic records, a agency can charge the actual cost of the media on which the records or data are produced.

Sources: O.C.G.A. Sec. 50-18-71 (c)(1), 50-18-71 (c)(1), 50-18-71 (c)(2); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Fees for Responding to Records Requests/Redaction

- Agency can charge for records--even if not picked up
- If estimated cost of producing records is over \$25.00, the agency must notify the requestor within three business days of the request as to the estimated amount. The agency can defer search and retrieval until the requestor agrees to pay the estimated amount
- If estimated cost of producing records is over \$500, the agency may require prepayment before the search, retrieval, review or production of records
- If costs not paid to the agency for prior requests, the agency may require prepayment for all new requests, regardless of amount, until the previous charges are paid

Sources: O.C.G.A. Sec.s 50-18-71 (c)(3), 50-18-71 (d), 50-18-71 (d), 50-18-71 (d); ACCG, "Summary: Open Meetings/Open Records" (April 20, 2012); GMA, "Summary: Open Meetings/Open Records" (April 2, 2012).





# Discovery

If records are sought as part of ongoing litigation, the request must be in writing and copied to the agency attorney simultaneously. The agency would have to prepare a duplicate set of the requested documents produced that must be provided to the agency attorney unless the agency attorney elects not to receive them

Sources: O.C.G.A. Sec. 50-18-71(e); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Requests for Emails or other Electronic Messages

“Requests for emails should contain information about the requested messages that is reasonably calculated to allow the records custodian to locate the requested messages such as name, title, office or specific data base to be searched to assist the custodian in finding the emails”

Sources: O.C.G.A. Sec. 50-18-71(g); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Electronic Records/Agency Website

- Agencies must produce electronic copies, or if the requestor prefers, printouts of electronic records or data from database fields used by the agency
- Agencies cannot refuse to produce electronic records, data or data fields on the grounds that exporting data or redaction of exempted data will require inputting range, search, filter, report parameters, or similar commands or instructions into the agency's computer system
- A requestor may request that electronic records, data and data fields be produced in the format in which such data or records are kept by the agency, or in a standard export format in which case the data or records are to be downloaded in such format onto suitable electronic media by the agency

Sources: O.C.G.A. Sec. 50-18-71 (f), 50-18-71 (f), 50-18-71 (f); ACCG, "Summary: Open Meetings/Open Records" (April 20, 2012); GMA, "Summary: Open Meetings/Open Records" (April 2, 2012).



# Agency Website/Private Vendors

- In lieu of providing printouts, an agency may provide access to records through a website accessible by the public. However, if the request is for data fields, the agency cannot refuse to comply on the grounds that the data is available on the website
- An agency cannot use private vendors to limit access data maintained by the vendor for the agency and must ensure that the vendor does not impede access to public records

Sources: O.C.G.A. Sec.s 50-18-71(h), 50-18-71 (h); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Exemptions from Disclosure

- “Other than those noted below, generally the exemption provisions are rewritten for clarity and consistency with no intent to broaden and limit their application:
  - ▶ Pending, rejected or deferred sealed bids or proposals and related detailed cost estimates are exempt from disclosure, but must be released after the final award of the contract is made, the project is terminated or abandoned, or the agency takes a public vote on the bids or proposals, whichever occurs first
  - ▶ Personal emails addresses, unlisted phone numbers, cell phone numbers found in public records are exempted and must be redacted before the underlying document is released
  - ▶ The exemption for personal information regarding public employees, such as home address, home telephone numbers, social security numbers, birthdates, credit card information, bank account information, and similar personal data is extended to former employees as well as current employees”

Sources: O.C.G.A. Sec. 50-18-72 (a)(10), 50-18-72 (a)(20)(A), 50-18-72 (a)(21); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Exemptions from Disclosure- Economic Development Community Development

- “The burden for determining whether or not records may include information that would reveal trade secrets is substantially shifted from the public agency to the private entity claiming the exemption”
  - ▶ “[The exemption applies to 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.”
- “Records of the Department of Economic Development pertaining to an economic development project until the project is secured by a binding commitment or has been terminated; and records related to state training programs for economic development projects”
  - ▶ some rules apply-
    - “No later than five business days after the Department of Economic Development secures a binding commitment and the department has committed the use of state funds from the OneGeorgia Authority or funds from Regional Economic Business Assistance for the project pursuant to Code Section 50-8-8, or other provisions of law, the Department of Economic Development shall give notice that a binding commitment has been reached by posting on its website notice of the project in conjunction with a copy of the Department of Economic Development's records documenting the bidding commitment made in connection with the project and the negotiation relating thereto and by publishing notice of the project and participating parties in the legal organ of each county in which the economic development project is to be located.
    - As used in this paragraph, the term 'economic development project' means 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;

Sources: O.C.G.A. Sec.s 50-18-72 (a)(34), 50-18-72(a)(45), 50-18-72 (a)(46) and (47) ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Exemptions from Disclosure

- Records pertaining to rating plans, underwriting rules and similar proprietary information used to administer self-insurance to an agency are exempt
- “Exhibits tendered to a court in a civil or criminal trial are not open to disclosure without the approval of the court. Where disclosure is allowed, it is done under circumstances provided for in the law. Where the exhibits relate to criminal charges relating to sexual exploitation of children, violation of this confidentiality provision is punishable by up to 20 years in jail, a fine of up to \$100,000, or both”

Sources: O.C.G.A. Sec. 50-18-72 (c) and (d); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Attorney-Client Privilege

- “The attorney-client privilege is broadened to include all records containing communications subject to the attorney-client privilege recognized by state law, with one exception.
  - ▶ The privilege does not extend to factual findings related to an investigation conducted by an attorney on behalf of the agency, so long as such investigation does not pertain to pending or potential litigation, settlement, claims or other judicial actions.
- Where records are withheld under this provision, the requestor make seek an in camera review of the records to determine whether or not the records were properly withheld”

Sources: O.C.G.A. Sec. 50-18-72 (a)(41); ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).





# Enforcement/Penalties/Defense

- “Criminal penalties for an open records violation increase from \$500 to \$1000. However, the bill also authorizes a court, as an alternative, to impose civil penalties of up to \$1000 against any person violating the open records act. The penalties will increase to \$2500 for subsequent violations in the same calendar year. A criminal violation of the act requires the person to have knowingly and willfully violated the law. There is a good faith defense to such charges.”
  - ▶ “Any person or entity knowingly and willfully violating the provisions of this article by failing or refusing to provide access to records not subject to exemption from this article, or by knowingly and willingly failing or refusing to provide access to such records within the time limits set forth in this article, or by knowingly and willingly frustrating or attempting to frustrate the access to records by intentionally making records difficult to obtain or review shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$1,000.00 for the first violation.”
- “On the other hand, civil penalties can be sought if someone negligently violates the requirements of the act. There is no good faith defense if civil penalties are sought”

Sources: O.C.G.A. Sec.s 50-18-73 and § 50-18-74; ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# Enforcement/Arrest Warrants

“Any prosecution to enforce the open records act can be commenced only by issuance of a citation served on the accused public official or employee. The defendant cannot be arrested prior to the time of trial, unless the defendant fails to appear for arraignment or trial.”

Sources: O.C.G.A. Sec.s 50-18-73 and 50-18-74; ACCG, “Summary: Open Meetings/Open Records” (April 20, 2012); GMA, “Summary: Open Meetings/Open Records” (April 2, 2012).



# CONCLUSION

- GMA and ACCG view the new law this way-
  - ▶ In addition to substantive changes, HB 397 significantly reorganizes current law, eliminates some inconsistencies, incorporates settled case law, and in some cases, reverses case law.
- In practical terms, the new law will provide more of a “roadmap to compliance” for a local government or local authority
- There will be some bumps along the way
- May your bumps be few and far between!



# QUESTIONS?

If you have any questions or comments on open meetings or open records, please do not hesitate to let me know.

Daniel M. McRae, Partner  
Seyfarth Shaw LLP  
1075 Peachtree St., N.E., Ste. 2500  
Atlanta, GA 30309  
404.888.1883  
404.892.7056 fax  
dmcrae@seyfarth.com  
dan@danmcræ.info



# MORE INFORMATION

This presentation is a quick-reference guide for elected and appointed officials and their staffs, company executives and managers, economic developers, participants in the real estate and financial industries, and their advisors. The information in this presentation is general in nature. Various points which could be important in a particular case have been condensed or omitted in the interest of readability. Specific professional advice should be obtained before this information is applied to any particular case. Any tax information or written tax advice contained herein is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

14565503.2