IN THE
COURT OF APPEALS OF THE
STATE OF GEORGIA

APPEAL NO. A21A0287

ALBERT E. LOVE et al.

Appellants,

vs.

ATLANTA FALCONS STADIUM COMPANY, LLC.

Appellee.

BRIEF OF AMICI CURIAE GEORGIA PRESS CLUB, GEORGIA FIRST AMENDMENT FOUNDATION, GEORGIA PRESS ASSOCIATION, AND UGA SCHOOL OF LAW'S FIRST AMENDMENT CLINIC IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

Amici curiae are the Georgia Press Association, the Georgia First Amendment Foundation, and the UGA School of Law's First Amendment Clinic (collectively, "amici"). Amici are groups dedicated to protecting transparency in government affairs, including through the use and enforcement of Georgia's Open Records Act.

The Georgia Press Association (GPA) is a non-profit association whose members are 139 daily and weekly Georgia newspapers. An important mission of the GPA is to protect, promote, foster and advance the freedom of speech and of the press in Georgia. One way in which this is accomplished is to advocate for enforcement of Georgia Open Records and Open Meetings Laws. While GPA is an organization of newspapers, its advocacy is intended to benefit all Georgians who are served by vigorous protection of freedom of speech.

The Georgia First Amendment Foundation is a not-for-profit, non-partisan organization which advocates for greater government transparency, and which, for more than 25 years, has been providing educational services to citizens, journalists, and public officials about Georgia's open records laws. As part of its overarching mission, the Georgia First Amendment Foundation works to ensure public access to information about government operations throughout the state.

The First Amendment Clinic at the University of Georgia School of Law defends and advances freedoms of speech and the press through direct client

representation and advocacy on behalf of journalists, students, government employees, and public citizens. Training law students to be leaders on First Amendment issues as litigators and community educators, the Clinic's work promotes free expression, open government, and the creation of a more informed citizenry.

INTRODUCTION

The Open Records Act ("ORA" or "the Act"), codified at O.C.G.A. § 50-18-70, provides the public with broad access to see, inspect, and copy all "public records." Particularly relevant here, O.C.G.A. § 50-18-70(b)(2) states that "public records" include "all documents . . . prepared and maintained or received . . . *by a private person or entity in the performance of a service or function for or on behalf of an agency*." (emphasis added). "Agency," in turn, includes "[e]very state department, agency, . . . and authority." O.C.G.A. §§ 50-14-1(a)(1)(A) & 50-18-70(b)(1).

Under § 50-18-70(b)(2) of the ORA, Appellants seeks construction documents and loan agreements in the possession of Appellee Atlanta Falcon Stadium Company, LLC ("StadCo") related to its construction, operation, and maintenance of the Mercedes Benz Stadium ("the Stadium") pursuant to a contract with a state agency known as the Georgia World Congress Center Authority

("GWCCA"). The requested documents in StadCo's possession fall squarely within the plain language of § 50-18-70(b)(2) defining "public records."

However, in granting summary judgment for StadCo, the trial court erroneously construed O.C.G.A. § 50-18-70(b)(2) to mean that documents held by a private entity are only subject to the ORA when the entity performs work that the delegating agency "would otherwise have to perform," and not when a private entity performs "work that the agency is merely authorized to do." SJ Order at p. 5. This is a fabricated distinction that appears nowhere in the language of the ORA or in any case law interpreting the ORA, and that runs directly counter to the ORA's stated public policy goals of promoting transparent government. *See* O.C.G.A. § 50-18-70(a) ("public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions").

If allowed to stand, the trial court's interpretation of O.C.G.A. § 50-18-70(b)(2) creates a gaping loop hole in the ORA whereby a government agency may avoid public records scrutiny by delegating to a private entity any number of services or functions that the agency would otherwise have performed itself. This is an absurd and deeply troubling result that threatens to nullify the General Assembly's enactment of O.C.G.A. § 50-18-70(b)(2) concerning public records in the possession of private entities.

Amici therefore respectfully request that this Court reject the trial court's unsupported interpretation of O.C.G.A. § 50-18-70(b)(2), reverse the grant of summary judgement for Appellee StadCo, and hold that the requested records in Appellee's possession are subject to the ORA by virtue of having been prepared and maintained or received in the performance of "a service or function for or on behalf of" GWCCA.

ARGUMENT

I. The Georgia Supreme Court requires a plain language interpretation of O.C.G.A. § 50-18-70(b)(2).

The Georgia Supreme Court holds that when construing the meaning of a statute, a court "must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would." *Deal v. Coleman*, 294 Ga. 170, 172 (2013). In *Smith v. Northside Hosp., Inc.*, 302 Ga. 517, 521 (2017), the Georgia Supreme Court applied this plain-language analysis specifically to O.C.G.A. § 50-18-70(b)(2) stating, "we must afford the statutory text its plain and ordinary meaning[.]"

A. A plain language analysis of O.C.G.A. § 50-18-70(b)(2) is in line with how courts interpret other states' open records laws.

A majority of states have enacted a state-level counterpart to the federal Freedom of Information Act that permits citizens to request and inspect government records. Courts regularly employ a plain language analysis to interpret these statutes.

For instance, in determining the amount of time agencies had to respond to a records requests under Pennsylvania's Right-To-Know Law, the state supreme court held that "the best indicator of legislative intent is the plain language of the statute[,]" in which "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]" *Commonwealth v. Donahue*, 626 Pa. 437, 461 (2014) (quoting 1 Pa.C.S. § 1903(a)).

Similarly, the Supreme Court of Kansas used a plain language approach to determine whether a county commission could be compelled to provide records requested via the Kansas Open Records Act. *State v. Great Plains of Kiowa Cty., Inc.*, 308 Kan. 950 (2018). The court found that "[r]elying on the plain language selected by the legislature is the best and only safe rule for determining legislative intent, and such plain language takes priority over both judicial decisions and policies advocated by the parties." *Id*. at 957.

When analyzing whether a nonprofit corporation that accepted public funds was subject to the open records law, the Supreme Court of North Dakota likewise held that "[l]egislative intent must first be sought from the language of the statute." *Adams County Record v. Greater N.D. Ass'n*, 529 N.W.2d 830, 833 (N.D. March 16, 1995) (describing prior reliance on plain language interpretations of the state's open records law).

These three jurisdictions, among others, have specifically held that interpretation of open records laws requires a plain-language reading of the statute. Under the Georgia Supreme Court's decision in *Northside*, the same standard must apply here in order to promote the accurate and intended meaning of O.C.G.A. § 50-18-70(b)(2).

B. By a plain language interpretation of "service or function for or on behalf of an agency," the ORA applies to the requested records in Appellee StadCo's possession.

The ORA defines "public records" as "all documents . . . prepared and maintained or received . . . by a private person or entity in the performance of a service or function for or on behalf of an agency." O.C.G.A. § 50-18-70(b)(2).

Here, there is no dispute that GWCCA is a state agency. Its statutory authority includes "acquiring, *constructing*, equipping, *maintaining*, and *operating* the project, in whole or in part...to promote...entertainment, recreational, athletic, or other events and related tourism within the state...." O.C.G.A. § 10-9-4 (a) (emphasis added). GWCCA's statutory authority also allows it to "make all contracts and to execute all instruments necessary or convenient to its purposes." O.C.G.A. § 10-9-4 (b)(6).

Pursuant to the foregoing aspects of its statutory empowerment, GWCCA contracted with Appellee StadCo to build, operate, and maintain the Mercedes Benz Stadium ("the Stadium"). The Stadium replaced the Georgia Dome that GWCCA

had owned and operated. The Stadium, like the Georgia Dome before it, is a sports and shopping center serving both Atlanta and Georgia broadly. The Stadium is the regular host of the Southeastern Conference Football Championship Game, Georgia high school championship games, and is the home stadium for both the Atlanta Falcons and Atlanta United FC. Additionally, the Stadium, like the predecessor Georgia Dome, serves as a venue for concerts, events, and tours. The uses of the Stadium are in direct furtherance of GWCCA's statutory duty to promote recreation, athletics, and tourism in Georgia. The construction, operation, and maintenance of the Stadium are therefore clearly within the legislatively sanctioned purview of GWCCA. So, too, is GWCCA's contractual delegation of these services and functions to StadCo.

Under a plain language analysis, StadCo is therefore performing both a service and function "for" GWCCA in that StadCo shoulders "the duty or responsibility" of carrying out tasks related to the Stadium based on GWCCA's contractual delegation to StadCo.[1] StadCo is also performing a service and function "on behalf of" GWCAA in that StadCo's involvement with the Stadium came about only "because of" GWCAA having contracted with StadCo.[2] Thus, the Stadium

[1] Cambridge Dictionary defines "for" as having "the duty or responsibility". https://dictionary.cambridge.org/us/dictionary/english/for.
[2] Cambridge Dictionary defines "on behalf of" as "representing" or "because of." https://dictionary.cambridge.org/us/dictionary/english/behalf?q=on+behalf+of.

construction documents and loan agreements in StadCo's possession are "public documents" as defined by O.C.G.A. § 50-18-70(b)(2) and must be disclosed.

C. A plain language interpretation of the ORA would not subject every government contractor to the disclosure of all its records.

The trial court posits that the application of a plain-language interpretation of the ORA "would subject *every* government contractor to the ORA, regardless of the nature and scope of the work done." SJ Order at 5, n.4 (emphasis in original). To the contrary, a private contractor's records would only be subject to the ORA *depending upon* (not regardless of) the nature and scope of the work done -- i.e., only if the private entity is performing work that constitutes "a service or function for or on behalf of an agency" do its records relating to that service or function become publicly obtainable. O.C.G.A. § 50-18-70(b)(2). The ORA otherwise lays no claim to the private entity's records.

The trial court also posits that a private entity has to "sufficiently step into the agency's shoes to become subject to the ORA." SJ Order at 5. However, the plain language of § 50-18-70(b)(2) contains no requirement that a private entity supplant a public agency in order for the ORA to apply. Rather, the straight-forward wording of § 50-18-70(b)(2) makes clear that a non-negotiable term of a private entity's performing a service or a function for a public agency is that the related records will be subject to public disclosure, regardless of whether the private entity is taking over certain functions for the public agency entirely or merely partnering with the agency.

II. The trial court misinterpreted *Northside*, reading it as creating a dichotomy in agency function where none exists.

The trial court misinterpreted *Smith v. Northside Hospital, Inc.*, 302 Ga. 517 (2017), as creating a dichotomy between "mandatory" versus "discretionary" agency functions for the purposes of applying O.C.G.A. § 50-18-70(b)(2). However, neither the language of the ORA, nor the opinion in *Northside* supports the trial court's dichotomous view.

As an initial matter, nowhere within the Open Records Act does the statute's language draw a distinction between "mandatory" versus "discretionary" agency functions in defining what "public records" are subject to disclosure. Such a distinction – even if it could reliably be drawn without litigating in every case which agency functions are "discretionary" versus which are "mandatory" – would contravene the "strong public policy of this state [that] is in favor of open government" and that recognizes that "open government is essential to a free, open, and democratic society," O.C.G.A. § 50-18-70(a). Bluntly stated, limiting public disclosure to only "mandatory" government functions, as the trial court suggests, would eviscerate the ORA.

Turning to the *Northside* decision, the court held that a private entity is acting "on behalf of" a government agency "when the agency arranges for the private entity to perform a government function *that the agency would otherwise have to perform*." 302 Ga. at 521 (emphasis added). Consistently here, the functions performed by

StadCo in constructing and operating the Stadium were functions that GWCCA would "have [had] to perform" itself, if not for its delegation to StadCo. In other words, once GWCAA decided a new stadium was desired, it had two options: build and operate the Stadium itself, or contract with another entity – StadCo – to do so in its place. GWCCA chose the latter. This arrangement between GWCCA and StadCo therefore clearly falls within the scope of § 50-18-70(b)(2)'s "on behalf of" prong, as interpreted by *Northside*.

Additionally, *Northside* did not address § 50-18-70(b)(2)'s "for" prong and therefore does not suggest that "performance of a service or function *for* . . . an agency" requires that the agency "otherwise have to perform" the service or function being carried out by the private entity in order for the private entity's related records to be subject to the ORA. Thus, the "for" prong of § 50-18-70(b)(2) independently requires StadCo to produce the requested Stadium documents in its possession, regardless of whether StadCo was performing any service or function for GWCAA that the agency would otherwise have performed itself.

The trial court's reading of *Northside* is further flawed because it interpreted *Northside* as creating a limiting principle based on the alleged distinction between "mandatory" versus "discretionary" agency functions when there is no indication in the *Northside* opinion that this was the Georgia Supreme Court's intent. Indeed, if the *Northside* court had intended to announce such a sweeping and constrictive rule

as that fashioned by the trial court's summary judgement order, the *Northside* court would surely have clearly enunciated that rule and expounded upon it so that lower courts would know to apply it. But nothing of this sort appears in the *Northside* opinion. Instead, the *Northside* opinion goes to some length to emphasize its reliance on the plain language of O.C.G.A. § 50-18-70(b)(2) which, in turn, says nothing – and, indeed, the entire ORA says nothing – about distinguishing so-called "mandatory" from "discretionary" agency functions. See 302 Ga. at 521.

Moreover, the trial court's constrictive reading of *Northside* is at odds with the rest of *Northside*'s deliberately expansive reading of O.C.G.A. § 50-18-70(b)(2). Specifically, the *Northside* court took a broader view of the private-entity provision than had the two lower courts and rejected the lower courts' holdings that, in order for O.C.G.A. § 50-18-70(b)(2) to apply, the delegating agency must have approved, directed, or been involved with the specific transactions at issue by the private entity. *See* 302 Ga. at 522-23 (rejecting the idea that "specific government involvement at every step [is] the *sine qua non* of whether the private entity is performing a service or function on behalf of the agency"). Given *Northside*'s championing of a more liberal interpretation of O.C.G.A. § 50-18-70(b)(2) consistent with the ORA's stated purpose of promoting open government, *see* § 50-18-70(b)(2), it makes no sense that in the same opinion the court would at the same time severely curtail O.C.G.A. § 50-18-70(b)(2)'s applicability without the court's so much as acknowledging that it was

doing so. Hence, read in its totality, the *Northside* opinion provides no authority for the trial court's restrictive and textually unsupported view of O.C.G.A. § 50-18-70(b)(2) as applying only to so-called "mandatory" agency functions.

IV. Access to StadCo records relating to use of taxpayer dollars furthers the public interest and advances the ORA's broad public policy goals.

The ORA states that "public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds." O.C.G.A. § 50-18-70(a).[3] Disclosure of Appellee StadCo's records pertaining to use of taxpayer dollars in the construction of the Stadium advances this public policy goal.

The construction of the Stadium, and its on-going maintenance, has been publicly funded, in part, through bond financing by the City of Atlanta using a hotel/motel tax. *See* Tim Tucker, *Falcons Secure $850M in Stadium Financing*, AJC https://www.ajc.com/sports/football/falcons-secure-850m-stadium-financing/1hh8Aj1ni6jnAC6I2ZiluL/ (Sep 23, 2016). The use of taxpayer dollars

[3] *See McFrugal Rental of Riverdale v. Garr*, 262 Ga. 369, 369 (1992) (purpose of the ORA "is to encourage public access to government information and to foster confidence in government through openness to the public"). *McFrugal* mirrors language found in other states' open records acts. *See, e.g.,* W.Va. Code §29B-1-1 ("it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government[.]"); Wi. Code § 19.31 ("it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government[.]").

creates a strong public interest in disclosure of records related to such spending. *See also Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 66 (1980).

For example, in *Cent. Atlanta Progress, Inc. v. Baker*, 278 Ga. App. 733 (2006), the Georgia Court of Appeals considered whether, in relevant part, the construction bid from a private company that involved the use of public funds to build the NASCAR hall of fame was subject to the ORA. Noting the "significant involvement of public. . . resources in the matter," the Court of Appeals declined to apply a narrow interpretation of the ORA and held that the document's disclosure was proper. *Id*. at 737. *See also United Healthcare of Ga. v. Ga. Dept. of Cmty Health*, 293 Ga.App. 84, 87-88 (2008) (ORA applied to records of a private corporation relating to its contract with a state agency that involved the "current and future expenditure of substantial public funds").

Similarly, in the present case, StadCo's contract with GWCCA to build, operate, and maintain the Mercedes Benz Stadium involved significant public funding.[4] As use of taxpayers' dollars is precisely a situation where the ORA intends

[4] *See* Project Funding and Development Agreement between GWCCA, StadCo and the Atlanta Falcons Football Club, LLC dated February 5, 2014 at Exhibit "E" of the Appellants' Motion for Summary Judgment. (R.v.3. pp. 530 – 609). This Agreement, at Article VII, describes the public contribution for construction of the Stadium. (R.v.3 pp. 558 – 563). Specifically, Section 7.9(c) describes the Invest Atlanta $200,000,000 bond funding grant to StadCo as a public contribution. (R.v.3 p. 562).

transparency, the Stadium construction contract and loan agreements in StadCo's possession are therefore subject to the ORA.

V. StadCo's assertion of trade secrets is unfounded.

O.C.G.A. § 50-18-72(a)(34) provides an exemption to the ORA for trade secrets. However, O.C.G.A. § 50-18-72(b) states that this section of the Act "shall be interpreted narrowly[.]" *See also Hardaway Co. v. Rives*, 262 Ga. 631, 634 (1992) ("any purported statutory exemption from disclosure under the Open Records Act must be narrowly construed").

First, StadCo has not made the showing required to protect documents under the ORA trade secret provision as it provided no affidavit when submitting the records to GWCCA that asserted the records constituted trade secrets. Moreover, even if StadCo had done so, the records sought in the present case would not qualify as trade secrets under Georgia law.

The ORA itself does not define what constitutes a trade secret but courts have established the following two-part test: (1) the party asserting the trade secret must "[d]erive[ ] economic value, actual or potential, from [the information] 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 (2) "the information must be 'the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" *United HealthCare of Ga., Inc. v. Ga. Dep't*

of Cmty. Health, 293 Ga. App. 84, 89 (2008) (citing O.C.G.A. § 10-1-761 (4)(A) & (B); *Douglas Asphalt Co. v. E. R. Snell Contractor*, 282 Ga. App. 546, 549 (2006)).

The StadCo documents at issue here fail this trade-secrets test. Construction contracts from six or more years ago have not been shown to be of economic value to a current day competitor. Years-old loan documents are similarly unlikely to inform a competitor of StadCo's current financial circumstances or decisions.

In a similar case, when presented with the question of whether a price proposal from a winning bid submitted to an agency was subject to the ORA, this Court held that the defendants failed to present sufficient evidence as to how disclosure of the unredacted price proposals would expose trade secrets. *See State Rd. & Tollway Auth. v. Elec. Transaction Consultants Corp.*, 306 Ga. App. 487, 490 (2010) ("The conclusory statement in Electronic's verified complaint, that the method by which it allocates costs and pricing for the services it provides is unique, provides no specific basis to evaluate its claims."). StadCo has likewise offered only conclusory statements to support its assertion that economic harm will flow from disclosure of the requested documents. StadCo also failed to ascribe an economic value to the documents at issue and could not identify a methodology by which a monetary value for these documents could be determined. (See Defendant's Response to Interrogatorys Nos. 11 and 12, at Exhibit "H," R.v.3, pp. 639-640). Furthermore, StadCo could not identify to whom the unredacted documents would have value.

(See Defendant's Response to Interrogatory No. 13 at Exhibit "H", R.v.3, p. 640). StadCo's contention of trade secrets is unfounded and contrary to the intended narrow construction of exemptions to the ORA.

CONCLUSION

Georgia, like other states, enacted its ORA in the pursuit of open and transparent government. In furtherance of these ideals, the legislature intended for the ORA to be read broadly and its exemptions interpreted narrowly. Under O.C.G.A. § 50-18-70(b)(2), performing a service or function "for or on behalf of" a state agency renders related documents in a private entity's possession subject to the ORA. A plain language reading of this provision, as well as the Georgia Supreme Court's opinion in *Smith v. Northside Hospital, Inc.*, 302 Ga. 517 (2017), require that Stadium construction documents and loan agreements in StadCo's possession are subject to the Act. Use of significant public funds to finance the Stadium project further weighs in favor of the documents' disclosure. And StadCo's trade secrets claim should be viewed with skepticism in light of its failure to carry its burden in establishing the applicability of this ORA exemption.

Amici respectfully request that this Court reverse the trial court's grant of summary judgement for StadCo and hold that by virtue of performing "a service or function for or on behalf of" GWCCA, the Stadium records in StadCo's possession are subject to the ORA.

Respectfully submitted this 11th day of December, 2020.

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RULE 24 CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

The undersigned certifies that she has caused a copy of the foregoing document to be served upon the following counsel by United States Mail, properly posted and addressed as follows:

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