IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A17A0620

CONSUMER CREDIT RESEARCH FOUNDATION,

Appellant,

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA and CAMPAIGN FOR ACCOUNTABILITY,

Appellees.

BRIEF OF APPELLEE CAMPAIGN FOR ACCOUNTABILITY

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Summary of Argument

Appellee Campaign for Accountability ("CfA") respectfully submits that this Court should affirm the trial court's ruling because the Georgia Open Records Act[1] does not prohibit state agencies from exercising discretion to release records to the public in those instances in which disclosure is not prohibited by another law, rule, or regulation. Stated differently, even where state agencies may otherwise withhold public records pursuant to an exemption within the Open Records Act (a "GORA exemption"), the GORA exemption does not strip state agencies of the discretion to instead release the public record where the law does not specifically prohibit disclosure (such as laws that prohibit disclosure of records that would invade personal privacy or violate some other state or federal law if released to the public).

Thus, CfA agrees with Appellant Consumer Credit Research Foundation ("CCRF") that the public is *not entitled* to receive all government records. The General Assembly included in the Act more than 50 exemptions to the Act's mandatory disclosure requirements for the express purpose of allowing state

[1] The Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.*, is referred to herein as the "Open Records Act," the "Act," or the "GORA."

agencies to refuse records requests and thereby avoid public disclosure of certain records. For those records, "[p]ublic disclosure shall not be required[.]" O.C.G.A. § 50-18-72(a). Accordingly, when a document is subject to one of the GORA exemptions, a requesting party can never force a state agency to release the document (thereby alleviating CCRF's misplaced concern that sensitive information will be without protection unless this Court overrules the trial court).

Not requiring disclosure, however, differs significantly from *prohibiting* disclosure. The language of the Open Records Act and cases interpreting the statute make clear that disclosure of public records otherwise subject to the Act is prohibited only when: (a) the language of the GORA exemption also contains an express prohibition against disclosure; or (b) an independent law or rule bars disclosure; or (c) a personal privacy interest bars disclosure. These three categories of non-discretionary prohibitions cover a wide variety of public records, including those records containing the types of information (like jurors' personal information or home security codes) that CCRF incorrectly argues would be subject to mandatory disclosure if its position does not prevail. To the contrary, such records are protected from disclosure by independent privacy laws or other bars on disclosure, which is entirely consistent with Appellees' position in this appeal.

By contrast, in cases where a GORA exemption from the Act's mandatory disclosure exists, but an express statutory or privacy prohibition is absent, as here, a state agency may, in its discretion, choose to release the requested public records in response to an Open Records Act request. Alternatively, it may choose to withhold them. CCRF's position—that *all* of the GORA exemptions *require* non-disclosure—is contrary to the plain language of GORA and would create a dangerous precedent. Private parties, upon the filing of a GORA request, effectively would be able to gag a state agency and shut down its disclosure of public records, even when the agency determines that disclosure is in the public's best interest, or necessary for public safety, or warranted to protect and defend the integrity of our public institutions.[2]

This case is a perfect example of the dangerous precedent CCRF would have this Court set. In its Open Records Act request, CfA implicitly raised questions regarding academic bias at Kennesaw State University ("KSU") as a result of undue influence by CCRF in the research process. (R-26.) Rather than allow KSU

[2] For the Court's reference, CfA has prepared a graphic that illustrates the conceptual interplay among: (1) GORA's mandatory disclosure requirements; (2) the prohibition on disclosure found in certain exemptions and independent statutes or laws; and (3) those records whose disclosure is left to an agency's discretion under a GORA exemption. (*See* Section E below.)

and the Board of Regents of the University System of Georgia ("Board of Regents") to demonstrate the integrity of KSU's work by releasing the requested communications, CCRF seeks to bind the government's hands and force it to stand by silently, despite the fact that CCRF has never asserted a valid personal privacy interest or any other recognized prohibition to prevent disclosure in this case.

CCRF's own undefined interests in preventing government transparency and denying the public access to public records directly contravenes the Board of Regents' expressed desire for transparency and openness in the public's interest. Yet CCRF argues that the GORA exemptions unconditionally shield disclosure and trump the public interest. This Court should acknowledge the Board of Regents' discretion to decide whether or not to release public records when their disclosure is not otherwise prohibited. Thus, CfA respectfully requests that this Court affirm the judgment below.

PART ONE—RESPONSE TO APPELLANT'S STATEMENT OF FACTS

CfA does not contest the accuracy or completeness of CCRF's statement of facts.

PART TWO—ARGUMENT AND CITATION OF AUTHORITY

CfA agrees that a *de novo* review standard applies to this appeal.

CfA further submits that the Court need not consider CCRF's second enumeration of error, because CfA does not contest, for purposes of this appeal, that the records it requested are subject to the exemptions set forth in O.C.G.A. §§ 50-18-72(a)(35)-(36).

The heart of this appeal is CCRF's first enumeration of error. Despite Appellant's posturing, the trial court did *not* hold that government agencies have "*unfettered"* discretion with respect to the Open Records Act exemptions (emphasis added). Instead, the trial court held only that the GORA exemptions—specifically those contained in O.C.G.A. § 50-18-72(a)(35) and (36)—vest in the government discretion to disclose or withhold records where disclosure otherwise would be mandatory. (R-695-99). The law in Georgia remains that a state agency's discretion is nonetheless constrained by many other factors, not least of which are (1) laws, rules, or regulations within or outside of the Open Records Act that explicitly prohibit disclosure of public records; and (2) the courts' ability to enjoin release of public records containing an individual's personal information. *See also* Section E below.

Nor do Appellees contend that state agencies have discretion "whether to apply" the exemptions, as CCRF claims in its first enumeration of error. State agencies are obligated to release public records unless an exemption or other prohibition applies. And the question of whether an exemption applies is not subject to the state agency's discretion (as demonstrated by the numerous cases in which courts have corrected state agencies who erroneously claimed that an exemption applied where it did not). Rather, whether an exemption applies is determined by the Open Records Act statute. In cases where an exemption applies and no statute, regulation, or privacy concern dictates otherwise, a state agency has discretion to release public records (as it would have done but for the exemption), or to employ the exemption as a basis to withhold the records.

CCRF's first enumeration of error (and its brief) also misstates the status of the law regarding the withholding of public records following a request under the Open Records Act. No court has held that the Open Records Act mandates that records be withheld simply because they are subject to a GORA exemption. Indeed, the trial court properly recognized this in its Order. (R-695-99.)

A. The Plain Language of the Statute Itself Shows That the GORA Exemptions Do Not Prohibit Disclosure Unless Explicitly Stated.

The General Assembly knows how to say what it means when it drafts a statute. The Open Records Act contains a clear preference for disclosure of public records, with the General Assembly declaring that:

> [T]he strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and 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 and the efficient and proper functioning of its institutions.

O.C.G.A. § 50-18-70(a); *accord Red & Black Pub. Co. v. Board of Regents*, 262 Ga. 848, 854 (1993) ("We are mindful that openness in sensitive proceedings is sometimes unpleasant, difficult, and occasionally harmful. Nevertheless, the policy of this state is that the public's business must be open, not only to protect against potential abuse, but also to maintain the public's confidence in its officials"). Accordingly, "there is a strong presumption that public records should be made available for public inspection without delay," and courts must "broadly construe [the Act] to allow the inspection of governmental records." O.C.G.A. § 50-18-70(a). Moreover, "exceptions set forth in this article, together with any other

exception located elsewhere in the Code, shall be interpreted narrowly to exclude only those portions of records addressed by such exception." *Id.*; *see also Hardaway Co. v. Rives*, 262 Ga. 631, 634 (1992).

"The cardinal rule of statutory interpretation is to ascertain the legislature's purpose in enacting a statute and then construe the statute to effect that purpose, avoiding interpretations that do not square with common sense and sound reasoning." *Ins. Dep't of State of Georgia v. St. Paul Fire & Cas. Ins. Co.*, 253 Ga. App. 551, 552 (2002) (internal citations and quotations omitted). Further, "if the statutory language is plain and unequivocal, then 'judicial construction is not only unnecessary but forbidden.'" *Id.* (quoting *Glover v. State*, 272 Ga. 639, 640 (2000)).

As applied here, the statutory language supports the approach of the trial court. The Act first provides that "[a]ll public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure." O.C.G.A. § 50-18-71(a). "Exempt" means "free or released from a duty or liability to which others are held." Black's Law Dictionary (10th ed. 2014). Thus, this language is properly interpreted to mean only that, if requested records are subject to one of the GORA

exemptions, a state agency is freed from a requirement that it release the records in response to a GORA request. Put differently, mandatory disclosure of those records is not required, and the public does not have the same automatic right to see them as it has with public records that are not subject to a GORA exemption. The phrase "exempted from disclosure" in the context of O.C.G.A. § 50-18-71(a) cannot reasonably be interpreted to state a requirement that disclosure is affirmatively *prohibited.*

The exemptions section of the Act, O.C.G.A. § 50-18-72, likewise provides that "public disclosure shall not be required" for the types of records outlined in O.C.G.A. § 50-18-72(a)(1) – (50). If the legislature had meant for disclosure of all exempted records to be *prohibited* (as CCRF claims) it would have said just that. It did not, however, and "shall not be required" means something entirely different from "shall be prohibited." When it intends to prohibit the disclosure of information by a public agency, the General Assembly makes that intent clear. *See, e.g.*, O.C.G.A. § 48-7-60(a) (stating that "it is unlawful for" a state officer, employee, or agent to divulge income tax information); O.C.G.A. § 49-5-40(b) ("Each and every record concerning reports of child abuse and child controlled substance or marijuana abuse [in the government's custody] is declared to be

confidential, and access thereto is prohibited …"); O.C.G.A. § 34-9-12(b) ("[Workers compensation records that] refer to accidents, injuries, and settlements, shall not be open to the public …"). Even within the exemptions themselves, if the legislature wanted to prohibit disclosure of certain records, it added explicit language making that clear. *See, e.g.,* O.C.G.A. § 50-18-72(c)(2) (stating that exhibits "tendered to the court as evidence in a criminal or civil trial shall not be open to public inspection without the approval of the judge"); *id.* § 50-18-72(a)(34) ("…the agency shall withhold the records …").

If the General Assembly had intended to impose an outright bar on the release of all records falling within the GORA exemptions, it would have simply said "disclosure is unlawful" or "disclosure is prohibited" for the covered records. *See Ins. Dep't of State of Georgia*, 253 Ga. App. at 554 ("If the legislature had intended to restrict [the types of action at issue in the case], then it would have said so, as it did elsewhere in the unfair trade practices chapter"). The General Assembly, however, chose not to add such language to O.C.G.A. § 50-18-72(a)(35) and (36).

Perhaps most tellingly, the General Assembly, in drafting GORA, also provided that, "[i]n any instance in which an agency is required to *or has decided*

to withhold all or part of a requested record, the agency shall [follow certain notice procedures].” O.C.G.A. § 50-18-71(d) (emphasis added). If an agency may “decide” to withhold requested records, it necessarily has the discretion to release them instead, for what is the exercise of “discretion” but the act of “deciding”? For all of these reasons, the plain language of the statute makes clear that the GORA exemptions “free or release[]” the government from the Act’s requirement of mandatory disclosure, but they do not *prohibit* a state agency from exercising discretion to release the exempt documents absent other prohibition.

B. Georgia Courts Have Not Held That The GORA Exemptions Are Mandatory.

Contrary to CCRF’s arguments, no Georgia court has held that the exemptions within the Open Records Act contain a blanket prohibition on disclosure. And no Georgia court has addressed the question before this Court: whether state agencies may exercise discretion to release records that fall under a GORA exemption when no other prohibition on disclosure exists. That is partly because, as one might expect, the vast majority of Open Records Act cases arise in a wholly different posture, following a state agency’s attempt to *withhold* records

when a private plaintiff has demanded their *disclosure*.[3] This radically different posture makes those cases inapposite.

The few cases CCRF cites to support its argument that the GORA exemptions are mandatory do not actually go that far. Instead, those cases are consistent with Appellees' position that disclosure is only prohibited when the law expressly says so. In *Bowers v. Shelton*, 265 Ga. 247 (1995), an individual, Shelton, filed a complaint for injunctive relief against the Georgia Attorney General to prevent disclosure of records related to the state's criminal investigation of his failure to pay state income tax. *See id*. at 247-48. Responding to the state's claim that the Open Records Act does not provide a private right of action to enjoin disclosure, the Court cited *Harris v. Cox Enterprises, Inc.*, 256 Ga. 299 (1986) for the proposition that "this Court has determined that the Georgia Act mandates the nondisclosure of certain excepted information."[4] *Bowers*, 265 Ga. at 248.

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[3] *See, e.g., Schick v. Board of Regents*, 334 Ga. App. 425 (2015); *Red & Black Publishing Company, Inc. v. Board of Regents*, 262 Ga. 848 (1992).

[4] *Harris* does not stand for the proposition that CCRF asserts. As discussed more fully below, the Court was not making a sweeping statement as to all exceptions. And CfA does not dispute that nondisclosure is mandatory when explicitly required by state or federal law and/or where personal privacy concerns are implicated. Thus, CfA's position aligns with the decision in *Harris*.

However, the Court did not state that *all* exempted records were prohibited from disclosure. *See id.* (stating only that the Act mandates the nondisclosure of *certain* information). The Court then found that a private citizen, such as Shelton, has standing to sue to prevent disclosure. *See id.* at 249.

Having answered the standing question, the *Bowers* Court then addressed whether the records at issue could be disclosed. The Court aptly acknowledged the distinction between prohibited and discretionary disclosure stating, "The Act allows any citizen… to inspect public records of an agency, except those which by court order or by law are *prohibited* or specifically *exempted* from public inspection. *Id.* (emphasis added). Noting that the "relevant state law relating to confidentiality of tax information is O.C.G.A. § 48-7-60(a)," the Court recognized that the Open Records Act "has in no manner abrogated the mandate of O.C.G.A. § 48-7-60(a) that tax information be maintained inviolate." *Id.* at 250. As a result, the Court held that the confidential tax information contained in Shelton's file could not be released in response to an Open Records Act request. *Id.*

The decision turned entirely on a prohibition found outside of the Open Records Act. At no time did the *Bowers* Court consider any of the GORA exemptions, nor did it even address whether a GORA exemption creates an

outright ban on disclosure, or whether it merely releases a government agency from mandatory disclosure, thereby placing disclosure in the agency's discretion, unless a separate law prohibits it (*e.g.*, O.C.G.A. § 48-7-60(a)). Accordingly, *Bowers* does not support CCRF's blanket claim that withholding documents subject to a GORA exemption is mandatory.

A closer look at *Harris* (the case on which the *Bowers* Court relied when it stated that certain exceptions "mandate" nondisclosure) further illustrates that the Act anticipates some exemptions to mandate non-disclosure while others do not. In *Harris*, the government argued that the requested record (a Georgia Bureau of Investigation report) contained information that would violate certain "individuals' rights to privacy," and that certain parts of the report "cannot be disclosed because they are required by the federal government to be kept confidential." 256 Ga. at 300.

The Court recognized that the first two exemptions in the Act, O.C.G.A. § 50-18-72(a)(1) and (2), protect records "[s]pecifically required by federal statute or regulation to be kept confidential," and records "the disclosure of which would be an invasion of personal privacy." 256 Ga. at 301. The *Harris* Court, however, never held that *all* of the Act's exemptions are mandatory. It simply acknowledged

that, under subsections (a)(1) and (a)(2), "[t]he language of the statute mandates the maintenance of confidentiality of records required by the federal government to be kept confidential or to medical or veterinary records and similar files, the disclosure of which would be an invasion of personal privacy," both categories being subject to separate prohibitions recognized by, and found outside of, the Act. *Harris*, 256 Ga. at 301. Following this analysis, the Court remanded for a determination of whether the requested report was subject to either exemption.

The *Harris* Court's reasoning, then, is entirely consistent with Appellees' position that non-disclosure of public records may be *mandated* by independent statutes or rules outside of the Act, including the law of privacy.[5] And certain GORA exemptions themselves expressly prohibit disclosure. But neither *Bowers* nor *Harris* stands for the proposition that all the GORA exemptions within the Act are, standing alone, mandatory. Those cases simply recognized the uncontroversial

[5] As courts have recognized, a broad range of information is protected from disclosure based on privacy interests. *See Harris*, 256 Ga. at 301 (reasoning that "those portions of public records which invade personal privacy may not be disclosed"); *Hardaway Co. v. Rives*, 262 Ga. 631, 633 (1992) (reasoning that courts may prohibit disclosure when "there is a claim that disclosure of the public records would invade individual privacy").

notion that a state agency cannot release records when doing so would violate a federal or state statute or a recognized and protected individual privacy interest.

CCRF also contorts the holding of *Howard v. Sumter Free Press, Inc.*, 272 Ga. 521, 522 (2000), a case involving a sheriff's refusal to produce documents despite their not being subject to *any* exception. Against this procedural posture, it is not surprising that the Court reasoned that "compliance with the Act is not discretionary, but mandatory." *Id*. That simply means that a state agency does not have discretion to ignore the Open Records Act and withhold public records that are not covered by any exemption. That holding, of course, says nothing about whether a state agency has discretion to *release* documents that *do* fall within a GORA exemption.[6]

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[6] The Attorney General opinions CCRF cites, Ga. Atty. Gen. Op. 97-20 and Ga. Atty. Gen. Op. U2000-4, are two more examples of an accepted proposition: if a state agency determines that requested records fall within a GORA exemption, it *can* withhold them. The opinions do not state that the records *must* be withheld, and the Attorney General was not asked to opine on that question.

The Board of Regents cases CCRF cites also miss the mark. (*See* pp. 13-14 of Appellant's opening brief, citing *Doe v. Bd. of Regents*, 215 Ga. App. 684 (1994), *Schick v. Bd. of Regents*, 334 Ga. App. 425 (2015), and *Red & Black Publishing Co., Inc. v. Bd. of Regents*, 262 Ga. 848 (1993).) In *Doe*, like *Bowers* and *Harris*, the Court held that some disclosure was prohibited by a non-GORA statute, Georgia's rape victim confidentiality statute. *See* 215 Ga. App. at 687. And in *Schick* and *Red & Black*, the Board of Regents *resisted* disclosure based upon a

C. CCRF's Public Policy Concerns Are Unfounded.

As previously explained, the Open Records Act makes clear that public records covered by a GORA exemption are not automatically available to the public upon request. State agencies have every right to refuse to release those protected documents, and they often do. Indeed, if KSU or the Board of Regents had determined that the threat of competitive disadvantage from releasing research-related communications in response to CfA's request outweighed the benefits and the public interest served by disclosing them, it could have simply declined CfA's request and withheld the records, as contemplated by the Act, without repercussion.

What is more, there is no evidence that state agencies take the release of public records lightly. Where disclosure could harm a private individual or entity, agencies give the interested parties advanced notification (as demonstrated here when KSU notified CCRF that it planned to release the requested communications). (R-32; R-93-94.) Similarly, in *Doe*, the "University's Office of

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GORA exemption. Cases in which a state agency resists disclosure do not answer the question presented by this appeal: whether a state agency may release documents even when a GORA exemption applies.

Legal Affairs contacted plaintiff, indicating that it intended to release the requested information." 215 Ga. App. at 685; *see also* O.C.G.A. § 50-18-72(a)(34) (requiring state agencies to notify private entities who have submitted trade secrets to the agency to "notify the entity … of its intent to disclose the information").

Attorney General opinions also recognize the safeguards already in place to prevent disclosure of public records that should properly be withheld. *See, e.g.*, Ga. Atty. Gen. Op. U2000-4 (recognizing, in response to a question about whether the utility billing and payment records of officers or employees of a publicly owned utility were subject to disclosure under the Act, that "[i]f there is a concern that the records should not be disclosed for some legitimate reason, the [state agency] could provide notice to the person or persons involved … [and if] the individuals involved then wished to raise a claim of an invasion of privacy, those persons could then seek judicial intervention to prevent the disclosure"). There simply is no indication in the record or case law that a state agency would release documents that might otherwise fall within a GORA exemption arbitrarily or on a whim without advanced warning to the affected parties.

Similarly, CCRF's claim that Appellees would have the Court "eliminate the right to sue 'to enforce compliance' with the Open Records Act" is flat wrong.

This appeal has no effect on a private party's right to sue to prevent disclosure of public records that are prohibited from disclosure. As has always been the case, the party seeking to prevent disclosure need only identify an actual prohibition on disclosure, rather than simply claiming, as CCRF asserts here, that the records are subject to a GORA exemption. The plaintiffs in *Doe* and *Bowers* did the former, where such prohibitions existed. In contrast, CCRF cites to no prohibition, relying instead entirely on its unprecedented and erroneous contention that two GORA exemptions, standing alone, mandate non-disclosure.

CCRF finally suggests that, if the trial court's order is upheld, rouge government agencies would release law enforcement records, including the identities of confidential sources; jury list data, including names, dates of birth, addresses, and social security numbers; home security codes collected by local governments for neighborhood watch programs; public employees' personal information; and records that would compromise public safety. (*See* Appellant's opening brief at pp. 19-20.) At the outset, social security numbers and other personal information must be redacted and would never be released in the ordinary course of responding to an Open Records Act request. *See* O.C.G.A. § 50-18-72(a)(20)(A). Other types of sensitive personal information, moreover, are

protected by the separate privacy laws that serve as a bar against disclosure, as discussed above. The remaining potentially harmful documents and information are still exempt from mandatory disclosure and remain so. The "parade of horribles" CCRF lists are thus nothing more than an unsubstantiated scare tactic.

D. CCRF's Proposed Interpretation is Unworkable.

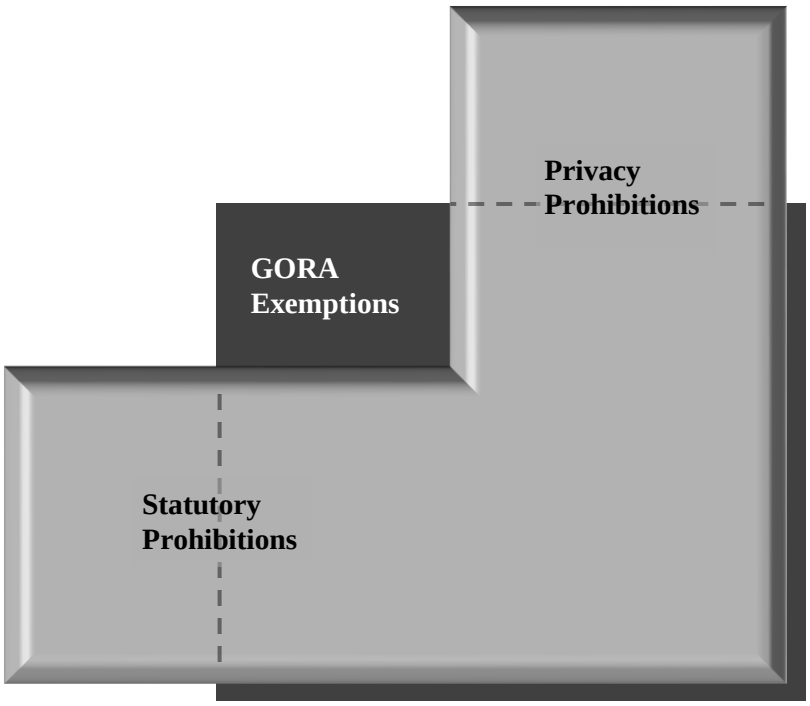
CCRF's proposed interpretation of the Act would lead to absurd results and place unworkable and nonsensical restrictions on government agencies, all to the public's detriment. State agencies routinely release information that would, in the Open Records Act context, be subject to an exemption (like information about an at-large suspect in a criminal case while an investigation is still underway, or, as here, information designed to assure the public of the integrity of a public university's actions). Indeed, it is squarely in the public's interest that they do so. Under CCRF's interpretation of the statute, if a state agency were to receive an Open Records Act request for the same information, the state agency would suddenly be barred from releasing the information and non-disclosure would be mandatory. Such an outcome is nonsensical, inconsistent with the purpose of the Open Records Act, and contrary to the public's interest.

A wide variety of sensitive public records enjoy an absolute protection from disclosure as a result of privacy prohibitions and other state and federal laws. But the fact that certain documents fall within a GORA exemption, without more, does not mean that a state agency has no discretion to release the requested records. The research-related exemptions at issue in this case contain no such prohibition, and the trial court properly concluded that the Board of Regents could exercise its discretion to choose to release the requested records.

E. Reference Graphic

The conceptual interplay between GORA's mandatory disclosures, the prohibitions on disclosure found in other statutes or laws, and the discretionary disclosure for records subject to a GORA exemption where no prohibition exists elsewhere is presented in graphic form on the following page:

Mandatory Disclosure
O.C.G.A. § 50-18-71



Legend:

- Mandatory disclosure
- Discretionary disclosure
- Disclosure prohibited

CONCLUSION

For the foregoing reasons, CfA respectfully requests that the Court affirm the judgment below.

Respectfully submitted this 3rd day of January, 2017.

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CERTIFICATE OF SERVICE

This is to certify that on January 3, 2017, I electronically filed the foregoing **BRIEF OF APPELLEE CAMPAIGN FOR ACCOUNTABILITY** with the Clerk of Court using the electronic case management system. I further certify that the following counsel of record were served by U.S. Mail, postage prepaid, properly addressed as follows:

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This 3rd day of January, 2017.

By: */s/ Henry R. Chalmers*
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