IN THE COURT OF APPEALS
STATE OF GEORGIA

CONSUMER CREDIT RESEARCH FOUNDATION, Appellant,	*	
v.	*	Case No. A17A0620
BOARD OF REGENTS OF THE, UNIVERSITY SYSTEM OF GEORGIA and CAMPAIGN FOR ACCOUNTABILITY, Appellees.	*	

BRIEF OF APPELLEE

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The Open Meetings and Open Records Acts are sometimes referred to as Georgia's "Sunshine Laws." The term evokes images of the doors of government being thrown open to illuminate the inner workings for all to see. Nothing could be more inconsistent with that philosophy than a rule that certain doors must be boarded shut, never to be opened, even when the government is willing to let the light in and no other law prohibits illumination. However, that is the interpretation of the Open Records Act that the Consumer Credit Research Foundation ("CCRF") urges this Court to adopt.

CCRF argues, in its first enumeration of error, that the exceptions to the Open Records Act contained in O.C.G.A. § 50-18-72(a) mandate that records be withheld in response to a request, and that the trial court erred in finding that disclosure of the records subject to the records exceptions is discretionary. But the plain language of O.C.G.A. § 50-18-72(a) imposes no such requirement. Instead, the plain language outlines a set of Open Records exceptions where "public disclosure shall not be required." Saying that disclosure "shall not be required" is not the same thing as saying that disclosure is "unlawful," or that disclosure is "prohibited." The phrase "shall not be required" does not require an agency to

withhold records; it gives an agency the discretion to withhold records. When the General Assembly wants to create a mandatory prohibition on the release of records, it uses mandatory language such as "unlawful," "prohibited," or "shall be redacted."

In this case, a state agency is choosing to make its records available to the public, even though some of the exceptions in the Act could allow part of those records to be withheld. The Act "encourage[s]" such public access; it is not worded in a way to discourage the release of records. The Act provides penalties for failing to provide access to records that are required to be disclosed, or for intentionally frustrating access to records. O.C.G.A. § 50-18-74(a). No such penalties exist for providing access to records whose disclosure is "not . . . required."

Because the language of O.C.G.A. § 50-18-72(a) gives the Board of Regents the discretion to release its records to the public even if some of them fall under the exceptions in O.C.G.A. § 50-18-72(a)(35)-(36) (hereinafter individually referred to respectively as the "(a)(35) provision" or the "(a)(36) provision" or collectively the "(a)(35) and (a)(36) provisions"), the trial court's order should be affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 4, 2013, Plaintiff Consumer Credit Research Foundation ("CCRF") entered into a Consulting Agreement with the Kennesaw State University Research and Service Foundation. Complaint ¶6 (R-30). Pursuant to that agreement, Dr. Jennifer Priestley, a professor at Kennesaw State University ("KSU")[1], conducted statistical research and analysis. Complaint ¶6 (R-30). On June 10, 2015, Anne L. Weismann, Executive Director of the Campaign for Accountability ("CfA"), sent KSU an Open Records Request for copies of correspondence between Dr. Priestley and a variety of people, including Hilary B. Miller, the chairman of the board of CCRF. Complaint ¶12 (R-30); Complaint Exhibit "C" (R-45); Miller Deposition, page 6 (R-705).

KSU informed CCRF that they intended to release the records in response to Ms. Weismann's request. Complaint, ¶¶16, 22 (R-32); Board of Regents' Answer, ¶16, 22 (R-93-94). Upon being informed that CCRF intended to file an action for declaratory judgment and permanent injunction to prevent the release of the

[1] Kennesaw State University is part of the University System of Georgia; therefore the Board of Regents ("BOR") is the proper party to this litigation.

records, KSU agreed to delay the release of the requested records until the Superior Court could decide the issues raised by CCRF.

In its Motion for Summary Judgment, CCRF argued that the requested public records were subject to two research-related exemptions in the Act, the (a)(35) and (a)(36) provisions. BOR responded that withholding records subject to the exceptions at issue in the Open Records Act is discretionary (because no specific language made non-disclosure mandatory) and therefore BOR possessed the discretionary authority to release the records, regardless of whether those two specific exceptions applied to those records. CCRF replied by claiming that all the exceptions in the Open Records Act mandate non-disclosure, and that records that fall under any one of the exceptions *must* be withheld. In response to cross-motions for summary judgment, the trial court granted summary judgment in favor of BOR and CfA, and denied relief to CCRF.

II. ARGUMENT AND CITATION OF AUTHORITIES

The main issue in this appeal is Appellant's first enumeration of error, which claims that the Open Records Act mandates that government agencies withhold all records that fall within the exceptions listed in the Act. In response to Appellant's

second enumeration of error, Board of Regents acknowledges that some (but not all) of the requested records do fall within the exceptions laid out in the (a)(35) and (a)(36) provisions, but a ruling on that issue is not necessary in this appeal because the Open Records Act gives the Board of Regents the discretion to release —or not release—those records to the public.

A. The Open Records Act does not mandate that the requested records be withheld.

In its appeal, CCRF takes the position that the requested documents are exempt from disclosure under the Open Records Act, including the two research exemptions contained within the (a)(35) and (a)(36) provisions, and therefore the Board of Regents may not produce the documents in response to an Open Records Act request. However, Plaintiff misconstrues the obligations placed upon, and the discretion vested in, governmental agencies under the Open Records Act. The Open Records Act, in introducing the list of records that are exempt from release, states: "public disclosure **shall not be required** for records …" O.C.G.A. § 50-18-72(a) (emphasis added). This language indicates discretion, not a

mandatory duty to withhold; the Act lists categories of records that **may** be withheld, not records that **must** be withheld.

By contrast, the General Assembly has chosen to mandate the withholding of certain types of records by using language that indicates that those records shall not be disclosed. For example, a statute relating to tax records states: "**it is unlawful** for the commissioner, other officer, employee, or agent, or any former officer, employee, or agent to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return…" O.C.G.A. § 48-7-60(a) (emphasis added). Similarly, O.C.G.A. § 49-5-40(b) states: "Each and every record concerning reports of child abuse and child controlled substance or marijuana abuse which is in the custody of the department or other state or local agency is declared to be confidential, and **access thereto is prohibited**" (emphasis added).

The General Assembly is no stranger to enacting statutory language that mandates the withholding of some records otherwise subject to the Open Records Act, and it has evinced this intention by using phrases such as "it is unlawful to divulge…" or "every record . . . is declared to be confidential, and access thereto is

prohibited." *See, e.g.*, O.C.G.A. §§ 48-7-60, 49-5-40(b). Yet the General Assembly chose not to use that language in O.C.G.A. § 50-18-72(a), saying "public disclosure shall not be required" instead of saying "public disclosure is prohibited" or "it shall be unlawful to disclose." The language "public disclosure shall not be required" gives discretion to an agency but does not create a mandatory duty to withhold. It implies that although disclosure is not required, a disclosure could still be made. The (a)(35) and (a)(36) provisions do not contain any language that mandates those records to be withheld; the withholding of those records is therefore discretionary.

The General Assembly's intent to make the O.C.G.A. § 50-18-72(a) exceptions discretionary is further illustrated by the language in O.C.G.A. § 50-18-72(a)(20)(A). That provision contains a list of personal information that must be redacted from records, such as social security number, mother's birth name, credit card information, and other sensitive personal information. That provision states: "Items exempted by this subparagraph **shall be redacted** prior to the disclosure of any record requested pursuant to this article. . ." O.C.G.A. § 50-18-72(a)(20)(A) (emphasis added). Similarly, O.C.G.A. § 50-18-72(a)(34)

has a provision regarding trade secrets. If an agency determines that records contain trade secrets, "the agency **shall withhold** the records." (Emphasis added.)

If the exceptions in O.C.G.A. § 50-18-72(a) already mandated non-disclosure—and thus documents falling under those exceptions were required to be withheld in all circumstances—it would not have been necessary for (a)(20) to include the mandatory language "shall be redacted," or for (a)(34) to include the mandatory language "shall withhold." If all the exceptions in O.C.G.A. § 50-18-72(a) mandated non-disclosure, then "shall be redacted" and "shall withhold" would be superfluous. The statute should not be interpreted in a way that makes its language meaningless.

Because the plain language of the Open Records Act allows – but does not mandate – the withholding of records that meet the criteria in the (a)(35) and (a)(36) provisions, KSU may choose to release those records, provided there is no other prohibition on it doing so, which there is not in this case. It is irrelevant to this litigation whether or not the (a)(35) and (a)(36) provisions actually apply; no agency is **required** to withhold such records solely on the basis of the (a)(35) and (a)(36) provisions.

No appellate court in Georgia has ever held that all the exceptions in O.C.G.A. § 50-18-72(a) actually prohibit records from being released. Some cases cited by Appellants to support their claim that the exemptions mandate non-disclosure involve statutory provisions outside the Open Records Act which, unlike O.C.G.A. § 50-18-72(a), use mandatory instead of discretionary language. The other cases involve situations where the issue before the court was whether the requested records were covered by various exceptions within the Act, not whether an agency could release them even if an exception applied.

For example, in *Bowers v. Shelton*, 265 Ga. 247 (1995), the Supreme Court considered a case where Shelton, a taxpayer charged with failure to pay income taxes, sought an injunction to prevent the Department of Revenue from releasing records from its investigative file on his case. In its decision, the Court stated: "this Court has determined that the Georgia Act mandates the nondisclosure of certain excepted information." *Id.* at 248. This is true for some information: as noted above, O.C.G.A. § 50-18-72(a)(20) uses mandatory language to prohibit the release of certain personal information. In *Bowers*, the state law that made tax information confidential was O.C.G.A. § 48-7-60(a), which states that "it is

unlawful" to release certain tax information. *Bowers* at 250. The language used in O.C.G.A. § 48-7-60(a), "it is unlawful," is starkly different from the discretionary language of O.C.G.A. § 50-18-72(a), "shall not be required." As the Supreme Court noted in *Bowers*, sometimes nondisclosure is mandated; and when the General Assembly wants to mandate such nondisclosure, it uses language that makes that mandate clear.

Appellants mistakenly claim that in *Schick v. Board of Regents*, 334 Ga. App. 425 (2015), *Red & Black Publishing Company, Inc. v. Board of Regents*, 262 Ga. 848 (1993), and *Doe v. Board of Regents*, 215 Ga. App. 684 (1994), the Board of Regents "argued that the exemptions prohibited disclosure of the requested records." *Doe* is inapposite because the Board of Regents told Plaintiff that it intended to release records from an incident where she reported a rape, and Plaintiff sued to enjoin that release. The Court did not consider the applicability of any exemption within the Open Records Act. Instead, the Court's decision addressed the issue of whether Plaintiff's right to privacy would allow the *Plaintiff* to block Board of Regent's disclosure of the records.

In *Schick* and *Red & Black*, unlike here, the Board of Regents argued that requested records were exempt from release because they fell under various exceptions in the Act. The issues before the courts were whether those exceptions applied to the records at issue or if the Board of Regents had violated the Act by allegedly withholding records for which there was no applicable exception. The issue of whether the various exceptions mandate non-disclosure was not before the courts and was not ruled upon.

B. Interpreting the Open Records Act exceptions as mandating non-disclosure would be contrary to the intent of the Act.

In the Open Records Act, the General Assembly declared "that the 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." O.C.G.A. § 50-18-70(a). It went on to urge that the Act "be broadly construed to allow the inspection of governmental records." BOR's decision to release the requested records—notwithstanding its ability to withhold them under the (a)(35) and (a)(36) provisions —is consistent with the public policy behind the Act. Furthermore, the

statutory language that vests agencies with discretion to release records even when the agency could otherwise choose to withhold them supports the public-policy underpinnings (such as openness) the Act promotes.

Moreover, the plain text of the Open Records Act illustrates the types of violations that the General Assembly intended to penalize—and those violations do not include an agency electing to release records it may otherwise be permitted to withhold under the Act. O.C.G.A. § 50-18-74(a) states:

> 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, 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 . . .

Although penalties may be imposed for "knowingly and willfully . . . failing or refusing to provide access to records not subject to exemption," the Act does not contemplate, and no penalty exists for, a violation such as "providing access to records subject to mandatory exemption from this article."

Such penalties are provided in O.C.G.A. § 48-7-60, which prohibits the release of certain information from income tax records. Such release is described as "unlawful." O.C.G.A. § 48-7-60(a). O.C.G.A. § 48-7-60(d) provides a specific penalty for such unlawful release: "Any person who divulges or makes known any tax information obtained under this subsection shall be subject to the same civil and criminal penalties as those provided for divulgence of information by employees of the department." Similarly, in O.C.G.A. § 49-5-40(b), certain records regarding child abuse are "declared to be confidential, and access thereto is prohibited." O.C.G.A. § 49-5-44(a) provides penalties for the unauthorized release of such records: "Any person who authorizes or permits any person or agency not listed in Code Section 49-5-41 to have access to such records concerning reports of child abuse declared confidential by Code Section 49-5-40 shall be guilty of a misdemeanor."

If the General Assembly had intended for the exceptions listed in O.C.G.A. § 50-18-72(a) to be a mandatory prohibition on the release of records that fall within those exceptions, it could have provided penalties for the unlawful release of those records—as it did for tax records and child abuse records, described

above. Not only do no such penalties exist, the General Assembly specifically provided that no "agency or person who provides access to information in good faith reliance on the requirements of this chapter shall not be liable for any action on account of such decision." O.C.G.A. § 50-18-73(c).

Finally, CCRF's proposed interpretation of the Act's requirements will have a chilling effect on government agencies that could prevent the release of records even when a there is a strong public interest in favor of their release. For example, O.C.G.A. § 50-18-72(a)(4) exempts the records of a law enforcement agency during a pending investigation, but does not contain any language mandating that records be withheld. A police artist's sketch of an assailant, based on a victim's description, could be a record that falls under the protection of this provision. Under CCRF's interpretation of the Act, a police department would be prohibited from releasing that sketch to a news agency that requested it, even if the police department needed the public's help in identifying or locating the suspect. Similarly, O.C.G.A. § 50-18-72(a)(8) exempts from release material obtained in the investigation of a public employee until ten days after the investigation is concluded. If an employee is falsely accused of theft of public funds, and later

cleared of wrongdoing by an investigation, CCRF's interpretation would force the agency to wait ten days before clearing the employee's name and informing the public that no theft occurred.

The Board of Regents wants to use the discretion the Act vests in it to release records that it otherwise could withhold under the Act. The Act should not be interpreted to strip from BOR the discretion the plain language of the Act affords, particularly when the BOR's decision promotes the openness and disclosure the Act works to promote.

C. BOR's decision to release the records will not harm scholarly research or academic freedom.

CCRF argues that BOR's failure to withhold the records will "have a detrimental impact on academic freedom and eliminate the shield that protects scholarly work from politically-motivated interest groups seeking to obtain researchers' and professors' notes, information, and research through the Open Records Act." However, BOR is not arguing that the (a)(35) and (a)(36) provisions should never be used to withhold scholarly records. To the contrary, BOR recognizes that the (a)(35) and (a)(36) provisions serve an important purpose

by protecting and promoting scholarly pursuits. And the Act ensures that these exceptions are available to any public educational institution in Georgia that desires to protect its academic freedom and its research work by relying on the exceptions. That BOR determined in this particular instance that it would not invoke the protections of the (a)(35) and (a)(36) provisions does not somehow eliminate BOR's ability to rely on those statutory exemptions in the future. CCRF also argues that Georgia's public universities will have "less protection than private universities in Georgia." (Appellant's Brief, page 25.) Putting aside, for the sake of brevity, the myriad differences that exist between a private university and a public university supported financially by the taxpayers, with its attendant benefits and obligations, Georgia's public universities still have the discretion to rely on the (a)(35) and (a)(36) provisions to withhold study and research records.

CCRF argues that Georgia's universities will have a "competitive disadvantage" in comparison to private colleges and universities, suggesting that third parties will not choose to collaborate with public universities if their records could be subject to release under the Open Records Act. (*Id.*) But BOR, not CCRF, is in the best position to gauge what is in the best interests of BOR and its

member institutions, and the self-serving statements of CCRF about what is in the best interests of BOR contradict the policy decision that BOR has exercised its discretion to make.

There are many situations outside of the academic setting where private companies and third parties have had their records become public through the Act, and companies continue to do business with the State. If the State ever determines that it faces a potential competitive disadvantage due to its public records law and how it applies those provisions, the General Assembly can pass new or revised legislation to address that issue. This Court should not ignore the plain language of the Open Records Act to protect against the imaginary harms conjured by CCRF.

III. CONCLUSION

For all of the above and foregoing reasons, the trial court's order denying Appellants' Motion for Summary Judgment and granting the Appellees' Motion for Summary Judgment should be affirmed.

Respectfully submitted this 30th day of December, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on December 30, 2016, I electronically filed the foregoing BRIEF OF APPELLEE 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 30th day of December, 2016.

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