9-1-1978

# The Omen of "Openness" in Local Government Law

R. Perry Sentell Jr.
*University of Georgia School of Law*

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## I. INTRODUCTION

On the one hand, no right is more precious to the individual than personal privacy. Mr. Justice Brandeis fashioned what is probably the most famous formulation of this claim: "Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone . . . ."[1]

On the other hand, no quality has historically been pressed more forcefully upon collective activities than the obligation of publicity. Mr. Justice Brandeis profferred what is probably the most famous formulation of that ideal: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants: electric light the most efficient policeman."[2]

In the realm of government, the goal of publicity translates into "openness," and its proponents have long cited James Madison: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."[3] In recent times, openness in government—and the quest for it—have experienced a resounding revival of interest. The result is yet another of those intriguing domains where basic traditional sentiments merge with intense modern reforms.[4] Governments at all levels have felt the impact of that revival, an impact produced by diverse developments in various contexts.

Three such developments most prominent on the surface are "open meetings," "disclosure," and "open records." These develop-

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* Regents' Professor of Law, University of Georgia School of Law, A.B., LL.B., University of Georgia, 1956, 1958; LL.M., Harvard University, 1961.

[1] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). Although the article was a joint effort, its preparation has been ascribed primarily to Brandeis. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[2] L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933), *quoted in* Buckley v. Valeo, 424 U.S. 1, 67 (1976).

[3] Letter of James Madison to W.T. Barby (Aug. 4, 1822), 9 WRITINGS OF JAMES MADISON 103 (1910), *quoted in* H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESS 394 (1976).

[4] For discussion of another such instance, see Sentell, *Remembering Recall in Local Government Law*, 10 GA. L. REV. 883 (1976).

ments have extended, to at least an interesting degree, to Georgia local governments. That none of the developments has yet run its course does not detract from the importance of what has occurred nor its significance as a benchmark for the measurement of future movement.

## II. OPEN MEETINGS

### A. *Generally*

The most obvious object of openness has been the local government's meetings. The "sunshine" syndrome has become preeminently popular and has forcefully manifested itself throughout the country.[5] Its origin may be found in state constitutions, in general statutes, and in local legislation.[6] Its most distinctive characteristic is diversity,[7] specifically in such respects as form, coverage, procedure, and specificity.[8]

The general thrust of the open-meetings requirement is the obvious one: public awareness of governmental action and the democratic ramifications of such awareness.[9] In accordance with the all-consuming nature of this impetus, focus often flares from the meeting itself to such peripheral concerns as prior notice of the meeting and sanctions imposed for violations.[10]

Parrying the thrust to a degree is the general acknowledgement that public benefit is not always best served by total public awareness.[11] This counterbalancing concern prompts attention to such matters as definitional flexibility, individual privacy, and express exceptions to coverage.[12]

In any event, statutory sunlight strictures now shine upon local governments in a considerable majority of the states.[13] In some, judicial determination has altered significantly the quality of their luster. In others, solar heat has not yet generated a sufficient mass

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[5] A sample of the recent literature includes the following: Bales, *Public Business Is Not Always Public*, 7 URBAN LAW. 332 (1975); Little & Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451 (1975); Wickham, *Let the Sun Shine In!*, 68 NW. U. L. REV. 480 (1973); Note, *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 HARV. L. REV. 1199 (1962).

[6] 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 4.06 (1978).

[7] J. FORDHAM, LOCAL GOVERNMENT LAW 436 (Rev. ed. 1975).

[8] *Id.*

[9] *E.g.*, Wickham, *Let the Sun Shine In!*, 68 NW. U. L. REV. 480 (1973).

[10] J. FORDHAM, *supra* note 7, at 436-37.

[11] *E.g.*, Bales, *supra* note 5, at 333.

[12] S. SATO & A. VAN ALSTYNE, STATE & LOCAL GOVERNMENT LAW 486 (2d ed. 1977).

[13] J. FORDHAM, *supra* note 7, at 436; S. SATO & A. VAN ALSTYNE, *supra* note 12, at 477.

of case law either to alter or confirm the nature of the statutory sunlight. In all, the topic is one of intrigue.

B. *In Georgia*

Georgia's modern legislative history reveals at least two general open-meeting mandates for local governments. The first was enacted in 1965[14] and is addressed to "the governing bodies of all municipalities and counties in this State, boards of public instruction, and all other boards, bureaus, authorities or commissions in the State of Georgia, excepting grand juries, supported wholly or in part by public funds or expending public funds . . . ."[15] The statute commands that "[a]ll meetings" of the covered entities "shall be public meetings."[16]

The only express exception from the statute's command is that the entities may hold private "executive sessions" "before or after" their public meetings.[17] At the conclusion of such an executive session, the statute requires that "the ayes and nays of any balloting shall be recorded."[18] Finally, willful violation of the statute is designated a misdemeanor, and persons convicted "shall be punished as for a misdemeanor."[19]

The second mandate was enacted in 1972.[20] Its requirements are directed to "any State department, agency, board, bureau, commission or political subdivision and the governing authority or any department, agency, board, bureau, commission or political subdivision of any county, municipal corporation, board of education or other political subdivision at which official actions are to be taken . . . ."[21] "All meetings" of the enumerated entities are declared "public meetings" and "shall be open to the public at all times."[22] The statute further requires that minutes of meetings of the entities "be promptly recorded" and "open to public inspection."[23]

The 1972 enactment specifies a number of exceptions, some of which appear to pertain to local governments. These exceptions

[14] 1965 Ga. Laws 118 (GA. CODE ANN. § 23-802 (1971)).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 119.
[19] 1965 Ga. Laws 119 (GA. CODE ANN. § 23-9912 (1971)).
[20] 1972 Ga. Laws 575 (GA. CODE ANN. ch. 40-33 (1975)).
[21] *Id.* (GA. CODE ANN. § 40-3301 (1975)).
[22] *Id.* at 575-76.
[23] *Id.* at 576.

include staff meetings for "investigative purposes";[24] meetings discussing "the future acquisition of real estate";[25] meetings discussing appointment, employment, discipline, or dismissal of "a public officer or employee";[26] and meetings to hear "complaints or charges brought against a public officer or employee."[27] Further, the statute expressly does not repeal the attorney-client privilege[28] or confidential tax matters:[29] it directs that "the public may be excluded in order to protect these privileges."[30]

Finally, the 1972 statute sets forth a number of consequences which result from its violation. First, any "resolution, rule, regulation or formal action" taken or made at non-complying meetings is non-binding.[31] Second, the superior courts have jurisdiction to issue injunctions, "upon application by any citizen of this State," to enforce the "purposes" of the statute.[32] Third, the conduct of non-complying meetings is a misdemeanor, and persons convicted "shall be punished by a fine not to exceed $100.00."[33]

Comparison of Georgia's two modern open-meetings mandates reveals a number of distinctions both general and specific. Obviously, the 1972 enactment is more expansive than the one of 1965. Apparently, legislative insight had developed considerably during the intervening seven years. First, and more specifically, the two measures differ in terms of coverage. Although the difference in the types of entities covered by the statutes is somewhat unclear, the difference in legislative triggers is more discernible. For the commands of the 1965 enactment to apply, the covered entity must be receiving or expending "public funds." Application of the 1972 mandate turns upon no such financial consideration; rather, its exactions derive from the "official" nature of the "actions" taken by the enumerated entities.

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[24] *Id.* (GA. CODE ANN. § 40-3302 (1975)). The purposes are those "under duties or responsibilities imposed by law." *Id.*

[25] *Id.*

[26] *Id.* at 577.

[27] *Id.* The person being charged, however, may request a public meeting.

[28] *I.e.*, the version of the privilege recognized by Georgia law.

[29] *I.e.*, those matters otherwise made confidential by Georgia law.

[30] 1972 Ga. Laws 577 (GA. CODE ANN. § 40-3303 (1975)).

[31] *Id.* at 576 (GA. CODE ANN. § 40-3301 (1975)). "Any action contesting a resolution, rule, regulation or formal action on the ground of non-complaince with this law must be commenced within 90 days of the date the resolution, rule or regulation was passed or the formal action was taken." *Id.*

[32] *Id.*

[33] *Id.* (GA. CODE ANN. § 40-9911 (1975)).

As to the nature of the exactions themselves, the 1965 statute commands that the meetings be "public meetings," thereby implying their openness to the public. The 1972 enactment is more explicit—it not only designates that the meetings be "public," but expressly requires that they "shall be open to the public at all times." Further, the only record requirement of the 1965 measure pertains to balloting in executive sessions. The 1972 statute mandates minutes of all meetings and declares them "open to public inspection."

A major distinction between the two measures is that of expressed exceptions. The 1965 statute excepts only "executive sessions," with no stated limitations upon what the covered entity might designate "executive." The 1972 measure, although making no mention of executive sessions, specifies a number of exceptions which depend primarily upon the nature of the subject under consideration. In practice, it may result that an entity will typically desire an executive session to consider those subjects enumerated in the 1972 version.

The treatment of sanctions is another noteworthy difference between the two statutes. Although both declare violations punishable as misdemeanors, the 1965 measure expressly requires that the violation be "willful." Moreover, the 1972 statute provides additional incentives for compliance—otherwise, the products of meetings are declared non-binding, and injunctions are expressly authorized.

A final important consideration is the effect, if any, of the latter statute upon the former. In this regard, only one point is perfectly clear: the 1972 enactment does not expressly repeal the statute of 1965. Given the additional sanctions available under the 1972 mandate, the incentives for citizen complaints under the earlier statute may be somewhat diminished. Situations might also arise in which direct conflicts between provisions of the two statutes would be presented. In that event, the 1972 enactment, a later expression of legislative intent on the subject, presumably would control. Otherwise, the general judicial aversion to finding repeals by implication, and the traditional desire to give full effect to all reconcilable provisions on the subject, might logically be anticipated.[31]

[31] It does appear that the 1972 statute is the General Assembly's point of reference when it wishes to make certain that later created, and somewhat unique, entities are subject to open meeting requirements. For example, in 1975 the legislature created the "Municipal Electric Authority of Georgia," a "public corporation" of the state, to facilitate the supply of electrical power to Georgia's political subdivisions. 1975 Ga. Laws 107 (GA. CODE ANN. ch. 34B-4

Judicial consideration of the 1965 statute has been summary, incidental, and virtually nonexistent. In 1968, *Lilly v. Crisp County School System*[35] presented the court of appeals with an intervenor's challenge to a county school system's effort to validate bonds.[36] Among the complaints registered by the intervenors was a violation of the 1965 open-meetings mandate by the school board's failure to notify the public of the special meeting calling the bond election. In response, the court employed a general presumption of validity in favor of regularity,[37] but did not deny applicability of the mandate to the school board. Rather, the court concluded that the provisions of that mandate "require that all official meetings of the board be open to the public, but do not require that notice be given to the public prior to special meetings of the board."[38] The summary tenor of this conclusion rendered the court's precise pivotal point somewhat unclear. Was it the nature of the board's omission (failure to give notice), or the nature of its meeting (special rather than "official")? If the former, then the implication might be that providing notice is simply not within the open-meetings requirement, even for an official meeting. If the latter, the implication might be that the 1965 mandate simply does not apply to special meetings; the statute itself, however, does not denominate the nature of the meeting to be a crucial consideration. Rather, as long as the covered entity receives or expends public funds and is not convened in executive session, the statute expressly applies to "all meetings." Thus, was the court also indicating that a special meeting constituted an executive session? *Lilly* left much to the imagination.

Since the enactment of the 1972 statute, the few relevant cases surfacing in the appellate courts have focused upon it rather than the earlier statute. The sparseness of this litigation and the fact that most of it did not involve local governments paints a pathetic profile for present purposes.

In two of these episodes, the Georgia Supreme Court pondered

(1978)). This statute of creation expressly provides that "meetings of the Authority shall be subject to the provisions of Ga. L. 1972, p. 577 . . . ." *Id.* at 145.

[35] 117 Ga. App. 868, 162 S.E.2d 456 (1968).

[36] The state had brought a proceeding to validate the bonds, and the plaintiff citizens had intervened.

[37] "Every presumption will be indulged in favor of the validity and legality of the official acts of public officers." 117 Ga. App. at 870, 162 S.E.2d at 459.

[38] *Id.* This was also the court's response to the plaintiff's charge that the board had violated the more specific requirements of GA. CONST. of 1945, art. VIII, § 8, para. 1: "All official meetings of County Boards of Education shall be open to the public."

problems of coverage. *McLarty v. Board of Regents*[39] subjected the admittedly closed meetings of the "Student Activity Fund Committee" of the University of Georgia to scrutiny. The Dean of Student Affairs appointed this committee, composed of both students and faculty, to assist him in making recommendations to the President who in turn recommended to the Chancellor of the University System the allocation of student activity funds.[40] In reviewing the trial judge's decision that this committee "did not come within the purview of the 'Sunshine Law,' "[41] the supreme court seized upon the legislative trigger of "official actions":

> This language is clear. It applies to the meetings of the variously described bodies which are empowered to act officially for the State and at which such official action is taken. Official action is action which is taken by virtue of power granted by law, or by virtue of the office held, to act for and in behalf of the State.[42]

The purpose was obvious: "What the law seeks to eliminate are closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name."[43]

Against this backdrop of coverage considerations, the court then sketched a contrast: "The 'Sunshine Law' does not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations, and rendering advice but which have no authority to make governmental decisions and act for the State."[44] The previously projected purpose of the statute would not be served by such inclusions: "There is no such compelling reason to require public meetings of advisory groups. They can take no official action. Generally their reports are submitted in writing and are available to the public well in advance of any

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[39] 231 Ga. 22, 200 S.E.2d 117 (1973). This was the first case decided by the supreme court under the 1972 statute, and the court's characterization was that "this litigation involves Georgia's 'Government in Sunshine Law.' "

[40] The funds were derived from mandatory student fees, amounted to approximately $500,000 per year, and were allocated to student organizations.

[41] 231 Ga. at 22, 200 S.E.2d at 118.

[42] *Id.* at 22, 200 S.E.2d at 119.

[43] *Id.* at 23, 200 S.E.2d at 119. The court said the statute "declares that the people, who possess ultimate sovereignty under our form of government, are entitled to observe the actions of those described bodies when exercising the power delegated to them to act on behalf of the people in the name of the State."

[44] *Id.* at 22-23, 200 S.E.2d at 119.

official action and are considered by the official body in public meeting."[45]

The task remained to post the university committee on the scale constructed, and the court opted for non-coverage: "[T]he Student Activity Fund Committee, having no authority to take official action, is not a body which comes within the purview of the 'Sunshine Law' and it is not required to hold its meetings in public."[46] In concluding, the court cautioned that it did not reach the question of "what constitutes official action of those bodies which are subject to that law."[47]

In the second case to arise under the 1972 statute, *Coggin v. Davey*,[48] the trial judge had determined that the mandate governed the General Assembly and its conference committees, thus prompting his invalidation of legislative action on the state appropriations bill.[49] Reversing, the supreme court rejected the contention that the statute's reference to "state department" included the three branches of state government. Rather, stated the court, "[w]e think that the statute is applicable to the departments, agencies, boards, bureaus, etc. of this state and its political subdivisions. It is not applicable to the General Assembly."[50] In support of this view, the court noted that after enactment of the statute, the two houses of the General Assembly had adopted internal rules which were inconsistent with it.[51] "We do not believe," said the court, "that it can reasonably be argued that the House or Senate cannot pass an internal operating rule for its own procedures that is in conflict with a statute formerly enacted."[52] The court thus held that the statute did not affect "the Legislative branch of the government and its committees."[53]

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[45] *Id.* at 23, 200 S.E.2d at 119.

[46] *Id.* In arriving at this determination, the court rejected the need for testimony by the author of the bill which resulted in the 1972 statute. Said the court: "The language of the Act is clear."

[47] *Id.*

[48] 233 Ga. 407, 211 S.E.2d 708 (1975).

[49] The plaintiff employees of a radio station alleged that they had been excluded from specified committee meetings and named as defendants a member of the Senate and a member of the House of Representatives. *Id.* at 408, 211 S.E.2d at 709.

[50] *Id.* at 411, 211 S.E.2d at 710.

[51] These rules provided for executive sessions and declared that minutes of committee meetings were not matters of public record.

[52] 233 Ga. at 411, 211 S.E.2d at 710-11. Concurring Justices Ingram and Hall took issue with this statement. *Id.* at 412, 211 S.E.2d at 711.

[53] *Id.* at 411, 211 S.E.2d at 711. The court observed that "[i]f the House, the Senate, or both want to let the sun shine more brilliantly and more pervasively upon their deliberations

The analytical thrusts of the *McLarty* and *Coggin* decisions are primarily negative. Neither dealt with local government, and each held the considered entity to be outside the coverage of the 1972 statute. In reaching this conclusion, the *McLarty* court focused upon the functions performed by the entity while the court in *Coggin* focused upon the entity itself. In *McLarty,* the entity probably fell within those entities enumerated by the statute, but its functions did not. In *Coggin,* the functions appeared "official" enough, but the entity was not among those enumerated by the statute. The committee's functions in *McLarty* apparently were not "official" because of their lack of finality. This test, the court implied, would exclude from the statute's coverage various nondecisional activities such as "collecting information," "making recommendations," and "rendering advice." Although important, such activities are only supportive of and preliminary to the "official" disposition of a matter and do not engender public "distrust" if performed in private.

*Georgia Real Estate Commission v. Horne*[54] provided an instance of the statute covering both entity and function—at least in the view of the Georgia Court of Appeals. Noted only incidentally in the opinion, one of the points in issue was the propriety of the public deliberations by the state commission in reviewing its hearing officer's determinations on the conduct of a real estate broker.[55] Citing the 1972 "Sunshine Law,"[56] the court treated the point in summary fashion as follows: "The Commission's public deliberations were not only made in full compliance with the law, but would have been nugatory had they been conducted otherwise."[57] Thus, the court presumably considered both the enumeration and finality requirements to be fulfilled, and was prepared to indicate one of the sanctions of noncompliance. That indication was, of course, sheer dictum.

The most recent presentations of the statute to the supreme court, at last in the domain of local government, are *Harms v. Adams*[58] and

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and actions, they can do so by adopting rules and procedures applicable to their operations that will accomplish this purpose."

[54] 141 Ga. App. 226, 233 S.E.2d 16 (1977).

[55] The court observed that the trial judge had found the commission's deliberations defective on the ground they were performed publicly, but had not ruled the 1972 statute to be unconstitutional. *Id.* at 230, 233 S.E.2d at 19.

[56] *Id.*

[57] *Id.*

[58] 238 Ga. 186, 232 S.E.2d 61 (1977).

*Dozier v. Norris.*[59] In *Harms* a citizen sought to invalidate actions of a municipal planning commission because designated meetings allegedly failed to comply with the 1972 mandate.[60] The evidence showed that the committee held those meetings in the mayor's office, "a small and crowded room,"[61] and gave no public notice of them. Responding in fairly abbreviated fashion, the supreme court was willing to assume without deciding that "our Sunshine Law is applicable to a municipal planning commission meeting."[62] Nevertheless, it concluded, plaintiff had demonstrated no statutory violation because his "evidence [did] not show that the meetings were closed to the public (i.e., that any person was excluded from or denied admission to the meetings)."[63] Additionally, the evidence revealed that the meetings were held in the mayor's office because other activities were being conducted in the council meeting room. In response to the plaintiff's further contention that the failure to give notice prevented the public from attending meetings, the court explained that "our Sunshine Law deals with the openness of public meetings, not with notice of such meetings."[64] For these reasons, the court affirmed the trial judge's grant of summary judgment for the defendant planning commission.

*Dozier v. Norris*[65] replayed the two issues of *Harms*—notice and location—in the county context and with the same result. In *Dozier* citizens attacked the validity of a meeting conducted by county commissioners, alleging the meeting to be both "secret" and held in the home of a commissioner. On the first point, the supreme court recounted the trial judge's finding "that there was no evidence that the meeting in question was 'secret,' " which, reasoned the court, "is tantamount to a finding that it was open to the public."[66] As to location, the court declared that it recognized "the potential for abuse when meetings that are open to the public are held away from their usual places."[67] Yet, the court qualified, "on the facts of this

[59] 241 Ga. 230, 244 S.E.2d 853 (1978).

[60] Named as defendants were the mayor, members of the municipal council, and members of the municipal planning commission.

[61] 238 Ga. at 187, 232 S.E.2d at 62.

[62] *Id.* at 187, 232 S.E.2d at 61. On the point of coverage, the plaintiff had argued that the planning commission took "official action" and thus came within the provisions of the 1972 statute.

[63] 238 Ga. at 187, 232 S.E.2d at 62.

[64] *Id.*

[65] 241 Ga. 230, 244 S.E.2d 853 (1978).

[66] *Id.* at 232, 244 S.E.2d at 855. The court repeated the *Harms* counsel that openness does not require notice.

[67] *Id.*

particular case, which are that the commissioners hurriedly were meeting to avoid loss of state funds by appointing someone to sign in behalf of the commission during the hospitalization of the commission chairman, this court is unprepared to hold that the trial court erred by refusing to hold that the commissioners had violated the 'sunshine law.' "[68]

As puny as is the profile here proffered, one preliminary certainty has emerged. When the Georgia Supreme Court alludes to "sunshine," it is referring to the 1972 open-meetings mandate. Although neither the title nor body of that statute employs such terminology, the court apparently feels free to do so. A second constant is the court's refusal to view openness as requiring prior notice. Indeed the supreme court made that point more forcefully under the 1972 statute in *Harms* and *Dozier* than had the court of appeals under the 1965 statute in *Lilly*. Neither statute expressly requires prior notice of meetings to the public, and the courts have been most unreceptive to the contention that such a requirement should be implied. Less certain, of course, is the court's posture on such matters as coverage and the precise meaning of openness. As observed above, coverage was the critically missing element in both *McLarty* and *Coggin*, yet its presence was casually assumed in *Harms* and *Dozier*. As to openness, the thrust turned more tense. If other activities occupy the regular meeting place or if state grant funds hang in the balance, location is not a matter of great concern. The result appears to be that unless a citizen can determine when and where the meeting is to be held and then can demonstrate the entity's actual affirmative denial of access to the meeting, the citizen cannot satisfy the court that the meeting was not an "open" one under the 1972 "sunshine" statute. Obviously, numerous nuances await further judicial evaluation.

## III. DISCLOSURE

### A. *Generally*

A second major openness theme in modern times is the requirement that governmental officials and candidates for public office disclose information to the public. The officials, the candidates, and the information covered by the requirements differ considerably among the jurisdictions, but the statutes typically cover local governments. Such disclosure, it is urged, serves the cause of good

[68] *Id.*

government by enhancing voter insight and discouraging corruption. In opposition are the claims that these requirements encroach on privacy, violate equal protection, and infringe upon freedoms protected by the first amendment.[69] In such a controversial context, observations in the abstract are generally of little assistance.

The focus of some disclosure mandates is on financial interests. For example, an early California statute required all public officials to file annual statements disclosing the nature and extent of all investments exceeding $10,000 in value which they, their spouses, or their minor children owned.[70] In the much-cited 1970 case of *City of Carmel-by-the-Sea v. Young,*[71] the California Supreme Court determined that the statute violated a constitutional right of privacy. In examining such requirements, the court reasoned, "there must be a balancing of interests between the government's need to expose or minimize possible conflicts of interest on the one hand and the right to maintain privacy in one's personal financial affairs while seeking or holding public office on the other."[72] The court concluded that this statute failed to strike that balance:

> No effort is made to relate the disclosure to financial dealings or assets which might be expected to give rise to a conflict of interest; that is, to those having some rational connection with or bearing upon, or which might be affected by, the functions or jurisdiction of any particular agency, whether statewide or local, or on the functions or jurisdiction of any particular public officer or employee.[73]

A similar 1972 Washington statute required all elected officials and candidates for elective offices to file annual statements disclosing numerous financial interests which they and members of their immediate families owned.[74] These interests included savings accounts over $5,000, stocks and bonds over $500, corporate directorships, all sources of compensation exceeding $500, and real property

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[69] *See* J. FORDHAM, *supra* note 7, at 374-87; S. SATO & A. VAN ALSTYNE, *supra* note 12, at 439-45.

[70] 1969 Cal. Stats. 3093 (repealed 1973).

[71] 2 Cal.3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

[72] *Id.* at 270, 466 P.2d at 232, 85 Cal. Rptr. at 8.

[73] *Id.* Following this decision, the California legislature revised the statute and this revision was upheld in County of Nevada v. MacMillen, 11 Cal.3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974). *See* S. SATO & A. VAN ALSTYNE, *supra* note 12, at 443.

[74] This was an initiative measure, approved by the voters in 1972. Initiative 276, WASH. REV. CODE ch. 42.17 (1974).

with an assessed value in excess of $2,500.[75] In *Fritz v. Gorton*[76] the Washington Supreme Court took considerable pains to emphasize its doubt as to the wisdom of this measure, terming it "unprecedented in either state or federal legislation."[77] Its requirements were "exhaustive" and "burdensome,"[78] said the court, and "may foreclose the candidacy or continued office holding of well qualified citizens of impeccable integrity."[79] Indeed, "it may well be that application and enforcement of the section will have negative, as well as affirmative social results."[80] Nevertheless, the court sustained the validity of the mandate, finding "a legitimate or perhaps even a compelling state or societal interest" in its enactment,[81] for it "seeks to enlarge the information based upon which the electorate makes its decisions."[82] Thus, the balance was struck:

> The right of the electorate to know most certainly is no less fundamental than the right of privacy. When the right of the people to be informed does not intrude upon intimate personal matters which are unrelated to fitness for public office, . . . the candidate or office holder may not complain that his own privacy is paramount to the interests of the people.[83]

Another current target of public disclosure requirements is the political campaign.[84] A large number of states place restrictions upon and require disclosure of campaign contributions and expenditures, and again these mandates frequently include local governments.[85] The specifics of the schemes vary, the composite is complex, but the thrust is unmistakable—additional controls over and more public knowledge of the route by which political office is procured.[86]

That same thrust—exclusively at the federal level and to an unprecedented degree—was manifested by the Federal Election Cam-

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[75] *Id.*
[76] 83 Wash. 2d 275, 517 P.2d 911 (1974).
[77] *Id.* at 293, 517 P.2d at 922.
[78] *Id.* at 301, 517 P.2d at 926.
[79] *Id.* at 301, 517 P.2d at 927.
[80] *Id.* at 300, 517 P.2d at 926.
[81] *Id.* at 294, 517 P.2d at 923.
[82] *Id.* at 298, 517 P.2d at 925.
[83] *Id.*
[84] *See* S. SATO & A. VAN ALSTYNE, *supra* note 12, at 444.
[85] *Id. See generally Developments in the Law—Elections*, 88 HARV. L. REV. 1111 (1975).
[86] *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1237 (1975).

paign Act of 1971, as amended in 1974.[87] There included were limitations upon contributions to candidates, expenditure ceilings, and reporting and disclosure requirements for persons who contributed in excess of stated amounts.[88] In 1976, in its multi-faceted decision of *Buckley v. Valeo,*[89] the United States Supreme Court assessed the constitutionality of the statute by drawing a general line of demarcation between contributions and expenditures. The Court stated that "[t]he contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[90] The expenditure ceilings were another matter: "These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[91]

Finally, the Court sustained the validity of the reporting and disclosure requirements. The Court noted that these requirements imposed no ceilings on campaign-related activities, but rather sought to vindicate three "governmental interests":[92] first, providing the electorate with information for evaluating candidates; second, deterring actual corruption and avoiding the appearance of corruption; and third, gathering data to detect contribution violations. Conceding that public disclosure might deter some contributors and expose others to harassment or retaliation, the Court nevertheless deemed it "to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[93] "In summary," the Court concluded, "we find no constitutional infirmities in the record-keeping, reporting, and disclosure provisions of the Act."[94]

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[87] Pub. L. No. 93-443, § 101, 88 Stat. 1263 (1975) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 171 (1976).

[88] Pub. L. No. 93-443, § 101, 88 Stat. 1263 (1975) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

[89] 424 U.S. 1 (1976). The decision has, of course, attracted considerable commentary. *See, e.g.*, Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976).

[90] 424 U.S. at 58.

[91] *Id.* at 58-59.

[92] *Id.* at 66.

[93] *Id.* at 68.

[94] *Id.* at 84.

B. *In Georgia*

Concurrent with the disclosure developments elsewhere, most of the Georgia activity has swirled around the political campaign. Legislative movement has been almost frantic, judicial consideration most infrequent, and the patterns of performance remain incomplete. Noteworthy, however, are the highlights.

The development began with the General Assembly's 1974 enactment of a provision officially designated the "Campaign Financing Disclosure Act."[95] Expressly founded upon the state's proclaimed responsibility "to protect the integrity of the democratic process and to insure fair elections,"[96] the statute declared its applicability to enumerated elected state officials, members of the General Assembly, and "all county and municipal elected officials."[97] The provision required that contributions to candidates for the covered offices be made directly to the candidate or to his campaign committee, and it expressly prohibited anonymous contributions.[98] The statute then placed two major requirements on the campaign committee:[99] first, to keep records of all contributions and of expenditures over a specified amount,[100] as well as the names and addresses of all contributors and recipients of the noted expenditures; and second, to file with the Secretary of State "campaign financing disclosure reports"[101] listing names and addresses of both contributors and recipients of stated amounts.[102] Further, the statute directed the Secretary of State to make the disclosure reports "available for public inspection and copying," and to preserve the reports for a five year period.[103]

Additionally, the enactment established the "State Campaign Ethics Commission."[104] This commission was to receive, review, and make public documents filed with it, make documents available to prosecutorial officers, and deliver an annual report to the General Assembly.

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[95] 1974 Ga. Laws 155 (current version at GA. CODE ANN. ch. 40-38 (1975)).

[96] *Id.* at 156 (current version at GA. CODE ANN. § 40-3802 (1975)).

[97] *Id.*

[98] *Id.* at 158. Any anonymous contributions received by the candidate or his committee were required to be transmitted for deposit in the state treasury.

[99] If the candidate received the contributions or made the expenditures personally, he was expressly made subject to the same requirements. *Id.* at 160.

[100] The amount was $101.00 or more. *Id.* at 159.

[101] *Id.*

[102] *Id.* The amount was $101.00 or more.

[103] *Id.* at 160.

[104] *Id.* at 161.

Finally, the statute treated the matter of sanctions. It declared violators subject to a "fine of not more than $5,000.00 or imprisonment of not more than one (1) year or both."[105]

The 1974 disclosure statute was in effect less than a year when its validity was challenged in *Fortson v. Weeks.*[106] In a per curiam opinion, the Georgia Supreme Court announced determinations on a number of the legislative declarations. First, the court invalidated two provisions because they were not expressed in the title of the statute as required by the Georgia Constitution.[107] One of those provisions declared the statute's applicability to county and municipal elected officials. The title limited its coverage to "certain State offices,"[108] and, said the court, "[a]ll county and municipal elected officials are not state officers."[109] Accordingly, "their inclusion in the body of the Act is unconstitutional and the Act can not be enforced as to candidates seeking such offices."[110] The court also voided the provision creating a State Ethics Commission; again, the title of the statute contained no mention of it.[111]

Following these invalidations, the court proceeded to inquire whether the remainder of the statute could stand in their absence, and concluded that it could. "As we view the Act its purpose is 'to protect the integrity of the democratic process and to insure fair elections.' "[112] The court reasoned that the deletion of local officials and the ethics commission from the statute did not destroy that purpose for "[t]he scheme of the Act setting forth the requirements and providing the procedures 'to protect the integrity of the democratic process and to insure fair elections' has not been disturbed."[113]

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[105] *Id.* at 162.

[106] 232 Ga. 472, 208 S.E.2d 68 (1974). The trial court had held the entire statute unconstitutional.

[107] "No law shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." GA. CONST. art. III, § 7, para. 4.

[108] 1974 Ga. Laws 155-56 (current version at GA. CODE ANN. ch. 40-38 (1975)).

[109] 232 Ga. at 473, 208 S.E.2d at 71.

[110] *Id.* at 473-74, 208 S.E.2d at 71.

[111] "It appears the 'Commission' is given 'carte blanche' authority to adopt whatever duties it desires to assume. Such sweeping authority cannot be sustained under the provision of the title . . . ." *Id.* at 476, 208 S.E.2d at 73. The court refused to find unconstitutional the title's reference to, but the statute's omission of, investigations by the Attorney General. The title's reference was deemed "mere surplusage." *Id.* at 475, 208 S.E.2d at 72.

[112] *Id.* at 475, 208 S.E.2d at 72.

[113] *Id.* In a dissenting opinion, Justice Undercofler explained that "the total effect of the deletions here compels me to conclude that the legislature would not have adopted the Act with all these provisions removed. Accordingly, I am of the opinion that the Act is unconstitutional." *Id.* at 495, 208 S.E.2d at 83 (Undercofler, J., dissenting).

With the statute thus reduced, the court next considered the more general constitutional complaints. One claimed a violation of equal protection in the statute's establishment of an allegedly arbitrary class of "certain State offices."[114] Considering this charge, the court observed that the enactment expressly covered all "the offices of the executive and legislative branches of the state government filled by public election."[115] The court conceded that members of the judiciary and district attorneys were omitted, but it determined that to be "a reasonable classification."[116] The court noted that the judiciary is an independent branch of state government, and "rules and procedures have already been established to assure appropriate conduct for justices, judges, district attorneys, and lawyers not only during political campaigns but at all other times."[117]

The most extensive challenge to the statute alleged encroachment upon freedoms protected by the first amendment. One of the prongs of this protest focused upon the recording and reporting requirements—these, the plaintiff contended, would "discourage citizens from exercising their rights in the full elective process."[118] The court diluted that danger by its interpretation of the requirements. The "contributions" covered primarily were restricted to contributions of money,[119] and the court stated: "We conclude that the donation of volunteer services to a candidate's campaign does not constitute a 'contribution' within the meaning of the Act and was not intended by the legislature to be the subject of reporting and disclosure."[120] This restriction enabled the court to distinguish between the act of a private citizen in endorsing a candidate and the purchasing of a newspaper advertisement for the candidate. The former did not amount to a "contribution"; the latter did.[121] This distinction, however, confronted the court with still another statutory command

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[114] *Id.* at 478, 208 S.E.2d at 74.

[115] *Id.*

[116] *Id.* In dissent, Justice Undercofler took issue with this conclusion. *Id.* at 496, 208 S.E.2d at 83 (Undercofler, J., dissenting).

[117] *Id.* at 479, 208 S.E.2d at 75. In a concurring opinion, Justice Hall emphasized the absence of a violation of equal protection: "The legislature is free to discern, or to think that it discerns, a greater need to protect the integrity of the democratic process in public elections of state officers in the legislative and executive branches of government than those within the judiciary. It may move to attack a harm where it is perceived, without any necessity for moving against it on other fronts where it may also be found." *Id.* at 489, 208 S.E.2d at 80 (Hall, J., concurring).

[118] *Id.* at 480, 208 S.E.2d at 75.

[119] "The definition of 'contribution' presents no problem so long as outright contributions of money are involved." *Id.*

[120] *Id.* at 480, 208 S.E.2d at 75.

[121] In the latter case, said the court, "money changes hands." *Id.* at 481, 208 S.E.2d at 75.

that all contributions must be made directly to the candidate or his campaign committee.[122] How could the citizen's purchase of media publicity for the candidate square with that command? Again, on the ground that "the exercise of First Amendment freedoms may not be harshly channeled and controlled,"[123] the court retreated to construction.

> [W]e construe this Act to mean that this and other financial outlays by persons in the course of the exercise of First Amendment rights, shall be deemed to be the equivalent of a direct contribution to the candidate or his campaign committee, so that the contributor is not in violation of the Act.[124]

Thus, the financial outlay was a "direct contribution" and must be reported by the candidate or his committee "if within his knowledge or if such knowledge might be discovered by reasonable inquiry."[125]

The remaining major first amendment contention concerned the statute's prohibition of anonymous contributions.[126] The court swiftly disposed of that objection by balancing the citizen's constitutional right of anonymity against the state's interest in fair elections. The court reasoned that disclosure "permits the voters to more intelligently appraise a candidate's true position on public affairs";[127] hence, "[a]ny right to anonymity in this regard must yield to the public's right to know who is 'behind the scene.' "[128] As to the eventual destination of anonymous contributions, the court held that they would never become property of the candidate and thus sustained their statutory relegation to the State Treasury.[129]

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[122] 1974 Ga. Laws 155, 158 (GA. CODE ANN. § 40-3804(a) (1975)).

[123] 232 Ga. at 481, 208 S.E.2d at 75.

[124] *Id.* at 481, 208 S.E.2d at 76. In a concurring opinion, Justice Gunter disagreed with this construction. He urged that financial outlays to anyone other than the candidate or his committee were violations of the statute, but that such outlays constituted only "conduct" which was not protected by the First Amendment. *Id.* at 486, 208 S.E.2d at 78 (Gunter, J., concurring).

[125] *Id.* at 481, 208 S.E.2d at 76. The court conceded the problem of the "phantom advertiser," but thought the situation would rarely occur and that the candidate's inability to report it would not constitute a "knowing" violation of the statute so as to incur penalties.

[126] 1974 Ga. Laws 155, 158 (GA. CODE ANN. § 40-3804(c) (1975)).

[127] 232 Ga. at 482, 208 S.E.2d at 76.

[128] *Id.* In dissent, Justice Undercofler argued that the statute was invalid in prohibiting all anonymous contributions in order to eliminate those made for corrupt purposes. *Id.* at 497, 208 S.E.2d at 84 (Undercofler, J., dissenting).

[129] 1974 Ga. Laws 115, 158 (GA. CODE ANN. § 40-3804(c) (1975)). Thus, the court rejected the argument that such relegation was an unconstitutional taking of private property without just compensation. 232 Ga. at 483, 208 S.E.2d at 76. In a concurring opinion, Justice Ingram urged that such funds be regarded as "escrow monies that belong to the contributor" which

Finally, the court addressed the contention "that the disclosure of contributions to political campaigns violates the right to a secret ballot."[130] The court quickly disposed of this argument as having "no merit," for "a campaign contribution can not be equated with a secret ballot."[131]

Less than two months after the Georgia Supreme Court's decision in *Fortson v. Weeks,* the 1974 disclosure statute was before a three-judge federal court in *Stoner v. Fortson.*[132] Evaluating claims by a candidate for Lieutenant Governor that the statute was violative of the United States Constitution, the federal court took the statute "as interpreted, construed, and modified by the Georgia Supreme Court."[133] From this base, the court analyzed two major constitutional contentions.

The plaintiff alleged that the statutory exclusion of the judiciary violated the equal protection clause. Finding that neither a "suspect class" nor a "fundamental right" was involved, the court restricted itself to determining whether "the classification bears a reasonable relationship to a legitimate state purpose."[134] Under this approach, it concluded that the "basic principle of separation of the three branches of government alone is sufficient to satisfy the requirement . . . ."[135] Treating only the legislative and executive branches of government to protect the "democratic process" and to insure "fair elections" was neither "invidiously discriminatory" nor "arbitrary."[136] With the judicial branch covered by the state's Code of Judicial Conduct,[137] and district attorneys' conduct regulated by the Georgia Supreme Court,[138] the court concluded that their exclusion from the disclosure statute was rational.

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he should have a "reasonable opportunity" to recover before they become a part of the state's public revenues. *Id.* at 488, 208 S.E.2d at 79 (Ingram, J., concurring).

[130] 232 Ga. at 484, 208 S.E.2d at 77.

[131] *Id.*

[132] 379 F. Supp. 704 (N.D. Ga. 1974). The *Fortson* decision was rendered on June 20, 1974, and the *Stoner* decision was rendered on August 2, 1974.

[133] 379 F. Supp. at 709. The court said that "the words of the state supreme court 'are the words of the statute.' " *Id.*

[134] *Id.* The classification was thus to be upheld "unless the choice departs from every public purpose which could reasonably be conceived." *Id.* at 708.

[135] *Id.* at 709.

[136] *Id.*

[137] Indeed, the court said that under that Code the members of the judiciary do not even know who their contributors are. *Id.* at 710.

[138] Also, the court reasoned that district attorneys do not pass laws nor establish state or departmental policy. *Id.*

The remaining complaint was grounded in the first amendment: disclosing the names of contributors to a controversial candidate such as the plaintiff would subject them to harassment and persecution and deprive them of their rights of free speech and association.[139] The court conceded that possible constitutional infringements existed, thus commanding the application of a "two-tier test."[140] First, the state must demonstrate the existence of a "significant or compelling state interest" in the purpose sought to be served by the statute.[141] The court noted that in this case, that tier presented no problem: "There can be little doubt that the state has a compelling interest in preserving the democratic process and insuring fair elections."[142] Secondly, the state must show a substantial relationship between that purpose and the disclosures required by the statute. The state also met the requirement posed by the second tier: "This court has no doubt that the disclosures sought bear a substantial connection to preventing corruption in politics, to preventing influence buying, to preventing favoritism in dealings with the state, to preventing the buying of appointments and positions; in short, to preserving the democratic system and ensuring fair elections."[143] Consequently, the court determined that any infringements upon first amendment rights of speech and association were "constitutionally permissible."[144]

In the span of less than one year, therefore, Georgia's first bona fide disclosure requirement was enacted by the General Assembly and judicially scrutinized at both the state and federal levels. The legislative effort at coverage was fairly expansive, and its regulatory thrusts employed both prohibition and revelation. On all those fronts, the measure was trimmed by virtue of its judicial exposure. The coverage restriction was the most striking: the state constitution obliterated the statute's applicability to all local governments. Also, the Georgia Supreme Court significantly diluted its impact by statutory construction. Although the court could hurdle the equal protection barrier, the first amendment remained a more substantial obstruction. In avoiding that obstruction, the court split the concept of "contributions," and converted some payments to third

[139] *Id.* at 710-11.
[140] *Id.* at 711-12.
[141] *Id.* at 712.
[142] *Id.*
[143] *Id.* at 713. The court also sustained the disclosure cut-off point of $101.00.
[144] *Id.* at 714. The court granted the defendant's motion to dismiss the plaintiff's action.

parties into the "equivalent" of payments directly to the candidate. Additionally, it softened the reporting requirement by the qualification of "reasonable inquiry." Taking the measure with these state judicial appendages, the federal court was able to certify it as constitutional. When the dust settled, the 1974 disclosure statute was alive but emaciated.

At its 1975 session, the General Assembly effected numerous revisions in both the title and body of the disclosure enactment.[145] It changed the title to include express references to "county and municipal elected officials" and a state ethics commission.[146] The legislature also changed the official designation of the statute itself: it now became the "Campaign and Financial Disclosure Act."[147]

More substantively, the General Assembly expanded the statute's coverage to district attorneys and "all constitutional judicial officers,"[148] and it amended both "contributions" and "expenditures." The legislature specifically excluded from the meaning of "contribution" "the value of personal services performed by persons who serve without compensation from any source on a voluntary basis."[149] As to "expenditures," it made the statute more inclusive, thus no longer subjecting the expenditures for which records were to be maintained and those to be included in the disclosure reports to a minimum cut-off point.[150]

A major addition to the statute in 1975 came in the form of a new prohibition limiting the total amount that a candidate for statewide office and for the General Assembly could "expend from his personal funds and from contributions made in furtherance of his political campaign, personally and through his campaign committee."[151] It also listed different specific maximum amounts for the various offices.[152] Another substantial addition was the creation of the "State Ethics Commission"[153] and the fleshing out of its authority and duties. The statute authorized the commission to adopt rules and regulations, issue subpoenas, and prosecute violations of the

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[145] 1975 Ga. Laws 1120 (GA. CODE ANN. ch. 40-38 (1975)).

[146] *Id.*

[147] *Id.* at 1121.

[148] *Id.* at 1122.

[149] *Id.* at 1122-23. Specifically included were retainer fees paid to public relations consultants who were candidates for office.

[150] *Id.* at 1124. The $101.00 minimum was retained for contributions.

[151] *Id.* at 1126.

[152] *Id.* The primary election amounts ranged from $6,000 for candidates for the House of Representatives to $400,000 for candidates for the office of Governor.

[153] *Id.* at 1128.

statute. Among its duties were the prescription of forms for complying with the enactment, the preparation of a manual of instructions, the dissemination of information, the investigation of complaints of violations, and the delivering of annual reports of its actions.[154]

A final important change was the refinement of sanctions. The law declared a knowing violation to be a misdemeanor on the first offense and a felony "upon the second or subsequent offense."[155]

Now that candidates for local government offices had been resubjected to coverage by the disclosure statute, the 1976 legislature turned to a more particular treatment of them.[156] It directed candicates for county office to file their disclosure reports with the county probate judge and those for municipal office with the municipal clerk.[157] The General Assembly gave the probate judge and the clerk the duty of inspecting each report and notifying the candidate of any noncompliance,[158] and also mandated them to make the disclosure reports "available for public inspection and copying during regular office hours"[159] and to preserve the reports for a period of two years.[160] Finally, it directed the probate judge and the clerk to notify the State Ethics Commission of any failures to file reports and of any complaints made against a candidate.[161]

As noted above, the United States Supreme Court in 1976 rendered its decision on the Federal Election Campaign Act in *Buckley v. Valeo*.[162] That decision immediately prompted litigation in Georgia over the validity of the expenditure limitations which the legislature had added to the Georgia disclosure statute in 1975.[163] In *State Ethics Commission v. McDowell*[164] the Georgia Supreme Court observed *Buckley*'s general distinction between contributions and expenditures and put it to immediate service: "The Georgia Act is no different from the Federal Act in this First Amendment area, and

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[154] *Id.* at 1130-32.

[155] *Id.* at 1133.

[156] 1976 Ga. Laws 1423 (current version at GA. CODE ANN. § 40-3806 (1978)).

[157] *Id.* at 1424. Should the candidate have no opposition, the report was also required to be filed with the Secretary of State.

[158] *Id.* at 1428.

[159] *Id.* at 1427.

[160] *Id.*

[161] "In the event any complaint is against a county or municipal candidate, a copy of the reports filed by such candidate will be forwarded to the Commission along with the complaint." *Id.* at 1427-28.

[162] 424 U.S. 1 (1976). *See* notes 89-94 and accompanying text *supra*.

[163] 1975 Ga. Laws 1120, 1126 (GA. CODE ANN. § 40-3808.1 (1975) (repealed 1977)). *See* notes 145-55 and accompanying text *supra*.

[164] 238 Ga. 141, 231 S.E.2d 734 (1977).

the over-all expenditure limitations in the Georgia Act are unconstitutional."[165]

During its 1977 session, the General Assembly responded to the *McDowell* decision by expressly repealing the expenditure limitations and deleting them from the statute.[166] The 1977 amendment also effected various other changes, including the further expansion of the meaning of "contributions" to encompass the payment of qualifying fees for candidates.[167] Moreover, the "State Ethics Commission" now became the "State Campaign and Financial Disclosure Commission,"[168] with authority to conduct "preliminary investigations"[169] as well as to "order the payment of civil penalties not to exceed $100.00 for each failure to file a report required by this Act."[170] Additionally, the amendment restricted the commission's ability to act: it was to conduct no investigation or inquiry unless the person filing the complaint "shall reduce the same to writing and verify the same under oath, to the best information, knowledge, and belief, the falsification of which shall be punishable as false swearing . . . ."[171]

By way of summation, therefore, the public disclosure phenomenon has been seen to be a subject with many sides. Emerging out of controversy, both its focus and its purposes may vary considerably. Among its most popular targets are local or federal political campaigns. In Georgia, legislative activity has been prolific, with minimal judicial consideration by state and federal courts. By rather debilitating judicial construction, a form of the original enactment was preserved, and later legislative sessions have yielded somewhat inconsistent efforts at both dilution and reenforcement. The result is an awkward statutory depository with many uncertain tensions yet to be resolved. In the meantime, the enactment continues to regulate candidates for elective local government offices.

## IV. OPEN RECORDS

### A. *Generally*

The third leg of the openness tripod, and by far the most historic,

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[165] *Id.* at 142-43, 231 S.E.2d at 735.
[166] 1977 Ga. Laws 1302, 1308 (GA. CODE ANN. § 40-3808.1 (1978)).
[167] *Id.* at 1303.
[168] *Id.* at 1310.
[169] *Id.*
[170] *Id.* at 1311.
[171] *Id.*

is the notion of a right of access to "public records." This notion, unlike those of open meetings and public disclosure, may possess a common law origin.[172] As early as 1891, for example, the Virginia Supreme Court of Appeals treated as firmly established the right of a voter to mandamus an election district registrar "to allow petitioner to inspect and to take a copy of his registration books."[173] Citing authorities which "might be multiplied almost indefinitely,"[174] the court held the books to be "of a public nature" and thought it to follow that "upon general principles, independently of any statute on the subject, any person having an interest in them would have a right to inspect them."[175] This heritage, in turn, apparently reenforced the court's liberal construction of a "public inspection" statute which the legislature had enacted.[176]

Modern authorites imply confirmation of both the common law origin of and later legislative support for the open records requirement. Again, local governments are typically covered, and questions relating to issues of both policy and practice remain unanswered. What are "public records"? To whom is the right of inspection extended? How much publicity is assured by "access" or "inspection"? Do countering policies require exceptions to this "right"?[177] Like the other aspects of openness, this one too is an unfinished chapter in local government law.

### B. *In Georgia*

In Georgia, the notion of open government records made its first general statutory appearance in 1959.[178] The General Assembly's enactment directed that "[a]ll State, county and municipal records shall be open for a personal inspection of any citizen of Georgia at a reasonable time and place . . . ."[179] The statute additionally provided that

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[172] *See generally* 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 19B.04 (1973); S. SATO & A. VAN ALSTYNE, *supra* note 12, at 487-95.

[173] Clay v. Ballard, 87 Va. 787, 13 S.E. 262 (1891).

[174] *Id.* at 792, 13 S.E. at 264.

[175] *Id.* at 790, 13 S.E. at 263. "At common law the right to inspect public documents is well defined and understood." *Id.* at 791, 13 S.E. at 263.

[176] According to the court, this statute had been passed "out of abundant caution." *Id.* at 790, 13 S.E. at 263.

[177] *See* 2 C. ANTIEAU, *supra* note 172; S. SATO & A. VAN ALSTYNE, *supra* note 12, at 487-95.

[178] 1959 Ga. Laws 88 (current version at GA. CODE ANN. ch. 40-27 (1975)).

[179] *Id.* (current version at GA. CODE ANN. § 40-2701 (1975)). The statute further directs that those in charge of such records "shall not refuse this privilege to any citizen." *Id.* at 89.

> [i]n all cases where a member of the public interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any such person shall hereafter have the right of access to said records, documents or instruments for the purpose of making photographs of the same while in the possession, custody and control of the lawful custodian thereof, or his authorized deputy.[180]

The statute required that the photographs be taken in the room where the records were kept, under the supervision of the custodian, at a charge agreed to by the person desiring the photographs.[181] Finally, it expressly declared as exceptions from the inspection mandate records "which by order of a court of this State or by law, are prohibited from being open to inspection by the general public . . . ."[182]

Following the original enactment, the legislature made few additions to the "public records" statute. It expressly excepted records "specifically required by the Federal Government to be kept confidential,"[183] and "medical records and similar files, the disclosure of which would be an invasion of personal privacy."[184]

Primarily, therefore, the legislature made two basic commands of Georgia local governments. First, it required that county and municipal "records" be open to "personal inspection." This requirement was for the benefit of "any citizen of Georgia," and included no qualification that the citizen possess a special interest in the particular record. The only original limitations upon this requirement were to except materials whose inspection was prohibited and to require that the inspection be made at a reasonable time and place. The second command encompassed "instruments" and "documents" in addition to "records," and mandated a right of photography. This requirement was to benefit any "member of the public," even a non-Georgia citizen, but it limited this benefit by

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[180] *Id.* at 89 (current version at GA. CODE ANN. § 40-2702 (1975)).

[181] *Id.*

[182] *Id.* at 88 (current version at GA. CODE ANN. § 40-2701 (1975)).

[183] 1967 Ga. Laws 455. This statute was subsequently repealed, but was reinstated by 1970 Ga. Laws 163 (GA. CODE ANN. § 40-2703 (1975)).

[184] 1970 Ga. Laws 163 (GA. CODE ANN. § 40-2703 (1975)). Otherwise, all records of hospital authorities were declared subject to the requirements. The 1970 statute added for state officers and employees a privilege to refuse to disclose "the identity of any person who has furnished medical or other similar information which has or will become incorporated into any medical or public health investigation, study or report of the Georgia Department of Public Health." *Id.* at 164.

two additional qualifications. Thus, the public member must possess an interest in the matter and enjoy a prior existing right to inspect, take extracts, or make copies. The statute did not indicate in what fashion that right previously must have existed. Additionally, the right to photograph was limited by the custodian's supervision and charges for service.

Finally, two further observations on the statutory scheme are offered. First, the later exceptions imposed for matters made confidential by the federal government and for medical matters which invaded personal privacy limited both commands. Secondly, neither command specified any penalties for violations.

Judicial consideration of Georgia's "open records" legislation is sketchy, and only recently in the evolution have courts effectively analyzed the legislation. What is seemingly the Georgia Supreme Court's first reference to the statute appears in *Bradford v. Bolton.*[185] The plaintiff sought to enforce the collection of a tort judgment against a municipality by requiring payment from present funds, if available, or from an additional tax, if necessary.[186] The municipality's defensive contentions included the plaintiff's alleged failure to show whether the municipality's taxation limit had been reached, whether an additional tax could be levied, whether the municipal charter authorized the tax, and whether the municipality possessed sufficient funds for the payment.[187] Sustaining the plaintiff's petition against general demurrers,[188] the supreme court reasoned that "at the time this action was filed, the act approved February 27, 1959, . . . providing for the inspection of all public records of State, county, and municipal authorities, had not been enacted."[189] Consequently, the court concluded, "it is not a valid ground of demurrer to her action that she has not negatived possible defenses of the city, or set forth facts peculiarly within the knowledge of the defendants."[190]

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[185] 215 Ga. 188, 109 S.E.2d 751 (1959). This case was decided on July 8, 1959, and the open records statute had received approval on February 27, 1959.

[186] The judgment had been obtained in the superior court and affirmed on appeal by the Georgia Court of Appeals. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160 (1956).

[187] On the basis of such contentions, the trial court had sustained the municipality's general demurrers to the plaintiff's petition. 215 Ga. at 189-90, 109 S.E.2d at 753.

[188] The court pointed to charter authorization to pay valid obligations and the absence of prohibitions upon such power. *Id.* at 191-92, 109 S.E.2d at 754.

[189] *Id.* at 192, 109 S.E.2d at 755.

[190] *Id.* "Matters of defense to the plaintiff's action should be set up and urged in a proper answer." *Id.*

What the court said in *Bradford* was clear enough; the possible implications of its statement were another matter. It stated that the municipality could not sit snugly in such a case and fault the plaintiff for the failure to show facts of which only the municipality had knowledge. Those facts were matters of defense which the municipality must assert in a proper answer to the plaintiff's complaint. The court implied that not only were such facts unknown, but the plaintiff possessed no means of obtaining access to them. The court further implied that the open records statute, had it been in effect, might have controlled this situation and required the opposite result. In that event, it implied, the plaintiff might either have secured the information or borne the burden of failing to do so. Thus, the final judicial implications appear to be that the 1959 statute gave birth to whatever rights of access were available in Georgia, and that prior to its enactment no such rights existed. Was the bottom line of *Bradford,* therefore, the signal that the Georgia Supreme Court—unlike some courts in other jurisdictions—found no common law origin for a right of access to public records? If this was the signal, did it carry an additional message as to the type of judicial construction of the statute which might be anticipated?

Whatever the signal of *Bradford*, it proved to be weak; it was not until the 1970's that the open records statute was mentioned in other judicial opinions. Even then, the references were mostly incidental, as the federal district court illustrated in *Crow v. Brown.*[191] That case presented a challenge to a county's denial of building permits for the construction of low rent public housing in unincorporated areas.[192] The court found that the county's only reason for the denial was "that the apartments would be occupied by low-income, black tenants,"[193] and thus declared its actions violative of equal protection. In reaching this finding, the court relied upon statements contained in memoranda written by the county attorney.[194] The county objected to the admission of these memoranda "on the ground that they were privileged communications between an attorney and his client."[195] In a footnote to its opinion, the court

[191] 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972).

[192] The county had previously rezoned the area for the construction of apartments, but then allegedly denied the building permits when it discovered the nature of the apartments. *Id.* at 387.

[193] *Id.* at 389.

[194] *E.g.,* "This is a 'hot potato.' I don't believe they can get a variance of 1 inch on anything. Be sure and keep everybody informed of developments." *Id.* at 387.

[195] *Id.* at 389 n.5.

responded to this objection by reasoning that "only confidential communications between an attorney and his client are privileged."[196] It then cited the open records statute for the following conclusion: "These memoranda are . . . county records and open to public inspection, . . . so the privilege does not apply."[197]

The Georgia Supreme Court in *Rentz v. City of Moultrie*[198] also made short shrift of an open records argument. Plaintiffs challenged the validity of a referendum on the sale and distribution of alcoholic beverages in the municipality.[199] The challengers alleged *inter alia* that the mayor had refused to permit them to see the petition seeking the election so that they might verify some of the signatures.[200] In response, the Georgia Supreme Court cited the open records statute[201] and expressly agreed that "the appellants had a right to view the petition under our law."[202] The court, however, tempered that concession by the following qualification: "[H]ere they took no action to enforce this right and at this late date, subsequent to the election, will not be heard to complain."[203]

With the federal technique in *Crow* and the state maneuver in *Rentz,* two courts twice treated the Georgia open records mandate in the most summary of judicial fashions. The conclusions on the statute's coverage, at least, were clear: both the county attorney's memoranda and the municipal citizens' petition constituted governmental "records" within the meaning of the statute. Having determined that point, the courts then focused on the quandry of possible exceptions, and there the judicial approaches diverged. Ironically, those approaches arrived at conclusions directly opposite from what one logically might have anticipated. After all, the statute expressly excepted records prohibited from inspection by law; it provided nothing whatever on the matter of waiver. In *Crow,* the county contended that the attorney-client privilege provided an ex-

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[196] *Id.*

[197] *Id.* at 390 n.5.

[198] 231 Ga. 579, 203 S.E.2d 216 (1974).

[199] The referendum had passed by a slight majority, and the trial court had rejected the plaintiff's challenge. *Id.* at 579, 203 S.E.2d at 217.

[200] *I.e.,* the challengers wished to determine whether the petition contained the valid signatures of 35% of those eligible to vote in the preceding general election. *Id.* at 579, 203 S.E.2d at 217-18.

[201] The court also cited a provision of the municipal elections code providing for the right of public inspection of election materials. *See* GA. CODE ANN. § 34A-108 (1970).

[202] 231 Ga. at 580, 203 S.E.2d at 218. The court also agreed that evidence supported the challengers' contention that they had been denied access to the petition. *Id.*

[203] *Id.* at 581, 203 S.E.2d at 218.

ception, only to be advised by the court that the privilege depended upon confidentiality, and confidentiality was lacking because of the statute! In contrast, the *Rentz* court, in the absence of any statutory provision, discovered an exception in that those who possessed the right to inspection had waited too long to exercise that right.[204] Neither approach elaborated anything resembling analytical rationale.

Remarkably, the first bona fide judicial analysis and interpretation of the open records statute did not occur until 1976 in *Houston v. Rutledge*.[205] That litigation arose over six files maintained by a municipal sheriff relating to the deaths of inmates in the jail under his supervision over a period of several years.[206] Representatives of local newspapers sought to mandamus the sheriff to produce those files for inspection, and then appealed the trial judge's dismissal of their complaint. The sheriff denied the characterization of the files as "public records," primarily on the ground that he prepared and maintained them as a matter of his discretion rather than legal requirement.[207] Against that backdrop, the supreme court formulated "the issue for decision" as "whether the six files involved in this litigation are or are not 'public records' within the meaning" of the open records statute.[208] With a minimum of exploration, the court defined the determinant to be whether the "documents," "papers," or "records" were "prepared and maintained in the course of the operation of a public office . . . ."[209] The court concluded that the files fit this formula, and it was "immaterial" that they "were not required to be prepared and maintained pursuant to a statute or ordinance."[210]

With apparent destination in sight, the court then detoured to a "second question": "Are these public records maintained by the

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[204] A somewhat convoluted perspective of a similar instance might be indicated by Billups v. State, 234 Ga. 147, 214 S.E.2d 884 (1975). There a majority of the supreme court held that an indigent who was convicted of a felony, but who took no appeal, was not entitled to a copy of his trial transcript. In dissent, three justices viewed the transcript as a public record, open for inspection and copying, and commented that "the public inspection and copying provisions of our law . . . do not require the person desiring to inspect or copy records to show justification or necessity therefor." *Id.* at 150, 214 S.E.2d at 886. The dissent urged that denial of the transcript constituted a violation of equal protection. *Id.* at 151, 214 S.E.2d at 887.

[205] 237 Ga. 764, 229 S.E.2d 624 (1976).

[206] The sheriff admitted his possession of the files. *Id.*

[207] The sheriff admitted his refusal to make the files available for inspection. *Id.*

[208] *Id.* at 764, 229 S.E.2d at 626. The court quoted the open records statute.

[209] *Id.* at 765, 229 S.E.2d at 626.

[210] *Id.*

sheriff now, at this time, open for inspection to an inquiring citizen?"[211] Viewing the answer "merely one of statutory construction,"[212] the court deemed applicable "First Amendment principles which favor open, unfettered communication and disclosure except where some limitation thereon is required in the public interest."[213] Without the benefit of legislative expression, the court took cover behind legislative intent: "We do not believe that the General Assembly intended that all public records of law enforcement officers and officials be open for inspection by a citizen as soon as such records are prepared."[214] Rather, the court suggested the following general rule:

> Statements, memoranda, narrative reports, etc. made and maintained in the course of a pending investigation should not in most instances, in the public interest, be available for inspection by the public. However, once an investigation is concluded and the file closed, either with or without prosecution by the state, such public records in most instances should be available for public inspection.[215]

In operation, that rule required a judicial balancing which the lower court had not undertaken;[216] consequently, the supreme court vacated the trial court's judgment and remanded the case for further proceedings "in which [the judge] will balance the public interest in favor of disclosure against the public interest in favor of nondisclosure."[217]

The supreme court's performance in *Houston v. Rutledge* thus

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[211] *Id.*

[212] *Id.* at 766, 229 S.E.2d at 627.

[213] *Id.*

[214] *Id.* at 765, 229 S.E.2d at 626.

[215] *Id.* "Generally, the public records that are prepared and maintained in a current and continuing investigation of possible criminal activity should not be open for public inspection. On the other hand, and again generally, public records prepared and maintained in a concluded investigation of alleged or actual criminal activity should be available for public inspection." *Id.* at 765-66, 229 S.E.2d at 626-27.

[216] "When a controversy of this nature arises between a citizen and a public official, the judiciary has the rather important duty of determining whether inspection or non-inspection of the public records is in the public interest." *Id.* at 765, 229 S.E.2d at 626.

[217] *Id.* at 766, 229 S.E.2d at 627. Justice Jordan dissented, and Justice Ingram concurred, urging that "unless the sheriff on remand can show some persuasive reason why the files should not now be made available for public inspection, I believe we have a duty under the First Amendment to the United States Constitution and Code Ann. § 40-2701 to require the files to be made available for public inspection without further delay." *Id.* at 766-67, 229 S.E.2d at 627 (Ingram, J., concurring).

constitutes a significant milestone in Georgia's "open records" history. On at least two important scores, the court's opinion substantively supplements the 1959 legislative expression. Interestingly, the court employed analytical thrusts of contrasting complexions on those scores. On the one hand, the court's definition of "public records" was straightforward, inclusive, and free of technicality. It casually extended to "documents" and "papers," and spurned limitations turning upon discretion in preparation. Rather, it was sufficient that the materials simply be "prepared and maintained in the course of the operation of a public office."

As though to offset its prior permissiveness, however, the opinion then diverted to effect a dilution. By structuring a "second question," by engaging "statutory construction," and by divining what the "General Assembly intended," the court evolved a rule of reason. Thus, it turned out, not all "public records" immediately became public; rather, a judicial balance must be undertaken between the "public interest" in disclosure and nondisclosure. This balancing must be performed, moreover, in an area which even the court conceded was permeated with "First Amendment principles."

Two years following *Houston,* the Georgia Supreme Court was again summoned into the open records arena in *Northside Realty Associates v. Community Relations Commission.*[218] There the plaintiffs alleged that various records, letters, documents, and memoranda accumulated by the commission during a compliance testing campaign constituted both "municipal records" and "public records" within the meaning of the statute.[219] Consequently, they sought to mandamus the commission to permit both inspection and reproduction of those materials, and they appealed the following portion of the trial judge's decision against them:[220] "They have no right to inspect and copy any such documents not related to Northside which are in the possession, custody or control of the Community Relations Commission."[221] The plaintiffs urged that this decision rested upon the judge's erroneous view that they were required to show a "special interest" in the materials before they were

[218] 240 Ga. 432, 241 S.E.2d 189 (1978).

[219] Plaintiffs alleged that the tests had been directed to determining whether real estate agents were in compliance with the Federal Fair Housing Act. *Id.* at 433, 241 S.E.2d at 190.

[220] This portion of the decision went to four of the demanded items. Other items were determined to have been already furnished, or not within defendants' possession, or an invasion of privacy. *Id.* at 433-34, 241 S.E.2d at 190.

[221] *Id.* at 434, 241 S.E.2d at 190.

entitled to inspect and copy them.[222] In response, the defendants argued that the plaintiffs had misinterpreted the basis for the judge's decision: "[T]he trial court has merely balanced the interest of the public in favor of inspection against the interest of the public in favor of non-inspection, as required by *Houston v. Rutledge* . . . ."[223] The controversy focused, therefore, not so much upon the trial judge's decision as upon the reasons for it.

To an extent, the supreme court agreed with both parties to the litigation. It declared that under the statute "a citizen of Georgia seeking an opportunity to copy and inspect a public record need not show any special or personal interest therein."[224] Under the principle of *Houston,* it acknowledged, "a citizen does not have an absolute right to an inspection of all public records,"[225] and the court must undertake a "public interest" balance. The problem, it confirmed, was the "somewhat cryptic" nature of the trial judge's ruling.[226] Accordingly, this problem required a remand of the case for the judge's reconsideration "of whether these are public or municipal records and, if so, whether allowing the appellants to inspect the records would be in the public interest."[227]

In conclusion, the court recognized "that the veil of the 'public interest' does not provide very specific guidance for rendering decisions in concrete cases."[228] Thus, it thought, the following directions were "somewhat in order":

> In determining whether allowing the appellants to inspect these records would be in the public interest, the trial court must weigh factors militating in favor of inspection (i.e., the interest of these appellants as citizens of Georgia in knowing what their government officials are doing) against factors militating against inspection (i.e., whether this would unduly disrupt the commission's investigation of discriminatory housing practices).[229]

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[222] *Id.* "The appellants enumerated error solely on the imposition of this perceived requirement." *Id.*

[223] *Id.* at 434, 241 S.E.2d at 190-91.

[224] *Id.* at 434, 241 S.E.2d at 191.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.* "In this regard, the court must weigh the benefits accruing to the government from non-disclosure against the harm which may result to the public if such records are not made available for inspection by the appellants." *Id.* at 435-36, 241 S.E.2d at 191.

The court directed the trial judge "to enter findings and conclusions specifically relating to this issue."[230]

The court's opinion in *Northside Realty Associates* both continued and contributed to the open governmental records saga in Georgia. Again, basic coverage was not the problem—the assorted materials accumulated by the commission apparently amounted to governmental "records" within the meaning of the statute. Also continued—indeed refined—was the judicial balance approach of *Houston*. With *Northside Realty*, that approach became the primary responsibility of the trial judge and not a matter for cryptic consideration. Moreover, the court offered specific directions to guide the judge in striking that balance, directions which pitted the interests of public knowledge against those of efficiency in government. A novel issue in *Northside Realty* involved "special interest." As previously noted, the statute can be read to require a special interest for the right of photography but not for that of inspection. The supreme court drew no such distinction, however, and refused to view special interest as a qualification for either right.

On the same day the supreme court decided *Northside Realty*, it also resolved the controversy presented by *Griffin-Spalding County Hospital Authority v. Radio Station WKEU*.[231] The radio station sought access to authority records relating to ambulance service, records which the trial judge found the station was entitled to inspect.[232] The judge also found, however, that these records had been placed on forms containing other information which could not be disclosed to the station.[233] Accordingly, the trial judge ordered the hospital authority "to maintain two forms in order that the disclosable information might be separated from the non-disclosable information."[234] On appeal, the supreme court agreed with the hospital

[230] *Id.* at 436, 241 S.E.2d at 192. The court said that a request for an undifferentiated mass of material might be properly denied for its overbreadth, but if the plaintiffs made a request for identifiable public records within the defendants' possession, "the burden is cast on the appellees to explain why the records should not be furnished." *Id.* at 436, 241 S.E.2d at 191.

[231] 240 Ga. 444, 241 S.E.2d 196 (1978). Both cases were decided on January 3, 1978.

[232] The radio station had petitioned to mandamus the hospital authority to produce the records. *Id.* at 444-45, 241 S.E.2d at 198.

[233] Apparently, the basis for nondisclosure was the statute's exception for medical records which would invade the personal privacy of persons using the ambulance service. *Id.* at 445, 241 S.E.2d at 198.

[234] *Id.* The trial judge found that the "intent of the open records Act would be circumvented if nonprivileged information which the public had a right to see could be barred from public review by mixing the information with information that the public did not have a right to see."

authority that the judge's action was unauthorized by the open records statute, and reversed that part of his order which required the authority to maintain two separate forms.[235] "However," continued the court, "we do agree with the trial court that the intent of the General Assembly was to afford to the public at large access to public records with the exceptions of certain information which the Act exempts from disclosure."[236] That intent could be fulfilled, the court concluded, by requiring the custodian to expunge nondisclosable information from the records: "In the case sub judice, the hospital authority must remove the objectionable medical histories from the ambulance form."[237] The court conceded that its decision thus cast additional burdens upon the authority,[238] but pointed to its statutory power to pass the costs of those burdens on to those desiring the records.[239] "The hospital authority in this case has a right to exact payment for these additional duties and liabilities from the radio station before it releases the information."[240]

By 1978, therefore, open records for Georgia local governments had become a matter of rather detailed judicial concern. Apparently derived exclusively from the legislature's original expression in 1959, public access to governmental records was a largely unclaimed "right" until recent times. Indeed, it was not until 1976 that the Georgia Supreme Court rendered anything resembling a genuine

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[235] "Nowhere in Ga. Code Ann. § 40-2702 is there authority for the trial court's actions." *Id.* at 447, 241 S.E.2d at 199.

[236] *Id.*

[237] *Id.*

[238] The court mentioned additional financial costs for personnel and possible legal liability if mistakes were made in separating the information. *Id.*

[239] The court said that the statute "specifically allows the custodian of the records to charge the individual requesting the information with the cost of providing it." *Id.*

[240] *Id.* The court qualified the authority's right by insisting that the charge must be "reasonable." "It can only be a reimbursement for costs incurred by the hospital. It may not contain a charge for the hospital services." *Id.*

The open records statute was mentioned by the court of appeals in another case involving hospital medical records, Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292 (1976). There the court sustained the dismissal of an action for invasion of privacy allegedly resulting from the introduction of medical records in a tort action. In concluding its opinion, the court observed:

> It is true that the public's right to inspect county and municipal records set out in Code Chapter 40-27 is held not applicable to "medical records and similar files, the disclosure of which would be an invasion of personal privacy. . . ." It is true that unauthorized publicity regarding the contents of such records, the patient's state of health, his anatomical debilities, and the opinions, diagnoses and tests of his doctors would indeed come within the inhibition of this Code section, but even so use in a relevant court proceeding is far different from dissemination by television or newsprint.

*Id.* at 430, 226 S.E.2d at 295.

analysis or interpretation of the statute, and numerous unresolved issues still remain. Overall, the court has characterized the topic as touched by first amendment principles, and has sought to formulate a "public interest" balance to be undertaken in the first instance by the trial judge. In the process, it discovered some limitations upon public access (*e.g.*, waiver) and rejected others (*e.g.*, "special interest"). Throughout the exercise, legislative intent has loomed large—sometimes to restrict (*e.g.*, police investigations in progress) and sometimes to expand (*e.g.*, duty to expunge and produce). Whatever the eventual result of this development, however, the court is increasingly being called to the task, and its evolution of "open records" will likely continue apace.

## V. Conclusion

Individual privacy and governmental publicity are historic notions in American thought and law. Their parallels and tensions are graphically illustrated in the modern renaissance of interest in openness of government. Among the many variations on that vintage theme, those of open meetings, public disclosure, and open records are particularly noteworthy. Although each constitutes a distinctive development which carries its own peculiarities, their collective evolution has extended to various levels of government in many jurisdictions.

Georgia government, including local government, is subject to each of the movements, by virtue of legislative expressions of recent years. Thus far, statutory formulations have evoked a minimum of litigation; consequently, the judiciary has developed no complete philosophy on the matter. Both interest and controversy are increasing, however, and the omen of openness holds considerable promise for confrontation in the future of Georgia local government law.