

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

THE MERCHANT LAW FIRM, P.C.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	FILE NO. 24CV001325
)	
FULTON COUNTY DISTRICT)	
ATTORNEY’S OFFICE,)	
FULTON COUNTY, GEORGIA)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S FIRST AMENDED COMPLAINT FOR
VIOLATION OF GEORGIA’S OPEN RECORDS ACT
AND MOTION FOR DEFENDANT TO SHOW CAUSE**

COMES NOW Plaintiff, The Merchant Law Firm, P.C. (“Plaintiff”), pursuant to O.C.G.A. § 50-18-73 and O.C.G.A. § 9-11-15, and hereby files its First Amended Complaint against the Fulton County District Attorney’s Office (“FCDA”) and Fulton County, Georgia (“County”)(collectively, “Defendants”) and Motion For Defendant To Show Cause, showing the Court further as follows:¹

¹ On March 13, 2024, FCDA filed a motion to dismiss claiming, among other things, FCDA was not an entity subject to the requirements of Georgia’s Open Records Act and not subject to suit. While Plaintiff does not believe that motion should be granted, Plaintiff is filing its Amended Complaint prophylactically in the event the Court rules that FCDA is not an “agency” or “office” under the Open Records Act. If FCDA is not responsible for providing the documents Plaintiff seeks, then Fulton County must be, which is why it is being added as a defendant in this matter. With the exception of adding Fulton County as a defendant and referencing “Defendants” in the plural where appropriate, Plaintiff has not amended any material allegations set forth in the original complaint.

INTRODUCTION

1.

Georgia’s Open Records Act, O.C.G.A. § 50-18-70, *et seq.* (“Act”), is the important mechanism by which citizens of Georgia are able to evaluate their government’s use of resources. The Georgia General Assembly explained the purpose of the Act:

The General Assembly finds and declares that the strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster confidence in government and ***so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions.*** The General Assembly further finds and declares that there is a strong presumption that public records should be made available for public inspection without delay. ***This article shall be broadly construed to allow the inspection of governmental records.*** The exceptions set forth in this article, together with any other exception located elsewhere in the Code, shall be interpreted narrowly to exclude only those portions of records addressed by such exception.

O.C.G.A. § 50-18-70(a)(emphasis added).

2.

Thus, the public policy behind the Act is to encourage transparency in government, and there is a strong presumption that public records be made available for public inspection—and without delay. As the Georgia Court of Appeals has explained:

[T]he [ORA] was enacted in the public interest to protect the public—both individuals and the public generally—from “closed door” politics and the potential abuse of individuals and the misuse of power such policies entail. Therefore, the Act must be broadly construed to effect its remedial and protective purposes. The intent of the General Assembly was to encourage public access to information and to promote confidence in government through openness to the public and allow the public to evaluate efficient and proper functioning of its institutions.

(Punctuation and footnotes omitted.) *Corp. of Mercer Univ. v. Barrett & Farahany, LLP*, 271 Ga.App. 501, 503(1)(a), 610 S.E.2d 138 (2005); *See also Wallace v. Greene Cnty.*, 274 Ga. App. 776, 782, 618 S.E.2d 642, 648 (2005)

3.

District Attorney, Fani Willis, has made public statements indicating that she would lead FCDA with a stated goal of being transparent with the citizenry.

4.

Despite the General Assembly's clear intent and Ms. Willis' statements supporting transparency in FCDA, however, FCDA has denied Plaintiff the right to inspect a number of FCDA records. Some of these records include reports provided to FCDA by third party media companies that were hired (with taxpayer funds) to track the impact of Ms. Willis' statements to the media and whether such statements were viewed favorably by the public. Ms. Willis first began contracting with these companies just before she and FCDA sought to indict Mr. Roman and the other co-defendants in a criminal case currently pending in Fulton County Superior Court.

5.

As shown more fully below, Defendants are in clear violation of the Act, appeared to be intentionally withholding information in advance of scheduled evidentiary hearings in two separate proceedings, and forced Plaintiff to take action through this filing to obtain relief. These are not the efforts of agencies that value "transparency", and Plaintiff requests that the Court grant the relief requested herein, and find that Defendants must permit inspection and/or copying of numerous categories of documents that still have not been

made available to Plaintiff. It is evident that Defendants have withheld the records without substantial justification under O.C.G.A. §50-18-73(b).

JURISDICTION AND VENUE

6.

This action is brought pursuant to Georgia’s Open Records Act, O.C.G.A. § 50-18-70, *et seq.* (“Act”).

7.

The Court has jurisdiction over the subject matter of this action pursuant to O.C.G.A. §§ 50-18-73(a), which notes that, “[t]he superior courts of this state shall have jurisdiction in law and in equity to entertain actions against persons or agencies having custody of records open to the public under this article to enforce compliance with the provisions of this article.”

8.

This Court has personal jurisdiction over Defendants because Defendants’ principal places of business and operation is located in Fulton County, Georgia.

9.

Each of the Defendants is an “[a]gency” as defined in O.C.G.A § 50-18-70(b)(1) because FCDA and Fulton County each “. . . has a membership or ownership body composed primarily of counties, municipal corporations, or school districts of this state, their officers, or any combination thereof and derives more than 33 1/3 percent of its general operating budget from payments from [Fulton County].” Therefore, Defendants are subject to the requirements of the Act.

10.

Each of the records sought by Plaintiff in this action is considered a “public record” as defined in O.C.G.A. § 50-18-70(b)(2) because the records sought include, “. . . documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by” FCDA “in the performance of a service or function for or on behalf of FCDA”

11.

Venue is proper in Fulton County, Georgia because Defendants are located in Fulton County, Georgia and the events giving rise to this action occurred in Fulton County, Georgia.

PARTIES

12.

Plaintiff, a Georgia professional corporation, is an entity entitled to request records pursuant to the Act under O.C.G.A. § 50-18-73(a), which provides that, “[s]uch actions may be brought by any person, firm, corporation, or other entity.”

13.

Fulton County is a political subdivision of the State of Georgia. Fulton County is added as a defendant because FCDA claims it is not subject to the Act. FCDA is the agency that prosecutes criminal cases on behalf of Fulton County. FCDA derives more than 33 1/3 percent of its general operating budget from payments from Fulton County. At all times relevant to this action, Defendants were responsible for maintaining all public records, in whatever form, and permitting Plaintiff and other citizens of Georgia to inspect FCDA’s public records. Pursuant to O.C.G.A. § 9-11-4(e)(5), FCDA may be served with

the Summons, Complaint, and First Amended Complaint by delivering a copy of same to Fani Willis, the Fulton County District Attorney, at 136 Pryor Street, Third Floor, Atlanta, Georgia 30303 and Fulton County. Pursuant to O.C.G.A. § 9-11-4, Fulton County may be served with the Summons, Complaint, and First Amended Complaint by delivering a copy of same to Robb Pitts, Chairman of the Fulton County Board of Commissioners, at 141 Pryor Street, 10th Floor, Atlanta Georgia 30303.

14.

Defendants are subject to the requirements of the Act and subject to the instant action, which seeks to compel Defendants' compliance with Act.

FACTUAL BACKGROUND

15.

Plaintiff represents Michael Roman, a defendant in Fulton County Superior Court Criminal Case No. 23SC188947. An evidentiary hearing is scheduled for February 15, 2024 on Mr. Roman's motion to dismiss the indictment and disqualify FCDA, Willis and the special prosecutor, Nathan Wade ("Wade"), from further prosecuting Mr. Roman in that case. Mr. Roman subpoenaed Willis and Wade to testify at the February 15, 2024 hearing.

16.

Among other grounds, Mr. Roman asserted that Willis and Wade should be disqualified because Willis used taxpayer money to pay Wade, with whom she has had a romantic relationship at the time, and, in turn, has received financial benefits from such payments in the form of vacations, hotel stays and other personal gifts. Since the filing of Plaintiff's original Complaint, the court in the criminal case granted, in part, and denied,

in part Mr. Roman's Motion to Disqualify. Wade resigned from the case, and the trial court certified its ruling for interlocutory appeal. Mr. Roman has applied to the Georgia Court of Appeals for permission to appeal the trial court's ruling.

17.

Mr. Roman believes that Willis' use of money budgeted to FCDA is of utmost importance in evaluating whether Willis and Wade have an irreparable and fatal conflict of interest and whether, and to what extent, Willis has otherwise used public monies for her personal gain. This is an ongoing issue despite the trial court's ruling in Mr. Roman's criminal case.

18.

In an apparent effort to intentionally stall Plaintiff's inspection of various categories of documents prior to the evidentiary hearing, Defendants refused, and now continue to refuse, without adequate explanation, to provide Plaintiff with many of the requested materials that are known to exist and which are not subject to any exception in the Act and some of which have been outstanding since September of 2023.

19.

For the sake of brevity, Plaintiff incorporates by reference as if set forth fully herein all of the information contained in Paragraphs 19-36 of its original Complaint and that contained in and including Exhibits A-O attached to Plaintiff's original Complaint. Plaintiff will serve Fulton County with a Summons, the full original Complaint, including exhibits, and the instant First Amended Complaint.

COUNT I

VIOLATION OF GEORGIA'S OPEN RECORDS ACT, O.C.G.A § 50-18-70, *ET SEQ.*

37.

Plaintiff incorporates Paragraphs 1 through 36 of this Complaint as if set forth fully herein.

38.

The Act provides that, “[a]ll public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure.” O.C.G.A. § 50-18-71(a).

39.

Under the Act, “[a]gencies shall produce for inspection all records responsive to a request within a reasonable amount of time not to exceed three business days of receipt of a request; provided, however, that nothing in this chapter shall require agencies to produce records in response to a request if such records did not exist at the time of the request.” O.C.G.A. § 50-18-71(b)(1)(A).

40.

“In those instances where some, but not all, records are available within three business days, an agency shall make available within that period those records that can be located and produced.” O.C.G.A. § 50-18-71(b)(1)(A). “In any instance where records are unavailable within three business days of receipt of the request, and responsive records exist, the agency shall, within such time period, provide the requester with a description of such records and a timeline for when the records will be available for inspection or copying and provide the responsive records or access thereto as soon as practicable.” O.C.G.A. § 50-18-71(b)(1)(A).

41.

“At the time of inspection, any person may make photographic copies or other electronic reproductions of the records using suitable portable devices brought to the place of inspection.” O.C.G.A. § 50-18-71(b)(1)(B).

42.

“In any instance in which an agency is required to or has decided to withhold all or part of a requested record, the agency shall notify the requester of the specific legal authority exempting the requested record or records from disclosure by Code section, subsection, and paragraph within a reasonable amount of time not to exceed three business days or in the event the search and retrieval of records is delayed pursuant to this subsection or pursuant to subparagraph (b)(1)(A) of this Code section, then no later than three business days after the records have been retrieved.” O.C.G.A. § 50-18-71(d).

43.

An agency's “use of electronic record-keeping systems must not erode the public's right of access to records under [the Act].” O.C.G.A. § 50-18-71(f). “Agencies shall produce electronic copies of or, if the requester prefers, printouts of electronic records or data from data base fields that the agency maintains using the computer programs that the agency has in its possession.” O.C.G.A. § 50-18-71(f). “An agency shall not refuse to produce such electronic records, data, or data fields on the grounds that exporting data or redaction of exempted information will require inputting range, search, filter, report parameters, or similar commands or instructions into an agency's computer system so long as such commands or instructions can be executed using existing computer programs that

the agency uses in the ordinary course of business to access, support, or otherwise manage the records or data.” O.C.G.A. § 50-18-71(f).

44.

If an agency “contracts with a private vendor to collect or maintain public records, the agency shall ensure that the arrangement does not limit public access to those records and that the vendor does not impede public record access and method of delivery as established by the agency or as otherwise provided for in this Code section.” O.C.G.A. § 50-18-71(h).

45.

Defendants have failed to properly and timely respond to Plaintiff's Request under the Act.

46.

None of the records sought from the Defendants are subject to any exception set forth in O.C.G.A. § 50-18-72.

47.

Defendants have refused to provide Plaintiff access to public records, including those sought in the Request, for an unreasonable time period and without a proper or legal basis for doing so.

48.

Defendants have no legal basis under the Act to withhold responsive documents without substantial justification. Indeed, it appears that Defendants are acting intentionally and in an effort to hide from public view public documents showing how FCDA has spent public monies related to the operation of the office of FCDA.

49.

Upon information and belief, Defendants are in possession of additional documents and materials that are responsive to Plaintiff's Request pursuant to the Act, and which are not subject to any exception under the Act, but which nonetheless still have not been produced.

50.

The foregoing actions and/or failures demonstrate that Defendants have acted in violation of the Act without substantial justification, continues to act in violation of the Act without substantial justification, and will continue to act in violation of the Act unless the Court intervenes to compel Defendants' compliance with the Act.

51.

Plaintiff, therefore, respectfully requests that this Court require Defendants to produce the requested records *instanter*.

WHEREFORE, Plaintiff requests and prays that the Court award the following relief to Plaintiff:

1. That process issue directing the Defendants answer this Amended Complaint on an expedited basis within ten (10) days of service of the Summons and Complaint and Amended Complaint;
2. That the Court enter judgment in favor of Plaintiff and against Defendants and order that Defendants provide the requested records under the Act or show cause why Defendants' failure to provide the records does not violate the Act;
3. That the Court award Plaintiff, pursuant to O.C.G.A. § 50-18-73, Plaintiff's costs and expenses incurred in this action and as well as the costs, expenses and fees incurred in obtaining Defendants' compliance with the Act and any other applicable provision of law; and
4. That the Plaintiff has such other and further relief as the Court deems just and proper.

**PLAINTIFF’S MOTION FOR DEFENDANTS TO SHOW CAUSE
FOR NON-COMPLIANCE WITH GEORGIA’S OPEN RECORDS ACT**

In addition to the relief requested above, Plaintiff respectfully moves the Court for an order compelling Defendants to produce all of the requested records for an *in-camera* inspection pursuant to O.C.G.A. § 50-18-73(a), and to appear before the Court and show cause why the relief requested in Plaintiff’s Complaint should not be granted *instanter*.

Respectfully submitted this 12th day of April, 2024.

THE MERCHANT LAW FIRM, P.C.

/s/ John B. Merchant, III

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2024, I served a true and correct copy of the foregoing First Amended Complaint upon the following counsel of record via United States Mail with adequate postage affixed thereon and by e-mail at the following address/e-mail addresses:

Sandy Monroe
Assistant County Counsel
141 Pryor Street, S.W., Suite 4308
Atlanta, Georgia 30303
sandy.monroe@fultoncountyga.gov

This 12th day of April, 2024.

/s/ John B. Merchant, III _____
JOHN B. MERCHANT, III
Georgia Bar No. 533511

*Counsel for Plaintiff, The Merchant Law
Firm, P.C.*