Local Government Law

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Local Government Law

• Overview & Goals:
  ▫ Clerks Rule the World!! Historical continuity.
  ▫ Assist you in identifying legal issues that may require attention.
  ▫ Update you on new laws that directly impact your job.
I. ORDER OF LAWS
• Federal
• State
• Local
Federal Laws

- U.S. Constitution
- U.S. Statutes
- U.S. Rules and Regulations
- U.S. Agency Advisory Opinions
State Laws

- Georgia Constitution
- Georgia Statutes & Jurisdictional Legislation
- Georgia Rules & Regulations
- Georgia Attorney General Opinions
Local Laws

• Ordinances

• Resolutions & Motions

• SOPs/Handbooks/Departmental Operating Rules
II. Important State Constitutional Provisions
Home Rule:

Ga. Const. Art. 9, §2, ¶I(a)

• Governing authority authorized to adopt “clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government...”

• “...for which no provision has been made by general law...”

• “...and which is not inconsistent with this Constitution or any local law applicable thereto.”
Amendments to Local Acts:

Ga. Const. Art. 9, §2, ¶(I(b)

- May amend or repeal by ordinance or resolution
  - Adopted at 2 regular consecutive meetings
  - Not less than 7 nor more than 60 days apart
  - Notice published once a week for 3 weeks within 60 days preceding final adoption
  - File with Secretary of State
Limits to Home Rule:

Ga. Const. Art. 9, §2, ¶I(c)

- Cannot legislate or amend related to:
  - Any elective county office or salary
  - Composition, form, procedure for election, compensation, expenses & allowances for Board of Commissioners
  - Or other areas preempted
Supplementary Powers:

Ga. Const. Art. 9, §2, ¶III

- Listed also in O.C.G.A. §36-5-22.1
- Cannot exercise powers within a city or another county, except by contract
Intergovernmental Contracts:

Ga. Const. Art. 9, §3, ¶I

• Not to exceed 50 years

• Between governmental entities
Power to Tax:

Ga. Const. Art. 9, §4, ¶1

• May tax for valid county purposes

• May collect business & occupational license taxes & fees in unincorporated county
Limitation on Local Debt:

Ga. Const. Art. 9, §5, ¶1

• Shall never exceed 10% of assessed value of all taxable property
• Generally incur debt by vote
• Temporary loans authorized
III. SOME “GOTTA KNOW” LOCAL GOVERNMENT RULES
Cannot Bind Future Boards:

O.C.G.A. §36-30-3

• Proprietary vs. governmental functions

• Some exceptions
  □ IGA
  □ Industrial wastewater treatment services (O.C.G.A. §36-30-2)
  □ Construction contracts
Multi-Year Lease, Purchase, Lease-Purchase Agreements

• O.C.G.A. §36-60-13
  ▫ Must terminate at close of calendar year
  ▫ Automatic renewal unless positive action
  ▫ Total obligation stated
  ▫ Title to any supplies, materials, equipment or personal property shall remain with the vendor until fully paid for by county

• Applies to agreements of “all kind for the acquisition of goods, materials, real and personal property, services, and supplies”
  ▫ Some exceptions
Ante Litem Notices

- Claims against the county must be presented in writing within 12 months
  - For cities – 6 months
Minutes

- O.C.G.A. §36-1-25: “Official minutes of the meetings of a county governing authority shall be maintained in the offices of the county governing authority. Copies of contracts, maps, or similar material or documents related to actions taken by a county governing authority may be included in the minutes or incorporated by reference to an alternate location. Where incorporated by reference, such documents shall be stored in a central location or locations identified by ordinance or resolution of the county governing authority.”
Minutes

- O.C.G.A. §36-10-1: All contracts entered into by the county shall be in writing and entered on its minutes
Uniform Electronics

Transactions Act

• O.C.G.A. §10-12-1 *et seq*:
  ▪ “Each governmental agency of the State shall determine whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records.”
  ▪ “If a law requires that a record be retained, such requirement shall be satisfied by retaining an electronic record...”
  • Must accurately reflect record
  • Remains accessible for retention period required by law

- Must designate a records custodian
- Must establish a records retention schedule that follows the State’s Archives Division’s Standard Records Retention schedule
- County may retain longer
- Can only destroy records per law or it is a misdemeanor
Codification of Ordinances & Resolutions

• Rule since 2002

• Amendments to the Code of Ordinances shall be incorporated & published at least annually

• Must be made available on the Internet or in the county law library
Budgets & Audits

O.C.G.A. §36-81-1, *et seq.*

- Budget must be available to public & media the DAY submitted to governing authority (O.C.G.A. §36-81-5(d))

- Budget must have at least one public hearing – cannot adopt until following meeting

- Budget ads cannot be published where legal notices appear

- Upon adoption of budget, for counties with more than $1 million budget, budget must be submitted to Carl Vinson Institute

- Audit must be performed each fiscal year, with some exceptions for small counties
Population Acts

• Laws that apply based upon population of your county
• With few exceptions, 2010 census numbers will be effective July 1, 2012
• ACCG website has publications
Registration of Authorities

O.C.G.A §36-80-16

• All authorities must register annually with Department of Community Affairs

• Before January 1st of each year

• If fail to do so, the authority cannot incur new debt
Local Government Efficiency Act
O.C.G.A §36-86-1, *et seq.*

- Grant program by DCA
- To allow local government to conduct efficiency studies regarding need for consolidation of government units or services, including privatization
- To fund planning of consolidations
- To fund implementation of consolidations
- DCA Rules & Regulations, Ch. 110-5-1
Ethics

- Local Ethics Ordinances
- Code of Ethics for Government Service – O.C.G.A. §45-10-1
  - “Any person in government service should...”
IV. CODE ENFORCEMENT
General

• Ordinances authorized by O.C.G.A. §36-1-20
• Notice Required
• Public Hearings — how many?
Penalties

- Punishable by fine (up to $1,000) or imprisonment (up to 60 days) or both in Magistrate Court
- Rights to a Public Defender
Other Options

- Code Enforcement Boards – OCGA §36-74-25
V. PROPERTY ACQUISITION
& DISPOSITION
Disposal Generally

- Disposal by order on minutes – O.C.G.A. §36-9-2
- Generally, must be by sealed bid or auction – O.C.G.A. §36-9-3(a)(1)
- Exceptions for easements, rights-of-way, governmental exchanges, irregular pieces to abutting property owners, & other exceptions
Disposal of Roads – O.C.G.A. §32-7-4

- Notify owner at time of acquisition or any new owner of abutting land
- Owner has right to acquire
- No less than price paid for acquisition if full parcel
- Fair Market Value for remnants or portions of original acquisition
- If less than $30,000, can negotiate the sale
- If no purchase after 60 days, sealed bid, listed with agent, or auction
Abandonment of Roads – O.C.G.A. §36-7-2

• Public Notice & Hearing requirements

• Must find that road has “ceased to be used by the public to the extent that no substantial public purpose is served by it”

• OR find that “its removal from the Road system is otherwise in the best public interest”
Exchanges of Land

- For Road Purposes – O.C.G.A. §32-3-3(b)
- General Property – O.C.G.A. §36-9-3(a)(2)(D)
Acquisition

• First steps...

• Eminent Domain –
  Ga. Const. Art. 9, §2, ¶V

• For public purposes on payment of just & adequate compensation

• Procedures for transportation takings – O.C.G.A. §32-3-1 et seq.

• Procedures for other takings - O.C.G.A. §22-2-1 et seq.
VI. PURCHASING/PROCUREMENT
Georgia Local Government Public Works Construction Law:
O.C.G.A §36-91-1, *et seq.*

- Applies if contract greater than $100,000

- Not applicable to:
  - Inmate labor
  - If county does not pay for labor
  - Federal requirements for federal grants
  - Emergency recorded on minutes
  - Roads – See Title 32
  - Sole Source
Public Works Construction Contract Requirements

• In writing
• Advertise opportunity – newspaper or Internet
• Sealed bids or proposals
• Can reject all & waive technicalities and formalities (O.C.G.A. §36-91-20(c))
• No changes within 72 hours of opening seals – or must extend 72 hours
• May include change orders without additional bid/proposal requirements
Bonds

- Bid bonds
  (O.C.G.A. §36-91-50)
- Performance bonds
  (O.C.G.A. §36-91-70)
- Payment bonds
  (O.C.G.A. §36-91-90)
Penalty?

- Illegal not to do competitive award requirements
- If contractor knows county failed to comply, contractor is not entitled to payment
Road Construction Projects

• Contracts must be in writing (O.C.G.A. §32-4-61)

• All contracts must be let by public sealed bids, unless less than $20,000 (O.C.G.A. §32-4-63-64)

• If contract greater than $5,000, must have performance bond & payment bond (O.C.G.A. §32-4-69)

• County may obtain a “bid bond”, which can be kept as liquidated damages if contractor refuses to sign (O.C.G.A. §32-4-66)
Purchasing Preferences:

O.C.G.A. §36-84-1

- When purchasing supplies, equipment, or agricultural products, shall give preferences to Georgia manufacturers & producers
- “As far as may be reasonable and practical”
VII. EMPLOYMENT LAW
& CIVIL SERVICE
Civil Service Generally

- Authorized by Ga. Const. Art. 9, §1, ¶IV & O.C.G.A §36-1-21
- Process to adopt a civil service system
- Once covered, always covered in absence of legislative amendment
What Does Civil Service Do For You?

• Employment at will vs. job protections
• Probationary period
• Progressive discipline
• Appeal rights
• Who is covered? Be clear.
Title VII of Civil Rights Act

- Prohibits discrimination based on race, color, religion, sex or national origin

- Can discriminate by:
  - Hiring & firing
  - Compensation, assignment, classification of employee
  - Transfer, probation, layoff, or recall
  - Recruitment
  - Benefits
  - Other terms & conditions of employment
Sexual Harassment

- *Quid Pro Quo*
- Hostile work environment
  - Unwelcome conduct
  - Severe or pervasive
- Need a policy!
Racial, National Origin & Religious Harassment

- Single comment likely not enough
- Reviewed like a sexual harassment claim
Retaliation

- Discrimination because an employee opposed an unlawful practice
- Claims can be brought under a variety of federal laws (Title VII, ADEA, FLSA, etc.)
- Also consider First Amendment & State Whistle Blower Statute
Age Discrimination in Employment Act (ADEA)

- 40 or older
- No maximum age anymore
Equal Pay Act (EPA)

- No discrimination in wages on the basis of gender
Americans with Disabilities Act (ADA)

• No discrimination on the basis of a real or perceived disability
• Employee must be able to perform essential functions
• Reasonable accommodations
Other Federal Laws

- Family & Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)
- Uniformed Services Employment & Reemployment Rights Act (USERRA)
VIII. PLANNING, ZONING & LAND USE
Zoning Procedures Law


- Authorizes administrative officers, bodies, or agencies to assist with zoning powers
  - Planning Commission
  - Zoning Board of Appeals
  - Other boards & committees

- Authorizes rules & regulations – Zoning Ordinance
What is a “Zoning Decision”?

• Ordinance & Zoning Map

• Amendment to ordinance

• Zoning of property from one zoning classification to another

• Special use permit
Procedures for Zoning Decisions

• Advertise hearing at least 15 days & no more than 45 days prior to meeting

• If citizen rezoning property, sign must be posted at least 15 days in advance

• Public hearing – at least one
  □ By Board or is Planning Commission ok?

• If defeated, cannot be reconsidered for 6 months
Adoption of Hearing Policies

• “Shall” adopt policies governing public hearings

• Polices must specify minimum time period for each side; at least 10 minutes per side
Conflict of Interest in Zoning Actions

• O.C.G.A. §36-67A-1 et seq.

• Disclosure of financial interests

• Disclosure of campaign contributions
Annexation

- 100% (O.C.G.A. §36-36-20)
- 60% (O.C.G.A. §36-36-30)
- Resolution & Referendum
- Local Act of General Assembly
- Unincorporated Islands
5-Day Deadline Regarding County Property (O.C.G.A. §36-36-7)

- County must notify city of any county-owned property within the area to be annexed
- Annexation does not diminish ownership & control of county-owned properties
- If county property is “no longer usable for service to the unincorporated area of the County…”
  - Provides service solely to unincorporated
  - County adopts resolution
  - County shall be compensated at fair market value
  - If no agreement for 180 days, special master decides value
Impact on County Road (O.C.G.A. §36-36-7(b))

• If land annexed on both sides of a county road, city must assume ownership, control, care & maintenance of the right-of-way unless parties agree otherwise by joint resolution
Land Dispute Resolution Process:

O.C.G.A. §36-36-110 et seq.

• County may object based on “material increase in burden” on the county directly related to any one or more of the following:
  □ The proposed change in zoning or land use
  □ Proposed increase in density
  □ Infrastructure demands related to the proposed change in zoning or land use
Objection Based on Zoning

- If based on zoning:
  - Must result in “substantial change in intensity of allowable use or a change to a significantly different allowable use”; or
  - A use which significantly increases the cost of infrastructure or significantly diminishes the useful life of a capital outlay project furnished by the county to annexed area; and
  - Differs substantially from the existing uses suggested by the county’s comprehensive plan or zoning ordinance
Binding Arbitration Process

- DCA has pools of arbitrators
- 4 county, 4 city, 3 academics chosen randomly by DCA
- 2/1 strikes
- County pays 75% & remainder apportioned by panel
Arbitration Panel Results

- Panel makes findings & recommendations that are recorded in deed records
- Can appeal to Superior Court, but only based upon errors, bias/misconduct of arbitrator, or panel abuse of discretion
- Any unappealed Order of Arbitration Panel is binding (O.C.G.A. §36-36-116)
What Happens to Zoning Upon Annexation?

- City must zone the property
- Can city adopt county zoning ordinance?
- What if no zoning?
- No change to more intense land use for one year after annexation & initial zoning
Comprehensive Plan:

O.C.G.A § 36-70-1

- Minimum Standards & Procedures established by DCA
- Geared to size of jurisdiction
- Must amend when conditions significantly change, but at least every 10 years
- Penalty? Loss of qualified local government certification
Comprehensive Plan

• DCA currently revising Rules & Regulations

• Implementation expected early 2013

• Nature of Changes:
  ▫ Simplicity – simplify the rules to make compliance easier (and cheaper)
  ▫ Flexibility – give local government the ability to choose planning options
  ▫ Custom Fit – want local governments to pick the desired level of planning for their situation
  ▫ Incentive – provide incentives to go above & beyond requirements
  ▫ Continuity – make sure that the long range planning does not get lost with successive administrations
  ▫ Use by State – make the final product something useable by state agencies (e.g. DOT)
Service Delivery Strategy:

O.C.G.A § 36-70-20

- Must identify services & geographic area of services
- Describe funding for each service
- Requirements to ensure fair rates across service areas
- Dispute resolution process
- Updates to Service Delivery Strategy required in conjunction with updates to comprehensive plan or when service delivery changes
Georgia Development Impact Fee Act:
O.C.G.A. §36-71-1 et seq.

• Just what it says: Fees charged to minimize impact of development
  ▪ Must have ordinance, Capital Improvement element in Comprehensive Plan, & create an Impact Fee Advisory Committee
  ▪ Adoption requires 2 public hearings at least 2 weeks apart (O.C.G.A § 36-71-6)
  ▪ Impact Fee Credits & Refunds
IX. E-Verify/SAVE
E-Verify:

O.C.G.A. §13-10-91

- “Public Employers”
- Public works contracts
Public Employers

• Must register & use federal E-Verify Program to verify the citizenship or alien status of all potential new employees.

• Governments must post on their websites their federal E-Verify Program identification number & date of authorization to use the E-Verify Program. Governments that do not have a website may publish this information annually in the official legal organ of their county.

• Registering for the E-Verify Program requires the government to enter into a memorandum of understanding with the Department of Homeland Security.

• The website for registration information is: http://www.uscis.gov/portal/site/uscis
Public Works Contracts

- Local governments are prohibited from entering into contracts for the “physical performance of service” where the contractor or any subcontractor fails to participate in the E-Verify Program.

- Must procure from contractors & subcontractors an affidavit attesting that they have registered with the E-Verify Program user identification number & date of authorization, & affirming that they are currently using the E-Verify Program & will continue to use it throughout the contract term.
What Contracts Apply?

- The affidavit requirements of O.C.G.A. §13-10-91(b)(1) are applicable to contracts that provide (to “public employers”) the “physical performance of service,” which term is defined in O.C.G.A. §13-10-90(4) as follows:

  “[T]he building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a public road; or any other performance of labor for a public employer within this state under a contract or other bidding process.”
Limited to “Public Works Contract”

- 2009 amendment – no reference to construction
- Attorney General Opinion dated January 31, 2012 to Senator Chip Rogers
- AG defines “public works contract” as:
  “Any Contract, to be performed on public property of the state and involving a fixed asset. This term includes a broad range of contracts, such as repair, maintenance, design, and consulting contracts and within its meaning includes all ‘construction contracts’ and ‘public works construction contracts’.”
- Err on the side of caution
Affidavit Exceptions

• New subsection (b)(5) allows contractors, subcontractors & sub-subcontractors with no employees to submit, in lieu of the normally required affidavit, a copy of their state issued driver’s license & the state issued driver’s license of each of their independent contractors.

• The driver’s license must be issued by U.S. states that verify lawful immigration status prior to issuing licenses, & the Attorney General was to post a list of such states on its website by July 1, 2011.

• Should any such contractor, subcontractor, or sub-subcontractor later hire any employee(s), they must then submit the required affidavit.
Reporting Requirements

- Must submit annual compliance reports to the State auditor by December 31st of each year.

- State must audit at least one-half of all reporting agencies each year.

- Violations must be corrected within 30 days of notice or the political subdivision will be excluded from the list of qualified local governments until compliance.

- Political subdivisions not accountable for acts of county constitutional officers.
Systematic Alien Verification for Entitlements

(“SAVE”)  

- O.C.G.A. §50-36-1  
- Must procure affidavits of citizenship/alien status from all applicants for “public benefits.”  
- “Public benefits” defined as: grants, contracts, loans, professional licenses, commercial licenses, retirement, welfare, health coverage, disability, housing, postsecondary education, food assistance, & unemployment.  
- Benefits excluded from statutory requirements include: short-term, noncash, in-kind emergency relief, certain immunizations, & soup kitchens.  
- Georgia Attorney General by August 1st of each year must provide a detailed written report regarding what benefits are implied by the SAVE statute.
Is a Contract a Public Benefit?

• Yes!

• Every proposed contractor for any written agreement for the provision to the government of goods and/or service must provide the affidavit.

• If a public works contract, the SAVE requirements are in addition to the E-Verify requirements.
What Documents Are Acceptable?

• O.C.G.A. §50-36-1(e), which became effective January 1, 2012, requires applicants for “public benefits” to provide at least one “secure and verifiable document” of identification.

• Attorney General must post a list of acceptable “secure and verifiable documents” on its website.
Penalties for SAVE

• O.C.G.A. §50-36-2(d) provides that any person who accepts identification documents that are not “secure and verifiable” will be guilty of a misdemeanor & may be imprisoned for up to 12 months and/or fined up to $1,000.
Penalties for SAVE

- O.C.G.A. §50-36-1(o) – “Intentional and knowing failure of any agency head” to abide by SAVE is a violation of the state code of ethics, which violations are subject to penalties, including removal from office, restitution & a fine of up to $10,000.

- An agency head who “willfully violates” SAVE or “acts so as to intentionally and deliberately interfere with the implementation of the requirements of” SAVE will be guilty of a “high and aggravated misdemeanor.”
Reporting Requirements for SAVE

- Must submit annual report by January 1st of each year to the Georgia Department of Community Affairs.

- Reports must identify each public benefit administered by the government & must list each benefit for which SAVE authorization for verification has not been received from the federal government.

- Registration for the SAVE program again requires that the local government enter into a memorandum of understanding with the Department of Homeland Security.

- Registration information website: http://www.uscis.gov/portal/site/uscis/
Complaints & Investigations Regarding E-verify & SAVE –

O.C.G.A. §50-36-3

• The Immigration Enforcement Review Board is authorized to investigate & review any complaint regarding E-verify & SAVE violations

• Method & grounds for filing complaint available on Department of Audits & Accounting’s website

• Georgia residents who are registered voters may file complaints with the Board

• If violations not remedied to Board’s satisfaction, Board may assess the following sanctions:
  □ a civil penalty of between $1,000 & $5,000 for a violation,
  □ revocation of qualified local government status,
  □ loss of state appropriated funds
X. Open Meetings
House Bill 397 – A Major Revision to the Open Meetings Act

• First significant rewrite of the bill since 1999

• Addresses almost every aspect of how government business is conducted

• Effective NOW!
Public Policy of the Open Meetings Act

- The Open Meetings or “Sunshine” Act was enacted to ensure that the proceedings of all public agencies are conducted in an open and public manner, so that the people may be informed about the actions of their governments and retain control of them.
Function of the Act

- The Act provides a framework for managing business by public agencies through posting agendas, keeping minutes, and dealing with personnel issues.

- The Act provides a mechanism for an aggrieved citizen who believes a governmental agency has committed a violation of the Act.
Who Must be Granted Access?

- The Public – At All Times.

- Any radio or television station may broadcast an open meeting, as can a private citizen. The public body may reasonably control the placement and use of cameras so as not to unduly interfere with the meeting.

- Each governing body may adopt reasonable rules for attendance of the public at its meetings.
Who Must Comply with the Open Meetings Act?

- What organizations are covered?
  - All organizations created under statute or by resolution of a local board, council, commission, or other governmental unit exercising policy-making authority.
  - Every county, municipal corporation, school district, or other political subdivision of this state.
  - Every department, agency, board, bureau, office, commission, authority, or similar body of each such county, municipal corporation or other political subdivision of the state.
What is a “Meeting”?

• Gathering of a Quorum of the Members of the governing body of an agency at which any official business, policy or public matter of the agency is formulated, presented, discussed, or voted upon.

• The gathering of a quorum of any committee of the members of the governing body of an agency or a quorum of any committee created by the governing body at which any official business, policy, or public matter of the committee is formulated, presented, discussed or voted upon.

• The statutory inclusion of a quorum of any committee created by the governing authority constituting a meeting irrespective of whether the committee has members of the governing body on it, is a significant change in the law.
What is NOT a Meeting

The gathering of a quorum of the governing body or a committee for the purpose of:

• Making inspections of physical facilities or property under the jurisdiction of the agency – where no other business is discussed or official action is taken;

• Attending a statewide, multi-jurisdictional or regional meeting to participate in seminars or courses of training on agency matters – where no official action is taken;

• Meeting with officials of the legislative or executive branches of the state or federal government at state or federal offices and at which no official action is to be taken by the members;
What is NOT a Meeting (cont’d)

• Traveling to any of the above assemblies so long as no official business, policy, or public matter is formulated, presented, discussed or voted upon by the quorum;

• Attending a social, ceremonial, civic or religious event – no county business;

• Incidental conversations unrelated to the business of the agency.

• E-mail communications among members of an agency, provided, however, that such communications shall be subject to disclosure pursuant to the Open Records Act;

• Staff meetings held for investigative purposes under duties imposed by law;
What is NOT a Meeting (cont’d)

- Gatherings involving an agency & one or more neutral parties in mediation of a dispute between the agency & any other party. In such a gathering, the neutral party may caucus jointly or independently with the parties to the mediation to facilitate a resolution of the conflict, & any such caucus shall not be subject to open meetings requirements.

**Caveat:** Any decision or resolution agreed to by an agency at any such caucus shall not become effective until ratified in a public meeting & the terms of any such decision or resolution are disclosed to the public.
But Wait!

The exclusions/exemptions discussed above shall not apply if it is shown that the primary purpose of the gathering or gatherings is to evade or avoid the requirements for conducting a meeting while discussing or conducting official business.
What Meetings Must be Open?
(And, is there an exception to this rule)

• Meetings of the governing bodies and committees of all public agencies must be open to the public, unless a specific statutory exception applies. These statutory exceptions authorize the governing body or committee to enter into an “executive session”.

• In the rewrite, executive session is now defined as “a portion of a meeting lawfully closed to the public.”
Participation in Meetings

• Historically, the Open Meetings Act prohibited meetings via teleconference, except for certain statewide agencies. Under the rewrite, an agency may conduct a teleconference meeting under the following circumstances:
  ▫ For emergency conditions involving public safety or the preservation of property;
  ▫ The public notice requirements must be met;
  ▫ The public must have simultaneous access to the teleconference meeting.
May a Member Participate Via Teleconference or Other Electronic Method Where a Quorum of the Agency is Physically Assembled?

• Under the new law, the answer is clearly yes.

• Only may do so if (1) away from the jurisdiction, or (2) necessary for health reasons.

• May only do so twice a year, absent an emergency condition or the member has a written opinion by a health care professional that reasons of health prevent the member’s physical attendance.
Caution: Situations to Watch!

- Seminars, Work Sessions and Retreats
- Pre-Meeting Meetings
- Breaks during Regular Meetings
- 2 x 2 Meetings
Making the Public AWARE

• For Regular meetings – the following is required:

The agency shall prescribe the time, place and dates of regular meetings of the agency. Such information shall be available to the general public and a notice containing such information shall be posted at least one week in advance and maintained in a conspicuous place available to the public at the regular place of an agency or committee meeting as well as on the agency’s website, if any.
Making the Public AWARE (cont’d)

• For OTHER than Regular meetings:

Written or oral notice shall be given at least 24 hours in advance of the meeting to the legal organ in which notices of sheriff’s sales are published in the county where regular meetings are held – or a paper that has the equivalent circulation of the legal organ. If the legal organ publishes less than 4 times per week, then sufficient notice shall be posting of written notice at least 24 hours at the place of regular meeting and, upon written request from the media, notice by telephone, email, facsimile, or to the media at least 24 hours in advance.
Making the Public AWARE (cont’d)

• For OTHER than Regular meetings with LESS THAN 24 hours advance notice:

  ▫ The touchstone here is “reasonable notice.”

  ▫ Notice must be reasonable under the circumstances, to include (1) notice to the county legal organ or its equivalent, (2) recording in the minutes the need for such an emergency meeting, (3) providing telephonic, facsimile or email notification to other media outlets that have a place of business in the County and that have requested such notice.
What is Required for an Agenda?

• Must produce Written Agenda prior to any meeting,

• The Public Body or committee must provide for all matters expected to be considered,

• Agenda shall be available upon request, and

• Posted at the meeting site, as far in advance of the meeting as reasonably possible, but not more than two weeks (14 days) prior.

• Failure to include an item does not stop its consideration by the Public Body.
Requirement for Minutes

- Public agencies must keep written minutes of all meetings, and must make them available to the public.
- These minutes must include all measures proposed and the results of all votes taken.
- Voting by secret or written ballot is prohibited.
Minutes – Technical Requirements

- A SUMMARY of the subjects acted on and those members present at a meeting shall be written and made available within two (2) business days of adjournment; and

- The minutes shall be promptly recorded and be open to public inspection once approved, but not later than the following regular meeting.

- The minutes shall, at a minimum, include:
  - Names of the members present;
  - A description of each motion or other proposal made, and a record of all votes;
  - The identify of the person making and seconding the motion or other proposal [new requirement]; and
  - A record of all votes. However, if unanimous, the law assumes that we know who was at the meeting. However, if the vote is split, identify who was for and against.
Minutes in Executive Session

• Traditionally, minutes were not required for executive session, except in the context of land acquisition

• New rules require minutes of executive session, which must include:
  □ a specification and brief description of each issue discussed
  □ the legislation is not specific regarding votes – but the preferred rule is to record motions and votes the same as in open session
  □ if attorney-client privileged, record fact that a privileged discussion occurred & its subject, but the substance of the discussion need not be recorded.

• Executive session minutes shall not be open to the public, but are to be preserved in case of a court challenge.
Voting

Old law

• All votes in open session, except binding voting in closed session allowed for land acquisition and litigation purposes.

• Voting in executive session for personnel matters was not authorized and could be challenged and stricken within 90 days of vote.

New law

• All votes at any meeting shall be taken in public; however, votes regarding settlement, negotiations to purchase land, options to purchase land, and appraisals may be taken in executive session, but no settlement, lease, disposal or acquisition shall become binding until voted on in public.
Exceptions to the Open Meetings Act

- A governing body of a public agency may hold an executive session (closed meeting) during a regular, special or emergency meeting, when the specific reason for such closure is entered upon the official minutes. To close a meeting, there must be a vote by a majority of a quorum to close the meeting and the minutes shall reflect:
  - The names of the members present; and
  - The names of the members that voted to close the meeting; and
  - The reason for the closure.
Executive Session Affidavit

• When an executive session occurs: the person presiding over such meeting – or the membership of the entire agency if the agency’s policies so provide – shall execute and file a notarized affidavit affirming that the subject matter of the meeting was authorized by pertinent law.

• If a discussion occurs in executive session on a topic not authorized by the law, the presiding officer shall declare the discussion out of order and the discussion shall cease. If the discussion continues, the meeting shall be adjourned.
Closed Meetings “Executive Session” Topics

- **Litigation Matters**

  When consulting with legal counsel regarding pending or potential litigation, settlement, claims, administrative proceedings, or other judicial action brought or to be brought by or against any agency or any officer or employee or in which the agency or any officer or employee may be directly involved.

  Cannot close a meeting for advice/consultation on whether to close a meeting.

  To discuss settlement of any matter which may be properly discussed in executive session, but a vote in executive session to settle shall not be binding until a subsequent vote is taken in open session.
Closed Meetings “Executive Session” Topics (cont’d)

- **Land Acquisition Matters**

- Meetings when any agency is discussing or voting to:
  - Authorize negotiations to purchase, dispose of, or lease property;
  - Authorize the ordering of an appraisal related to the acquisition or disposal of real estate;
  - Enter into a contract to purchase, dispose of, or lease property subject to approval in a subsequent public vote;
  - Enter into an option to purchase, dispose of, or lease real estate subject to approval in a public vote

*Caveat:* No vote in executive session to acquire, dispose of, or lease real estate shall be binding on an agency until a subsequent vote is taken in open session. The mere authorization of negotiations & to secure appraisals have no requirement.
Closed Meetings “Executive Session” Topics (cont’d)

- **Personnel matters** — meetings when discussing or deliberating upon the:
  - Appointment;
  - Employment;
  - Compensation;
  - Hiring;
  - Disciplinary action;
  - Dismissal or periodic evaluation or rating of a public officer or employee; or
  - [new section] interviewing applicants for the position of executive head of an agency.

- Votes on any matter involving personnel issues must be taken in open session and otherwise will not be binding.
Closed Meetings “Executive Session” Topics (cont’d)

- Portions of meetings during which that portion of a record made exempt from public inspection or disclosure pursuant to the Open Records Act is to be considered by an agency and there are no reasonable means by which the agency can consider the record without disclosing the exempt portions if the meeting were not closed.
Enforcement

- The Superior Court has jurisdiction over Open Meetings Act complaints.
- The Attorney General may bring a civil or criminal complaint to enforce compliance, as may any citizen, firm, corporation or other entity.
- Unless action taken with substantial justification, the agency shall be responsible for prevailing party attorney fees and litigation costs.
- Any person knowingly and willfully conducting or participating in a meeting in violation of the Open Meetings Act shall be guilty of a misdemeanor and face up to a $1,000 fine per violation.
- A civil penalty of up to $1,000 per violation may be assessed when the violation was negligent.
- A civil or criminal penalty of up to $2,500 per offense will be imposed for additional violations within a 12 month period from the date that the first penalty was imposed.
Who can be Sued?

- The Public Entity and members of the governing body
- Anyone conducting or participating in the meeting
- Any action contesting a resolution, rule, regulation, ordinance, or other formal action of an agency based on an alleged violation of this provision shall be commenced within 90 days of the date such contested action was taken; or, if the meeting was held in a manner not permitted by law, within 90 days from the date the party alleging the violation knew or should have known about the alleged violation so long as such date is not more than six months after the date the contested action was taken.
What Legal Remedies may be Available?

- Injunctive Relief
- Mandamus
- Civil Penalties (Attorney Fees)
- Criminal Penalties
- Invalidating Official Action
- Forfeiture of Office
- Contempt of Court
Defenses to the Lawsuit

- Substantial Compliance
- Advice of Counsel
- Nonparticipation in the Violation
- Good Faith (defense in criminal action)
- Harmless or De Minimus Violation
Practice Pointers

• Become familiar with the Act’s Requirements – Address questions about the law to legal counsel.

• Assure yourself that the public body follows the Act’s requirements for notifying the public and press and for making and preserving records.

• Presume that meetings will be open, unless there is a clear showing of need for a closed meeting specifically authorized by the Act.

• When voting to close a meeting:
  ▫ Specify which exemption is being used to close the meeting;
  ▫ Have this noted in the minutes; and
  ▫ Stick to the topic.

• Take final action in public.
XI. Open Records Act
Public Policy of the Open Records 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 for inspection of governmental records.”
Importance of Access

• The Act allows the citizens, the public, or anyone to know how the government is doing its business & functioning as a public agency. The records are a way that the citizens can understand what their government is doing.
What is a “Public Record”

• Georgia law does not restrict the concept of a “public record” by focusing on the content, formal approval or format of document.

• Public record means “all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use.”
Both Inspection and Copying are Contemplated

- All public records shall be open for inspection & copying, except those which by order of a court of this state or by law are specifically exempted from disclosure.

- Citizens have the right to both inspect the originals of documents & to copy them.

- At the time of inspection, a person is entitled to make copies or other electronic reproductions (i.e., scans) of the records using their own electronic devices.
What is the Appropriate Format of an Open Records Act Request?

- A request may be made either orally or in writing, to include email, facsimile, or by any other method approved by the agency. Email & facsimile delivery are only appropriate if the agency uses email & facsimile communications in the ordinary course of business.

- However, an agency may (but is not required) to require that all written requests be made upon the agency’s choice of one of the following:
  - The agency’s director;
  - The agency’s chairperson;
  - The agency’s chief executive officer;
  - The agency’s senior official at any satellite office;
  - A clerk specifically designated as the custodian of agency records; or
  - A duly designated open records officer of an agency.

- **NOTE:** The lack of availability of any of the above persons may not delay an agency’s response.
Important Caveat

The enforcement provisions in the Open Records Act shall be available only to enforce compliance & punish noncompliance when a written request is made consistent with this subsection & shall not be available when made orally.
How Much Detail in the Request?

• Many times this is not an issue, as the request is sufficiently clear.

• If unclear, typically parties requesting records are very willing to provide further clarity.

• Where you see confusion is requests for electronic records. The new law provides:
  
  □ Requests for electronic messages (email, texts) **should** contain information about the messages that is reasonably calculated to allow the recipient of the request to locate the messages sought, including, if known, the name, title or office of the specific person or persons whose electronic messages are sought & to the extent possible, the specific databases to be searched.
What if the Request is Sent to Someone Other Than the Records Custodian?

• If an agency designates a records officer, the three-day responsive period does not begin until the written request is delivered to that office.

• If an open records officer is designated, the agency has an obligation to instruct a party requesting records of the name of that officer either orally or in writing.

• If a records officer is so designated, the agency shall also have an obligation to notify the legal organ of such designation & shall prominently display the records officer on the agency’s website.
So Who Replies to the Request?

• If an agency has designated a records officer, then that person will respond.

• If not, then the custodian of the requested records, or perhaps the county attorney, should respond.

• Reviews each request, organizes the documents, & replies to ensure compliance with the law.
How Long Does the Agency Have to Respond?

• A reasonable amount of time to determine whether or not the records are subject to access & to permit inspection & copying. In no event shall this time exceed three (3) business days.
What to do if Records are not Available in 3 Days

• Where responsive records exist, & are not exempted, but are not available within three business days of the request, a written description of such records, together with a timetable for their inspection & copying, shall be provided within that period. The records shall then be produced as quickly as practicable.
What are Options for Responding?

• If no responsive records, then advise.

• If records exist, but cannot be assembled in three days, then you produce the description & timetable as mentioned previously within 3 days. If some records can be produced immediately, but not others, then you produce what you can.

• If records are immediately available, then you produce in 3 days.

• At the time of production, you must specify the specific code section that allows either the withholding of records or the redaction of information within records.
Caveat to the Above Options

- If an agency estimates that the cost to produce responsive records will cost more than $25.00, the agency shall notify the requesting party within three (3) business days of this cost estimate, & the agency may defer its search until the requesting party has confirmed its willingness to pay the estimated cost – UNLESS –

- The requesting party has stated in their request that they agree on the front end to be responsible for an amount in excess of the estimated search & retrieval costs.

- One FINAL caveat: If the agency estimates that the cost to search & assemble responsive documents will exceed $500.00, the agency may demand advance payment prior to beginning the search, retrieval, review or production.
Lawful Reasons to Delay 3-Day Production of Records (not responding – just production)

- Records do not exist;
- Agreement of requesting party;
- Records are not subject to retrieval within 3 days;
- Preretrieval estimate provided (for amount greater than $25.00) – awaiting agreement to pay;
- Awaiting prepayment if estimate over $500.00;
- Requesting party has previous unpaid balance with agency, and therefore, the law allows agency to demand prepayment;
- Delay awaiting court filing by company that believes information held by agency is trade secret information, so long as trade secret affidavit is provided.
What if a Private Firm is Holding the Records?

• A governmental body cannot prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions.

• Disclosure is required as if received or maintained by such agency, public agency, or public office.
Special Rules - Computers

- **Computer Programs**: No right to access & inspect any computer program or computer software used or maintained in the course of operation of a public office or agency.

- **Computer Records**: Records maintained by computer shall be made available where practicable by electronic means, including Internet access, subject to reasonable security restrictions.

- **Computer Indexes**: Any computerized index of deed records shall be printed every 30 days.
Situations to Watch

- Email
- Settlement Agreements
- Your letters
- Handwritten notes
What Fees May be Assessed by the Agency? (administrative costs for retrieval)

• The agency may impose a reasonable charge for the search, retrieval, redaction, & production or copying costs for the production of records;

• An agency must use the most economical means to make records available;

• The charge for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid full-time employee who, in the reasonable discretion of the custodian of records, has the necessary skill & training to perform the request – less the first 15 minutes of time.

• The specific authority in the Act to charge for the cost to redact records is new.
Copy Costs

- A fee may be charged for the copying of records or data;
- 10¢ per page for letter or legal size documents; [this is a reduction from 25¢ per page]
- In the event of oversize documents, the actual cost to the agency for copies;
- For electronic records, the actual cost of digital media to reproduce the electronic content.
What if the Requesting Party Receives a Preretrieval Estimate, Agrees to it, & Then Will Not Pay?

• The agency has the right to collect any lawfully assessed charges against the requesting party “in any manner authorized by law for the collection of taxes, fees, or assessments” by the agency.

• An agency may require prepayment for compliance with all future requests for production of records from that person until the costs for the prior production of records have been paid or the dispute regarding payment has been resolved.
What Happens if the Fee is Disputed?

• Custodian must justify fee.

• May an agency impose fees that are high & discourage requestors?
Special Rules in New Law

- Requests made by litigants during civil or administrative litigation where the agency is a party:
  - Must be made in writing;
  - Copied on counsel of record for the agency at the same time as it is delivered to the agency; and
  - The agency shall serve a copy of its response on the requesting party & its attorney of record in the litigation (unless the attorney of record declines).
Special Rules in New Law (cont’d)

• Electronic Records
  ▪ Agencies must produce:
    • Electronic copies; or
    • Printouts of electronic data; or
    • Data from database fields

from the computer programs the agency has in its possession.

An agency shall not refuse a request for electronic records merely because producing such will require (1) inputting range, (2) search, (3) filter, (4) 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.
Special Rules in New Law (cont’d)

• A requestor may request electronic data in the same format as maintained by the agency – or – subject to technical feasibility, may request that the agency produce the electronic data in a standard export format such as flat file electronic American Standard Code for Information Interchange (ASCII) format.
Special Rules in New Law (cont’d)

- Access to public records via websites:
  - In lieu of providing separate printouts or copies of records or data, an agency may provide access to records through a website accessible by the public. However, if data fields are requested, the agency may not refuse to provide such data on the grounds that it is otherwise on the website.
  - The public has a right to electronic data in its original form, if requested.
No Requirement to Create a Document That Does Not Already Exist

- The long standing rule remains that an agency shall not be required to prepare new reports, summaries, or compilations not in existence at the time of the request.
Records or Types of Data That May be Withheld

- The exemptions under the Open Records Act are the most complex part of this legislation, because they encompass a broad spectrum of policy objectives, privacy, & public safety rationales. Some exemptions are purely discretionary. Some exemptions are based upon other federal & state law protecting data against release. Other exemptions protect the lives of law enforcement personnel or sensitive infrastructure related to national secrets.
Most Common Exemptions Routinely Used by Local Governments

- Law enforcement records that might reveal confidential sources or the release of which might endanger physical safety
- Law enforcement, prosecutorial or regulatory agencies’ records during a pending investigation or prosecution (except initial incident reports)
- Individual Georgia Uniform Motor Vehicle Reports, except upon a statement of need
- Confidential evaluations submitted to or examinations prepared by a governmental agency & prepared in connection with the appointment or hiring of a public officer or employee
- Investigation material related to the suspension or firing of a public officer or employee, until 10 days following its presentation to agency
Most Common Exemptions Routinely Used by Local Governments
(cont’d)

- Pending, rejected, or deferred sealed bids or proposals & detailed cost estimates related thereto until final award of contract or until the bid process is abandoned or terminated, or until the agency takes a public vote on the bid award.

- Records that would reveal individuals under consideration for the executive head of an agency, except that 14 days prior to taking a final vote on such appointment, information regarding up to 3 candidates shall be subject to inspection & copying.

- Records that would reveal the name, home addresses, telephone numbers, security codes, e-mail addresses, or any other data regarding a neighborhood watch or public safety notification program or security systems.
Most Common Exemptions Routinely Used by Local Governments (cont’d)

- Records that reveal an individual’s social security number, mother’s birth name, credit card information, debit card information, bank account information, account number, utility account number, password used to access his or her account, financial data or information, insurance or medical information in all records, unlisted telephone number if so designated in a public record, personal e-mail address or cellular telephone number, day & month of birth, & information regarding public utility, television, internet or telephone accounts held by private customers, provided that non-itemized bills showing amounts owed & amounts paid shall be available, except a bona fide media organization may access social security and day & month of birth information.
Most Common Exemptions Routinely Used by Local Governments (cont’d)

• Records concerning public employees that reveal the public employee’s home address, home telephone number, day & month of birth, social security number, insurance or medical information, mother’s birth name, credit card information, debit card information, account number, utility account number, password used to access his or her account, financial data or information other than compensation by a government agency, unlisted telephone number if so designated in a public record, & the identity of the public employee’s immediate family members or dependents.

• This paragraph only applies on public records that specifically identify the public employee by their job, title or office.
Most Common Exemptions Routinely Used by Local Governments (cont’d)

- Records the disclosure of which might compromise security against sabotage or criminal or terrorist acts & the nondisclosure of which is necessary for the protection of life, safety or public property.
  - Security plans & assessments
  - Plans for protection against terrorism
  - Locations of security devices
  - Records regarding training relative to government security measures
- 911 records if the release of such records would compromise a confidential source or endanger the physical safety of any person
- Trade secret information, if identified as such & if the agency concurs.
Most Common Exemptions Routinely Used by Local Governments (cont’d)

• Records protected by the **Attorney Client Privilege** & **Attorney Work Product** doctrine as recognized by state law, except for:
  □ Factual finds of an agency attorney investigation, unrelated to pending litigation, settlement, claims, administrative proceedings or other actions
  □ Legal conclusions of such an investigation remain privileged

• Information withheld under Attorney Client Privilege may be challenged in a court proceeding & the withheld communications may be reviewed in camera by the court.

• Certain protected tax information (business returns, etc.)
What if a Record Contains Some Confidential Information?

- If a record contains some information that is confidential by law, the remaining portion of the record should be provided. Mere inclusion of some information that is confidential by law does not make an entire record exempt from disclosure.
Enforcement

- The Superior Court has jurisdiction over Open Records Act complaints.
- The Attorney General may bring a civil or criminal complaint to enforce compliance, as may any citizen, firm, corporation or other entity.
- Unless action taken with substantial justification, the agency shall be responsible for prevailing party attorney fees and litigation costs.
Penalties

- Any person knowingly and willfully frustrating or attempting to frustrate access to records by making records difficult to review shall be guilty of a misdemeanor & face up to a $1,000 fine per violation.

- A civil penalty of up to $1,000 per violation may also be assessed for negligent violations.

- A civil or criminal penalty of up to $2,500 per offense will be imposed for additional violations within a 12-month period from the date that the first penalty was imposed.
Who Can be Sued?

- The Public Entity
- Employees or public officials
- Records custodian or records officer
What Legal Remedies may be Available?

- Injunctive Relief
- Mandamus
- Civil Penalties (including Attorney Fees)
- Criminal Penalties
- Contempt of Court
Defenses to the Lawsuit

• Substantial Compliance

• Advice of Counsel

• Failure to Make Specific Demands

• Records Do Not Exist

• Acted in Good Faith
The End

Local Government Law

April 28, 2012

Savannah, Georgia

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