

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

**WXIA-TV d/b/a 11ALIVE NEWS
and ANDY PIERROTTI,**

Plaintiffs,

v.

**NEIL WARREN, in his official capacity as
the Cobb County Sheriff; ROBIN E.
CLEMENTS, in her official capacity as
Open Records Custodian for the Cobb
County Sheriff's Office; and NATHAN J.
WADE,**

Defendants.

Case No. 20105803

**BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS, GEORGIA ASSOCIATION OF BROADCASTERS, GEORGIA FIRST
AMENDMENT FOUNDATION, AND RADIO TELEVISION DIGITAL NEWS
ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY
AND FINAL INJUNCTION**

Clare R. Norins
Georgia Bar No. 575364
First Amendment Clinic
University of Georgia School of Law
P.O. Box 388
Athens, Georgia 30603
Telephone: (706) 542-1419
Email: cnorins@uga.edu

Counsel for Amici Curiae

October 9, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION AND INTEREST OF AMICI CURIAE	1
ARGUMENT	2
I. Courts must narrowly construe exemptions to the Open Records Act, including Section 50-18-72(a)(4).....	2
A. Courts must narrowly interpret all exemptions and appropriately limit Section 50-18-72(a)(4) to ensure it does not swallow the Act’s general rule of disclosure.	2
B. The requested records cannot be withheld because they have already been publicly disclosed.....	5
II. Access to the records at issue will contribute to important reporting in the public interest.....	6
CONCLUSION.....	8
APPENDIX: DESCRIPTIONS OF AMICI	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases

<i>Broward Bulldog, Inc. v. Dep’t of Justice</i> , 939 F.3d 1164 (11th Cir. 2019)	5
<i>Byrne v. Eagle</i> , 319 Ark. 587 (1995)	3
<i>Capital Newspapers Div. of Hearst Corp. v. Whalen</i> , 69 N.Y.2d 246 (1987).....	4
<i>Chambers v. Birmingham News Co.</i> , 552 So. 2d 854 (Ala. 1989)	3
<i>City of Riviera Beach v. Barfield</i> , 642 So. 2d 1135 (Fla. Dist. Ct. App. 1994).....	4
<i>Cottone v. Reno</i> , 193 F.3d 550 (D.C. Cir. 1999)	5
<i>Davis v. City of Macon</i> , 262 Ga. 407 (1992)	2
<i>Dep’t of Interior v. Klamath Water Users Protective Ass’n</i> , 532 U.S. 1 (2001)	3
<i>Dep’t of Justice v. Tax Analysts</i> , 492 U.S. 136 (1989)	3
<i>Fuller v. City of Homer</i> , 75 P.3d 1059 (Alaska 2003).....	3
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982)	6
<i>Hardaway Co. v. Rives</i> , 262 Ga. 631 (1992)	3
<i>Hechler v. Casey</i> , 175 W. Va. 434 (1985)	5
<i>Judicial Watch, Inc. v. Dep’t of Defense</i> , 963 F. Supp. 2d 6 (D.D.C. 2013).....	5
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	6
<i>Napper v. Georgia Television Co.</i> , 257 Ga. 156 (1987)	3
<i>Nat’l Archives & Records Admin. v. Favish</i> , 541 U.S. 157 (2004)	3
<i>Nebraska Press Ass’n v. Stuart</i> , 427 U.S. 539 (1976)	1, 6
<i>Newspapers, Inc. v. Metro. Police Dep’t</i> , 546 A.2d 990 (D.C. 1988).....	4
<i>Office of Governor v. Davis</i> , 122 A.3d 1185 (Pa. Commw. Ct. 2015).....	4
<i>Progressive Animal Welfare Soc’y v. Univ. of Washington</i> , 125 Wash. 2d 243 (1994).....	4
<i>Sierra Club v. Superior Court</i> , 57 Cal. 4th 157 (2013)	3
<i>Simmons v. Kuzmich</i> , 166 S.W.3d 342 (Tex. App. 2005).....	4
<i>Springfield Sch. Dist. v. Guard Publ’g Co.</i> , 156 Or. App. 176 (1998).....	5
<i>State ex rel. Zuern v. Leis</i> , 56 Ohio St. 3d 20 (1990).....	4, 6
<i>Swickard v. Wayne Cty. Med. Examiner</i> , 438 Mich. 536 (1991).....	4
<i>Times Picayune Publ’g Corp. v. Bd. of Sup’rs of Louisiana State Univ.</i> , 845 So.2d 599 (La. App. 1 Cir. 5/9/03).....	4

<i>Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.</i> , 787 N.E.2d 893 (Ind. Ct. App. 2003).....	5
<i>United Healthcare of Ga., Inc. v. Ga. Dep’t of Cmty. Health</i> , 293 Ga. App. 84 (2008)	2, 3
<i>Ward v. Portneuf Med. Ctr., Inc.</i> , 150 Idaho 501 (2011).....	4
<i>Wilson v. Freedom of Info. Comm’n</i> , 181 Conn. 324 (1980).....	3

Statutes

5 U.S.C. § 552.....	3
Mo. Ann. Stat. § 610.011	4
Nev. Rev. Stat. Ann. § 239.001	4
O.C.G.A. § 50-18-70, <i>et seq.</i>	1, 2, 3
Va. Code Ann. § 2.2-3700	4
W. Va. Code § 29B-1-4	4

Other Authorities

Christine Willmsen & Beth Healy, <i>When Inmates Die Of Poor Medical Care, Jails Often Keep It Secret</i> , WBUR (Mar. 23, 2020), https://perma.cc/6HUX-ETV5	7
Jordan Wilkie & Frank Taylor, <i>Former guards allege pattern of inmate abuse at NC county jail</i> , Carolina Pub. Press (Oct. 29, 2018), https://perma.cc/2ZZ2-WZ89	7, 8
Kristal Dixon, <i>Outcry over Cobb County jail deaths, conditions grows louder</i> , Atlanta J.-Const. (Nov. 22, 2019), https://perma.cc/AP5H-NN9B	8
Stanley Dunlap, <i>COVID Races Through Some Georgia Prisons, Sickening Staff And Inmates</i> , Ga. Pub. Broad. (Sept. 29, 2020), https://perma.cc/S35X-642G	6

INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, Georgia Association of Broadcasters, Georgia First Amendment Foundation, and Radio Television Digital News Association (collectively, “amici”). Amici are groups dedicated to protecting the First Amendment and newsgathering rights of the press. The journalists and news organizations amici represent frequently rely on public records, including those obtained pursuant to the Georgia Open Records Act, O.C.G.A. § 50-18-70, *et seq.* (the “Open Records Act” or the “Act”), to report on the criminal justice system and to shed light on the operations of government in Georgia and across the country. Because “[f]ree and robust reporting, criticism, and debate” about correctional facilities “contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976), amici have a strong interest in this case.

The case files of Bradley Emory, Reginald Wilson, and Stephanie McClendon—three inmates who died in the custody of the Cobb County Sheriff’s Office—that Plaintiffs WXIA-TV d/b/a 11Alive News and Andy Pierrotti (collectively, “11Alive”) requested pursuant to the Open Records Act must be disclosed because they are public records under O.C.G.A. § 50-18-70(b)(2) to which no valid exemption applies. The “pending investigation” exemption of O.C.G.A. § 50-18-72(a)(4) (“Section 50-18-72(a)(4)”) must be narrowly construed and does not apply in the absence of a bona fide investigation or prosecution of criminal or unlawful activity. In addition, public access to the case files at issue will enable the news media to report important information about the treatment of individuals detained by local law enforcement, allow the public to oversee the workings of government, and foster accountability of government officials—paramount goals of the Open Records Act.

ARGUMENT

I. Courts must narrowly construe exemptions to the Open Records Act, including Section 50-18-72(a)(4).

- A. Courts must narrowly interpret all exemptions and appropriately limit Section 50-18-72(a)(4) to ensure it does not swallow the Act's general rule of disclosure.

The Open Records Act makes clear Georgia's "strong public policy . . . in favor of open government." O.G.C.A. § 50-18-70(a) (stating "that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged . . . so that the public can evaluate . . . the efficient and proper functioning of its institutions"). The Act specifically provides that it "shall be broadly construed to allow the inspection of governmental records." *Id.* Echoing prior Georgia court decisions, the Georgia Legislature expressly declared in its 2012 revision to the Act that the default presumption is "that public records should be made available for public inspection" rather than shielded from public view. *Id.* The Act's pro-disclosure structure is based on the understanding that "[b]ecause public men and women are amenable 'at all times' to the people, they must conduct the public's business out in the open." *Davis v. City of Macon*, 262 Ga. 407, 408 (1992) (citations omitted); *see also* Pls.' Mot. for Interlocutory and Final Inj. and Incorporated Mem. of Law in Support ("Pls.' Mem.") 12 (explaining that "[t]he Open Records Act was enacted in the public interest to protect the public from 'closed door' politics and the potential abuse of individuals and misuse of power such policies entail" (quoting *United Healthcare of Ga., Inc. v. Ga. Dep't of Cmty. Health*, 293 Ga. App. 84, 86 (2008))).

Under the Open Records Act, the records of law enforcement agencies—including sheriffs' offices—are open to the public unless they fall within one of the Act's exemptions.

O.C.G.A. § 50-18-70(a); *United Healthcare of Ga., Inc.*, 293 Ga. App. at 87. And the Open Records Act provides that its exemptions must be narrowly construed. O.C.G.A. § 50-18-70(a).

Broad disclosure of public records and the narrow construction of any exemptions are cornerstones of freedom of information laws. For example, narrow construction of the exemptions in the federal Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”)—which courts in this state have looked to as instructive when deciding Open Records Act cases, *see, e.g., Napper v. Georgia Television Co.*, 257 Ga. 156, 163 (1987)—has been a fixture since FOIA’s passage in 1966. *See, e.g., Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (explaining that FOIA’s exemptions “have been consistently given a narrow compass”). This is because FOIA’s ability to facilitate the public’s right to know is a “structural necessity in a real democracy,” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), and narrow construction of FOIA’s exemptions comports “with the Act’s goal of broad disclosure,” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). Such is the case with Georgia’s Open Records Act, as well. *See, e.g., Hardaway Co. v. Rives*, 262 Ga. 631, 632–34 (1992) (explaining that the Open Records Act “directs a narrow construction of its exclusions” and that the default presumption under the Act is disclosure rather than secrecy).

Other state courts across the country, similarly, broadly interpret the disclosure provisions of their state’s open records laws and narrowly construe exemptions; other state freedom of information laws explicitly require such a construction. *See, e.g., Chambers v. Birmingham News Co.*, 552 So. 2d 854, 857 (Ala. 1989) (Alabama Open Records Act); *Fuller v. City of Homer*, 75 P.3d 1059, 1062 (Alaska 2003) (Alaska Public Records Act); *Byrne v. Eagle*, 319 Ark. 587, 589 (1995) (Arkansas Freedom of Information Act); *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 166 (2013) (California Public Records Act); *Wilson v. Freedom of Info.*

Comm'n, 181 Conn. 324, 329 (1980) (Connecticut Freedom of Information Act); *Newspapers, Inc. v. Metro. Police Dep't*, 546 A.2d 990, 993 (D.C. 1988) (District of Columbia Freedom of Information Act); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. Dist. Ct. App. 1994) (Florida Public Records Act); *Ward v. Portneuf Med. Ctr., Inc.*, 150 Idaho 501, 505 (2011) (Idaho Public Records Act); *Times Picayune Publ'g Corp. v. Bd. of Sup'rs of Louisiana State Univ.*, 845 So.2d 599, 605 (La. App. 1 Cir. 5/9/03) (Louisiana Public Records Act); *Swickard v. Wayne Cty. Med. Examiner*, 438 Mich. 536, 544 (1991) (Michigan Freedom of Information Act); Mo. Ann. Stat. § 610.011 (Missouri Sunshine Law); Nev. Rev. Stat. Ann. § 239.001(3) (Nevada Public Records Act); *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (New York Freedom of Information Law); *Office of Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015) (Pennsylvania Right to Know Law); *Simmons v. Kuzmich*, 166 S.W.3d 342, 346 (Tex. App. 2005) (Texas Public Information Act); Va. Code Ann. § 2.2–3700(B) (Virginia Freedom of Information Act); *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wash. 2d 243, 251 (1994) (Washington Public Records Act).

It is crucial that courts construe the specific exemption claimed here, Section 50-18-72(a)(4), narrowly. As this case demonstrates, Section 50-18-72(a)(4) must be appropriately limited “to guard against the[] exception[] swallowing up the rule which makes public records available.” *State ex rel. Zuern v. Leis*, 56 Ohio St. 3d 20, 21 (1990) (overruled on other grounds). In recognition of this concern, other states have held that exemptions for investigatory records are limited in scope. For example, the West Virginia Freedom of Information Act exempts from disclosure records of law enforcement agencies “that deal with the detection and investigation of crime.” W. Va. Code § 29B-1-4. The West Virginia Supreme Court of Appeals has held that “investigations” within the meaning of that exemption do not include routine

oversight, and records generated as part of such routine oversight are not exempt from disclosure. *Hechler v. Casey*, 175 W. Va. 434, 447 (1985); *compare id. with* Pls.’ Mem. 3 (likening Mr. Wade’s “investigation” to a more generalized “review of jail operations”). Such limiting interpretations, including a requirement that a pending investigation be genuine for Section 50-18-72(a)(4) to apply, are indispensable for ensuring the efficacy of public records laws, which mandate openness rather than secrecy.

- B. The requested records cannot be withheld because they have already been publicly disclosed.

Even if Section 50-18-72(a)(4) applies to the requested case files, amici agree with 11Alive that they must still be disclosed because the Cobb County Sheriff’s Office has already previously disclosed the same records to members of the public. *See* Pls.’ Mem. 17–18. Numerous courts have recognized that prior disclosure of public records necessarily means that those records cannot be withheld in the future, a principle often referred to as the “public domain doctrine” or “prior disclosure doctrine.” *Broward Bulldog, Inc. v. Dep’t of Justice*, 939 F.3d 1164, 1185 (11th Cir. 2019). “The logic of the public domain doctrine is that ‘where information requested is truly public, then enforcement of an exemption cannot fulfill its purposes.’” *Id.* (quoting *Judicial Watch, Inc. v. Dep’t of Defense*, 963 F. Supp. 2d 6, 12 (D.D.C. 2013)). Again, this principle is applied in state courts across the country. *See, e.g., Springfield Sch. Dist. v. Guard Publ’g Co.*, 156 Or. App. 176, 182 (1998) (“[T]he disclosure of a summary of a report or of a significant portion of the information in a confidential report can result in a waiver of the applicable exemption.”); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003) (“[A] state agency might relinquish the protections afforded by [the Access to Public Records Act’s] exceptions. If, for example, an agency allowed one party access to materials and then in turn denied another party

access to the same materials . . . the agency might well be held to have waived the applicable APRA protections.”); *Leis*, 56 Ohio St. 3d at 22 (“Voluntary disclosure can preclude later claims that records are exempt from release as public records.”). Amici agree with 11Alive that because the case files were previously released to members of the public, Defendants cannot withhold them now. *See* Pls.’ Mem. 17–18.

II. Access to the records at issue will contribute to important reporting in the public interest.

There is a strong public interest in access to the inmate case files 11Alive seeks. The news media plays a critical role in keeping the public informed about the actions of government agencies and officials. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.”). More specifically, news reporting on jails and prisons, important components of the criminal justice system, allow the public to understand and oversee their functioning. As Justice Brennan explained in *Nebraska Press Association*: “Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of the system is of crucial import to citizens concerned with the administration of government.” 427 U.S. at 587 (Brennan, J., concurring)). Transparency in the operation of prisons and jails, in turn, fosters public trust in the criminal justice system. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Such transparency, and the news reporting it facilitates, is all the more important—and urgent—in light of the COVID-19 pandemic and its devastating effect on inmates housed in detention facilities. *See, e.g., Stanley Dunlap, COVID Races Through Some Georgia Prisons, Sickening Staff And Inmates*, Ga. Pub. Broad. (Sept. 29, 2020), <https://perma.cc/S35X-642G> (describing how “sick inmates are not getting adequate care while quarantined” as they recover from COVID-19).

Access to government records concerning the conditions of jails and prisons and the care and treatment afforded to inmates has made possible powerful journalism affecting communities across the nation. For example, WBUR, Boston's NPR member station, relied heavily on public records when examining the treatment of inmates suffering from a variety of medical conditions in correctional facilities in Massachusetts. See Christine Willmsen & Beth Healy, *When Inmates Die Of Poor Medical Care, Jails Often Keep It Secret*, WBUR (Mar. 23, 2020), <https://perma.cc/6HUX-ETV5>. According to WBUR's investigation, "when people suffered from dire medical conditions in Massachusetts county jails, they were often ignored or mistrusted, with fatal consequences." *Id.*

Similarly, in North Carolina, local news media reviewed hundreds of pages of public records as part of an investigation into conditions at the Cherokee County Detention Center ("CCDC"). See Jordan Wilkie & Frank Taylor, *Former guards allege pattern of inmate abuse at NC county jail*, Carolina Pub. Press (Oct. 29, 2018), <https://perma.cc/2ZZ2-WZ89>. Prompted by allegations that jail staff encouraged inmates to engage in altercations with one another, news outlet Carolina Public Press filed public records requests with multiple state agencies; some of the records they obtained corroborated what former employees of the jail described as "a culture of 'jailhouse justice' in which vulnerable inmates are not protected and detention staff uses some inmates as 'enforcers' to beat up other inmates." *Id.* Inmate deaths also prompted Carolina Public Press to examine what mechanisms are in place to protect individuals awaiting trial or serving a sentence at the facility. See *id.* When Joshua Shane Long died while detained at the CCDC and under the influence of unknown intoxicants, "[r]ecords provided by the Sheriff's Office d[id] not indicate that Long was placed on 24-hour watch or that he was seen by medical

staff”—protocols which, according to the former employees, should have been followed under the circumstances. *Id.*

The case files 11Alive seeks will shed light on a facility that has been the subject of public scrutiny. *See, e.g.,* Kristal Dixon, *Outcry over Cobb County jail deaths, conditions grows louder*, Atlanta J. -Const. (Nov. 22, 2019), <https://perma.cc/AP5H-NN9B> (describing conditions at Cobb County jail which have a “serious impact on peoples’ mental health and physical health”). In the twelve month period between November 22, 2018 and November 22, 2019, seven inmates housed at the Cobb County Adult Detention Center died. *See id.* Families and the community at large are seeking additional information about the alleged “‘improper, poor medical care[]’ [and] inadequate staffing” that may have contributed to these deaths. *Id.* Release of the case files will illuminate the facts and conditions surrounding the deaths of Bradley Emory, Reginald Wilson, and Stephanie McClendon, and allow 11Alive to play its constitutionally recognized role of informing the public, which in turn will enable the public to hold government officials and institutions accountable.

CONCLUSION

For the reasons set forth herein, amici respectfully request that the Court grant Plaintiffs’ motion for an interlocutory and final injunction.

Date: October 9, 2020

Respectfully submitted,

/s/ Clare R. Norins

Clare R. Norins

Georgia Bar No. 575364

First Amendment Clinic

University of Georgia School of Law

P.O. Box 388

Athens, Georgia 30603

Telephone: (706) 542-1419

Email: cnorins@uga.edu

Counsel for Amici Curiae

APPENDIX: DESCRIPTIONS OF AMICI

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Georgia Association of Broadcasters, Inc. is a Georgia corporation and trade association representing the interests of Georgia broadcasters. The Association's members include television and radio stations throughout the State of Georgia. The Georgia Association of Broadcasters is interested in this action because the Association believes that proper application of Georgia's open records and open meetings laws are of great importance to both the public and to all news media publishers and broadcasters.

The Georgia First Amendment Foundation is a not-for-profit, non-partisan organization which, for more than 25 years, has been providing educational services to citizens, journalists and public officials about Georgia's open records, open meetings, and free speech laws. As part of its overarching mission, the Georgia First Amendment Foundation advocates for government transparency and access to information about government operations throughout the state. This includes promoting freedom of the press to bring this information to Georgia's citizens.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic

media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

CERTIFICATE OF SERVICE

I hereby certify that the within and foregoing **BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GEORGIA ASSOCIATION OF BROADCASTERS, GEORGIA FIRST AMENDMENT FOUNDATION, AND RADIO TELEVISION DIGITAL NEWS ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR INTERLOCUTORY AND FINAL INJUNCTION** was electronically filed with the Clerk of Court using the PeachCourt system, which will automatically send notification of such filing to all attorneys of record, and that I also served this filing via email to the following:

S. Derek Bauer
Ian K. Byrnside
Erin Morrissey Victoria
Baker & Hostetler LLP
1170 Peachtree Street, NE, Suite 2400
dbauer@bakerlaw.com
ibyrnside@bakerlaw.com
evictoria@bakerlaw.com

Sheriff Neil Warren
c/o Lauren S. Bruce, Esq.
185 Roswell Street
Public Safety Building, Second Floor
Marietta, GA 30090
Lauren.Bruce@cobbcounty.org

Robin E. Clements
c/o Lauren S. Bruce, Esq.
185 Roswell Street
Public Safety Building, Second Floor
Marietta, GA 30090
Lauren.Bruce@cobbcounty.org

Nathan J. Wade, Esq.
Wade, Bradley, & Campbell Firm
2000 Powers Ferry Road SE, Suite 110
Marietta, GA 30067
nathan@thewbfirm.com
nathanwade@lawyer.com

This 9th day of October, 2020.

/s/ Clare R. Norins
Clare R. Norins
Georgia Bar No. 575364