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STATE GOVERNMENT Open Meetings: Revise Law

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STATE GOVERNMENT

Open Meetings: Revise Law

CODE SECTIONS:	O.C.G.A. §§ 50-14-1 to -4 (amended); 50-14-5, -6 (new)
BILL NUMBER:	SB 394
ACT NUMBER:	916
SUMMARY:	The Act substantially revises Georgia's "open meetings" law. The Act requires that notice of a meeting be sent to the legal organ of the county and be posted at the meeting place at least twenty-four hours in advance of the meeting. An agenda of business acted on at the meeting must be made available to the public within two business days of the meeting. The Act now specifically covers all nonprofit organizations except nonprofit hospitals. Also, the maximum fine for a violation of the law is increased from one hundred to five hundred dollars, but the violation now must be "willful and knowing." Finally, the Act provides that attorney's fees may be awarded in certain circumstances.
EFFECTIVE DATE:	July 1, 1988

History

Open meetings statutes, often referred to as "sunshine laws," are grounded in the first amendment.[1] The policy considerations which must be balanced in constructing a law permitting public access to governmental meetings include the public's "right to know" what is going on in state government and the government's interest in privacy and security in carrying out its tasks.[2]

Georgia passed its first open meetings law in 1972.[3] This statute pro-

1. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
2. Houston v. Rutledge, 237 Ga. 764, 229 S.E.2d 624 (1976).
3. 1972 Ga. Laws 575.

vided that all meetings "at which official actions are to be taken" would be open to the public.[4] Formal actions taken at closed meetings were not intended to be binding. However, the statute of limitations for bringing a suit contesting any formal action made at an illegally closed meeting was ninety days from the date of the formal action.[5] Thus, it would be theoretically possible to conduct a closed meeting and pass a rule to go into effect 120 days after the meeting. Because the public might not learn of the rule or of the meeting until the rule went into effect, it could be upheld as valid, because the statute of limitations would already have run. In *Worthy v. Paulding County Hospital Authority*,[6] the Georgia Supreme Court construed the ninety-day period strictly against the citizen contesting the action of the public body. The court held that the statute of limitations begins to run on the date the governing body holds the meeting in violation of the statute, not on the date on which any action from an illegally closed meeting becomes effective.

The 1972 law further required that minutes of the meeting "shall be promptly recorded and . . . open to public inspection."[7] It also provided that any person conducting an illegally closed meeting would be guilty of a misdemeanor and could be fined up to one hundred dollars.[8]

The 1972 law provided several exemptions to the open meetings requirement: (1) staff meetings for investigative purposes under a duty imposed by law; (2) deliberations of the Board of Pardons and Paroles; (3) meetings of the Georgia Bureau of Investigation or any other law enforcement agency; (4) meetings to discuss future acquisition of real estate; (5) meetings of public hospital committees considering grants of abortions; (6) meetings to discuss the appointment, employment, disciplinary action, or dismissal of a public officer or employee; or (7) meetings to hear complaints brought against a public officer or employee, unless he requests a public meeting.[9] The 1972 law did not repeal either the attorney-client privilege or the privacy protections covering tax matters otherwise made confidential by Georgia law but explicitly provided that the public could be excluded to protect these privileges.[10]

The 1972 law has never been interpreted as applying to the Georgia legislature. The General Assembly was first exempted by the Georgia Supreme Court in *Coggin v. Davey*.[11] In this case, the court deferred to the internal operating procedures of each house, holding that the legislature has sole discretion over how open its operations must be, even if that

4. *Id.*
5. *Id.*
6. 243 Ga. 851, 257 S.E.2d 271 (1979).
7. 1972 Ga. Laws 576.
8. *Id.*
9. *Id.* at 576—77.
10. *Id.* at 577.
11. 233 Ga. 407, 211 S.E.2d 708 (1975).

policy is inconsistent with the state's general open meetings law.[12]

A 1979 opinion of the Attorney General stated that the open meetings law did not apply to the judicial branch of government because the 1972 law contained no reference to the judicial branch or to any judicial function; therefore, it did not contemplate coverage of the judiciary.[13] No suit has been brought on this matter, but the traditional independence of the judicial branch supports this position.

The exemption of advisory groups which have no authority to make governmental decisions under the 1972 open meeting law was formulated by the Georgia Supreme Court in the case of *McLarty v. Board of Regents.*[14] The court emphasized that the policies of the statute were not implicated when the group was merely advisory, since the public could review the advisory reports prior to official consideration.[15] The *McLarty* ruling was limited by a 1985 opinion of the Attorney General which suggested that only ad hoc advisory panels are exempt from the open meetings law.[16] A committee set up by statute is subject to the 1972 law.[17]

The 1972 law was amended three times.[18] In 1978, the law was extended to cover all state and local housing authorities.[19] Two amendments were made in 1980. One amendment required votes to be recorded in all open meetings.[20] The second amendment granted the news media access to all open meetings and allowed both visual and audio recordings of the proceedings.[21] This second amendment also defined the term "agency" as used in the statute;[22] prior to the amendment, the statute contained no definitions at all.

In 1982, the entire chapter containing the open meetings law was replaced.[23] The new law defined the key terms "agency," "meeting," and "records."[24] The 1982 law also sought to correct what some perceived as a glaring deficiency in the 1972 law by requiring that notice of regular meetings be made available to the general public.[25] The omission of a notice provision in the 1972 law often negated the effectiveness of the open meetings law. For example, in *Harms v. Adams,*[26] a Union City resident sued to have certain city council actions declared invalid on the

12. *Id.* at 411, 211 S.E.2d at 711.
13. 1979 Op. Att'y Gen. 55, 56.
14. 231 Ga. 22, 200 S.E.2d 117 (1973).
15. McLarty v. Board of Regents, 231 Ga. at 23, 200 S.E.2d at 119.
16. 1985 Op. Att'y Gen. 218.
17. *Id.*
18. 1978 Ga. Laws 1364; 1980 Ga. Laws 595; 1980 Ga. Laws 1254.
19. 1978 Ga. Laws 1364.
20. 1980 Ga. Laws 595.
21. 1980 Ga. Laws 1254, 1255.
22. *Id.*
23. 1982 Ga. Laws 1810.
24. *Id.* at 1810—11.
25. *Id.* at 1811.
26. 238 Ga. 186, 232 S.E.2d 61 (1978).

grounds that a series of meetings violated the open meetings law. The court, holding that the meetings were open, determined that the problem was actually one of lack of notice, but because the statute did not require notice, city officials had not violated the law.[27]

The 1982 law required that notice be posted at the regular meeting location at least twenty-four hours in advance of the meeting.[28] This requirement could be dispensed with if "special circumstances" should occur; when such circumstances did occur, the agency was required to give whatever notice is "reasonable" and was required to record in the minutes the special circumstances and the nature of the notice given.[29] These notice provisions were calculated to reach only those who happened by the meeting site within twenty-four hours prior to the meeting. Very little burden was imposed on the governmental unit.

The 1982 law also added adoption proceedings to the list of the activities exempted from coverage by the open meetings law.[30] Further, the law provided that part of a meeting could be closed, as long as the minutes reflected the reason for the closure.[31] Other than these alterations, however, the law was substantially the same as its predecessor. The statute of limitations period remained ninety days from the illegally closed meeting, and the fine for a violation of the law remained one hundred dollars.[32]

The revised 1983 Georgia Constitution extended open meetings coverage to the legislature, providing that "[t]he sessions of the General Assembly and all standing committee meetings thereof shall be open to the public."[33] However, this sweeping provision is severely limited by the following sentence which provides that "[e]ither house may by rule provide for exception to that requirement."[34]

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27. Harms v. Adams, 238 Ga. at 187, 232 S.E.2d at 62. *See also* Dozier v. Norris, 241 Ga. 230, 244 S.E.2d 853 (1978).

28. 1982 Ga. Laws 1811.

29. *Id.*

30. *Id.* at 1813.

31. *Id.* at 1812.

32. *Id.* Not only is the low fine a small deterrent to violation of the act, it is also seldom enforced. The only person to date to be punished under the open meetings statute is former Colquitt County Commission Chairman Bill Kennedy, who entered "no contest" pleas to three charges of holding secret meetings and was fined $100 on each count. *See* Shepard, *Georgia "Sunshine Law" Often Falls Short, Experts Say*, Atlanta J., Aug. 28, 1986, at 5C, col. 3.

33. GA. CONST. art. III, § 4, ¶ 11.

34. *Id.*

SB 394

SB 394 was initially more far-reaching than the final version passed by the 1988 Georgia General Assembly. As proposed, the new legislation was considered important for two main reasons: it clarified various provisions of the open meetings requirements, and it provided for better notice of meetings to the public.[35] The bill, as introduced, expressly covered the General Assembly.[36] "Agency" was also redefined to include any nonprofit organization which received more than one-third of its funds from the public.[37] Minutes of every public meeting were to be made available to the public within two business days after the meeting.[38] This version of the bill also added a provision that required oral or written notice of the date, time, place, and purpose of a meeting be given at least twenty-four hours in advance to the legal organ of the county where the meeting was to be held.[39]

SB 394, as introduced, also raised the maximum fine for a violation of the law from one hundred to five hundred dollars. The bill provided that, in a suit to enforce the provisions of the open meetings law, the prevailing party would be awarded attorney's fees and costs.[40]

The Senate unanimously passed SB 394 early in the session with only five changes.[41] The Senate committee substitute narrowed the definition of nonprofit organizations covered by the open meetings law to include only those nonprofit organizations which receive more than one-third of their funds from the public.[42] The substitute reinstated language providing a statute of limitations exception for zoning decisions, which was a part of the 1972 law omitted in the original version of SB 394.[43] The Senate committee substitute relaxed the requirement that minutes of a meeting be made available within two business days; the bill as passed by the Senate required only that a "memorandum" of the proposed minutes be available to the public within that time period.[44] Further, this substitute limited the circumstances in which a meeting could be closed for consultation with legal counsel.[45] The Senate also modified the section permitting recovery of attorney's fees and costs by limiting recoveries to a range

35. Telephone interview with Senator Harrill Dawkins, Senate District No. 45 (Apr. 14, 1988) [hereinafter Dawkins Interview]. Senator Dawkins sponsored the bill and Lieutenant Governor Zell Miller strongly supported it.

36. SB 394, as introduced, 1988 Ga. Gen. Assem.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. SB 394 (SCS), 1988 Ga. Gen. Assem.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

of $200 to $1000 in the absence of significant justification for the suit.[46] No range of fees was found in the original version of SB 394.[47]

While the Senate considered SB 394, the House considered HB 1344, another open meetings bill.[48] The House bill closely resembled the Senate bill, with one notable exception: the House bill did not include the General Assembly in its coverage.[49] Upon reaching the House, SB 394 was assigned to the House Committee on Rules and studied in a House Subcommittee on Rules which developed a committee substitute for the bill.[50] The major change made by the subcommittee was to delete the General Assembly from the open meetings requirements.[51] The bases for supporting the removal of the General Assembly from the bill were twofold.[52] First, the 1983 Georgia Constitution adequately provided that the General Assembly's meetings be open to the public. Second, the Georgia Supreme Court held, in the case of *Hamrick v. Rouse*,[53] that "no Legislature has the right to bind all subsequent Legislatures, all posterity, as to any matter of mere political arrangement or expediency."[54]

Although there was no dispute regarding the constitutional provision, some legislators believed that, despite the decision in *Hamrick v. Rouse*, the General Assembly could pass a statute providing that it also is covered by the open meetings bill.[55]

The House subcommittee chairman believed the bill as passed by the Senate would virtually "shut down" government on all levels, regardless of whether or not the General Assembly was included within its provisions.[56] The broad definition of "meetings" contained in the Senate committee substitute generated considerable controversy in the House.[57] While the 1982 Act provided that a meeting was the "gathering of a quorum of an agency, pursuant to schedule, call, or notice of or from the agency at a designated time or place,"[58] the Senate committee substitute deleted the qualifying language after "agency." The Senate subcommittee concerns about the broad definition of "meeting" were echoed by the

46. *Id.*

47. SB 394, as introduced, 1988 Ga. Gen. Assem.

48. HB 1344, as introduced, 1988 Ga. Gen. Assem. The bill was strongly supported by Governor Joe Frank Harris. Dawkins Interview, *supra* note 35.

49. HB 1344, as introduced, 1988 Ga. Gen. Assem.

50. *Id.* The subcommittee was headed by Representative Denmark Groover, Jr., House District No. 99.

51. SB 394 (HCS), 1988 Ga. Gen. Assem.

52. Telephone interview with Representative Denmark Groover, Jr., House District No. 99 (Apr. 12, 1988) [hereinafter Groover Interview].

53. 17 Ga. 56 (1855).

54. Hamrick v. Rouse, 17 Ga. at 60.

55. Dawkins Interview, *supra* note 35.

56. Groover Interview, *supra* note 52.

57. *Id.*

58. 1982 Ga. Laws 1811.

Georgia Municipal Association (GMA).[59] The GMA and the House subcommittee also were concerned that the memorandum of minutes requirement[60] would burden the governmental unit subject to the law.[61]

The House Committee on Rules adopted the House subcommittee's substitute to SB 394.[62] The House substitute deleted the General Assembly from coverage under the Act[63] and made several other changes to the Senate committee substitute. The memorandum that was required to be made available to the public within two business days was changed to an "agenda of the subjects acted on and those members present" at the meeting.[64] The House also modified the attorney's fees provision[65] to allow an award of attorney's fees and costs to the prevailing party if the court determined that the violation of the open meetings law was "willful and without substantial justification," or if the court determined that the suit was "completely without merit as to law or fact."[66] In addition, the House committee substitute deleted any range of allowable attorney's fees and costs.

The House committee substitute also expanded the exception made in the Senate bill for hospitals. While the bill which passed the Senate allowed hospitals to close meetings only when considering the grant of abortions,[67] the House committee substitute also allowed hospitals to close meetings when the hospital was considering matters such as peer review; the granting, restriction, or revocation of staff privileges; or information of a proprietary nature.[68]

Interest groups such as the League of Women Voters, Common Cause, and the American Civil Liberties Union argued for making willful, repeated violations of the law a felony.[69] In its final form, SB 394 did include "knowingly and willfully" in the section providing for penalties;[70] however, the penalty remained a misdemeanor.[71] The House committee substitute did not change the Senate provision for a maximum fine of $500.[72]

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59. Telephone interview with Ed Sumner, legal counsel for Georgia Municipal Association (Apr. 12, 1988) [hereinafter Sumner Interview]. GMA believed that any social event, however unplanned, could be deemed a "meeting" if a quorum of members of a particular agency were present and discussed, even casually, some agency business.
60. *See supra* text accompanying note 44.
61. Sumner Interview, *supra* note 59; Groover Interview, *supra* note 52.
62. SB 394 (HCS), 1988 Ga. Gen. Assem.
63. *Id.*
64. *Id.*
65. *See supra* note 46 and accompanying text.
66. SB 394 (HCS), 1988 Ga. Gen. Assem.
67. SB 394 (SCS), 1988 Ga. Gen. Assem.
68. SB 394 (HCS), 1988 Ga. Gen. Assem.
69. May, *Sunshine Law Critic Offers Plan*, Atlanta J., Feb. 11, 1988, at 1B, col. 1.
70. O.C.G.A. § 50-14-6 (Supp. 1988).
71. *Id.*
72. SB 394 (HCS), 1988 Ga. Gen. Assem.

A House floor amendment was proposed to the House committee substitute in order to include the General Assembly within the Act.[73] The amendment was more workable than the provision covering the General Assembly in the Senate committee substitute. The latter would have imposed an "impossible" burden on the General Assembly because a legislature which meets only forty days a year has serious time constraints.[74]

When SB 394 returned from the House, the Senate amended it further. The Senate returned the statute of limitations to its original ninety days[75] from the House trimmed-down sixty-day limitation.[76] The Senate also narrowed the hospital exception, providing that a hospital otherwise required to have open meetings would be exempt only when considering the granting of abortions or the granting, restricting, or revocation of staff privileges.[77] The Georgia Hospital Association argued that the Senate revision posed an obstacle to hospitals' competitiveness in the market.[78] For example, the provision created a risk that a hospital's competitors could sit in on the hospital's advertising campaign meeting. Also, the open meetings requirement could have made it difficult for a hospital to obtain participation from community leaders.[79] In the section regarding attorney's fees and costs, the Senate deleted the House committee substitute's language of "willful and without substantial justification,"[80] and left unchanged the standard of "without merit as to law or fact."[81]

With SB 394 back in the Senate after substantial revision in the House, the Senators faced a choice of either passing the bill with House agreement to the new amendments or attempting to include the General Assembly as covered under the bill and risk having it fail completely.[82] Therefore, a decision was made not to take the risk of failure.[83]

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73. SB 394 (HFA), 1988 Ga. Gen. Assem.

74. Telephone interview with Representative Johnny Isakson, House District No. 21 (Apr. 12, 1988). Isakson stated that, although the constitution does cover the General Assembly, the provision is not clear. The House floor amendment which he proposed would have required the Legislative Services Committee to address specifically, as to each legislative house, such issues as adequate notice to the public of meetings, adequate accessibility for the public to meetings, and adequate recourse for the public in case of a violation of the requirement. The constitution permits the legislature to make rules to provide for exceptions to the requirement; therefore, the only rules passed by either house regarding open meetings contemplate the circumstances in which a meeting may be closed. There are no rules addressing the concerns Representative Isakson raised. *Id.*

75. O.C.G.A. § 50-14-1(b) (Supp. 1988).

76. SB 394 (HCS), 1988 Ga. Gen. Assem.

77. O.C.G.A. § 50-14-3(5) (Supp. 1988).

78. Telephone interview with Paul Bolster, Georgia Hospital Association (Apr. 15, 1988).

79. *Id.*

80. SB 394 (HCS), 1988 Ga. Gen. Assem. *See supra* note 66 and accompanying text.

81. O.C.G.A. § 50-14-5(b) (Supp. 1988).

82. Dawkins Interview, *supra* note 35.

83. Nevertheless, Senator Paul Coverdell, Senate District No. 40, proposed a floor

Although the Senate and House differed on specific changes, the resulting open meetings bill completely replaced Chapter 14 of Title 50. The definitions section has three main modifications from the 1982 statute. First, it expressly provides that the Act will cover any nonprofit organization to which there is a direct allocation of tax funds which constitutes more than one-third of the sources for the organization.[84] However, it specifically exempts nonprofit hospitals from coverage.[85] Second, the term "meeting" is expanded, making clear that the law is intended to include committees of agencies as well as the agencies themselves.[86] The law applies to meetings in which official action is taken, official business or policy is discussed, or recommendations concerning official business or policy are formulated.[87] It is unclear whether a purely informational committee meeting would have to be open under this definition. Third, the Act no longer includes a provision regarding public records. A public records bill passed in the 1988 session, incorporating a public records definition into that bill.[88]

Another change made by the 1988 Act is the stricter requirement of notice to the public for meetings that are open. The new statute includes the old requirement of posting notice of the meeting at the meeting place within twenty-four hours of the meeting.[89] However, it also requires that "due notice" of a meeting must be either written or oral notice at least twenty-four hours in advance to the legal organ of the county where the meetings are held.[90] It is interesting to note that the designated legal organ does not have to publish such notices of meetings; they only have to make the information available to any member of the public upon inquiry.[91] Thus, if no one asks, there is no requirement for the information to be disseminated.

An additional change made by the 1988 Act is the provision that an agenda of subjects acted upon and a list of members present at the meeting must be made available in written form for public inspection within two business days of adjournment of the meeting.[92] The new law also specifies what must appear in the minutes of an agency's meeting; at a minimum, the minutes must include the names of the members present, a description of each motion or other proposal made, and a record of all

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amendment to put the General Assembly back into the bill. The amendment was defeated, and the House accepted all of the Senate amendments. *See* Final Composite Status Sheet, Mar. 7, 1988.

84. O.C.G.A. § 50-14-1(a)(1)(E) (Supp. 1988).
85. *Id.*
86. O.C.G.A. § 50-14-1(a)(2) (Supp. 1988).
87. *Id.*
88. O.C.G.A. § 50-18-70 (a)—(c) (Supp. 1988).
89. O.C.G.A. § 50-14-1(d) (Supp. 1988).
90. *Id.*
91. *Id.*
92. O.C.G.A. § 50-14-1(e) (Supp. 1988).

votes.[93]

The new law retains the protection of the attorney-client privilege, although additional language was added to provide that a meeting may be closed in order to consult with legal counsel, but it may not be closed to consult with legal counsel regarding whether or not a meeting may be properly closed.[94] It is unclear how the new language will be interpreted, but there are already some concerns that this actually constricts the attorney-client privilege.[95]

The exception for the State Board of Pardons and Paroles is expanded under the new Act by the inclusion of clemency or revocation hearings in deliberations which may be closed if the Board decides that an open meeting on the subject may pose a substantial risk of harm to a witness.[96] The exception regarding acquisition of real estate still exists; however, it is limited by the new requirement that minutes of such a closed meeting must be made available, although without identification of the real estate, before the proceedings are complete.[97]

The Act modifies the provision which allows meetings to be closed when the agency is discussing the appointment, employment, hiring, dismissal or disciplinary action of a public officer or employee, by providing that the meetings must be open when the agency is receiving evidence or hearing argument on charges to determine disciplinary action or dismissal of a public officer or employee.[98] This contrasts with the old law which allowed the meeting to be closed unless the employee himself requested that the meeting be open.[99] The new law, like the old one, permits a meeting to be partially closed.[100] However, it also requires that whenever any meeting is closed, the reasons for the closure and the names of those voting for closure be recorded in the minutes.[101]

There are two modifications regarding enforcement. The first allows the court to award attorney's fees and costs to the prevailing side when the court determines either that the violation of the law was "completely without merit as to law or fact," or that the suit brought was "completely without merit as to law or fact."[102] The second provision raises the maximum fine for a violation of the law from one hundred to five hundred

93. *Id.*
94. O.C.G.A. § 50-14-2(a)(1) (Supp. 1988).
95. Sumner Interview, *supra* note 59.
96. O.C.G.A. § 50-14-3(2) (Supp. 1988).
97. O.C.G.A. § 50-14-3(4) (Supp. 1988).
98. O.C.G.A. § 50-14-3(6) (Supp. 1988).
99. 1982 Ga. Laws 1810, 1813 (formerly found at O.C.G.A. § 50-14-4(6)(B)).
100. O.C.G.A. § 50-14-4 (Supp. 1988).
101. *Id.*
102. O.C.G.A. § 50-14-5(b) (Supp. 1988).

dollars, but in order to be guilty, a person must "knowingly and willfully" violate the law.[103]

D. Voyles

103. O.C.G.A. § 50-14-6 (Supp. 1988).