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STATE GOVERNMENT State Printing and Documents: Provide for Conditions of Disclosure of Public Records Received or Maintained by Private Persons or Private Entities Performing Services for Public Entities; Change Provisions Relating to Time and Manner in Which Custodians Must Respond to Requests for Inspection; Require Custodians to Provide Access to Computer Records by Electronic Means; Require a Custodian Who Refuses to Provide a Document for Inspection to Make a Binding Explanation of the Reasons the Custodian Denied

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Access; Impose Criminal Penalties for Failure to Provide Access to Records and Define Punishment

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STATE GOVERNMENT

State Printing and Documents: Provide for Conditions of Disclosure of Public Records Received or Maintained by Private Persons or Private Entities Performing Services for Public Entities; Change Provisions Relating to Time and Manner in Which Custodians Must Respond to Requests for Inspection; Require Custodians to Provide Access to Computer Records by Electronic Means; Require a Custodian Who Refuses to Provide a Document for Inspection to Make a Binding Explanation of the Reasons the Custodian Denied Access; Impose Criminal Penalties for Failure to Provide Access to Records and Define Punishment

CODE SECTIONS:	O.C.G.A. § 50-18-70 to –72, -74 (amended)
BILL NUMBER:	HB 279
ACT NUMBER:	323
GEORGIA LAWS:	1999 Ga. Laws 552
SUMMARY:	The Act provides that private persons or entities that perform services for public entities must make records of such services available to the public. It requires the entities to turn over the public records three days after a citizen requests them. The Act also requires the entities to provide access to computer records by electronic means under certain conditions. Under the Act, the custodian must give an explanation when he or she denies access to a requested record. The Act makes it a criminal offense to knowingly and willfully fail or refuse to provide access to records.
EFFECTIVE DATE:	July 1, 1999

History

The Georgia General Assembly amended the Open Records Act to "put some teeth" into the state's so-called "sunshine laws."[1] The

1. Rep. J. Glenn Richardson, House District No. 26, Address, *Georgia's Open*

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amendments give the public greater access to government records, including those kept by private businesses that provide public services.[2] The Act's sponsors introduced it because some governmental bodies and agencies refused to comply with the existing law.[3]

The Governor's House Floor Leaders, Representatives Charlie Smith, Jr. of the 175th District, Henrietta Turnquest of the 73rd District, and Winfred Dukes of the 161st District, sponsored HB 279.[4] Governor Roy Barnes made the Act's goals part of his campaign platform and his 1999 legislative agenda.[5] Representative Smith said that Governor Barnes assigned a high priority to the legislation, in part, because he encountered difficulty getting public records as a trial lawyer.[6] Proponents of the Act say Governor Barnes's support during the legislative process helped ensure the Act's success.[7]

Original Draft of the Governor's Counsel

Inclusion of Private Firms Providing Public Services

The Governor's counsel drafted the Act with help from the Georgia Press Association.[8] The Act amends Code section 50-18-70 by adding a provision requiring that records received or maintained by a private person, firm, or corporation that performs work for or on behalf of a state agency be subject to the same disclosure requirements established for public agencies.[9] The General Assembly added the provision because of the government's increasing use of private entities to carry out the government's official functions.[10] Proponents also voiced concern about reports that public agencies used private

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Meetings and Open Records Law Revisited–1999 (Apr. 1999) (available in Georgia State University College of Law Library).

2. *See Dome Digest: A Weekly Recap and Preview of Activity in the Georgia Legislature*, ATLANTA J. & CONST., Feb. 21, 1999, at F3.

3. *See* Facsimile Interview with David E. Hudson, Georgia Press Association (May 20, 1999) [hereinafter Hudson Interview].

4. *See* HB 279, as introduced, 1999 Ga. Gen. Assem.

5. *See* Facsimile Interview with Rep. Jim Martin, House District No. 47 (May 19, 1999) [hereinafter Martin Interview].

6. *See* E-mail Interview with Rep. Charlie Smith, Jr., House District No. 175 (May 18, 1999) [hereinafter Smith Interview].

7. *See id.*

8. *See id.*

9. *Compare* 1998 Ga. Laws 128, § 50, at 143 (formerly found at O.C.G.A. § 50-18-70 (1998)), *with* O.C.G.A. § 50-18-70 (Supp. 1999).

10. *See* Hudson Interview, *supra* note 3.

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firms to create a "loophole" in the existing law by taking public records to the private business for "safekeeping."[11] In effect, this made the records unavailable to the public.[12]

Three-Day Compliance Period

The Act also adds a provision that requires the individual who has control of a requested record (the custodian) to turn over the record within three business days of the request if the record is available.[13] If related records exist but cannot be made available within the three-day period, the custodian must provide a written description of the records and set a timetable for production.[14] Representative Smith told fellow legislators that under the old law some custodians would respond within three days with a promise to provide the records.[15] However, even though they replied within the required statutory period, the custodians would not follow up with the person who made the request.[16] It took one person an entire year to get the documents he requested.[17] The Act makes such delays less likely because it forces the custodian to commit to a time schedule for production.[18]

Custodians of Computer Records Must Make Them Available

The Act adds a provision requiring custodians of computer records to make the records available when practical by electronic means; this includes access over the Internet, subject to security restrictions.[19] The drafters included this provision because some agencies refused to grant access to their computer records.[20] These agencies claimed that if they did not print the information on paper, the information did not qualify as a public record.[21] The change, which Governor Barnes's

11. *See* Smith Interview, *supra* note 6.
12. *See id.*
13. *Compare* 1994 Ga. Laws 618, § 1, at 619 (formerly found at O.C.G.A. § 50-18-70 (1998)), *with* O.C.G.A. § 50-18-70 (Supp. 1999).
14. *See* O.C.G.A. § 50-18-70 (Supp. 1999).
15. *See State of Georgia Session Archives* (audio recording of Feb. 11, 1999, House Proceedings) (remarks by Rep. Charlie Smith, Jr.) [hereinafter Smith Remarks] <http://www.ganet.org/services/leg/audio/99archive/>.
16. *See id.*
17. *See id.*
18. *See* O.C.G.A. § 50-18-70 (Supp. 1999).
19. *See id.*
20. *See* Smith Remarks, *supra* note 15.
21. *See id.*

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office supported, makes it faster and easier for citizens to access government records.[22] According to Representative Smith, custodians can download requested information onto a floppy disk, transmit the information on the Internet, and transmit the information via e-mail.[23]

The Act also prohibits custodians from charging citizens additional fees for computer access to public records, other than the actual cost of providing access.[24] Proponents of the bill say the General Assembly added this provision because it is unlikely that agencies will incur significant extra expenses when they provide computer access.[25]

Exempt Records

The Act amends the provisions of Code section 50-18-72 that govern exempt records.[26] If a record is exempt, the custodian must specify the legal authority that excludes the record.[27] The old law merely required custodians to specify the provision of the Article under which the exemption fell.[28]

Punishment for Non-compliance

The Act adds a provision that makes it a misdemeanor, punishable by a maximum fine of $100, to knowingly and willfully fail or refuse to provide access to requested documents within the established time limits.[29] Proponents say the General Assembly added this provision because the existing law provided for no penalties for those who refused to turn over public records; instead, a citizen had to appeal to the courts for an injunction.[30] Some proponents of the Act contended that under the old law, government agencies could easily resist disclosure by refusing access and waiting for the citizen to file a lawsuit.[31]

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22. *See* O.C.G.A. § 50-18-70 (Supp. 1999).
23. *See* Smith Remarks, *supra* note 15.
24. *See* O.C.G.A. § 50-18-71.2 (Supp. 1999).
25. *See* Hudson Interview, *supra* note 3.
26. *See* O.C.G.A. § 50-18-72 (Supp. 1999).
27. *See id.*
28. *See* 1998 Ga. Laws 1652, § 1, at 1653-55 (formerly found at O.C.G.A. § 50-18-72 (1998)).
29. *See* O.C.G.A. § 50-18-74 (Supp. 1999).
30. *See* Smith Interview, *supra* note 6.
31. *See* Hudson Interview, *supra* note 3.

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House Judiciary Committee Substitute

The House Judiciary Committee limited the extent to which the Act applies to a private business that performs government functions.[32] It struck the phrase "other private entity which performs" a service for the government and substituted the phrase "other private entity in the performance of" a service.[33] The language only requires the disclosure of information related to the business's performance of the government service.[34] Some feared that the phrase "other private entity which performs" a government service could authorize citizens to demand private business records that did not relate to the government service.[35]

Senate Substitute

The Senate added a provision requiring that custodians of records maintained by computer make them available electronically only at the request of the person who asks to see the records.[36] This language eases the potential economic and administrative burden on state agencies by releasing them from an obligation to provide access to several million citizens who may not want to see the records.[37]

The Senate also added a provision that exempts personal information from records, including an individual's birth date, birthplace, parents' names, addresses, telephone numbers, social security numbers, or insurance or medical information.[38] The Senate added this language because of a concern for the individual's personal privacy.[39] However, the House and Senate later passed HB 250, which limited exempt information to "an individual's social security number and insurance or medical information in personal records."[40] HB 250 further provided that the custodian may simply redact this

32. *Compare* HB 279, as introduced, 1999 Ga. Gen. Assem., *with* HB 279 (HCS), 1999 Ga. Gen. Assem.
33. *Compare* HB 279, as introduced, 1999 Ga. Gen. Assem., *with* HB 279 (HCS), 1999 Ga. Gen. Assem.
34. *See* HB 279 (HCS), 1999 Ga. Gen. Assem.
35. *See* Martin Interview, *supra* note 5.
36. *Compare* HB 279 (HCS), 1999 Ga. Gen. Assem., *with* HB 279 (SCSFA), 1999 Ga. Gen. Assem.
37. *See* Smith Interview, *supra* note 6.
38. *Compare* HB 279 (HCS), 1999 Ga. Gen. Assem., *with* HB 279 (SCSFA), 1999 Ga. Gen. Assem.
39. *See* Hudson Interview, *supra* note 3; Smith Interview, *supra* note 6.
40. HB 250, as passed, 1999 Ga. Gen. Assem.

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information from the record.[41] HB 250 specifically states that these provisions supercede Section 4 of HB 279.[42]

The Senate added a provision that allows custodians of records to be prosecuted only after authorities have served them with a citation in the same manner as an arrest warrant.[43] Furthermore, law enforcement officers will not arrest the custodian unless he or she fails to appear in court.[44] The Senate added this provision to keep citizens from abusing the misdemeanor penalty section by deliberately seeking to have a public officer or employee arrested or charged with a crime.[45] In essence, authorities treat the offense more like a traffic ticket than a criminal act.[46] Representative Smith stated that "[s]ome had a fear that some innocent . . . clerk would be arrested in the dead of night by political opponents for an honest mistake."[47]

The House passed all of the Senate's changes.[48]

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41. *See id.*
42. *See id.*
43. *Compare* HB 279 (HCS), 1999 Ga. Gen. Assem., *with* HB 279 (SCSFA), 1999 Ga. Gen. Assem.
44. *See* HB 279 (SCSFA), 1999 Ga. Gen. Assem.
45. *See* Hudson Interview, *supra* note 3.
46. *See* Facsimile Interview with Ed Sumner, Georgia Municipal Association (May 25, 1999).
47. Smith Interview, *supra* note 6.
48. *Compare* HB 279 (SCSFA), 1999 Ga. Gen. Assem., *with* O.C.G.A. § 50-18-74 (Supp. 1999).

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