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IN THE COURT OF APPEALS

STATE OF GEORGIA

_____)
TIMES-JOURNAL, INC.)
))
Appellee,)
))
v.)
))
NORTHWEST GEORGIA HEALTH SYSTEM, INC.)
and PROMINA HEALTH SYSTEM, INC.,)
))
Appellants,)
_____)

Case No. A95A1324

BRIEF OF AMICI CURIAE
GEORGIA FIRST AMENDMENT FOUNDATION
AMERICAN CIVIL LIBERTIES UNION
ASSOCIATED PRESS
THE ATLANTA JOURNAL AND THE ATLANTA CONSTITUTION
GEORGIA CENTER FOR LAW IN THE PUBLIC INTEREST
COMMON CAUSE/GEORGIA
GEORGIA PRESS ASSOCIATION
GEORGIA TELEVISION COMPANY d/b/a WSB-TV
THE MACON TELEGRAPH
WGNX, INC.

Amici curiae Georgia First Amendment Foundation, American Civil
Liberties Union, Associated Press, The Atlanta Journal and The Atlanta Constitution,
Georgia Center for Law in the Public Interest, Common Cause/Georgia, Georgia



I hereby certify that this is a true and correct
copy of portions of case A95A1324
as they appear in the original file in the Court
of Appeals of Georgia.

Date: 4/24/95
Signature: Stephen E. Carter
Clerk, Court of Appeals of Georgia

WITNESS MY SIGNATURE AND SEAL OF THE COURT
OF APPEALS OF GEORGIA

Press Association, Georgia Television Company, d/b/a WSB-TV, The Macon Telegraph, and WGNX, Inc., respectfully submit the following brief in support of the trial court's determination that Northwest Georgia Health System, Inc. and Promina Health System, Inc. are subject to the Open Records Act, O.C.G.A. § 50-18-70, et seq., and the Open Meetings Act, O.C.G.A. § 50-14-1, et seq.

Amici curiae respectfully submit that the undisputed record establishes that, although non-profit charitable corporations, Northwest and Promina perform the highly public function of controlling and operating the public hospitals and other public assets of Cobb County and numerous other counties in the Atlanta metropolitan area. The well-settled law of this State thus compels affirmance of the trial court's determination that Northwest and Promina are subject as a matter of law to the requirements of the Open Records Act and the Open Meetings Act. See, e.g., Clayton County Hosp. Auth. v. Webb, 208 Ga. App. 91, 93-94, 430 S.E.2d 89, 92 (1993) ("private" companies that control assets of public hospital authority are subject to Open Records Act); Hackworth v. Board of Education, 214 Ga. App. 17, 19-20, 447 S.E. 2d 78 (1994) (focus under Open Records Act is not on the public or private status of the actor, but whether the actor's "function is a public one"); Jersawitz v. Fortson, 213 Ga. App. 796, 446 S.E.2d 206 (1994) (private committee that acted as

Atlanta Housing Authority's vehicle for carrying out public responsibilities was subject to Open Meetings Act).

STATEMENT OF INTEREST

The Georgia First Amendment Foundation is a Georgia non-profit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public's access to public institutions is threatened.

The American Civil Liberties Union is a non-profit corporation founded in 1920 for the purpose of maintaining and advancing civil liberties in the United States. The ACLU is composed of nearly 300,000 members nationwide. The ACLU of Georgia is a state affiliate of the ACLU, with over 2,600 members. The ACLU has long supported openness in government and the state sunshine laws which make this possible. This ACLU participates in this amicus curiae because of the impact this case may have upon the public accountability of public health care in the State of Georgia.

The Atlanta Journal and The Atlanta Constitution are daily newspapers of general circulation in the State of Georgia that regularly report on matters of national, state and local public interest and concern, including specifically the affairs of state and local government. The Journal-Constitution regularly reports on health-

care issues and in 1993 was awarded a Pulitzer Prize for its reporting on drug-resistant bacteria.

The Associated Press, the world's largest newsgathering organization, is a cooperative distributing news to 1,783 American newspapers and other newspapers abroad, in addition to 6,000 radio and TV outlets worldwide. The AP reports and transmits news from Georgia to every daily newspaper in the state and many major radio and TV outlets. In addition, news from Georgia of broader interest is transmitted nationally and internationally.

The Georgia Center for Law in the Public Interest is a private non-profit, 501(c)(3) public interest law center organized in 1992 to advance the public interest by providing legal representation and educational services to members of the public on issues of civic concerns. The Georgia Center regularly provides legal and educational services to assist the public in assuring compliance with the Georgia Sunshine Laws.

Common Cause/Georgia is a duly recognized state affiliate of Common Cause, a non-profit and non-partisan corporation incorporated in the District of Columbia to work for the improvement of the political and governmental institutions and processes on the federal, state, and local levels. Common Cause has more than 270,000 members in the United States, approximately 3,000 of whom reside in

Georgia. Common Cause/Georgia believes that this case involves the right of its members, as well as all Georgia citizens, to have open and public scrutiny of publicly funded institutions' and agencies' records in accordance with Georgia law.

The Georgia Press Association is an organization comprised of 127 weekly newspapers and 32 daily newspapers located throughout Georgia. The Association and each member newspaper are committed to preserving for the people of Georgia maximum access to and oversight of public affairs and the performance of those charged with carrying out public responsibilities.

Georgia Television Company d/b/a WSB-TV is an Atlanta television station which each day broadcasts several hours of news programming produced by WSB-TV and by ABC, of which WSB-TV is an affiliate. WSB-TV Channel 2 regularly reports on matters of local, state, and national interest, including state and local government and health care issues.

The Macon Telegraph is a daily newspaper of general circulation in middle Georgia that regularly reports on matters of local, state, and national interest, including local and state government and health care issues.

WGNX, Inc., is a television station based in Atlanta which broadcasts a daily general news program on channel 46 seen by viewers throughout north Georgia. As of December 11, 1994, WGNX became the CBS network affiliate in Atlanta.

WGNX Atlanta 46 regularly covers and reports on matters pertaining to health care coverage in north Georgia.

STATEMENT OF THE CASE

In October 1994, two public hospital systems in the Atlanta metropolitan area -- Northwest and Gwinnett Health Systems, Inc. ("Gwinnett Health") -- announced their affiliation with Piedmont Medical Center, Inc., to form a new, consolidated health care system known as Promina. Under the terms of the alliance, as set forth in part in Northwest's restated and amended articles of incorporation, Promina is the "sole member" of Northwest and has the power to appoint or control the appointment of the members of the board of directors of Northwest. See Second Amended and Restated Bylaws of Northwest Georgia Health Systems, Inc. ("Second Amended Bylaws of Northwest"), Arts. 2, 4.3(a); Answer of Northwest Georgia Health Systems, Inc. and Promina Health System, Inc. to Plaintiff's First Amended Verified Complaint for Injunctive and Declaratory Relief, ¶ 8. Northwest, in turn, is "organized . . . to perform the functions of, or to carry out the purposes of" the following public hospital authorities: Cobb County Kennestone Hospital Authority, the Hospital Authority of Cobb County, the Hospital Authority of

Douglas County, the Paulding County Hospital Authority, and the Cherokee County Hospital Authority. Second Amended Bylaws of Northwest, Art. 3.2.^{1/}

After repeated requests for documents pursuant to the Open Records Act and for assurances that Northwest and Promina would operate in accordance with the Open Meetings Act, Times-Journal, Inc., the publisher of The Marietta Daily Journal ("The Daily Journal"), brought this action for injunctive and declaratory relief. On October 10, 1994, the trial court entered a temporary restraining order requiring Northwest to continue to operate in accordance with the Open Records Act and the Open Meetings Act, without prejudice to Northwest's ability to seek modification of the order upon reasonable notice to the parties. The court declined to enter a similar order against Promina -- then known only as "ABC, Inc." -- since Promina at that time was unidentified and was not represented by counsel. Once

^{1/} Through its control of Northwest, Promina thus effectively performs the functions of the public hospital authorities of Cobb, Douglas, Paulding and Cherokee counties. And through similar arrangements with Gwinnett Health, Promina also effectively performs the functions of the Gwinnett County Hospital Authority. Indeed, Promina's Articles of Incorporation specify that Promina was organized "to perform the functions of, or to carry out the purposes of" the various corporate entities that control the hospitals and other public assets of the hospital authorities of Cobb, Douglas, Gwinnett, Paulding and Cherokee counties. Articles of Incorporation of Promina Health System, Inc., Art. 3.

Promina's identity was revealed, The Daily Journal filed an amended complaint naming Promina as a defendant.^{2/}

On November 23, 1994, Northwest and Promina filed a motion to dismiss The Daily Journal's complaint as moot, asserting that no justiciable controversy exists because Northwest and Promina have complied and will continue to comply voluntarily with the requirements of the Open Records Act and the Open Meetings Act. Despite their assertions of "voluntary" compliance, however, Northwest and Promina insisted that the Open Records Act and the Open Meetings Act "are not applicable to private, nonprofit corporations such as themselves," Brief in Opposition to the Motion of Plaintiff to Amend, etc., at 2, and ultimately withdrew their motion.

On December 2, 1994, The Daily Journal filed a motion for partial summary judgment seeking an order declaring, under Count I of its First Amended Complaint, that Northwest and Promina are subject to the Open Records Act and the Open Meetings Act as a matter of law. By order entered February 10, 1995, the trial court granted The Daily Journal's motion.

^{2/} The Daily Journal subsequently moved also to name Gwinnett Health and Gwinnett Hospital Systems, Inc. ("Gwinnett Hospital") as additional defendants.

For the reasons set forth below and in The Daily Journal's brief, the undisputed record and the well-established law of this State require affirmance of the trial court's decision.

ARGUMENT

Our democratic society is based upon the concept of an informed public through openness in government. As James Madison wrote in 1822, "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both." Letter of James Madison to W. T. Barby (August 4, 1822), 9 Writings of James Madison 103 (G. Hunt ed. 1910).^{2/}

Georgia's Open Records Act and Open Meetings Act were enacted to give practical effect to this historical and philosophical foundation of our system of self-government. Recognizing the critical importance of the Acts for the proper functioning of government, the appellate courts of this State have repeatedly held that

^{2/} Indeed, as the United States Supreme Court noted more than half a century ago, the American Revolution "really began" in 1765 as a revolt against the Stamp Act's imposition of taxes on newspapers as a means to curtail their circulation. Grosjean v. American Press Co., 297 U.S. 233, 246-47 (1936). The aim of the struggle against these "'taxes on knowledge'" was to "establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. . . . In the ultimate, an informed and enlightened public opinion was the thing at stake." Id.

the Acts must be "broadly construed" to effect their twin purposes: protecting against potential abuse of government power and maintaining the people's confidence in its officials. E.g., Kilgore v. R. W. Page Corp., 261 Ga. 410, 411, 405 S.E.2d 655 (1991) (Open Meetings Act); Red & Black Pub. Co. v. Board of Regents, 262 Ga. 848, 854, 427 S.E.2d 257 (1993) (Open Records and Open Meetings Acts). As former Chief Justice Weltner noted in his last, posthumous opinion as a member of the Georgia Supreme Court, the courts' broad enforcement of the Acts is essential to our system of government: "Because 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, 419 S.E.2d 483 (1992) (quoting Ga. Const. Art. I, Sec. II, Par. I).

The General Assembly has specified that Georgia's public hospital authorities are subject to the Acts, and Georgia's courts have repeatedly compelled hospital authorities to comply with the Acts' requirements. See, e.g., Georgia Hosp. Ass'n v. Ledbetter, 260 Ga. 477, 396 S.E.2d 488 (1990) (rejecting hospital association's claim that DHR hospital accreditation records should not be publicly disclosed); Richmond County Hosp. Auth. v. Southeastern Newspapers Corp., 252 Ga. 19, 311 S.E.2d 806 (1984) (rejecting hospital authority's claim that records identifying names, salaries and job titles of hospital employees should not be

disclosed; authority's prediction that highly qualified staff would go elsewhere and morale would plummet if salaries disclosed was speculative and could not override strong public policy in favor of open government); Atchison v. Hospital Auth. of City of St. Mary's, 245 Ga. 494, 265 S.E.2d 801 (1980) (rejecting hospital authority's claim that business telephone records should not be disclosed to a Georgia resident employed by a Florida newspaper); Griffin-Spalding County Hosp. Auth. v. Radio Station WKEU, 240 Ga. 444, 241 S.E.2d 196 (1978) (rejecting hospital authority's claim that ambulance service records should not be disclosed); Clayton County Hosp. Auth. v. Webb, 208 Ga. App. 91, 430 S.E.2d 89 (1993) (rejecting hospital authority's claim that private corporations affiliated with authority were not subject to public access laws).

Likewise, the General Assembly has specified that the delegation of public responsibilities to private entities cannot operate to shroud the public's window on their execution, and this Court and the Georgia Supreme Court have repeatedly held that the Acts apply despite claims that the actor was a private entity exempt from the Acts' requirements. See, e.g., Red & Black Pub. Co. v. Board of Regents, 262 Ga. 848, 427 S.E.2d 257 (1993) (delegating official responsibility and authority for student discipline to student organization did not release university from complying with Open Records and Open Meetings Acts); Cremins v. Atlanta Journal and

Constitution, 261 Ga. 496, 496, 405 S.E.2d 675, 676 (1991) (records reflecting private but athletically-related 'outside' income of public university coaches are public records); Dooley v. Davidson, 260 Ga. 577, 579, 397 S.E.2d 922, 924 (1990) (same); Macon Telegraph Pub. Co. v. Board of Regents, 256 Ga. 443, 350 S.E.2d 23 (1986) (records relating to the University of Georgia intercollegiate sports program are public records regardless of whether records were prepared by employees of private Athletic Association); Hackworth v. Board of Education, 214 Ga. App. 17, 19-20, 447 S.E.2d 78 (1994) (personnel records of private company employed to operate public school buses are public records); Jersawitz v. Fortson, 213 Ga. App. 796, 446 S.E.2d 206 (1994) (private committee that acted as Atlanta Housing Authority's vehicle for carrying out public responsibilities was subject to Open Meetings Act). As this Court explained in Hackworth, "our focus in cases under the Act is necessarily not on the actor but on the particular, discrete *function* performed by that actor. We must determine whether that function is a public one, rendering the records generated in the course of its performance subject to the Act." Hackworth, 214 Ga. App. at 19-20.

The well-settled law of this State thus compelled entry of the trial court's order declaring that Northwest and Promina are subject to the requirements of the Open Records Act and the Open Meetings Act. The assertions by Northwest and

Promina that they are "private corporations" exempt from the requirements of the Sunshine Laws previously was rejected by this Court in Clayton County Hosp. Auth. v. Webb, 208 Ga. App. 91, 430 S.E.2d 89 (1993). The organizational records of these corporations establish without dispute that they were formed to serve, and do serve, a quintessential "public function" -- the operation and control of the public hospitals and other facilities that comprise the assets of the public hospital authorities of Cobb County and its neighboring counties. See id.; Hackworth, 214 Ga. App. at 19-20 (Acts apply where actor's function is "a public one").

The hospitals and other facilities of the hospital authorities of Cobb County and neighboring counties that have been placed under the control of Northwest and Promina are public assets worth literally hundreds of millions of dollars. The Open Records Act and the Open Meetings Act were enacted to ensure that the citizens have the ability to monitor the operation of these public assets. For, as the courts of this State have recognized on numerous occasions, such public oversight is essential not only to protect against potential misuse of these public assets for private gain, but also to maintain the public's confidence in the officials charged with operating these public facilities. E.g., Kilgore v. R. W. Page Corp., 261 Ga. at 411. Indeed, by expressing their willingness to comply, in part, with the Acts -- even while denying that the laws are applicable to them -- Northwest and Promina have

effectively acknowledged that their ultimate success will depend upon the public's confidence in their stewardship of the public assets under their control and that such public confidence will be impossible to foster if their actions are cloaked in secrecy.

The arguments asserted by Northwest and Promina in this Court in their efforts to evade the settled law and established public policies of this State are wholly without merit. Northwest and Promina first contend that they are not subject to the Acts because they do not receive more than one-third of their funding from state sources and thus do not fall within the term "agency" as defined in O.C.G.A. § 50-14-1(a)(1)(E). This provision, however, was not the basis for the trial court's determination that Northwest and Promina are subject to the Acts. Rather, in accordance with the settled law of this State, Northwest and Promina are subject to the Acts because they perform the function of various hospital authorities. See, e.g., Hackworth, 214 Ga. App. at 19-20 (holding private company performing public function to be subject to the Open Records Act); Jersawitz v. Fortson, 213 Ga. App. 796 (holding private committee to be subject to Open Meetings Act).

Contrary to the arguments of Northwest and Promina, the statutory grounds for holding entities accountable under the Open Meetings and Open Records Acts are cumulative: An entity may be subject to the requirements of openness under one definitional provision although another provision might not be applicable. Thus,

an ostensibly private entity is subject to the Acts because, as here, it performs the "public function" of operating public hospitals, while another would be subject to the Acts because it received more than one-third of its operating budget from public funds. The approach urged by Northwest and Promina is contrary both to the settled law of this State and to logic.

Equally without basis is Northwest and Promina's attempt to graft onto the Acts a purported legislative intent -- based solely on the non-passage of House Bill 336 introduced during the General Assembly's 1993 session -- to exclude organizations such as Northwest and Promina from the reach of the Acts. Contrary to the assertions of Northwest and Promina, the bill was not "rejected" by the General Assembly, but instead died in committee without being voted upon. Moreover, the bill did not even address the Open Meetings or Open Records Acts, but, rather, was proposed as an amendment to the Georgia Hospital Authorities Law.

The bill proposed in 1993 thus provides no insight into the General Assembly's intent regarding the Acts, and certainly does not suggest that the General Assembly intended that the Acts would not apply under the undisputed facts presented here. Neither this Court nor the Georgia Supreme has ever attempted to discern legislative intent regarding an existing statute based on the non-passage of a subsequently proposed bill. In the cases relied upon by Northwest and Promina, the

General Assembly enacted legislation but specifically refused to pass certain portions of the proposed bills.

Here, in contrast, the General Assembly took no action at all. When the bill was proposed, as now, the law was settled that public hospital authorities and ostensibly private entities that perform the functions of public agencies are subject to the requirements of the Open Meetings and Open Records Acts. See, e.g., Georgia Hosp. Ass'n v. Ledbetter, 260 Ga. 477 (applying Acts to hospital association); Macon Telegraph Pub. Co. v. Board of Regents, 256 Ga. 443 (applying Acts to "private" athletic association). The bill proposed in 1993 thus was unnecessary to accomplish the result it addressed. If, however, the General Assembly did intend to depart from settled law to exclude entities such as Northwest and Promina from the requirements of the Acts -- as Northwest and Promina now contend occurred -- then the legislature "could have amended the . . . Act[s]" to so specify. Irvin v. Macon Telgraph Pub. Co., 253 Ga. 43, 44. That the General Assembly did not amend the Open Meetings and Open Records Acts to exclude entities such as Northwest and Promina from their coverage provides further indication -- although none was necessary -- that the trial court properly ruled that the Northwest and Promina are subject to the Acts' requirements.

CONCLUSION

The evolution of the health care alliance that now includes under one umbrella the public hospitals of Cobb, Douglas, Paulding, Cherokee and Gwinnett counties, as well as Piedmont Hospital in Atlanta, is of enormous interest and importance to the citizens of this State and particularly of the communities Promina will serve. The Open Records and Open Meetings Acts entitle the public access to the records and meetings of Promina and its affiliated companies, including Northwest, both to protect against misuse of their public assets and to promote the public's confidence in those charged with operating their public assets. Accordingly, this Court affirm the order of the trial court declaring that Northwest and Promina are subject to the Open Meetings Act and the Open Records Act as a matter of law.

DATED this the 24th day of April, 1995.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the BRIEF OF AMICI CURIAE upon all counsel of record by depositing a copy of same in the United States Mail, first class postage prepaid, and addressed as follows:

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This the 24th day of April, 1995.


