IN THE COURT OF APPEALS
STATE OF GEORGIA

TIMES-JOURNAL, INC.,	*	
	*	
Appellee,	*	
	*	
v.	*	CASE NO. A95A1324
	*	
NORTHWEST GEORGIA HEALTH SYSTEM, INC. and PROMINA HEALTH SYSTEM, INC.,	*	
	*	
Appellants.	*	

AMICUS BRIEF OF THE GEORGIA ATTORNEY GENERAL IN SUPPORT OF APPELLEE

MICHAEL J. BOWERS 071650
Attorney General

JOHN E. HENNELLY 347075
Assistant Attorney General

STEPHANIE B. MANIS 468888
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

STEPHANIE B. MANIS
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3383

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AMICUS BRIEF OF THE GEORGIA ATTORNEY GENERAL

NOW COMES Michael J. Bowers, the Attorney General of Georgia, who submits this amicus brief in support of Appellee. As chief legal officer of this state, the Attorney General believes it is within his responsibilities to bring before the Court his position on the issues of public importance raised by this litigation.

At stake in this appeal is whether non-profit corporations can utilize public assets to operate public hospitals and avoid public accountability. The court below correctly held that Georgia's open government statutes, the Open Records and Open Meetings Laws, apply to Appellants, non-profit corporations which operate several public hospitals.

It is the position of the Attorney General that the private delivery of public services cannot be considered a

purely private affair. The clear policy of this state "is that the public's business must be open, not only to protect against potential abuse, but also to maintain the public's confidence . . . ." Red & Black Publishing Co. v. Board of Regents, 262 Ga. 848, 854 (1993). In the increasing trend toward privatization, we must resist the temptation to keep the business of government secret in the name of "efficiency". The need for efficiency and competitiveness does not provide a legal basis to avoid public scrutiny. That would be too high a price to pay and it is contrary to Georgia law.

I. RELEVANT BACKGROUND

A county governing authority is authorized to create a hospital authority to establish and operate hospital facilities within and beyond county boundaries. O.C.G.A §§ 31-7-72 and 31-7-75. A county may also establish a hospital authority jointly with municipalities and with other counties. Local hospital authorities, created under the authority of the Hospital Authority Law, O.C.G.A § 31-7-70, et seq., are considered local instrumentalities. The State Constitution empowers counties to operate in the sphere of health care and to utilize these hospital authorities as their own instrumentalities. Fulton-DeKalb Hospital Authority v. Gaither, 241 Ga. 572, 573 (1978).

As evidence by this case, a number of hospital authorities have taken action to turn over their operations and assets to private corporations. Northwest Georgia Health Systems, Inc. ("Northwest"), as stated in its By-Laws, is organized and operated "for the benefit of, to perform the functions of, or to carry out the purposes of" the Cobb County Kennestone Hospital Authority, the Hospital Authority of Cobb County, the Hospital Authority of Douglas County, the Cobb Hospital, Inc., Douglas Hospital, Inc., Kennestone Hospital, Inc. and Cobb Ambulatory Services, Inc. The sole member of Northwest is Promina Health Systems, Inc. ("Promina"). Northwest has non-profit subsidiaries which enter into lease agreements with hospital authorities. The undisputed facts indicate that seven public hospitals in Georgia are controlled by Promina and Northwest. As Appellee has observed, Northwest alone controls public assets in excess of $275 million.

The trial court correctly held that Northwest and Promina are subject to Georgia's open government laws.

II. ARGUMENT AND CITATION OF AUTHORITY

It is a basic premise that the public's business must be performed in the open. Davis v. City of Macon, 262 Ga. 407, 408 n. 3 (1992) (reviewing cases supporting the concept that public responsibility demands public

scrutiny). Georgia courts have consistently recognized that the intent of the Open Records and Open Meetings Laws is not only to provide wide access to government information but also to foster public confidence through a requirement of openness to the public. Athens Observer v. Anderson, 245 Ga. 63, 66 (1980).

The Attorney General recognizes that these non-profit corporations are not public entities for all purposes. However, given the clear legislative intent of the Open Records and Open Meetings Laws to insure that the public's business is conducted publicly, when a public entity discharges specific legal obligations by delegating certain operations to private corporations, the legal obligation to the public remains. It would disserve the citizens of this State to permit government to transfer responsibilities to non-profit corporations through transactions that purport to insulate the corporations' activities from public scrutiny. See Hackworth v. Board of Education for the City of Atlanta, 214 Ga. App. 17, 20 (1994).

It is the position of the Attorney General that when a hospital authority's obligation to provide for the health of the people is privatized by the lease of a public hospital to a non-profit corporation, this business

reorganization and layering of corporate form cannot shield the operations of that hospital from public scrutiny. Cf. J.& A. Pipeline Co. v. DeKalb County, 208 Ga. App. 123, 125 (1993) (a legal position should be rejected which "elevates form over substance, ignoring and undermining the purpose of" the statute at issue in the litigation). The health care alliance through Promina Health Systems and Northwest Georgia Health Systems includes public hospital authorities and public institutions in Cobb, Douglas, Paulding, Gwinnett and Cherokee counties as well as Piedmont Hospital of Atlanta. The alliance now contends that any compliance with Georgia's open government laws is voluntary. The Attorney General does not agree.

The Appellants argue that the Open Records and Open Meetings Laws are applicable to non-profit organizations only if those entities receive one-third of their funds from direct tax allocations so as to fall under subsection (E) of O.C.G.A. § 50-14-1. Appellants place great reliance that specific proposed legislation, H.B. 336, was not adopted by the General Assembly. The argument has no merit. H.B. 336 was not an amendment to the Open Records Act or the Open Meetings Act but was a proposal to amend the Georgia Hospital Authority Laws. The proposed bill

was never voted upon by the General Assembly and died in committee. See STATENET, Georgia Bill Tracking, 142nd General Assembly--First Regular Session (1993), House Bill 336.

Promina and Northwest must accept certain consequences when they voluntarily undertake a business relationship with hospital authorities. Cf. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (["f]avors from a government often carry with them an enhanced measure of regulation"). It is the position of the Attorney General that in Georgia the consequence for utilizing public assets to perform a public function is the application of the Georgia Open Records and Open Meetings Laws.

A. The Open Meetings And Open Records Laws Apply To Non-Profit Corporations Which Carry Out A Public Function.

When hospital authorities enter into a lease agreement pursuant to O.C.G.A. § 31-7-75, it is clear that the lease "must continue [the public hospital's] operations in the same manner as they now exist: non-profit and for the benefit of the community." Richmond County Hospital Authority v. Richmond County, 255 Ga. 183, 184 (1985). It is axiomatic that the manner in which hospital authorities operate is subject to public scrutiny. Clayton County

Hospital Authority v. Webb, 208 Ga. App. 91 (1993). Therefore, a non-profit corporation must continue operations in the same manner -- non-profit, for the benefit of the community, and subject to public scrutiny.

It is not whether the entity is private or public that determines if the open government statutes apply but whether the function performed is public or private. Hackworth v. Board of Education, 214 Ga. App. 17 (1994). Those who effectively control the functions or the assets of public agencies which are subject to the open government statutes, are themselves subject to these same laws. When non-profit corporations serve as vehicles for controlling public assets or performing of certain functions, then those private entities are subject to the open government requirements.

This Court recently concluded that when a private corporation contacted with the Atlanta Board of Education to transport public school students, the corporation was subject to the Open Records Law because the activities performed were public ones. Hackworth v. Board of Education, supra. In Macon Telegraph Publishing Co. v. Board of Regents, 256 Ga. 443 (1986), the Supreme Court concluded that the records of the private University of Georgia Athletic Association relating to assets,

liabilities, income and expenses of its intercollegiate sports program were subject to the Open Records Act because the Association's operation of a sports program was a legitimate function of the University. 256 Ga. at 444. This was notwithstanding O.C.G.A. §§ 20-3-48 and 49 which provides that such athletic associations are private corporations, not agencies of the state, and not subject to the same restrictions which might apply if they were state agencies. 256 Ga. at 444 n.1.

Delegation of public responsibilities to a private entity cannot affect the application of open government statutes. See e.g., Red & Black Publishing Co. v. Board of Regents, 262 Ga. 848 (1993) (University's delegation of student discipline to student organization does not alter open government requirements); Cremins v. Atlanta Journal and Constitution, 261 Ga. 496 (1991) (University athletic coaches' private consultant contracts arise from their public activities and are public records); Jersawitz v. Fortson, 213 Ga. App. 796 (1994) (private committee that acted as housing authority's vehicle for carrying out public responsibilities is subject to Open Meetings Act).

As stated in Hackworth, "our focus in cases under the [Open Records] Act is necessarily not on the actor but on the particular, discrete function performed by that

actor. We must determine whether the function is a public one, rendering the records generated in the course of its performance subject to the Act." 214 Ga. App. at 19 (emphasis in original).

B. Defendants are fulfilling a legitimate public function, making them subject to Georgia's Open Government Statutes.

Defendants contend they are not subject to required public scrutiny because they are not a hospital authority and not a lessee of a hospital authority. Any non-profit corporation controlling the assets of a hospital authority should be considered an agency subject to the open government statutes. Richmond County Hospital Authority v. Southeastern Newspapers, 252 Ga. 19 (1984); Clayton County Hospital Authority v. Webb, 208 Ga. App. 91 (1993).

Appellants are caring out the powers, duties, responsibilities and functions which hospital authorities would otherwise carry out. Promina and Northwest are fulfilling a legitimate public function in providing health care to the general public and thus subject to open government statutes. See Jersawitz v. Fortson, 213 Ga. App. 796, 799 (1994).

In controlling assets and operating public hospitals, these non-profit corporations have a special and very favorable financial status which distinguishes them for

"profit" hospital companies. Careful structuring of the corporate organization and the formation of a corporate holding company cannot create a wall to keep our citizens from knowing how public assets are being used and how public functions are being performed.

III. CONCLUSION

Even if we were to accept the Appellants' speculation that some inefficiency would occur if the Open Records and Open Meetings Laws were applicable, that is a price that the citizens of this State are willing to pay. The private delivery of public services should not be a private affair. These non-profit corporations are subject to the Open Meetings and Open Records Laws.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

JOHN E. HENNELLY 347075
Assistant Attorney General

STEPHANIE B. MANIS 468888
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

STEPHANIE B. MANIS
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3383

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing AMICUS BRIEF OF THE GEORGIA ATTORNEY GENERAL, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Richard L. Shackelford, Esq.
King & Spalding
191 Peachtree Street, N.E.
Atlanta, Georgia 30303

D. Glenn Brock, Esq.
Brock & Clay
49 Atlanta Street
Marietta, Georgia 30060

F. T. Davis, Jr., Esq.
Long, Aldridge & Norman
One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308-2101

This 1st day of May, 1995.

Stephanie B. Manis

STEPHANIE B. MANIS
Senior Assistant Attorney General