No. S16G1463

IN THE SUPREME COURT OF GEORGIA

E. KENDRICK SMITH,

Appellant,

v.

NORTHSIDE HOSPITAL, INC., ET AL.,

Appellees.

On Writ of Certiorari to the Court of Appeals of Georgia

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL CHRISTOPHER M. CARR

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INTEREST OF AMICUS CURIAE

The Office of the Attorney General has long served as a champion of open government. The Office has promoted the Georgia Open Records Act and the Georgia Open Meetings Act, administered the State's Open Government Mediation Program, and educated the public about the critical importance of maintaining open and transparent state and local governments. Moreover, the Attorney General, like most Georgians, believes that "open government is essential to a free, open, and democratic society." O.C.G.A. § 50-18-70(a). Accordingly, the Attorney General—as a champion of open government, and as the State's chief legal officer—urges the Court to honor the plain text of the Georgia Open Records Act, which embodies the State's "strong public policy . . . in favor of open government." *Id.*

INTRODUCTION

The question presented by this appeal is whether certain records held by a private entity—*i.e.*, Northside Hospital, Inc.—are "public records" subject to disclosure under the Georgia Open Records Act. As the parties have rightly noted, that question turns on whether Northside acted "for or on behalf of" an "agency" when it engaged in the conduct that generated the records, because the Act defines the term "public record" to include any record prepared, maintained, or received

"by a private person or entity in the performance of a service or function *for or on behalf of* an agency." O.C.G.A. § 50-18-70(b)(2) (emphasis added).

Turning to that question of statutory interpretation, it would be a mistake to assume that the Act has existed in an unaltered form since 1959, when it was first signed into law. *See* 1959 Ga. Laws 88-89. The General Assembly revised the Act in 1988, 1992, and 1999. *See* 1988 Ga. Laws 244; 1992 Ga. Laws 1064; 1999 Ga. Laws 553. And most important here, in 2012, the General Assembly "comprehensively revise[d]" the Act. 2012 Ga. Laws 218. The question presented is thus a matter of first impression, as no court has given sufficient attention to the General Assembly's 2012 comprehensive rewrite of the Act.

As demonstrated below, when read in the context of the entire Act as revised by the General Assembly in 2012, the phrase "for or on behalf of" should be interpreted to create an implied contractual obligation that requires a private person or entity to produce any non-exempt record to a governmental agency upon the agency's request. That broad obligation exists whenever a private person or entity contracts with an agency, and it exists regardless of whether the private person or entity otherwise acts subject to the agency's direction and control.

Because the Court of Appeals did not apply that rule, the Attorney General respectfully urges the Court to reverse and remand with instructions that it do so.

ARGUMENT

I. Under the Georgia Open Records Act, a private person or entity has an implied contractual obligation to produce any non-exempt record that it prepared, maintained, or received in the performance of any service or function "for or on behalf of" an agency.

Words and phrases are known by the company they keep. That maxim is the key that unlocks the meaning of the phrase "for or on behalf of," which is, as the parties to this appeal have noted, the phrase in the Georgia Open Records Act that, more so than any other, determines how the Act applies to private persons and entities. Indeed, when read in context, the phrase "for or on behalf of" should be interpreted to create an implied contractual obligation that requires a private person or entity to produce records to a governmental agency upon the agency's request.

A. Standing alone, the phrase "for or on behalf of" is ambiguous.

Standing alone, the phrase "for or on behalf of" is ambiguous. That much is plain from (1) the U.S. Supreme Court's prior construction of the phrase; (2) definitions of the phrase and of related terms; and (3) the arguments made by the parties to this appeal.

1. The U.S. Supreme Court has concluded that the phrase "for or on behalf of" is ambiguous. In *Dixson v. United States*, the Court interpreted the phrase "for or on behalf" as used in the federal bribery statute, 18 U.S.C. § 201. 465 U.S. 482, 491-93 (1984). The petitioners in that case—two employees of a private, nonprofit corporation—had been convicted for seeking bribes while administering federal

grant funds. *Id.* at 484-85. They challenged their convictions on the ground that they were not properly charged under the bribery statute because they were not "public officials" within the meaning of 18 U.S.C. § 201(a), which defines the term to include any person "acting for or on behalf of the United States." *Id.* at 484-85, 490. As the Court noted, the petitioners' argument rested on the premise that a person does not work "for or on behalf of" the United States "without some formal bond with the United States, such as an agency relationship, an employment contract, or a direct contractual obligation." *Id.* at 490. In response, the Government argued that the phrase "for or on behalf of" as used in the definition of "public official" has a "broader sweep, covering not only parties in privity with the United States, but also any private individuals responsible for administering federally-funded and federally-supervised programs." *Id.* The Court ultimately sided with the Government and adopted a broad interpretation of the phrase "for or on behalf of," but only after noting that the phrase is ambiguous: "As is often the case in matters of statutory interpretation, the language of section 201(a) does not decide the dispute. The words can be interpreted to support either petitioners' or the Government's reading." *Id.* at 491, 496-97.

2. Definitions of the phrase "for or on behalf of" and of related terms also demonstrate that the phrase is ambiguous. For instance, the phrase could be interpreted to reach only those private persons and entities that are agents of a govern-

mental agency and thus directly subject to that governmental agency's direction and control. That follows because the phrase "for or on behalf of" tracks the definition of an agency relationship: "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another *to act for him* or subsequently ratifies the acts of another *in his behalf*." O.C.G.A. § 10-6-1 (emphasis added); *see also* Restatement (Second) of Agency § 1, cmt. a (Am. Law Inst. 1958) ("The principal must in some manner indicate that the agent is *to act for him*, and the agent must act or agree to act *on the principal's behalf* and subject to his control." (emphasis added)); *Agent*, Black's Law Dictionary (10th ed. 2014) ("Someone who is authorized *to act for or in place of another*; a representative." (emphasis added)).

On the other hand, because the terms "for" and "behalf" can carry broader meanings, the phrase "for or on behalf of" could also be interpreted to reach any private person or entity that performs any service or function that is directed at, received by, performed at the request of, or performed in the place of an agency. *See For*, Merriam-Webster Online Dictionary, merriam-webster.com ("[U]sed as a function word to indicate the object or recipient of a perception, desire, or activity" or "in place of."); *Behalf*, Black's Law Dictionary (10th ed. 2014) ("[O]n behalf of means 'in the name of, on the part of, as the agent or representative of.'").

3. The arguments made by the parties to this appeal also confirm that the phrase "for or on behalf of" is ambiguous. For instance, Northside's brief relies on a long line of decisions from this Court and the Court of Appeals—most of which were decided years before the current statutory language was enacted in 2012—to craft a narrow interpretation of the phrase "for or on behalf of." *See* Northside's Feb. 17, 2017, Br. 14-18, 23, 25-27. Summarizing its take on those decisions, Northside asserts that Georgia courts look to a non-exhaustive list of factors when determining whether a private person or entity has performed a service or function "for or on behalf of" an agency. *Id.* at 15-18. Those factors—which evoke agency principles—include:

- whether the governmental agency expressly requested that the private person or entity perform the service or function that generated the records (*id.* at 15);
- whether the governmental agency's officials or funds were significantly involved in the service or function that generated the records (*id.* at 16);
- whether the governmental agency required the private person or entity to maintain the records in issue (*id.*); and
- whether the governmental agency was involved in, or exercised direction or control over, the service or function and documents in issue (*id.* at 16-17).

On the other hand, Smith relies on dictionary definitions and a long line of decisions from this Court and the Court of Appeals—most of which were decided years before the current statutory language was enacted in 2012—to craft a broader

interpretation of the phrase "for or on behalf of." *See* Smith's Jan. 12, 2017, Br. 9-16. Summarizing his take on those authorities, he asserts that a private person or entity performs a service or function for or on behalf of an agency whenever its conduct furthers responsibilities, purposes, or goals entrusted to or assigned to it by an agency. *See id.* Indeed, according to Smith, that holds even when a private person or entity's conduct is "taken in furtherance of even a broad responsibility, purpose or goal assigned by the agency." *Id.* at 14.

In sum, the U.S. Supreme Court's prior construction of the phrase "for or on behalf of," definitions of the phrase and of related terms, and the arguments made by the parties to this appeal confirm that the phrase is ambiguous and can thus carry a number of possible meanings, some quite narrow and some quite broad.

B. Read in context, the phrase "for or on behalf of" should be interpreted to create an implied contractual obligation to produce records to an agency upon the agency's request.

Where, as here, a phrase used in a statutory provision can carry several possible meanings, courts employ the whole-text canon to determine its true meaning. Indeed, if the meaning of a statutory provision is "doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other." *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (citation omitted); *see also Reliance Equities, LLC v. Lanier 5, LLC*, 299 Ga. 891, 894

(2016) ("[W]e thus look to the text of the provision in question, and its context within the larger legal framework, to discern the intent of the legislature in enacting it." (citation omitted)). Applying the whole-text cannon here, the phrase "for or on behalf of" creates an implied contractual obligation that requires a private person or entity to produce records to a governmental agency upon the agency's request.

That follows because the Act's definition of "public record" would otherwise be in tension with its implementing and enforcement provisions. The Act defines the term "public record" to include not only those records prepared, maintained, or received by an agency, but also all those records prepared, maintained, or received by a "private person or entity in the performance of a service or function for or on behalf of an agency." O.C.G.A. § 50-18-70(b)(2). It thus plainly contemplates that private persons or entities will sometimes possess public records. In addition, the Act provides that "[a]ll public records shall be open for personal inspection and copying," O.C.G.A. § 50-18-71(a), and thus plainly contemplates that those public records in the possession of private persons or entities will be available for personal inspection and copying.

And yet the Act's implementing and enforcement provisions apply only to "agencies," and not to all private persons and entities. Indeed, the Act defines the term "agency" to include a broad array of governmental entities as well as any pri-

vate, nonprofit entity that receives a "direct allocation of tax funds . . . which constitutes more than 33 1/3 percent" of its total revenues, O.C.G.A. §§ 50-18-70(b)(1); 50-14-1(a)(1), and it then utilizes that defined and thus limited term throughout its implementing provisions:

- O.C.G.A. § 50-18-71(a) subjects agencies, but not all private persons or entities, to document-retention obligations: "Records shall be maintained by agencies to the extent and in the manner required by Article 5 of this chapter."

- O.C.G.A. § 50-18-71(b)(1)(A) instructs agencies, but not all private persons or entities, to produce records: "Agencies shall produce for inspection all records responsive to a request within a reasonable amount of time not to exceed three business days of receipt of a request . . . ."

- O.C.G.A. § 50-18-71(b)(1)(B) authorizes agencies, but not all private persons or entities, to require the public to serve records requests on specified officials: "An agency may, but shall not be obligated to, require that that all written requests be made upon the responder's choice of one of the following . . . ."

- O.C.G.A. § 50-18-71(b)(2) instructs agencies, but not all private persons or entities, how to designate records officers: "Any agency that designates one or more open records officers upon whom requests for inspection or copying of records may be delivered shall . . . ."

- And O.C.G.A. § 50-18-71(c)(1) authorizes agencies, but not all private persons or entities, to charge a reasonable fee for responding to records requests: "An agency may impose a reasonable charge for the search, retrieval, redaction, and production or copying costs for the production of records . . . ."

In addition, the Act's enforcement provisions are available only when a written records requests is made consistent with the Act's agency-focused implementation

provisions: "The enforcement provisions of Code Sections 50-18-73 and 50-18-74 shall be available only to enforce compliance and punish noncompliance when a written request is made consistent with this subsection [*i.e.*, O.C.G.A. § 50-18-71(b)] and shall not be available when such request is made orally." O.C.G.A. § 50-18-71(b)(3).

That the Act plainly contemplates that public records in the possession of private persons or entities will be available for personal inspection and copying, but permits implementation and enforcement only against agencies, creates an obvious tension. But that tension is best resolved by recognizing that, when a private person or entity performs a service or function for or on behalf of an agency, it acts subject to existing law, and in particular here, subject to those provisions in the Act that plainly contemplate that public records in the possession of private persons or entities will be available for personal inspection and copying. *See John A. Roebling's Sons Co. v. S. Power Co.*, 145 Ga. 761, 761 (1916) ("[W]hat the law writes into a contract is as much a part of the written contract as if expressed therein."); *Wilensky v. Blalock*, 262 Ga. 95, 98 (1992) (noting that the laws "in existence at the time a contract is executed are part of that contract"); 7 Ga. Jur. Contracts § 1:78 ("The laws that exist at the time and place of the making of a contract enter into and form part of the contract, and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter."); *W. Sky*

Fin., LLC v. Olens, 300 Ga. 340, 346-47 (2016) (holding that a party cannot contract around a statutory restriction); 1989 Op. Att'y Gen. 89-32, at p. 73 ("With these principals in mind, it is clear that a contract cannot overrule or modify the Open Records Act.").

Thus, when a private person or entity performs a service or function for or on behalf of agency, it has an implied contractual obligation created by the Act to produce records to that agency upon the agency's request. And while that obligation runs directly to the agency as the contracting party, it benefits those members of the public who serve records requests on agencies, as agencies are expected to produce all responsive, non-exempt records that are directly or indirectly in their possession.

C. The parties and the amici have argued in support of a narrower reading of the Act, but their arguments are flawed.

The parties and the amici have made arguments that are inconsistent with the interpretation provided above, and in fact have urged the Court to adopt a narrower interpretation of the Act. But their arguments are flawed.

First, to the extent the parties and the amici argue that the Act applies only to those private persons or entities that are in an agency relationship with a governmental agency, that argument ignores the text of the Act. The Act supplies a rule of construction, providing that its provisions must "be broadly construed to allow the inspection of governmental records." O.C.G.A. § 50-18-70(a). Interpret-

ing the phrase "for or on behalf of" to reach only those private persons or entities that are in an agency relationship with a governmental agency, or otherwise subject to a governmental agency's direction and control, runs directly contrary to that rule of construction. For that reason alone, the Act should not be interpreted to reach only those private persons or entities that are in an agency relationship with a governmental agency.

Second, to the extent the parties and amici rely on a line of decisions that apply the Act to only those private persons or entities that act as "vehicles" or "management tools" of governmental agencies, that reliance is misplaced. Those decisions apply a 1959 version of the open records statute that was interpreted to define the term "public record" to include all records "prepared and maintained in the course of the operation of a public office or agency,"[1] or later versions of the statute that codified that in-the-course-of-operation definition.[2] But in 2012 the

[1] *See, e.g.*, 1959 Ga. Laws 88-89; *Houston v. Rutledge*, 237 Ga. 764, 765 (1976) (defining the term "public record" to mean those records "prepared and maintained in the course of the operation of a public office"); *Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 64 (1980) (applying *Houston's* in-the-course-of-operation definition); *Macon Tel. Publ'g Co. v. Bd. of Regents*, 256 Ga. 443, 444 (1986) (applying *Houston's* in-the-course-of-operation definition and interpreting it to reach "management tools").

[2] *See, e.g.*, 1988 Ga. Laws 244 (codifying *Houston* by defining "public record" to mean those records "prepared and maintained or received in the course of the operation of a public office or agency"); 1992 Ga. Laws 1064 (retaining the in-the-course-of-operation definition); *Red & Black Publ'g Co. v. Bd. of Regents*, 262 Ga. 848, 848-50 (1993) (applying the in-the-course-of-operation definition); *Hackworth v. Bd. of Educ.*, 214 Ga. App. 17, 19-20 (1994) (applying in part (a) the

General Assembly struck the in-the-course-of-operation definition of the term "public record" from the Act. *See* 2012 Ga. Laws 2168, 226 (striking in-the-course-of-operation definition). Thus, decisions applying the in-the-course-of-operation definition are of limited application here, where the sole question presented turns on the definition of "public record" crafted by the General Assembly in 2012. *Compare* 1999 Ga. Laws 553 (retaining in-the-course-of-operation definition; adding that records "received or maintained by a private person . . . in the performance of a service or function for or on behalf of an agency . . . shall be subject to disclosure *to the same extent* that such records would be subject to disclosure if received or maintained by such agency" (emphasis added)), *with* 2012 Ga. Laws 226 (omitting in-the-course-of-operation definition; omitting "shall be subject to disclosure *to the same extent* that such records would be subject to disclosure if received or maintained by such agency" (emphasis added)).

Third, to the extent the parties and the amici argue that the Act applies only when private persons or entities perform "governmental" (as opposed to "ministerial") services or functions for or on behalf of agencies, that argument fails on two

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in-the-course-of-operation definition and interpreting it to reach "management tools"); *Nw. Ga. Health Sys., Inc. v. Times-Journal, Inc.*, 218 Ga. App. 336, 338-39 (1995) (applying the in-the-course-of-operation definition and interpreting it to reach the "vehicles" through which agencies operate); *United HealthCare of Ga., Inc. v. Ga. Dep't of Cmty. Health*, 293 Ga. App. 84 (2008) (applying the in-the-course-of-operation definition and interpreting it to reach the "vehicles" and "management tools" through which agencies operate); 1999 Ga. Laws 553 (retaining the in-the-course-of-operation definition).

fronts. As an initial matter, the argument runs against the plain-and-ordinary-meaning rule, which provides that "statutory text is to be given its 'plain and ordinary meaning,' viewed in the 'context in which it appears.'" *Mooney v. Webster*, 300 Ga. 283, 289 (2016) (citation omitted). The Act speaks broadly to encompass any "service or function" performed for or on behalf of an agency, and the plain and ordinary meaning of "service or function" does not allow for any distinction between "governmental" and "ministerial" services or functions.

In addition, the Court "has acknowledged the difficulty in" distinguishing governmental from ministerial functions, *City of Atlanta v. Mitcham*, 296 Ga. 576, 580 (2015), and should be wary about incorporating so ambiguous a standard into any statute, like the Act, that incorporates criminal sanctions, *see* O.C.G.A. § 50-18-74. *See also* Scalia & Garner, *supra*, at 296 (noting that the rule of lenity rests on the "interpretive reality that a just legislature will not decree punishment without making clear what conduct incurs the punishment" or, alternatively, rests on the "constitutional requirements of fair notice and separation of powers").

Fourth, to the extent the parties and the amici argue that the Act applies any time an agency entrusts or assigns a "responsibility, purpose, or goal" to a private person or entity, or read a limitation into the Act by interpreting the phrase "service or function" to reach only "responsibilities, purposes, or goals," that reading is inconsistent with the plain text of the Act. *See Mooney*, 300 Ga. at 289 (noting that

statutory text "is to be given its 'plain and ordinary meaning'"). Indeed, as noted above, the Act speaks broadly to encompass any "service or function" performed by a private person or entity for or on behalf of an agency. Moreover, any interpretation that limits "service of function" to reach only "responsibilities, purposes, or goals" would create unwarranted ambiguity, as it is not clear what constitutes a "responsibility, purpose, or goal."

CONCLUSION

For all the reasons provided above, the Attorney General respectfully urges the Court to hold that the Georgia Open Records Act creates an implied contractual obligation that requires any private person or entity to produce any non-exempt record that it prepared, maintained, or received in the performance of a service or function for or on behalf of an agency. In addition, because the Court of Appeals did not apply that rule, the Attorney General respectfully urges the Court to reverse and remand with instructions that it do so.

Dated: May 22, 2017

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