IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S24C0198

RYAN MILLIRON,

Appellant,

v.

MANOS ANTONAKAKIS,

Appellee.

On Appeal from the Georgia Court of Appeals
No. A22A0227

BRIEF OF AMICUS CURIAE GEORGIA FIRST AMENDMENT FOUNDATION

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Amicus curiae Georgia First Amendment Foundation ("GFAF") respectfully submits the following brief in support of Appellant Ryan Milliron.

INTEREST OF AMICUS CURIAE

GFAF is a Georgia nonprofit 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 government institutions is threatened. GFAF has an interest in this case because the Court of Appeals' opinion will have serious and negative implications for the public's ability to access open records in the state of Georgia.

INTRODUCTION

When enacting the Georgia Open Records Act ("the Act"), the General Assembly found that "the strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society." O.C.G.A. § 50-18-70(a). The Court of Appeals' opinion in this case is contrary to the Act and these values, and this Court should correct course. Specifically, the opinion below carved a new exception to the Act that would shield from disclosure any public records in the custody of a contractor who also happens to be a public employee. The Court should reject this judicially created loophole and remand the action to the trial court for further proceedings.

ARGUMENT AND CITATION TO AUTHORITIES

This Court's March 19, 2024 Order granting Appellant's Petition for Writ of Certiorari identifies two questions for resolution:

(1) When a public employee also performs services for their agency as a private contractor, does the Open Records Act, OCGA § 50-18-70(a), apply to records held by the employee relating to that service as a contractor?

(2) If so, can a request for such records be sent directly to the employee or must it instead be sent to the agency's designated open records officer? See OCGA § 50-18-70(b)(1)(B) and (2).

The proper answer to each question is an emphatic yes.

I. The Act applies to the records of a private contractor who performs services for an agency even if the contractor is also an employee of the agency.

The Act has always deemed "public" any records prepared and maintained or received in the performance of a service or function for or on behalf of an agency, regardless of whether the person performing the service or function—or preparing, maintaining, or receiving the records—was acting as an agency employee, an independent contractor, or (as this Court has sometimes encountered) both. *See, e.g., Cremins v. Atlanta Journal*, 261 Ga. 496 (1991); *Dooley v. Davidson*, 260 Ga. 577 (1990). The remarkable contrary rule advanced by the decisions below finds no support in the language of the statute and is antithetical to its stated purpose. Indeed, by exalting irrelevant form over substance, it threatens

to immunize and encourage conduct that no logical reading of the Act nor its caselaw would condone.

May agencies avoid disclosure of public records by retaining their employees as contractors and thereby shield from disclosure of the public records related to that employee's work? Obviously not. That is because the appropriate focus under the Act is now, and has always been, "necessarily not on the actor but on the particular, discrete *function* performed by that actor." *Hackworth v. Bd. of Educ. for City of Atlanta*, 214 Ga. App. 17, 19 (1994) (emphasis in original). As long as the function "is a public one," then "the records generated in the course of its performance" are "subject to the Act." *Id.*; *see also Davis v. Augusta Press*, 367 Ga. App. 893, 897 (2023) (explaining that the relevant inquiry in open records litigation is whether the records, even if in the possession of a private party, "were prepared or maintained in the course of the operation of a public office").

II. The Act does not require a party to request public records from an agency's designated open records officer when those records are in the custody of a contractor who is also an employee.

The plain language of the Act makes clear that a request for public records can be sent directly to a contractor in possession of those records, even if the contractor is also an employee of an agency that has a designated open records officer.

The Act states that "[a]ll public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure." O.C.G.A. § 50-18-71(a). The Act further provides that "[a] request made pursuant to this article may be made to ***the custodian of a public record*** orally or in writing." O.C.G.A. § 50-18-71(b)(1)(B) (emphasis added). As described above, a custodian of a public record may be either an agency ***or*** a private person who performs services for an agency. In the very next sentence, the Act provides that "***[a]n agency*** may, but shall not be obligated to, require that all written requests be made upon" a designated open records officer. *Id.* (emphasis added). Thus, if the custodian of a public record is an agency, then a requestor may need to make the request to a designated open records officer, if the agency so requires. But if the custodian of a public record is a private person, then the provision concerning designated open records officers is not applicable. This is true even if the private person is also an employee of the agency, so long as the requested records relate to the person's services as a contractor. This makes sense because records prepared and maintained or received by the contractor in performing services for the agency may be in the sole possession of the contractor.

In this case, Appellant submitted open records requests to two records custodians: Georgia Institute of Technology ("Georgia Tech"), through its

designated open records officer, and Appellee, a private person who performed services on behalf of Georgia Tech. As an agency, Georgia Tech can require that written requests for records in its possession—including records belonging to the Appellee in his status as a Georgia Tech employee—be made to its designated open records officer. But because Appellee is ***also*** a private contractor to Georgia Tech, the Act allowed Appellant to directly request that Appellee provide any records in his possession related to his contractor services. Indeed, requests can be directed to private contractors because—for reasons fair or foul, *see, e.g., Cent. Atlanta Progress, Inc. v. Baker*, 278 Ga. App. 733, 738, 740 (2006)—many records relating to contract work may be in the possession of only the contractor and not the agency.

The Court of Appeals' ruling has created an opportunity for Appellee (and other private individuals who perform services for public agencies) to avoid disclosure of public records that are in their sole custody. Its reading of the Act—which is inconsistent with the Act's text, evident purpose, and past interpretations by this Court and the Court of Appeals—should be corrected. The Court of Appeals' opinion is particularly concerning to GFAF, given GFAF's mission to advocate for government transparency and access to public information. If the Court of Appeals' ruling were to stand, access to public records would be

significantly curtailed because public records in the custody of private parties would inevitably evade disclosure.

CONCLUSION

For the foregoing reasons, this Court should reverse the opinion of the Court of Appeals and remand this action to the Superior Court of Fulton County for further proceedings.

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted this 18th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE GEORGIA FIRST AMENDMENT FOUNDATION to be served on the following counsel of record by U.S. mail:

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