GEORGIA FIRST AMENDMENT FOUNDATION
your right to know

February 3, 2025

Judiciary Committee of the Georgia Senate
327-B Coverdell Legislative Office Building
Atlanta, GA 30334

Re: Senate Bill 12

Dear Senators:

We are writing to share our concerns about Senate Bill 12. The bill in its current form would harm the Georgia Open Records Act ("the Act") by undoing a bedrock principle in Georgia. That principle is the commonsense recognition that private organizations performing a service or function for or on behalf of a government agency must provide records under the Act about that service or function to interested citizens. This principle has protected transparency in Georgia for almost 40 years.

In 1986, in *Macon Tel. Pub. Co. v. Bd. of Regents*, 256 Ga. 443 (1986), the Georgia Supreme Court squarely rejected the argument that government functions carried out by a private institution were beyond the reach of the Act. The Court held that even though the University of Georgia managed its intercollegiate sports programs through a private "Athletic Association," the records of the Association were still subject to public disclosure under the Act:

> Because Dr. Davison, by virtue of his position as President of the University of Georgia, is charged with controlling the intercollegiate sports program

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"Because public men and women are amenable 'at all times' to the people, they must conduct the public's business out in the open."
— The late Charles L. Weltner Sr., Chief Justice, Georgia Supreme Court, *Davis et al v. City of Macon* (1992)

> at the University, and because the maintenance of documents relating to the assets, liabilities, income, and expenses of the intercollegiate sports program is an integral part thereof, we conclude that, regardless of whether the documents are prepared by employees of a private Athletic Association or by Dr. Barber as Treasurer of that Association, it is clear that they are "documents, papers, and records prepared and maintained in the course of the operation of a public office," and are therefore "public records" under the Open Records Act.

In numerous decisions thereafter, the Georgia courts have emphasized and expanded this principle to ensure Georgia taxpayers are able to examine how their tax dollars are being spent.[1] Based on these decisions, the principle has been instrumental in, for example, monitoring the City of Atlanta's defunct effort to privatize its water system, the State of Georgia's attempts to negotiate a sole source contract for the operation of its IT infrastructure, and wildly improper expenditures by contractors purporting to modernize the technology in City of Atlanta school rooms. Additionally, this principle has been particularly important in making sure public hospitals continue to carry out their public mission, notwithstanding the fact that a multitude of functions are performed within such hospitals by an array of private partnerships and companies. *See generally Smith v. Northside Hospital, Inc.*, 302 Ga. 517, 531 (2017) ("It is plain that Northside [Hospital's] work in operating the 'Leased Facilities,' i.e., the original leased hospital complex in Fulton County and any improvements thereto, is work 'on behalf of' the [public Hospital] Authority.").

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[1] *See, e.g., Hackworth v. Bd. of Ed. for City of Atlanta*, 214 Ga.App. 17, 20 (1994) (records of school bus drivers employed by private company were public records because they were "an integral part of the course of the operation of public agency"); *Clayton Cnty. Hosp. Auth. v. Webb*, 208 Ga.App. 91, 94–95 (1993) (records of county hospital authority's corporate affiliates "received or maintained by a private person or entity on behalf of a public office or agency"; authority admittedly had the documents in its possession) (citation and punctuation omitted); *United Healthcare of Ga., Inc. v. Ga. Dept. of Cmty. Health*, 293 Ga.App. 84, 87–89 (2008) (records of private corporation relating to its contract with state agency for administration of state health benefits plan were public where administration of the plan involved "current and future expenditure of substantial public funds" and public officials were "actively" involved in plan issues even after contract executed); *Central Atlanta Progress, Inc. v. Baker*, 278 Ga.App. 733, 735–738, 739–740 (2006) (bids for NASCAR Hall of Fame and 2009 Super Bowl were public records where public officials involved in preparation and promotion of bids and significant public funds were involved in preparation and/or ultimate success of bids).

Notwithstanding this important history of transparency, Senate Bill 12 seeks to banish this principle from Georgia law. Through the bill's proposal to strike the language "by a private person or entity in the performance of a service or function for or on behalf of an agency" (at lines 22-23), the bill would potentially eliminate the entire body of law referenced above. Indeed, in House Bill 397 in the 2012 Session, this language was added by Attorney General Sam Olens to embrace the decisional law referenced above and incorporate it into the text of the Open Records Act. Governor Nathan Deal signed HB 397 into law on April 17, 2012.

There is nothing in the Georgia Supreme Court's recent decision in *Milliron v Antonakais*, Case No. S24G0198, 2024 WL 3802782 (Decided: August 13, 2024) that expanded or diminished the principle set forth above. It left the principle in exactly the same state it has existed in since the *Macon Telegraph Publishing* decision in 1986. For this reason, SB 12's elimination of this language is startling and unnecessary.

Furthermore, GFAF is very concerned about Section 2 of SB12, which would strip Georgia courts' jurisdiction over Open Records lawsuits unless they are brought against agencies or designated records custodians. This provision would effectively repeal the Open Records Act's civil fines provision—a vital enforcement tool. O.C.G.A. § 50-18-74(a). Such civil fines may *only* be pursued against individual employees (not agencies) who wrongfully violate the Act. *See Williams v. DeKalb Cnty.*, 308 Ga. 265, 275 (2020) (under identical language in Open Meetings Act, civil fines are available only against individuals, not agencies); *Gravitt v. Olens*, 333 Ga. App. 484, 492 (2015) (same). But SB12's Section 2 would mean courts no longer have jurisdiction over suits against individuals, ending entirely the public's ability to seek civil fines, even against government employees who flout the Act. This is particularly significant given Attorney General Chris Carr's position that his office has a conflict of interest and cannot enforce the Open Records Act against state agencies or employees, leaving civil fines sought by private litigants as the only enforcement mechanism for state-level violations. There is no reason to remove the public's ability to penalize those who refuse to comply with the Act.

Finally, we want to note that the Open Records Act already contains a number of protections for private companies to ensure that transparency laws do not unduly burden or harm government contractors. First, only

the records that relate to a private company's work on behalf of the government are public. O.C.G.A. § 50-18-70(b)(2). Second, the Open Records Act exempts from disclosure sealed bids, trade secret information, and personal identifying information. O.C.G.A § 50-18-72(a)(10), (20), & (34). Third, the Act includes procedural protections for expensive or burdensome requests. O.C.G.A. 50-18-71(c)(1).

We have appreciated your serious consideration of transparency issues in the past. For this reason, we are reaching out to you again. On behalf of the Georgia First Amendment Foundation, we request that you decline to support SB 12 and help us in addressing the unfortunate changes it seeks to make.

Sincerely,

Sarah Brewerton-Palmer
President, Georgia First Amendment Foundation