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Health Care ADVISORY ■

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Georgia Hospitals Can Close the Door on Open Records Requests

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In a closely watched case, the Georgia Court of Appeals, in *Smith v. Northside Hospital, Inc.*, affirmed the determination that Northside Hospital—a private, nonprofit corporation—was not required to comply with a request for documents under the Georgia Open Records Act (GORA or the "Act"). Nos. A15A2303 and A15A2304, 2016 BL 99181 (Ga. Ct. App. Mar. 30, 2016). Under this majority decision, documents in the possession of entities created through hospital authority restructurings may no longer be subject to the Act—in certain circumstances.

The Fulton County Hospital Authority created Northside in 1991 and entered into a lease-transfer agreement under which the authority leased its hospital facilities and transferred its operating assets and existing operations to Northside. A decade later, Northside began the process of acquiring four privately owned physician groups. In 2013, after learning of this development, E. Kendrick Smith sent Northside and the authority an open records request under the Act in an effort to obtain "access to financial statements and other documents related to the acquisitions." Northside rejected that request, responding that, as a private, nonprofit hospital, it is "not subject to GORA." Concurrently, the authority claimed that it "did not possess any records or documents that were responsive to his request." Smith filed an action to compel Northside's compliance with his GORA request, claiming that Northside was subject to GORA because it nevertheless performed "a service or function for or on behalf of the Authority, which is a public agency within the meaning of the Act, and that no exemption applied."

The Georgia Court of Appeals sided with Northside and found that, even though the Act has been "broadly applied as it relates to public offices or agencies to ensure adequate public access to public records, it should not be construed broadly and in derogation of its express terms so as to bring private entities within the purview of the statute." In doing so, the court declined to find that all records held by Northside were subject to GORA, but instead indicated that the appropriate question was whether the specific documents in question were "public" documents under GORA. In finding that the specific records in dispute were not subject to disclosure under GORA, the court pointed out that Smith did not provide any evidence that Northside entered into the transactions to acquire the physician groups "on behalf of the Authority or exercised any of the Authority's powers when doing so." The court further noted that based on undisputed testimony and evidence, including language in the original lease-transfer agreement between the authority and Northside, the bylaws of both entities and the testimony of the authority chairman and Northside's director of finance, (1) there was a "complete severance" of the business decisions and hospital operations between the authority and Northside when it was founded; (2) Northside was granted exclusive control over hospital operations without interference from the authority and the right to operate the hospital for its own purpose; and

(3) the authority had no involvement whatsoever in the transactions resulting the acquisition of the physician group practices and no public funds were used to finance those acquisitions.

The Georgia Court of Appeals distinguished the dispute in *Smith* from its well-publicized *Promina* decision, *Nw. Ga. Health Sys., Inc. v. Times-Journal, Inc*., 218 Ga. App. 336 (1995). In *Promina*, the court expanded Georgia's Open Meetings Act to cover several private corporations that were created to lease and operate hospital authority-owned facilities. The bylaws for such entities provided that they were organized "for the benefit of, to perform the functions of, or to carry out the purposes of" the hospital authority, and the court concluded that such corporations were "the vehicle through which the public hospital authorities carried out their official responsibilities." The court distinguished its decision in *Promina* by pointing out that the issue before the court in the *Promina* case was whether the trial court erred in granting the plaintiff's motion for declaratory relief based on the finding that the private entities were subject to GORA, but that in the *Smith* case the trial court made no such general finding. The court further noted that unlike the *Smith* case, there was no indication in *Promina* that the private entities disputed that if they were subject to the Act the disputed documents were public in nature.

The court further distinguished its finding in *Clayton County Hospital Authority, et al. v. Webb, et al.*, 208 Ga. App. 91 (1993), by pointing out that unlike in the *Smith* case, the requested documents in the *Webb* case remained in the possession and control of the hospital authority and that the particular facts in *Webb* provided a sufficient basis to conclude that the private entities functioned under the direction and control of the hospital authority. For these reasons, the court concluded that "the mere fact that Northside's healthcare operations and services may provide an indirect public benefit does not convert its private documents into public records absent any evidence that the documents relate to Northside's performance of a specific function on the Authority's behalf."

However, Judge Christopher McFadden issued a dissenting opinion that was joined by Presiding Judge Anne Elizabeth Barnes. In this dissent, Judge McFadden stated that he would have followed the court's earlier *Promina* decision and found that the documents relating to the acquisition of the physicians' practices in question were public documents subject to disclosure under the Act based on his determination that the authority delegated to Northside its governmental responsibilities and authority under the lease-purchase agreement and was the vehicle through which the authority carries out its official responsibilities. In doing so, the dissent noted that the lease-transfer agreement provided that the authority's stated intent was to lease the authority's facilities to Northside in order to "promote the public health needs of the community by making additional facilities available in the community" and that all of Northside's assets, presumably including the acquisitions at issue in *Smith*, would revert to the authority at the end of the lease.

Accordingly, under the Georgia Court of Appeals holding in *Smith*, GORA does not automatically apply to documents of private corporations created by a hospital authority's corporate restructuring. Those entities that have voluntarily submitted to the Act's requirements may no longer need to do so, unless under the facts and circumstances documents requested under GORA were prepared, maintained or received in connection with the performance of a specific service or function for or on behalf of a hospital authority. Any such determination must be made on a case-by-case basis and should be based on a careful review of myriad factors of the specific documents being requested and the relationship of the private entity and the related hospital authority.

Procedurally, following the decision of the court of appeals affirming the trial court's dismissal, Smith filed a motion for reconsideration, which the court of appeals denied on April 14. If Smith decides to appeal to the Georgia Supreme Court, he must file a notice with the clerk of the court of appeals within 10 days of the 14th and file a petition for certiorari with the clerk of the supreme court by May 4, 2016 (along with notice to the court of appeals).

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