

Robert W. Adamson

*SENIOR JUDGE
SUPERIOR COURTS
STATE OF GEORGIA*

*46-A SOUTH BROAD STREET
WINDER, GEORGIA 30680*

*PHONE 770-307-1973
CELL 678-227-3102*

August 21, 2014

Kelly Campanella
Assistant Attorney General
Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334

RE: Forsyth County Civil Action 12-CV-1205

Ms. Campanella,

Please find enclosed the Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion to Dismiss, which has been signed by Judge Adamson. He asks that your office please file this original Order and serve the appropriate parties with a copy of said Order.

Thank You,



Julie Lanthier

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

SAMUEL S. OLENS, in his official
capacity as the Attorney General of
the State of Georgia,

Plaintiff,

v.

H. FORD GRAVITT, individually and
in his official capacity as Mayor of the
City of Cumming, Georgia, and the
CITY OF CUMMING, GEORGIA,

Defendants.

*
*
*
*
*
*
*
*
*
*
*
*

CIVIL ACTION FILE NO.
No. 12CV-1205

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFEDANTS' MOTION TO DISMISS**

Defendants, having filed a Motion to Dismiss, and Plaintiff having filed a Motion for Summary Judgment, and the Court having considered argument made at a July 25, 2013 oral hearing, all briefs, pleadings and the entire record, the Court finds as follows:

I. BACKGROUND

The present action involves a suit by the Attorney General to enforce the Open Meetings Act, O.C.G.A. § 50-14-1 *et seq.* The Attorney General filed the Complaint on June 5, 2012 and a slightly Amended Complaint on June 25, 2012. The Attorney General seeks a declaration that Defendants violated the Act on three (3) separate occasions on April 17, 2012, at which time a citizen attending the meeting, Nydia Tisdale, was prevented from recording a Cumming City Council Meeting. Besides these violations, the Attorney General also seeks penalties, which are, per amendment to the Open Meetings Act effective April 17, 2012, \$1,000 for the first violation and \$2,500 for each additional violation and which are now awarded on a negligence standard (*see* O.C.G.A. § 50-14-6), and attorneys fees for Defendants' lack of "substantial justification" or

“special circumstance” to excuse its failure to comply with the Open Meetings Act. See 50-14-5(b).

Defendants moved to dismiss the Attorney General’s complaint on August 29, 2012, claiming the City and the Mayor have immunity from the Open Meetings Act. On October 3, 2012, the Attorney General filed for summary judgment below based on the palpable and undisputed nature of Defendants’ actions, which have been captured on both Ms. Tisdale and the City’s video tapes. This Court held a hearing on these motions on July 25, 2013. Following the hearing, the parties filed supplemental briefs on the issue of sovereign immunity.

II. ORDER ON DEFENDANTS’ MOTION TO DISMISS

The Court will first address Defendants Motion to Dismiss, which is premised on the argument that both the City of Cumming and the Mayor are shielded by sovereign immunity from this action. A motion to dismiss “should be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim. *Blockbuster Investors LP v. Cox Enterprises, Inc.*, 314 Ga. App. 506 (2012). The allegations in the Complaint are considered true, are construed in a light most favorable to the complaining party with all doubts resolved in the non-movant’s favor. *Id.* Further, a trial court may properly consider exhibits attached to the incorporated in the pleadings in considering a motion to dismiss for failure to state a claim for relief. *Id.*

A. Defendants are Not Shielded by Sovereign Immunity

The Open Meetings Act provides that “[t]he superior courts of this state *shall have jurisdiction* to enforce compliance with the provisions of this chapter [the Open Meetings Act], including the power to grant injunctions and other equitable relief.” O.C.G.A. § 50-14-5(a) (emphasis added). This straightforward language can lead to only one conclusion: this Court has

express jurisdiction over the Attorney General's claims. This conclusion is reinforced by the fact that the Open Meetings Act, on its face, solely governs the conduct of governmental actors. *See* O.C.G.A. §§ 50-14-1(a)(2); 50-14-1(b).¹ Indeed, the Open Meetings Act would be essentially meaningless were local governments immune from its enforcement, as Defendants urge. The Court simply cannot conclude that this was the intent of the General Assembly in enacting the Open Meetings Act, including the recent civil penalty provision provided for in H.B. 397.

Defendants' suggestion that they are shielded from the Act because it does not specifically state that "sovereign immunity is waived" is unavailing. As recently as November of last year, the Georgia Supreme Court affirmed that such language is not necessary. *Colon et al. v. Fulton County*, 294 Ga. 93 (2013). In *Colon*, the Supreme Court affirmed that Georgia's whistleblower statute, O.C.G.A. § 45-1-4 "unambiguously" expresses a specific waiver of sovereign immunity and the extent of such waiver, even though the statute does not explicitly state that sovereign immunity is waived. Further, the Court recognizes that the "[l]egislature need not use specific 'magic words' such as 'sovereign immunity is hereby waived' in order to create a specific statutory waiver of sovereign immunity. *Id.* at 95. As with the whistleblower statute, the Open Meetings Act must "be interpreted as creating a waiver of sovereign immunity" "for the statute to have any meaning" at all. *Id.* at 96. Thus, Defendants' argument that the City and Mayor Gravitt are immune from suit simply cannot be reconciled with this Supreme Court ruling. *See also Williamson v. Dept. of Human Resources*, 258 Ga. App. 113 (2002).

¹ The Act describes what constitutes an "agency" in detail; the term includes only various types of governmental entities and officials and organizations that function (due to funding, etc.) as governmental actors. O.C.G.A. § 50-14-1(a)(1); *see Central Atlanta Progress, Inc. v. Baker*, 278 Ga. App. 733 (2006) (suit by the Attorney General involving question of when private entities can be subject to the open government laws). Defendants have, rather creatively, suggested that because these private entities would be subject to the Act but unprotected by sovereign immunity under their theory, the Act still would have some meaning, unlike the whistleblower statute in *Colon*. To suggest that the sole purpose of the Act and its 2012 revisions would be to apply the civil penalty provisions to non-profits acting as governmental entities, but not the governmental entities themselves, defies logic in that it eviscerates the Act, rather than enhances it.

Moreover, numerous cases have upheld some sort of monetary award against a state and local government entities under the larger umbrella of an Open Meetings or Records Act claim. While these do not address the if not the civil penalty outlined by H.B. 397 (and could not do so since this is the first case to challenge that provision), they are nonetheless relevant and instructive since they consistently and repeatedly analyze the ability of state and municipal entities to be sued under the Open Meetings Act, specifically. *See, e.g., City of Statesboro v. Dabbs*, 289 Ga. 669, 670-71 (2011) (upholding award of attorneys fees against the City, its mayor, and city council members as a successfully suit alleging violation of Open Meetings Act); *Forrester v. Cont'l Gin Co.*, 67. Ga. App. 119 (1942) (ordering refund of tax monies improperly collected by Department of Revenue and recognizing that State had consented to be sued by enacting tax refund statute). Given these analogous cases and the unambiguous precedent set by *Colon*, Defendants' suggestion that a civil fine is unconstitutional cannot prevail.

B. The City of Cumming is an "Agency" Under the Act

The City of Cumming is an "agency" for purposes of the Open Meetings Act, as well as a "person" for the purpose of imposing sanctions under O.C.G.A. § 50-14-6. The word "person" in O.C.G.A. § 50-14-6 is an inclusive term that includes both individuals and municipal corporations, such as the City. *See Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876, 899-901 (2010) (explicitly establishing that that the term "person" includes corporate entities as well as natural persons). The most logical interpretation of the term "persons" in the statute is that "persons" includes both people arising through a corporate identity, like Defendant City of Cumming, and natural persons, like Defendant Gravitt; although the General Assembly did not choose to limit liability to only agencies, that does not mean it excluded them. If the General

Assembly had chosen to limit liability to only natural persons, it would have said “natural persons.” Because this Court must interpret the Act in a broad and logical manner, it hereby finds that the City is subject to the Open Meetings Act. *See, e.g., EarthResources, LLC v. Morgan County*, 281 Ga. 396, 399 (2006); *Steele v. Honea*, 261 Ga. 644, 646 (1991); *Crossland v. Butts County*, 214 Ga. App. 295, 296 (1995) (Open Meetings Act must be broadly construed).

C. Mayor Gravitt is a “Person” Subject to the Act

Finally, this Court finds meritless Defendants’ contentions that sovereign immunity shields Mayor Gravitt from this action in his official capacity.

Defendants’ argument that the Mayor is not liable based on “official immunity for lack of injury or damage” fails for the same reasons that their argument respecting the sovereign immunity of the City fails. *See Colon*, 294 Ga at 65-96; *Dabbs*, 289 Ga. at 669 (sovereign immunity (and, specifically, its requirement for *ante litem* notice) does not bar a claim and attorney’s fees for violating the Open Meetings Act because it is not a claim for damages); *see also Atlanta Airmotive v. Royal*, 214 Ga. App. 760 (1994) (officials can be held liable in their official capacities, and, moreover, those not serving as complete volunteers can be held liable in their individual capacities as well). The Open Meetings Act expressly gives the Court the power to entertain enforcement actions like this one, and it expressly gives the Attorney General the authority to bring them.

Nor does the Georgia Constitution protect Mayor Gravitt from suit. *See* Const. Art. I Sec. 2, Para IX (“officers and employees of the state or its departments and agencies may be subject to suit and liable for injuries and damages caused by the *negligence performance of or negligent failure* to perform their ministerial functions.”) Nonetheless, such officers “may be liable for injuries and damages if they acted with...*actual intent to cause injury . . .*.”

Considering the record before the Court, it cannot conclude that Mayor Gravitt's conduct was merely a negligent execution of his powers or an exercise of official discretion made in good faith. Mayor Gravitt did not have discretion to not allow videotaping. He had a clear and well defined obligation to allow videotaping under the law prior to April 17, 2012 and the law after April 17, 2012; indeed, that provision did not change in any meaningful sense regarding the requirement that the public be allowed to attend and video tape meetings.

III. ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Having found that sovereign immunity shields neither the City nor the Mayor from Plaintiff's causes of action, the Court now turns to the merits of Plaintiff's Motion for Summary Judgment. Summary judgment "is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). In order to "prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in a light most favorable to the nonmoving party, warrant judgment as a matter of law." *Lau's Corp. v. Haskins*, 261 Ga. 491, 491 (1991), *overruled on other grounds by Robinson v. Kroger Co.*, 268 Ga. 735 (1997). The moving party need not affirmatively disprove Plaintiff's case, but discharges its burden by "pointing out by reference to affidavits, depositions, and other documents in the record that there is an absence of evidence to support the nonmoving party's case." *Id*; *Smith v. Lewis*, 259 Ga. App. 548, 549 (2003). If the moving party discharges this burden, "the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." *Lau's Corp.*, 261 Ga. at 491; *Smith*, 259 Ga. App. at 549.

The Open Meetings Act plainly provides that "**all meetings shall be open to the public.**" O.C.G.A. § 50-14-1(b)(1), (c) (2012) (emphasis added). The Open Meetings Act reiterates the

requirement that the public is entitled to attend meetings in the next subsection, and then provides for video recording:

The public at all times shall be afforded access to meetings declared open to the public pursuant to subsection (b) of this Code section. **Visual and sound recording during open meetings shall be permitted.**

O.C.G.A. § 50-14-1(c) (2012).²

Defendants' wrongful conduct, as outlined in the Complaint, consists of three separate acts in violation of the Open Meetings Act: (1) they wrongfully prevented a citizen from video recording a meeting at the start of the meeting; (2) they wrongfully removed the citizen from the meeting when she had done nothing wrong; and (3) they wrongfully prevented the citizen from later videotaping the meeting, without sound, using a different camera. Based on the record before the Court, including the undisputed video recordings of the incident, the Court concludes that there exists no triable issue of material fact that Defendants violated the Open Meetings Act on each of these three separate occasions.

The undisputed material facts that support this conclusion include, but are not limited to the following:

- That Mayor Gravitt of the City of Cumming ordered citizen Nydia Tisdale not to film a public meeting (saying things such as "remove the camera from the auditorium" and "we do not allow recording"), and in response to this as well as intervention of city officials Ms. Tisdale stopped recording as ordered. (See authenticated videos at <http://www.youtube.com/watch?v=vaulDwK6ou0> and <http://www.youtube.com/watch?v=Vs1sOg8HXws>; affidavit of Nydia Tisdale; deposition of Nydia Tisdale.) His and the other city officials' conduct were patent, undisputable violations of the Open Meetings Act.
- That Ms. Tisdale was also expressly told to leave the meeting at the direction of the mayor (with city officers saying, for instance, "[s]tep outside -- please step outside"), and she did leave the meeting space in response to this. (*Id.*) Again, the

² The Court finds unavailing Defendants' suggestion that the 2012 revisions somehow obscured the Act's mandate that video recording be permitted.

Defendants' conduct were patent, undeniable violations of the Open Meetings Act; and

- That Ms. Tisdale was later told to stop recording the meeting with another hand held camera when she later returned to the meeting and attempted to do so. (*Id.*) And, again, this was a patent, undeniable violation of the Open Meetings Act.

Defendants have attempted to characterize as “voluntary” that Ms. Tisdale stopped recording (as she turned off her video recorded after repeated demands), or that she left the meeting (as, apparently, they were not required to drag her out), or that she did not go all the way to the curb after leaving the meeting space (although unquestionably being removed from the meeting space itself), or that she later returned to the meeting (after being excluded) and took some still images without audio (although told to stop). These allegations, even if true, do not raise material issues to the violations of the law. *See, e.g., EarthResources*, 281 Ga. at 399 (Act must be interpreted broadly). They do not change the fact that the Open Meetings Act was violated in each of the particulars, above, and the facts are undisputable to these violations.

The public policy behind the Open Meetings Act is transparency. It is designed not only to allow citizens to see what their officials are acting upon but to see how their officials are acting. *See EarthResources*, 281 Ga. at 399; *see also Cardinale v. City of Atlanta*, 290 Ga. 521, 524 (2012) (internal citations omitted) (“The Act [] reflects a policy ‘that the public’s business must be open, not only to protect against potential abuse, but also to maintain the public’s confidence in its officials.’”) The amply supported record shows that the conduct of Mayor Gravitt, the elected head of the City of Cumming, as well as the conduct of his Chief and Deputy Chief of Police, constitutes precisely the type of “closed door politics” the Open Meetings Act was intended to combat. *Id.*

A. Defendants Are Liable for Civil Penalties

Having violated the Act on three separate occasions, the Defendants are each liable for civil penalties. Specifically, O.C.G.A. § 50-14-6 (2012) provides:

Any person knowingly and willfully conducting or participating in a meeting in violation of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$1,000.00. **Alternatively, a civil penalty may be imposed by the court in any civil action** brought pursuant to this chapter against any person who **negligently** violates the terms of this chapter in an amount not to exceed **\$1,000.00 for the first violation**. A civil penalty or criminal fine not to exceed **\$2,500.00 per violation may be imposed for each additional violation** that the violator commits within a 12 month period from the date that the first penalty or fine was imposed. It shall be a defense to any criminal action under this Code section that a person has acted in good faith in his or her actions.

(emphasis added.)

Thus, Defendants are liable for up to \$1,000 per person for the first violations of each of the Defendants, and up to \$2,500 per person for each of the subsequent violations for each of the Defendants. As recognized above, the word “person” includes both natural persons and corporate persons. *See Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876, 899-901 (2010). The minimum threshold for violating the Act is negligence. Given the serious and amply documented nature of Defendant’s violations, the Court concludes that the City is liable for \$6,000 in civil penalties (representing \$1,000 for the first violation and \$2,500 for each of the subsequent violations). Mayor Gravitt is also separately liable for civil penalties in the same \$6,000 amount, totaling \$12,000.00 in fines from Defendants.

B. The Attorney General is Entitled to Reasonable Attorney’s Fees and Costs

Further, Plaintiff has requested and is entitled to reasonable attorney’s fees and costs pursuant to O.C.G.A. § 50-14-5(b) (2012). Specifically, that section provides that

In any action brought to enforce the provisions of this chapter in which the court determines that an agency acted without substantial justification in not complying with this chapter, the court shall, unless it finds that special circumstances exist, assess in favor of the complaining party reasonable

attorney's fees and other litigation costs reasonably incurred. Whether the position of the complaining party was substantially justified shall be determined on the basis of the record as a whole which is made in the proceeding for which fees and other expenses are sought.

Defendants can offer no conceivable “substantial justification” or “special circumstance” to excuse its failure to comply with the Open Meetings Act and refusing to resolve the claims arising from their clear violations of the law. In this instance, Defendants were put on unequivocal notice that they were violating the Act as soon as they attempted to remove both Ms. Tisdale and her camera from the meeting. Ms. Tisdale not only referenced the specific statutory provisions that authorized the taping, but also requested three times that the Mayor and City Council consult with the City’s attorney, Dana Miles, who was also present. Yet, Mayor Gravitt pushed ahead with the meeting, while the Chief of Police challenged Ms. Tisdale to “go ahead and file your [Open Meetings] complaint.” There is no justification, substantial or otherwise, for such conduct. Accordingly, the Attorney General, on behalf of the State of Georgia, is entitled to recover the Department of Law’s reasonable attorney's fees and other litigation costs incurred by being forced to bring this action. *City of Statesboro v. Dabbs*, 289 Ga. 669, 671 (2011) (affirming trial court’s award of attorney’s fees against the City of Statesboro which ultimately conceded that it held closed meetings regarding the City budget and could offer no substantial justification for this violation of the Open Meetings Act).

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendants’ Motion to Dismiss is DENIED and Plaintiff’s Motion for Summary Judgment is GRANTED. Further, Defendants are hereby ORDERED to pay penalties in the amount of \$12,000.00 total and attorneys fees in an amount to be determined at a subsequent hearing or via agreement. This order constitutes a final order of all issues raised in this action.

ENTERED this 21st day of August, 2014.


The Honorable Robert W. Adamson
Superior Court Judge

SUBMITTED BY:
Kelly Campanella
Assistant Attorney General
Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 656-4666

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **AMENDED [PROPOSED] ORDER GRANTING PLAINTIFF' S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION OT DISMISS** by causing the same to be delivered via United States Mail, addressed as follows:

Dana B. Miles
Kevin J. Tallant
MILES PATTERSON HANSFORD TALLANT, LLC
202 Tribble Gap Road, Suite 200
Cumming, GA 30040-2540

This 8th day of August 2014.



KELLY CAMPANELLA
Assistant Attorney General