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Administrative Law

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SURVEY ARTICLES

Administrative Law

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This Article covers important developments in Georgia administrative law for the two-year period from June 1, 1997 through May 31, 1999. Because administrative law has been omitted from major consideration in the *Annual Survey of Georgia Law* since 1987,[1] this Article is an attempt to cover an additional period of review, which, the authors hope,

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1. *See* Mark H. Cohen & Stephanie B. Manis, *Administrative Law*, 39 MERCER L. REV. 33 (1987).

will be continued in future surveys. This Article includes cases as well as a discussion of two significant legislative enactments during the survey period.

I. OVERVIEW

An historical overview of the progression and importance of administrative law in Georgia reveals how far and fast this area of law has developed. Today, administrative law undoubtedly impacts more individual lives than does our court system. Back in the earliest editions of the Georgia Survey, Professor Maurice Culp, who penned the first fifteen annual surveys of administrative law, bemoaned the "dearth of judicial development" in the area and opined that "prompt and thorough development of administrative law in Georgia must come from a pioneering legislative effort."[2] As if taking the cue, the 1964 Georgia General Assembly enacted the Georgia Administrative Procedure Act ("APA"),[3] which Professor Culp called "perhaps the most important single advance in administrative law [in Georgia] during this century."[4]

The expressed statutory purpose of the APA is not to "create or diminish any substantive rights or delegated authority," but "to provide a procedure for administrative determination and regulation where expressly authorized by law or otherwise required by the Constitution or a statute of this state."[5] In reality, the APA fulfills two important legal purposes. First, and foremost, the APA "resolve[s] conflicts within the authority vested in administrative agencies without resort to courts of record in the first instance."[6] Second, the APA provides "uniform, minimum procedural requirements to be followed by an administrative agency in determining the legal rights, duties or privileges of a party, in matters in which the particular agency regulates."[7]

In the thirty-five years since the APA's inception, what may have begun as a dearth of cases exploring the parameters of administrative law has turned into a plethora of judicial decisions on issues concerning the promulgation of administrative regulations, the administrative hearing process, the availability of judicial remedies, and the standards for appellate review.

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2. Maurice S. Culp, *Administrative Law*, 14 MERCER L. REV. 7, 7 (1962).

3. 1964 Ga. Laws 338 (codified as amended at O.C.G.A. §§ 50-13-1 to -44 (1998 & Supp. 1999)).

4. Maurice S. Culp, *Administrative Law*, 16 MERCER L. REV. 12, 13 (1964).

5. O.C.G.A. § 50-13-1 (1998).

6. Georgia State Bd. of Dental Exam'rs v. Daniels, 137 Ga. App. 706, 709, 224 S.E.2d 820, 822 (1976).

7. 1965 Ga. Op. Att'y Gen. No. 65-73, at 119.

This Article analyzes the appellate decisions issued during the survey period that discuss many of these issues. The Georgia Court of Appeals reviewed the validity of agency regulatory actions in different contexts, and the General Assembly enacted a new law permitting the granting of variances and waivers to agency rules. The appellate courts discussed several issues relating to the administrative hearing process, including whether statements made during an agency investigation are privileged, the availability of any recourse if an administrative decision is untimely, the extent to which a summary determination is appropriate, the impact of the denial of the right to confront witnesses, and an agency's reversal of an administrative law judge's recommendation.

This Article further reviews the principle requiring exhaustion of administrative remedies and the availability of other forms of equitable relief. The courts continued to reaffirm, if not expand, the use of the "any evidence rule" as a standard of review in various circumstances. Two cases also dealt with the ability to appeal a superior court's decision involving an administrative order to an appellate tribunal. Finally, this Article discusses two cases interpreting recent legislative changes to Georgia's open records and open meetings laws.

II. RULES AND REGULATIONS

A. *Validity of Agency Interpretations*

When the General Assembly enacts laws of general application, it usually delegates to administrative agencies the authority to carry out its legislative mandates by the promulgation and adoption of rules and regulations.[8] An agency "has only such powers as the legislature has expressly, or by necessary implication, conferred upon it."[9]

When a statute provides broad regulatory authority to an agency, great weight is given to the agency's interpretation of the law, as long as it is consistent with the statutory framework. In *St. Joseph's Hospital, Inc. v. Thunderbolt Health Care, Inc.*,[10] the court of appeals reviewed the decision of the State Health Planning Agency ("SHPA") granting a certificate of need for the addition of eleven nursing home beds to St. Joseph's, which proposed to accomplish this addition by the conversion of general acute care hospital beds into "subacute care" beds in a skilled nursing unit.[11] On appeal by Thunderbolt, the trial court

8. Eason v. Morrison, 181 Ga. 322, 324, 182 S.E. 163, 165 (1935).
9. Bentley v. State Bd. of Med. Exam'rs, 152 Ga. 836, 838, 111 S.E. 379, 381 (1922).
10. 237 Ga. App. 454, 517 S.E.2d 334 (1999).
11. *Id.* at 454, 517 S.E.2d at 335.

reversed SHPA's decision because it "was improper."[12] Because the statute was silent as to the definition of a "nursing home," the focus of the appeal was whether "subacute care" equated to "nursing home" service. While the agency's rules did not precisely resolve the issue, the agency's health planning expert testified that subacute care was consistent with skilled nursing care.[13] The court of appeals gave credence to that interpretation and reversed the trial court's decision, concluding that "[t]he interpretation of a statute by an administrative agency which has the duty of enforcing or administering it is to be given great weight and deference."[14] Unless an agency's interpretation of its enabling statute or its rules exceeds the authority granted to it by the legislature,[15] reviewing courts are required to give that interpretation controlling weight.[16]

Nevertheless, the appellate courts will not hesitate to invalidate an administrative regulation that they find violative of the pertinent enabling statute. In *Georgia Public Service Commission v. Alltel Georgia Communications Corp.*,[17] the Public Service Commission ("PSC") initiated an administrative action to interpret and implement a section of The Telecommunications and Competition Development Act of 1995[18] that provides for an alternative form of regulation for certain local exchange companies.[19] The court of appeals, after conducting a detailed analysis of the enabling law, held that the PSC's interpretation violated the terms of the statute.[20]

The bottom line for any person seeking to challenge the validity of an administrative rule is that absent a showing that the rule is not authorized by statute or is unreasonable,[21] the appellate court will usually give an agency broad leeway in promulgating and adopting regulations.

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12. *Id.*

13. *Id.* at 455-57, 517 S.E.2d at 337.

14. *Id.* at 457-58, 517 S.E.2d at 337 (citing Hospital Auth. of Gwinnett County v. State Health Planning Agency, 211 Ga. App. 407, 408, 438 S.E.2d 912, 914 (1993)).

15. *See* HCA Health Servs. of Ga., Inc. v. Roach, 265 Ga. 501, 502-03, 458 S.E.2d 118, 120-21 (1995).

16. 237 Ga. App. at 458-59, 517 S.E.2d at 339.

17. 230 Ga. App. 563, 497 S.E.2d 50 (1998).

18. O.C.G.A. §§ 46-5-160 to -174 (Supp. 1999).

19. 230 Ga. App. at 563, 497 S.E.2d at 51.

20. *Id.* at 566-67, 497 S.E.2d at 53-54.

21. *See, e.g.*, Brown v. State Bd. of Exam'rs of Psychologists, 190 Ga. App. 311, 312, 378 S.E.2d 719, 720 (1989).

B. Variances and Waivers to Administrative Rules

The APA sets forth the procedural requirements for the adoption, amendment, or repeal of a rule or regulation.[22] Prior to 1997, the only means available to avoid the application of an agency rule were to petition the agency to amend or repeal the rule[23] or to ask for a waiver of the rule if the agency's rules permitted such a request.[24] The strict application of certain rules occasionally caused somewhat inequitable results.[25]

In an effort to give agencies the authority to modify a rule or to exempt its application to avoid significant and unintended hardship without having to go through the formal APA rulemaking process, the 1997 General Assembly amended the APA to permit the granting of variances or waivers to agency rules.[26] Based upon a similar provision in the Florida Administrative Procedure Act,[27] the law now permits many agencies[28] to grant a variance[29] or waiver[30] if the person subject to a rule

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22. *See* O.C.G.A. § 50-13-4 (1998).

23. *See id.* § 50-13-9.

24. *See, e.g.*, GA. COMP. R. & REGS. R. 290-2-2-.15 (1991) (allowing Department of Human Resources to grant variance or waiver from rules setting standards for day care centers).

25. *See, e.g.*, Brown v. State Bd. of Exam'rs of Psychologists, 190 Ga. App. 311, 378 S.E.2d 718 (1989) (applicant for psychologist license satisfied old examining board rule requiring graduation from a school accredited at the time of application but not new rule requiring graduation from a school accredited when degree was received).

26. 1997 Ga. Laws 1521 (codified as amended at O.C.G.A. § 50-13-9.1 (1998 & Supp. 1999)).

27. FLA. STAT. ANN. § 120.542 (West Supp. 1999).

28. The provisions apply to all rules adopted by state boards, commissions, and departments that are included in the definition of "agency" under the APA, O.C.G.A. § 50-13-2(1) (Supp. 1999), except for rules and regulations promulgated or adopted (1) "to implement or promote a federally delegated program," (2) "by the Department of Corrections concerning any institutional operations or inmate activities," (3) "by the State Board of Pardons and Paroles regarding clemency considerations and actions," (4) "by the Department of Community Health," (5) "by the Department of Agriculture," (6) "by the Department of Natural Resources for the protection of the natural resources, environment, or vital areas of [Georgia]," or (7) when "[t]he granting of a waiver or variance would be harmful to the public health, safety, or welfare." O.C.G.A. § 50-13-9.1(h)(1)-(7) (Supp. 1999).

29. O.C.G.A. § 50-13-9.1(b)(2) (Supp. 1999) ("'Variance' means a decision by an agency to grant a modification to all or part of the literal requirements of a rule to a person who is subject to the rule.").

30. *Id.* § 50-13-9.1(b)(3) ("'Waiver' means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.").

> demonstrates that the purpose of the underlying statute upon which the rule is based can be or has been achieved by other specific means which are agreeable to the person seeking the variance or waiver and that strict application of the rule would create a substantial hardship to such person.[31]

To obtain a variance or waiver, a person subject to a rule must first file a petition that meets specific statutory prerequisites.[32] A register of pending requests for variances or waivers and those that have been approved is required to be posted on GeorgiaNet, which is the state's official Internet website.[33] The agency's decision, which must be issued in writing, can be appealed by filing either (1) a petition for judicial review if the original petitioner's request is denied, or (2) an action for declaratory judgment by some other interested party if the waiver or variance is granted.[34]

III. ADMINISTRATIVE HEARINGS

A. *Statements Made During Investigations*

Prior to bringing formal allegations against a particular license or permit holder, usually following a complaint lodged by a private citizen, an administrative agency often will conduct an investigation of the charges. In *Skoglund v. Durham*,[35] the court of appeals addressed the question, apparently one of first impression, of whether statements made during such an investigation are entitled to the absolute privilege that is afforded to parties for allegations contained in pleadings filed in civil actions.

After Skoglund filed an application to obtain a broker's license from the Georgia Real Estate Commission, a couple who claimed they had been defrauded by Skoglund filed a request for the commission to

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31. *Id.* § 50-13-9.1(c).

32. *Id.* § 50-13-9.1(d). The petition must specify, in addition to any other requirements that may be imposed by a particular agency, (1) "[t]he rule from which a variance or waiver is requested," (2) "[t]he type of action requested," (3) "the specific facts of substantial hardship which would justify a variance or waiver" (including alternative standards that the petitioner agrees to meet and that will afford adequate protection to the public), and (4) "the reason why the variance or waiver requested would serve the purpose of the underlying statute." *Id.* § 50-13-9.1(d)(1)-(4).

33. *Id.* § 50-13-9.1(c).

34. *Id.* § 50-13-9.1(e)-(f). "The agency . . . shall grant or deny a petition for variance or waiver in writing no earlier than 15 days after the posting of the petition on the register and no more than 60 days after receipt of the petition." *Id.* § 50-13-9.1(e).

35. 233 Ga. App. 158, 502 S.E.2d 814 (1998).

investigate his conduct. Skoglund then filed a defamation action against the couple, which the trial court dismissed, finding that the allegations made in the request to investigate were entitled to an absolute privilege.[36]

On appeal the court reviewed the policy behind O.C.G.A. section 51-5-8, which applies an absolute privilege for "'[a]ll charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought.'"[37] In analyzing the nature of the proceeding before the commission, the court found it to be quasi-judicial because the enabling statute provided for an investigation following the filing of a sworn complaint, the issuance of subpoenas to compel production of documents, and a hearing on the merits.[38] In addition, not only does public policy support the application of an absolute privilege for allegations of fraud, but the commission's statute also protects documents contained in the investigative file from inspection.[39]

> It would appear to make little sense for the legislature to provide a statutory scheme for policing the integrity of the real estate profession by reporting unprofessional conduct and then for this Court to stymie the process by permitting libel actions against those who do as contemplated by the statute and report such conduct.[40]

While licensees are still entitled to receive exculpatory materials from an investigative file, including the identity of the complainant if that information is viewed as arguably favorable for the defense,[41] there is no right to general discovery in an administrative proceeding.[42] Also, the court in *Skoglund*, while rightfully protecting those who file complaints against licensees, supported the continued confidentiality of the administrative investigatory process, making it difficult for those accused of violating the law or an administrative regulation to uncover the supporting material behind the allegations against them.[43]

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36. *Id.* at 158, 502 S.E.2d at 815.
37. *Id.* at 159, 502 S.E.2d at 816 (quoting O.C.G.A. § 51-5-8) (alteration by court).
38. *Id.*
39. *Id.* at 160-61, 502 S.E.2d at 816-17.
40. *Id.* at 161, 502 S.E.2d at 817.
41. Wills v. Composite State Bd. of Med. Exam'rs, 259 Ga. 549, 553, 384 S.E.2d 636, 639-40 (1989).
42. *See* Lansford v. Cook, 252 Ga. 414, 415, 314 S.E.2d 103, 104-05 (1984); Georgia State Bd. of Dental Exam'rs v. Daniels, 137 Ga. App. 706, 709, 224 S.E.2d 820, 822 (1976).
43. 233 Ga. App. at 160, 502 S.E.2d at 817.

B. Deadline for Issuing Administrative Decisions

The APA provides that "[e]ach agency shall render a final decision in contested cases within 30 days after the close of the record" unless the time period is extended by order.[44] Although appellants have argued that decisions issued by agencies after the thirty-day period should be reversed, the appellate courts historically have read this seemingly mandatory time constraint as discretionary only.[45] This trend continued during the survey period.

In *Safety Fire Commissioner v. U.S.A. Gas, Inc.*,[46] the court of appeals summarily rejected the argument that the failure of the fire commissioner to issue a decision before the expiration of the thirty-day period mandated reversal of the agency's final decision.[47] The court engaged in a more detailed analysis one year later in *Thebaut v. Georgia Board of Dentistry*,[48] when the court reviewed an appeal from a decision issued by the state's dental board more than thirty days after the close of the record.[49]

In *Thebaut* the court focused on O.C.G.A. section 1-3-1(c), which provides that "substantial compliance" with a statutory requirement by public officers is sufficient unless the law expressly provides penalties for noncompliance.[50] Because the APA provision did not provide for invalidation of an out-of-time decision, and because there was no specific harm shown, the thirty-day decision-making requirement was once again held to be discretionary rather than mandatory.[51] For the first time, however, there was some judicial consternation over the untimeliness of the agency decision, as shown by the majority's direction that the board "aggressively endeavor" to meet the thirty-day deadline for issuing its decision[52] and the concurrer's regret over the weakening of the word "shall" by the appellate courts.[53] Nevertheless, unless re-examined by the judiciary, a challenge to an administrative decision based on untimeliness will continue to fall on mostly deaf ears.

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44. O.C.G.A. § 50-13-17(c) (1998).
45. *See, e.g.*, Hardison v. Fayssoux, 168 Ga. App. 398, 400, 309 S.E.2d 397, 398-99 (1983).
46. 229 Ga. App. 807, 494 S.E.2d 706 (1997).
47. *Id.* at 809-10, 494 S.E.2d at 709.
48. 235 Ga. App. 194, 509 S.E.2d 125 (1998).
49. *Id.* at 194, 509 S.E.2d at 127.
50. *Id.* at 195, 509 S.E.2d at 128.
51. *Id.* at 196, 509 S.E.2d at 129.
52. *Id.*
53. *Id.* at 203-04, 509 S.E.2d at 133-34 (Ruffin, J., concurring specially).

C. *Propriety of Summary Determinations in Administrative Proceedings*

The Civil Practice Act does not apply to contested cases arising under the APA.[54] Nevertheless, "[t]he rules of evidence as applied in the trial of civil nonjury cases" apply to administrative hearings,[55] and other segments of civil procedure have crept into administrative practice by rule.[56] One procedural approach has been the use of summary determination, which allows the administrative law judge ("ALJ") to decide cases in which there are no disputed, genuine issues of material fact, and which is similar to summary judgment procedure under the Civil Practice Act.[57] A recent appeal of a summary administrative determination reveals that while appellate courts may recognize the availability of the procedure, they will apply the same standards applicable to review of orders granting summary judgment in civil proceedings.

In *Children's Hospital of Pittsburgh v. Georgia Department of Medical Assistance,*[58] the state Medicaid agency approved an evaluation of a Georgia child for a bowel transplant by a Pittsburgh hospital. Following the evaluation and three hospitalizations in Georgia for liver problems, the child was transferred upon physician recommendation back to the Pittsburgh hospital, where he died after an extended stay. The Department of Medical Assistance denied the hospital's request for reimbursement. Upon an administrative appeal, the ALJ granted the department's motion for summary determination, finding that there were no genuine issues of material fact because no prior authorization had been received for the out-of-state services. The superior court affirmed the ALJ's decision, but the court of appeals reversed.[59]

The issue on appeal was whether the ALJ correctly concluded that there was not a factual issue concerning the provision of services to the child on an emergency basis.[60] The court of appeals found that the superior court erred by failing to conduct the type of de novo review required in cases reviewing the appropriateness of a grant of summary

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54. *Daniels*, 137 Ga. App. at 709, 224 S.E.2d at 822.

55. O.C.G.A. § 50-13-15(1) (1998).

56. *See, e.g.*, GA. COMP. R. & REGS. R. 295-5-.04 (providing for the exchange of lists of witnesses and documents to be offered into evidence in proceedings initiated on behalf of state examining boards).

57. GA. COMP. R. & REGS. R. 616-1-2-.15. For the summary judgment procedure under the Civil Practice Act, see O.C.G.A. § 9-11-56 (1993 & Supp. 1999).

58. 235 Ga. App. 697, 509 S.E.2d 725 (1998).

59. *Id.* at 697-98, 509 S.E.2d at 725-26.

60. *Id.* at 700, 509 S.E.2d at 727.

judgment.[61] Because a de novo review revealed that there were competing affidavits from the hospital and the department as to whether the transfer to Pittsburgh was critically necessary, the ALJ's grant of summary determination was erroneous.[62]

While summary determination is a viable procedure for concluding administrative appeals without a full evidentiary hearing, practitioners should recognize that the procedure will be treated like a summary judgment motion. As a result, conflicting affidavits will likely result in the denial of the motion, and the ALJ will hear and decide the factual disputes.

D. Procedural Due Process Issues

During the survey period, the Georgia Supreme Court reached differing conclusions in two cases on whether a particular administrative procedure violated principles of procedural due process. The court ruled that the state's statutory scheme for investigating alleged teacher misconduct and issuing appropriate disciplinary sanctions comported with due process. In *Gee v. Professional Practices Commission*,[63] the court held that the investigation and hearing before the Professional Practices Commission, with a subsequent report of recommendations to the Professional Standards Commission for final action, "more than satisfies the requirements of procedural due process."[64] Subsequent to *Gee* the Professional Practices Commission was abolished, and the investigative and adjudicatory functions for teacher discipline are now combined within the Professional Standards Commission.[65]

In 1996 the General Assembly enacted legislation amending the statutory provisions providing for the establishment and maintenance of a central registry of confirmed and unconfirmed cases of child abuse.[66] Upon completion of an investigation into allegations of abuse, the law provides that an investigator must classify the report as either "unfounded," "confirmed," or "unconfirmed."[67] After the alleged abuser

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61. *Id.*, 509 S.E.2d at 728.
62. *Id.*
63. 268 Ga. 491, 491 S.E.2d 375 (1997).
64. *Id.* at 493, 491 S.E.2d at 376.
65. *See* O.C.G.A. §§ 20-2-982 to -984.5 (Supp. 1999).
66. *See id.* §§ 49-5-180 to -187 (1998).
67. *Id.* § 49-5-183. The law defines "unfounded" as a "determin[ation] that there is no credible evidence that child abuse occurred." *Id.* § 49-5-180(12). "'Confirmed' means that an investigation . . . has revealed that there is equal or greater credible evidence that child abuse occurred than the credible evidence that child abuse did not occur." *Id.* § 49-5-180(6). Finally, the law defines "unconfirmed" as a determination "that there is some credible evidence that child abuse occurred but there is not sufficient credible evidence to

is notified of the classification, a hearing could be requested before an ALJ within ten days of receipt of the notice.[68] The statute prohibits the accused abuser from compelling a child under age fourteen to testify at the hearing.[69] Although the ALJ's decision as to whether the evidence meets the required standards for classification can be appealed to the superior court, that court's decision is not appealable under the statute.[70]

In *State v. Jackson*,[71] a person who was acquitted of criminal child molestation charges but placed on the child abuse registry as a confirmed abuser challenged the law in a declaratory judgment action.[72] The supreme court affirmed the decision of the trial court that the statute providing for the administrative classification of a child abuser was unconstitutional.[73] Contrary to the State's contention, the court found that listing someone on an abuse registry impacts that person's liberty interest and that preventing the accused from compelling a child's testimony in administrative proceedings violates the accused's due process rights.[74]

E. Agency Review of the ALJ's Initial Decision

For most agencies under the parameters of the APA, there is a two-tiered administrative hearing process. First, the agency representative or ALJ issues to the agency or department head an initial recommended decision containing findings of fact and conclusions of law.[75] Then, upon review of that initial decision, the agency or official issues a final decision after a review of the whole record, giving due regard to the ALJ's opportunity to observe witnesses.[76] If the agency or department head rejects or modifies a finding of fact or proposed decision, the reasons for doing so must be in writing.[77]

In *Thebaut v. Georgia Board of Dentistry*,[78] the court of appeals discussed the inherent difficulty in an agency reversing an ALJ's initial decision, particularly with respect to factual determinations. In a

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classify that child abuse as confirmed." *Id.* § 49-5-180(10).

68. *Id.* § 49-5-183.1(d).
69. *Id.* § 49-5-183.1(i).
70. *Id.* § 49-5-183.1(g).
71. 269 Ga. 308, 496 S.E.2d 912 (1998).
72. *Id.* at 308, 496 S.E.2d at 913.
73. *Id.*
74. *Id.* at 310-12, 496 S.E.2d at 915-17.
75. O.C.G.A. §§ 50-13-17(b), -41(c) (1998).
76. *Id.* § 50-13-41(d).
77. *Id.*
78. 235 Ga. App. 194, 509 S.E.2d 125 (1998).

proceeding brought on behalf of the dental board, the ALJ, after weighing expert testimony presented by the state and the accused dentist, issued an initial decision against the board and held that the evidence did not support a finding that the dentist's actions fell below acceptable medical standards. On review the board, after hearing the testimony of only the dentist charged, reversed the ALJ and substituted its own finding that the standards fell below minimal acceptable standards.[79]

After discussing the national split of authority concerning whether a professional licensing board can issue findings of negligence based upon its own expertise, the court adopted the majority view that it should not, thereby reversing the board's determination.[80]

> [W]here the issues of competence and negligence are of a complicated nature, expert testimony is required to establish the proper competency standards and whether or not they are met. To do otherwise would render this appellate court's review meaningless, as absent expert testimony, we cannot, by telepathy, act as mind readers determining from an empty record the factual determinations of the Board members.[81]

Consequently, on appeal it may be difficult to sustain a reversal of an ALJ's factual decision by the final decision-maker unless there is additional testimony presented to justify an agency's new or different findings of fact.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The APA authorizes any person who has exhausted all administrative remedies to seek review of an agency decision in superior court.[82] On the other hand, the APA expressly does not preclude using "other means of review, redress, relief, or trial de novo provided by law."[83] As a general rule, the law requires a party aggrieved by an agency's decision to raise all issues before the agency and to exhaust any available administrative remedy before filing a petition for judicial review or otherwise initiating a judicial action for equitable relief.[84] The only

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79. *Id.* at 194, 509 S.E.2d at 127.

80. *Id.* at 201-02, 509 S.E.2d at 132-33.

81. *Id.* at 202-03, 509 S.E.2d at 133 (quoting *In re* Schramm, 414 N.W.2d 31, 36-37 (S.D. 1987)).

82. O.C.G.A. § 50-13-19(a) (1998).

83. *Id.*

84. *See Lansford*, 252 Ga. at 415, 314 S.E.2d at 105; Brogdon v. State Bd. of Veterinary Med., 244 Ga. 780, 781, 262 S.E.2d 56, 57 (1979).

exception to this general rule is when an administrative remedy is either unavailable or inadequate.[85]

The failure to pursue judicial review following an agency decision normally will preclude a later effort to seek equitable relief in superior court to challenge the same agency action. For example, in *Chambers of Georgia, Inc. v. Department of Natural Resources*,[86] the department's Environmental Protection Division ("EPD") denied an application for a solid waste handling permit, and the unsuccessful applicant did not file a petition for judicial review to appeal that decision. Fourteen months later, the aggrieved party filed a petition for declaratory and injunctive relief, alleging that it had been harmed by the denial of the application, that the statute relied upon by the EPD in its earlier denial was unconstitutional, and that further efforts at administrative review would be futile.[87] The court of appeals disagreed, concluding that declaratory judgment was not available when the applicant could have raised the issue in the earlier administrative proceeding or on appeal to the superior court as part of a petition for judicial review.[88]

Requiring parties to exhaust administrative remedies is also a recognition by the judiciary of the APA's primary goal to allow agencies to exercise their expertise in interpreting their regulations without resort to courts in the first instance. The supreme court again strongly set forth this principle in *Cerulean Cos. v. Tiller*,[89] which arose out of the conversion of Blue Cross and Blue Shield of Georgia from a nonprofit to a for-profit entity.[90]

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85. *See* Moss v. Central State Hosp., 255 Ga. 403, 404, 339 S.E.2d 226, 227 (1986); Galaxy Carpet Mills, Inc. v. Massengill, 255 Ga. 360, 361, 338 S.E.2d 428, 430 (1986).

86. 232 Ga. App. 632, 502 S.E.2d 553 (1998).

87. *Id.* at 632-33, 502 S.E.2d at 554.

88. *Id.* at 633, 502 S.E.2d at 555. Although an ALJ or agency lacks authority to declare a statute unconstitutional, the courts still require an applicant to raise the issue first at the administrative level so that the constitutional objection can be properly considered on review after administrative proceedings have concluded. *See* Flint River Mills v. Henry, 234 Ga. 385, 386-87, 216 S.E.2d 895, 896-97 (1975); North Fulton Community Hosp., Inc. v. State Health Planning & Dev. Agency, 168 Ga. App. 801, 803, 310 S.E.2d 764, 767 (1983).

89. 271 Ga. 65, 516 S.E.2d 522 (1999).

90. *Id.* at 65, 516 S.E.2d at 522. Georgia law allows a nonprofit corporation governed by the Health Care Plan Act, O.C.G.A. §§ 33-20-1 to -34 (1992 & Supp. 1999), to merge with, or amend its articles of incorporation to become, a for-profit corporation, provided that it submits a plan of conversion to the Insurance Commissioner and notifies the Attorney General, and provided that the commissioner determines, after a public hearing, that the plan is "in the best interest of the company, its policyholders, and the general public." O.C.G.A. § 33-20-34 (Supp. 1999).

Blue Cross developed a conversion plan for approval by the state Insurance Commissioner in which stock in the new for-profit company would be offered to Blue Cross subscribers.[91] After "staff investigation and a public hearing, the commissioner issued an [administrative] order [allowing] Blue Cross to implement the conversion plan."[92] No appeal was taken from that order, nor was any objection made to the commissioner when forms were sent to eligible subscribers to give them the option of receiving stock in the new for-profit entity.[93] Nevertheless, when the merger of the new for-profit entity with WellPoint Health Networks was announced two years later, those Blue Cross subscribers who did not accept the earlier stock offer filed a declaratory judgment action to establish that they were shareholders entitled to profit from the pending merger.[94] The trial court agreed and enjoined the merger from proceeding without this additional shareholder participation.[95]

After noting that orders of the Insurance Commissioner fall within the doctrine of exhaustion of administrative remedies[96] and that there was no judicial review from the commissioner's order or any later use of other available administrative remedies,[97] the court concluded that failure to exhaust such remedies precluded later judicial action to obtain equitable relief:

> The rationale for requiring exhaustion of administrative remedies is that resort to the administrative process will permit the agency to apply its expertise, protect the agency's autonomy, allow a more efficient resolution, and result in the uniform application of matters within the agency's jurisdiction . . . . [T]he legislature entrusted the insurance commissioner with overseeing the process of conversion . . . . The commissioner's wide authority in this area can be respected only if courts decline the invitation to interpret various clauses and terms

91. 271 Ga. at 65, 516 S.E.2d at 522-23.

92. *Id.*, 516 S.E.2d at 523.

93. *Id.* at 65-66, 516 S.E.2d at 523. A petition for judicial review could have been filed within thirty days after the commissioner's order. *See* O.C.G.A. § 50-13-19(b) (1998). In addition, the subscribers could have sought a hearing and decision on the manner of implementation of the conversion plan. *See* O.C.G.A. § 33-2-17 (1992). Finally, the subscribers could have filed an administrative petition for declaratory ruling of the commissioner's action. *See* GA. COMP. R. & REGS. R. 120-2-2-.05 (1983).

94. 271 Ga. at 66, 516 S.E.2d at 523.

95. *Id.*

96. *Id.* (citing First Union Nat'l Bank of Ga. v. Independent Ins. Agents of Ga., 197 Ga. App. 227, 228, 398 S.E.2d 254, 256 (1990); *cf.* Provident Indem. Life Ins. Co. v. James, 234 Ga. App. 403, 406, 506 S.E.2d 892, 894-95 (1998) (exhaustion is not a prerequisite for maintenance of tort action that incidentally concerns violations of Insurance Code).

97. 271 Ga. at 66-67, 516 S.E.2d at 523.

> of an approved conversion plan. Such interpretation is the province of the commissioner subject to judicial review as provided by statute.[98]

Exhaustion of administrative remedies may not be required when a challenge is made to the jurisdiction of an agency to take certain action. In *AT&T Wireless PCS, Inc. v. Forest Condominium Ass'n*,[99] the court of appeals enjoined the construction of a communications tower, which was to be built on property rezoned for a specific commercial use.[100] Because the county planning department issued a building permit for the tower, AT&T contended on appeal that the residents should have first appealed the county's decision to the local board of appeals.[101] The court disagreed, concluding that "the mere existence of an unexhausted administrative remedy does not, standing alone, afford a defendant an absolute defense to a legal action" and, that because the residents challenged the planning department's actions as an unlawful usurpation of zoning authority, exhaustion would not be required "where the defect urged goes to the power of the agency to issue the order."[102]

Therefore, the better course of action is almost always to pursue administrative relief prior to initiating an action in superior court unless it can be conclusively established that no such remedy is available or adequate.

V. STANDARDS FOR JUDICIAL REVIEW

The statutory standard of review of agency decisions under the APA is as follows:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantive evidence on the whole record; or

98. *Id.* at 67, 516 S.E.2d at 524 (citations omitted).
99. 235 Ga. App. 319, 509 S.E.2d 374 (1998).
100. *Id.* at 319, 509 S.E.2d at 375.
101. *Id.* at 321, 509 S.E.2d at 377.
102. *Id.* at 321-22, 509 S.E.2d at 377.

> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[103]

During the survey period, the appellate courts substantially focused on the fifth ground for judicial review referenced above.

Given that the superior court is precluded from substituting its judgment for that of the agency regarding the weight of the evidence on questions of fact,[104] the appellate courts have interpreted the "clearly erroneous" standard of review similar to the "any evidence rule," which makes findings of fact binding on appeal unless wholly unsupported by the evidence. "The 'clearly erroneous' standard of review to be applied by the superior court prevents a de novo determination of evidentiary questions leaving only a determination of whether the facts found by the [ALJ] are supported by 'any evidence.'"[105]

In every case during the survey period in which a superior court reversed a decision by an ALJ based on a contrary evidentiary determination, the court of appeals reversed the superior court based on application of the any evidence rule.[106] A case on point is *Miles v. Andress*,[107] which reviewed the decision of the Georgia Department of Public Safety to suspend a driver's license based upon the department's receipt of an unsatisfied judgment.[108] The superior court reversed the agency's decision, concluding that the suspension was inequitable.[109] The court of appeals overturned the superior court's decision, noting that the trial court erroneously attempted to invoke its power as a court of equity when it was instead sitting as an appellate court and was bound by the evidence presented before the agency.[110]

The any evidence standard under the APA has been applied in other administrative contexts. In appeals from administrative determinations of the State Personnel Board, the superior court must also confine its review to the record and cannot substitute its judgment for that of the

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103. O.C.G.A. § 50-13-19(h) (1998).

104. *Id.*

105. Sawyer v. Reheis, 213 Ga. App. 727, 729, 445 S.E.2d 837, 839 (1994) (citing Hall v. Ault, 240 Ga. 585, 586, 242 S.E.2d 101, 102 (1978)).

106. *See* Reheis v. Drexel Chem. Co., 237 Ga. App. 87, 88, 514 S.E.2d 867, 868 (1999); Reheis v. AZS Corp., 232 Ga. App. 852, 853, 503 S.E.2d 36, 37 (1998); Safety Fire Comm'r v. U.S.A. Gas, Inc., 229 Ga. App. 807, 809, 494 S.E.2d 706, 709 (1997); Georgia Real Estate Comm'n v. Peavy, 229 Ga. App. 201, 202, 493 S.E.2d 602, 603 (1997); Miles v. Andress, 229 Ga. App. 86, 87, 493 S.E.2d 233, 234 (1997).

107. 229 Ga. App. 86, 493 S.E.2d 233 (1997).

108. *Id.* at 86, 493 S.E.2d at 234. "The department, upon receipt of a certified copy of an unsatisfied judgment, shall suspend the driver's license . . . of the person against whom such judgment was rendered except as provided . . . ." O.C.G.A. § 40-9-61(a) (1997).

109. 229 Ga. App. at 86, 493 S.E.2d at 234.

110. *Id.* at 86-87, 493 S.E.2d at 235.

board regarding the weight of the evidence.[111] Using the any evidence standard of review, the court of appeals has reversed decisions of superior courts that rejected factual determinations that were made by ALJs and agencies and that were based upon some evidence in the record.[112]

Even when a statute requires a stricter evidentiary standard for findings made by the agency, the superior court's review still is constrained by the any evidence rule. For example, an application for a solid waste landfill permit can be denied only if clear and convincing evidence reveals that the applicant has attempted to obtain the permit by misrepresentation.[113] Nevertheless, in reviewing an ALJ's decision to uphold the agency's denial of the permit, the superior court still must affirm that decision if it is supported by some evidence in the record.[114]

The term "substantial evidence" also has been equated to any evidence when the superior court is sitting as an appellate tribunal. In *City of Atlanta Government v. Smith*,[115] a police officer was terminated after an evidentiary hearing for filing a false report and paying money confiscated from an arrest to an informant working in an undercover sting operation. The officer appealed to the city civil service board, contending that he was entrapped, but the board rejected that defense because the appeal was a civil, rather than a criminal, proceeding. The superior court reviewed the board's decision pursuant to O.C.G.A. section 5-4-12(b), which limits the scope of review on certiorari to the superior court to a determination of whether the ruling is supported by substantial evidence. The court reversed the board's decision based, in part, on the ground that due process principles precluded the city from disciplining the officer because its behavior was so outrageous.[116]

The court of appeals sitting en banc reviewed some of its earlier decisions in which it distinguished between the any evidence and substantial evidence standards.[117] However, in 1991 the supreme court held that "in Georgia, the substantial-evidence standard is

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111. O.C.G.A. § 45-20-9(m) (1990).

112. *See, e.g.*, Georgia Mountains Community Serv. Bd. v. Carter, 237 Ga. App. 84, 86-87, 514 S.E.2d 86, 87 (1999); Department of Correction v. Glisson, 235 Ga. App. 51, 52, 508 S.E.2d 714, 715 (1998).

113. O.C.G.A. § 12-8-23.1(a)(3)(B)(ii) (1998).

114. Bartram Env'tl, Inc. v. Reheis, 235 Ga. App. 204, 207, 509 S.E.2d 114, 116-17 (1998).

115. 228 Ga. App. 864, 493 S.E.2d 51 (1997).

116. *Id.* at 865, 493 S.E.2d at 52.

117. *Id.* at 866, 493 S.E.2d at 53 (citing Pelis v. LaPorte, 203 Ga. App. 850, 851, 418 S.E.2d 124, 125 (1992); Smith v. Elder, 174 Ga. App. 316, 316, 329 S.E.2d 511, 512 (1985)).

effectively the same as the any-evidence standard."[118] Consequently, the court of appeals overruled its earlier cases recognizing a distinction between the two standards, reversed the superior court's judgment because some evidence supported the board's decision that the police officer engaged in inappropriate conduct, and held that entrapment was not available as a defense.[119]

Accordingly, the odds of a court reversing an ALJ's or agency's decision based upon lack of evidence to support that decision are very slim. Even if a superior court can be convinced to overturn the administrative ruling, it is highly unlikely that the appellate courts will find that no evidence supports the decision. Instead, they will usually hold that the trial court improperly substituted its judgment for that of the agency in question.

VI. APPEALS FROM SUPERIOR COURT

Under O.C.G.A. section 5-6-35(a)(1) and (b), appeals from decisions of the superior courts that review decisions made by state and local administrative agencies must be by application for a discretionary appeal. Although this requirement appears to be simple, there are regular examples of the proper procedure not being followed. The survey period was no exception. In *Simmons v. Georgia Bureau of Investigation*,[120] a direct appeal was taken from the decision of a superior court affirming the dismissal of a state law enforcement agent for misappropriating state funds, which an ALJ and the State Personnel Board approved.[121] The court of appeals summarily dismissed the appeal for failure to file an application for discretionary appeal.[122]

On occasion an issue arises regarding whether an order of the superior court reviewing an administrative decision is appealable. In many instances, when the superior court remands the case to the agency for additional proceedings, the remand order itself is not considered a final order for purposes of further appeal.[123] In rare circumstances, a remand order may be appealable.[124] For example, in *Georgia Public*

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118. Emory Univ. v. Levitas, 260 Ga. 894, 897, 401 S.E.2d 691, 694 (1991).

119. 228 Ga. App. at 865-67, 493 S.E.2d at 52-54; *accord* Angell v. Hart, 232 Ga. App. 222, 223, 501 S.E.2d 594, 595-96 (1998).

120. 236 Ga. App. 59, 510 S.E.2d 618 (1999).

121. *Id.* at 59, 510 S.E.2d at 619.

122. *Id.*

123. *See, e.g.*, Howell v. Harden, 231 Ga. 594, 595, 203 S.E.2d 206, 207 (1974); State Health Planning Review Bd. v. Piedmont Hosp., Inc., 173 Ga. App. 450, 451, 326 S.E.2d 814, 815 (1985).

124. *See, e.g.*, Tri-State Bldg. Supply, Inc. v. Reid, 251 Ga. 38, 39, 302 S.E.2d 566, 568 (1983).

Service Commission v. Campaign for a Prosperous Georgia,[125] the PSC, after a limited hearing, issued an Accounting Order that adopted an alternative rate plan and range of return on equity for Georgia Power Company. After concluding that the Accounting Order was illegal and that the PSC should have treated the matter as a rate case with a full APA-type hearing, the superior court remanded the case to the commission.[126] The PSC and Georgia Power appealed the remand order to the court of appeals, which concluded that the order was appealable because the superior court, rather than remanding for additional evidence that would facilitate a final review of the issue, determined that the challenged process constituted a rate case requiring a full hearing.[127]

VII. OPEN RECORDS AND OPEN MEETINGS

A. *The Open Records Law*

Since its origin in 1959 and continuing until the present, Georgia's open records law[128] has been interpreted broadly by the courts, with most public records held to be disclosable and most exceptions to public disclosure treated very narrowly.[129] In *Fincher v. State*,[130] the court of appeals addressed the issue of whether the State should be liable to a third party for invasion of privacy for releasing a public record. Pursuant to an open records request from a television station, the State Board of Pardons and Paroles released an investigative report containing claims of sexual harrassment by an employee against Fincher, who sued the board for invading his right to privacy. The trial court granted the board's motion for summary judgment, and the court of appeals affirmed.[131]

While there was little doubt that the report was a public record, Fincher contended that the report should have been kept confidential because it was part of his personnel file.[132] However, there is no

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125. 229 Ga. App. 28, 492 S.E.2d 916 (1997).

126. *Id.* at 29, 492 S.E.2d at 917.

127. *Id.*

128. 1959 Ga. Laws 88 (codified as amended at O.C.G.A. §§ 50-18-70 to -77 (1998 & Supp. 1999)).

129. For a discussion of cases analyzing Georgia's open records and open meetings statutes through 1987, see Mark H. Cohen & Stephanie B. Manis, *Georgia's Open Records and Open Meetings Laws: A Continued March Toward Government in the Sunshine*, 40 MERCER L. REV. 1 (1988).

130. 231 Ga. App. 49, 497 S.E.2d 632 (1998).

131. *Id.* at 50, 497 S.E.2d at 634.

132. *Id.* at 51, 497 S.E.2d at 635.

blanket exception in the open records law for personnel records, and the supreme court previously held that mere placement of investigative records in a personnel file does not transform them into confidential personnel records.[133] Moreover, the open records law specifically permits the release of an investigative file ten days after it has been presented to an agency for action or the investigation has otherwise been concluded.[134]

Disclosure of public records still is not required for "medical or veterinary records and similar files, the disclosure of which would be an invasion of personal privacy."[135] The invasion of privacy encompassed by the "similar files" exception has been the subject of a significant amount of litigation. The issue of whether the exception applies in a given situation has been held to be resolved by an examination of the tort of invasion of privacy,[136] although this does not exclude a legitimate inquiry into the operation of a government institution and those employed by it.[137] The tort of invasion of privacy protects the right to be free from unwarranted publicity as well as from the "publicizing of one's private affairs with which the public has no legitimate concern."[138]

The application of the "personal privacy" exception must be considered on a case-by-case basis. In *Fincher* the court found the public interest in obtaining the information, which involved the alleged illegal activity by a public employee, outweighed the employee's privacy interests.[139] Because this is one area of the open records law in which the courts have occasionally ruled in favor of maintaining the confidentiality of records, it may be advisable to notify the person whose privacy interests may be implicated in advance of any release of records to provide that person with an opportunity to file a court action to block the release based on the right to privacy.

In 1999, pursuant to legislation advocated by the Governor, the General Assembly enacted the first major expansion of the open records law in a decade.[140] First, the definition of what constitutes a "public record" was broadened to include

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133. *Id.* (citing Irvin v. Macon Tel. Publ'g Co., 253 Ga. 43, 44, 316 S.E.2d 449, 451 (1984)).

134. *Id.* at 52, 497 S.E.2d at 635 (citing O.C.G.A. § 50-18-72(a)(5) (1998)).

135. O.C.G.A. § 50-18-72(a)(2) (1998).

136. *See* Athens Observer, Inc. v. Anderson, 245 Ga. 63, 65, 263 S.E.2d 128, 130 (1980).

137. *See* Harris v. Cox Enter., 256 Ga. 299, 299-300, 348 S.E.2d 448, 449 (1986).

138. Napper v. Georgia Television Co., 257 Ga. 156, 160, 356 S.E.2d 640, 644 (1987).

139. 231 Ga. App. at 53, 497 S.E.2d at 636.

140. 1999 Ga. Laws 552; 1999 Ga. Laws 809; 1999 Ga. Laws 1222 (each codified at various sections of O.C.G.A. §§ 50-18-70 to -77 (1998 & Supp. 1999)).

> [r]ecords received or maintained by a private person, firm, corporation, or other private entity in the performance of a service or function for or on behalf of an agency, a public agency, or a public office . . . to the same extent that such records would be subject to disclosure if received or maintained by such agency, public agency, or public office.[141]

This goes beyond the prior provision, which affected only those documents received or maintained by a private entity "on behalf of" an agency.[142] Now, unless otherwise exempted, any document collected by a private entity pursuant to an agreement with an agency will be considered a disclosable public record.[143]

Second, the 1999 amendments now mandate that records must be made available for public inspection within three business days of the request (rather than just making a determination of whether the requested records are disclosable), and, for those not made available, a written description of the records and the timetable for their ultimate release must be made available within that same time period.[144] If the records custodian denies access to requested records, in whole or in part, there must be a written specification of the legal authority that exempts the records from disclosure "by Code section, subsection, and paragraph" within three business days.[145]

Third, if requested records are maintained by computer, they should be "made available where practical by electronic means."[146] Finally, a willful violation of the open records law is now a misdemeanor punishable by a fine of up to $100.[147]

The amendments also alter certain existing exceptions to disclosure under the open records law as follows:

(1) A new provision permits social security numbers and insurance or medical information in personnel records to be redacted from otherwise open records.[148]

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141. O.C.G.A. § 50-18-70(a) (Supp. 1999).

142. *Id.* § 50-18-70(a) (1998).

143. The appellate courts have held that, under the former law, private corporations that perform functions on behalf of a public agency are under the auspices of the open records law. *See, e.g.*, Northwest Ga. Health Sys., Inc. v. Times-Journal, 218 Ga. App. 336, 340, 461 S.E.2d 297, 300 (1995); Clayton County Hosp. Auth. v. Webb, 208 Ga. App. 91, 95, 430 S.E.2d 89, 93 (1993).

144. O.C.G.A. § 50-18-70(f) (Supp. 1999).

145. *Id.* § 50-18-72(h).

146. *Id.* § 50-18-70(g).

147. *Id.* § 50-18-74(a).

148. *Id.* § 50-18-72(a)(11.1).

(2) An amendment to an existing provision altered the exception from disclosure for certain real estate appraisals and engineering or feasibility estimates to apply only until the time the final award is made.[149]

(3) A new provision provides that Individual Georgia Uniform Motor Vehicle Accident Reports can be disclosed only if the requesting party submits a written statement of need, which the provision defines, and if a copy of the report is made available to the person identified in the report or that person's representative.[150]

The amendments also added a new Code section to specify that "[t]he procedures and fees provided for in [the open records law] shall not apply to public records . . . requested in writing by a state or federal grand jury, taxing authority, law enforcement agency, or prosecuting attorney in conjunction with an ongoing administrative, criminal, or tax investigation."[151]

B. The Open Meetings Law

Although the case law interpreting the open meetings law[152] is not as extensive as the case law analyzing open records issues, the appellate courts similarly tend to favor openness by reading statutory exceptions narrowly. Nevertheless, to overturn action taken by a governmental body, a violation must be clearly proven. During the survey period, the supreme court reviewed the actions of a county commission in *Board of Commissioners v. Levetan,*[153] in which one of the county commissioners contended that the ordinance was invalid because some commission members discussed it in a closed meeting prior to a public vote.[154] However, the open meetings law contains no provision authorizing the invalidation of an ordinance on the ground that its subject matter was discussed at earlier meetings held in violation of the law.[155] As long as the county commission adopted the ordinance in a public meeting, the official action is binding.[156]

There were also significant legislative changes to the open meetings law in 1999. The General Assembly amended the law to clarify that public corporations are now covered by the requirements of the Act.[157] In addition, there is now a requirement that, prior to any meeting, an

149. *Id.* § 50-18-72(a)(6).
150. *Id.* § 50-18-72(a)(4.1).
151. *Id.* § 50-18-77.
152. *Id.* §§ 50-14-1 to -6 (1998 & Supp. 1999).
153. 270 Ga. 544, 512 S.E.2d 627 (1999).
154. *Id.* at 549, 512 S.E.2d at 632.
155. *Id.*
156. *Id.*
157. O.C.G.A. § 50-14-1 (a)(1)(A) (Supp. 1999).

agenda of all expected matters must be made available and posted at the meeting site during the two-week period prior to the meeting.[158] Failure to list an item on the agenda does not preclude its consideration at the meeting.[159]

Perhaps the most important revision is the protection afforded to a closed meeting by requiring the presiding officer to execute and file with the official minutes of the meeting an affidavit attesting that the closed meeting was devoted to matters that can legally be discussed in a closed meeting under the Act.[160]

158. *Id.* § 50-14-1(e)(1).
159. *Id.*
160. *Id.* § 50-14-4(b).