Mercer Law Review

Volume 32
Number 1 *Annual Survey of Georgia Law*

Article 22

12-1980

Informational Privacy Under the Open Records Act

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I. Introduction

An element essential to the vitality of a democracy is its citizens' ability to obtain information on the workings of their government. Georgia citizens are guaranteed access to all state, county, and municipal public records by the "Open Records Act."[1] In recent years, many individuals and groups, especially the news media, have resorted to this statute in order to gain access to government records. The records sought have been outside the categories of traditional courthouse records such as land titles and mortgages, and have consisted of documents such as ambulance records of a hospital authority,[2] records of a public housing authority,[3] or a departmental evaluation report commissioned by a state university.[4] As a result, Georgia courts have had to reexamine and expand their traditional definition of "public records."

These cases also brought another complex issue before the courts. The same statute that grants Georgia citizens access to public records also places restrictions on that right. For example, one category of public records which cannot be disclosed is within that group "the disclosure of which would be an invasion of personal privacy."[5] In light of the burgeoning amount of personal data collected by the government on individuals, this statutory exception gives the individual a resource to prevent indiscriminate release of personal information to the public.

Legislative recognition of this concept of "informational privacy"[6] is a reflection of the historic treatment by Georgia lawmakers of the right of privacy as a fundamental right. Before any other state or federal court had recognized the right of privacy, the Supreme Court of Georgia had declared, "The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guar-

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1. GA. CODE ANN. §§ 40-2701 to 2703 (1975).
2. Griffin-Spalding County Hosp. Auth. v. Radio Station WKEU, 240 Ga. 444, 241 S.E.2d 196 (1978).
3. Doe v. Sears, 245 Ga. 83, 263 S.E.2d 119 (1980).
4. Athens Observer, Inc. v. Anderson, 245 Ga. 63, 263 S.E.2d 128 (1980).
5. GA. CODE ANN. § 40-2703 (1975).
6. The concept of informational privacy is discussed in Note, 15 WASHBURN L.J. 273 (1976).

anteed to persons in this State by the constitutions of the United States and of the State of Georgia. . . ."[7] These two factors, increasing clamor for access to new categories of government records, and Georgians' historic insistence upon a fundamental right of privacy, have come into conflict in several cases recently decided under the Open Records Act. The purpose of this comment will be to examine the Georgia Supreme Court's position with regard to these competing policy goals. By adhering to an expanded definition of public records and by adhering to a narrow interpretation of the parameters of the right of privacy, the court has made a policy choice that favors increased access to public records over the individual's right of privacy.

II. Judicial Development of the Right of Privacy

The right of privacy was first recognized as a fundamental right in Georgia and in the United States[8] in a landmark opinion written by Justice Andrew J. Cobb in 1905. In *Pavesich v. New England Life Insurance Co.*,[9] plaintiff sought damages from an insurance company, its agent, and a photographer for libel and for invasion of privacy.[10] The trial court dismissed the complaint, but the Georgia Supreme Court reversed, holding that the plaintiff had stated a valid cause of action in seeking damages for invasion of privacy.[11]

In the first part of his brilliantly reasoned opinion, Justice Cobb justified recognition of the right of privacy, in spite of an absence of precedent in Georgia case law, by asserting that, "such absence, even for all time, is not conclusive of the question as to the existence of the right."[12] The two most important questions, he said, were whether the plaintiff had suffered "an injury cognizable by law"[13] and whether the case was not new in principle, but was instead merely "an application of a recognized principle to a new case."[14]

Justice Cobb answered both questions in the affirmative, finding the origin of the concept in ancient sources.[15] He found one origin of the right

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7. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68, 71 (1905).

8. Pember, *The Burgeoning Scope of "Access Privacy" and the Portent for a Free Press*, 64 Iowa L. Rev. 1155, 1156 (1979).

9. 122 Ga. 190, 50 S.E. 68 (1905).

10. *Id.* at 192, 50 S.E. at 69 (The suit resulted from publication by the Atlanta Constitution of an unauthorized photograph of plaintiff in an advertisement).

11. *Id.* at 216, 50 S.E. at 79.

12. *Id.* at 193, 50 S.E. at 69.

13. *Id.*

14. *Id.* at 194, 50 S.E. at 69.

15. *Id.* at 194-95, 50 S.E. at 69-70 (Justice Cobb stated that the right of privacy was embraced by Roman law, and that the principle could also be deduced from the writings of

of privacy in natural law, the right of privacy being one of those liberties obtained in a state of nature and retained by the individual when he or she surrenders other rights for the good of society.[16] The right was also said to be derived from both the state and federal constitutions "in those provisions which declare that no person shall be deprived of liberty except by due process of law."[17] Another provision protecting the right of privacy, according to Justice Cobb, is "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, which is so fully protected in the constitutions of the United States and of this State."[18]

After elaborating on the historical precedent for recognizing a right of privacy, Justice Cobb then defined the limits of that right. One such limit was said to exist in the doctrine of waiver. The right of privacy may be waived generally or for a limited purpose and the waiver may be either express or implied.[19] Examples were given of a candidate for public office, a public office holder, and a member of the learned professions, all of whom allow the public to scrutinize their otherwise private affairs to determine their qualification to serve the public.[20]

Another parameter of the right exists in the obligation of publicity for the public welfare, an obligation insured by the rights of free speech and freedom of the press.[21] Each may be used "as a check upon the other"[22] and "[i]n many cases the law require[s] the individual to surrender some of his natural and private rights for the benefit of the public; and this is true in reference to some phases of the right of privacy as well as other legal rights."[23]

Applying these principles to the facts, Justice Cobb found that plaintiff's privacy had been invaded and that none of the limits on the right were applicable in this instance.[24] With great foresight, he summarized that "the law recognizes within proper limits, as a legal right, the right of privacy . . . we venture to predict that the day will come that the American Bar will marvel that a contrary view was ever entertained by judges

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Sir William Blackstone).

16. *Id.* at 194, 50 S.E. at 70.

17. *Id.* at 197, 50 S.E. at 71. The current provisions are contained in GA. CONST. art. I, § 1, ¶ 1, GA. CODE ANN. § 2-101 (1977), and in U.S. CONST. amend. V.

18. *Id.* at 198, 50 S.E. at 71. The current provisions are contained in GA. CONST. art. I, § 1, ¶ 10, GA. CODE ANN. § 2-110 (1977), and in U.S. CONST. amend. IV.

19. *Id.* at 199, 50 S.E. at 72.

20. *Id.* at 199-200, 50 S.E. at 72.

21. *Id.* at 201-05, 50 S.E. at 73-74.

22. *Id.* at 205, 50 S.E. at 74.

23. *Id.* at 204-05, 50 S.E. at 74.

24. *Id.* at 217, 50 S.E. at 79.

of eminence and ability. . . ."[25]

Decisions over the next seventy-five years proved that Justice Cobb's recognition of the right of privacy was not an isolated judicial event. The idea was so well established that in 1939 the Georgia Court of Appeals could state, "Whatever may be the rule in other jurisdictions as to the right of . . . privacy it has been definitely settled in this State that such a right exists."[26] However, despite repeated acknowledgement of the soundness of Justice Cobb's opinion, the judicial trend in Georgia has been to emphasize the limiting aspects of the decision in *Pavesich* rather than those aspects which made positive additions to the right of privacy.

An example of this tendency to restrict the right of privacy is illustrated in the cases involving lawsuits by debtors against creditors for invasion of privacy because of collection techniques. One typical case was *Davis v. General Finance and Thrift Corp.*,[27] in which the alleged invasion of privacy was the publication of a telegram by the defendant-creditor threatening legal action against plaintiff for a debt. The Georgia Court of Appeals held that the plaintiff had stated no cause of action for an invasion of privacy.[28] Citing the famous article by Warren and Brandeis[29] which had been quoted in *Pavesich*, the court stated: "This right to sue for a violation of the right of privacy is one of recent origin and has been very much restricted from the beginning."[30] Another reason for denying plaintiff relief was that the right of privacy must be restricted to protect only ordinary sensibilities and not supersensitiveness because "[t]here are some shocks, inconveniences and annoyances which members of society in the nature of things must absorb without the right of redress."[31]

A more graphic illustration of the direction in which the appellate courts were headed was given in *Waters v. Fleetwood*.[32] In this rather sensational case, the Georgia Supreme Court affirmed the trial court's dismissal of plaintiff's action to enjoin commercial sale of a photograph of a murder victim.[33] The appellate court concurred with opinions of other jurisdictions which had held that publication in connection with matters

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25. *Id.* at 220, 50 S.E. at 81.

26. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 99, 2 S.E.2d 810, 815 (1939).

27. 80 Ga. App. 708, 57 S.E.2d 225 (1950).

28. *Id.* at 710, 57 S.E.2d at 226-27.

29. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

30. 80 Ga. App. 710, 57 S.E.2d at 227.

31. *Id.* at 711, 57 S.E.2d at 227.

32. 212 Ga. 161, 91 S.E.2d 344 (1956).

33. *Id.* at 168, 91 S.E.2d at 348. (The subject of the photograph was the unrecognizable mutilated body of plaintiff's fourteen year-old daughter).

of public interest could be a violation of no one's legal right of privacy.[34] The court observed that this murder was a subject of public interest and a matter of public investigation and, therefore, the newspaper could not be prohibited from disseminating photographic information about the incident on the basis that plaintiff's privacy was being invaded.[35]

Cabaniss v. Hipsley[36] was one of the few cases since *Pavesich* to add any positive substance to the law of privacy in Georgia. Like *Pavesich*, *Cabaniss* dealt with the unauthorized use by defendant of a photograph of plaintiff.[37] Judge Eberhardt of the Georgia Court of Appeals clarified the law as to the right of privacy in Georgia by the same method as had Justice Cobb in *Pavesich*—he incorporated the theories of an eminent legal scholar, Dean Prosser.[38] Judge Eberhardt adopted Prosser's four categories of torts which constitute an invasion of privacy.[39] Judge Eberhardt analyzed the facts in light of these categories and also classified preceding Georgia cases as far back as *Pavesich*.[40]

But despite his listing additional situations where the right of privacy might be applicable, Judge Eberhardt eventually based his holding on one of the limiting features of the law. Finding that the matters disclosed by defendant had previously been made public by plaintiff, plaintiff's case failed on the theory that defendant had disclosed embarrassing private facts about plaintiff.[41] Citing *Pavesich* on waiver of the right of privacy, Judge Eberhardt agreed with Justice Cobb and with Warren and Brandeis that, "to whatever degree . . . a man's life has ceased to be private, to that extent the protection is to be withdrawn."[42]

A recent decision made explicit the negative attitude of the courts toward enlarging the bounds of the right of privacy. In *Hines v. Columbus Bank and Trust Co.*,[43] a bank officer had written a letter to the United States ambassador to Costa Rica requesting information on the plaintiff for one of its customers.[44] Plaintiff, who was not a bank customer,

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34. *Id.* at 163-67, 91 S.E.2d at 346-48.

35. *Id.* at 167, 91 S.E. 2d at 348.

36. 114 Ga. App. 367, 151 S.E.2d 496 (1966).

37. *Id.* at 368-69, 151 S.E.2d at 499. Plaintiff, a strip-tease dancer, had unsuccessfully sought to prohibit distribution of a revealing portrait of herself by claiming the display of the photograph amounted to an invasion of privacy. *Id.*

38. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

39. The four groupings consisted of: 1) intrusions upon plaintiff's seclusion; 2) public disclosure of embarrassing facts about plaintiff; 3) publicity placing plaintiff in a false light in the public eye; and 4) appropriation for the defendant's advantage of plaintiff's name or likeness. *Id.* at 389.

40. 114 Ga. App. at 371-78, 151 S.E.2d at 500-04.

41. *Id.* at 370, 151 S.E.2d at 501-02.

42. *Id.* at 374, 151 S.E.2d at 502, *quoting*, Warren and Brandeis, *supra* note 29, at 215.

43. 137 Ga. App. 268, 223 S.E.2d 468 (1976).

44. *Id.* at 268, 223 S.E.2d at 469 (The information was to be used in a lawsuit against

brought an action for invasion of privacy against the bank.[45] The issue was whether or not the court should extend the right of privacy to create a cause of action based on these facts.[46] The court replied with a negative answer based on "[l]aw, logic, and the practicalities of modern commerce."[47]

The court characterized the right of privacy as a judge-made tort and balanced the right against the necessities of commerce.[48] Citing *Davis* and the Warren-Brandeis article, the court held that "the courts should not interfere with the established business practice whereby inquiries are made to get information concerning activities, reputation, and financial responsibility—provided it is sought legitimately and not for a malevolent purpose."[49] Judge Quillian disagreed that the issue was whether or not plaintiff had stated a cause of action in her complaint. Rather, he said the issue was whether plaintiff's complaint disclosed with certainty that plaintiff would not be entitled to relief under any proveable state of facts which would support plaintiff's claim.[50] The conclusion reached by Judge Quillian was that plaintiff should not be precluded from recovery "[s]ince the defendants requested information about the plaintiff they may not escape responsibility for the manner in which it was obtained or the harm thereby caused by delegating to another the job of obtaining such information."[51]

III. Judicial Treatment of the Right of Privacy Under the Open Records Act

A. *Early Judicial Interpretation*

Georgia's Open Records Act[52] became law in 1959. In the original version of the act, the only exception to the disclosure requirements was for "those [records], which by order of a court of this State or by law, are prohibited from being open to inspection by the general public."[53] The provision exempting records from disclosure when the result would be an invasion of privacy did not become a part of the act until added as an

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plaintiff).

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 270, 223 S.E.2d at 470.
49. *Id.*
50. *Id.* at 273, 223 S.E.2d at 468 (Quillian, J., dissenting).
51. *Id.* at 273-74, 223 S.E.2d at 472.
52. Ga. Code Ann. § 40-2701 (1975).
53. *Id.*

amendment in 1967.[54]

The statute had been in effect for seventeen years before it generated any major case law.[55] The first case to deal with the statute in any significant way was *Houston v. Rutledge*,[56] decided in 1976. An action was brought by representatives of two newspapers to require a sheriff to release records concerning the death of inmates.[57] The significance of the holding in *Houston* was twofold.[58] First the court issued its initial definition of a public record under the act. The court rejected defendant's argument that the records were not public records because no law required the sheriff to make or keep them.[59] Rather, the court said, the records were of a public nature merely because they "were prepared and are maintained by the sheriff, or at his direction, in the ordinary course and operation of this public office."[60] With this expansive definition of public records the court laid the foundation upon which later decisions dealing with the right of privacy would be based.

The second significant aspect of the holding was the establishment of a balancing test to decide whether public records should be disclosed.[61] The courts would be required to balance the "interest of the public in favor of inspection against the interest of the public in favor of non-inspection."[62] This balancing test was also to become a cornerstone of future decisions under the act.

The next open records case which had any bearing on informational privacy was *Griffin-Spalding County Hospital Authority v. Radio Station WKEU*,[63] in which the Georgia Supreme Court made its initial encounter with the statutory privacy exception.[64] Plaintiff, a radio station, sought disclosure of ambulance records of the defendant hospital authority.[65] The hospital authority argued in the trial court that since the records contained private information (patients' medical histories) interspersed with public information, none of the records could be released without invading patients' privacy.[66] The trial court solved this dilemma

54. GA. CODE ANN. § 40-2703 (1975).
55. Sentell, *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97, 125 (1978).
56. 237 Ga. 764, 229 S.E.2d 624 (1976).
57. *Id.*
58. Sentell, *supra* note 55, at 127.
59. 237 Ga. at 765, 229 S.E.2d at 626.
60. *Id.*
61. Sentell, *supra* note 55, at 126.
62. 237 Ga. at 765, 229 S.E.2d at 626.
63. 240 Ga. 444, 241 S.E.2d 196 (1978).
64. Sentell, *supra* note 55, at 129.
65. 240 Ga. at 444, 241 S.E.2d at 198.
66. *Id.* at 445, 241 S.E.2d at 198.

by ordering the authority to maintain two sets of records, one containing only non-private information which could then be legally disclosed.[67]

On appeal, the Georgia Supreme Court agreed that the private information should not be released, but disagreed as to the method for protecting patients' privacy. The court said that to require two sets of records to be kept was inconsistent with the statute.[68] The authority was ordered to expunge from existing records any information the public had no right to see.[69] In discussing the financial burden of this requirement, the court emphasized the importance of the privacy exception by noting the vulnerability of the hospital to liability for invasion of privacy if a mistake was made in separating the information.[70]

B. Later Decisions: The Informational Privacy Issue Emerges

The Georgia Supreme Court has had the opportunity to delineate the scope of the privacy exception to the Open Records Act in a series of cases decided since *Houston* and *Griffin-Spalding*. In dealing with the issue, the trend has been for the court to restrict the dimensions of the right of privacy and to refuse to apply the right to situations where informational privacy is at stake. The court has thus followed the line of post-*Pavesich* decisions that focused on the limits of the right of privacy.

In *Northside Realty Associates, Inc. v. Community Relations Commission*,[71] the privacy issue was dealt with only indirectly, but that decision established a pleading rule which has had a major bearing on the limits of the privacy exception. Plaintiffs sought disclosure of Commission records regarding compliance with the Federal Fair Housing Act.[72] The trial court ruled that as to four of the items, plaintiffs had no right to demand disclosure because the items contained no information relating to plaintiffs.[73] The Georgia Supreme Court reversed that ruling by holding that Georgia citizens need not show any special interest in public records to be entitled to copy and inspect them.[74]

The portion of the holding in *Northside* which affected the privacy issue was the appellate court's rule as to the allocation of the burden of proof in cases in which there was a demand for disclosure. Adopting the concurring opinion of Justice Ingram in *Houston v. Rutledge*,[75] the court

67. *Id.*
68. *Id.* at 447, 241 S.E.2d at 199.
69. *Id.*
70. *Id.*
71. 240 Ga. 432, 241 S.E.2d 189 (1978).
72. *Id.* at 433, 241 S.E.2d at 190.
73. *Id.* at 434, 241 S.E.2d at 190.
74. *Id.* at 435, 241 S.E.2d at 191.
75. 237 Ga. at 766-67, 229 S.E.2d at 627.

in *Northside* stated, "if it is found that the appellants have made a request for identifiable public records within the appellees' possession, the burden is cast on the appellees to explain why the records should not be furnished."[76] The policy basis for allocating the burden to the record holder was alluded to in the concurring opinion in *Houston:*

> [U]nless the sheriff on remand can show some persuasive reason why the files should not now be made available for public inspection, I believe we have a duty under the First Amendment to the United States Constitution and Code Ann. § 40-2701 to require the files to be made available for public inspection without further delay.[77]

The court in *Northside* thus gave its strong support to the policy favoring disclosure of government records over the informational privacy interests which arise in these situations. This was accomplished by the formulation of a rule of evidence which is weighted in favor of plaintiffs in cases where the plaintiff is requesting disclosure. The holder of the records now bears the burden of persuading the fact-finder as to the reasons why the records should not be released, including the invasion of privacy defense. If the record keeper cannot carry this burden, the records must be released. Adding to the difficulty of the record keeper's task is the fact that a record keeper, as defendant, will usually be arguing for an interest that exists outside himself. The defendant will be arguing for a right of informational privacy that exists in the subjects of the records, subjects who are frequently not even parties to the action. As a result, the record keeper may not be wholly committed to protecting the private information in the records.

In 1980, the Georgia Supreme Court proved that indirect means were not the only judicial resources for dealing with the privacy exception to the Open Records Act. Two cases were decided in which the informational privacy issue had been brought squarely before the court. In its decisions the court made explicit its resistance to expansion of the right of privacy into the area of informational privacy.

Doe v. Sears[78] was an action brought by an editor of an Atlanta newspaper to require disclosure of records of the Atlanta Housing Authority (AHA) which contained names, addresses, and income information of public housing tenants.[79] AHA and intervening tenants argued that release of the records would constitute an invasion of tenants' privacy, but the trial court disagreed and ordered disclosure. The lower court held

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76. 240 Ga. at 436, 241 S.E.2d at 191.

77. 237 Ga. at 766-67, 229 S.E.2d at 627 (Ingram, J., concurring).

78. 245 Ga. 83, 263 S.E.2d 119 (1980).

79. *Id.* at 84, 263 S.E.2d at 121 (The request was made as part of an investigation of political favoritism).

that tenants whose rent was six months past due had waived their right of privacy.[80]

The Georgia Supreme Court affirmed the trial court. The court found AHA to be a public body created by statute to exercise "public and essential government functions."[81] The property of AHA is public property and AHA housing constitutes a "public use and purpose for which public monies are spent."[82] Since AHA is a public body, the court found its records to be necessarily subject to the disclosure requirements of the act, unless the records are the object of a specific statutory exception.[83]

The court found no such applicable exceptions. Specifically, the right of privacy was no barrier to disclosure.[84] Although the parties had requested the court to "delimit with precision the full extent of the federal and state constitutional rights of privacy, if any, and state statutory and common law rights of privacy, if any, as to the tenants' rent accounts with AHA,"[85] the court declined the invitation. The court concluded that it was unnecessary to decide the full extent of the tenants' rights of privacy and the court instead applied the doctrine of waiver of right.[86]

The court cited *Pavesich* for the principle that the right of privacy may be expressly or impliedly waived.[87] The court then gave as one example the debtor-creditor situation in *Davis* where the court had held that a debtor impliedly waived his or her right of privacy to obtain credit and to allow the creditor to collect.[88] From this holding, the court in *Sears* deduced the principle that a tenant in default under a lease impliedly consents to reasonable and necessary disclosures of his arrearage and financial condition to persons who are properly concerned with the status of the rental account.[89] The court then declared that the general public has a legitimate concern with the rent payment patterns of public housing tenants.[90]

The addition of the AHA to the courts' list of public bodies whose files are public records diminishes the scope of the right of privacy. The court in *Sears* issued an expanded definition of public records which was a direct heritage from *Houston v. Rutledge*.[91] Like the court in *Houston*, the

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80. *Id.*
81. *Id.* at 85, 263 S.E.2d at 122.
82. *Id.*
83. *Id.*
84. *Id.* at 87-88, 263 S.E.2d at 122-23.
85. *Id.* at 86, 263 S.E.2d at 122.
86. *Id.*
87. *Id.* at 87, 263 S.E.2d at 122.
88. *Id.* at 87, 263 S.E.2d at 123.
89. 245 Ga. at 87, 263 S.E.2d at 123.
90. *Id.*
91. 237 Ga. 764, 229 S.E.2d 624 (1976).

court in *Sears* looked not at the nature of the records to classify them as public or private, but instead looked to the nature of the office in which the records were prepared. Although the court enumerated a long list of factors which served to make AHA a public body,[92] the court made no equivalent inquiry into the public or private nature of the records' contents. The court merely assumed that because the records were created in a public office, they had to be public records.

In making this assumption, the court ignored the possibility that certain records, even if compiled in a public office, may contain private information. Of course, such private information may still be protected from disclosure by the statutory privacy exception. But the import of the holding in *Sears* is that the plaintiff in a disclosure action is not required to prove that the records he is seeking from a public office are public records. The court makes that assumption for the plaintiff. Like the holding in *Northside*, the effect of the holding in *Sears* is to cast an additional pleading burden upon the defendant, who must now distinguish between public and private records created in a public office.

The court in *Sears* created another impediment to expansion of the right of informational privacy when it relied upon the waiver doctrine. The court made the illogical statement that employment of the waiver doctrine meant it was not compelled to decide the full extent of the tenants' rights of privacy.[93] The court felt itself sufficiently prepared to explain how the tenants had given up their privacy rights without the necessity of first defining just what those rights were. A more logical process would have been for the court to delineate the extent of tenants' privacy rights first, *then* to proceed to deciding the waiver issue. The holding leaves the door open for even more extensive applications of the waiver doctrine in future cases at the expense of privacy rights. By explaining more clearly the exact extent of the privacy rights involved here, the court could have avoided setting this dubious precedent.

In quoting *Pavesich*, the court noted that the right of privacy may be waived in whole or in part.[94] The court also noted that the limits of the waiver doctrine as set forth in *Pavesich* meant that "the law continues to protect a person's right of privacy to whatever extent it has not been waived."[95] But the discussion of the idea of partial waiver ended there. The court set no specific limits as to how far plaintiff's inquiry into AHA's records could go before becoming an invasion of privacy. The court spoke only in general terms of allowing disclosure of a tenant's "arrearage and his financial condition . . . to persons who properly are con-

92. 245 Ga. at 85, 263 S.E.2d at 121-22.
93. *Id.* at 86, 263 S.E.2d at 122.
94. *Id.* at 87, 263 S.E.2d at 122.
95. *Id.*

cerned. . . ."[96] This defect in reasoning is another product of the court's refusal to delineate the full extent of tenants' privacy rights. The court could not effectively decide the limits of the waiver doctrine if it did not know the full extent of the privacy rights.

In general, the decision in *Sears* continued the judicial encroachment upon the right of privacy since *Pavesich* by expanding the waiver doctrine. In *Pavesich,* Justice Cobb recited only three examples of individuals who might, to a limited extent, waive their right of privacy: a candidate for public office, a member of the learned professions, or a public office-holder.[97] In *Davis,* the doctrine was extended to apply to persons who obtain credit.[98] In *Waters,* the doctrine was said to apply to the parents of a murdered child.[99] Now, in *Sears,* the court has extended that doctrine again, this time to apply to public housing tenants whose rent is past due. In each case the application of the doctrine moved the court further away from the original ideas of Justice Cobb. As originally expounded, the doctrine was to apply only in narrow circumstances, a limited concept to be called upon only as necessary and proper in the circumstances. The holding in *Sears* is far removed from Justice Cobb's statement that

> any person who engages in any pursuit . . . which calls for approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise . . . to accord him the approval or patronage which he seeks.[100]

The reasoning in *Sears* was reflected in *Athens Observer, Inc. v. Anderson.*[101] An Athens, Georgia newspaper requested disclosure by the University of Georgia under the Open Records Act of a report on the university's mathematical sciences program.[102] The trial court refused to order disclosure, saying that the need for candid evaluation of personnel outweighed the public's right to disclosure.[103]

The Georgia Supreme Court reversed the decision and ordered disclosure.[104] The court first concluded that the report was a public record since it was commissioned by public officers and "was maintained in the

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96. *Id.* at 87, 263 S.E.2d at 123.
97. 122 Ga. at 199-200, 50 S.E. at 72.
98. 80 Ga. App. at 711, 57 S.E.2d at 227.
99. 212 Ga. at 163-67, 91 S.E.2d at 344-48.
100. 122 Ga. at 200, 50 S.E. at 72.
101. 245 Ga. 63, 263 S.E.2d 128 (1980).
102. *Id.* at 63, 263 S.E.2d at 129 (The report was commissioned by the university and made by outside consultants).
103. *Id.*
104. *Id.* at 67, 263 S.E.2d at 131.

course of the operation of a public office,"[105] as required by *Houston v. Rutledge*. The court also found that release of the report would not amount to an invasion of privacy. The report's subjects, university employees, were public officers and the public could legitimately inquire into the operation of the university and its employees.[106] The court reversed the trial court's findings under the balancing test and held that non-disclosure would contravene the public policy of the state in favor of open government.[107]

Three Justices dissented from the majority opinion. Justice Jordan, writing for the dissenters, did not agree that the records were public records; rather, he felt that the language of the statute in reference to "public records" was "not broad enough to encompass all papers . . . of all description."[108] This report was not an official record, but consisted of only written evaluations and opinions of outside experts.[109] That was not enough to make the records "public" or to justify their release.[110]

The majority's classification of this report as a public record was predictable after the holdings in *Houston* and *Sears*. The court had established in those cases that its inquiry would extend only into the nature of the office and not into the nature of the records or their contents. The natural consequence of that reasoning was the holding in *Athens* which gave a public character to documents on the periphery of the traditional definition of public records. That a state university is a public body cannot be denied. But to classify all the documents emanating out of such an institution as public records is a dubious and peril-laden proposition. The characterization draws into its sweep not only records which are only marginally public in nature, but also many other papers in which the public may have no legitimate interest at all. A more discriminating standard for defining public records would better serve the protection of the right of informational privacy of university officials.

The court also characterized the subjects of the reports as public officials.[111] Many state university employees would be surprised to learn they are "public officials" performing "official duties." Undoubtedly the public has some interest in these employees' performance since their salaries are paid with tax dollars. But here again, as in *Doe v. Sears*, the court set no precise boundaries as to the limits of the public's inquiry. A university professor should owe less of an obligation to the public eye than most

105. *Id.* at 64, 263 S.E.2d at 129.
106. *Id.* at 65-66, 263 S.E.2d at 130.
107. *Id.* at 66, 263 S.E.2d at 130.
108. *Id.* at 67, 263 S.E.2d at 131 (Jordan, J., dissenting).
109. *Id.*
110. *Id.*
111. *Id.* at 66, 263 S.E.2d at 130.

other public officials, for example, an elected office-holder. Dean Prosser realized the necessity for making such a distinction when he stated, "there is some rough proportion to be looked for, between the importance of the public figure or the man in the news, and of the occasion for the public interest in him, and the nature of the private facts revealed."[112]

The court in *Athens* made no such distinction and placed the university's employees into the same classification as any other public official. Such a procedure contradicts the limited nature of the waiver doctrine as contemplated by Justice Cobb in *Pavesich* when he stated that "the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver."[113] The decision in *Athens* further clouds the meaning of those "necessary and proper" limits.

IV. Conclusion

In these recent cases decided under the Open Records Act, Georgia appellate courts have been confronted with competing public interests. The interest of the public in access to government records has been set against the individual's desire to shield himself from unnecessary public scrutiny in matters protected under the aegis of the right of privacy. The courts have indicated their support of the former policy by employing various techniques to limit the effectiveness of the privacy defense to a demand for disclosure. The courts have shifted the burden of proof on the privacy and public records issues to the defendant, expanded the definition of public records, and resorted to the waiver doctrine to justify granting access to new categories of public records.

The eventual impact of these decisions is a matter of speculation. Will the courts finally reverse this trend and widen the scope of the privacy exception? Or will the courts continue to expand application of the statute at the expense of diminishing the vitality of what was once considered a fundamental right in Georgia? Will the Georgia courts which were once in the forefront of judicial progress in recognizing the right of privacy now be content to let that right wither under pressure for access to government records? Only time and future decisions will tell if the right of privacy in Georgia law has been dealt a fatal blow.

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112. Prosser, *supra* note 38, at 417.
113. 122 Ga. at 199, 50 S.E. at 72.