Mercer Law Review

Volume 60
Number 2 *Articles Edition*

Article 10

3-2009

Must Government Contractors "Submit" to Their Own Destruction?: Georgia's Trade Secret Disclosure Exemption and *United HealthCare of Georgia, Inc. v. Georgia Department of Community Health*

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Must Government Contractors "Submit" to Their Own Destruction?: Georgia's Trade Secret Disclosure Exemption and *United HealthCare of Georgia, Inc. v. Georgia Department of Community Health*

I. INTRODUCTION

The notion that the records of government offices should be open and accessible to the public is rooted in the basic political structure of the State of Georgia.[1] The Georgia Constitution provides that "[p]ublic officers are the trustees and servants of the people and are at all times amenable to them."[2] Further, it is generally believed in this country that openness in government increases efficiency and responsiveness while decreasing incidents of corruption.[3] Still, concerns about

1. *See* GA. CONST. art. I, § 2, para. 1.

2. *Id.*

3. *See id.*; *see generally* Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451 (1975); R. Perry Sentell, Jr., *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978); Douglas Q. Wickham, *Let the Sun Shine In!: Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U. L. REV. 480 (1973).

government decision-making and general privacy rights have led to the creation of various exclusions from disclosure under open records laws.[4] In *United HealthCare of Georgia, Inc. v. Georgia Department of Community Health*,[5] the Georgia Court of Appeals confronted one such disclosure exclusion contained in the Georgia Open Records Act[6] (the Act): the exclusion of trade secrets that have been submitted to the government by private owners.[7]

While it is settled law in Georgia that private trade secrets submitted to a state agency during the performance of a contract are excluded from disclosure under the Act,[8] it remains unclear whether trade secrets submitted to a state agency as part of a voluntary bid on a government contract are excluded from disclosure. This uncertainty of the applicability of the trade secret protection mandated by the Act requires clarification from either the judiciary or the Georgia General Assembly because trade secret protection in government contracting is vital to the ability of the state to provide public services. If the law prevents contractors from protecting trade secrets from disclosure to the general public when bidding on government contracts, many contractors will forgo government contract work, resulting in diminished quality and availability of many government services.

II. FACTUAL BACKGROUND

Georgia requires its Department of Community Health (the Agency) to administer a health insurance plan for state employees known as the State Health Benefit Plan (the Plan).[9] In 2005, through a public bidding process, the Agency selected United HealthCare and its subsidiary, United HealthCare of Georgia (United HealthCare), to be third-party administrators of the Plan.[10] Accordingly, the Agency and United HealthCare entered into a contract (the Contract) authorizing United

4. *See* Michael L. Van Cise, *The Georgia Open Records Law Electronic Signature Exception: The Intersection of Privacy, Technology, and Open Records*, 12 J. INTELL. PROP. L. 567 (2005).

5. 293 Ga. App. 84, 666 S.E.2d 472 (2008).

6. O.C.G.A. §§ 50-18-70 to -72 (2006 & Supp. 2008).

7. *United HealthCare*, 293 Ga. App. at 84, 666 S.E.2d at 474.

8. *See* Douglas Asphalt Co. v. E. R. Snell Contractor, Inc., 282 Ga. App. 546, 551-52, 639 S.E.2d 372, 376-77 (2006).

9. O.C.G.A. § 45-18-2(a) (2002).

10. *See* O.C.G.A. § 45-18-6(c) (2002) (authorizing the Georgia Department of Community Health to contract with private third parties for administration of the State Health Benefit Plan).

HealthCare to administer the Plan by processing and paying "health insurance claims . . . out of a bank account funded by [the Agency]."[11]

In March 2006, the South Georgia Physicians Association, LLC, and the Medical Association of Georgia (collectively, the Physicians' Association) filed a request pursuant to the Georgia Open Records Act[12] seeking disclosure of documents related to United HealthCare's administration of the Plan. Specifically, the Physicians' Association sought disclosure of United HealthCare's fee schedules, contracts executed with medical care providers, correspondence with the Agency, as well as any form contracts related to United HealthCare's administration of the Plan.[13] Of these requested documents, the Agency was only in possession of records of its correspondence with United HealthCare and various form provider contracts United HealthCare had supplied to the Agency as part of the public bidding process (the Agency Documents). The fee schedules and provider contracts were never supplied to the Agency and remained in the sole possession of United HealthCare (the United Documents). While United HealthCare refused to disclose the United Documents, the Agency concluded that the Agency Documents were subject to the Act and therefore made the documents available to the Physicians' Association. United HealthCare then filed suit against the Agency, seeking to temporarily and permanently enjoin the disclosure of both the Agency and the United Documents.[14]

The Physicians' Association intervened in the suit and counterclaimed, seeking disclosure of both the Agency and the United Documents. After discovery concluded, United HealthCare moved for summary judgment, claiming that the United Documents were not "public records" within the meaning of the Act and that both the United and the Agency Documents were exempt from disclosure under the trade secret exclusion to the Act. Specifically, United HealthCare argued that the United Documents were not public records because they had never been submitted to the Agency. The Physicians' Association moved for summary judgment contending that, as a matter of law, all the documents in question were public records, subject to disclosure under the Act.[15]

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11. United HealthCare of Ga., Inc. v. Ga. Dep't of Cmty. Health, 293 Ga. App. 84, 85, 666 S.E.2d 472, 475 (2008).

12. O.C.G.A. §§ 50-18-70 to -72 (2006 & Supp. 2008).

13. *United HealthCare*, 293 Ga. App. at 85, 666 S.E.2d at 475. Interestingly, the facts of the case suggest that the Physicians' Association did not actually request the contract executed between the Agency and United HealthCare. Rather, the focus appears to have been on the contracts and arrangements between United HealthCare and individual care providers. *Id.*

14. *Id.* at 85-86, 666 S.E.2d at 475.

15. *Id.* at 86, 666 S.E.2d at 475-76.

The Fulton County Superior Court granted summary judgment to the Physicians' Association. The court first ruled as a matter of law that both sets of documents in question were public records under the Act.[16] The court then ruled that neither the Agency Documents nor the United Documents qualified for exemption from disclosure under the Act because neither set of documents had been "'required by law to be submitted to a government agency.'"[17] United HealthCare appealed.[18] The Georgia Court of Appeals affirmed the trial court's ruling that the documents were public records under the Act;[19] however, the court vacated the trial court's ruling that neither of the sets of documents were exempt from disclosure under the Act.[20] Rather, the court held that the trial court had misinterpreted the "required by law to be submitted" language of the Act and erred by not first considering whether the documents were trade secrets under Georgia law.[21] Accordingly, the appellate court vacated the trial court's ruling and remanded the case for a determination of whether the documents constitute trade secrets under Georgia law.[22]

III. LEGAL BACKGROUND

In recent years, "[g]ood government has become increasingly synonymous with open government."[23] In this spirit, the Georgia Open Records Act[24] (the Act) was enacted on February 27, 1959[25] with the intent of encouraging public access to information related to the

16. *Id.*, 666 S.E.2d at 476.

17. *Id.* at 90, 666 S.E.2d at 478 (quoting O.C.G.A. § 50-18-72(b)(1) (Supp. 2008)).

18. *Id.* at 86, 666 S.E.2d at 476.

19. *Id.* at 89, 666 S.E.2d at 478.

20. *Id.* at 92-93, 666 S.E.2d at 480.

21. *Id.* at 92, 666 S.E.2d at 480.

22. *Id.* at 93, 666 S.E.2d at 480.

23. 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, 1 (1988).

24. O.C.G.A. §§ 50-18-70 to -72 (2006 & Supp. 2008).

25. 1959 Ga. Laws 88 (codified as amended at O.C.G.A. § 50-18-70 (2006)). Notably, Georgia's Open Records Act was passed seven years prior to the enactment of the Federal Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)). However, the lack of detail provided in the original act leads at least one author to doubt whether Georgia was truly a leader in the development of open records laws. Van Cise, *supra* note 4, at 578 (noting the lack of a definition of *public records* in 1959 Ga. Laws 88); *but see* Meri K. Christensen, *Opening the Doors to Access: A Proposal for Enforcement of Georgia's Open Meetings and Open Records Laws*, 15 GA. ST. U. L. REV. 1075, 1080-82 (arguing that the "open government movement" started with the states and not the federal government).

functioning of government and its expenditure of public funds.[26] By mandating that all citizens should have the opportunity to inspect the records of public offices, the legislature sought to ensure effective accountability in government and to help protect the public from "'closed door' politics."[27] Additionally, by allowing the public to observe the inner-workings of government, the legislature intended the Act to increase public confidence in the actions of elected officials.[28] The Act broadly provides that "public records" of all government agencies are to be "open for a personal inspection by any citizen of th[e] state."[29] The expansive language of the Act, along with its purpose of fostering public awareness of the activities of public officials, suggest that the Act should be interpreted broadly to include all materials and information that are not statutorily exempt from disclosure.[30] As the Georgia Supreme Court has explained, all records of government are open for public inspection unless they are specifically exempted by the Act or another applicable code section.[31]

A. *Definition of Public Records*

Despite its broad scope, the original version of the Act failed to define "public records" subject to disclosure.[32] Rather, the Georgia Supreme Court, interpreting the Act in *Houston v. Rutledge*,[33] first defined public records as "documents, papers, and records prepared and maintained in the course of the operation of a public office."[34] In *Houston* a county sheriff claimed that records related to the deaths of several inmates were not public records under the Act because they were prepared and maintained pursuant to his discretionary orders and not any statutory obligation.[35] The court disagreed, however, reasoning that because the documents were prepared and maintained in the ordinary course of the

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26. McFrugal Rental of Riverdale, Inc. v. Garr, 262 Ga. 369, 369, 418 S.E.2d 60, 60 (1992); Athens Observer, Inc. v. Anderson, 245 Ga. 63, 66, 263 S.E.2d 128, 130 (1980).

27. United HealthCare of Ga., Inc. v. Ga. Dep't of Cmty. Health, 293 Ga. App. 84, 86, 666 S.E.2d 472, 476 (quoting Cent. Atlanta Progress, Inc. v. Baker, 278 Ga. App. 733, 734, 629 S.E.2d 840, 842 (2006)).

28. *Athens Observer*, 245 Ga. at 66, 263 S.E.2d at 130.

29. O.C.G.A. § 50-18-70(b) (2006).

30. *United HealthCare*, 293 Ga. App. at 86, 666 S.E.2d at 476 (quoting *Cent. Atlanta Progress*, 278 Ga. App. at 734-35, 629 S.E.2d 842).

31. Doe v. Sears, 245 Ga. 83, 85, 263 S.E.2d 119, 122 (1980).

32. *See* 1959 Ga. Laws 88.

33. 237 Ga. 764, 229 S.E.2d 624 (1976).

34. *Id.* at 765, 229 S.E.2d at 626.

35. *Id.* at 764, 229 S.E.2d at 626.

business of the government entity, they constituted public records under the Act regardless of why the sheriff prepared them.[36]

The Georgia Supreme Court subsequently expanded on the definition of public records in *Macon Telegraph Publishing Co. v. Board of Regents of the University System of Georgia*[37] and *Athens Observer, Inc. v. Anderson*.[38] In both cases, the issue before the court was whether documents prepared by entities outside the government agency (by a private association in *Macon Telegraph* and by a third-party contractor in *Athens Observer*) were public records under the Act.[39] The court held the documents in question in each case were public records subject to disclosure regardless of who created them because, under the analysis of *Houston*, the records had been "prepared and maintained in the course of the operation of a public office."[40]

In 1988 the Georgia General Assembly took the first major step toward codifying the common law developed in and after *Houston* by amending the Act to define a public record as "all documents, papers, letters, maps, books, tapes, photographs, [computer based or generated information], or similar material prepared and maintained or received in the course of the operation of a public office or agency."[41] Amendments in 1992[42] and 1999[43] completed the codification process by expanding the definition of public records to expressly include "items received or maintained by a private person or entity on behalf of a public office or agency . . . in the performance of a service or function for or on behalf of . . . a public agency, or a public office."[44] Thus, the legislative evolution of the Act has simply codified the jurisprudence of the Georgia Supreme Court regarding the scope of the Act.[45] Accordingly, the

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36. *Id.* at 765, 229 S.E.2d at 626.

37. 256 Ga. 443, 350 S.E.2d 23 (1986).

38. 245 Ga. 63, 263 S.E.2d 128 (1980).

39. *Macon Tel. Publ'g Co.*, 256 Ga. at 444, 350 S.E.2d at 24-25; *Athens Observer*, 245 Ga. at 64, 263 S.E.2d at 129.

40. *Macon Tel. Publ'g Co.*, 256 Ga. at 444, 350 S.E.2d at 25; *Athens Observer*, 245 Ga. at 64, 263 S.E.2d at 129.

41. 1988 Ga. Laws 244 (codified as amended at O.C.G.A. § 50-18-70(a) (2006)).

42. 1992 Ga. Laws 1061 (codified as amended at O.C.G.A. § 50-18-70(a)).

43. 1999 Ga. Laws 552 (codified as amended at O.C.G.A. § 50-18-70(a)). Suzanne Sturdivant, *State Government*, 16 GA. ST. U. L. REV. 262 (1999).

44. 1999 Ga. Laws 552 (codified as amended at O.C.G.A. § 50-18-70(a)). Interestingly, then-Georgia Governor Roy Barnes made the 1999 amendments a priority because of the difficulties he often faced in obtaining public records as a trial lawyer.

45. *See* Cohen & Manis, *supra* note 23, at 4 (noting that the 1988 amendment to the Act "recognized statutorily what the Georgia Supreme Court ha[d] decided judicially").

requirements of the Act apply to private entities that perform any activity or service for a government agency.[46]

B. *Exclusion from Disclosure*

Despite the legislative purpose to provide broad public access to information regarding government activities, in its present form, the Act includes certain specific exclusions from disclosure.[47] The original Act, however, did not contain these exclusions, but rather exempted any public documents, "which by order of a court of this State or by law, are prohibited from being open to inspection by the general public."[48] The determination of what information was intended by the legislature to be excluded was initially left up to the courts, and, as one scholar has argued, the Georgia Supreme Court apparently welcomed this opportunity.[49]

In *Houston* the Georgia Supreme Court adopted a balancing test to evaluate the interests of the public and the state in determining whether information should be disclosed under the Act.[50] In that case, after determining the police records sought were public records under the Act, the court "detoured"[51] to consider whether the records should be exempt from disclosure.[52] The court first explained its belief that the legislature did not intend to make all public records subject to disclosure.[53] For example, the court reasoned that police officers would be unable to effectively investigate crimes if required to publicly disclose information related to pending investigations.[54] The court explained that the Act is rooted in "First Amendment principles" and "favor[s] open, unfettered communication and disclosure [of public records] except where some limitation thereon is required in the public interest."[55] Accordingly, the court held that courts must balance the public interest of gaining the requested information against the public interest in exempting the

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46. Nw. Ga. Health Sys., Inc. v. Times-Journal, Inc., 218 Ga. App. 336, 339, 461 S.E.2d 297, 300 (1995); Hackworth v. Bd. of Educ., 214 Ga. App. 17, 18, 447 S.E.2d 78, 80 (1994).

47. O.C.G.A. § 50-18-72(a) (Supp. 2008).

48. 1959 Ga. Laws 88.

49. *See* Sentell, *supra* note 3, at 125-26 (noting that "[w]ith apparent destination in sight, the court . . . detoured to" the question of whether the records sought were intended by the legislature to be disclosed under the Georgia Open Records Act).

50. *Houston*, 237 Ga. at 765, 229 S.E.2d at 626.

51. Sentell, *supra* note 3, at 125.

52. *Houston*, 237 Ga. at 765, 229 S.E.2d at 626.

53. *Id.* (opining that the Georgia General Assembly did not intend for the active investigation files of police departments to be subject to disclosure).

54. *Id.*

55. *Id.* at 766, 229 S.E.2d at 627.

information from disclosure.[56] This new balancing test substantively added to the requirements of the Act and tempered the rather broad definition of public records that the court had constructed.[57]

While the balancing test announced in *Houston* remained the law regarding claims under the Act for many years, the 1988 amendments superseded this common law test.[58] While these amendments did not divest Georgia courts of the discretion to determine what information should be disclosed under the Act,[59] the amendments mandated certain exclusions from disclosure,[60] including the exclusion for private trade secrets at issue in *United HealthCare*.[61] While the trade secrets of government agencies themselves are not exempt from disclosure,[62] the trade secrets of private entities may be protected from disclosure under the Act if the trade secrets are "of a privileged or confidential nature and *required by law to be submitted to a government agency*."[63] Thus, the initial inquiry when considering whether documents or materials qualify for exclusion from disclosure under the Act is whether the documents or materials are trade secrets.[64]

C. *The Definition of Trade Secrets*

Modern American trade secret law is traceable to English common law concepts brought to America in the 1800s.[65] Unlike the other two legal doctrines used to protect proprietary information, patent and copyright, there is no comprehensive federal statute that protects trade secrets.[66] Rather, in keeping with its common law origins, individual states have

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56. *Id.* at 765, 229 S.E.2d at 626.

57. *See* Sentell, *supra* note 3, at 127 (arguing that the balancing test allowed the court to limit the application of its expansive definition of public records).

58. 1988 Ga. Laws 243 (codified as amended at O.C.G.A. § 50-18-72(a)(4)); Unified Gov't of Athens-Clarke County v. Athens Newspapers, LLC, 284 Ga. 192, 194, 663 S.E.2d 248, 250 (2008).

59. Bowers v. Shelton, 265 Ga. 247, 248-49, 453 S.E.2d 741, 743 (1995) (citing Harris v. Cox Enters. Inc., 256 Ga. 299, 301, 348 S.E.2d 448, 450-51 (1986)).

60. 1988 Ga. Laws 243-44 (codified as amended at O.C.G.A. § 50-18-70(a)).

61. *See United HealthCare*, 293 Ga. App. at 84, 666 S.E.2d at 474.

62. *See* Ga. Op. Att'y Gen. No. 94-15 (Mar. 31, 1994).

63. O.C.G.A. § 50-18-72(b)(1) (Supp. 2008) (emphasis added).

64. *See* Ga. Op. Att'y Gen. No. 94-15 (Mar. 31, 1994) (citing O.C.G.A. § 10-1-761(4) (2000)).

65. Linda B. Samuels, *Protecting Confidential Business Information Supplied to State Governments: Exempting Trade Secrets from State Open Records Laws*, 27 AM. BUS. L.J. 467, 469 (1989).

66. *Id.* at 470-71; Linda B. Samuels & Bryan K. Johnson, *The Uniform Trade Secrets Act: The States' Response*, 24 CREIGHTON L. REV. 49, 49-50 (1990).

their own laws protecting trade secrets.[67] Recognizing the wide variance among state laws in this area, in 1979 the National Conference of Commissioners on Uniform State Laws attempted to unify state trade secret laws and drafted the Uniform Trade Secrets Act (UTSA).[68] Despite the fact that forty-five states, the District of Columbia, and the U.S. Virgin Islands have adopted some form of the UTSA, variation among states remains.[69]

Prior to 1989, Georgia trade secrets law was unique in its narrow definition of a trade secret as "'a plan, process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it must be confided in order to apply it to the uses intended.'"[70] In defining trade secrets so narrowly, Georgia rejected as overly broad the more common definition of a trade secret contained in the Restatement of Torts[71] and the UTSA.[72] Instead, Georgia took an approach that distinguished "trade secrets" from "confidential information."[73] Trade secrets were protected so long as they could not be reproduced by "legitimate means," while confidential information was only protected to the extent there existed a contractual relationship limiting its use.[74] As at least one scholar has argued, this bifurcated protection was often difficult to work with, and Georgia court opinions reflected this fact.[75] Finally, in 1989, with a subsequent amendment in 1990, Georgia followed the lead of the National Conference of Commissioners and, with a few modifications, adopted a trade secrets act that closely resembles the UTSA.[76]

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67. Samuels, *supra* note 65, at 469; Samuels & Johnson, *supra* note 66, at 50.

68. Samuels & Johnson, *supra* note 66, at 50; UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 537 (1985).

69. Sharon K. Sandeen, *Identifying and Keeping the Genie in the Bottle: The Practical and Legal Realities of Trade Secrets in Bankruptcy Proceedings*, 44 GONZ. L. REV. 81, 87 (2008); Clay A. Tillack & Mark E. Ashton, *Who Takes What: The Parties' Rights to Franchise Materials at the Relationship's End*, 28 FRANCHISE L.J. 88, 88 (2008).

70. Elizabeth R. Calhoun, *Making Sense of Georgia's State Law Protections for Trademarks and Trade Secrets*, 5 J. INTELL. PROP. L. 307, 328 (1997) (quoting 43A C.J.S. *Injunctions* § 151(a) (1978)).

71. *See* RESTATEMENT (FIRST) OF TORTS § 757 (1939) (using a two-part definition of trade secrets that focuses on value derived from being unknown to the public and reasonable attempts to maintain secrecy).

72. *See* Textile Rubber & Chem. Co. v. Shook, 243 Ga. 587, 589-90, 225 S.E.2d 705, 707 (1979).

73. Calhoun, *supra* note 70, at 328.

74. *Id.* at 329.

75. *Id.* at 328.

76. *Id.* at 329; *compare* UNIF. TRADE SECRETS ACT, § 1, 14 U.L.A. 537 *with* O.C.G.A. § 10-1-761 (2000).

As the Georgia Trade Secrets Act[77] now provides, information in any form may constitute a trade secret if it is not "commonly known by or available to the public" and meets a two-part test delineated in the statute.[78] First, the information must derive actual or potential economic value "from not being generally known to, and not being readily ascertainable by proper means by" the public at large.[79] Second, the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[80] The purpose of this trade secret protection is to allow businesses to prevent the unlawful dissemination or "misappropriation" of proprietary trade secret information by "'improper means,' accident or mistake."[81] Because trade secret protection depends on the reasonableness of one's efforts to guard information from public disclosure, "'[w]hether a particular type of information constitutes a trade secret is a question of fact.'"[82]

The Act requires state agencies to protect trade secrets submitted to them.[83] In fact, state agencies must determine whether information submitted to them qualifies as trade secrets and thus, would be exempt from disclosure under the Act.[84] The provisions of the Act and its exceptions apply to the entity in possession of the public records, and as such, the obligation to identify and protect private trade secrets rests with the government agency that possesses them, even if the entity submitting the information has notified the Agency of trade secrets contained in the submitted information.[85] In other words, the failure of a private entity to identify all trade secrets submitted to a government agency does not constitute a waiver of the protected status of those trade secrets.[86] The Act's requirement that the trade secret be the subject of "reasonable" efforts "to maintain its secrecy," however, may mean that a private entity should err on the side of designating all trade secrets

77. O.C.G.A. § 10-1-760 to -767.

78. *Id.* § 10-1-761(4).

79. *Id.* § 10-1-761(4)(A).

80. *Id.* § 10-1-761(4)(B).

81. Ga. Op. Att'y Gen. No. 94-15 (Mar. 31, 1994) (quoting O.C.G.A. §§ 10-1-761 to -763).

82. Insight Tech., Inc. v. Freightcheck LLC, 280 Ga. App. 19, 27, 633 S.E.2d 373, 380 (2006) (quoting Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 1410-11 (11th Cir. 1998)).

83. *See* Ga. Op. Att'y Gen. No. 94-15, (Mar. 31, 1994); Theragenics Corp. v. Dep't of Natural Res. (*Theragenics I*), 244 Ga. App. 829, 832, 536 S.E.2d 613, 616 (2000), *aff'd* 273 Ga. 724, 545 S.E.2d 904 (2001).

84. *Theragenics I*, 244 Ga. App. at 832, 536 S.E.2d at 616.

85. *Id.*

86. *Id.*

submitted to any government entity as confidential to ensure trade secret protection.[87]

Still, the Act was not intended to require government agencies doing business with private entities to guarantee the protection of private trade secrets.[88] Accordingly, these agencies may fulfill their statutory obligations with a good faith review of the submitted materials.[89] Alternatively, the receiving government agency may inform the submitting party of the open records act request and seek to have the submitting party confirm that all confidential trade secrets have been appropriately designated.[90]

D. The "Required to be Submitted" Element

Consistent with the general goals behind the protection of trade secrets, the Act purports to exempt private trade secrets contained in public records from public disclosure.[91] Rather than simply exempting all trade secrets, however, the language of the Act exempts only those trade secrets that are "required by law to be submitted to a government agency."[92] Trade secrets are required to be submitted to a government agency if they are submitted pursuant to an established contractual relationship or applicable law.[93] It remains unclear, however, whether materials submitted to the government in the absence of a legal requirement or contractual relationship, such as bids on government contracts in response to Requests for Proposals, are protected.[94]

In *Georgia Department of Natural Resources v. Theragenics Corp.*,[95] the Georgia Supreme Court recognized that trade secrets submitted to a government agency pursuant to a statutory requirement are excluded from disclosure by the Act.[96] Theragenics Corporation was required to submit certain information, including trade secret information, to the

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87. *See* O.C.G.A. § 10-1-761; *but see* Dep't of Natural Res. v. Theragenics Corp. (*Theragenics II*), 273 Ga. 724, 725, 545 S.E.2d 904, 905 (2001) (holding that a government agency may not disclose private proprietary information simply because the private owner of the information failed to designate it as confidential).

88. *Theragenics II*, 273 Ga. at 725, 545 S.E.2d at 906.

89. *Id.*

90. *Id.*

91. O.C.G.A. § 50-18-70(b).

92. *Id.* § 50-18-72(b)(1).

93. Douglas Asphalt Co. v. E. R. Snell Contractor, Inc., 282 Ga. App. 546, 551-52, 639 S.E.2d 372, 376-77 (2006).

94. *See generally United HealthCare*, 293 Ga. App. 84, 666 S.E.2d 472; *Douglas Asphalt*, 282 Ga. App. 546, 639 S.E.2d 372; *Theragenics II*, 273 Ga. 724, 545 S.E.2d 904.

95. 273 Ga. 724, 545 S.E.2d 904 (2001).

96. *Id.* at 725, 545 S.E.2d at 905-06.

Georgia Department of Natural Resources due to the corporation's use of radioactive materials. A competitor of Theragenics filed an open records request seeking disclosure of the information under the Act, and Theragenics filed suit to enjoin disclosure. The trial court rejected Theragenics's request for an injunction, holding that the trade secret status of the submitted information had been lost because in submitting the information to the Department of Natural Resources, Theragenics had not acted reasonably to protect its trade secret. The Georgia Court of Appeals reversed. After holding that the trade secret protection of the submitted information had not been lost, the court held that the documents were exempt from disclosure under the Act, in part, because Georgia law had required the submission of the information to the Department of Natural Resources.[97] The supreme court echoed this reasoning and unanimously affirmed the court of appeals.[98]

Similarly, in *Douglas Asphalt Co. v. E. R. Snell Contractor, Inc.*,[99] the Georgia Court of Appeals held that information is "required by law" to be submitted to a government agency when the information is submitted pursuant to a contractual relationship.[100] In *Douglas* several paving contractors sought to enjoin the Georgia Department of Transportation (DOT) from disclosing proprietary asphalt mixture information to a competitor paving company. Seeking reversal of the trial court's grant of a permanent injunction, the competitor argued that the proprietary mix information was not excluded from disclosure under the Act because the proprietary mix information had been submitted as part of a voluntarily bid on a paving contract. Thus, the competitor argued, the trade secret information was not required to be submitted to the DOT.[101] The court of appeals disagreed, however, reasoning that "while . . . the contractors were not required by law to enter into contracts with the state, . . . once they entered those contracts, they were required by law to submit the information to the DOT."[102] The court noted that while the "required by law" language of the Act had not yet been interpreted by any Georgia court, a federal district court had held in a "similar" case that "information that must be submitted in conjunction with a government contract is 'required by law.'"[103]

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97. *Id.* at 724-25, 545 S.E.2d at 905-06.
98. *Id.* at 725, 545 S.E.2d at 906.
99. 282 Ga. App. 546, 639 S.E.2d 372 (2006).
100. *Id.* at 551, 639 S.E.2d at 376.
101. *Id.* at 546-51, 639 S.E.2d at 373-76.
102. *Id.* at 551, 639 S.E.2d at 376.
103. *Id.* (citing TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1098 (E.D. Mo. 1998)).

That similar case was *TRIFID Corp. v. National Imagery & Mapping Agency*,[104] in which the United States District Court for the Eastern District of Missouri employed a broad reading of the term "required."[105] In *TRIFID*, a software company sought to enjoin the National Imagery and Mapping Agency from disclosing certain trade secrets submitted with its contract bid in response to a request for contract proposals.[106] The parties seeking disclosure argued that the proprietary information was not exempt from disclosure under the federal Freedom of Information Act[107] because the information was submitted to the agency voluntarily before an executed contract required submission.[108] The district court disagreed and held that because the information had to be submitted to the government to make its owner eligible to receive a government contract, the information was required to be submitted to the government.[109]

IV. THE RATIONALE OF THE GEORGIA COURT OF APPEALS

In *United HealthCare of Georgia, Inc. v. Georgia Department of Community Health*[110] the Georgia Court of Appeals first held that the fee schedules and provider contracts (the United Documents) created by United HealthCare of Georgia (United HealthCare), which United HealthCare had maintained and not transmitted to the Department of Community Health (the Agency), were public records under the Georgia Open Records Act[111] (the Act).[112] The court relied on the statutory language of the Act[113] and its understanding of Georgia precedent, which dictated that information in the possession of a private entity may be subject to disclosure under the Act.[114] The court focused on the collaborative relationship between United HealthCare and the Agency

104. 10 F. Supp. 2d 1087 (E.D. Mo. 1998).
105. *Id.* at 1098.
106. *Id.* at 1089-91.
107. 5 U.S.C. § 552 (2006).
108. *TRIFID*, 10 F. Supp. 2d at 1097-98.
109. *Id.* at 1098.
110. 293 Ga. App. 84, 666 S.E.2d 472 (2008).
111. O.C.G.A. §§ 50-18-70 to -72 (2006 & Supp. 2008).
112. *United HealthCare*, 293 Ga. App. at 89, 666 S.E.2d at 478.
113. O.C.G.A. § 50-18-70(a) (2006) (stating that "[r]ecords received or maintained by a private person, firm, corporation, or other private entity in the performance of a service or function for . . . a public agency . . . shall be subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by such . . . public agency").
114. *United HealthCare*, 293 Ga. App. at 87-88, 666 S.E.2d at 476-77 (citing Cent. Atlanta Progress v. Baker, 278 Ga. App. 733, 629 S.E.2d 840 (2006); Hackworth v. Bd. of Educ., 214 Ga. App. 17, 447 S.E.2d 78 (1994)).

as reflected in the record and noted that United HealthCare was essentially the "'vehicle' . . . through which" the Agency carried out its "public function of administering" the State Health Benefit Plan (the Plan).[115] Accordingly, the court concluded that all records pertaining to United HealthCare's work for the Agency were subject to disclosure under the Act.[116]

The court then considered United HealthCare's argument that even if it was subject to the requirements of the Act, the portions of the United Documents that were created before the execution of the agreement between United HealthCare and the Agency—which authorized United HealthCare to administer the Plan by processing and paying health insurance claims out of a bank account funded by the Agency (the Contract)—were exempt from disclosure.[117] Rejecting this argument, the court noted that the Contract required United HealthCare to maintain these documents.[118] As such, the court reasoned that the documents were "received or maintained . . . 'in the performance of a service or function for or on behalf of an agency'" and were therefore, public records under the Act.[119]

The court then turned to the issue of the applicability of the trade secrets exclusion from disclosure under the Act and ultimately remanded the case for further consideration because the trial court did not consider whether the United Documents and the form provider contracts supplied to the Agency by United HealthCare as part of the bidding process (the Agency Documents) constituted trade secrets eligible for exclusion under the Act.[120] The court also reversed the trial court's determination that the documents did not satisfy the "'required by law to be submitted'" language of the Act, holding that because the Agency Documents were transmitted from United HealthCare to the Agency pursuant to the Contract, they were "required to be submitted" under the Act.[121] The court explicitly based its reasoning in this contractual obligation analysis on *Douglas Asphalt Co. v. E. R. Snell Contractor, Inc.*,[122] and included with its citation an explanatory parenthetical that stated: "information submitted to a public agency in conjunction with or pursuant to a

115. *Id.* at 88, 666 S.E.2d at 477 (quoting Nw. Ga. Health Sys. v. Times-Journal, 218 Ga. App. 336, 339, 461 S.E.2d 297, 300 (1995)).

116. *Id.*

117. *Id.*

118. *Id.* at 89, 666 S.E.2d at 477-78.

119. *Id.*, 666 S.E.2d at 478 (quoting O.C.G.A. § 50-18-70(a)).

120. *Id.* at 89, 93, 666 S.E.2d at 478, 480.

121. *Id.* at 90, 666 S.E.2d at 478 (quoting Douglas Asphalt Co. v. E. R. Snell Contractor, Inc., 282 Ga. App. 546, 551, 639 S.E.2d 372, 376 (2006)).

122. 282 Ga. App. 546, 639 S.E.2d 372 (2006).

government contract is 'required by law to be submitted.'"[123] As noted previously in this Article, while *Douglas Asphalt* dealt with submissions to a government agency that were required under an executed contract, the court in that case cited in support of its reasoning the federal case of *TRIFID Corp. v. National Imagery & Mapping Agency*,[124] which held that information was required when it was necessary to make an entity eligible for a government contract.[125] Thus, in *United HealthCare* the court implicitly endorsed this reasoning even though the court did not directly apply it.[126]

Next, the court held that the required by law language of the Act did not prevent the Agency Documents from being exempt from disclosure as trade secrets.[127] Analyzing the language of the Act, the court reasoned that the "required by law to be submitted" language could be read to provide more protection from disclosure for materials submitted to government agencies than materials retained by a private entity.[128] While the court recognized that the exemptions to disclosure in the Act must be construed narrowly,[129] the court also rejected the potential of interpretation of the Act that would lead to the "absurd result" of protecting disclosed information more than nondisclosed information.[130] To avoid this absurd result, the court construed the language of the Act to mean that trade secrets may be exempt from disclosure *"even if* they are submitted to a public agency, so long as the submission was 'required by law.'"[131] The court continued, explaining that "[u]nder this construction, public records that remain in the sole possession of a private entity are exempt from disclosure if the records otherwise qualify as trade secrets."[132]

The court then rejected the arguments of the South Georgia Physicians Association, LLC, and the Medical Association of Georgia (collectively the Physicians' Association) that United HealthCare contractually waived its right to claim protection for some of its trade secrets by

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123. *United HealthCare*, 293 Ga. App. at 90, 666 S.E.2d at 478 (quoting *Douglas Asphalt*, 282 Ga. App. at 551, 639 S.E.2d at 376).

124. 10 F. Supp. 2d 1087 (E.D. Mo. 1998).

125. *Douglas Asphalt*, 282 Ga. App. at 551, 639 S.E.2d at 376 (citing *TRIFID*, 10 F. Supp. 2d at 1098).

126. *See United HealthCare*, 293 Ga. App. at 90, 666 S.E.2d at 478.

127. *Id.*

128. *Id.*

129. *Id.* (citing City of Atlanta v. Corey Entm't, Inc., 278 Ga. 474, 476, 604 S.E.2d 140 (2004)).

130. *Id.* (citing Flournoy v. Brown, 226 Ga. App. 857, 859, 487 S.E.2d 683 (1997)).

131. *Id.* (quoting O.C.G.A. § 50-18-72(b)(1) (Supp. 2008)).

132. *Id.*

limiting the definition of trade secrets only to protected software.[133] Essentially, the Physicians' Association asserted that by providing in the Contract that all submissions to the Agency would be subject to disclosure under the Act, and only specifically exempting from disclosure proprietary software, United HealthCare waived its right to claim exemption for other materials.[134] In rejecting this argument, the court first reasoned that the reference in the contract to disclosure under the Act did not mean that "all documents *will* be disclosed" regardless of their qualification for an exemption.[135] Rather, the court held that the Contract simply meant that records would be disclosed *"if required under"* the Act.[136] Second, the court reasoned that the language of the contract did not provide the necessary "clear, unambiguous, and conscious intent" to waive statutory rights, which would be required to conclude that United HealthCare had waived its trade secret protections.[137] Finally, the court rejected the Physicians' Association's "broad" assertion that the public policy goal of transparency in the operation of state government demands the disclosure of the documents related to United HealthCare's administration of the Plan.[138]

V. IMPLICATIONS

While the court's opinion in *United HealthCare of Georgia, Inc. v. Georgia Department of Community Health*[139] seems to suggest that all trade secrets submitted to government agencies by private entities will be exempt from disclosure under the Georgia Open Records Act (the Act),[140] it remains less than clear whether trade secrets contained in contract proposals submitted to the government will be protected. At the very least, by providing a specific exemption from disclosure under the Act, the Georgia General Assembly clearly intended to protect trade secrets submitted to government entities. Furthermore, by protecting individual property interests in proprietary information, the trade secret exemption to disclosure under the Act is consistent with the general policy goals behind trade secret protection, namely encouraging

133. *Id.* at 91, 666 S.E.2d at 479.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 92, 666 S.E.2d at 479 (citing *In re* Estate of Sims, 259 Ga. App. 786, 790, 578 S.E.2d 498, 502 (2003)).
138. *Id.*
139. 293 Ga. App. 84, 666 S.E.2d 472 (2008).
140. O.C.G.A. §§ 50-18-70 to -72 (2006 & Supp. 2008).

innovation in industry by allowing individuals to protect the fruits of their labor and ingenuity.

Moreover, it seems that there are few, if any, possible policy reasons to disclose private trade secrets submitted to the government. One could argue that the state could benefit from forcing all bidders to work with open information and increased competition. This practice, however, would directly contravene the purpose of trade secret law by removing virtually all incentives for innovation in private business. It seems that if full disclosure were to be the law in this state, the Georgia General Assembly should unambiguously declare it rather than leave the courts to wrestle with the language of the Act. Furthermore, there is no logical distinction to be made between trade secrets required by law or executed contracts to be submitted to the government and those that are voluntarily submitted in pursuit of a potential government contract. Trade secrets contained in voluntary submissions have no less value than those submitted after a contract has been entered into with the government.

There are, however, many policy reasons to prevent disclosure of trade secrets contained in proposals that are not required by law to be submitted to the government. First, the government and the public have an interest in obtaining desirable contracts and services for the state. If private companies know that their trade secrets may be lost by virtue of their bid for a government contract, however, they might be less willing to bid. In fact, the policy of not protecting trade secrets contained in proposals would likely work directly against the government's goal of obtaining favorable contracts for goods and services. Companies with substantial investments in their trade secrets would likely be dissuaded from contracting with the government because these companies would lose more by relinquishing their trade secrets. Some of these companies would likely include those who have developed the newest and best tools and services available to the public.

Finally, the difference between the wording of the Act and the federal Freedom of Information Act[141] (FOIA) is telling. While the FOIA was crafted to require the federal government to disclose most information, it never explicitly requires the nondisclosure of information.[142] By contrast, the Georgia Act explicitly mandates the nondisclosure of

141. 5 U.S.C. § 552 (2006).

142. *Id.*; *see also* Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 593 (1995) (explaining that while the Freedom of Information Act "sometimes requires the government to disclose information, [it] never requires *nondisclosure*").

various categories of information.[143] This difference in construction of the two statutory schemes, both of which aim to require disclosure of public records unless there is a reason to exclude them, seems to suggest that the Georgia General Assembly may have been more concerned about protecting private information from disclosure than Congress.[144] Accordingly, it seems most likely that Georgia law protects all trade secrets submitted to a government agency, regardless of whether a law or contract requires their submission to the government. The scope of this protection will remain less than clear, however, until either the Georgia General Assembly or the Georgia courts find the occasion and the will to tackle this question directly.

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143. O.C.G.A. § 50-18-72 (Supp. 2008).

144. *See* Van Cise, *supra* note 4, at 578 (arguing that the Georgia Open Records Act provides "stronger privacy protection" than the federal Freedom of Information Act).