IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DAVID SCHICK,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 2013CV232324**
vs.	)	
	)	
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR RELIEF PURSUANT TO O.C.G.A. § 50-18-71(a) AND BRIEF IN SUPPORT THEREOF

COMES NOW the Board of Regents of the University System of Georgia ("Board of Regents"), by and through its attorney of record, Samuel S. Olens, the Attorney General for the State of Georgia, and pursuant to § 50-18-71(a), requests that the Court enter an order directing Plaintiff, David Schick, to remove from his blog, four pages of documents that are exempt from disclosure under the Georgia Open Records Act ("ORA"). O.C.G.A. § 50-18-72(a)(11). These four pages were inadvertently disclosed by the Board of Regents on a CD produced to Plaintiff's attorney on August 5, 2013. The exempt documents disclose the identity of a number of individuals who applied for the position of president at one of the Board of Regents colleges or universities. None of these individuals were finalists or eventually selected for the position for which they had applied. None of these documents relate in any way to Georgia Perimeter College ("GPC"), which was the focus of Plaintiff's July 16, 2012 and July 18, 2012 ORA requests.

STATEMENT OF THE FACTS

Plaintiff filed this lawsuit on June 10, 2013, alleging that the Board of Regents violated the ORA in responding to Plaintiff's July 16, 2012 ORA request to GPC and Plaintiff's July 18, 2012 ORA request to the Board of Regents. The case was tried on April 16, 2014 through April 18, 2014. At trial, Plaintiff spent a significant amount of time establishing that the purpose of his two ORA requests was to obtain information about the budgetary shortfall at GPC and the subsequent layoff of 282 employees.

In addition to writing several stories and blog posts about GPC and its budgetary issues, Plaintiff posted the documents he received from the Board of Regents in response to his July 18, 2012 ORA request onto his blog, including 713 pages contained in the August 5, 2013 CD produced to his attorney. In his July 18, 2012 ORA request, Plaintiff requested "all emails" between several Board of Regents employees without limitation as to subject matter. Thus, it was inevitable that many of the emails responsive to his request would be unrelated to GPC. The Board of Regents ultimately produced 12,195 pages of documents in response to this request.

In preparing for trial, Defendant's attorneys reviewed the August 5, 2013 CD and noticed several pages of documents that related to presidential searches and also noted that at least a few of those pages had post-it notes attached with a hand-written notation that said "search" or "search exemption." On Wednesday, April 16, 2014, Defendant's attorney raised this issue with the Court prior to the commencement of trial. Defendant's attorney had identified thirteen pages of documents that Defendant claimed should not have been produced because they were exempt pursuant to the presidential search exemption. O.C.G.A. § 50-18-72(a)(11). Defendant requested that the Court order

Plaintiff to remove these pages from his blog. The Court denied Defendant's request for relief at that time and directed Defendant to file a written motion.

Following completion of the trial, Defendant's attorney forwarded the thirteen pages she had identified as exempt to Steve Wrigley for review. Wrigley is the Board of Regents' Executive Vice Chancellor for Administrative and Fiscal Affairs. Affidavit of Steve Wrigley, ¶ 2. Wrigley's Affidavit is attached to this Motion. One of Wrigley's responsibilities is to oversee the selection process when a new president is to be appointed at one of the Board of Regents' colleges or universities. *Id.* Thus, Wrigley is the person in the Chancellor's office with the most intimate knowledge of presidential searches. *Id.* Wrigley reviewed those documents responsive to David Schick's July 18, 2012 ORA request that were identified as relating to presidential searches. *Id.*, ¶ 3.

Based on his review of the thirteen pages that Defendant's attorney had identified as exempt, Wrigley determined that four pages should have been withheld pursuant to O.C.G.A. § 50-18-72(a)(11), but that the remaining nine pages were properly disclosed.[1] Wrigley Aff., ¶ 4. Each of the four pages Wrigley identified as exempt includes the name of at least one candidate for the position of president. *Id.*, ¶ 5. None of the individuals identified in any of the four pages was a finalist for the position. *Id.* Additionally, none

[1] On April 29, 2014, Defendant's attorney sent Plaintiff's attorney a letter with a proposed settlement of this issue. In that letter, Defendant's attorney said that Steve Wrigley had advised her that eight of the thirteen documents she had originally identified as exempt should be designated as exempt and five were properly disclosed. Subsequently, in preparing his affidavit and reviewing the documents again, Wrigley decided that only four of the thirteen documents should be designated as exempt. The other four pages Wrigley had originally identified as exempt include names of potential interim presidents. Defendant does not intend to assert the presidential search exemption with regard to those four pages.

of the individuals identified in those four pages were applying for the position of president of GPC. *Id.*, ¶ 6.

In order to protect the privacy of the individuals identified in the four pages of documents identified by Steve Wrigley as exempt, Defendant is filing those documents separately with a Motion to File Documents under Seal. Defendant will deliver a courtesy copy of the four pages to the Court in chambers and will serve a copy of the four pages on Plaintiff with the service copy of this motion. Each page contains a hand-written notation indicating where the document is located on the August 5, 2013 CD. Defendant will also provide the Court with a copy of the August 5, 2013 CD.

ARGUMENT AND CITATION OF AUTHORITY

O.C.G.A. § 50-18-71(a) provides in pertinent part: "All public records shall be open for personal inspection and copying, *except those which by order of a court of this state or by law are specifically exempted from disclosure.*" (emphasis added). The four pages of presidential search records identified by Steve Wrigley are exempt from disclosure pursuant to O.C.G.A. § 50-18-72(a)(11). This exemption provides that any record disclosing the identity of a candidate for the position of president of any Board of Regents college or university shall be exempt from disclosure unless or until the candidate is selected as a finalist for the position. If the candidate is selected as a finalist, before releasing any documents, the Board of Regents must notify the candidate in order to give him or her an opportunity to decide whether s/he wants to decline further consideration rather than having any records disclosed. *Id.*[2]

[2] The full text of O.C.G.A. § 50-18-72(a)(11) is as follows:

The General Assembly's intention to protect the identity of any person who applies for the position of president at any Board of Regents institution is clear from the language in O.C.G.A. § 50-18-72(a)(11). The General Assembly added this exemption to the ORA after the Board of Regents was ordered to produce all records relating to all candidates who applied for the position of president of Georgia State University in response to an ORA request submitted by the Atlanta Journal and Constitution. *Bd. of Regents v. Atlanta Journal*, 259 Ga. 214 (1989). Because there was no applicable

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> Records which identify persons applying for or under consideration for employment or appointment as executive head of an agency or of a unit of the University System of Georgia; provided, however, that at least 14 calendar days prior to the meeting at which final action or vote is to be taken on the position of executive head of an agency or five business days prior to the meeting at which final action or vote is to be taken on the position of president of a unit of the University System of Georgia, all documents concerning as many as three persons under consideration whom the agency has determined to be the best qualified for the position shall be subject to inspection and copying. Prior to the release of these documents, an agency may allow such a person to decline being considered further for the position rather than have documents pertaining to such person released. In that event, the agency shall release the documents of the next most qualified person under consideration who does not decline the position. If an agency has conducted its hiring or appointment process without conducting interviews or discussing or deliberating in executive session in a manner otherwise consistent with Chapter 14 of this title, it shall not be required to delay final action on the position. The agency shall not be required to release such records of other applicants or persons under consideration, except at the request of any such person. Upon request, the hiring agency shall furnish the number of applicants and the composition of the list by such factors as race and sex. The agency shall not be allowed to avoid the provisions of this paragraph by the employment of a private person or agency to assist with the search or application process; . . . .

exemption at the time that request was made, the court held that the Board of Regents was required to produce the documents. In its opinion, the Supreme Court commented:

> [The Board of Regents] insists that its ability to attract qualified applicants will be diminished by the disclosure of their identities, in disservice of the cause of higher education. We acknowledge that this preference may be justifiable as a matter of good practice.

Id. at 216. However, the court held that it had to decide whether the documents were subject to disclosure under the ORA as enacted at that time. *Id.*

Following the Supreme Court's decision in the *Atlanta Journal* case, the ORA was amended in 1992 to add an exemption to protect from disclosure "those portions of records which would identify persons applying for" the position of president at one of the Board of Regents' institutions unless that individual became a finalist and authorized the release of the records. O.C.G.A. § 50-18-72(a)(7) (1992). *See also* 1992 Ga. Laws 1061, § 8. This exemption was most recently amended in 2012 as part of the overall revision of the ORA. 2012 Ga. Laws 218, § 2.

Thus, for more than twenty years the General Assembly has reaffirmed that it is in the best interest of the public to exempt from disclosure any document that would disclose the identity of a candidate for the position of president at one of the Board of Regents' colleges or universities unless or until the candidate authorizes such disclosure. O.C.G.A. § 50-18-72(a)(11). As the court noted in the *Atlanta Journal* case, the Board of Regents' ability to attract the best qualified candidate is diminished if applicants are afraid that their identity might be disclosed during the selection process. 259 Ga. at 216. Therefore, the legislature amended the ORA to provide that only information relating to finalists for the position of president is subject to disclosure, and then only with the

permission of the candidate. This exemption is in the best interest of the public. *See Deal v. Coleman*, 294 Ga. 170, 185, n. 21 (2013) ("No doubt, some public records may contain information that — if publicly disseminated — could do serious harm to some of our fellow citizens, to segments of our business community, or to the public generally.").

The four pages of documents identified as exempt by Steve Wrigley contain the names of a number of individuals who applied for the position of president at one of the Board of Regents' colleges or universities. Wrigley Aff., ¶ 5. None of these individuals was selected as a finalist for the position for which they applied. *Id.* Thus, pursuant to the exemption contained in O.C.G.A. § 50-18-72(a)(11) and the public policy behind that exemption, the disclosure of these documents "could cause serious harm" not only to the individuals candidates but to the public generally by discouraging the most qualified candidates from applying in the future for fear that their identity will be disclosed. *Deal*, 294 Ga. at 185, n. 21. Because the Board of Regents has already inadvertently produced the four pages of documents, and they have been published on Plaintiff's blog, the privacy rights of the individuals identified on those pages has already been compromised. Thus, it is imperative that action be taken to remedy the current situation and to prevent any future disclosure of the documents and their contents.

Even if the exemption in O.C.G.A. § 50-18-72(a)(11) did not apply, Defendant would still be entitled to relief pursuant to O.C.G.A. § 18-50-71(a), based on the case law, which makes it clear that no records should be produced in response to an ORA request if the production of those records would violate the privacy rights of any third party. *See e.g. Hardaway Co., v. Rives*, 262 Ga. 631, 633 (1992); *Harris v. Cox Ent., Inc.*, 256 Ga. 299, 302 (1986).

In *Harris*, the Atlanta Journal and Constitution submitted an ORA request for a Georgia Bureau of Investigation report and minutes of an executive session of the Georgia Board of Public Safety. Without citing to any specific exemption, the responding state agencies argued that because certain documents referred to private individuals the disclosure of those documents would violate those individuals' right to privacy. The Supreme Court held that even when documents are found to be public records subject to inspection, "there may be some material contained therein which for competing public policy reasons are not subject to disclosure." *Id.* at 300. In such cases, the law "requires a custodian of public records to preserve the confidentiality of information that the public does not have a right to see." *Id.* *See also Rives*, 262 Ga. at 633.

The less relevant the documents are to the subject matter of the request, the more the balance tilts in favor of an individual's right to privacy over the press' right of access to the requested documents. As the court explained in *Harris*:

> While this state has a strong policy of open government, there is a corresponding policy for protecting the right of the individual to personal privacy. References to matters about which the public has, in fact and in law, no legitimate concern, though found in a public document are not subject to disclosure under the Public Records Act because they are not the subject of "legitimate public inquiry."

Id. at 302 (quotation marks in original). In *Rives*, the court reaffirmed that regardless of the exemptions contained in the ORA the State should not produce any public records that would invade an individual's privacy.

> If [the records] are not exempt under the list of exemptions found in § 50-18-72 or under any other statute, then the question is whether they should be protected by court order

> under § 50-18-70, but only if there is a claim that disclosure of the public records would invade individual privacy[.]

Id. (citations omitted). Based on *Harris* and *Rives*, the four pages at issue in this case should be protected from any further disclosure since it would only further invade the privacy of the individuals identified in those documents.

These four pages were disclosed inadvertently, as evidenced by the fact that three of the four pages contain a notation such as "search" or "search exemption." Even when the State inadvertently discloses documents that might infringe upon the privacy rights of a private citizen, "the state [cannot] waive the rights of individuals who are not parties to the present litigation and to the extent there may be rights to be protected, a further in camera review of the documents by the trial court will be necessary." *Harris*, 256 Ga. at 301.

When Defendant raised this issue at the beginning of the trial, Plaintiff's attorney argued that Defendant is attempting to impose a "prior restraint" on Plaintiff's First Amendment right of free speech and freedom of the press.[3] However, the facts show that the Board of Regents has not imposed any "prior restraint" upon Plaintiff. It is undisputed that the Board of Regents produced 12,195 pages of documents to Plaintiff and/or his attorney. Plaintiff has been free to publish every one of those pages of documents and to publish any article or commentary he chooses regarding GPC or the

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[3] The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Board of Regents. The Board of Regents has in no way infringed upon Plaintiff's First Amendment rights.

When the disclosure of a document that has no relevance to the "legitimate public inquiry" will result in the invasion of privacy of a private citizen, the State is required to withhold the document from any response to an ORA request, even if there is no applicable ORA exemption. *Harris*, 256 Ga. at 302. Defendant inadvertently produced four pages of presidential search documents that should have been withheld based on standard established by the court in *Harris*. None of the four pages identified as exempt in this case are in any way relevant to the issues Plaintiff was investigating. Plaintiff cannot show how the Defendant's request that he remove these four pages from his blog will in any way infringe upon his First Amendment right to report and comment upon GPC, its budgetary shortfall and its layoff of 282 employees, or any other matter of "legitimate public inquiry." Because these four pages are in no way relevant to Plaintiff's investigation, any First Amendment right he has relating to these documents is substantially outweighed by the First Amendment privacy rights of the individuals identified in the documents.

Furthermore, a state may enact laws that constitute a reasonable "prior restraint" upon speech so long as the law is "narrowly tailored" to address an important governmental purpose. In *Hill v. Colo.*, 530 U.S. 703, 730, 733-34 (2009), the Supreme Court upheld a Colorado statute that regulated speech within 100 yards of a health care facility. The Court concluded that the statute was "narrowly tailored" to serve the governmental interests and that it left open ample alternative channels for communication. *Id.* at 726.

The presidential search exemption contained in the ORA is "narrowly tailored" to protect the privacy rights of candidates at the initial stages of the hiring process while requiring the institution to disclose the information of up to three finalists at least five (5) days before the meeting at which the final decision is made. O.C.G.A. § 50-18-72(a)(11). This statutory scheme encourages candidates to apply without fear that their application will be disclosed unless or until they authorize disclosure. Without such a provision many of the best qualified candidates would decline to apply for the position.

The presidential search exemption constitutes a reasonable and appropriate balancing of the First Amendment right of freedom of speech and the press on the one hand and the First Amendment right of privacy on the other. *See Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.") "The Georgia Supreme Court was the first high court in the nation to declare that its citizens have an absolute and immutable right of privacy, which, above all else, accords them a legal right to be let alone, so long as they are not interfering with the rights of others or of the public." *Christensen v. State*, 266 Ga. 474, 479-80 (1996) (Sears, J., dissenting) (quoting *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905) (internal quotations and punctuation omitted)). Even without relying upon any specific exemption under the ORA, the Georgia courts have repeatedly held: "those portions of public records which invade personal privacy may not be disclosed." *Harris*, 256 Ga. at 302. *See also Rives*, 262 Ga. at 633.

Plaintiff may argue that an individual applying for the position of president of a state college or university is not truly a "private" individual. First, the Georgia General Assembly has concluded that it is in the public's best interest to treat a candidate for the job of president at any Board of Regents college or university as if they are a private individual unless or until that individual becomes a finalist for the position and authorizes disclosure of their identity. O.C.G.A. § 50-18-72(a)(11). Second, the individuals identified in the four pages of documents at issue here are private individuals whose identity was inadvertently disclosed by the Board of Regents when it produced presidential search records that are irrelevant to the issue Plaintiff was investigating. Plaintiff does not need these documents on his blog in order to report on GPC or the Board of Regents. These four pages are not the subject of any "legitimate public inquiry." *Harris*, 256 Ga. at 302. Because these pages have no relevancy to Plaintiff's reporting, Plaintiff's continued publication of these four pages constitutes a continuing violation of the right of privacy of each of the individuals identified in those pages.

Therefore, pursuant to O.C.G.A. § 50-18-71(a), the Board of Regents respectfully requests that the Court enter an Order providing the following relief:

REQUEST FOR RELIEF

(1) That the Court conduct an *in camera* inspection of the four pages of documents identified by Steve Wrigley as exempt pursuant to O.C.G.A. § 50-18-72(a)(11).

(2) Based on its *in camera* inspection, that the Court enter an Order designating the four pages of documents referred to in paragraph (1) as exempt pursuant to O.C.G.A. § 50-18-72(a)(11).

(3) That the Court order Plaintiff to remove the four pages of exempt documents from his blog within seven (7) calendar days from the date of the Court's order.

(4) That the Court include in its order a directive that neither Plaintiff, nor his attorney, nor any agent of the Plaintiff, may publish, post, or otherwise publicly disclose any of the four pages (or any portion thereof) that have been designated as exempt by the Court's order at any time in the future.

Respectfully submitted,

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DAVID SCHICK,	)	
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Plaintiff,	)	
	)	**Civil Action No. 2013CV232324**
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	)	
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,	)	
	)	
Defendant.	)	

STATE OF GEORGIA

COUNTY OF FULTON

AFFIDAVIT OF STEVE WRIGLEY

1.

I am over the age of eighteen, and am mentally competent. The information contained in this affidavit is based on my personal knowledge.

2.

I am currently the Executive Vice Chancellor for Administrative and Fiscal Affairs for the Board of Regents of the University System of Georgia. I have held that position since 2011. I previously worked at the University of Georgia in several capacities. As part of my current duties and responsibilities I oversee the selection process when a new president is to be appointed at one of the Board of Regents' colleges or universities.

Therefore, I am the person in the Board of Regents' main office with the most knowledge and expertise regarding presidential searches.

3.

Prior to producing the documents responsive to David Schick's July 18, 2012 Open Records Act ("ORA") request, the documents were reviewed by members of the Board of Regents' staff in order to ensure that no documents or information that is exempt under the ORA was improperly produced. I was asked to review those documents that were identified as relating to presidential searches.

4.

Shortly after the conclusion of the trial of this case, one of the Board of Regents' attorneys, Julia Anderson, forwarded to me thirteen pages of documents that she explained had been included on the CD produced to David Schick's attorney on August 5, 2013. She asked me to review those pages to determine which of those pages are, in my opinion, exempt from production based on the presidential search exemption contained in the Georgia Open Records Act. O.C.G.A. § 50-18-72(a)(11). Based on my review, it is my opinion that four of the pages I reviewed are exempt pursuant to that exemption but that the remaining nine pages are public records.

5.

The four pages I have identified as exempt contain the name of at least one potential candidate for the presidency at one of the Board of Regents' colleges or universities. Based on my review, I also determined that none of the individuals identified in any of these four pages was a finalist for that position. The presidential search exemption provides that in such cases that the identity of the candidate is not subject to disclosure.

6.

None of the individuals identified in the four pages of documents I have identified as exempt was applying for the position of president of Georgia Perimeter College.

Further affiant sayeth not.

STEVE WRIGLEY

Sworn to and subscribed
before me this 14th day
of May, 2014.

Chioncetia W. Elder
NOTARY PUBLIC

CHONCETIA W. ELDER NOTARY PUBLIC DEKALB COUNTY EXPIRES GEORGIA JAN. 28, 2017

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **DEFENDANT'S MOTION FOR RELIEF PURSUANT TO O.C.G.A. § 50-18-71(a) AND BRIEF IN SUPPORT THEREOF** by depositing a copy of the same to be delivered via United States Mail, addressed as follows:

Daniel Levitas
Clements & Sweet, LLP
1355 Peachtree Street
Suite 1800
Atlanta, GA 30309

This 15th day of May 2014.

Julia B. Anderson
Senior Assistant Attorney General