

**IN THE SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA**

AUGUSTA PRESS,)	
THE AUGUSTA CHRONICLE,)	
WJBF-TV, AND GRAY MEDIA)	CIVIL ACTION FILE NO.:
GROUP, INC., D/B/A WRDW-TV,)	
Plaintiffs,)	2021-RCCV-00274
)	
v.)	
)	
THE CITY OF AUGUSTA/)	
RICHMOND COUNTY,)	
Defendants.)	

ORDER

The above-styled matter came on for hearing on May 3, 2021 on the Plaintiffs' Complaint and Motion for Preliminary Injunction, contending Defendants violated the Open Records Act, O.C.G.A. §50-18-70 *et seq.* by failing to properly respond to open records requests concerning the hiring of the city of Augusta Fire Chief.

Specifically, Plaintiffs (hereinafter "Media") argues that Defendants (hereinafter "City") have violated the Open Records Act ("ORA") by failing to properly respond to open records requests concerning the hiring of the Fire Chief for the city of Augusta. Plaintiff contends that Defendants' responses were insufficient, as the City has produced records on only one candidate, Antonio Burden, and failed to produce records on the other candidates who were interviewed on April 15, 2021.

FACTS

The facts are largely undisputed. On December 2, 2020, the City's fire chief resigned. The resignation triggered the search for a successor. Applications were solicited for the position.

Each applicant would be scored on a range of 0 to 20 points. Candidates scoring 14 or more would be interviewed. Candidates scoring 10 or higher would be considered for an interview. Those scoring less than 10 would not be interviewed.

On April 13, 2021, the Augusta Chronicle sent the City an open records request for the names and cities of candidates to be interviewed. On April 15, 2021, the Augusta Press and WJBF-TV sent the City detailed information requests about the interviewees.¹ On April 15, 2021, the City conducted closed interviews of four candidates. On April 20, 2021, members of the City Commission met in executive session to discuss the applicants.

On April 20 and 21, 2021, the City responded to the open records requests by providing Media a resume and other redacted information concerning the sole “finalist,” Antonio Burden. The City provided Media no information on the other three interviewees.² Burden had scored 10 on his application.

On May 11, 2021, the City is scheduled to take a Commission vote on whether to hire Burden to head the Fire Department.

Conclusions of Law

The parties appear to accept that the documents in question are public records. Plaintiffs and Defendant all rely on OCGA Sec. 50-18-72(a)(11). Paragraph 11 is one of fifty exceptions or exemptions to Georgia’s Open Records Act. It reads in relevant part as follows:

“(a) Public disclosure shall not be required for records that are:...(11) [1] Records which identify persons applying for or under consideration for employment or appointment as executive head of an agency.....be 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.....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. [2] 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. [3] In that event, the agency shall release the documents of the next most qualified person under consideration who does not decline the position. [4] 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. [5] The agency shall not be required to release such records of other applicants or person under consideration, except at the request of any such person. [6] Upon request, the hiring agency shall furnish the number of applicants and the composition of the list by such factors as race and sex. [7] 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[.]”

Georgia’s Open Records Act and its companion law, the Open Meetings Act (found in Title 50 Chapter 14), both serve the important public policy of bringing transparency and “sunshine” to the process of governing. They help educate the citizenry about public affairs and help hold public officials to a high level of accountability.

The importance of the ORA’s public disclosure function is recognized in the statute itself, mandating how it is to be interpreted: “This article shall be *broadly construed* to allow the inspection of governmental records. The exceptions set forth in this article...shall be interpreted *narrowly* to exclude only those portions of records addressed by such exception.” OCGA §50-18-70(a)(11). (emphasis added).

Turning to OCGA §50-18-70(a)(11), the first portion of the first sentence sets forth the exemption from disclosure, [r]ecords which identify persons applying for or under consideration for employment as executive head of an agency...³ The court is admonished by the legislature that this limitation on disclosure is to be construed “narrowly.” However, giving legislative language a narrow construction does not mean construing text “in derogation of its express terms.” Unified Government of Athens-Clarke County v. Athens Newspapers, LLC, 284 Ga. 192 (2008). The exemption itself supports important policies such as protection of individual privacy and enlarging the pool of qualified applicants for public service positions.

The first sentence of OCGA §50-18-70(a)(11) ends with a major proviso that reads: “...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...” “...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.” (emphasis added).

There has been much discussion between the parties about the meaning of “as many as.” The City argues that it puts a ceiling on the number of applicants that it must disclose, below which it lies within the City’s discretion to disclose just the one “finalist.” Plaintiffs argue that the phrase means “at least,” mandating that the City must disclose three applicants. This Court does not adopt either interpretation. Instead, in the context of the remaining paragraph and applying the ordinary meaning of the words, this Court finds that “as many as” refers to the maximum number of applicants for which Media can insist on obtaining disclosure. Of course, in some cases there might not be three applicants to disclose. In any event, the City does not have to disclose more than three. The decision to disclose more than three or which three to disclose is left up to the City subject to further statutory direction.

OCGA §50-18-70(a)(11) states that the City must disclose the three “best qualified” applicants “under consideration.” Who are the best qualified applicants is left for determination by the City. In this case, it might be the applicants who scored the highest points. The applicants must be under consideration at the time of the request. Here, the Media requests were made on or before the date of the interviews and prior to the executive session in which the candidates were discussed.⁴ Clearly, at least the four interviewees were still under consideration when the ORA requests were made.

In a nod to privacy protection and protecting the pool under the particular circumstances, OCGA §50-18-72(a)(11) allows the City to permit an applicant to withdraw his or her name from consideration in order to avoid disclosure. If such withdrawal occurs, OCGA §50-18-72(a)(11) directs the City to “release the documents of the next most qualified person under consideration who does not decline the position.” In the case at hand, the City has not indicated that it allowed candidates to withdraw their names from further consideration to avoid disclosure. In addition, OCGA §50-18-72(a)(11) states that the City cannot be compelled to release records of other applicants (presumably not in the “best qualified” group) under consideration unless disclosure is requested by the applicant.⁵

The timing of disclosure and its impact upon final action is addressed twice in OCGA §50-18-72(a)(11). It is intended to allow a requesting party to have the information on applicants “at least 14 calendar days” prior to the government agency taking final action on the appointment. The only situation in which OCGA §50-18-72(a)(11) indicates no impact upon the scheduling of final action is where the recruitment process is conducted “without conducting interviews or discussing or deliberating in executive session” in a manner consistent with the Open Meetings Act. This situation is inapplicable to the present case because both interviews and discussions were held in executive session.⁶

The interim injunctive relief sought by Plaintiffs is appropriate. The ORA confers on the court the power to utilize remedies at law and equity. OCGA §50-18-73(a). The postponement of final action on the Fire Chief appointment until the City is in full compliance with the ORA is expressly addressed in O.C.G.A. 50-18-72(a)(11). Issuing a preliminary injunction at this point is compelled to avoid the matter becoming moot.

First, there is no adequate remedy at law. Plaintiffs and the public would suffer irreparable harm if the Defendant is not required to make the requested disclosures. Otherwise, the public will have no meaningful input into selection of the City's next Fire Chief. Without information, the citizenry cannot engage in effective discourse with their elected representatives about making this important decision. Second, the harm to the Plaintiffs and the public far outweighs any harm to the Defendant. At the hearing, when questioned, Defendant's counsel could not articulate any specific injury to the City. The concerns over applicant privacy and the pool of applicants expressed in the amicus curae brief of the Georgia Municipal Association are all adequately addressed in the safeguards built into the statute. Third, Plaintiffs are likely to prevail on the merits for the reasons set forth above. Finally, an injunction is in the public interest. Enforcement of the ORA under these circumstances is essential to carry out "the strong public policy of this state...in favor of open government." OCGA §50-18-90(a). Knowledgeable public input is needed in order to ensure that public health and safety is maintained by selection of the best candidate for Fire Chief.

For the foregoing reasons, it is now **ORDERED**:

(a) Within three (3) business days of the filing of this Order, the City shall make full disclosure to Plaintiffs of all nonexempt records in the City's possession pertaining to three persons determined by the City to be best qualified as of or effective at or about April 13, 2021, making any substitutions for persons whom the City permitted to decline the release of information and who removed their names from consideration for the position of Fire Chief; and

(b) the City shall take no final action on appointment of Fire Chief for at least fourteen (14) calendar days following release and delivery to Plaintiffs copies of all such records or following the date such records are made available for inspection and copying.⁷

SO ORDERED, this 5th day of May, 2021



Jesse C. Stone
Superior Court Judge
Augusta Judicial Circuit

¹ The three open records requests were for the following documents or information:

- a. The Augusta Chronicle (April 13, 2021) – “names and cities of the four finalists for Augusta Fire Chief;”
- b. Augusta Press (April 15, 2021) – “Copy of all records in Augusta Richmond County possession related to the candidates being interviewed on April 15, 2021 for the Fire Chief position including but not limited to resumes, background checks, applications, internal memos, and any paperwork regarding rating or evaluation of candidates;
- c. WJBF-TV (April 15, 2021) – “copies of resumes, correspondence and other documents pertaining to no less than three finalists for the position of Augusta-Richmond County Fire Chief under GA Sec. 50-18-72(a)(11);
- d. WRDW-TV (April 21, 2021) – “copies of public names, current city, and submitted resumes of the top four finalists for Augusta Richmond County Fire Chief.”

² Media has obtained the names and cities of three applicants from a source other than the Defendant.

³ “Agency” is defined as “[e]very *department*, agency, board, bureau, office, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of the state “. OCGA §50-14-1(a)(1)(C) of the Open Meetings Act, incorporated by reference in the ORA, OCGA §50-18-70(b)(1).

⁴ The request was made prior to the taking of a final vote on the matter.

⁵ However, the City can be required to disclose the total number of applicants and their breakdown by factors such as “race and sex”. This could reasonably include a list of applicants (excluding names) sorted by other factors like age, scoring or rank without disclosing identity and while maintaining privacy as long as the request was for information readily available and not requiring special preparation.

⁶ It matters not that much of the recruitment process was handled by a private agency as was done here. The last sentence of Paragraph 11 states that the City cannot avoid compliance with ORA by delegating any or all of the candidate search to a third party.

⁷ Plaintiffs sought imposition of civil penalties and attorney fees. The court makes no ruling on this request at this time, noting that no proffer has been made. Moreover, the court observes that the turnover requests aimed for information on four “finalists” whereas the statute caps such request at three. Given the complexity of Paragraph 11 and that this arguably is a case of first impression, the court could find special circumstances exist and that there could be substantial justification in the City’s partial response. O.C.G.A. Sec. 50-18-73(b). The court rejects any argument that the City may have waived any objections due to its timing of a response. Chua v. Johnson, 336 Ga.App. 298 (2016), distinguishing Jaraysi v. City of Marietta, 294 Ga.App. 6 (2008)

CERTIFICATE OF SERVICE

Prior to filing, a copy of the foregoing ORDER was delivered to counsel of record
as follows:

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This 5th day of May, 2021.



JESSE C. STONE
Honorable Jesse Stone
Superior Court Judge
Augusta Judicial Circuit