

IN THE COURT OF APPEALS
STATE OF GEORGIA

THE CORPORATION OF MERCER
UNIVERSITY/MERCER UNIVERSITY
POLICE DEPARTMENT,

Defendant/Appellant,

v.

BARRETT & FARAHANY, LLP,

Plaintiff/Appellee.

Case No. A05A0186

BRIEF OF AMICI CURIAE

GEORGIA FIRST AMENDMENT FOUNDATION
SECURITY ON CAMPUS, INC.
THE NATIONAL POLICE ACCOUNTABILITY PROJECT OF THE
NATIONAL LAWYERS GUILD, AMERICAN CIVIL LIBERTIES
UNION OF GEORGIA, INC.,
SOCIETY OF PROFESSIONAL JOURNALISTS
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Amici curiae Georgia First Amendment Foundation, Security On Campus, Inc., The National Police Accountability Project Of The National Lawyers Guild, American Civil Liberties Union Of Georgia, Inc., Society Of Professional Journalists, and Student Press Law Center, respectfully submit the following brief in support of the holding in the Superior Court of Bibb County that certain records maintained by the Mercer University Police Department (“MUPD”) are “public records” under the Open Records Act, O.C.G.A. § 50-18-70 *et seq.*

Amici curiae respectfully submit that the records of the MUPD are subject to the open records laws of Georgia to the same extent as those of any police force exercising the police power of this State, and that such a holding is critically important to preserve Georgia's position as a leader in openness for governmental functions.

STATEMENT OF INTEREST

The Georgia First Amendment Foundation is a Georgia non-profit corporation organized in Georgia in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public's access to public institutions is threatened.

Security On Campus, Inc. is a non-profit organization dedicated to safe campuses for college and university students. The mission of Security on Campus, Inc., is: to educate prospective students, parents and campus communities about the prevalence of crime on our nation's college and university campuses; to give victims and their families guidance pertaining to laws, victims' organizations, legal counsel, and access to Security On Campus, Inc. files; to foster security improvements through campus community initiatives; and to provide effective procedures and programs to reduce alcohol and drug abuse.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, it promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

The National Police Accountability Project of the National Lawyers Guild is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. The Project is a non-profit organization, dedicated to ending police abuse of authority through coordinated legal action, public education, and support for grassroots and victim's organizations combating police misconduct.

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 400,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Georgia, Inc. is a state affiliate of the ACLU with over 6,000 members.

The Student Press Law Center is a national, not-for-profit corporation created to conduct legal research and offer information and advocacy for the purpose of promoting and preserving the free press and freedom of information

rights of high school and college journalists. To that end, the Center has collected information on student press cases and campus issues and conflicts nationwide and appears in important cases where these rights are threatened throughout the United States.

ISSUE

This is an important case. The issue in this case is whether a campus police force exercising the police power of the State of Georgia by express legislative grant on a private university campus will be subject to the Georgia “Open Records Act”¹ to the same extent as other police forces in Georgia.

STATEMENT OF FACTS

The material facts of this case are not in dispute. Appellant, The Corporation of Mercer University, is a nonprofit corporation of the State of Georgia which operates a highly respected university in Bibb County, Georgia. Mercer University itself is not a government agency. Mercer University has voluntarily elected, under specific authority granted to colleges and universities in Georgia by the General Assembly, to establish its own campus police force known

¹ O.C.G.A. § 50-18-70, *et seq.*

as the “Mercer University Police Department” and to authorize the MUPD to exercise broad law enforcement powers, including the power of arrest. O.C.G.A. § 20-8-2 provides: “On the campus of an educational facility, a campus policeman employed by such educational facility who is certified in accordance with Code Section 20-8-3 and when authorized by the governing body or authority of such educational facility shall have the same law enforcement powers, including the power of arrest, as a law enforcement officer of the local government with police jurisdiction over such campus.” In the course of exercising such police powers, the MUPD maintains records, including incident reports and crime logs.

Appellee made an Open Records Act request for disclosure of certain incident reports and crime logs maintained by the MUPD. The records at issue are not exempt from disclosure under the Open Records Act. MUPD refused to produce the records on the grounds that MUPD was not subject to the Open Records Act because it was a police department formed by a private, not a public, university. After a full hearing, Judge L.A. McConnell, Jr. of the Superior Court of Bibb County held that the records maintained by MUPD with respect to its police functions were “public records” subject to the Open Records Act, and ordered that the records be disclosed. That Order is the subject of this Appeal.

DISCUSSION OF ISSUE PRESENTED

There is no power which more strongly embodies the power of the State of Georgia than the police power. As this Court stated in *City of Atlanta v. Fry*, 148 Ga. App. 269, 251 S.E.2d 90 (1978): “It cannot be gainsaid that the operation of a police department . . . is a governmental function.” Again, in *DeBerry v. City of LaGrange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940) this Court stated: “[The exercise of the] police power is an attribute of sovereignty . . . and [the police power] is inherent in the State of Georgia and in municipal corporations where there has been an express grant by the state” In *Veit v. State*, 182 Ga. App. 753, 357 S.E.2d 113 (1987), this Court re-confirmed that all exercises of police power within the State of Georgia must be by delegation from the State itself, by either constitutional provision or statute.

The MUPD, without question, directly exercises the police power of the State of Georgia, just as surely as the City of Macon Police Department or the Georgia Bureau of Investigation exercises such power. Through statute (O.C.G.A. § 20-8-2) and the express concurrence of the governing body of the Corporation of Mercer University, the State of Georgia has vested in the officers of the MUPD all law enforcement powers, including the power of arrest, to the same extent as are

vested in a law enforcement officer of any local government of the State of Georgia.

This Court has regularly upheld the police powers of those operating under O.C.G.A. § 20-8-2 against various attempts to undercut the police power functions exercised by campus police in Georgia. In *State v. Harber*, 198 Ga. App. 170, 401 S.E.2d 57 (1990), this Court upheld the authority of campus police officers to obtain and execute a search warrant. This Court stated in its decision that, within their geographical jurisdiction, “campus police officers are essentially no different from county and municipal police officers whose authority to make an arrest may otherwise be subject to similar territorial restrictions.” In *Tabor v. State*, 203 Ga. App. 60, 416 S.E.2d 138 (1992), this Court upheld the use of evidence seized incident to an arrest by a university police officer.

The appellate courts of Georgia have consistently held that the Open Records Act, and its companion Open Meetings Act (O.C.G.A. § 50-14-1 *et seq.*) are remedial in nature and must be broadly construed. The Supreme Court stated in *Atlanta Journal v. Hill*, 257 Ga. 398, 399, 359 S.E.2d 913, 914 (1987) that those laws were “enacted in the public interest to protect the public -- both individuals and the public generally -- from ‘closed door’ politics and the potential abuse of

individuals and the misuse of power such policies entail. Therefore, the Act must be broadly construed to effect its remedial and protective purposes.” The logic of the Open Records Act and similar acts is that public functions should be exercised in the sunshine of openness and should be accountable to the citizens of this state, both to assure the public that power, which flows from the people, is accountable to the people, and to allay any suspicion of abuse of such power.

The test in Georgia as to whether or not records of a private organization are subject to the Open Records Act is whether or not the entity holding such records carries out a governmental function. This Court’s decision in *Hackworth v. Board of Education for the City of Atlanta*, 214 Ga. App. 17, 447 S.E.2d 78 (1994), specifically addressed that point. In *Hackworth*, this Court held that records of a private corporation performing a public function (there, a private contractor operating public school buses) was subject to the Open Records Act. This Court stated: “[o]ur focus in cases under the [Open Records] Act is necessarily not on the actor but on the particular, discrete *function* performed by that actor. We must determine whether that function is a public one, rendering the records generated in the course of its performance subject to the Act.” *Id.* at 19-20, 447 S.E.2d at 81. Where a private actor performs a public function using powers delegated or

granted to it by a public agency, the records the actor keeps pursuant to that public function have consistently been held to be subject to the Open Records Act. For example, this Court held that records related to the operation of public hospitals maintained by private, non-profit corporations are subject to the Open Records Act in *Northwest Georgia Health System Inc. v. Times-Journal, Inc.*, 218 Ga. App. 336, 461 S.E.2d 297 (1995). Similarly, records of a private athletic association which related to the operation of the athletic department of a public university were held to be subject to the Open Records Act in *Macon Telegraph Pub. Co. v. Board of Regents of University System of Georgia*, 256 Ga. 443, 350 S.E.2d 23 (1986). The exercise of the police power of the State of Georgia by the MUPD is the exercise of a public function and is therefore subject to the Open Records Act.

The importance of public oversight of such a public function is paramount. Any person who enters the grounds of Mercer University and is subject to the jurisdiction of the law enforcement authority that operates there has a vital interest in being able to obtain information about crimes that occur and the actions police officers take in response. This interest is even greater for those who are victims of crime or accused of wrongdoing.

Because of such public interest, there is no question that the records sought by Appellee in this case, if maintained by the campus police department of a public university of this state, or by a municipal police department, would be subject to disclosure under the Open Records Act. The statute itself, O.C.G.A. 50-18-72(a)(4) only exempts “Records of law enforcement . . . in any pending investigation. . . other than initial police arrest reports and initial incident reports . . .” [emphasis added]. In *Doe v. Board of Regents*, 215 Ga. App. 684, 452 S.E.2d 776 (1994) this court held that incident reports maintained by campus police officers employed by the University of Georgia system pertaining to crimes committed within their jurisdiction were subject to the Open Records Act. The authority of the University of Georgia police involved in the *Doe* case flowed from the same statute which has authorized the MUPD to exercise its police powers, O.C.G.A. § 20-8-2. The police function is identical. The treatment under the Open Records Act should be identical.

CONCLUSION

There can be no excuse for the police records of the MUPD involved in the present case to be hidden from the citizens of Georgia. Appellant’s Board of Trustees voluntarily created a campus police department and authorized that police

department to exercise public police powers pursuant to the specific grant of the State found in O.C.G.A. § 20-8-2. The University then obtained certification of its officers by the State so that the officers could exercise arrest and other public police functions on campus. Under the Open Records Act, records maintained relating to exercise of such public police functions are subject to public scrutiny.

This is an important case. Records as to the exercise of the police power of Georgia should be open to the citizens of this State, whether the entity is the State itself, or one exercising the State's police power by delegation as a municipality or county police department, or as a university police department. The Mercer University Police Department cannot hide its exercise of its public functions behind the skirts of its private university parent.

It is respectfully submitted that Judge McConnell's well-reasoned decision on this important issue should be affirmed. The records of the exercise of the

police power of the State of Georgia should remain open to the citizens of our State. As Justice Brandeis noted, “Sunshine is the best disinfectant.”

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of September , 2004, I perfected service upon all counsel of record before the filing of **BRIEF OF AMICI CURIAE** by placing a copy of same in the United States mails, adequate first-class postage affixed thereon, to:

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