

**IN THE SUPREME COURT
STATE OF GEORGIA**

CASE NO. S16C1463

E. KENDRICK SMITH,

Petitioner,

v.

NORTHSIDE HOSPITAL, INC., *et al.*,

Respondents.

**AMICUS BRIEF IN SUPPORT
OF THE PETITION FOR WRIT OF CERTIORARI**

GEORGIA WATCH

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I. STATEMENT OF INTEREST

Georgia Watch is a statewide nonprofit consumer advocacy organization founded in 2002. Georgia Watch empowers and protects Georgia consumers through education, advocacy and policy development. Georgia Watch focuses on safeguarding consumer protections in personal finance, ensuring lower utility bills and cleaner energy, defending the availability of quality affordable healthcare, protecting the right to trial by jury, and promoting access to the courts.

In support of this mission, Georgia Watch advocates for hospital and healthcare system transparency and accountability. This advocacy necessarily depends on access to public records about hospital operations, including private nonprofit hospitals operating on behalf of hospital authorities around the state. Northside in particular has a substantial impact on a large number of Georgians: in 2015, the estimated 3,741,308 residents of the Northside Community accounted for 37% of Georgia's total population. Northside Hospital Implementation Plan, available at <http://www.northside.com/doc/Page.asp?PageID=DOC002145>, (last viewed September 17, 2016).

Public records contain information that advocates and consumers alike need in order to hold hospitals like Northside accountable to the communities they serve. Public records reveal the institutional policies, overall financial health, and community investments made by the private nonprofits and public agencies that operate hospital facilities in Georgia. Through public records, consumers obtain information about hospitals' financial health; hospital investments in community health initiatives and community-identified needs; expenditures and programs related to indigent care; and hospital policies and practices on financial assistance, billing and debt collections. Advocates need to know about agreements between hospital organizations and third-

party entities contracted to handle revenue cycle and debt collection in order to defend the interests of healthcare consumers.

To understand their own healthcare costs, consumers need access to information about the legal relationships among the organizations that operate a given hospital facility, as well as between hospitals and providers who have admitting privileges or provide services to hospital patients. For healthcare consumers, basic facts about whether their provider is affiliated with the hospital or a separate entity can be incredibly elusive. Georgia Watch strongly believes consumers should continue to have access to public records to help ascertain this information, which is fundamental for determining health insurance coverage as well as identifying available financial assistance and consumer protections.

Georgia Watch gives a powerful voice to Georgia consumers who are struggling to navigate the ever more complex healthcare system. Georgia Watch guards the interests of low-income, vulnerable Georgia citizens who deserve to know whether their publicly funded and tax-exempt hospitals are fulfilling their obligations. This mission requires timely access to accurate information. For Georgia Watch and the consumers it represents, access to public records provides critical information that is otherwise unavailable.

II. CERTIORARI SHOULD BE GRANTED

This case is a matter of great concern and importance to the public. Georgia citizens have enjoyed access and transparency with regard to hospital authorities and their delegates for more than 20 years. This access permits crucial public oversight to foster dialogue and, where necessary, change. Georgia Watch relied on this access to prepare a series of Hospital Accountability Project reports documenting costs, revenues, employee salaries, and indigent and charity care policies at public hospitals around Georgia. *Hospital Accountability Project*,

Northside Hospital, available at <http://www.georgiawatch.org/wp-content/uploads/2009/07/georgia-watch-northside-hospital.pdf>, (last viewed September 18, 2016); *Metropolitan Atlanta Hospital Accountability Project*, available at http://www.georgiawatch.org/wp-content/uploads/2015/01/Metropolitan-Atlanta_Hospital-Accountability-Report-6.21.2010.pdf, (last viewed September 17, 2016). These reports underscore the importance of public access to public records about the operation of hospitals, even when hospital authorities have delegated their responsibilities to nonprofit organizations.

Access to public records is particularly critical in Georgia, where state law public reporting requirements for hospitals on community benefit planning and spending are not as robust as those that exist in some other states. *See* “Community Benefit State Law Profiles,” The HillTop Institute, available at http://www.hilltopinstitute.org/hcbp_cbl.cfm, (last viewed September 20, 2016.)

No substitute for access under the Open Records Act (the "Act") exists. While Georgia Watch obtains valuable information from IRS reports about Georgia hospitals, due to the reporting timeline for filing tax returns, this information is usually unavailable to the public until it is anywhere from one to three years old. Thus, tax records are more valuable for conducting retrospective analyses of hospital performance than for understanding a hospital's current priorities, day-to-day operations, and future planning.

Perhaps more importantly, IRS reporting requirements do not paint the full picture of how local hospitals are responding to community needs and complying with billing and collection laws. For example, IRS documents do not reveal the calculations behind hospitals' reported charity care expenditures or the amount of community health improvement expenditures that are devoted to specific projects outlined in a hospital's implementation strategy to address

community health needs. The IRS does not review the steps the hospital has taken to ensure third-party contractors working on billing and collections issues are in compliance with new federal requirements for nonprofit hospitals. Additionally, information about the number of applications for financial assistance that were filed, processed and approved by the hospital, and hospitals' full efforts to address the needs of patients whose primary language is not English, are not necessarily reported in IRS documents. Simply put, IRS documents are a useful supplement to public records available under the Act, but they are not an adequate replacement.

Hospital acquisition of entities, including the relevant transactions here, have profound implications for Georgia consumers. Such purchases can ultimately lead to doubling of prices and shocking out-of-pocket costs for identical care. *See Local hospitals buy medical practices; patients forced to pay*, available at <http://www.wsbtv.com/news/local/local-hospitals-buy-medical-practices-patients-for/53837305> (last viewed September 12, 2016). Patients have complained of higher bills for the same oncology care and poor customer service following such acquisitions. *See Carrie Teegardin, When doctors sell out, hospitals cash in*, Atlanta Journal Constitution, available at <http://www.myajc.com/news/news/when-doctors-sell-out-hospitals-cash-in/nYfkW/> (last viewed September 12, 2016).

Where the public agencies charged with providing public hospital services have delegated their duties to the point they do not oversee even major purchases of additional practices, the public cannot be asked to entrust its rights to private nonprofits without any form of accountability. Public access to public records provides that necessary accountability. At its core, the purpose of public records access is to ensure an informed citizenry, needed to check against corruption and to hold public officials accountable. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The right to know what a public agency, or its delegate, is doing is a

structural necessity in a real democracy. *See News-Press v. U.S. Dept. of Homeland Sec.*, 489 F.3d 1173, 1190 (11th Cir. 2007) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)).

III. ARGUMENT AND CITATION OF AUTHORITIES

The Court of Appeals decision defies long-standing Georgia open government principles. The Act favors access to public records and shall be construed broadly. O.C.G.A. § 50-18-70. For more than two decades, records of private nonprofit hospitals operating on behalf of hospital authorities generally have been subject to the Act. The Court of Appeals decision overturned this well-established access in favor of an overly restrictive standard. This standard will quickly thwart access and public oversight of the entities carrying out hospital authorities' statutorily-mandated, essential government function of promoting the public health needs of the community. *See* O.C.G.A. § 31-7-75.

The court's holding, if permitted to stand, would substantially erode crucial public access to public records in Georgia, where the Act has consistently been construed to guarantee access. In reaching its decision, the Court of Appeals relied heavily on the Fulton County Hospital Authority's (the "Authority") hands-off approach to oversight of Northside Hospital to deny access, when, to the contrary, this approach bolsters the need for transparency and public oversight. The General Assembly has consistently taken measures to ensure public oversight of significant hospital and healthcare transactions. For these reasons, certiorari should be granted to correct these errors.

A. The Act Ensures Access to Hospital Records

The Court of Appeals created a new standard for access to public records, requiring that a requester seek records only about transactions in which the delegating agency exercises direct

control and involvement. *Smith v. Northside Hosp., Inc.*, 336 Ga. App. 843, 851 (2016), reconsideration denied (Apr. 14, 2016). This places a nearly impossible burden on a public records requester to know more about the transactions it desires to review than the public agency itself may know, and contradicts the Act's mandate in favor of access. The Act imposes an affirmative duty on public agencies – not Georgia citizens – to ensure public access. O.C.G.A. § 50-18-71. And it has been consistently construed to provide access under the facts presented here.

In *Northwest Georgia Health System, Inc. v. Times-Journal, Inc.*, 218 Ga. App. 336 (1995), the Court of Appeals held that private, nonprofit hospitals carrying out the official responsibilities of hospital authorities were subject to both the Open Records Act and the Open Meetings Act. "Without question, these private, nonprofit corporations became the vehicle through which the public hospital authorities carried out their official responsibilities." *Id.* at 339. Thus, such entities are subject to the Act. *Id.* The court made clear that the relevant analysis is whether the private hospital was performing a service for or on behalf of an agency. The decision never considered whether any particular transaction was done in furtherance of the authority's purposes, because the private entities as a whole were performing the function of the several public hospital authorities. *Id.* Performance of this overall function – not any particular act taken in said performance – subjected the entities to the Act.

Here, the court injected an overly narrow inquiry to negate these long-established principles, by arguing that the specific transactions about which petitioner sought records were somehow not done in performance of any public function. To reach this conclusion, the court made much of the fact that Authority leadership was not aware of the particular transactions at issue until the leadership read about it in the newspaper. *Smith*, 336 Ga. App. at 851. This is a red

herring. Authority leadership does not have access to the hundreds of transactions Northside carries out each day because the Authority has delegated its responsibility for these transactions to Northside. That fact alone has no bearing on whether Northside records are public records; it merely reflects the nature of a delegation of duties. Moreover, the Authority's hands-off approach indicates that Northside is operating to fulfill Authority duties with only minimal oversight. This fact weighs in favor of public access to Northside records; without some sort of oversight, Northside may be permitted to entirely shirk its obligations to the public as surrogate for the Authority. The Authority's lack of concern about Northside's actions does not determine the public interest. In fact, it strengthens the public interest.

The Court of Appeals also distinguished *Clayton County Hospital Authority v. Webb*, 208 Ga. App. 91 (1993), because in *Clayton*, the requested records remained in the possession and control of the Authority, while here they did not. This distinction ignores the fact that records in the possession of a private entity on behalf of a public agency meet the statutory definition of public records. O.C.G.A § 50-18-70 (documents that have been transferred to a private person or entity by an agency for storage or future governmental use are public records). In *Clayton*, the court considered not only the actual possession of the records, but also the fact that the private entities were created as part of a reorganization of the hospital authority and that all assets of the authority had been transferred to these entities. *Id.* at 93. And, as in *Northwest*, the court did not consider specifically the Authority's level of control over or involvement in any of the transactions about which records were sought.

The Court of Appeals decision here not only undermines access to hospital records across Georgia, it also has ominous implications for public oversight of the multitude of private agencies conducting public business through a similar delegation. The lower court has provided a

road-map by which public agencies and private companies may evade public access: a public agency can relinquish oversight and management of what its delegate is doing or not doing in fulfillment of its delegated role, and the delegate can consequently avoid public oversight of its actions. The decision is at odds with the fundamental tenets of the Act, which requires courts defend access to public records. O.C.G.A. § 50-18-70(a). Until now, Georgia courts have consistently refused to permit public agencies to evade public access by delegating their responsibilities. *Jersawitz v. Fortson*, 213 Ga. App. 796 (1994) (Olympic Task Force Selection Committee was subject to the Act); *Macon Tel. Publ'g Co. v. Board of Regents*, 256 Ga. 443 (1986) (University of Georgia athletic association carrying out university function was subject to the Act). The Court of Appeals decision represents a reversal of clear principles of Georgia open government.

B. Georgia Law Favors Hospital Oversight

In addition to the explicit mandates of the Act, the General Assembly has taken numerous legislative steps to ensure oversight of hospitals around the state. These measures further evidence the legislative interest in and support for public scrutiny of hospitals and hospital authorities. Eliminating access under the Act undermines not only the public interest in the Act, but also the public interest in oversight of large healthcare transactions. Although Georgia Watch has advocated and will continue to advocate for even greater transparency and consumer engagement, these statutes reflect a clear public policy by the General Assembly in favor of hospital oversight.

For example, the Hospital Acquisition Act (the "Acquisition Act") requires public notice, a public hearing, and public comment period before any acquisition or disposition of a hospital owned, controlled, or operated by a nonprofit corporation. O.C.G.A. § 31-7-400, *et seq.* The

buyer and seller are required to testify under oath subject to questioning by the Attorney General at the hearing. O.C.G.A. § 31-7-405. The Acquisition Act helps to ensure meaningful public input into a proposed transaction. *Sparks v. Hosp. Auth. of City of Bremen & County of Haralson*, 241 Ga. App. 485, 487 (1999). The General Assembly, through the Acquisition Act, showed a clear interest in public oversight of nonprofit hospital dispositions. *Turpen v. Rabun County Bd. of Comm'rs*, 245 Ga. App. 190, 195 (2000). Thus, the General Assembly has made clear its substantial interest in public oversight of nonprofit hospital transactions.

The General Assembly has also enacted the Certificate of Need Program to ensure oversight of major hospital expenditures. O.C.G.A. § 31-6-40. This program requires state review of certain expenditures by or on behalf of a healthcare facility in excess of \$2.5 million. *Id.* The program is part of the overall state policy of ensuring that healthcare services and facilities are developed in an orderly and economical manner and are made available to all citizens. O.C.G.A. § 31-6-1. The Legislature created the Certificate of Need requirement to avoid costly and unnecessary duplication of healthcare services. *Georgia Dept. of Cmty. Health v. Satilla Health Servs., Inc.*, 2004266 Ga. App. 880, 886 (2004). The program reflects the General Assembly's strong interest in careful oversight and planning with regard to expansions and acquisitions in healthcare.

As recognized by the dissenting opinion in the appellate court, the General Assembly has also imposed reporting requirements on nonprofit corporations operating on behalf of a hospital authority; within these requirements, the General Assembly explicitly endorsed the *Northwest Ga. Health Systems* decision. See O.C.G.A. § 14-3-305(e); *Smith v. Northside Hosp., Inc.*, 336 Ga. App. 843, 859-860 (2016) (McFadden, J. dissenting), reconsideration denied (Apr. 14, 2016).

These legislative measures are in addition to the robust access under the Act that Georgia citizens have long enjoyed. Simply put, the strong public policy in Georgia favors careful monitoring and scrutiny of healthcare transactions. Where, as here, the transactions do not fall squarely within the aforementioned provisions requiring additional government scrutiny, access to public records under the Act is even more important.

IV. CONCLUSION

The Court of Appeals decision violates clear legislative mandates in favor of public access to public records generally, and public oversight of public hospitals. Access has been thwarted in favor of secrecy to veil the very transactions that should be conducted in open, so that Georgia citizens and consumer advocates like Georgia Watch can scrutinize and understand the implications of these transactions. For these reasons, this Court should grant the Petition for Certiorari and reverse the Court of Appeals decision.

Respectfully submitted this 20th day of September, 2016.

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CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that she caused to be served on the below-listed counsel of record a copy of the foregoing AMICUS BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI by United States mail, first-class postage prepaid and addressed as follows (and also by email):

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This 20th day of September, 2016.

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