

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

GARLAND FAVORITO, MICHAEL)
SCUPIN, TREVOR TERRIS, SEAN)
DRAIME, CAROLINE JEFFORDS,)
STACY DORAN, CHRISTOPHER PECK,)
ROBIN SOTIR and BRANDI TAYLOR,)
Petitioners,)

v.)

FULTON COUNTY, FULTON COUNTY)
BOARD OF REGISTRATION AND)
ELECTIONS, and FULTON COUNTY)
CLERK OF SUPERIOR AND)
MAGISTRATE COURTS,)
Respondents.)

CIVIL ACTION NO.

2020CV343938

*Granting ORA
rel. of Counts 9 & 10*

ORDER

On December 23, 2020, Petitioners filed the above-styled petition for declaratory judgment and injunctive relief, which was amended on January 13, 2021. Therein, Petitioners allege that Respondents violated the Open Records Act, OCGA § 50-18-70 *et seq.* (the “ORA”), and their state constitutional rights. On January 15, 2021, and March 15, 2021, the parties appeared to argue the merits of the ORA claims. On April 13, 2021, the parties appeared before the Court on Petitioners’ motion to unseal the ballots; relief that Petitioners believe is necessary to prove their constitutional claims.

I. Petitioners’ Request to Enforce Compliance with the ORA

Petitioners ask the Court to enforce compliance with Garland Favorito’s November 5, 2020, ORA request (the “November 5th ORA request”) in Count VIII of the amended petition; Garland Favorito’s December 3, 2020, ORA request (the “December 3rd ORA request”) in Count

IX; and Caroline Jeffords' December 28, 2020, and December 29, 2020, ORA requests (the "December 28th ORA request" and the "December 29th ORA request") in Count X.

The ORA provides that:

[T]he strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions.... [Further,] there is a strong presumption that public records should be made available for public inspection without delay.¹ OCGA § 50-18-70 (a).

The ORA further provides that "[a]ll 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."² OCGA § 50-18-71 (a). Accordingly, an "Agency"³ must produce "all records responsive to a request within a reasonable amount of time not to exceed three business days of receipt of a request...." OCGA § 50-18-71 (b) (1) (A). However, an agency may require that all written requests be made upon a duly designated open records officer. OCGA § 50-18-71 (b) (1) (B). If an agency has designated an open records officer, and requires that ORA requests be made upon such individual, then "the three-day period for response to a

¹ Fulton County's policy is "that public records in the possession of any employee, officer, elected or appointed official, or agency of Fulton County shall be subject to disclosure to the fullest extent permitted and required by the laws of the State of Georgia." Fulton County Board of Commissioners' Item #16-0185, 384, Mar. 2, 2016; Resp'ts' Hr'g Ex. 4, Jan. 15, 2021.

² On March 25, 2021, the ORA was amended to specifically state that "[s]canned ballot images created by a voting system authorized by Chapter 2 of Title 21 shall be public records subject to disclosure under this article." OCGA § 50-18-71 (k).

³ Agency is a defined term under the ORA and, here, it is uncontroverted that Fulton County constitutes an agency as defined thereunder. OCGA § 50-18-70 (b) (1).

written request shall not begin to run until the request is made in writing upon such individual[.]”
OCGA § 50-18-71 (b) (2).

To designate an open records officer, the agency must make the designation in writing; notify the legal organ of the county in which the agency’s principal office resides; and, if the agency has a website, must also prominently display such designation thereon. *Id.*

Here, attorney Steven Rosenberg was duly designated as Fulton County’s open records officer in writing, pursuant to Fulton County Board of Commissioners’ Item #16-0185,⁴ and the subsequent notice advertised in the Daily Report⁵ on November 9, 2016. Additionally, that designation is prominently displayed on Fulton County’s website.

The Court finds that Fulton County’s designation of Mr. Rosenberg as its open records officer also served as a designation for purposes of the Fulton County Board of Registration and Elections, which is a political subdivision of Fulton County.

The Court further finds that an ORA request made upon a Fulton County employee other than Mr. Rosenberg does not trigger the three-day period for response because Fulton County requires that ORA requests be made upon its designated open records officer.

II. Specific ORA Requests

The Court now turns to the four ORA requests that Mr. Favorito and Ms. Jeffords ask the Court to enforce. Because Mr. Favorito and Ms. Jeffords seek to enforce provisions of the ORA, they bear the burden of proving Respondents’ purported violations. *GMS Air Conditioning v. Dept. of Human Resources*, 201 Ga. App. 136, 138, 410 S.E.2d 341 (1991).

(1) *Garland Favorito’s November 5th ORA Request*. Mr. Favorito alleges that Fulton County violated the ORA because he did not receive a response to his November 5th ORA

⁴ Fulton County Board of Commissioners’ Item #16-0185, 384-392, Mar. 2, 2016; Resp’ts’ Hr’g Ex. 4.

⁵ The legal organ of Fulton County.

request for “an electronic copy of [i]nterim election results summaries for each transmission made from Fulton County to the office of the Secretary of State for the November 3, 2020 election.” Mr. Favorito’s November 5th ORA request was made via email to the members of the Fulton County Board of Registration and Elections, Fulton County’s Elections Director, Fulton County’s Chief of Registration, and a Fulton County attorney.

While Mr. Favorito complains about the lack of response to his November 5th ORA request, he has presented no evidence that shows his request was made upon Mr. Rosenberg. Therefore, the Court concludes that the three-day period for response was not triggered by Mr. Favorito’s November 5th ORA request. Accordingly, Mr. Favorito has not met his burden to show that Fulton County violated the ORA in this regard.

(2) *Garland Favorito’s December 3rd ORA Request*. Mr. Favorito alleges that Fulton County violated the ORA because they failed to timely and sufficiently respond to his December 3rd ORA request to “view the Fulton Co. 2020 absentee ballots prior to certification of the election results.” Mr. Favorito’s December 3rd ORA request was made via email to the members of the Fulton County Board of Registration and Elections, Fulton County’s Elections Director, a Fulton County attorney, and an open records liaison to Mr. Rosenberg.

On January 4, 2021, Mr. Rosenberg emailed a response to Mr. Favorito wherein he claimed not to have received Mr. Favorito’s December 3rd ORA request until December 28, 2020, and cited OCGA § 21-2-500 as the basis of non-disclosure of the absentee ballots. Mr. Favorito concedes that he did not submit the December 3rd ORA request via Fulton County’s ORA request portal.⁶ Accordingly, the Court finds that the three-day period for response began

⁶ Hr’g Tr., 33, Jan. 15, 2021. If Mr. Favorito had submitted his request via Fulton County’s ORA request portal, it would have automatically been emailed to Mr. Rosenberg.

to accrue when Mr. Rosenberg first received Mr. Favorito's December 3rd ORA request, when it was forwarded to his email, on December 28th.

Nevertheless, the Court finds that Fulton County's response was untimely and otherwise deficient. Pursuant to OCGA § 1-3-1 (d) (3),

Except as otherwise provided by time period computations specifically applying to other laws, when a period of time measured in days...is prescribed for the exercise of any privilege or discharge of any duty, the first day shall not be counted but the last day shall be counted.... When the period of time prescribed is less than seven days, intermediate Saturdays, Sundays, and legal holidays [as set forth in OCGA § 1-4-1] shall be excluded in the computation.

OCGA § 1-4-1 (a) provides that the State of Georgia recognizes and observes as public and legal holidays,

- (1) All days which have been designated as of January 1, 1984, as public and legal holidays by the federal government; and
- (2) All other days designated and proclaimed by the Governor as public and legal holidays or as days of fasting and prayer or other religious observance....

Mr. Rosenberg testified that he responded on January 4th because, by his calculation, that was when his response was due. The Court, however, concludes that the due date was Thursday December 31st, 2020, because no evidence was introduced by Fulton County to show that December 31st was a public and legal holiday.

Turning to the sufficiency of Mr. Rosenberg's January 4th response, OCGA § 50-18-71 (d) requires that "[i]n any instance in which an agency is required to or has decided to withhold all or part of a requested record, the agency shall notify the requester of the specific legal authority exempting the requested record or records from disclosure by Code section, subsection, and paragraph...." (emphasis added).

Here, Mr. Rosenberg wrote, *inter alia*, "I believe the election result[s] have been certified and th[e] records you are seeking are now exempt from disclosure pursuant to OCGA § 21-2-

500.” Because the absentee ballots were sealed at the time Mr. Rosenberg’s response was due, pursuant to OCGA § 21-2-500 (a),⁷ Petitioners have not met their burden to show that non-disclosure of the absentee ballots constituted a violation of the ORA. See *Smith v. DeKalb County*, 288 Ga. App. 574, 577, 654 S.E.2d 469 (2007). However, Mr. Rosenberg’s response did not cite the subsection exempting the absentee ballots from disclosure under OCGA § 21-2-500. Accordingly, the content of the January 4th response was deficient pursuant to OCGA § 50-18-71 (d) by failing to set forth the relevant subsection of OCGA § 21-2-500.

Mr. Favorito contends that he is entitled to have access to the paper absentee ballots due to Fulton County’s violation of the ORA.⁸ However, a technical violation of the ORA does not entitle Mr. Favorito to have access to the paper absentee ballots. See *Chua v. Johnson*, 336 Ga. App. 298, 301-303, 784 S.E.2d 449 (2016). Rather, disclosure is only permitted if the paper absentee ballots are, in fact, public records subject to disclosure, which, as noted above, they are not pursuant to OCGA § 21-2-500 (a). *Chua*, 336 Ga. App. at 301-303, 784 S.E.2d 449; *Smith*, 288 Ga. App. at 577, 654 S.E.2d 469 (2007).

Additionally, Mr. Favorito asks the Court to award him attorney’s fees and other litigation costs reasonably incurred.⁹ OCGA § 50-18-73 (b) provides that, in any action brought to enforce the ORA, the court must award attorney’s fees and litigation costs reasonably incurred if it determines “that either party acted without substantial justification either in not complying with [] [the ORA] or in instituting the litigation” unless “special circumstances exist.” Here, the Court finds that Fulton County acted without substantial justification in not complying with the

⁷ See Sec. State Br., 7, Apr. 2, 2021.

⁸ To the extent Petitioners seek the absentee ballot images, that request has been mooted pursuant to the Court’s April 16, 2021, Order to Produce Scanned Absentee Ballot Images.

⁹ Petitioners ask the Court to assess civil penalties pursuant to OCGA § 50-18-74 (a), however, the Court finds that only the Attorney General may seek civil penalties under that Code section. See OCGA § 50-18-73 (a); see also *Blalock v. Cartwright*, 300 Ga. 884, 886-887, 799 S.E.2d 225 (2017).

ORA in connection with Mr. Rosenberg's untimely and deficient January 4th response. Further, the Court finds that no special circumstances exist such that attorney's fees and litigation costs reasonably incurred should not be awarded. However, Mr. Favorito has failed to make any showing as to what attorney's fees and other litigation costs he reasonably incurred. Accordingly, Mr. Favorito's request for attorney's fees and litigation costs is denied.

(3) *Caroline Jeffords' December 28th ORA Request.* Ms. Jeffords alleges that Fulton County violated the ORA because they did not sufficiently respond to her December 28th ORA request that was submitted via Fulton County's ORA request portal and sought,

- All original, paper absentee mail-in ballots as well as the scanned/electronic copies that were counted towards the 2020 Presidential Election vote totals which were scanned at State Farm Arena located at 1 State Farm Drive, Atlanta, GA 30303 between the dates of November 3, 2020, and November 4, 2020;
- All original, paper absentee mail-in ballots as well as the scanned/electronic copies for the 2020 Presidential Election that were discarded or otherwise not counted for the 2020 Presidential Election; and
- The originals of the spoiled absentee mail-in ballots.

On December 30, 2020, Mariska Bodison, a non-attorney liaison that reports to Mr. Rosenberg on behalf of the Fulton County Board of Registration and Elections, submitted a response stating that the absentee ballots were not subject to disclosure pursuant to OCGA § 21-

2-483(b).¹⁰ Additionally, Ms. Bodison forwarded Ms. Jeffords several voluminous, non-responsive, documents entitled “Election Summary Report” and “Statement of Votes Cast.”

Here, it is uncontested that Ms. Bodison’s response was timely, however, Ms. Jeffords contends the response was substantively deficient. The Court agrees that Ms. Bodison’s response was deficient because OCGA § 21-2-483(b) applies when ballots are being tabulated and tabulation had concluded by December 30th.¹¹ However, the Court finds that non-disclosure of the absentee ballots was proper because, by December 30th, they were sealed and therefore not public records subject to disclosure. See *Smith*, 288 Ga. App. at 577, 654 S.E.2d 469 (2007); OCGA § 21-2-500 (a).

Ms. Jeffords also asserts that Fulton County’s violation of the ORA entitles her to have access to the paper absentee ballots. However, as previously discussed, the paper absentee ballots were sealed and therefore not public records subject to disclosure under the ORA. Additionally, Ms. Jeffords asks the Court to award her attorney’s fees and other litigation costs that she reasonably incurred. However, Ms. Jeffords too has failed to make any showing as to what attorney’s fees and other litigation costs she reasonably incurred. Accordingly, Ms. Jeffords’ request for attorney’s fees and litigation costs is denied.

(4) *Caroline Jeffords’ December 29th ORA Request*. Ms. Jeffords alleges that Fulton County violated the ORA because its response to her December 29th ORA request, that she submitted via Fulton County’s ORA request portal, was substantively deficient. Specifically, Ms. Jeffords alleges that Ms. Bodison provided her aforementioned December 30th response to her December 29th ORA request. To the contrary, Mr. Rosenberg testified that Ms. Bodison provided

¹⁰ That Code section states that “[a]ll proceedings at the tabulating center and precincts shall be open to the view of the public, but no person except one employed and designated for the purpose by the superintendent or the superintendent’s authorized deputy shall touch any ballot or ballot container.”

¹¹ Sec. State Br., 7, Apr. 2, 2021.

a separate response to Ms. Jeffords' December 29th ORA request.¹² Further, he testified, without objection, to viewing Ms. Bodison's separate response to the December 29th ORA request that he claimed was provided via Fulton County's ORA request portal.¹³ Ms. Jeffords did not follow up by admitting a copy of that separate response into evidence or by demonstrating that Mr. Rosenberg's testimony was incorrect. Accordingly, because the record does not include Ms. Bodison's response to the December 29th ORA request, Ms. Jeffords has not shown that Fulton County violated the ORA in this regard.

Accordingly, **IT IS HEREBY ORDERED** that Count VIII of the amended petition, concerning Mr. Favorito's November 5th ORA request is **DENIED**.

IT IS FURTHER ORDERED that Count IX of the amended petition, concerning Mr. Favorito's December 3rd ORA request is **GRANTED** in that the Court finds that Mr. Rosenberg's January 4th response was in violation of the ORA because it was untimely and deficient. Count IX is otherwise **DENIED**.

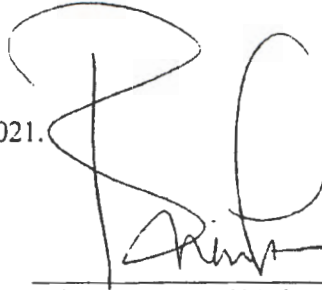
IT IS FURTHER ORDERED that Count X of the amended petition, concerning Ms. Jeffords' December 28th ORA request and December 29th ORA request, is **GRANTED** in that the Court finds that Ms. Bodison's December 30th response to Ms. Jeffords' December 28th ORA request was in violation of the ORA because it was not responsive. Count X is otherwise **DENIED**.

¹² Hr'g Tr., 97-98.

¹³ Mr. Cheeley: "Mr. Rosenberg, you understand that Ms. Bodison filed one response to my law firm, and it covered both December 28th and December 29th open records requests that our firm sent to Fulton County. You agree with that?"

Mr. Rosenberg: "I do not, actually. And I appreciate you asking the question in that way, because I have since been able to refresh my recollection, and that's not what happened. I think they got combined within your firm perhaps. But as I see them, I get to view them on the open records portal, right, and they're different requests. So I can give you both request numbers, and Mariska provides different responses to each of those requests. And, in fact, in response to your December 29th request, she actually posted the guidance from the Secretary of State's office saying that valid images were exempt from disclosure. Your secretary, Ms. Dracos, could go out there now and pull it up. It's been there for some time." Hr'g Tr., 97-98.

SO ORDERED this 20th day of April, 2021.

A handwritten signature in black ink, appearing to read 'Brian J. Amero', written over a horizontal line.

Brian J. Amero, Chief Judge
Superior Court of Henry County
Flint Judicial Circuit
By Designation, a Fulton County
Superior Court Judge