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***Regulatory Oversight Podcast: Unveiling the Impact: How Georgia's Open Records Act Affects Private Businesses***

**Host: Stephen Piepgrass**

**Guest: David Dove**

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**Stephen Piepgrass:**

Welcome to another episode of *Regulatory Oversight*, a podcast that focuses on providing expert perspective on trends that drive regulatory enforcement activity. I'm Stephen Piepgrass, one of the hosts of the podcast and the leader of our firm's Regulatory Investigations, Strategy and Enforcement Practice Group.

This podcast features insights from members of our practice group, including its nationally ranked state attorney's general practice, as well as guest commentary from business leaders, regulatory experts, and current and former government officials. We cover a wide range of topics affecting businesses operating in highly regulated areas.

Before we get started today, I want to remind all of our listeners to visit and subscribe to our blog at [RegulatoryOversight.com](https://www.regulatoryoversight.com), so you can stay up to date on developments and changes in the regulatory landscape.

Today, I'm joined by my colleague, David Dove, to discuss a recent Georgia Supreme Court decision that significantly impacts private companies under Georgia's Open Records Act. We'll discuss the implications of this ruling for business owners and contractors and practical steps to ensure compliance and avoid penalties.

David's a member of our RISE Practice Group and heads up our Regulatory and Economic Investment Practice in Georgia. Prior to joining Troutman Pepper, David had extensive leadership experience in state government most recently serving as Executive Counsel to Georgia Governor Brian Kemp. David, thanks for joining me today.

**David Dove:**

Stephen, it's great to be here. Thanks for having me.

**Stephen Piepgrass:**

Absolutely. Well, let's jump right in and discuss the August 13th opinion issued by the Georgia Supreme Court. I guess the first question is how do we pronounce the opinion. Take your best shot at that.

**David Dove:**

No. Stephen, I think this case is going to be known either as Milliron or Milliron, depending on whether you were on the north or south side of the Gnat Line in Georgia. I think that's going to be the probative fact as it relates to the pronunciation, but we'll go with Milliron.

Milliron versus Antonakakis is, as you mentioned, a recent Georgia Supreme Court case. It's really expanded the scope of Georgia's Open Records Act as it relates to private entities. Traditionally, this act has been known and applies to government agencies where, as you would expect, just like a Federal Open Records Act, a FOIA request, if there's a public document that a reporter or a citizen or anyone wants to request from a government agency, they can file that request with a public records officer for an agency and then get that document. What we have now is really a pretty dramatic shift in the landscape of this law to bring in private companies and private contractors.

**Stephen Piepgrass:**

Great Point, David. Obviously, this is something we advise our clients on all the time per Open Records Acts, FOIA acts all across the country in different states. Usually, when we're talking with them, we say, "Look, if you're a private entity, you're okay. You don't need to worry about a request. Certainly, don't need to worry about a request coming into you."

**David Dove:**

Right.

**Stephen Piepgrass:**

Obviously, if you're interacting with the government and they get a request and it implicates documents you've submitted to the government, then those might be an issue. Does this case address that distinction?

**David Dove:**

It does, but it actually reads public records far more broadly in Georgia than what I believe had previously been the kind of status quo in terms of how attorneys advise their client. Looking at the Open Records Act, essentially what happened in this case, you have Ryan Milliron who submitted an Open Records Act request to the Georgia Institute of Technology through its public records officer.

Professor Antonakakis, who is at Georgia Tech, is a member of faculty there but also had a couple of LLCs where he did business directly with the university. He's sitting both as a member of faculty, as well as a private contractor for Georgia Tech. Milliron sent requests both to Georgia Tech and to Antonakakis individually, and Antonakakis declined to respond to the request. It's essentially stated that he was going to not search his private emails for any public documents that you may have.

Now, taking a pause there, you mentioned earlier my background. I worked over eight and a half years in state government, the last five of which was serving as General Counsel to the Georgia Governor's Office. One thing that we always drilled there with our agencies and with our staff was that it does not matter the medium where a communication is held or a document is held. If the content of that document is related to a public function, then that is under the Georgia Open Records Act a public record.

Essentially, that's what we're running into here, right? Professor Antonakakis has documents that relate to his engagement with Georgia Tech, and what the Georgia Supreme Court came down with was essentially kind of two holdings in this case. First, that records held by any private contractor that relate to the services provided to a public agency are subject to the Georgia Open Records Act.

Secondly, and this is probably what is going to be most challenging for private companies in this space, open records request can now be made to the custodian of the public record outside of the agency or public records officer for that agency specifically including private contractors.

**Stephen Piepgrass:**

If I'm understanding that right, that means private businesses that are dealing with the government may need to appoint a foyer custodian to respond to requests like that. Is that how you read that?

**David Dove:**

I think that's exactly right. I think that's one of the strategies that private companies can employ to ensure that to the extent that they're a broader company and they have a lot of employees that they have some means by which to track whether they have compliance with the Georgia Open Records statute.

In practical terms, this is going to really require private contractors for government agencies to really take on a lot of the same frameworks that public agencies have in place to ensure that they remain compliant to the extent that they're doing business with a government in Georgia. I want to note for our listeners, if you are a company that does work with the state government and this, obviously, is going to apply to you.

For the Georgia Open Records Act, agency is broadly defined not only to include state government but all local governments, school systems, authorities that arise either under the state government or under a local county. This is going to be broad ranging from industrial development authorities, people doing business with them, literally all the way up to people contracting directly with the university system or with executive branch agencies generally.

**Stephen Piepgrass:**

That's a great point. So this is actually extremely, at least potentially, expansive and implicates all kinds of private parties that are interacting with government at just about every level. Are there areas that you see that are left unanswered by this case that we'll have to see how they get addressed in the future?

**David Dove:**

Yes. Now, I think there are many areas because as you could imagine, Stephen, there's a lot of things in the Georgia Open Records Act that, at least in terms of the statutory text, may not have been anticipated by the legislature to apply to private companies. One of those you mentioned earlier is having a public records custodian.

It's common practice in government agencies to have one identified individual who is responsible for receiving requests and then collecting the relevant documents within an agency. The Supreme Court really left the question open as to whether that in and of itself is going to be sufficient to be responsive to these types of requests. Let me give you an example to tell you what I mean there.

If you have a company that you say you do business with a local school system, but you have one individual employee who may have an LLC that is also doing business with the school system. Maybe there's a lot of overlap with that employee's time, both in your company, as well as – and to the extent that that employment agreement is reached. Your open records officer, even if you designate one, is not going to protect that employee even if their work is substantially similar to what your company's providing the local school system, right?

There's a lot of questions unanswered here about whether single open records officers will be sufficient to respond to anyone under your umbrella. Moreover, there's open questions about where liability lies. One thing I want to point out for our listeners is non-compliance with the Georgia Open Records Act, depending on the Mens Rea level at which that non-compliance meets, whether it's just purely negligence or whether it's intentional, can result in civil and criminal penalties that can be brought either by the attorney general's office or through citizen suits by individuals on their own, which is what we saw here in the Milliron case.

There is a lot of exposure that has been created for government contractors that do work both at the state and local level. There's a lot of exposure that's been created here that companies need to be aware of and need to plan for to the extent that they may have any records in their possession.

**Stephen Piepgrass:**

Maybe you could, and I would think this would be valuable for our listeners, talk a little bit about what practical steps you might advise a business to take if it's thinking through, "Oh, my gosh. I'm in a position where suddenly a public records act looks like it's going to apply to us because we deal with the government regularly."

**David Dove:**

Yes. No, absolutely. This is something that in working in state government, both in the Secretary of State's office, as well as in the governor's office, we put together these types of plans to address the open records needs for our respective agencies at the time. For anyone who thinks they might fall into this category of being a company that could have public records, the very first question is an analysis of the scope of your business. Look at what agencies you're serving, what you are doing in terms of providing a service for the government because that is going to determine what the scope of records within your possession may be.

If it's, say, an IT vendor that's only supplying sort of backend support for IT hardware within a government agency, you may have fewer records in your possession than, say, a company that's processing license applications for the Secretary of State's office or some other regulatory agency, right? That is step one.

Step two is then identifying the records within your possession, going through your system, understanding the logic of both your email system, as well as any systems you may be providing to a government to understand what data or what documents within those systems are public records and what are not.

I will note here that document is defined and public record is defined in the statute. It's defined broadly, but it does have a meaningful exception, which is if the data is not in a form that can be produced, there's no requirement to create some sort of mechanism to then create a document. That's something important. It's going to matter on a case-by-case basis with what data companies may have or what documents companies may have as to whether they can utilize that exception. But that's something I definitely wanted to know.

The third thing, and this is something that even many state employees, unfortunately, are just not very well-trained in. We trained on this every quarter in the governor's office, but there are document retention schedules for different kinds of documents that are possessed within a state agency and now under this opinion that may be possessed by your company. There is a small state board that sets these document retention schedules. Essentially, they say if a document falls within this x category, then it either has a 1, 5, 10, 20, 30-year lifespan where that document has to be preserved in its native format.

Once you understand what documents you may have in your possession, it's really essential to sit down with an attorney, with an expert to go through and see how that document retention schedule then impacts what data you have to store because that's going to impact your contracts for cloud storage, for hard storage if it's a physical document. There's a lot of different things that come into play there, and non-compliance with one of those retention schedules carries the same penalty as a violation of the Open Records Act.

Next, you want to create a process. This kind of goes back to your question as it relates to having an open records officer. Obviously, I think that's a great way to begin setting up a process. But when that open records officer receives a request for documents, there needs to be a protocol and an SOP that that open records officer follows to ensure that they can turn around the open records request within the requisite amount of time.

Generally, in Georgia, you have to provide records within three business days of proceed to request unless it's going to take more time to pull and analyze those records. Then you have to know for that person which pond they're fishing in. You've got to look at where those records are, whether their search criteria is going to be broad enough to find those different caches of records within your business to make sure that the request is fully responsive.

Finally, you have to train your employees and for them to know the exceptions to the act so that you can rely on this process working day in and day out and not creating liability for your company. Of course, training and finding ways to address the specificities that come along with these requests are something that we can help with and something that we've done not only, as you mentioned earlier, for governments across the country but also specifically here in Georgia.

**Stephen Piegrass:**

Yes. Thanks. Those are really great practical tips, David. There are just so many different ways that this could go from here. I'm thinking about agencies are allowed to charge for the copying

of records and the costs associated with the searches for those. I don't know if that's an issue that's been addressed in this opinion or if that is yet to be seen or can private companies charge people if they're submitting requests to them rather than to the government, and what rules might apply in those situations.

Then you raise the question of exceptions. Many of those give the discretion to the government to invoke an exception. Does a private entity have the same level of discretion that a government body does when someone seeks a document that may be subject to an exception? I can see all kinds of case law coming out of this decision to provide further clarification, but I guess the best advice is to come and talk to someone like you who's got a lot of experience in this area to at least come to as good a conclusion as you can in answering some of these questions.

**David Dove:**

Yes. No. I mean, I think you have identified just the tip of the iceberg in terms of the questions that are going to come out of this. Looking at the penalties for non-compliance, I mean it is essential that if we have a listener whose company is doing business with any government agency in Georgia, there is a whole new world of exposure as it relates to liability for non-compliance on this that companies are going to have to get their arms around relatively quickly.

To your point, the biggest thing there is ensuring that your council has the requisite expertise to be able to go in having addressed these situations before and come up with the best possible plan, given the data and reference that you hold and the degree of engagement that you have with a Georgia government, to ensure that you remain compliant and don't have to worry about the penalties that come along with non-compliance to this act.

A whole other area that kind of falls into that is, generally, open records cases get a much higher profile of media attention than cases in other areas, right? Because it's the public wanting to know and see what their government is doing, and there's a lot of concern about the spin-off effects of not being compliant in this. But like I said, I think you have definitely highlighted the tip of the iceberg, and it's going to be interesting to see the cases that get burst out of this out of this line to understand where exactly the Georgia Open Records Act is going to go.

**Stephen Piepgrass:**

It'll be a fascinating area of law to watch develop over the coming months. Well, thank you, David. I'm sure our listeners have enjoyed hearing your insights on this subject. I know I have. As you know, I follow the public records developments all across the country as we advise clients all over the country. Particularly when it comes to state public records laws, this one is a sea change, I think, for businesses in Georgia. It's great to have your expertise and history of advising folks in this area in Georgia to be able to share that with our listeners and with the businesses we represent. So very much appreciate it.

**David Dove:**

Well, thank you for having me, Stephen. I appreciate it.

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**Stephen Piepgrass:**

Thank you to our audience for tuning in. Remember to subscribe to this podcast through Apple Podcast, Google Play, Stitcher, or whatever platform you use. We look forward to having you join us next time.

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