

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

WILSON, MORTON & DOWNS,)
LLC,)

Plaintiff,)

v.)

GEORGIA IMMIGRATION)
ENFORCEMENT REVIEW BOARD,)
an official board of the State of Georgia,)

Defendant.)
_____)

CIVIL ACTION

FILE NO. 2018CV303253

COMPLAINT TO ENFORCE COMPLIANCE
WITH GEORGIA OPEN RECORDS ACT

COMES NOW WILSON, MORTON & DOWNS, LLC and, pursuant to O.C.G.A. § 50-18-73, files this Complaint to enforce compliance with the Georgia Open Records Act by the Georgia Immigration Enforcement Review Board, showing the Court the following.

I. SUMMARY OF COMPLAINT

The Georgia Immigration Enforcement Review Board adjudicates complaints filed against public agencies and employees. The Board receives written submissions, such as motions and briefs, holds hearings and issues decisions. The work of this board is of interest to citizens across the State.

The strong public policy of the State of Georgia is in favor of open government. Although there are exceptions to the Georgia Open Records Act, such exceptions are supposed to be construed narrowly.

However, contrary to Georgia law and the public policy of this state, the Immigration Enforcement Review Board is broadly interpreting a statutory exemption in order to block access to public records. Indeed, there is no valid reason for these public records — written decisions and written submissions — to be hidden from public view.

II. PARTIES

1.

Plaintiff Wilson, Morton & Downs, LLC (“WM&D” or “Plaintiff”) is a law firm and Georgia limited liability company with its principal office address at 125 Clairemont Avenue, Suite 420, Decatur, DeKalb County, Georgia 30030.

2.

One of the principals of WM&D, Bryan A. Downs, serves as City Attorney for the City of Decatur.

3.

Defendant Immigration Enforcement Review Board (“IERB” or “Defendant”) is a state board established by the Georgia General Assembly pursuant to O.C.G.A. § 50-36-3.

4.

The IERB is an “agency,” as that term is defined by O.C.G.A. § 50-18-70(b)(1), which is subject to the Georgia Open Records Act.

5.

The IERB may be served with this Complaint and Summons through the IERB’s Chairperson, Shawn Hanley, at the IERB’s address for legal notices, 270 Washington Street, SW, Room 1-156, Atlanta, Georgia 30334.

6.

Pursuant to § 50-36-3(c), the IERB is “attached” to the Department of Audits and Accounting (“DOAA”) for administrative purposes.

III. JURISDICTION AND VENUE

7.

This Court has jurisdiction to enforce compliance with the Georgia Open Records Act pursuant to O.C.G.A. § 50-18-73(a).

8.

Venue is proper in this Court.

IV. FACTS

The Quasi-judicial work of the IERB

9.

The IERB adjudicates complaints filed against public agencies and employees pursuant to O.C.G.A. § 50-36-3. These complaints allege violation of or failure to enforce certain Georgia statutes involving immigration.

10.

Pursuant to O.C.G.A. § 50-36-3, the IERB conducts reviews or investigations of complaints filed and conducts hearings, makes recommendations, issues written reports of its findings and judgments, takes remedial actions, and imposes sanctions, all pursuant to majority votes of its members.

11.

As stated by the Chairperson at the IERB’s February 28, 2018 meeting, the IERB is “a board of citizens who adjudicate complaints.”

12.

The statute that established the IERB and the IERB's procedural rules show that the IERB functions as a quasi-judicial, adjudicatory body.

13.

For example, in connection with its evidentiary hearings, the IERB is empowered to issue subpoenas and to administer oaths to witnesses.

14.

In the course of adjudicating a complaint, the IERB makes various written determinations and receives various written motions, briefs and appeals from the parties:

(a) the IERB makes a written determination, known as an "initial decision," following the evidentiary hearing, stating whether there has been a violation of or failure to enforce an eligibility status provision by a respondent;

(b) the IERB receives written motions and written responses from the complaining party and the respondent agency or employee;

(c) if a determination is made that there has been a violation, the respondent public agency or employee submits a "sanction response" to the IERB;

(d) if the IERB determines that the respondent should be sanctioned, the IERB provides the respondent with a written recommendation of sanction;

(e) both the complaining party and the respondent public agency or employee may submit to the IERB a written appeal of the initial decision and/or the recommendation of sanctions.

15.

O.C.G.A. § 50-36-3 does not contain any provision suggesting that the proceedings before the IERB are confidential or are to be conducted in private.

16.

To the contrary, in practice and as required by the Georgia Open Meetings Act, the meetings of the IERB, where pending cases are discussed, are open to the public, and evidentiary hearings conducted by the IERB are open to the public.

17.

Likewise, O.C.G.A. § 50-36-3 does not contain any provision suggesting that the written decisions of the IERB should be kept confidential.

18.

The IERB Rules provide that “[a] record shall be kept of all actions of the IERB, including all actions of any review panel of the IERB.”

19.

The IERB Rules do not contain any provisions suggesting that written submissions by the parties to an IERB proceeding should be treated as confidential or filed under seal.

20.

Nonetheless, despite these facts, the IERB takes the position that written decisions by the IERB and written submissions by the parties may not be disclosed while a case is pending.

The Open Records Act Requests at Issue and the IERB’s Responses

21.

As of December 18, 2017, fifteen (15) cases were pending before the IERB.

22.

These cases were filed against public agencies from across the State of Georgia: the City of Atlanta; the City of Decatur; Georgia Southern University; the Bibb County Board of Education; the Bulloch County Board of Education; the Cobb County School System; the

DeKalb County Board of Education; the Glynn County Board of Education; the Gwinnett County Board of Education; the Hall County Board of Education; the Marietta City Schools; and the Whitfield County Board of Education.

23.

On December 12, 2017, the undersigned Bryan A. Downs submitted a request to the IERB, pursuant to the Georgia Open Records Act. The request sought, among other things, initial decisions, final decisions, and recommendations of sanctions issued by the IERB since July 1, 2011.

24.

On December 18, 2017, Downs received a written response from Ms. Carol Schwinne, Director of Administration for the DOAA, on behalf of the IERB. The response stated, without any explanation, that “on-going investigations are not subject to open records.” The response further stated that, therefore, no other documents that pertain to open cases would be produced.

25.

No legal authority was provided that would exempt from disclosure documents pertaining to pending cases or “on-going investigations.”

26.

The IERB did produce the requested records for closed cases.

27.

True and accurate copies of Downs’ December 12, 2017 request and the IERB’s December 18, 2017 response are attached hereto as Exhibits A and B, respectively.

28.

In a follow-up letter to Ms. Schwinne dated February 6, 2018, Downs noted that no legal authority had been provided with respect to the purported exemption of records in pending cases. Downs also pointed out that, although the IERB has some investigative powers, it functions as a tribunal, and that members of the public are entitled to review decisions the IERB issues and recommendations it makes pursuant to votes by its members. Downs again requested that the withheld documents be produced.

29.

Downs provided a courtesy copy of the February 6 letter to the Senior Assistant Attorney General who serves as the IERB's attorney. Downs stated that he would welcome the opportunity to review any legal authority supporting the IERB's contention that it could withhold records in pending cases.

30.

A true and accurate copy of Downs' February 6, 2018 letter is attached hereto as Exhibit C.

31.

On February 8, 2018, Ms. Schwinne wrote to Downs, clarifying that actually there were not any responsive records that had been withheld because the IERB had not made an initial decision, a final decision or a recommendation of sanctions in any of the fifteen pending cases. She also provided a bare bones reference to specific legal authority for the purported exemption: "Per the Attorney General's Office, my basis for withholding such records comes from O.C.G.A. § 50-18-72(a)(4)."

32.

A true and accurate copy of Ms. Schwinne's February 8, 2018 response is attached hereto as Exhibit D.

33.

On February 21, 2018, Downs again wrote to Ms. Schwinne, confirming that the IERB was taking the position that, other than the initial complaint, any records pertaining to pending cases are exempt from disclosure pursuant to the "pending investigation" exemption set forth in O.C.G.A. § 50-18-72(a)(4).

34.

A true and accurate copy of Downs' February 21, 2018 letter is attached hereto as Exhibit E.

35.

In this letter, Downs expressed concern that the IERB is using this narrow exception to block public access to records pertaining to pending cases, which, by definition are of public interest since they involve local governments, public school systems and public universities across the State.

36.

The February 21 letter provided a detailed legal analysis of why the "pending investigation" exemption does not apply to records such as pleadings filed with the IERB and written decisions issued by this adjudicatory body.

37.

Once again, a courtesy copy of the February 21 letter was provided to the Senior Assistant Attorney General who serves as the IERB's attorney. Downs specifically requested that the Attorney General's office respond to the letter.

38.

The Attorney General's office has never responded to the February 21 letter.

39.

Also on February 21, 2018, Downs submitted another request to the IERB pursuant to the Open Records Act.

40.

A true and accurate copy of the February 21, 2018 request is attached hereto as Exhibit F.

41.

The February 21 request sought specific records for the fifteen pending cases: notices to the complaining party and the respondent; responses filed by the respondent; pleadings and communications filed by the complaining party and the respondent; and records evidencing "initial determinations" made by the IERB.

42.

Seven (7) business days later the IERB finally provided a response. In a letter dated March 2, 2018, Ms. Schwinne stated that "[u]nder the advice of the Attorney General's office," she was "unable to provide" the documents requested in the February 21 request. She also stated that "[t]he Attorney General's Office has affirmed the IERB's position that documents relating to pending cases meet the provisions of O.C.G.A. § 50-18-72(a)(4)."

43.

A true and accurate copy of the March 2, 2018 response is attached hereto as Exhibit G.

The Public's interest in IERB submissions

44.

On February 28, 2018, at a special called meeting, the IERB conducted hearings on approximately ten (10) of its pending cases.

45.

IERB members and a private attorney hired by the IERB spoke freely about the contents of various written submissions made by the agencies against whom these cases are pending and about communications between the IERB and attorneys for these agencies.

46.

For example, a letter brief submitted on behalf of Georgia Southern University (apparently months earlier) was discussed at length and formed the basis of a decision to dismiss the case on jurisdictional grounds. There was nothing confidential or private about the contents of the letter brief.

47.

However, members of the public who attended the hearings were not able to review that letter brief—before, during or after the hearing—given the IERB's refusal to produce such records.

48.

Likewise, if a newspaper in Statesboro was interested in learning about filings in the case involving Georgia Southern University, the IERB would refuse to produce the letter brief or other submissions, relying on the "pending investigation" exemption.

49.

Such a position makes no sense and does not fulfill the purpose of the exemption. The contents of the letter brief was discussed in an open meeting so clearly there was no need to shield the brief from public disclosure.

50.

Citizens attending the February 28 meeting did in fact express interest in obtaining written submissions in pending cases.

51.

One citizen, an attorney, spoke during the public comment period of the meeting and said she would have liked to have reviewed the submissions prior to the hearings in order to determine if she wanted to file amicus briefs.

52.

However, these interested citizens were told that public access was not allowed under the Open Records Act.

53.

The IERB's attorney offered his opinion that under current law the IERB has no discretion to waive statutory exemptions. However, he did not address the actual applicability of the underlying exemption that is being relied upon by the IERB. He failed to provide any explanation of how a written submission to an adjudicatory body by a party to the proceeding could fit within the pending investigation exemption.

COUNT ONE -
VIOLATION OF THE GEORGIA OPEN RECORDS ACT

54.

Paragraphs 1 through 53 of this Complaint are re-alleged as if set forth verbatim herein.

55.

The Georgia General Assembly has found and declared: (a) that the strong public policy of this state is in favor of open government; (b) that open government is essential to a free, open, and democratic society; and (c) 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. O.C.G.A. § 50-18-70(a).

56.

The Open Records Act is to be broadly construed to allow the inspection of public records. O.C.G.A. § 50-18-70(a).

57.

Statutory exceptions to disclosure must be narrowly construed. O.C.G.A. § 50-18-70(a).

58.

Contrary to Georgia law and the public policy of this State, the IERB is broadly interpreting the “pending investigation” exemption in order to shield virtually all records in cases pending before the IERB.

59.

The pending investigation exemption protects from disclosure “[r]ecords of law enforcement, prosecution or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity.” O.C.G.A. § 50-18-72(a)(4).

60.

The pending investigation exemption was intended to protect true investigative materials created by law enforcement, prosecution and regulatory agencies while the investigation or prosecution is pending, such as statements, memoranda, narrative reports, and the like made in and maintained in the course of a pending investigation. Unified Government of Athens-Clarke County v. Athens Newspapers, LLC, 284 Ga. 192, 194 (2008).

61.

Although the IERB does have some investigative powers under Georgia statutory law, overall it functions as a tribunal or adjudicatory body.

62.

Pleadings filed with the IERB, written decisions entered by the IERB, and communications between the IERB and parties to pending cases are not the type of investigative materials protected from disclosure by the pending investigation exemption.

63.

All such records should be open to public access by individual citizens, by the media, and by any person or entity interested in the proceedings of this state board that adjudicates complaints filed against public agencies and employees.

64.

To the extent there are specific records pertaining to an IERB proceeding that actually fall within the pending investigation exception (i.e., that legitimately need to be shielded from public view), the Open Records Act directs that only those specific records be withheld. O.C.G.A. 50-18-70(a). Instead, the IERB asserts a blanket exemption for all records, even those that have nothing to do with investigation.

65.

The IERB's reliance on a narrow exception to block access to all records pertaining to pending cases except the complaint violates both the letter and spirit of the Georgia Open Records Act.

66.

The IERB has also violated technical requirements of the Open Records Act.

67.

With respect to the December 12 request, the IERB initially failed to identify specific legal authority upon which the claimed exemption is based, as required by O.C.G.A. 50-18-71(d). It did so only after being asked to in a follow-up letter.

68.

With respect to the February 21 request, the IERB ignored the three business day requirement of O.C.G.A. 50-18-71(b)(1)(A), providing its response seven business days after receipt.

69.

The Court should enforce compliance with the Georgia Open Records Act by declaring that the pending investigation exemption, O.C.G.A. § 50-18-72(a)(4), does not apply to the records sought through the December 12, 2017 request and the February 21, 2018 request and by directing the IERB to produce to Plaintiff records responsive to the February 21, 2018 request.

COUNT TWO –

ATTORNEY'S FEES AND LITIGATION COSTS

70.

Paragraphs 1 through 69 of this Complaint are re-alleged as if set forth verbatim herein.

71.

The IERB's refusal to produce records responsive to the December 12 and February 21 requests on the basis of an inapplicable, narrow exception lacks substantial justification.

72.

The IERB has displayed a cavalier attitude toward the validity of its legal position.

73.

The IERB first failed to provide any legal authority; then provided a tardy, one sentence citation of authority; and then ignored a substantive analysis provided by the requesting party and a direct request for a response from the IERB's attorney.

74.

In short, Plaintiff was given no choice but to file this enforcement action.

75.

Moreover, the IERB's blocking of public access to its records is indicative of a developing pattern of secrecy in the workings of this State board.

76.

For example, it appears the IERB is conducting some of its business in the fifteen pending cases by way of email, with decisions being made by email votes of sub-panels, in violation of the IERB's own rules and in disregard of the Georgia Open Meetings Act.

77.

In light of the above facts, pursuant to O.C.G.A. § 50-18-73(b), Plaintiff is entitled to an award of its reasonable attorney's fees and litigation costs incurred in having to bring this enforcement action.

WHEREFORE, Plaintiff prays:

1. That process issue and be served upon Defendant; and
2. That Defendant be ordered to comply with the Plaintiff's requests pursuant to the Georgia Open Records Act; and
3. That the Court award Plaintiff its reasonable attorney's fees and litigation costs incurred in having to bring this action; and
4. That Plaintiff be granted such other and further relief as the Court deems just and proper.

This 4th day of April, 2018.

WILSON, MORTON & DOWNS, LLC

By: 

Bryan A. Downs
Georgia Bar No. 228437
Stephen G. Quinn
Georgia Bar No. 153012

Attorneys for Plaintiff

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125 Clairemont Avenue
Decatur, Georgia 30030
(404) 377-3638 telephone
bdowns@wmdlegal.com
squinn@wmdlegal.com

EXHIBIT A



WILSON MORTON & DOWNS LLC
ATTORNEYS AT LAW

December 12, 2017

Via Hand Delivery

Immigration Enforcement Review Board
270 Washington Street, SW
Suite 1-156
Atlanta, Georgia 30334

Re: Open Records Act Request

Greetings:

Please consider this letter a request for public records pursuant to the Georgia Open Records Act, O.C.G.A. §50-18-70, et seq. We ask that you make available for inspection the following records:

1. All agendas of meetings of the Immigration Enforcement Review Board ("IERB");
2. All summaries of meetings of the IERB;
3. All minutes of meetings of the IERB;
4. All complaints filed with the IERB;
5. All initial decisions issued by the IERB;
6. All final decisions issued by the IERB;
7. All recommendations of sanctions made by the IERB.

The terms "agendas," "summaries" and "minutes" are intended to have the same meanings as such terms are used in O.C.G.A. § 50-14-1. The terms "complaints," "initial decisions," "final decisions" and "recommendations of sanctions" are intended to have the same meanings as such terms are used in O.C.G.A. § 50-36-3 and the Rules of the Immigration Enforcement Review Board.

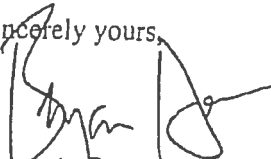
This request seeks records from July 1, 2011 through the date of your response.

If the requested records are already publicly available, such as on a State website, please direct me to such repository.

Immigration Enforcement Review Board
December 12, 2017
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If you have any questions regarding the scope of this request, please feel free to contact me directly at my number referenced above.

Sincerely yours,



Bryan A. Downs

BAD:cah

EXHIBIT B

MEMORANDUM

To: Mr. Bryan A. Downs, Wilson, Morton & Downs, LLC
From: Carol Schwinne, Director of Administration, Department of Audits and Accounts
Date: December 18, 2017
Re: Open Records Request

Carol

On December 12, 2017, the Department of Audits and Accounts received an Open Records Request for various records concerning the Immigration Enforcement Review Board (IERB). In response to your request, I respectfully offer the following response.

Since 2011, the Immigration Enforcement Review Board has received 22 complaints. This includes:

- Five in 2012
- One in 2013
- Two in 2016
- Fourteen in 2017

Of the 22 complaints received, the IERB has closed seven of the complaints. These complaints are 2012-01, 2012-02, 2012-03, 2012-04, 2012-05, 2013-01, and 2016-01. In accordance with the Open Records Law, I have attached electronic documents relating to these seven complaints. These documents include, but are not limited to, the original complaint, hearing transcripts, and correspondence from/to the IERB. Much of the detail relating to these closed complaints is located in the Meeting Minutes. I have included an attachment with this memorandum to assist you in locating the relevant information in the Meeting Minutes.

I have also attached a copy of the initial complaint for the 15 open cases. However, on-going investigations are not subject to open records. Therefore, I have not provided any other documents that may pertain to the case.

Finally, I have included all agendas and approved meeting minutes. Since the Board has not approved the meeting minutes from the November 15, 2017 meeting, those minutes are not included.

Please do not hesitate to contact me if you have any questions about this memorandum or the information provided. I can be reached at 404-463-2670 or at schwinne@audits.ga.gov.

cc: Shawn Hanley, Chairman, Immigration Enforcement Review Board
James Balli, Vice Chairman, Immigration Enforcement Review Board

Attachment

EXHIBIT C

February 6, 2018

Via Email (schwinne@audits.ga.gov)

Ms. Carol Schwinne
Director of Administration
Department of Audits and Accounts
270 Washington Street, SW
Suite 1-156
Atlanta, Georgia 30334

Re: Open Records Act Request

Dear Ms. Schwinne:

I am writing to follow up on your December 18, 2017 memo to me, which served as the response to my December 12, 2017 Open Records Act request to the Immigration and Enforcement Review Board. For ease of reference, I am attaching copies of my letter and your response.

I first want to thank you again for your diligence in forwarding to me the large volume of records responsive to my request. I appreciate your efforts.

The purpose of this letter is to address the requested records that were not produced. Three categories of records were not produced for cases that are pending: initial decisions issued by the IERB; final decisions issued by the IERB; and recommendations of sanctions made by the IERB (item numbers 5, 6 and 7 of my request).

You stated in your response that you were providing copies of the initial complaint for the 15 open cases, but were not providing "any other documents that may pertain to" these open cases, because "on-going investigations are not subject to open records." However, no legal authority was provided that would support the position that these records in pending cases are exempt from disclosure. The Open Records Act requires that such authority be provided at the time of the initial response. O.C.G.A. § 50-18-71(d).

I do not believe that there is an appropriate legal basis under the Georgia Open Records Act for withholding the documents requested: decisions issued and recommendations of sanctions made by a state board that has adjudicatory powers. Although the IERB certainly has some investigative powers under Georgia statutory law, it functions as a tribunal. Members of the public are entitled to review decisions the Board issues and recommendations it makes pursuant to votes by members of the Board. Accordingly, I request that all records responsive to

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item numbers 5, 6 and 7 be produced to me within three (3) business days of your receipt of this follow-up request.

I am providing a copy of this letter to the IERB's attorney, Senior Assistant Attorney General Russ Willard. If there is legal authority supporting the withholding of these records, I welcome the opportunity to review it.

Thank you for your attention to this matter.

Sincerely yours,



Bryan A. Downs

Enclosures
BAD:cah

cc: Russ Willard, Esq. (via email: rwillard@law.ga.gov)

EXHIBIT D



DEPARTMENT OF AUDITS AND ACCOUNTS

270 Washington Street, S.W., Suite 1-156

Atlanta, Georgia 30334-8400

GREG S. GRIFFIN
STATE AUDITOR

MEMORANDUM

To: Mr. Bryan A. Downs, Wilson, Morton & Downs, LLC
From: Carol G. Schwinne, Director of Administration, Department of Audits and Accounts *CGS*
Date: February 8, 2018
Re: Open Records Request

On February 6, 2018, the Department of Audits and Accounts received an Open Records Request for various records concerning the Immigration Enforcement Review Board (IERB). Specifically, you requested the following information for cases that are pending with the IERB:

- Initial decisions issued by the IERB
- Final decisions issued by the IERB
- All recommendations of sanctions made by the IERB

At the time of the original request, there were 15 pending complaints. There were no instances, among the 15 cases, in which the IERB had made an initial decision, final decision, or made any recommendations of sanctions. Therefore, there were no records related to the request noted above. While I provided you a copy of the initial complaint, I indicated that I could not provide any other records since these 15 cases were the subject of an open investigation. Per the Attorney General's Office, my basis for withholding such records comes from O.C.G.A. §50-18-72(a)(4).

Please note that the Immigration Enforcement Review Board will be holding hearings on the pending complaints, with the exception of 2017-13, on February 28, 2018. The meeting will be held in the Coverdell Legislative Office Building, Room 415. The meeting is scheduled to begin at 10:00 AM.

Please do not hesitate to contact me if you have any questions about this memorandum or the information provided. I can be reached at 404-463-2670 or at schwinne@audits.ga.gov.

cc: Russ Willard, Attorney General's Office

EXHIBIT E

February 21, 2018

Via Email (schwinne@audits.ga.gov)

Ms. Carol Schwinne
Director of Administration
Department of Audits and Accounts
270 Washington Street, SW
Suite 1-156
Atlanta, Georgia 30334

Re: Open Records Act Request

Dear Ms. Schwinne:

Thank you for providing your February 8, 2018 memorandum, which responded to my February 6, 2018 letter. I have reviewed your February 8 memorandum, as well as your initial response to my ORA request (your December 18, 2017 memoranda).

It is my understanding that, based on the advice of the Attorney General's office, the IERB is taking the position that, other than the initial complaint, any records pertaining to pending cases are exempt from disclosure under the Open Records Act, specifically pursuant to the "pending investigation" exemption set forth in O.C.G.A. § 50-18-72(a)(4). Please let me know if I have misconstrued the IERB's position.

I am deeply concerned about the IERB's position that the public may not access any records pertaining to a pending case, other than the initial complaint. For example, the public may not access other pleadings or communications submitted by a complainant to the IERB; the public may not access pleadings or communications submitted by a respondent public agency or employee; the public may not access written decisions, determinations, findings, recommendations, orders or rulings of the IERB or one of its review panels; and the public may not access written communications between the IERB and parties to a pending case. By way of further example, if a newspaper in Bulloch County or Bibb County or the City of Marietta wants to determine what is going on in one of the pending cases involving school systems in their area (respectively, pending case numbers 2017-11, 2017-8, 2017-5), the only record the IERB will release to them is the initial complaint.

The IERB's position that records in pending cases are exempt pursuant to the pending investigation exception is erroneous. Moreover, I find that the IERB's position disregards the State of Georgia's strong public policy of open government. I have again copied the Assistant Attorney General who represents the IERB and ask that the Attorney General's office respond to this letter.

The Attorney General's Office will undoubtedly agree with the following key tenets of Georgia sunshine laws. "[O]pen government is essential to a free, open, and democratic society." O.C.G.A. § 50-18-70(a). The Open Records Act is to be "broadly construed to allow the inspection of public records." *Id.* Statutory exceptions to disclosure "must be narrowly construed." Hardaway Company v. Rives, 262 Ga. 631, 634 (1992); See also O.C.G.A. § 50-18-70(a).

Contrary to clearly stated Georgia law, the IERB is broadly interpreting the "pending investigation" exemption in order to shield virtually all records in cases pending before the IERB. The pending investigation exemption protects from disclosure "[r]ecords of law enforcement, prosecution or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity." O.C.G.A. § 50-18-72(a)(4). The adjudicatory process by which the IERB determines whether a public agency or employee has violated Georgia law cannot and should not be shoe horned into this narrow exception, which was intended to protect true investigative materials created by law enforcement, prosecution and regulatory agencies while the investigation or prosecution is pending.

The IERB does have some investigative powers under Georgia statutory law. However, overall it functions as a tribunal or adjudicatory body. The IERB conducts "reviews" or "investigations" of complaints filed and conducts hearings, makes recommendations, issues written reports of its findings and judgments, takes remedial actions, and imposes sanctions, all pursuant to votes of its members. O.C.G.A. § 50-36-4. Of course, the meetings of the IERB, where pending cases are discussed, are open to the public and evidentiary hearings conducted by the IERB are open to the public. The required openness of such meetings undercuts any validity to the notion that records pertaining to pending cases are supposed to be kept secret.

As explained by the Georgia Supreme Court, the pending investigation exemption is intended to protect records such as "[s]tatements, memoranda, narrative reports, etc. made in and maintained in the course of a pending investigation." Unified Government of Athens-Clarke County v. Athens Newspapers, LLC, 284 Ga. 192, 194 (2008). Pleadings filed with the IERB, written decisions entered by the IERB, and communications between the IERB and parties to pending cases are not the type of investigative materials protected from disclosure by the pending investigation exemption. Therefore, all such records should be open to public access, whether by the undersigned or by another individual citizen or by the media.

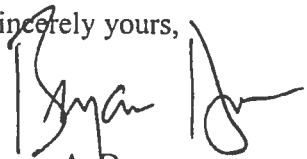
Although we cannot think of any, perhaps there are specific records pertaining to an IERB proceeding that actually fall within the pending investigation exception (i.e., that legitimately need to be shielded from public view). If that is the case, the Open Records Act directs that only those specific records be withheld. O.C.G.A. 50-18-70(a).

Most concerning, the IERB's attempt to prevent public access to its records seems to be indicative of a developing pattern of secrecy by this State board. It appears the IERB is conducting much of its business in the 15 pending cases by way of email, with decisions being

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February 21, 2018
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made by email votes of sub-panels, in violation of the IERB's own rules and in disregard of the Georgia Open Meetings Act. Coupled with the creative and broad interpretation of the "pending investigation" exemption, it appears that the IERB wants to operate in the dark, without public access and public observation of its proceedings. In light of the Attorney General's Office responsibility for ensuring open government in Georgia, I request by copy of this letter that the Attorney General's Office address these issues and encourage its client to fully comply with Georgia's Open Records Act.

Thank you for your attention to this matter.

Sincerely yours,

Bryan A. Downs

BAD:cah

cc: Russ Willard, Esq. (via email: rwillard@law.ga.gov)

EXHIBIT F

February 21, 2018

Via Email (schwinne@audits.ga.us)
and Regular U.S. Mail

Immigration Enforcement Review Board
270 Washington Street, SW
Suite 1-156
Atlanta, Georgia 30334

Re: Open Records Act Request

Greetings:

Please consider this letter a request for public records pursuant to the Georgia Open Records Act, O.C.G.A. §50-18-70, et seq.

We ask that you make available for inspection the following records for each of the Pending Cases:

1. Any notice to the respondent of the filing of a complaint;
2. Any response filed by the respondent;
3. Any other pleading, communication, or other record filed by the respondent;
4. Any other pleading, communication or other record filed by the complainant;
5. Any records evidencing the review panel's IERB Rule 291-2-.02 determination;
6. Any notice to complainant of the scheduling of the IERB Rule 291-2-03 Initial Hearing;
7. Any notice to respondent of the scheduling of the IERB Rule 291-2-03 Initial Hearing.

The term "Pending Cases" shall have the same meaning as the term "open cases" used in Carol Schwinne's December 18, 2017 memorandum to the undersigned, specifically including, but not limited to, complaint numbers 2017-5, 2017-6, 2017-7, 2017-8, 2017-9, 2017-10, 2017-11, 2017-12 and 2017-14.

Immigration Enforcement Review Board
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If you have any questions regarding the scope of this request, please feel free to contact me directly at my number referenced above.

Sincerely yours,



Bryan A. Downs

BAD:cah

Cc: Russ Willard, Esq. (via email: rwillard@law.ga.gov)

EXHIBIT G



DEPARTMENT OF AUDITS AND ACCOUNTS

270 Washington Street, S.W., Suite 1-156

Atlanta, Georgia 30334-8400

GREG S. GRIFFIN
STATE AUDITOR

March 2, 2018

Mr. Bryan A. Downs
Wilson Morton & Downs, LLC
Two Decatur Town Center
125 Clairemont Avenue, Suite 420
Decatur, GA 30030

Dear Mr. Downs:

On February 21, 2018, the Department of Audits and Accounts received an Open Records Request for information relating to pending cases with the Immigration Enforcement Review Board (IERB). In response to previous requests, I have provided you copies of the initial complaints for all cases that are pending with the IERB. However, I cited O.C.G.A. §50-18-72(a)(4) as my basis for withholding any other documents relating to these cases.

Under the advice of the Attorney General's Office, I am unable to provide you with the documents you have requested in your letter dated February 21, 2018. The Attorney General's Office has affirmed the IERB's position that documents relating to the pending cases meet the provisions of O.C.G.A. §50-18-72(a)(4). Please note, there are 15 pending complaints before the IERB. Upon full closure of any of these complaints and upon your request, we will be happy to provide you with case documents.

Please do not hesitate to contact me if you have any questions about this memorandum. I can be reached at 404-463-2670 or at schwinne@audits.ga.gov.

Respectfully,

Carol G. Schwinne
Director of Administration

cc: Mr. Russ Willard, Attorney General's Office