IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

WXIA-TV d/b/a 11ALIVE NEWS and ANDY PIERROTTI,

Plaintiffs,

v.

NEIL WARREN, in his official capacity as the Cobb County Sheriff; ROBIN E. CLEMENTS, in her official capacity as Open Records Custodian for the Cobb County Sheriff's Office; and NATHAN J. WADE,

Defendants.

Civil Action No.: 20105803

PLAINTIFFS' MOTION FOR INTERLOCUTORY AND FINAL INJUNCTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Pursuant to O.C.G.A. § 9-11-65, and in accordance with their Verified Complaint to Enforce the Georgia Open Records Act filed on September 17, 2020 (the "Verified Complaint"), Plaintiffs WXIA-TV d/b/a 11Alive News and Andy Pierrotti (collectively, "11Alive") respectfully move this court to: (1) advance the trial on the merits of this action and consolidate such trial with the interlocutory injunction hearing; and (2) enter an interlocutory and final injunction directing Defendants Neil Warren, in his official capacity as the Cobb County Sheriff ("Sheriff Warren"), Robin E. Clements, in her official capacity as Open Records Custodian for the Cobb County Sheriff's Office, and Nathan J. Wade (collectively, "Defendants") to immediately produce the records that 11Alive requested from each of them under the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.* (the "Open Records Act").

Based on the facts set forth in the Verified Complaint and the legal authorities discussed below, 11Alive respectfully submits that it is likely to succeed on the merits of its claims to enforce

the Open Records Act, that it will be irreparably harmed if Defendants' ongoing violations of the Open Records Act are not enjoined, and that the public interest and balance of the equities weigh in favor of an interlocutory and final injunction. Moreover, because Defendants' refusal to comply with the Open Records Act is preventing 11Alive from gathering and reporting the news on matters of significant public interest and importance, especially in the run up to an election of a public and constitutional officer, 11Alive respectfully submits that this Motion should be heard on an expedited basis and that the trial on the merits of this action should be advanced and consolidated with the interlocutory injunction hearing pursuant to O.C.G.A. § 9-11-65(a)(2).

I. INTRODUCTION

This case seeks to enforce the mandatory disclosure obligations in the Open Records Act and the "strong presumption that public records should be made available for public inspection ***without delay***." O.C.G.A. § 50-18-70(a) (emphasis added). Specifically, 11Alive brought this action to compel the Cobb County Sheriff's Office to produce public records that will shine sunlight on multiple inmate deaths at the Cobb County Adult Detention Center (the "CCADC"), but that are being improperly withheld by the Sheriff's Office in order to protect it from public scrutiny and criticism while Sheriff Warren is in a challenging reelection campaign.

In connection with its ongoing reporting about several recent deaths at the CCADC, 11Alive sent an Open Records Act request to the Cobb County Sheriff's Office seeking case files for three inmates who died in the custody of the Sheriff's Office in the last two years. The Sheriff's Office's investigations into two of those deaths were closed and the records of those inmates were previously released to members of the public long ago, but the Sheriff's Office has nevertheless refused to produce any of those records to 11Alive now, claiming that all of them are exempt from disclosure because they are part of a "pending investigation" that does not, in fact, exist. Instead, the "investigation" the Sheriff's Office has relied on to withhold the records sought by 11Alive is

an unsanctioned, undocumented, undefined, unregulated, uncompensated, and wholly manufactured "review" of jail operations by the friend and personal attorney of Sheriff Warren, Nathan Wade.

It could not be clearer that Mr. Wade's "investigation" is a charade. For example, Mr. Wade is a not a law enforcement officer or investigator. He is a private attorney who has no apparent experience, qualifications, or training in conducting jailhouse investigations and no bona fide investigative authority. Moreover, there are no documents defining the scope, purpose, parameters, or limitations of Mr. Wade's "investigation"; there are no written benchmarks, guidelines, deadlines, or other requirements for the "investigation"; there is no engagement letter or other memoranda authorizing the "investigation"; there was no deputization of or formal delegation of authority to Mr. Wade; and no compensation is being paid to Mr. Wade for conducting the "investigation." And Mr. Wade apparently has not prepared or provided to the Sheriff's Office ***any written work*** product related to his "investigation" in the three months since it purportedly began. Finally, while the Sheriff's Office claimed that the Cobb County District Attorney may someday, "if appropriate," present Mr. Wade's report "to the grand jury," the District Attorney refused to acknowledge any awareness of Mr. Wade's alleged "investigation," much less that she intends to rely on it for making potential criminal indictment determinations, and it is now evident that she has no such intention.

In short, it is clear that Mr. Wade's "investigation" is not designed to lead to any bona fide prosecutions regarding the deaths of the three inmates 11Alive is seeking to review, but is instead being used as a pretext to prevent 11Alive, and therefore the public, from reviewing virtually ***all*** Cobb County Sheriff's Office records related to inmate deaths in the last several years. Such blatant abuse by the Sheriff's Office of the "pending investigation" exception to the Open Records

Act is contrary to both the letter and spirit of the Open Records Act and, if not enjoined, will not only create a black hole for thousands of public records regarding the operations of the CCADC, but will also serve as a road map for other agencies and public records custodians to avoid disclosure of potentially embarrassing or politically-damaging public records. Sunshine is the only disinfectant for the Sheriff's Office's behavior.

For the reasons explained below, 11Alive is likely to prevail on the merits of its claims to enforce the Open Records Act, but immediate and permanent injunctive relief is necessary to prevent the irreparable injury that 11Alive (and the public) will suffer if Defendants are not required to immediately produce the records sought by 11Alive's Open Records Act requests. Accordingly, 11Alive respectfully requests that the Court enter an interlocutory and final injunction directing Defendants to immediately produce to 11Alive all of the records sought by the Open Records Act requests attached to the Verified Complaint.

II. STATEMENT OF FACTS

A. 11Alive's Reporting on Inmate Deaths at the Cobb County Detention Center

11Alive is a television news station located in Atlanta, Georgia that is committed to providing its viewers with accurate, timely, and impartial reporting on matters of public concern. (Verif. Compl. at ¶ 2.) Mr. Pierrotti is an award-winning investigative reporter for 11Alive, whose investigations primarily focus on government accountability, criminal justice, taxpayer waste, and civil rights. (*Id.* at ¶ 3.) Mr. Pierrotti and his investigations have been recognized with a George Foster Peabody award, multiple Edward R. Murrow awards and Emmy awards, and by the Scripps Howard Foundation. (*Id.*)

11Alive has been investigating, reporting, and working on news stories related to a number of deaths at the CCADC, which is operated by Sheriff Warren and the Cobb County Sheriff's Office. (*Id.* at ¶¶ 10-11, 13.) For example, on August 17, 2020, Mr. Pierrotti published a news

report detailing his investigation into the death of Kevil Wingo, a 36-year-old Atlanta resident and father of three who was detained by the Cobb County Sheriff's Office and died while in custody at the CCADC in September 2019. (*Id.* at ¶ 13.)[1] As detailed in Mr. Pierrotti's reporting, Cobb County Sheriff's Office deputies and CCADC staff saw Mr. Wingo vomiting, sweating, and collapsing multiple times and heard Mr. Wingo repeatedly begging for help, screaming that he could not breathe, and asking to be taken to the hospital, but they refused to take his vitals or provide him with other medical care. (Verif. Compl. at ¶ 14.) Instead, Mr. Wingo was locked in a padded isolation room and was pronounced dead two hours later. (*Id.*)

After publishing his news report about Mr. Wingo, Mr. Pierrotti continued his investigation into other inmate deaths at the CCADC to determine whether Mr. Wingo's treatment was indicative of systemic issues at the CCADC. (*Id.* at ¶ 15.) Mr. Pierrotti's investigation revealed that 51 inmates have died at the CCADC since 2004, including at least seven who have died since December 2018, and that only one of those deaths was investigated by an agency outside the Cobb County Sheriff's Office. (*Id.* at ¶ 16.) The remaining 50 inmate deaths were internally investigated by the Sheriff's Office. (*Id.*) 11Alive has been unable to determine whether the Sheriff's Office or its medical contractor conducted a clinical review following any of those deaths to evaluate the medical response because both entities have refused to provide copies of their reports. (*Id.*)

B. The Open Records Act Request

On August 24, 2020, 11Alive sent an Open Records Act request (the "ORA Request") to the Cobb County Sheriff's Office requesting "the complete criminal and internal affairs case files" for the following former CCADC inmates: (a) Bradley Emory, who was found unresponsive on

[1] *See* Lindsey Basye & Andy Pierrotti, *'I can't breathe': Man dies in custody after hours of begging for help*, 11Alive (Aug. 17, 2020), https://www.11alive.com/article/news/investigations/the-reveal/cobb-co-jail-death-of-kevil-wingo/85-846db820-3ffc-4fd9-957a-7c757bda38a2.

March 10, 2019; (b) Reginald Wilson, who was found unresponsive on December 29, 2018; and (c) Stephanie McClendon, who died on June 19, 2020. (*Id.* at ¶ 17, Ex. A.) Ms. Clements responded to the ORA Request on behalf of the Cobb County Sheriff's Office on August 27, 2020, and refused to produce any of the requested records. (*Id.* at ¶ 18, Ex. B.) Specifically, Ms. Clements stated that "[t]he Internal Affairs case file as well as the Criminal Investigation case file on Stephanie McClendon, Bradley Emory, and Reginald Wilson are exempt from disclosure at this time pursuant to O.C.G.A. 50-18-72(a)(4)." (Verif. Compl. at ¶¶ 18-19, Ex. B.)[2]

Ms. Clements' assertion was inconsistent with facts that were already in the public domain. Indeed, the Sheriff's Office's investigation into the death of Mr. Emory was closed in 2019, without any prosecutions, and the Sheriff's Office released its investigative files and records for Mr. Emory to members of the public in 2019. (*Id.* at ¶¶ 21-22.) Similarly, the investigation into the death of Mr. Wilson was closed in 2019 or early 2020, without any prosecutions, and the Sheriff's office released its investigative files and records for Mr. Wilson to members of the public in early 2020. (*Id.* at ¶¶ 23-26.) Although the investigate files and records regarding Messrs. Emory and Wilson had been previously disclosed to the public, Ms. Clements told Mr. Pierrotti in an August 28, 2020 phone call that she could not answer any of his questions regarding the Sheriff's Office refusal to produce those same documents now. (*Id.* at ¶ 27.)

Counsel for 11Alive sent a letter to Ms. Clements and the Cobb County Sheriff's Office on August 28, 2020, explaining why the "pending investigation" exception to the Open Records Act does not apply to the documents sought by the ORA Request and demanding that the Sheriff's Office withdraw its assertion of that exception and make arrangements to produce the records to

[2] O.C.G.A. 50-18-72(a)(4) provides a narrow exception to public disclosure under the Open Records Act for "[r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity."

11Alive immediately. (*Id.* at ¶ 28, Ex. C.) Lauren S. Bruce, Assistant County Attorney at the Cobb County Attorney's Office, responded by letter dated September 1, 2020. (*Id.* at ¶ 29, Ex. D.) Ms. Bruce confirmed that the Cobb County Sheriff's Office's files related to Mr. Emory and Mr. Wilson "were previously released to members of the public – following conclusion of the initial investigations," but claimed that "circumstances have changed since those responses were made in 2019 and early 2020." (*Id.* at ¶ 30, Ex. D.) Specifically, Ms. Bruce alleged that "on June 11, 2020, Sheriff Warren requested that an independent law firm investigate the circumstances surrounding the inmate deaths occurring [at the CCADC] since December 2018," and that "[t]his review includes the deaths of Reginald Wilson and Bradley Emory." (*Id.* at ¶ 31, Ex. D.)

Based on the "reopened investigation" purportedly being performed by an "independent law firm," Ms. Bruce claimed that the "case files related to the deaths of Messrs. Wilson and Emory fall squarely within the exemption found in O.C.G.A. § 50-18-72(a)(4), as all direct litigation involving the death investigations and prosecutions have not become final or otherwise terminated." (*Id.* at ¶ 32, Ex. D.) To support that contention, Ms. Bruce claimed that "[t]he Cobb County District Attorney has requested that, once the review is complete, the report and its findings be provided to her office for review and, if appropriate, for presentation to the grand jury." (*Id.*)

C. The Purported Investigation

The "independent law firm" that is referenced in Ms. Bruce's letter and that was hired to conduct the alleged "investigation" is Nathan J. Wade, an attorney at the law firm of Wade, Bradley, & Campbell. (Verif. Compl. at ¶ 34.) Mr. Wade is no stranger to Sheriff Warren or the Cobb County Sheriff's Office. (*Id.* at ¶ 35.) Indeed, at the suggestion of Cobb County Chief Deputy Sheriff Sonya Allen, who is Mr. Wade's former classmate and friend, Mr. Wade represented Sheriff Warren in his personal capacity at a hearing before the Cobb County Board of Elections earlier this year and defended Sheriff Warren against allegations made by a former

Democratic challenger that Sheriff Warren did not notarize his original qualifying documents. (*Id.*) Mr. Wade called witnesses and presented evidence on Sheriff Warren's behalf and ultimately defeated the challenger's claim. (*Id.*)

Aside from having a pre-existing personal relationship with Sheriff Warren and Chief Deputy Allen and agreeing to perform the alleged "investigation" for free, there is no discernible reason why Mr. Wade was chosen to conduct the "investigation." (*Id.* at ¶¶ 36, 46.) Mr. Wade is a private attorney working at a private law firm focusing his practice on personal injury, family law, and contract disputes. (*Id.* at ¶ 37.) He is not a law enforcement officer or trained investigator; he has no bona fide investigative authority; and he cannot detain, prosecute, or take any other official action against anyone based on his alleged "investigation." (*Id.* at ¶ 38.) Moreover, Mr. Wade has no experience, education, training, certifications, or specialized skills that qualify him to investigate jailhouse deaths, complaints regarding use of force, or potential civil rights violations or to otherwise assess the operations of a county detention center, much less to prepare an investigative report for presentation to the District Attorney or a grand jury. (*Id.* at ¶ 39.)

Even if Mr. Wade was qualified to conduct an investigation of deaths at the CCADC, the Sheriff's Office has not provided him with any written direction about the scope of his "investigation" or the deliverables, if any, that he is supposed to provide to the Sheriff's Office (or anyone else) during or after completing his "investigation." (*Id.* at ¶ 41.) Indeed, there is no engagement letter between the Sheriff's Office and Mr. Wade (or his firm) that evidences the Sheriff's Office's engagement or retention of Mr. Wade to conduct an "investigation"; there is no documentation that defines the scope, purpose, or objective of, or any limitations on, Mr. Wade's "investigation"; and there are no written benchmarks, mandates, guidelines, deadlines, or other requirements for Mr. Wade's "investigation." (*Id.* at ¶¶ 43-45.) And Mr. Wade has not generated

or provided to the Sheriff's Office any written work product related to his "investigation" in the three months since it began. (*Id.* at ¶ 47.)

Finally, and contrary to the contention in Ms. Bruce's September 1, 2020 letter, Cobb County District Attorney Joyette Holmes ("D.A. Holmes") has no intention of presenting the results of Mr. Wade's "investigation" to a grand jury or to pursue criminal charges against any individual(s) based on such information. (*Id.* at ¶ 56.) D.A. Holmes has declined even to acknowledge the existence of Mr. Wade's "investigation," much less that she asked to "review" Mr. Wade's "report and its findings" after it is complete. (*Id.* at ¶¶ 32, 57.) In fact, on September 16, 2020, D.A. Holmes announced that she had "asked" the U.S. Attorney for the Northern District of Georgia "to conduct an independent investigation of the recent inmate deaths at the Cobb Adult Detention Center" and "requested" the Georgia Attorney General to appoint a district attorney *pro tempore* to coordinate with the U.S. Attorney's investigation, thereby confirming that her office is not relying on, and does not intend to rely on, Mr. Wade's "investigation" to pursue any criminal charges against anyone in connection with any inmate deaths at the CCADC. (*Id.* at ¶ 58.)

D. <u>The Second Open Records Act Request</u>

On September 2, 2020, 11Alive sent an Open Records Act request (the "Second ORA Request") to the Cobb County Sheriff's Office and to Mr. Wade, as a private person performing a service or function for or on behalf of the Sheriff's Office, requesting: a copy of the engagement letter between the Cobb County Sheriff's Office and Mr. Wade; copies of all non-privileged work and/or updates submitted to the Sheriff's Office; and invoices sent to the Sheriff's Office. (Verif. Compl. at ¶ 48, Ex. E.) The Sheriff's Office responded on September 8, 2020, stating that it had no documents responsive to the Second ORA Request, confirming that Mr. Wade and his firm are "not charging for the review," and asserting that an engagement letter was therefore "not required." (*Id.* at ¶ 49, Ex. F.) Mr. Wade never responded to the Second ORA Request. (*Id.* at ¶ 50.)

E. The Third Open Records Act Request

On September 10, 2020, counsel for 11Alive sent another Open Records Act request (the "Third ORA Request") to Mr. Wade requesting, among other things, all documents and communications evidencing or relating to the Cobb County Sheriff's Office's engagement or retention of Mr. Wade or his law firm to perform any investigation or review related to the CCADC or any of its current or former inmates; all documents and communications evidencing or relating to any work performed by Mr. Wade or his firm in connection with any such investigation or review; and all documents and communications that Mr. Wade or his firm prepared, maintained, and/or received in connection with any such investigation. (*Id.* at ¶ 51, Ex. G.) Mr. Wade never responded to the Third ORA Request. (*Id.* at ¶ 52.)

III. LEGAL STANDARD

This Court has broad discretion to grant a request for an interlocutory injunction. O.C.G.A. § 9-5-8; *see, e.g.*, *Outdoor Advert. Ass'n of Georgia, Inc. v. Garden Club of Georgia, Inc.*, 272 Ga. 146, 147 (2000). In determining whether interlocutory injunctive relief is appropriate, "the trial court should consider" whether: (1) the movant is likely to succeed on the merits at final adjudication; (2) there is a substantial threat that the movant will suffer irreparable injury if the injunction is not entered; (3) the threatened injury to the movant outweighs the threatened harm the proposed injunction might cause to the opposing party; and (4) granting the injunction will not disserve the public interest. *SRB Inv. Svcs. v. Branch Banking and Trust Co.*, 289 Ga. 1, 5 (2011); *Lee v. Envtl. Pest & Termite Control, Inc.*, 271 Ga. 371 (1999). These factors are "a balancing test" and "it is not incumbent upon the movant to prove each factor." *City of Waycross v. Pierce Cty. Bd. of Commissioners*, 300 Ga. 109, 112 (2016).

This Court also has broad discretion to enter a permanent injunction in "clear and urgent cases where there is a vital necessity to prevent a party from being damage and left without an

adequate remedy at law," and its decision to grant a permanent injunction will be "sustained on review" if there is "any evidence to support such judgment." *Savannah Cemetery Grp., Inc. v. DePue-Wilbert Vault Co.*, 307 Ga. App. 206, 210 (2010).

IV. ARGUMENT AND CITATION OF AUTHORITIES

Although the moving party is not required to prove all of the factors outlined above in order to obtain an interlocutory injunction, *SRB Inv. Svcs.*, 289 Ga. at 5 n.7, the law and the facts in this case show that each factor and the overall balance of the equities strongly favor 11Alive, and that a permanent injunction is necessary to prevent 11Alive from being irreparably harmed. Therefore, and based on the evidence that will be presented at the hearing, the Court should exercise its discretion to grant this Motion for an Interlocutory and Final Injunction.

A. 11Alive Is Likely to Succeed On the Merits of Its Claims for Defendants' Violations of the Open Records Act.

There are only two issues a court must decide in an action seeking to enforce the Open Records Act. First, the court must determine "whether the documents are public records as defined in OCGA § 50-18-70(a)." *United Healthcare of Ga., Inc. v. Ga. Dep't of Cmty. Health*, 293 Ga. App. 84, 87 (2008). Second, "[i]f the documents are public records, the next step is to determine whether they are exempt from disclosure under OCGA § 50-18-72 or some other statute." *Id.*

1. 11Alive Is Likely to Succeed On Its Claims Against Sheriff Warren and Ms. Clements.

It is undisputed that the records sought by the ORA Request are "public records" as defined by O.C.G.A. § 50-18-70(b)(2). Thus, the only question this Court must decide to resolve the merits of 11Alive's claims against Sheriff Warren and Ms. Clements is whether those records are exempt from disclosure under the "pending investigation" exemption in O.C.G.A. 50-18-72(a)(4), which is the only exemption the Sheriff's Office has asserted.

The Georgia Court of Appeals has repeatedly recognized that "[t]he Open Records Act was enacted in the public interest to protect the public from 'closed door' politics and the potential abuse of individuals and misuse of power such policies entail." *United Healthcare of Ga., Inc.*, 293 Ga. App. at 86 (quoting *Central Atlanta Progress v. Baker*, 278 Ga. App. 733, 734-735 (2006)). Indeed, "[t]he intent of the General Assembly was to encourage public access to information and to promote confidence in government through openness to the public." *Id.*; *see also* O.C.G.A. § 50-18-70(a) (declaring 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"). Accordingly, the Open Records Act "must be broadly construed to effect its remedial and protective purposes." *United Healthcare of Ga., Inc.*, 293 Ga. App. at 86 (citation omitted); *see also* O.C.G.A. § 50-18-70(a) ("This article shall be broadly construed to allow the inspection of governmental records.").

In keeping with these purposes and "the strong public policy of this state [] in favor of open government," the Open Records Act mandates that all statutory and other exemptions to the Act "shall be interpreted narrowly." O.C.G.A. § 50-18-70(a). The Georgia Supreme Court has also made clear that "*any* purported statutory exemption from disclosure under the Open Records Act must be narrowly construed." *Hardaway Co. v. Rives*, 262 Ga. 631, 634 (1992) (emphasis in original); *see Bd. of Regents of the Univ. Sys. of Ga. v. The Atlanta Journal*, 259 Ga. 214, 215-16 (1989) ("The Act directs a narrow construction of its exclusions, exempting *only* that *portion* of a public record to which an exclusion is *directly* applicable.") (emphasis in original).

Sheriff Warren and Ms. Clements have turned these principles on their head by using the "pending investigation" exemption to withhold virtually ***all*** Cobb County Sheriff's Office records

related to inmate deaths in the last several years -- including the entire criminal, investigative, and internal affairs case files related to Mr. Emory and Mr. Wilson -- based on an undocumented, undefined, and wholly contrived "investigation" of jail operations by the Sheriff's personal attorney and friend. That expansive application of the "pending investigation" exemption is contrary to both the plain language of the Open Records Act and the Georgia Supreme Court's "directive" that statutory exemptions under the Open Records Act must be narrowly construed, and it directly "contravenes the legislative intent as expressed in the Act that it should be construed in favor of, not against, disclosure." *Schick v. Bd. of Regents of Univ. Sys. of Ga.*, 334 Ga. App. 425, 432 (2015). It should therefore be rejected by this Court. *See id.* ("[C]ourts should always strive to give effect to the purpose and intent of the legislature, and this is particularly true in the instant case, where we have a specific admonition by the General Assembly to construe OCGA § 50–18–72(a)(4) narrowly.") (internal punctuation and citations omitted).

Sheriff Warren and Ms. Clements bear the burden of proving that the "pending investigation" exemption applies to the records sought by the ORA Request. *See Napper v. Ga. Television Co.*, 257 Ga. 156, 161 (1987) ("If there has been a request for identifiable public records within the possession of the custodian thereof, the burden is cast on that party to explain why the records should not be furnished."). Sheriff Warren and Ms. Clements cannot satisfy their burden here because it is clear that Mr. Wade's alleged "investigation" is not a bona fide investigation related to the deaths of Messrs. Emory and Wilson. Indeed, even under the broadest permissible application of the "pending investigation" exemption to the Open Records Act, Mr. Wade's purported activities do not and cannot come within its scope.

Mr. Wade is a private attorney with no apparent training, experience, education, or skills in conducting jailhouse investigations (or any other type of criminal investigations), no bona fide

investigative authority, and no law enforcement authority. (Verif. Compl. at ¶¶ 36-39.) He is entirely unqualified to perform a legitimate criminal investigation related to the CCADC's operations, including the circumstances surrounding inmate deaths at the CCADC over the last several years, and he appears to have been "hired" to perform his alleged "investigation" based solely on his personal relationship with Sheriff Warren and the Sheriff's Office. (*Id.* at ¶¶ 36, 40.) Moreover, if Mr. Wade has been given any direction about his "investigation" or performed any work in connection with his "investigation," there is no record of it. There is no engagement letter or other documentation defining the scope, purpose, or objective of Mr. Wade's "investigation"; there are no written benchmarks, guidelines, deadlines, or requirements for Mr. Wade's "investigation"; and Mr. Wade has not generated or provided to the Sheriff's Office any written work product related to his "investigation" in the three months since it purportedly began. (*Id.* at ¶¶ 43-47.) Further, and contrary to the assertions made by the Cobb County Attorney's Office, D.A. Holmes has no involvement with Mr. Wade's alleged "investigation," and her office has no intention of presenting the results of such an illusory and self-serving "investigation" to a grand jury or pursuing criminal charges against any individual(s) based on such information. (*Id.* at ¶¶ 56-58.) D.A. Holmes has, in fact, refused even to acknowledge any awareness of Mr. Wade's alleged "investigation." (*Id.*) In short, Mr. Wade's alleged "investigation" has ***zero*** indicia of a legitimate criminal investigation.

To the extent Mr. Wade is performing some sort of "investigation," he is not investigating specific inmate deaths at the CCADC or preparing an investigative report for the District Attorney to consider in pursuing criminal charges. Mr. Wade admitted that Sheriff Warren did not ask him to specifically investigate the deaths of Mr. Emory and Mr. Wilson (or any other specific inmates), but instead generally asked him to "look into complaints over the use of force, racial biases and

discrimination and allegations of neglect dating back five years." (*Id.* at ¶ 54.)[3] Mr. Wade further admitted that he is not conducting an "investigation" for the purposes of prosecuting criminal or unlawful activity, but is instead preparing a "report" outlining "what the Sheriff's Office is doing well at the jail and what areas need to be improved." (*Id.* at ¶ 55.) Thus, by his own admissions, Mr. Wade's "investigation" is not a "pending investigation . . . of criminal or unlawful activity" concerning the deaths of Mr. Emory and Mr. Wilson. O.C.G.A. § 50-18-72(a)(4).

D.A. Holmes removed any doubt about the legitimacy and purpose of Mr. Wade's purported "investigation" when she announced that she had asked the U.S. Attorney for the Northern District of Georgia to "conduct an independent investigation of the recent inmate deaths at the Cobb Adult Detention Center" and requested the Georgia Attorney General to appoint a district attorney *pro tempore* to coordinate with the U.S. Attorney's investigation. (*Id.* at ¶ 58.) That announcement merely confirmed what was already clear: Mr. Wade's "investigation" is not a bona fide criminal investigation, and D.A. Holmes is not relying on, and does not intend to rely on, Mr. Wade's "investigation" in determining whether to pursue any potential criminal indictments or charges against anyone in connection with any inmate deaths at the CCADC. Because there was (and is) no bona fide pending investigation or prosecution of criminal or unlawful activity related to the deaths of Mr. Emory and Mr. Wilson, the "pending investigation" exemption does not apply to the documents sought by the ORA Request.[4]

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[3] *See* Kristal Dixon, *Law firm to review Cobb County jail conditions*, The Atlanta Journal-Constitution, (June 15, 2020), https://www.ajc.com/news/local/law-firm-review-cobb-county-jail-conditions/virAJo39jIoZ1SNcBeMrlN/.

[4] To the best of 11Alive's knowledge, the U.S. Attorney has not accepted D.A. Holmes' request or opened an investigation into any specific inmate deaths at the CCADC and, thus, there is no law enforcement agency presently investigating any criminal or unlawful activity related to the deaths of Mr. Emory or Mr. Wilson. (Verif. Compl. at ¶¶ 59-60.) Even if the U.S. Attorney's Office were to open such an investigation in the future, and even if such investigation encompassed the deaths of Messrs. Emory and Wilson, it would not change the outcome here for two reasons. First,

If Sheriff Warren and the Sheriff's Office wished to conduct a legitimate investigation of the recent deaths at the CCADC, there are numerous ways they could have done so under Georgia law. For example, O.C.G.A. § 35-3-8.1 expressly permits Sheriff Warren to request assistance from the Georgia Bureau of Investigation ("GBI") to investigate inmate deaths and related jailhouse incidents, and the GBI routinely accepts such requests. (Verif. Compl. at ¶ 61.) Sheriff Warren intentionally avoided asking the GBI to investigate potential criminal misconduct at CCADC because he could not control such an investigation. Instead, Sheriff Warren "hired" his personal lawyer to conduct a free, undefined, potentially limitless, and thus far wholly undocumented "investigation" that the Sheriff's Office is now unlawfully using as a pretext to shield years' worth of public, but potentially unflattering, documents from disclosure in the run up to the Sheriff's election. That is not a proper or permissible exercise of the "pending investigation" exemption to the Open Records Act and, indeed, there is no pending investigation related to the deaths of Messrs. Emory and Wilson. [5]

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the U.S. Attorney's Office is not an "agency" as defined by the Open Records Act. *See* O.C.G.A. § 50-18-70(b)(1); O.C.G.A. § 50-14-1. Thus, any investigation by the U.S. Attorney's Office and any records of that investigation do not fall within the "pending investigation" exemption to the Open Records Act. *See* O.C.G.A. § 50-18-72(a)(4). Second, an Open Records Act request should be evaluated at the time the request was made, and there was no investigation pending by the U.S. Attorney's Office (or anyone else) when the ORA Request was made. *See Florez v. Cent. Intell. Agency*, 829 F.3d 178, 187 (2d Cir. 2016) (noting the "general rule" is that "a FOIA decision is evaluated as of the time it was made and not at the time of a court's review"); *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (recognizing that in determining whether agency properly withheld requested information under the federal Freedom of Information Act, the agency's decision to withhold a document "must be evaluated as of time it was made" and not at time of the court's review). The fact that an investigation may subsequently be opened by the U.S. Attorney's Office is irrelevant. *See Unified Gov't of Athens-Clarke Cty. v. Athens Newspapers, LLC*, 284 Ga. 192, 196 (2008) (holding that once an investigation is "concluded and the file closed," the investigation is no longer pending for purposes of O.C.G.A. § 50-18-72(a)(4), "even though it could possibly be reopened thereafter").

[5] This is not the first time the Cobb County Sheriff's Office has abused the "pending investigation" exemption to withhold public records, including certain of the records at issue in this case. Before filing her lawsuit against the Cobb County Sheriff's Office and others late last year, Mr. Wilson's

Even if there was a legitimate pending investigation into the deaths of Messrs. Emory and Wilson, the Cobb County Sheriff's Office waived any right it might have had to rely on the "pending investigation" exemption with respect to the case files for Messrs. Emory and Wilson by publicly disclosing those records to other members of the public in the past. *See, e.g.*, *Globe Newspaper Co. v. Police Com'r of Bos.*, 648 N.E.2d 419 (Mass. 1995) (holding police could not rely on the investigatory exemption to shield records from disclosure under state open records act where a considerable amount of information had already been disclosed to the public); *see also Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011) (holding agency "waived" otherwise applicable exemption under FOIA by disclosing records to members of the public "without any limits on further dissemination"); *Cottone v. Reno*, 193 F.3d 550, 554-555 (D.C. Cir. 1999) (observing that "the logic of FOIA postulates that an exemption can serve no purpose once information—including sensitive law-enforcement intelligence—becomes public").

The Sheriff's Office has admitted that it produced the "incident report concerning [Mr. Wilson's] death," the "full internal report concerning [Mr. Wilson's] death" and a Sheriff's Office "memorandum (totaling 113 pages) summarizing an inspection and review of the circumstances leading to [Mr. Wilson's] death" to Mr. Wilson's next of kin in early 2020, without placing any restrictions on further dissemination of those records. (Verif. Compl. at ¶¶ 24-25;

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next of kin asked the Sheriff's Office to produce records concerning Mr. Wilson's imprisonment and death. (Verif. Compl. at ¶ 63; *see Peltier v. Sheriff Neil Warren, et al.*, Civil Action No. 1910882, Complaint at ¶¶ 97-102 (Cobb County Superior Court, Dec. 9, 2019).) The Sheriff's Office refused to produce any such records, citing the "pending investigation" exemption, O.C.G.A. § 50-18-72(a)(4), but stated that "following release of the medical examiner's report, the investigation would be closed and the file materials released." (*Id.*) After the medical examiner's report was released, the Sheriff's Office still refused to produce any documents related to the investigation of Mr. Wilson's death, claiming that the GBI was reviewing the County's findings. (*Id.*) Yet, when Mr. Wilson's next of kin sent an Open Records Act request to the GBI for records related to its investigation, the GBI responded that no such records were located. (*Id.*)

Peltier v. Sheriff Neil Warren, et al., Civil Action No. 1910882, Reply Brief in Support of Sheriff Neil Warren's Motion for Protective Order Limiting Discovery at pp. 2-3 (Cobb County Superior Court, Apr. 20, 2020).) And this Court subsequently ordered the Sheriff's Office to produce additional documents related to Mr. Wilson to his next of kin, without restriction, including "any incident reports with attachments related to Mr. Wilson" and "the internal affairs report" related to Mr. Wilson. (Verif. Compl. at ¶ 26.) Moreover, the Cobb County Attorney's Office confirmed that the Sheriff's Office's files related to Mr. Emory and Mr. Wilson "were previously released to members of the public" in 2019 and early 2020. (*Id.* at ¶ 30, Ex. D; *see also id.* at ¶ 22.) Based on these undisputed facts and the law cited above, the records related to the deaths of Messrs. Emory and Wilson are not confidential or protected, and the Sheriff's Office waived any right to withhold them under the "pending investigation" exemption to the Open Records Act, regardless of any investigation that may be pending now or in the future.

For all these reasons, 11Alive is likely to succeed on the merits of its claims against Sheriff Warren and Ms. Clements.

2. 11Alive Is Likely to Succeed On Its Claim Against Mr. Wade.

Pursuant to O.C.G.A. § 50-18-70(b)(2), "all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by . . . a private person or entity in the performance of a service or function for or on behalf of an agency" are "public records" subject to disclosure under the Open Records Act. Whatever the scope of his "engagement" by the Cobb County Sheriff's Office at Sheriff Warren's request, Mr. Wade's activities in furtherance of that "engagement" are a service or function for or on behalf of the Cobb County Sheriff's Office. Accordingly, all documents and records that Mr. Wade has prepared, maintained, and/or received in connection

with his "engagement" by the Cobb County Sheriff's Office -- including those sought by the Second ORA Request and the Third ORA Request -- are "public records" subject to disclosure under the Open Records Act.

The Open Records Act requires every custodian of public records to provide "an affirmative response to an open records request within three business days." *Unified Gov't of Athens-Clarke Cty.*, 284 Ga. at 198; *see also* O.C.G.A. § 50-18-72(b(1)(A) (requiring a response to Open Records Act requests within three business days). Moreover, if the custodian "is required to or [] has decided to withhold all or part of a requested record," the response must identify the "specific legal authority exempting the requested record or records from disclosure by Code section, subsection, and paragraph." O.C.G.A. § 50-18-72(d). It is well settled that "[t]he failure to make such a response within the statutory time period constitutes a violation of the Open Records Act." *Unified Gov't of Athens-Clarke Cty.*, 284 Ga. at 198.

Mr. Wade did not respond to the Second ORA Request or the Third ORA Request and did not identify any exemptions that he believed applied to any of the documents sought by those requests within three business days or at any time thereafter. (Verif. Compl. at ¶¶ 86-90.) Thus, regardless of any investigation that may exist, Mr. Wade plainly violated the Open Records Act, and 11Alive is likely to succeed on its claims against him.

B. 11Alive Will Be Irreparably Harmed If Defendants Are Not Required to Immediately Produce the Requested Records.

11Alive is actively investigating and preparing news stories related to the numerous inmate deaths at the CCADC over the last several years, including the Sheriff's Office's operation of the CCADC and the manner in which it handled each of those inmates. As with any news story, time is of the essence with respect to 11Alive's reporting on these issues. *See, e.g.*, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 561 (1976) ("the element of time is not unimportant if press coverage

is to fulfill its traditional function of bringing news to the public promptly"). The element of time is particularly important here because 11Alive's reporting concerns the conduct of a constitutional officer who is up for re-election ***in less than two months***. In fact, it appears that the Sheriff's Office may have manufactured Mr. Wade's "investigation" in an effort to prevent this information from being disclosed to the public until after the election is over.

Defendants' unjustified refusal to comply with the Open Records Act is preventing 11Alive from providing complete and timely reporting to the public, and is a continuing and irreparable injury to 11Alive's constitutionally-protected rights to gather newsworthy information for public dissemination. Indeed, the law is clear that any infringement on the media's First Amendment rights constitutes an intolerable and irreparable constitutional injury that should be remedied immediately. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (holding that where there is a restraint on the media's ability to report the news, "each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable."); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").[6]

There is no measure of damages and no remedy at law that can make 11Alive whole if it is not able to timely report the news. No remedy at law can prevent Defendants from continuing

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[6] Numerous other courts have similarly recognized that even short delays in vindicating the media's First Amendment rights to gather and report the news can cause irreparable harm. *See, e.g.*, *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (delaying access "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access … is denied, whatever provision is made for later public disclosure"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (delaying access, even for "as little as a day . . . delays access to news, and delay burdens the First Amendment").

to violate the Open Records Act with respect to the records sought by 11Alive, and no subsequent order directing Defendants to produce those records could make up for the fact that 11Alive was not able to timely gather and disseminate the news to the public before the election, when it was of the most interest and utility to the public. *See Concrete Coring Contractors, Inc. v. Mech Contractors & Engineers, Inc.*, 220 Ga. 714, 718-19 (1965) (stating a remedy at law is not adequate unless it is "as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity"); *see also Rash v. Toccoa Clinic Med. Associates*, 253 Ga. 322, 326 (1984) (award of damages alone "would not properly vindicate the plaintiff's rights"). This Court should issue an interlocutory and final injunction to prevent 11Alive from being irreparably harmed.

C. The Balancing of the Equities Weighs In Favors of Entering an Interlocutory and Final Injunction.

The harm that 11Alive will suffer if Defendants are not required to immediately produce the records sought by the Open Records Act requests -- *i.e.*, the deprivation of its First Amendment rights -- is severe and cannot be undone. That irreparable harm weighs heavily in favor of entering in injunction.

Granting an interlocutory and final injunction requiring Defendants to produce the records sought by 11Alive will also serve the public interest and further the stated purpose of the Open Records Act by promoting transparency and accountability in government. The documents that 11Alive requested from the Sheriff's Office relate to the Sheriff's Office's operation of the taxpayer-funded county detention center, its treatment of local inmates, and its responsibility for the slew of recent inmate deaths at the CCADC. Absent the sunshine that only the compelled production of the records sought by 11Alive will bring, the public will not know the full extent to which the Sheriff's Office has failed the inmates in its care, and the Sheriff's Office likely will not change or improve its policies or practices at the CCADC.

In addition, ensuring the public has access to this information, particularly before voting in an election in which it is being asked to determine whether the current Sheriff should stay in office, will serve the public interest by preventing closed door politics, promoting confidence in government, and allowing the public to fairly evaluate the functioning of its public institutions and elected officials. *See United Healthcare of Ga., Inc.*, 293 Ga. App. at 86; *see also* O.C.G.A. § 50-18-70(a); *City of Atlanta v. Corey Entm't, Inc.*, 278 Ga. 474, 476 (2004) (noting Georgia's "public policy strongly favors open government"). Even the Sheriff's Office has acknowledged "the critical role the Georgia Open Records Act plays in promoting transparency and fostering confidence in public officials." (Verif. Compl. at Ex. D.) Allowing the Sheriff's Office to withhold the records sought by 11Alive, even temporarily, would defeat these important public policies and prevent the Open Records Act from fulfilling its vital role in our democracy and public discourse.

In contrast to the significant harm that 11Alive and the public will suffer in the absence of an injunction, the Defendants will not be harmed if an injunction is entered. The requested injunction merely asks the Court to order Defendants to do what the law already requires: produce the public records requested by 11Alive "without delay." O.C.G.A. § 50-18-70(a). Defendants have not identified any legally cognizable harm they would suffer if they are required to produce those records, nor could they. Indeed, the policy concerns underlying the "pending investigation" exemption -- such as protecting the privacy of individuals and safeguarding information that could compromise a criminal investigation if publicly disclosed -- have no application here because there is no bona fide pending investigation, and even if there was, many of the records have already been publicly disclosed by the Sheriff's Office without restriction. *See Unified Gov't of Athens-Clarke*, 284 Ga. at 196-197 (discussing policy justifications for the pending investigation exemption, including ensuring "effective law enforcement," protecting "the right to privacy of individuals

named in investigative records and the integrity of the investigations," and keeping sensitive information related to the details of a crime confidential until the investigation is closed).

The equities weigh heavily in favor of an injunction. The damage to 11Alive and the public if an injunction is not entered is substantial, irreparable, and unreasonable, particularly when compared to the potential harm to Defendants if they are required to produce the requested records.

V. CONCLUSION

All factors relevant to evaluating whether injunctive relief should be granted weigh in favor of 11Alive. Accordingly, and pursuant to the "strong presumption that public records should be made available for public inspection without delay," 11Alive respectfully submits that the Court should grant this Motion, advance the trial on the merits of this action and consolidate such trial with the interlocutory injunction hearing, and enter an interlocutory and final injunction: (a) directing Sheriff Warren and Ms. Clements to immediately produce to 11Alive all of the records sought by the ORA Request; and (b) directing Mr. Wade to immediately produce to 11Alive all of the records sought by the Second ORA Request and the Third ORA Request.

Respectfully submitted this 21st day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the within and foregoing **Plaintiffs' Motion for Interlocutory and Final Injunction and Incorporated Memorandum of Law in Support** was electronically filed with the Clerk of Court using the PeachCourt system, which will automatically send notification of such filing to all attorneys of record, and that I also served this filing via email to the following:

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This 21st day of September, 2020.

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