

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
TWELFTH DIVISION**

**RUBY NICHOLS**

**PLAINTIFF**

**VS.**

**NO. 60CV-16-3980**

**ARKANSAS CHILDREN'S HOSPITAL**

**DEFENDANT**

**AMENDED ORDER GRANTING DECLARATORY JUDGMENT**

This matter came before the Court for hearing on Count I of Plaintiff's Complaint seeking a declaratory judgment that Defendant is subject to the requirements of the Arkansas Freedom of Information Act. Plaintiff appeared personally and by and through her counsel, Lucien R. Gillham. Defendant appeared by and through its representative and its counsel, Jane W. Duke and David F. Koehler.

The Court hereby FINDS and ORDERS:

**Background**

1. On July 20, 2016, Plaintiff, Ruby Nichols, filed the instant action seeking a declaratory judgment that Defendant, Arkansas Children's Hospital, is subject to the provisions of the Arkansas Freedom of Information Act ("FOIA"), Ark. Code Ann. §25-19-101 *et seq.* Plaintiff's Complaint also asserts a claim for employment discrimination. That issue is not currently before the Court, and the parties seek a ruling only as to the declaratory judgment request at this time.

2. Plaintiff was employed by Defendant from October 1999 until her termination in May 2014. On June 21, 2016, Plaintiff, through her attorney, submitted a

FOIA request to Defendant for a copy of her personnel file.<sup>1</sup> By letter dated June 22, 2016, Defendant denied Plaintiff's request on the ground that Defendant is not an entity covered by the FOIA, and that therefore, it could not comply with Plaintiff's request without a signed "Consent and Authorization to Employment Information" form. Plaintiff then filed the current action.

### **Declaratory Judgment Act Applicable to FOIA Disputes**

3. Declaratory judgments are used to determine the rights and liabilities of respective parties. *McCutchen v. City of Fort Smith*, 2012 Ark. 452, 425 S.W.3d 671 (2012). The purpose of the declaratory-judgment statutory scheme is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. *Id.* The proceeding is intended to supplement rather than supercede ordinary causes of action. *Martin v. Equitable Life Assur. Soc'y of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001). Thus, a declaratory relief action is dependent on and not available in the absence of a justiciable controversy. *Id.* The issue of whether an entity is subject to FOIA is a justiciable controversy on which a court may properly issue a declaratory judgment. *See Harrill & Sutter, PLLC v. Farrar*, 2012 Ark. 180, 402 S.W.3d 511 (2012).

### **Applicability of FOIA to Defendant**

5. The issue of the applicability of the FOIA is a question of statutory interpretation. *See Harrill & Sutter, PLLC v. Farrar, supra.* The FOIA is liberally interpreted

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<sup>1</sup> Plaintiff's personnel file would be subject to disclosure by Defendant to Plaintiff or Plaintiff's counsel under the FOIA. *See Ark. Code Ann. § 25-19-105(c)(2)* ("Any personnel or evaluation records exempt from disclosure under this chapter shall nonetheless be made available to the person about whom the records are maintained or to that person's designated representative.").

to accomplish its broad and laudable purpose that public business be performed in an open and public manner. *Id.* The FOIA is broadly construed in favor of disclosure. *Id.*

6. Except as specifically provided by the FOIA or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during regular business hours of the custodian of the records. *Id.* A citizen may make a request to the custodian to inspect, copy, or receive copies of public records. *Id.*

7. For a record to be subject to the FOIA and available to the public, it must be (1) possessed by an entity covered by the FOIA, (2) fall within the FOIA's definition of a public record, and (3) not be exempted by the FOIA or other statutes. *Id.* The only dispute between the parties in this case is whether Defendant is an entity subject to the FOIA.

8. For purposes of the FOIA, a "public record" is a writing, recorded sound, film, tape, electronic or computer-based information, or data compilation in any medium required by law to be kept or otherwise kept and that constitutes a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or that is expending public funds. *See Ark. Code Ann. § 25-19-103(7)(A).* In order for Defendant to be an entity subject to the FOIA, Defendant must be an agency which is wholly or partially supported by public funds or that is expending public funds. *See, e.g., Kristen Inv. Properties, LLC v. Faulkner County Waterworks and Sewer Public Facilities Bd.*, 72 Ark. App. 37, 32 S.W.3d 60 (2000); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990);

*Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.3d 258 (1981); *North Central Ass'n of Colleges & Schools v. Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977).

9. Pursuant to Amendment 32 of the Arkansas Constitution, at a general election on November 7, 1978, Pulaski County voters approved the imposition of a one (1) mill tax upon all taxable real and personal property located within Pulaski County to be used for the maintenance, operation, and support of Arkansas Children's Hospital as a public hospital of Pulaski County (the "Hospital Maintenance Tax").

10. On November 14, 1978, the Pulaski County Quorum Court adopted Ordinance 198. Section 2 of Ordinance 198 authorized the County Judge to accept ownership of Arkansas Children's Hospital in the name of Pulaski County, and Arkansas Children's Hospital was designated as a public hospital of Pulaski County. Section 3 of Ordinance 198 provided that Arkansas Children's Hospital would be leased to Arkansas Children's Hospital, an Arkansas non-profit corporation and benevolent association. Said lease was entered into between Pulaski County and Arkansas Children's Hospital in January 1979, and has been supplemented several times since then.

11. Pulaski County collects the Hospital Maintenance Tax from Pulaski County residents annually.<sup>2</sup> Although the record is unclear, it appears that from the time Pulaski County began collecting the Hospital Maintenance Tax in the late 1970s until 2001, the revenues raised by the tax were remitted by Pulaski County directly to Arkansas Children's Hospital. On May 2, 2001, however, the Treasurer of Arkansas Children's Hospital sent a letter to the Pulaski County Treasurer stating in part:

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<sup>2</sup> Records from the Pulaski County Treasurer admitted into evidence at the hearing reflect that \$3,849,285.96 was collected in 2012, \$3,817,467.06 was collected in 2013, and \$3,977,999.83 was collected in 2014.

Pursuant to Article [sic] 32, section 2 of the Arkansas Constitution, you are requested to remit to the Arkansas Department of Human Services, as soon as available for disbursement the proceeds of the ad valorem tax collected in Pulaski County for the maintenance, operation and support of Arkansas Children's Hospital. This request should be for the current year and all subsequent years until notified by Arkansas Children's Hospital.

Each remittance should be to the Department of Human Services, Division of Medical Services and marked to indicate "Account of Arkansas Children's Hospital."

Remittances in accordance with this request shall be regarded as made to Arkansas Children's Hospital and this request constitutes your authority to proceed as set forth herein.

From that point forward, the Pulaski County Treasurer complied with Defendant's directive and transmitted the Hospital Maintenance Tax revenue to the Arkansas Department of Human Services. This practice was still in place at the time of the hearing in this matter.

12. The FOIA has consistently been held to apply to private entities that receive public funds. *See Kristen Inv. Properties, LLC v. Faulkner County Waterworks and Sewer Public Facilities Bd., supra*. Although the term "public funds" is not defined by the FOIA, the Arkansas Supreme Court has defined "public funds" in the context of the FOIA as "moneys belonging to government." *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993). Funding which comes from a public source in the form of a levy against property which is collected by the county assessor and which is then used to fund the operations of a private entity are "public funds" under the FOIA and can subject that private entity to the FOIA. *See Kristen Inv. Properties, LLC v. Faulker County Waterworks and Sewer Public Facilities Bd., supra*.

13. The Court finds that Defendant is an entity supported in part by public funds. Pulaski County levied and collects an annual Hospital Maintenance Tax against

all taxable real and personal property within the County for the maintenance, operation, and support of Defendant.<sup>3</sup> The revenues raised by this tax are public funds which are specifically designated to be used for the maintenance, operation, and support of Defendant.<sup>4</sup> Defendant maintains control and authority over the revenues raised by the Hospital Maintenance Tax, as evidenced by Defendant's ability to direct the Pulaski County Treasurer where to remit the revenues once the tax is collected, to dictate that the funds shall be regarded as made to Defendant, and its ability to direct that the funds be distributed to Defendant. Defendant's May 2, 2001, letter to the Pulaski County Treasurer makes it clear that "[r]emittances in accordance with this request shall be regarded as made to Arkansas Children's Hospital." Thus, both Defendant and the Pulaski County Treasurer continue to regard the disbursements of the Hospital Maintenance Tax to the Arkansas Department of Human Services as being made to Defendant, and disbursement of the funds remains subject to Defendant's direction. Defendant does not cease to be partially supported by public funds simply because Defendant directs that the collected tax revenue be forwarded to and held by a state

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<sup>3</sup> See Amendment 32, Section 2, of the Arkansas Constitution ("The election commissioners shall certify to the county judge the result of the vote and if a majority of the qualified electors voting on the question at such election vote in favor of the specified tax then it shall thereafter be continually levied and collected as other general taxes of such county are levied and collected. . . . The proceeds of any tax so voted shall upon the settlement of the collecting officer be paid by the treasurer of the county to the treasurer of such hospital to be used by such treasurer in the maintenance, operation and support of such institution.").

<sup>4</sup> See Pulaski County Ordinance 198 of 1978.

agency until such time as Defendant requests disbursements of the funds directly to Defendant.<sup>5</sup>

In reaching this decision, the Court notes that it fully considered all arguments by Defendant as to why it is not an entity which is subject to the requirements of the FOIA, as well as opposing arguments made by Plaintiff. Additionally, the Court considered the language of Amendment 32 to the Arkansas Constitution (which provides that the proceeds of the Hospital Maintenance Tax be paid by the Pulaski County Treasurer to Defendant's treasurer for the maintenance, operation, and support of Defendant), versus what is actually being done (upon Defendant's direction, the Pulaski County Treasurer first remits the funds to the Department of Human Services and the Department of Human Services later remits the funds to Defendant in a different form). As far as the FOIA is concerned, the result is the same. The funds, in the form of a tax, are still collected by Pulaski County for the maintenance, operation and support of Defendant.<sup>6</sup> The collected tax revenue never belongs to any entity except Defendant.

### **Relief**

14. Based upon the foregoing, the Court grants a declaratory judgment that Defendant is an entity subject to the provisions of the FOIA by virtue of Defendant being

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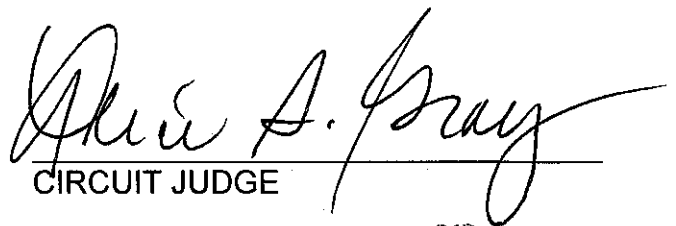
<sup>5</sup> It should be noted that nothing in Amendment 32 appears to allow a county treasurer to remit the proceeds of a tax levied under the provisions of that amendment to an entity other than the treasurer of the hospital which the tax is supporting. See Amendment 32, Section 2, of the Arkansas Constitution ("The proceeds of any tax so voted shall . . . be paid by the treasurer of the county to the treasurer of such hospital to be used by the treasurer in the maintenance, operation and support of such institution . . ."). The parties have not cited the Court to any law which would allow a county treasurer to remit the proceeds of a tax levied under this amendment to an entity other than the treasurer of the hospital which the tax is supporting.

<sup>6</sup> See Amendment 32, Section 2, of the Arkansas Constitution and see Pulaski County Ordinance 198 of 1978.

supported in part by public funds. Defendant is hereby ordered to immediately comply with Plaintiff's FOIA request for a copy of her personnel records.

15. Defendant has requested that the Court issue a certification pursuant to Arkansas Rule of Civil Procedure 54(b). However, the parties have not presented the Court with any requested findings related to such a certificate. Defendant may prepare a proposed Rule 54(b) certificate, complete with the requisite findings, submit it to opposing counsel for approval as to form, then submit it to the Court.

IT IS SO ORDERED.



CIRCUIT JUDGE

AUG 14 2017

DATE

cc: Lucien R. Gillham  
Jane W. Duke  
David F. Koehler  
John J. Watkins