REL: June 28, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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The Health Care Authority for Baptist Health, an affiliate of UAB Health Systems, and Simeon F. Penton

v.

Central Alabama Radiation Oncology, LLC

Appeal from Montgomery Circuit Court
(CV-18-900710)

MENDHEIM, Justice.

The Health Care Authority for Baptist Health, an affiliate of UAB Health Systems ("the Authority"), and Simeon F. Penton (hereinafter referred to collectively as "Baptist

Health") appeal from a judgment of the Montgomery Circuit Court requiring Baptist Health to disclose certain documents to Central Alabama Radiation Oncology, LLC ("CARO"), under the auspices of the Alabama Open Records Act, §§ 36-12-40 and -41, Ala. Code 1975 ("ORA"). We affirm the judgment of the circuit court.

I. Facts

CARO is a Montgomery-area radiation-oncology practice consisting of four physicians. CARO provides radiation and oncology services at the Montgomery Cancer Center ("MCC"), a facility owned and operated by the Authority. The Authority and CARO executed a noncompetition agreement in May 2012. The noncompetition agreement provides, in part:

> "During the Restricted Period, [the] Authority agrees for the benefit of [CARO at MCC], that it will not, indirectly or directly, employ or contract with physicians to provide radiation oncology services within 150 miles from any location within the greater Montgomery, Alabama area where [CARO] provides radiation oncology services. ... [The Authority] further agrees that it will not work with UAB Health System or University Hospital in Birmingham to recruit or employ radiation oncologists in the greater Montgomery, Alabama area."

The noncompetition agreement also provided that the agreement could be terminated by either CARO or the Authority "upon six months' notice to the other parties" to the agreement.

On October 3, 2017, the Authority submitted a letter of intent to file a certificate-of-need ("CON") application with the State Health Planning and Development Agency ("SHPDA"). The letter of intent indicated that the Authority sought to offer radiation-oncology services at the Prattville location of MCC. CARO alleges that it then attempted to persuade the Authority to use CARO physicians for radiation-oncology services at the Prattville location of MCC but that the Authority rebuffed CARO's overtures. In February 2018, the Authority filed its CON with SHPDA seeking permission to offer radiation-oncology services at MCC's Prattville location. On March 26, 2018, the Authority served upon CARO a written notice of termination of the noncompetition agreement.

On April 18, 2018, CARO filed a "Notice of Intervention and Opposition" to the Authority's CON application. At least part of the reason CARO objected to the Authority's application was that CARO was in the process of developing a new radiation-oncology facility in Prattville. The facility

would be known as Prattville Cancer Center, and CARO had broken ground and begun construction of the facility.[1]

Also on April 18, 2018, CARO filed in the Montgomery Circuit Court a "Complaint for Declaratory and Equitable Relief and Preliminary Injunction" against the Authority, in which CARO alleged that the Authority had breached the noncompetition agreement, and CARO sought enforcement of the noncompetition agreement. On the same date, CARO filed a motion for expedited discovery in which CARO argued that it needed an abbreviated discovery schedule in order to be adequately prepared for the hearing on a preliminary injunction.

On April 19, 2018, CARO sent Penton, who is vice president and general counsel for the Authority, a letter "[p]ursuant to the Alabama Public Records Law," in which CARO requested "access to all documents, records, reports, statements, presentations, writings, filings, or records, of any kind, addressing, regarding, of, or related to radiation oncology, including, but not limited to, the use and/or

[1]Because of a physician-office exemption, CARO was not required to obtain a CON from SHPDA to construct the Prattville facility.

expansion of radiation oncology services, over the past twenty-four (24) months." Additionally, CARO requested the minutes of the meetings of the Authority's Board from the previous two years ("the Board minutes"). After CARO received no response to the letter, it sent Penton a second letter on May 8, 2018, reiterating its requests and citing legal authority for the proposition that the Authority was subject to the ORA.

On May 9, 2018, counsel for the Authority responded to CARO by letter, in which it sought clarification concerning CARO's request for the Board minutes because there appeared to be a discrepancy between CARO's request in its letters and its discovery requests in the filed action. In the letter, counsel for the Authority also cited legal authority for the proposition that CARO's ORA request exceeded the scope of the law.

Also on May 9, 2018, the circuit court entered an order in which it noted that it had held a hearing on CARO's motion for expedited discovery but that after the hearing the circuit court had heard from the parties that they had "agreed to a plan allowing for mutual discovery." The circuit court

therefore ruled that the motion for expedited discovery was moot.

On May 24, 2018, CARO sent Penton a third letter reiterating its ORA documents requests. Following receipt of that letter, counsel for both parties arranged for CARO's counsel to conduct an in camera review of the Board minutes without redactions. During the first week of June 2018, counsel for CARO reviewed the Board minutes. In that inspection, CARO uncovered what it deemed to be a "concerning portion" of the minutes from a November 30, 2017, meeting of the Authority's Board:

> "[Russell] Tyner [president and CEO of the Authority] proposed [to establish a radiation-oncology facility in Prattville]. He reported capital investment and estimated annual return for this undertaking. He stated that the larger strategy is to enter the regional Radiation Oncology market with low risk and reasonable market share; to effectively eliminate the current monopoly of Central Alabama Radiation Oncology (CARO), which should decrease the perceived and actual value of existing CARO operation; and to potentially create a scenario of cooperative integration."

(Emphasis added.)

CARO asserts that the above-quoted portion of the minutes and others confirmed CARO's suspicion that the Authority was attempting to drive CARO out of business. A week after it had

inspected the minutes, CARO requested copies of the Board minutes.

In response, on June 13, 2018, counsel for the Authority sent CARO a letter requesting that CARO dismiss its action because, the Authority asserted, CARO's review of the Board minutes confirmed that the Authority had not breached the noncompetition agreement by recruiting or employing radiation oncologists to work at the Prattville location of MCC.

On June 18, 2018, counsel for the Authority provided CARO with copies of the Board minutes that contained numerous redactions. CARO asserted that the redactions included information relating to arrangements with medical oncologists, the Medicare 340B program,[2] and the Authority's other proposed projects in the Prattville area. Counsel for the Authority contended that the remainder of the Board minutes and other documents CARO requested were "confidential and privileged and/or not subject to production under [the ORA]."

[2]CARO explains in its brief: "Effective January 1, 2018, reimbursements under 340B for medical oncology were decreased, making radiation oncology potentially the more lucrative area of oncology. This information is central to Baptist Health's efforts to establish radiation oncology services." CARO's brief, p. 5.

On June 19, 2018, CARO filed an "Amended Complaint for Declaratory and Injunctive Relief" in the circuit court against the Authority and Penton, whom CARO believed to be the custodian of the Authority's records, that substituted an ORA claim in the place of all of CARO's previous claims pertaining to the breach of the noncompetition agreement. Specifically, CARO requested a judgment declaring that the Authority had violated the ORA, and it sought an injunction requiring the Authority and Penton to produce all the documents CARO had sought in past correspondence. CARO categorized those documents into two requests:

> "[1] [T]he Radiation Oncologist request: '[A]ll documents, records, reports, statements, presentations, writings, filings, or records, of any kind, addressing, regarding, of, or related to radiation oncology, including, but not limited to, the use and/or expansion of radiation oncology services, over the past twenty-four (24) months.'
>
> "[2] The Board Minutes Request: '[M]inutes from the last twenty-four (24) months of meetings of the Board of [the Authority].'"

On June 29, 2018, CARO filed a "Motion for Preliminary and Final Injunction" in which it presented its arguments as to why the Authority was subject to the ORA and why its two

documents requests were not protected by exceptions to the ORA.

On July 3, 2018, Baptist Health filed a motion to dismiss both the allegations in the original complaint and the ORA claim in the amended complaint. Baptist Health contended that the allegations in the original complaint were due to be dismissed pursuant to Rule 41, Ala. R. Civ. P., for lack of prosecution. Baptist Health argued that the ORA claim should be dismissed because, it said, the Authority was not subject to the ORA. Additionally, Baptist Health argued that, even if the Authority was subject to the ORA, CARO's requests exceeded the scope of what the Authority should be required to produce under the ORA.

On July 31, 2018, the circuit court held a hearing on the motions from both parties. On August 6, 2018, the circuit court entered an order granting CARO's ORA documents requests. Specifically, the circuit court concluded that,

> "as a matter of law, [the Authority], as a health care authority created pursuant to the Health Care Authorities Act of 1982, Ala. Code [1975,] § 22-21-310 et seq., is subject to the Open Records Act. See Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale County, 61 So. 3d 1027 (Ala. 2010). Accordingly, [Baptist Health] must produce documents in response to CARO's requests."

With respect to CARO's Board-minutes request, the circuit court concluded that the Authority had waived any objection to confidentiality by allowing CARO's counsel to view unredacted copies of the Board minutes. Accordingly, the circuit court ordered Baptist Health to produce "an unredacted copy of the entire set of previously disclosed Board Minutes." With respect to CARO's radiation-oncologist request, in accordance with arguments made by CARO's counsel at the July 31, 2018, hearing, the circuit court concluded that the second request would be somewhat more limited than originally described. Specifically, Baptist Health was ordered to produce

> "the following documents created during the two-year period preceding the Open Records Act requests and related to radiation oncology by 5:00pm on August 3, 2018:
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> > "1. All documents distributed at Board meetings related to radiation oncology or to CARO;
> >
> > "2. All pro forma financial statements, feasibility studies, or budgets for [the Authority's] proposed radiation therapy facility in Prattville; and
> >
> > "3. All calculations of value of CARO or of CARO's Montgomery radiation oncology practice."

Baptist Health appeals the judgment of the trial court.[3]

II. Standard of Review

The first issue presented in this appeal -- whether the Authority is subject to the ORA -- is a pure question of law. Therefore, we review the circuit court's determination on that issue de novo. "[W]here the facts are not in dispute and we are presented with pure questions of law, this Court's standard of review is de novo." State v. American Tobacco Co., 772 So. 2d 417, 419 (Ala. 2000).

However, the second issue -- whether the ordered records disclosure exceeded the scope of the ORA -- concerns the application of judicially created exceptions to required disclosures under the ORA. See Stone v. Consolidated Publ'g Co., 404 So. 2d 678, 681 (Ala. 1981) (explaining that "[c]ourts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in

[3]Immediately following the entry of the judgment, Baptist Health filed an emergency motion to stay the judgment pending appeal. However, that motion was later withdrawn after the circuit court agreed to enter a stay on the condition that Baptist Health post a supersedeas bond, which it promptly did.

having the business of government carried on efficiently and without undue interference"); and Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989) (stating that questions involving the exceptions "are factual in nature and are for the trial judge to resolve"). Therefore, we review the circuit court's determination on the second issue by asking whether the circuit court exceeded its discretion in ordering the disclosure of the records.

> "A court exceeds its discretion when its ruling is based on an erroneous conclusion of law or when it has acted arbitrarily without employing conscientious judgment, has exceeded the bounds of reason in view of all circumstances, or has so far ignored recognized principles of law or practice as to cause substantial injustice. Hale v. Larry Latham Auctioneers, Inc., 607 So. 2d 154, 155 (Ala. 1992); Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 13 (Ala. 1979)."

Edwards v. Allied Home Mortg. Capital Corp., 962 So. 2d 194, 213 (Ala. 2007).

III. Analysis

A. Is the Authority subject to the ORA?

Section 36-12-40, Ala. Code 1975, provides, in pertinent part, that "[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise provided by statute." This Court previously has concluded

that the term "public writing" is synonymous with the definition of the term "public record" provided in § 41-13-1, Ala. Code 1975, see Stone, 404 So. 2d at 680, and the Court has defined the term as follows: "'[P]ublic writing' ... is such a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens." Id. at 681. Section 36-12-1, Ala. Code 1975, provides:

> "A public officer or servant, as used in this article, is intended to and shall include, in addition to the ordinary public offices, departments, commissions, bureaus and boards of the state and the public officers and servants of counties and municipalities, all persons whatsoever occupying positions in state institutions."

In concluding that the Authority is subject to the ORA, the circuit court relied upon Tennessee Valley Printing Co. v. Health Care Authority of Lauderdale County, 61 So. 3d 1027 (Ala. 2010). Tennessee Valley concerned an ORA request submitted to the Health Care Authority of Lauderdale County and the City of Florence d/b/a Coffee Health Group ("the Lauderdale HCA") by the Tennessee Valley Printing Company, Inc., which published the TimesDaily newspaper in Florence.

The ORA request asked for information about bids taken by the Lauderdale HCA on the sale of two hospitals it owned. The circuit court in Tennessee Valley concluded that the Lauderdale HCA was exempt from the ORA request based on the Health Care Authorities Act of 1982, § 22-21-310 et seq., Ala. Code 1975 ("the HCA Act"). This Court reversed the judgment of the circuit court. In doing so, the Tennessee Valley Court first noted that the ORA itself exempts some government entities from its requirements, but health-care authorities are not among those exempted entities. 61 So. 3d at 1032-33. The Court further observed that the legislature in the HCA Act expressly exempted health-care authorities from certain laws applicable to governmental entities, including the Open Meetings Act, but did not exempt them from the ORA. Id. at 1033. Finally, the Court concluded that the Lauderdale HCA "is a local governmental entity," not a private entity, and as such it was subject to the ORA. Id. at 1034. The Court explained:

> "We find support for this in the HCA itself, which provides that a health-care authority is designated as an instrumentality of its authorizing subdivision. § 22-21-318(c)(2). Here, that would be Lauderdale County and the City of Florence. Eight of the 11 members of the board of the Health Care

> Authority are either members as a result of their elected position or appointed by the City and the County in accordance with § 22-21-316(a). Unlike a private entity, the Health Care Authority has the power of eminent domain, to take private property for public use. § 22-21-319. Public health-care authorities are exempt from usury laws, interest laws, § 22-21-328, Ala. Code 1975, and from paying property or income taxes. § 22-21-333, Ala. Code 1975. The income from securities issued by a health-care authority is not taxable. § 22-21-333. Health-care authorities can also be designated as the recipient of proceeds from public-hospital taxes. § 22-21-338, Ala. Code 1975. It is important to note that while health-care authorities have the power to purchase property, they are prohibited from selling 'substantially all [their] assets' 'without the prior approval of the governing body of each authorizing subdivision.' § 22-21-318(a)(7), Ala. Code 1975."

61 So. 3d at 1034.

Baptist Health contends that Tennessee Valley is distinguishable because the Lauderdale HCA was authorized by Lauderdale County and the City of Florence. Baptist Health argues that those are clearly government entities, and thus it is not surprising that this Court would conclude that a health-care authority formed by government entities would be subject to the ORA. In contrast, the hospitals now owned by the Authority were originally privately owned, and the Authority was not authorized by a county or a city but rather by the University of Alabama Board of Trustees. "When Baptist

Health encountered financial problems in conjunction with the operation of those hospitals, it sought the assistance of the University of Alabama Board of Trustees ('the Board'). In June 2005, the Board adopted a resolution authorizing the formation of the Authority ...." Health Care Auth. for Baptist Health v. Davis, 158 So. 3d 397, 400 (Ala. 2013) (footnote omitted).

Baptist Health relies heavily on Davis in arguing that it should not be subject to the ORA. In Davis, this Court concluded that the Authority is not entitled to immunity under Art. I, § 14, Ala. Const. 1901. The Davis Court summarized the reasoning for this conclusion as follows:

> "Based on our weighing of the [Armory Commission of Alabama v.] Staudt[, 388 So. 2d 991 (Ala. 1980),] factors,[4] we must conclude that a health-care

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[4]In Staudt, this Court stated:

> "Whether a lawsuit against a body created by legislative enactment is a suit against the state depends on [1] the character of power delegated to the body, [2] the relation of the body to the state, and [3] the nature of the function performed by the body. All factors in the relationship must be examined to determine whether the suit is against an arm of the state or merely against a franchisee licensed for some beneficial purpose."

388 So. 2d at 993.

> authority organized and operating under the HCA Act is not an '"immediate and strictly governmental agenc[y] of the State."' See, e.g. Tallaseehatchie Creek [Watershed Conservancy Dist. v. Allred], 620 So. 2d [628,] 631 [(Ala. 1993)] (quoting Thomas [v. Alabama Mun. Elec. Auth.], 432 So. 2d [470,] 480 [(Ala. 1983)]). The Authority does not serve as 'an arm of the State.' Instead, it is a 'franchisee licensed for some beneficial purpose,' Staudt, 388 So. 2d at 993, namely to participate with other health-care providers in this State, both public and private, in rendering health-care services to citizens of this State. The Authority therefore is not entitled to State immunity under § 14 of the Alabama Constitution."

Davis, 158 So. 3d at 415–16. Baptist Health argues that because this Court held in Davis that the Authority is a "franchisee" rather than an "arm of the state" for purposes of Art. I, § 14, Ala. Const. 1901, the Authority should not be subject to the ORA. See Baptist Health's brief, p. 21. In short, Baptist Health contends that the Davis Court concluded that the Authority "is not a governmental entity" and it, therefore, "should not be subject to a statute like the Open Records Act, whose sole purpose is to regulate governmental entities." Id. at 22.

However, Baptist Health misunderstands our decision in Davis. The sole question in Davis was whether a suit against the Authority constituted an action against the State as

defined by Art. I, § 14, Ala. Const. 1901. As the Davis decision itself explained at length, there are several governmental entities that are not entitled to § 14 immunity. See Davis, 158 So. 3d at 405 (noting that "the power of eminent domain is a power enjoyed by entities such as municipalities and counties, public corporations, and other agencies that are not part of the State and that do not enjoy State immunity"); Davis, 158 So. 3d at 408–09 (observing that, "[d]espite the potential availability to them of immunity as to certain anticompetitive conduct, however, neither counties nor municipalities nor private entities are part of the State or enjoy State immunity"). Thus, the fact that a governmental entity is not entitled to § 14 immunity does not speak to whether that entity is subject to the ORA. Cf. Vandenberg v. Aramark Educ. Servs., Inc., 81 So. 3d 326, 339 (Ala. 2011) (noting that "[t]he immunity that comes from § 14 and that is associated with being part of the State, however, does not automatically attach to all public corporations; some public corporations are entitled to it while others are not").

"The Authority is a public corporation. It is an entity separate from the State." Davis, 158 So. 3d at 402. This

fact, however, does not mean that the Authority is entirely separate from government -- as the term "public corporation" and the Tennessee Valley decision concerning health-care authorities indicate. Nothing in Tennessee Valley indicates that the ORA's applicability to a particular health-care authority could turn on whether that health-care authority began as "a private entity ... joining with a public entity." Baptist Health's reply brief, p. 4. Instead, the decision in Tennessee Valley focused primarily on the fact that neither the HCA Act nor the ORA exempted health-care authorities from the requirements of the ORA. Moreover, the Tennessee Valley Court specifically observed that "the HCA [Act] itself ... provides that a health-care authority is designated as an instrumentality of its authorizing subdivision." 61 So. 3d at 1034. The HCA Act defines an "authorizing subdivision' as "[e]ach county, municipality, and educational institution with the governing body of which an application for the incorporation of an authority hereunder or for the reincorporation of a public hospital corporation hereunder is filed." § 22-21-311(a)(4), Ala. Code 1975 (emphasis added). The Authority's authorizing subdivision is the University of

Alabama Board of Trustees, which is unquestionably a state educational institution.

Regardless of how Baptist Health began, it chose to partner with the University of Alabama to become a government-authorized health-care authority. That choice offered the Authority several benefits. As the Tennessee Valley Court observed:

> "Public health-care authorities are exempt from usury laws, interest laws, § 22-21-328, Ala. Code 1975, and from paying property or income taxes. § 22-21-333, Ala. Code 1975. The income from securities issued by a health-care authority is not taxable. § 22-21-333. Health-care authorities can also be designated as the recipient of proceeds from public-hospital taxes. § 22-21-338, Ala. Code 1975."

61 So. 3d at 1034. Likewise, the Davis Court noted that the Authority has the power of eminent domain and is immune from actions alleging anticompetitive conduct. See Davis, 158 So. 3d at 405, 408. The Authority receives those benefits precisely because of its designation as a government-authorized health-care authority. It is understood that, along with those benefits, public entities have certain responsibilities. Unless a governmental entity is exempted,

one of those responsibilities is being subject to ORA requests.

Even if we accepted Baptist Health's view that the import of Davis should be that the Authority generally is not a public entity for purposes of "interpreting statutes that apply to public entities," Baptist Health's reply brief, p. 6, Davis itself indicates that that would not be case for the activities alleged against the Authority in this case. Section 22-21-318(c)(2), Ala. Code 1975, provides:

> "(c) As a basis for the power granted in subdivision (31) of the preceding subsection (a),[5] the Legislature hereby:
>
> "....
>
> "(2) Determines, as an expression of the public policy of the state with respect to the displacement of competition in the field of health care, that each authority, when exercising its powers hereunder with

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[5]Section 22-21-318(a)(31), Ala. Code 1975, provides that a health-care authority shall have the power

> "[t]o exercise all powers granted hereunder in such manner as it may determine to be consistent with the purposes of this article, notwithstanding that as a consequence of such exercise of such powers it engages in activities that may be deemed 'anticompetitive' within the contemplation of the antitrust laws of the state or of the United States."

> respect to the operation and management of health care facilities, acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state."

(Emphasis added.) The Davis Court opined that this section means that "a health-care authority acts as an agency or instrumentality of its authorizing subdivision and as a political subdivision of the State only in connection with its engagement in anticompetitive conduct." Davis, 158 So. 3d at 408. The conduct of the Authority about which CARO complains is specifically alleged to be anticompetitive in nature. Therefore, even under Baptist Health's (inaccurate) interpretation of Davis, the Authority must be said to be acting as an instrumentality of its authorizing subdivision and the state for purposes of the activities alleged in this action.

Aside from its use of Davis, Baptist Health presents one other argument as to why it believes the Authority should not be subject to the ORA. It notes that this Court's shorthand definition of a "public writing" includes records "reasonably necessary to record the business and activities required to be done or carried on by a public officer." Stone, 404 So. 2d at

681. Baptist Health then states that the definition of a "public officer" in § 36-12-1 includes "all persons occupying positions in any department, commission, bureau, board, subdivision of the State of Alabama, or its counties and municipalities. Here, [the Authority] is not a department, commission, bureau, board, or subdivision of the State of Alabama, or its counties and municipalities." Baptist Health's brief, p. 21.

Baptist Health reads the applicable definitions too narrowly. See, e.g., Tennessee Valley, 61 So. 3d at 1030 (noting that "'[t]he Open Records Act is remedial and should therefore be liberally construed in favor of the public'" (quoting Water Works & Sewer Bd. of Talladega v. Consolidated Publ'g, Inc., 892 So. 2d 859, 862 (Ala. 2004))). The full definition of a "public record" in § 41-13-1, Ala. Code 1975, provides, in part, that the term "shall include all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business." (Emphasis added.) As we noted above, the Authority's "authorizing

subdivision" is the University of Alabama Board of Trustees, which is plainly a subdivision of government. Moreover, § 36-12-1 defines a "public officer or servant" to include "all persons whatsoever occupying positions in state institutions." (Emphasis added.) Again, as we noted above, § 22-21-318(c)(2) and (a)(31) state that a health-care authority "acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state" when it "engages in activities that may be deemed 'anticompetitive.'" Accordingly, Penton fits within the ORA's understanding of a "public officer."

Based on the foregoing, we conclude that the circuit court did not err in determining that the Authority is subject to the ORA.

B. Does the circuit court's ordered records disclosure exceed the scope of the ORA?

The Court has explained that it is not the case that

> "any time a public official keeps a record, though not required by law, it falls within the purview of § 36-12-40. McMahan v. Trustees of the University of Arkansas, 255 Ark. 108, 499 S.W.2d 56 (1973). It would be helpful for the legislative department to provide the limitations by statute as some states have done. Absent legislative action, however, the judiciary must apply the rule of reason. State v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977). Recorded

> information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure. Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference. MacEwan v. Holm, 226 Or. 27, 359 P.2d 413 (1961)."

Stone, 404 So. 2d at 681 (emphasis added).

The Court later provided some context for the so-called "Stone exceptions" to the ORA.

> "To put the Stone 'exception' language into perspective, along with the language of § 36-12-40, we offer the following guidance. There is a presumption in favor of public disclosure of public writings and records expressed in the language of § 36-12-40. Limitations to the broad language of the statute are, nevertheless, necessary, and, as stated in Stone, absent legislative action, the judiciary has to apply the 'rule of reason.' However, it must be noted that this 'rule of reason' shall not be applied so as to hamper the liberal construction of § 36-12-40. The exceptions set forth in Stone must be strictly construed and must be applied only in those cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure. These questions, of course, are factual in nature and are for the trial judge to resolve. Moreover, the Stone exceptions should not come into play merely because of some perceived necessity on the part of a public official or

> established office policy. Furthermore, because there is a presumption of required disclosure, the party refusing disclosure shall have the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them.
>
> "Doubtless, exceptions to the broad language of § 36-12-40 are needed and should be applied under appropriate circumstances. But, we emphasize that these exceptions must be narrowly construed and their application limited to the circumstances stated herein, for it is the general rule, and has been the policy of this state for a number of years, to advocate open government. The Stone exceptions were not intended, nor shall they be used, as an avenue for public officials to pick and choose what they believe the public should be made aware of."

Chambers v. Birmingham News Co., 552 So. 2d 854, 856-57 (Ala. 1989). See also Stone, 404 So. 2d at 680 (explaining that "'the public generally have the right of a reasonable and free examination of public records required by law to be kept by public officials, except in instances where the purpose is purely speculative or from idle curiosity, or such as to unduly interfere or hinder the discharge of the duties of such officer'" (quoting Holcombe v. State, 240 Ala. 590, 597, 200 So. 739, 746 (1941))).

With the foregoing principles in mind, we now examine Baptist Health's contention that, even if the Authority is subject to the ORA, the circuit court's order based on CARO's

records requests exceeded the scope of the ORA. Only one of Baptist Health's arguments addressing the scope of CARO's requests attempts to rely in any way upon the Stone exceptions. Specifically, Baptist Health argues:

> "The redacted portions of the [Authority's] Board Minutes contain irrelevant, confidential, privileged, and proprietary information on topics including physician credentialing, business and contractual relationships with third parties, retirement benefits for employees, operating and capital budgets and financial information, internal operating strategies, and insurance amounts, among other things, none of which concern or involve CARO."

Baptist Health's brief, p. 24. This argument essentially copies verbatim a statement from Penton's affidavit submitted in support of Baptist Health's motion to dismiss CARO's original and amended complaints.

We disagree with this argument for several reasons. First, as CARO observes, "there is no exception under Alabama [law] based on a public entity's own conception of relevance." CARO's brief, p. 14. Such an exception would swallow the general presumption in the ORA of required disclosure because a public entity could set its own parameters for what constitutes a required disclosure. As the Chambers Court noted: "[T]he Stone exceptions should not come into play

merely because of some perceived necessity on the part of a public official." Chambers, 552 So. 2d at 856.

Second, Baptist Health has the burden of proving that the redactions to the Board minutes fall within an exception, and those exceptions are to be strictly construed. Baptist Health never demonstrated to the circuit court that the redactions contained irrelevant, confidential, or proprietary information. Instead, it solely relied upon the single statement of Penton's affidavit asserting as much.

Third, the exception for confidentiality concerns "information received by a public officer in confidence." Stone, 404 So. 2d at 681 (emphasis added). Baptist Health never alleged that the redacted information was received in confidence; it merely asserted that it believed the information was confidential. Absent a fuller explanation, Baptist Health appears to be using the exception "as an avenue for public officials to pick and choose what they believe the public should be made aware of." Chambers, 552 So. 2d at 857.

Finally, as the circuit court observed, during this litigation the Authority permitted counsel for CARO to view the unredacted Board minutes; in doing so, the Authority

surrendered any plausible claim that the redactions actually contained confidential or proprietary information. Baptist Health repeatedly complains throughout its briefs to this Court that the Authority permitted CARO's counsel to view the unredacted Board minutes only because, at that time, CARO had initiated a suit alleging breach of contract, not an ORA request. In other words, Baptist Health implies that CARO obtained the information by a sort of subterfuge. But the record belies that assertion. CARO filed its action alleging breach of contract on April 18, 2018. The next day, April 19, 2018, CARO sent Penton a letter making its first ORA request. That request included CARO's demand for the Board minutes. CARO sent two subsequent letters reiterating its ORA requests, and, soon after the Authority received the third letter, arrangements were made for CARO's counsel to view the unredacted Board minutes. Thus, CARO's ORA requests occurred simultaneously with its prosecution of the breach-of-contract complaint. Moreover, even if CARO had obtained a review of the unredacted Board minutes under the auspices of its breach-of-contract claim, the Authority never raised a discovery objection that the Board minutes contained "irrelevant,

confidential, privileged, and proprietary information." Accordingly, we find no fault with the circuit court's approval of CARO's ORA request for the Board minutes.

Baptist Health also contends that the approved radiation-oncologist request includes opinions and preliminary analyses that are not included in final documents. Baptist Health asserts that the ORA applies only to "completed records in final form," and so the ordered disclosures from the radiation-oncologist request exceeded the scope of the ORA. Baptist Health's brief, p. 22. For this argument, Baptist Health relies upon opinions of the Alabama Attorney General. See, e.g., Ala. Op. Att'y Gen. No. 2014-087 (Aug. 22, 2014) (stating that "this Office, on multiple occasions, has reasoned that the Public Records Law only contemplates the dissemination of completed records in final form. Documents containing mere impressions, such as notes, are not required to be disseminated pursuant to the Public Records Law"); Ala. Op. Att'y Gen. No. 96-00126 (Feb. 8, 1996) (concluding that "not every record kept by a public official falls within the purview of the Public Records Law. Documents which reflect part of an official's thought processes, which are not records

of the ultimate decision, are not subject to disclosure until a final action is arrived at or acted upon. ... It is only the final draft or document, reflecting the ultimate decision, which is contemplated by the Public Records Law").

There are also several problems with this argument. First, Baptist Health fails to explain in any degree of detail how all, or even any of, the radiation-oncologist requested documents are just notes or impressions or that they are incomplete. Baptist Health merely states, without any support or further argument, that all of those documents are not in "final" form. "Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived." White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008). It is not immediately self-evident that documents distributed at the Authority's Board meetings would be incomplete records or preliminary notes, nor is it obvious that "financial statements, feasibility studies, or budgets for [the Authority's] proposed radiation therapy facility in Prattville" were not in "final form." Therefore, Baptist

Health has not adequately articulated an argument on this point that could warrant a reversal of the circuit court's judgment.

A second problem is that "an attorney general's opinion is only advisory; it is not binding on this Court and does not have the effect of law." Farmer v. Hypo Holdings, Inc., 675 So. 2d 387, 390 (Ala. 1996). The qualification on required disclosures in the ORA outlined in the attorney general opinions was not among the exceptions listed in Stone, nor was it listed in Tennessee Valley, even though, by the time Tennessee Valley was decided, multiple attorney general opinions had referenced the qualification. Compare Water Works & Sewer Bd. of City of Talladega v. Consolidated Publ'g, Inc., 892 So. 2d 859, 866 (Ala. 2004) (finding "persuasive" an attorney general opinion addressing "what teacher personnel information must be made public pursuant to a request made under the Open Records Act").

Moreover, it is not apparent why the definition of a "public writing" or its synonym, "public record," would require the production of only "completed records in their final form." Again, this Court has stated that a "public

writing" includes records "reasonably necessary to record the business and activities required to be done or carried on by a public officer." Stone, 404 So. 2d at 681. A "public record" "shall include all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers." § 41-13-1, Ala. Code 1975. Those definitions do not readily imply that only materials documenting a final decision by a public entity must be disclosed in response to an ORA request. Beyond citing the attorney general opinions, Baptist Health does not provide any explanation as to why the interpretation of the ORA provided in those opinions comports with a plain reading of the ORA or with our stipulation that the ORA should be liberally construed in favor of the public. Therefore, we find Baptist Health's citation to the attorney general opinions unpersuasive.

Baptist Health also contends that the ordered records disclosures violate "the purposes of the [ORA]" because the disclosures allow a competitor to obtain both information irrelevant to the underlying action and confidential information. Baptist Health's brief, p. 25. Baptist Health

seems to be arguing that the purpose of the ORA is to give the public "'the right of a reasonable and free examination of public records,'" Stone, 404 So. 2d at 680 (quoting Holcombe, 240 Ala. at 597, 200 So. at 746), not to allow a competitor to gain an advantage. It is undoubtedly true that the goal of the ORA is to aid "citizens in knowing what their public officers are doing in the discharge of public duties." Id. at 681. But the ORA does not purport to limit the availability of public-entity disclosures to certain groups of the public and not others. In other words, the fact that CARO is potentially in competition with the Authority does not make CARO any less a part of the public so far as the ORA is concerned. We will not curtail the application of the plain language of the ORA based on a vague notion that a party's request violates the spirt of the ORA.

Finally, Baptist Health argues that, at least with respect to the request for the Board minutes, this Court should find that allowing CARO's counsel to review the unredacted Board minutes was "sufficient to comply with CARO's requests under the ORA." Baptist Health's brief, p. 29. As we have already observed, § 36-12-40, Ala. Code 1975,

provides, in part, that "[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise provided by statute." (Emphasis added.) Although the Authority allowed CARO's counsel to review the unredacted Board minutes, it has steadfastly refused to provide a copy of those unredacted minutes to CARO. Thus, the Authority plainly did not sufficiently comply with the ORA with respect to the Board minutes. Moreover, the Authority in no sense complied with CARO's radiation-oncologist request. We find this argument wholly unpersuasive.

Based on the foregoing, we conclude that the circuit court's ordered records disclosure did not exceed the scope of the ORA.

IV. Conclusion

For the reasons provided, we conclude that the Authority is subject to the ORA and that the circuit court's ordered records disclosure did not exceed the scope of the ORA. Accordingly, the circuit court's judgment is affirmed.

AFFIRMED.

Parker, C.J., and Shaw, Wise, Sellers, and Stewart, JJ., concur.

Bolin and Bryan, JJ., concur in the result.

Mitchell, J., recuses himself.