



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-013

May 20, 2016

The Honorable Scott Flippo
State Senator
P.O. Box 705
Bull Shoals, AR 71619

Dear Senator Flippo:

You have requested my opinion on the following questions regarding the possible application of the Arkansas Freedom of Information Act ("FOIA") to the operation of the North Arkansas Regional Medical Center ("Medical Center")¹:

Question 1: Do the provisions of the [FOIA] pertain to all aspects of the operation of the [Medical Center]?

Question 2: If the answer to question #1 is "no", do the provisions of the [FOIA] pertain to any aspect of the operation of [the Medical Center]?

Question 3: If the answer to question #1 is "yes", which provision/provisions of the [FOIA] pertains/pertain to which aspect/aspects of the operation of the [Medical Center]?

¹ The background information attached to your request indicates that the Medical Center is the Boone County hospital facility formerly known as the North Arkansas Medical Center and formerly operated by Boone County through its board of directors. The Medical Center's name was changed to the "North Arkansas Regional Medical Center" when the private, nonprofit corporation of that same name began operating the county hospital facility some time in 1996 under a lease agreement with the county. To avoid confusion, I will refer herein to the county hospital facility as the Medical Center. I will refer to the private, nonprofit corporation that operates the hospital as NARMC.

Question 4: Does the wording of Section 16 of the attached ASSIGNMENT AND LEASE AGREEMENT BETWEEN BOONE COUNTY, ARKANSAS AND NORTH ARKANSAS REGIONAL MEDICAL CENTER forbid the County Judge of Boone County, Arkansas, from unilaterally extending and renewing the lease agreement with no approval of the Boone County, Arkansas Quorum Court?

RESPONSE

You have provided considerable background information regarding the Medical Center and NARMC. It is my opinion based upon the information supplied that the answer to Question 1 is “no” because the information before me does not evidence direct public funding of the Medical Center’s general operations. This response renders Question 3 moot. I must emphasize, however, that the question whether a nonprofit corporation is subject to the FOIA is largely a question of fact.² There may be other material facts, outside the information before me, to be considered in answering the questions you have posed.

I cannot offer a definitive response to Question 2. The information before me indicates there is likely a factual question whether certain aspects of the Medical Center’s operation are publicly funded such that the FOIA might be partially applicable. This factual inquiry is beyond the scope of an Attorney General opinion. My opinion must therefore be limited to the legal principles upon which the appropriate factual inquiry and determination must be based.

I cannot answer Question 4. Although I am statutorily directed to render formal opinions on questions of state law submitted by specified officials, the construction of a contract is generally beyond the scope of an Attorney General opinion.

DISCUSSION

Question 1 - Do the provisions of the [FOIA] pertain to all aspects of the operation of the [Medical Center]?

² See, e.g., Op. Att’y Gen. Nos. 2012-108; 2010-057; 2006-086; 2004-223; 97-148.

As noted above, the Medical Center is operated by a private, nonprofit corporation (North Arkansas Regional Medical Center (“NARMC”)) under a lease agreement with Boone County. I thus take this question to be asking whether NARMC is subject to the FOIA in all aspects of its operation of the Medical Center.

The Arkansas Supreme Court has established that the FOIA sometimes applies to private entities.³ The Arkansas Supreme Court has reasoned that the FOIA applies to private entities because of language in three areas of the FOIA: (i) the FOIA’s express intent, which is to keep electors advised of “public business;”⁴ (ii) the definition of “public meetings;”⁵ and (iii) the definition of “public records.”⁶

³ A representative sampling of cases in which private entities have been subjected to the FOIA include: *Kristen Inv. Properties, LLC v. Faulkner County Waterworks and Sewer Public Facilities Bd.*, 72 Ark. App. 37, 32 S.W.3d 60 (2000); *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989) (overruled on other grounds by *Harris v. City of Fort Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006)); *Rehab Hosp. Servs. Corp. v. Delta-Hills Health Sys. Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985); *Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.2d 258 (1981); *North Central Assn. of Colleges & Schools v. Troutt Brothers, Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977).

Another Arkansas Supreme Court decision, *Nabholz Construction Corp. v. Contractors for Public Protection Association*, 371 Ark. 411, 266 S.W.3d 689 (2007), should also be noted, however, on the issue of obtaining public records held by private entities.

⁴ Arkansas Code Annotated § 25-19-102 (Repl. 2014) explains the legislature’s intent:

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.

⁵ Arkansas Code Annotated § 25-19-103(6) (Supp. 2015) defines “public meetings” in relevant part as “meetings of ... organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds....” See also Ark. Code Ann. § 25-19-106(a) (Supp. 2015) (slightly different “public funding” language under the open meeting requirement).

⁶ Arkansas Code Annotated § 25-19-103(7)(A) defines “public records” in relevant part as records kept by “any other agency ... that is wholly or partially supported by public funds or expending public funds.”

Private entities that receive public funds are therefore potentially subject to the FOIA.⁷ But if the facts show that a private entity only receives public funds with respect to certain activities or functions, then the entity will not be wholly subject to the FOIA.⁸ In the case of NARMC, the information before me includes evidence of public funding with respect to certain activities. But there is no evidence of public funding of the Medical Center's general operations.⁹ This leads me to conclude that the threshold public funding requirement has not been met such that NARMC might be subject to the FOIA in all aspects of its operation of the Medical Center.¹⁰

Another version of the "public funding" language is found in Ark. Code Ann. § 25-19-107(a) (Repl. 2014) (providing a right of appeal in FOIA cases and referring to "an agency of a county, municipality, ... or a private organization supported by or expending public funds..."). As noted in a treatise on the FOIA: "The Arkansas Supreme Court has used these provisions interchangeably, thereby indicating that the minor variations in wording are irrelevant and that the same analysis applies to both meetings and records." John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 60*, n. 95 (citations omitted) (Arkansas Law Press, 5th ed., 2009).

⁷ As explained further below, the public funding must be **direct** in order for the FOIA to potentially apply to a private organization.

⁸ See *Edmark*, *supra* note 3; Watkins & Peltz, *supra* note 6, § 2.03[d].

⁹ The background material submitted with your request for my opinion points to NARMC's receipt of the Medical Center's net receivables and net investments (upon NARMC's lease of the Medical Center) as evidence of NARMC's receipt of public funds. However, because these asset accounts are not money in hand, they do not satisfy the FOIA's threshold direct public funding requirement. See note 12 and accompanying text, *infra*. They are more in the nature of indirect benefits; and it is clear that a private entity's receipt of indirect government benefits or subsidies does not constitute direct public funding for purposes of the FOIA. See *Kristen Inv. Properties, LLC*, *supra* note 3 (citing *Weatherford*, *supra* note 9).

¹⁰ Compare Watkins & Peltz, *supra*, at 64 (noting *Rehab Hosp. Servs. Corp.*, *supra* note 3 and other instances addressed in Attorney General opinions where "a private entity receives public funds for the general support of activities that are closely aligned with those of government."); *North Central Assn of Colleges and Schools*, *supra* note 3 (FOIA held applicable to a private, nonprofit academic accrediting organization supported by public money contributed by public-school members). See also Op. Att'y Gen. 2004-223 (finding the FOIA applicable to a private, nonprofit county-hospital operator that received tax funds levied for the hospital's maintenance, where the county in question had provided hospital services prior to its arrangement with the nonprofit, though noting a possible fact question as to the extent of the FOIA's applicability).

The answer to Question 1 is therefore “no,” in my opinion. It is my conclusion based on the information before me that NARMC is not subject to the FOIA in all aspects of its operation of the Medical Center. I must emphasize, however, that the question whether a nonprofit corporation is subject to the FOIA, either wholly or in part, is largely a question of fact. There may be other material facts, outside the information before me, to be considered in answering this question.

Question 2 - If the answer to question #1 is “no”, do the provisions of the [FOIA] pertain to any aspect of the operation of [the Medical Center]?

The test with respect to private organizations has been summarized as follows:

[T]he FOIA applies only to private organizations that (1) receive public funds, (2) engage in activities that are of public concern, and (3) carry on work that is intertwined with that of government bodies. This approach is sound. If the mere receipt of public funds were enough to trigger the act, it would reach anyone who received government largesse, including welfare recipients and private hospitals that receive Medicare and Medicaid payments. As the Supreme Court has recognized, however, the FOIA should apply when the government “seeks to conduct its affairs through private entities,” for in that situation “the entities are for all practical purposes the government itself.”¹¹

Thus, the threshold question regarding any particular private entity is whether it receives public funds. This part of the test is satisfied only if there is a direct transfer to the private organization of government money.¹² The government’s indirect subsidy of a private organization is not sufficient to make the private organization subject to the FOIA.¹³

¹¹ Watkins & Peltz, *supra* note 6, at 63 (citing Edmark and John J. Watkins, *Access to Public Records under the Arkansas FOIA*, 37 Ark. L. Rev. 741, 768-69 (1984)).

¹² *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 659, 846 S.W.2d 641, 643 (1993) (noting that the FOIA does not define “public funds” and looking to *Black’s Law Dictionary*, which defines it as “[m]oneys belonging to government, or any department of it, in [the] hands of [a] public official.”).

¹³ *Id.* (city’s lease of property to the American Red Cross for \$1.00 per year held not to qualify as public funding under the FOIA); *accord* Op. Att’y Gen. Nos. 97-148 and 96-116 (opining that a

Additionally, as a general rule, a private entity that receives only partial support from government is only partially bound by FOIA requirements. That is, in some situations, a private entity may be subject to the FOIA only to the extent of requiring the openness of meetings and records that are “relevant to the task” of the public business that is carried out by the entity.¹⁴

With regard to NARMC, the information before me indicates that there has been some direct payment of government money to NARMC, in the form of certain Medicaid bonus payments and several federal and state grants. These payments might give rise to the question whether NARMC is partially bound by FOIA requirements. The mere receipt of public funds will not, however, bring a private organization within the FOIA’s reach. As indicated above, it must also be determined whether the activities of the private entity are of public concern and “sufficiently intertwined” with government.¹⁵

The activities for which NARMC reportedly received direct public funds are clearly of public concern. The activities involve the computerization of medical records, certain patient screening and treatment, and ambulance service trauma readiness. I believe the inquiry therefore focuses on the intertwining issue.

It is unclear just how “intertwined” a private entity must be with the government before the FOIA will be deemed applicable.¹⁶ I can state generally that intertwining is most likely to occur when the private entity engages in activities or functions or provides services that are normally performed by governmental entities.¹⁷ With regard to the activities for which NARMC received the government funds, the information before me does not present a clear case of intertwining as to the medical records services and the screening and treatment

private corporation’s lease of a hospital facility from the city/county will not satisfy the public funding part of the test under the FOIA, even if the rentals are below fair market rates).

¹⁴ See *Edmark, supra*. See also *Watkins & Peltz, supra*, at 70; Op. Att’y Gen. Nos. 2010-081 and 2007-227.

¹⁵ *Watkins & Peltz, supra*, § 2.03; *Edmark, supra*; e.g., Op. Att’y Gen. Nos. 2012-108; 2006-086; 96-287.

¹⁶ *Watkins & Peltz, supra* at 64 (citing Op. Att’y Gen. 92-205).

¹⁷ E.g., *Kristen Inv. Properties, L.L.C. and Swaney, supra* note 3.

program. However, issues of “public funding and function” are intensely factual.¹⁸ I cannot act as a factfinder in issuing opinions and therefore cannot definitively determine whether NARMC and the county are “intertwined” with respect to these services and functions.

As for the ambulance-related grant, counties are expressly authorized to establish and operate ambulance services.¹⁹ If it is evident in this case that Boone County would be carrying out ambulance services in the absence of the arrangement with NARMC, then it may be fair to say, as a general proposition, that the intertwining element is met in this respect.²⁰ However, I believe a question may remain in light of the size of the ambulance services grant. According to the attached material, the grant was for \$34,000. If in fact this is a small amount in relation to the ambulance service’s operating revenue, then I believe the funding amount could also factor into the intertwining analysis.²¹

In sum, it is impossible, absent a thorough factual review, to definitively determine whether NARMC is subject to some extent to the FOIA as a result of receiving public funds for certain activities. There clearly must be evidence of an alignment with government, beyond merely receiving the public funds. But whether such alignment exists ultimately presents a factual question that is outside the scope of this opinion.²²

Question 3: If the answer to question #1 is “yes”, which provision/provisions of the [FOIA] pertains/pertain to which aspect/aspects of the operation of the [Medical Center]?

This question is rendered moot by my response to Question 1.

¹⁸ Op. Att’y Gen. Nos. 2007-192 and 2001-314.

¹⁹ Ark. Code Ann. § 14-14-802(b)(2)(D)(i) (Repl. 2013).

²⁰ See Op. Att’y Gen. Nos. 2004-223 and 96-116.

²¹ See Op. Att’y Gen. Nos. 2012-108 and 2006-086 (opining that a de-minimus level of public funding might undermine the intertwining element).

²² I should also reiterate that *Nabholz Construction Corp.*, *supra* note 3, should be noted on the issue of obtaining public records held by private entities.

Question 4: Does the wording of Section 16 of the attached ASSIGNMENT AND LEASE AGREEMENT BETWEEN BOONE COUNTY, ARKANSAS AND NORTH ARKANSAS REGIONAL MEDICAL CENTER forbid the County Judge of Boone County, Arkansas, from unilaterally extending and renewing the lease agreement with no approval of the Boone County, Arkansas Quorum Court?

I am not authorized to answer this question. I am statutorily directed to render formal opinions on questions of state law submitted by specified officials.²³ This duty does not extend to questions involving particular agreements. The construction of a contract is generally beyond the scope of an Attorney General opinion.²⁴

Sincerely,



LESLIE RUTLEDGE
Attorney General

²³ Ark. Code Ann. § 25-16-706 (Repl. 2014).

²⁴ *Accord* Op. Att’y Gen. 2014-092 (and opinions cited therein, noting that questions regarding agreements entered by political subdivisions must be decided in the first instance by local counsel, subject to review by the courts).