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ARKANSAS COURT OF APPEALS

DIVISIONS II & III
No. CV-20-575

DEE BLAKELY
APPELLANT

V.

ARKANSAS CHILDREN'S HOSPITAL
APPELLEE

Opinion Delivered March 9, 2022

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION
[NO. 60CV-17-2148]

HONORABLE TIMOTHY DAVIS FOX, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Dee Blakely appeals the Pulaski County Circuit Court's order holding that the issue remanded to the court is moot. On appeal, Blakely argues three points: (1) the circuit court erred by ignoring the mandate of this court; (2) the circuit court erred by finding the issue is moot; and (3) the circuit court made a finding that appellee Arkansas Children's Hospital (ACH) is subject to the Arkansas Freedom of Information Act (FOIA). We affirm the circuit court's order.

I. *Procedural History*

A. *Blakely I*

This is the third appeal involving Blakely and ACH. Litigation began on August 17, 2015, when Blakely filed a complaint seeking ACH's compliance with FOIA and for a declaratory judgment that ACH is subject to FOIA. Blakely sought funding and

expenditure records in regard to funds that ACH had received from Pulaski County. After a preliminary hearing, the circuit court ordered that ACH did not have any FOIA documents pertaining to Blakely's request. Thereafter, Blakely sent a FOIA request directly to Jane Duke, counsel for ACH, seeking emails and letters between her firm and ACH, and Duke refused the request. Blakely amended her complaint three times, ultimately naming Duke individually and adding a FOIA claim for Duke's emails and letters and illegal-exaction claims against ACH and Pulaski County. ACH, Pulaski County, and Duke filed motions to dismiss or strike.

On May 13, 2016, the circuit court denied as moot the dismissal motions in regard to the amended and second amended complaints. The court granted ACH's motion to dismiss Blakely's third amended complaint on the FOIA and illegal-exaction claims. Duke's motion to dismiss the FOIA claim against her was also granted, leaving the illegal-exaction claim against Pulaski County.

On April 4, 2017, a bench trial was held, and the circuit court took the case under advisement. Thereafter, Blakely moved to vacate the May 13, 2016 order. On April 17, the circuit court issued its findings of fact and conclusions of law, dismissing the illegal-exaction claim and denying Blakely's request for a declaration that Pulaski County had used the "Hospital Maintenance Tax" moneys inappropriately. A dismissal order was filed on the same day, and on appeal, this court affirmed the circuit court's ruling. *Blakely v. Ark. Children's Hosp.*, 2019 Ark. App. 568, 590 S.W.3d 199 (*Blakely I*).

B. *Blakely II*

On May 1, 2017, Blakely filed a complaint against ACH, arguing that Blakely had requested information from ACH by letter dated February 15, 2017, and that ACH had denied the request, stating that it was not subject to FOIA. Blakely also alleged that she had made an oral FOIA request to Duke for all advice letters sent to ACH from Medicaid that had been identified in testimony during the April 4, 2017 bench trial in *Blakely I*. She also claimed to have made an oral FOIA request to Duke and Rhonda McKinnis, an attorney, for their notes taken during the *Blakely I* bench trial. Blakely alleged that ACH is subject to FOIA because it is a county hospital and recipient of an ad valorem tax collected in the county; it is the recipient of appropriations having control over disbursements; and it is affiliated with UAMS. She asked for an expedited hearing under FOIA, an order requiring ACH to comply with FOIA, a declaratory judgment that ACH is subject to FOIA, and attorney's fees and costs.

On May 25, ACH filed a bench brief, arguing that it is not subject to FOIA and is a private entity, and on June 16, ACH filed its answer to Blakely's complaint.

On December 13, the circuit court found and ordered:

> [A]lthough [ACH] is a 501(c)(3), this is not a bar to being subject to the [FOIA]. Until 2001, approximately $4,000,000 a year was sent to ACH as the County Hospital for Pulaski County. In 2001, the money from the Pulaski County millage started being sent directly to the State of Arkansas to DHS. However, ACH could receive the money directly and has the absolute ability to direct where the money goes. Periodically spreadsheets are provided to ACH by the State of Arkansas through DHS, that relate to the Pulaski County tax millage money.
>
> . . . .
>
> a. [Blakeley's] request of April 4, 2017, to outside counsel for ACH for "all remittance advice letters sent to ACH from Medicaid" . . . is DENIED; and

b. [Blakely's] oral request made on April 4, 2017, to both outside counsel and in-house counsel for ACH for "all notes they had taken while attending the bench trial of [*Blakely I*] . . . is DENIED as those documents are not subject to FOIA.

c. [Blakely's] written request made on February 15, 2017, to Chief Financial Officer Gena Wingfield for "[r]ecords related to the receipt and expenditure of County tax funds by [ACH] . . . for the calendar years 2011–2016" is GRANTED in part and DENIED in part. More specifically, [ACH], for the time period of 2011 through 2016, received documents from the Arkansas Department of Human Services concerning Pulaski County millage tax monies, such documents are subject to the FOIA and [ACH] is ORDERED to disclose such records to [Blakely] within three (3) days from entry of this Order. With respect to any other document encompassed within [Blakely's] February 15, 2017 written request, the relief sought is DENIED.

ACH filed a timely notice of appeal and a motion for stay pending appeal, and the circuit court denied the motion for stay. Blakely filed a notice of cross-appeal, appealing "the denial of FOIA requests." On appeal, ACH argued that the circuit court clearly erred by ordering it to produce the documents under FOIA. *Blakely v. Ark. Children's Hosp.*, 2019 Ark. App. 565 (*Blakely II*). This court declined to decide the merits, finding the circuit court's order unclear on some points. We remanded for clarification as follows:

> Before a private entity like the hospital can be ordered to disclose records under FOIA, it must be covered by the act. *Sebastian Cty. Chapter of Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993). Whether a private entity is covered by FOIA is determined by a three-factor test, which according to an authoritative commentator in this area of the law, asks whether the entity (1) receives public funds, (2) engages in activities that are of public concern, and (3) carries on work that is intertwined with that of governmental bodies. *See* John J. Watkins et al., *The Arkansas Freedom of Information Act*, 64 (6th ed. 2017) (footnotes omitted). The test is a conjunctive one according to the preeminent book on Arkansas's FOIA, and the parties in this case so argued in their respective briefs, themselves each citing Arkansas Attorney General opinions to that effect. As one example, in a bench brief filed with the circuit court in opposition to Blakely's FOIA complaint, the hospital argued that "The FOIA only applies to organizations that meet a three-prong test. The receipt of [direct] public funds is merely one prong of the test." The hospital then provided the same quote from Professor Watkins's book as the one we provided

at the beginning of this paragraph. And in its appeal brief, the hospital asserts that it "is not an entity subject to FOIA. The record demonstrates that ACH does not engage in matters of public concern, is not intertwined with the government, and is not supported by direct public funds."

A primary reason we have decided to remand the case rather than decide it now on its merit is that the circuit court expressly made a finding on the first factor related to public funds, but it remained silent on the other two factors. The court also appears to have determined whether certain documents were subject to FOIA, not whether the hospital itself was subject to it. (More on this below.) Normally we indulge the presumption that the circuit court made the findings necessary to support its judgment. *See Moreland v. Dodds*, 2012 Ark. App. 10, 388 S.W.3d 73. Here, however, we cannot fairly do so.

Blakely asked for a declaration in her complaint that the hospital is a FOIA-covered entity. But the circuit court's order is unclear on whether it decided that question fully. For example, paragraph 2 of the order indicates that the court may have applied the three factors in a disjunctive, not conjunctive, manner. The opening sentence of the paragraph states (with our emphasis): "Defendant Arkansas Children's Hospital (ACH) contests that it is an entity subject to the Arkansas FOIA because, as a private entity it does not: (1) directly receive public funds; and/or (2) engage in activities that are of public concern; and/or (3) carry on work that is intertwined with that of government bodies." The remainder of the paragraph reads as focusing on factor one. Having considered the entire order, we cannot tell with confidence whether all three factors were applied in a conjunctive or disjunctive manner. The difference is a legally meaningful one.

Another example of an important ambiguity is that in paragraph 3.c. the court speaks in terms of FOIA attaching to certain documents. Specifically, the order states in part:

> Arkansas Children's Hospital, for the time period of 2011–2016, received documents from the Arkansas Department of Human Services concerning Pulaski County millage tax monies, such documents are subject to the FOIA and Arkansas Children's Hospital is ORDERED to disclose such records to Plaintiff within three (3) days from entry of this Order. With respect to any other document encompassed within Plaintiff's February 15, 2017 written request, the relief sought is DENIED.

Here again we cannot tell whether the court did or did not rule that the hospital was a FOIA-covered entity, and why or why not. The hospital can have no potential liability under FOIA unless the three-factor test is first met. *See Nabholz Constr. Corp. v. Contractors for Pub. Prot. Ass'n*, 371 Ark. 411, 416, 266 S.W.3d 689, 692 (2007) (whether an entity is covered by the act "such that a suit against [the

> entity] is even proper" is a threshold question). Whether a private entity subject to FOIA is the "custodian" of a "public record" under Arkansas Code Ann. §§ 25-19-103, -105 (Supp. 2017) is an important question; but it does not arise until and unless a private entity is first determined to be covered under the act pursuant to the three-factor test we have mentioned.
>
> To honor the circuit court's intentions and the parties' arguments in an important area of the law, we deem it best to remand the case and ask the court to clarify its order.

Blakely II, 2019 Ark. App. 565, at 3–5.

C. Case on Remand

The mandate was filed on January 7, 2020, and a hearing was held on June 8. The parties agreed that the illegal-exaction matter is resolved, and Blakely's counsel stated, "Only the FOI is live. That's what was remanded." The following colloquy occurred:

> THE COURT: So, are you-all wanting to proceed with this, at this juncture?
>
> BLAKELY'S COUNSEL: Yes, sir.
>
> THE COURT: All right. Because when I rule in the manner that I'm going to rule, then [ACH] is not going to be able to accept that precedent, and they are going to appeal again and you-all are all going to have the time, cost, and expense. Okay?
>
> . . . .
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> ACH'S COUNSEL: I don't think . . . that Ms. Blakely has a claim right now that she can decide whether or not to appeal or not [sic]. So, if I may—
>
> THE COURT: Well, certainly. I mean, so you are saying something has arisen?
>
> ACH'S COUNSEL: Well, what I'm saying is this. I think she brought claims—right?—and they were partly denied and partly granted. We appealed, and she cross-appealed. She did not perfect her cross-appeal. She didn't file anything

> with the Court of Appeals. So, our appeal of the denial, the partial deal, of—or the partial granting, rather, of the first FOIA request is what was before the Court of Appeals. And I think that's the only thing that's left. And I also would say to the Court that we, notwithstanding the mootness arguments we made to the Court of Appeals, subsequently, per this Order of the Court, produced the documents that we were ordered to produce because that was not stayed on appeal. So, as I see it, we sit here with three FOIA requests, two of which were denied. And I think that Ms. Blakely has lost the opportunity to appeal or challenge that further. One of which was partly granted and appealed, but which is now moot as we sit here today.
>
> And so, I don't think there is anything for Ms. Blakely to proceed on that hasn't been abandoned in this particular underlying litigation.

On June 12, Blakely filed a posttrial letter brief on the issues. In the timeline provided within, Blakely states, "1/3/18 ACH produced the records per your order and the world does not end." She then stated several reasons that the mootness doctrine could not apply, including that the mandate could not be ignored. ACH responded that it is confirmed that Blakely received the documents on January 3. It argued that the declaratory-relief issue is not live because the only issue ACH appealed was the portion of the order requiring production of documents under FOIA and did not include a ruling on any claim for declaratory relief. "If a finding about whether ACH is an entity subject to FOIA was implicit in or a prerequisite to the Order, it was as part of the FOIA claim, not an adjudication of a claim for declaratory relief."

On June 24, the circuit court ordered that the issue remanded to the court is moot because the subject documents were provided to Blakely in January 2018. Blakely moved to alter or amend, arguing that the case is not moot because the issue is whether ACH is a

public entity subject to FOIA. She claimed that the issue falls under an exception to the mootness doctrine, i.e., either an issue of substantial public interest or an issue that is capable of repetition yet evading review. She claimed that the specific instructions of the mandate should be followed and that the appellate court had asked for more information on the issue from the circuit court. ACH responded, arguing that there is no live claim for declaratory relief, that the request for documents under FOIA is moot, and that no exception to the doctrine of mootness applies. Blakely's motion was deemed denied, and this appeal timely followed.

II. *Standard of Review*

Both parties agree that the standard of review is whether the circuit court's findings are clearly erroneous. *Pulaski Cnty. v. Ark. Democrat-Gazette, Inc.*, 371 Ark. 217, 264 S.W.3d 465 (2007); Ark. R. Civ. P. 52(a). Conclusions of law are reviewed de novo on appeal. *Hickman v. Courtney*, 361 Ark. 5, 203 S.W.3d 632 (2005).

III. *Mandate*

The lower court is bound to follow the mandate, and jurisdiction conferred on the circuit court on remand is bound by the mandate and the decision of the superior court. *City of Dover v. Barton*, 342 Ark. 521, 29 S.W.3d 698 (2000). When an appellate court remands a case with specific instructions, those instructions must be followed. *Id.*; *Kight v. Ark. Dep't of Hum. Servs.*, 94 Ark. App. 400, 231 S.W.3d 103 (2006). A lower court is bound to follow both the letter and spirit of the opinion and mandate. *Id.*

Blakely argues that the circuit court "lost its way" when it found that the issue remanded is moot. She asserts that in *Blakely II*, this court asked for clarification on whether

the circuit court found that ACH is covered under FOIA pursuant to the three-factor test. She claims that the circuit court failed to follow those instructions, deciding instead that the "important question" was moot and ignoring the mandate on nonjurisdictional grounds. She claims that the mootness finding should be reversed and that the lower court should be instructed to complete its analysis or that its original decision should be affirmed to avoid further litigation.

Blakely argues that she has not waived the request for declaratory relief because this court found it to be live and instructed that the case be remanded for determination. *Green v. George's Farms, Inc.*, 2011 Ark. 70, at 7, 378 S.W.3d 715, 720 (law-of-the-case doctrine prohibits a court from reconsidering issues of law and fact that have already been decided on appeal). "Blakely asked for a declaration in her complaint that the hospital is a FOIA-covered entity. But the circuit court's order is unclear on whether it decided that question fully." *Blakely II*, 2019 Ark. App. 565, at 4–5. Blakely contends that the mandate specifically found that declaratory relief was still at issue and directed the circuit court to make clear its findings under the three-prong test; thus, she maintains that the order should be reversed.

ACH argues that the circuit court did not ignore the mandate, and we agree. The mandate rule is a subset of the law-of-the-case doctrine, and that doctrine does not apply if there was a material change in the facts. *Turner v. Nw. Ark. Neurosurgery Clinic, P.A.*, 91 Ark. App. 290, 298–99, 210 S.W.3d 126, 133–34 (2005). This court focused on whether the circuit court erred by ordering it to produce the documents under FOIA. *Blakely II*, 2019 Ark. App. 565, at 2 (ACH makes one point for reversal: the circuit court clearly erred by ordering it to produce the documents under FOIA). This court stated, "We have chosen

not to decide the merits of this appeal now because the circuit court's order is unclear on some points, which in turn prevents us from ensuring that our review is fair to the court and the parties." *Id.* at 1. The case was remanded with broad instructions to clarify the order. *Id.* However, while the case was pending on appeal, ACH produced the documents and mooted the point of contention. Thus, the circuit court did not violate the mandate or law of the case because it did not ignore the decision of *Blakely II*; instead, it dismissed the case due to a material change in facts because the documents were produced. *See Ark. Dep't of Hum. Servs. v. Ledgerwood*, 2019 Ark. 100, 571 S.W.3d 1.

IV. *Doctrine of Mootness*

A. Applicable Law

Appellate courts will not review issues that are moot. *Ledgerwood*, 2019 Ark. 100, at 2, 571 S.W.3d at 2 (citing *Terry v. White*, 374 Ark. 387, 391, 288 S.W.3d 199, 202 (2008)). To do so would be to render advisory opinions, which this court will not do. *Id.* A case is moot when any judgment rendered would not have any practical legal effect upon a then existing legal controversy. *Id.* In other words, a moot case presents no justiciable issue for determination by the court. *Id.*

In *Ledgerwood*, the Arkansas Supreme Court discussed the exceptions to the mootness doctrine after determining that no live controversy was before the court and that the case was moot:

> But mootness alone does not foreclose our consideration of issues on appeal. We have recognized two exceptions to the mootness doctrine: matters capable of repetition yet evading review and matters of substantial public interest that are likely to be litigated in the future. *See Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 28, at 3, 566 S.W.3d 105, 108. An issue capable of repetition yet evading review arises when the justiciable controversy will necessarily expire or terminate prior to

> adjudication. *See Wright v. Keffer*, 319 Ark. 201, 203, 890 S.W.2d 271, 272 (1995). The other exception applies where considerations of substantial public interest or the prevention of future litigation are present. *See Duhon v. Gravett*, 302 Ark. 358, 360, 790 S.W.2d 155, 156 (1990). That said, "the choice remains ours as to whether we may elect to settle an issue" that is moot. *Id.* And we do not improvidently utilize either exception. *See Protect Fayetteville*, 2019 Ark. 28, at 3, 566 S.W.3d at 108 (collecting cases).

Id. at 2–3, 571 S.W.3d at 2–3 (holding that there was no reason to apply an exception to mootness).

B. Declaratory Relief vs. Production of Documents

Blakely argues that hers is an action, in part, for declaratory relief, Ark. Code Ann. § 16-111-101 (Repl. 2016), and that she sought such relief in her complaint. She maintains that this court found that whether a private entity is covered by FOIA depends on a three-factor test and that the circuit court had made a finding only on the first factor, not mentioning the other two. *Blakely II*, 2019 Ark. App. 565, at 3. Blakely relies on *McGehee v. Arkansas State Board of Collection Agencies*, 375 Ark. 52, 289 S.W.3d 18 (2008), wherein a justiciable controversy was found when the sole remaining claim was for declaratory relief. She contends that even though ACH gave up the documents, it refuses to recognize that it is subject to FOIA.

ACH argues that the circuit court did not err in deciding that the issue is moot because ACH had produced the documents. ACH disagrees with Blakely's characterization of the issue as one for declaratory judgment—instead, ACH contends that determining whether ACH is subject to FOIA is the first step in the analysis of whether it must produce documents under FOIA. The first step should not be confused with Blakely's alleged declaratory-judgment action, which she failed to preserve on cross-appeal and the circuit

court never decided. ACH argues that Blakely is incorrect that her declaratory-judgment-relief clam was "live" on appeal given that she did not include a section in her *Blakely II* brief that set forth her arguments on cross-appeal. The fact that Blakely made an "argument reflecting the substance of the cross-appeal" in arguing that ACH should produce the records because it was subject to FOIA is not enough. *See Rheem Mfg., Inc. v. Bark*, 97 Ark. App. 224, 228, 245 S.W.3d 716, 719 (2006) (holding that making an argument reflecting the substance of the cross-appeal in response to appellant's argument is not enough to present the argument for appellate review).

We hold that Blakely abandoned her cross-appeal, and it was not before this court in *Blakely II*. The only issue on appeal is whether the circuit court clearly erred by ordering ACH to produce the documents under FOIA. *Blakely II*, 2019 Ark. App. 565, at 2. Given that the documents were produced, the circuit court did not err in finding that the issue is moot.

C. Exceptions to the Mootness Doctrine

An exception to the mootness doctrine is when the matter is capable of repetition but likely to evade review. *Brown v. Brown*, 2012 Ark. 89, 387 S.W.3d 159; *Russellville Police Pension & Retirement Bd. v. Johnson*, 365 Ark. 99, 225 S.W.3d 357 (2006); *Ark. Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001). Blakely argues that if the mootness ruling is allowed to stand, ACH can resist FOIA and that most petitioners will not sue. If ACH is sued, it can fight, be ordered to hand over documents, and then claim the issue is moot. Thus, she argues that ACH might never be held accountable under FOIA.

Another exception to the mootness doctrine is when the issue is of substantial public interest, and addressing the issue would prevent future litigation. *Med. Liab. Mut. Ins. Co. v. Alan Curtis Enters., Inc.*, 373 Ark. 525, 285 S.W.3d 233 (2008); *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997); *Cummings v. Washington Cnty. Election Comm'n*, 291 Ark. 354, 724 S.W.2d 486 (1987). Blakely contends that this court held in *Blakely II* that whether a private entity is subject to FOIA is an important question. She argues that ACH has been the subject of Arkansas Attorney General opinions and multiple lawsuits over the years and that it is time for the matter to be settled without further litigation.

Blakely insists that the controversy is whether ACH is a public entity, subject to FOIA requests from her. She contends that the parties' interests are adverse and that the issue has been litigated many times. *See, e.g.*, *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002); *Andres v. First Ark. Dev. Fin. Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959). She argues that the issue will continue to arise and has been debated for at least fourteen years. *See Harrill & Sutter, PLLC v. Farrar*, 2012 Ark. 180, 402 S.W.3d 511; Op. Ark. Atty. Gen. No. 086 (2006).

We hold that neither exception to the mootness doctrine is applicable. First, Blakely could have taken steps to obtain a ruling on her declaratory-judgment claim and then appealed any adverse ruling, but she did neither. There is no reason to believe the issues raised by Blakely will escape review in the future. *See Gillespie v. Brewer*, 2019 Ark. App. 275, 577 S.W.3d 59. The circuit court did not find that the sought-after declaration was moot. Rather, it held that Blakely's claim seeking certain documents under FOIA is moot

because they were furnished. ACH produced the documents after the circuit court refused to stay its order to do so pending the *Blakely II* appeal. If anything, Blakely's argument illustrates that the FOIA issues can be and will likely be litigated again in future.

Second, this is not a substantial-public-interest issue because Blakely wanted "records related to the receipt and expenditure of County tax funds by ACH" for calendar years 2011–2016. Resolution of whether those records should have been produced will not prevent future litigation. The issue is fact specific, and the documents have already been released. *See id*.

Blakely further argues that mootness was before this court and rejected because in *Blakely II*, ACH argued that Blakely had already received the documents in question from the Arkansas Department of Humans Services. Thus, she contends that the law of the case prohibits the circuit court from reconsidering mootness. *Green*, *supra*. This argument is unpersuasive because we did not reach or reject any argument regarding mootness in *Blakely II*; instead, we remanded for clarity of the lower court's decision. Finally, Blakely argues that there remains a question of whether she is entitled to attorney's fees as the prevailing party. *See Kan. Jud. Watch v. Stout*, 653 F.3d 1230 (10th Cir. 2011) (where party prevails on preliminary injunction that is later held moot during appeal, the party is still considered to have prevailed on merits and entitled to attorney's fees). Having affirmed the circuit court's order finding that the issue before it is moot without addressing Blakely's request for fees, we decline to address the issue.

V. *Whether the Circuit Court Made a Finding that ACH is Subject to FOIA*

Blakely contends that the circuit court was clearly going to rule in her favor before the issue of mootness was raised, citing the colloquy at the remand hearing and the circuit court's statement, "Because when I rule in the manner that I'm going to rule, then [ACH] is not going to be able to accept that precedent, and they are going to appeal again and you-all are going to have the time, cost, and expense." However, the circuit court did not rule that ACH is subject to FOIA. The circuit court's comment was made before ACH notified the court that the contested records had been produced. Further, the written order controls, *DFH/PJH Enters., LLC v. Caldwell*, 373 Ark. 412, 284 S.W.3d 66 (2008), and the circuit court's order did not find that ACH is an entity subject to FOIA.

Affirmed.

WHITEAKER, HIXSON, and MURPHY, JJ., agree.

HARRISON, C.J., and ABRAMSON, J., dissent.

BRANDON J. HARRISON, Chief Judge, dissenting. The appellate history of this case began when Arkansas Children's Hospital appealed a 13 December 2017 Pulaski County Circuit Court order that granted in part and denied in part Dee Blakely's request for hospital records under Arkansas's Freedom of Information Act. On 2 January 2018, the circuit court denied Children's request for a stay pending its appeal. So the hospital filed the appeal record with this court's clerk in February 2018; the appeal was submitted for a decision about one year later. Blakely filed a notice of cross-appeal but did not request any affirmative relief on appeal; she simply asked for the circuit court's December 13 disclosure order to be affirmed. In contrast, the hospital asked us to reverse the December 13 order.

As I will explain, the parties' dispute has always centered on whether the hospital was subject to the Freedom of Information Act.

I.

Before going further, I pause to focus on a key event that happened a few weeks after the circuit court denied the hospital's request to stay the 13 December 2017 order: Children's gave the disputed documents to Blakely on 3 January 2018. I highlight this point because despite the hand-off, Children's did not seek to dismiss its main appeal as moot. Yet, that is precisely what it argued on remand and in this appeal. Though there are additional reasons why this court should not moot this appeal, a main reason is that Children's never argued mootness the first time it came here—although the exact same circumstances presented in the first appeal are present now. If mootness is a viable option now, then it was every bit as viable years ago when Children's pursued an appeal.

Back to the remand. On 4 December 2019, we remanded this case to the circuit court and directed it to clarify a 13 December 2017 order because the order was ambiguous on a core point the parties had put before the circuit court: was Children's a FOIA-covered entity? *See Ark. Children's Hosp. v. Blakely*, 2019 Ark. App. 565 (*Blakely II*). On remand, the circuit court held a hearing; its transcript contains the circuit court's opening monologue wherein it makes known its displeasure about being asked to clarify its order on the important point of whether the court used the three-prong test to be applied to Children's in either the disjunctive or the conjunctive. An order of ham *and* eggs is not the same as ham *or* eggs. Ask a server for an order of ham *and/or* eggs, and you have justly invited a clarification.

As the remand opinion (*Blakely II*) clearly states, both Blakely and Children's argued that a three-prong test should be used in the conjunctive, meaning, of course, that all three prongs must be satisfied before the hospital could be deemed a FOIA-covered entity for this case's purposes. That was the crux of *Blakely II*. When faced with the directive to clarify whether the court meant ham and eggs versus ham or eggs, it balked. After the court finished complaining about *Blakely II*, Children's spoke up and steered it to mootness.

The hospital argued that the case was now moot because it had turned over to Blakely all the documents she had requested. Blakely argued that Children's mootness argument was untimely, that there was a "live" claim for declaratory relief, and that attorney's fees were still disputed. Shortly after the hearing, the parties submitted letter briefs on the mootness issue that Children's had raised for the first time on remand. On 24 June 2020, the circuit court wrote, "[T]he court finds that the issue remanded to the court is moot because the subject documents were provided to [Blakely] in January of 2018." Blakely filed a posttrial motion to alter or amend the judgment within ten days of the June 24 order. Blakely's posttrial motion was deemed denied on 31 July 2020. *See* Ark. R. App. P.–Civ. 4(b)(1) (2021). On July 31, Blakely filed a timely notice of appeal from the June 24 order. On August 26, she amended her notice of appeal to include the denial of the posttrial motion.

Blakely III was then born.

II.

For reversal, Blakely now argues the following: (1) the circuit court erred by ignoring our mandate; (2) the circuit court erred by finding the issue was moot; and (3) the circuit court did, in fact, rule that Children's was subject to the FOIA.

Assuming that Children's did not waive its current mootness argument given its litigation behavior, the hospital's vacillating positions over the years still support the main point that I here make: there is an available exception to the mootness doctrine, and we should apply it. Doing so would likely foreclose future litigation on the same issue that these appeals have raised but not yet answered. The exception is called the "substantial public interest" exception. Whether Children's is a FOIA-covered entity is a matter of substantial public interest, especially in the taxpayer-money arena, which is what this case is partly about. *See Blakely v. Ark. Children's Hosp.*, 2019 Ark. App. 568 (*Blakely I*) (illegal-exaction case). I would reverse the June 24 order because an exception to the mootness doctrine applies. And because the circuit court did not expressly rule on whether Children's is a FOIA-covered entity, the circuit court should again be asked to make a specific finding on the issue.

A. Does an Exception to the Mootness Doctrine Apply?

The mootness doctrine bars judicial action when any judgment would have no practical legal effect on the existing legal controversy. *Shipp v. Franklin*, 370 Ark. 262, 258 S.W.3d 744 (2007). FOIA lawsuits generally become moot once an entity has made available the nonexempt records that the plaintiff has requested. *See, e.g.*, *Hyman v. Sadler*, 2017 Ark. App. 292, 521 S.W.3d 167. As I have said, the parties concede that on 3 January

2018, Blakely received the documents she requested from the hospital, because the circuit court denied Children's request for a stay pending the appeal. Despite the January 3 release of the documents to Blakely, Children's appealed the 13 December 2017 decision that ordered disclosure. In *Blakely II*, Children's argued that the circuit court erred by ordering it to produce documents that Blakely had already received from the Arkansas Department of Human Services. The hospital reasoned on appeal that because DHS had given Blakely the requested records in April 2017, the circuit court's 13 December 2017 order should be reversed as it related to the hospital.

The hospital, however, never argued that its own appeal in *Blakely II* was moot because it had already been forced to give Blakely the documents on 3 January 2018. Nowhere in the hospital's appellant's brief was this fact mentioned. Because we did not decide the DHS-related mootness point Children's raised in *Blakely II*—and because it is a different issue than the one being made here—mootness is not resolved by the law-of-the-case doctrine, which is one point Blakely argues this time around. Nor in my view is the issue barred by Blakely's failure to develop a cross-appeal point in *Blakely II*, which is what the hospital argues. The 24 June 2020 order the circuit court entered on remand is the first time any court has decided that the hospital's document transfer to Blakely on 3 January 2018 mooted the dispute.

I agree that an exception to the mootness rule is required if we are to move forward. There are two primary exceptions to the mootness doctrine that can apply in FOIA cases. *Motal v. City of Little Rock*, 2020 Ark. App. 308, 603 S.W.3d 557. The first exception involves issues that are capable of repetition yet evade review; and the second exception

concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Id.* The exceptions to the mootness doctrine are not automatic. *Gillespie v. Brewer*, 2019 Ark. App. 275, 577 S.W.3d 59. We retain the choice "as to whether we may elect to settle an issue" that is moot. *Duhon v. Gravett*, 302 Ark. 358, 360, 790 S.W.2d 155, 156 (1990). In limited cases, Arkansas appellate courts have applied one of the exceptions and addressed the issues raised despite completion of the controversy between the parties, but we do not "improvidently utilize" either exception. *Ark. Dep't of Hum. Servs. v. Ledgerwood*, 2019 Ark. 100, at 3, 571 S.W.3d 1, 3.

Blakely urges that this case falls within both exceptions. There is an argument for both exceptions. But the second exception applies best, though there is some conceptual and practical overlap. I here focus on the one related to matters of substantial public interest, which has two elements: (a) there must be a substantial public interest in the issues being considered; and (b) addressing such issues, despite their being otherwise moot, would prevent future litigation. *Motal*, *supra*.

Blakely argues the following in this appeal (*Blakely III*):

> If a mootness ruling is allowed to stand, ACH can resist FOIA requests by refusing to answer them. Most people will not sue. If they do, ACH can then appear at the hearing and fight liability. If they lose, they can hand over the materials, then file a motion to alter or amend, and claim it is now moot, and basically string Arkansas taxpayers along while largely avoiding being accountable under the FOIA.
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> . . . .
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> As to ACH, it has been the subject of Arkansas AG opinions and multiple lawsuits over a period of years. It is time for the matter to be settled without further litigation.

Blakely is correct. As will be explained, whether Children's is subject to FOIA has been the subject of legal controversy since (at least) 2006, when the Arkansas Attorney General was asked to opine on the matter.

B. The Substantial-Public-Interest Exception Should Be Applied

First, is Children's status or lack of status as a FOIA-covered entity a matter of substantial public interest? I think so. Deciding whether the hospital is subject to FOIA is likely to contribute significantly to the public's understanding of the operations of Arkansas's government. Children's obtains substantial taxpayer funding. Blakely's FOIA request was not primarily based on her personal or commercial interest but in the public's interest. Some caselaw is helpful to illuminate the point.

In FOIA cases, courts generally first look at whether the information sought is of a personal or intimate nature sufficient to give rise to a "substantial privacy interest." *Young v. Rice*, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992). If so, then the question becomes whether the privacy interest is outweighed by the public's interest in disclosure. The balance usually favors public interest. *Id.* ("[W]hen the public's interest is substantial, it will usually outweigh any individual privacy interests and disclosure will be favored."). Under federal FOIA law, the Supreme Court of the United States has held that a "public interest" inquiry looks at whether the records at issue would shed some light on the workings of government. *U.S. Dep't of Just. v. Reporters Comm. For Freedom of Press*, 489 U.S. 749 (1989). This is because FOIA statutes are designed to enable citizens to "know what their government is up to[.]" *Id.* at 773 (internal citations and quotations omitted).

The most recent example when the Arkansas Supreme Court decided an issue in a FOIA case that was otherwise moot under the public-interest exception is *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346. The court decided that the public had an interest in the identification of the lethal-injection-drug supplier. As with *Kelley*, here the public has interest in the records that Children's disclosed to Blakely under protest. The disclosed documents were records from 2011 to 2016 that concerned a Pulaski County tax. They ostensibly had nothing to do with Blakely's personal privacy or financial interests. The public's interest in the taxes and millage rates that it pays is obvious. *See Russellville Police Pension & Ret. Bd. v. Johnson*, 365 Ark. 99, 225 S.W.3d 357 (2006) (tax and millage issues are reviewable under a mootness exception); *see also Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) (reversing circuit court's ruling that issue of millage and public-school funding was moot and remanding for trial). Consequently, the first prong for the exception involving matters of public interest has been satisfied.

C. Future Litigation on the Same Issue Can Be Foreclosed Now

The next element of the exception asks: would addressing Children's FOIA status prevent future litigation? Yes, maybe. Whether Children's is a FOIA-covered entity depends on whether it (1) receives public funds, (2) engages in activities that are of public concern, and (3) carries on work that is intertwined with that of governmental bodies. *See* John J. Watkins et al., *The Arkansas Freedom of Information Act* 64–65 (6th ed. 2017) (footnotes omitted). This threshold question has been the subject of an opinion solicited from the Arkansas Attorney General's Office, which has expressed that judicial action "may ultimately be necessary to resolve the issue [of whether Children's is subject to the FOIA.]"

Op. Ark. Att'y Gen. No. 86, at 7 (2006); *see also* Op. Ark. Att'y Gen. No. 154 (1997) (opinion involving FOIA and hospital personnel files); Op. Ark. Att'y Gen. No. 189 (1997) (same).

If we do not decide the case under a mootness exception, then Children's (and other future litigants) have a recipe for mootness that can be replicated, time and time again. It does not take Julia Child to imagine the dish. In each repetitive scenario, Children's (or some other person or entity) is now permitted to dispute a FOIA request; and if it loses in the end, the entity may hand over key documents to the requesting plaintiff and effectively end all litigation without an appellate court ever deciding whether it was or was not a FOIA-covered entity. All the while, Children's (or some other person or entity in the future) can thwart the core purpose of FOIA. As we know, a FOIA-covered entity must respond promptly upon receiving a FOIA request, generally no later than three working days. *See* Ark. Code Ann. § 25-19-105(e) (Supp. 2021). Here, Blakely had to wait not three days but more than one year before the records that she had requested were released, and it was done only after Children's was denied a stay of an order and produced the material under the threat of contempt of court. Repeatable, prolonged, and litigious delays are anathema to FOIA.

Contrary to the hospital's litigation course, Arkansas's public-policy commitment is to open government. *Dep't of Ark. State Police v. Keech Law Firm, P.A.*, 2017 Ark. 143, 516 S.W.3d 265 (interpreting FOIA liberally to accomplish the purpose of promoting free access to public information). Requiring anyone to engage in litigation to obtain release of the documents from Children's every time chills the public's ability to enforce FOIA. *See*

Newport Aeronautical Sales v. Dep't of the Air Force, 684 F.3d 160, 164 (D.C. Cir. 2012) (recognizing that "even though a party may have obtained relief as to a specific request under the FOIA, this will not moot a claim that an agency policy or practice will impair the party's lawful access to information in the future").

III.

Arkansas Children's Hospital's complete but belated response, which it performed under compulsion when the circuit court denied its request for a stay pending an appeal in *Blakely II*, does not moot this case because it concerns a matter of substantial public interest that is likely to permit future litigation. Furthermore, the circuit court did not follow this court's remand order, and it lacked a viable justification for doing so. The court instead, for a second time, avoided the core question in the dispute.

I would reverse the June 2020 "mootness order" because a substantial public interest is at stake. Consequently, the circuit court should again be directed to act and clarify its 13 December 2017 order, a directive this court's mandate issued in *Blakely II*.

ABRAMSON, J., joins.

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