Rel: February 23, 2024



# SUPREME COURT OF ALABAMA

## OCTOBER TERM, 2023-2024

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## SC-2023-0530

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**Fred Zackery**

**v.**

**Water Works and Sewer Board of the City of Gadsden**

**Appeal from Etowah Circuit Court**
**(CV-16-900676)**

SELLERS, Justice.

Fred Zackery appeals from a judgment of the Etowah Circuit Court holding that the Water Works and Sewer Board of the City of Gadsden

("the Board") does not have to immediately disclose confidential settlement agreements requested by Zackery pursuant to the Open Records Act, § 36-12-40 et seq., Ala. Code 1975. We affirm.

## I. Facts

In September 2016, the Board commenced an action against various carpet and chemical manufacturers ("the defendants"), alleging that those defendants had caused the Board's raw water intake to become contaminated with perfluoroalkyl and polyfluoroalkyl substances known as "PFAS." The substance of the relief sought by the Board was funding for technology to remediate PFAS from its drinking water. The Board ultimately settled with all the defendants before the scheduled trial. At the request of the Board and the defendants, the trial court entered a protective order providing that the terms of the settlements would remain confidential between the parties. The Board thereafter issued a press release informing its customers that it had approved a proposal from an engineering firm to design, bid, and oversee the construction of a new water-treatment facility; that the cost of the water-treatment facility would be paid from the settlement funds received from the defendants; and that the preliminary cost of the project, including

contingencies, was approximately $80 million. According to the Board, the settlement funds will also be used for the long-term operation and maintenance of the new water-treatment facility.

In November 2022, Zackery, a citizen of Gadsden and the manager of a local radio station, filed a motion to intervene in the underlying action pursuant to Rule 24(a), Ala. R. Civ. P., for the sole purpose of seeking disclosure of the settlement agreements entered into between the Board and the defendants pursuant to the Open Records Act. The trial court entered an order granting Zackery's motion to intervene, indicating that the underlying action would remain open pending resolution of his claim under the Open Records Act. Following two evidentiary hearings and an in camera inspection of all the settlement agreements, the trial court entered a judgment finding that, although the settlement agreements fell within the scope of the Open Records Act, the Board did not have to disclose them until after it had accepted a bid for the construction of the water-treatment facility as required by Alabama's Competitive Bid Law, § 41-16-50 et seq., Ala. Code 1975. See § 41-16-50(a), Ala. Code 1975 (requiring that public agencies covered by the Competitive Bid Law must award contracts to "the lowest responsible

bidder"); see also Bessemer Water Serv. v. Lake Cyrus Dev. Co., 959 So. 2d 643, 649 (Ala. 2006) (noting that the purpose of competitive bidding by sealed bids is to "guard[] against opportunities for corruption in the procurement of contracts for public-works projects"). The trial court certified its judgment as final, pursuant to Rule 54(b), Ala. R. Civ. P. This appeal followed.

## II. Standard of Review

On appeal, the parties concede that the settlement agreements are subject to the Open Records Act. The trial court, however, denied immediate disclosure of the settlement agreements subject to the Open Records Act based on a judicially created exception; thus, we apply the excess-of-discretion standard of review to that ruling. Health Care Auth. for Baptist Health v. Central Alabama Radiation Oncology, LLC, 292 So. 3d 623, 627-28 (Ala. 2019).

## III. Discussion

Zackery contends that the settlement agreements in this case are public records and that the trial court exceeded its discretion in denying him immediate access to those agreements in violation of the Open

Records Act.[1] Section 36-12-40, Ala. Code 1975, a part of the Open Records Act, provides, in relevant part, that "[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." In the absence of a specific statute exempting public records from inspection, this Court must apply a rule-of-reasoning balance test:

> "This is not to say, however, 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

[1]Zackery contends in the alternative that the settlement agreements are judicial records. It is well settled that judicial records fall within the scope of the Open Records Act. See Holland v. Eads, 614 So. 2d 1012, 1014 (Ala. 1993) ("It has long been the rule of this State to allow public inspection of judicial records."). There is, however, no evidence in the record to indicate that the settlement agreements were filed with the trial court, which would make them judicial records. See Thompson v. State, 153 So. 3d 84, 107 (Ala. Crim. App. 2012) (noting that once documents have been filed in court, they become judicial records subject to public disclosure). See also Enprotech Corp. v. Renda, 983 F.2d 17, 20 (3d Cir. 1993) (holding that, because the "Settlement Agreement ha[d] not been filed with, placed under seal, interpreted or enforced by the district court," it was not a judicial record). Zackery represents that the settlement agreements presumably contained confidentiality provisions and that, at the time the trial court entered the protective order, it was unaware of the settlement amounts. Accordingly, we construe the settlement agreements to be public records.

> 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."

Stone v. Consolidated Publ'g Co., 404 So. 2d 678, 681 (Ala. 1981) (emphasis added). Because the purpose of the Open Records Act is to permit the examination of public records, the exceptions set forth in Stone should be strictly construed. Allen v. Barksdale, 32 So. 3d 1264, 1274 (Ala. 2009). Questions involving the exceptions to the Open Records Act "are factual in nature and are for the trial judge to resolve." Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989). Finally, "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." Id. at 856-57.

The Board concedes that the settlement agreements fall within the scope of the Open Records Act; however, it relies on an exception to the Act, i.e., that disclosure of the settlement agreements would be

detrimental to the best interests of the public. Specifically, the Board argues that disclosure of the settlement amounts before the competitive-bid process is initiated and completed could drive the bids upwards, increasing the cost of the project. Such a scenario, argues the Board, would leave fewer settlement dollars available to fund the cost of the future operation and maintenance of the new water-treatment facility, thus requiring its customers to pay more for their drinking water. In support of its argument, the Board relies on the testimony of Brian Kylie Pate, the chief executive officer of InSite Engineering, LLC. Pate testified that the Board had selected his firm to, among other things, design, bid, and oversee the construction of the water-treatment facility that the Board intended to build. Pate indicated that his firm had estimated the preliminary cost of the project, including contingencies, to be approximately $80 million and that he assumed the bids would be at or below that amount. Pate opined that, while he agreed that the settlement amounts should be disclosed to the public, disclosure should not occur until after the competitive-bid process had occurred. Specifically, Pate explained that, if the contractors bidding on the project knew the total amount of funds available for the project, i.e., the top end

of the budget, "they would probably bid a little bit less competitively." Dennis Chad Hare, the general manager of the Board, testified that he had never seen a situation in which the bid process for a project had been adversely impacted by general knowledge of the total budget for the project. However, he stated that, in this case, the situation involving a new water-treatment facility was different and that, in his opinion, it would be detrimental to the best interests of the Board's customers if the settlement amounts were disclosed before a contract was awarded. After considering the testimony and conducting an in camera review of all the settlement agreements, the trial court entered a judgment stating, in relevant part:

> "Generally, the intent of the Alabama Competitive Bid Law … is to protect the public from collusion and prevent contracts awarded solely on the basis of favoritism. See Glencoe Paving Co. v. Graves, 94 So. 2d 872 (Ala. 1957). There is an inherent tension between the disclosure required under the Open Records Act and the Competitive Bid Law's intent to avoid collusion among bidders. It is apparent that the settlement funds obtained through this lawsuit will allow [the Board] to not only construct a new water treatment facility, but also to operate that facility. If the total budget available to [the Board] for the new facilities were made public through disclosure of the settlement documents prior to open bids for construction, the bidders could all raise their bid prices to capture more of the settlement funds, thus harming the public interest by reducing funds for future operation and maintenance. Simply put, every dollar that

> could be saved on construction costs[] will allow [the Board] to operate the facility for longer … without passing along those costs to its rate payers. It is unarguably in the public's best interest to avoid unnecessary rate increases for drinking water.
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> "….
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> "The Court agrees with the parties that eventual disclosure of the settlement agreements is required under the Alabama Open Records Act. However, it is not in the best interest of the public to do so before completion of the competitive bid process required by the Alabama Competitive Bid Law."

(Emphasis added.)

We recognize that the public's interest in access to public records is particularly important where, as here, one of the parties to the action is a public entity. However, applying the rule-of-reasoning test, 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." Stone, 404 So. 2d at 681. In this case, it is undisputed that the Board seeks to protect its customers from the possibility of future rate hikes that would likely occur if the competitive-bid process is influenced by immediate disclosure of the Board's total budget for the water-treatment project. As previously

indicated, the Board seeks to use the settlement funds not only for the construction of a water-treatment facility, but also for the long-term operation and maintenance of that facility. After hearing the testimony and conducting an in camera review of all the settlement agreements, the trial court obviously recognized the sensitive nature of the settlements, thus agreeing that it would not be in the best interests of the citizens of Gadsden if the settlement amounts were disclosed before a contract for the project was awarded pursuant to the Competitive Bid Law. Nonetheless, the trial court determined that, once a contract for the project was awarded, any justification for maintaining the confidentiality of the settlement amounts would no longer exist. Cf. Chambers, 552 So. 2d at 855 (affirming trial court's judgment that held that the disclosure of certain documents was not detrimental to the best interests of the public because the documents neither contained a request to be kept confidential nor contained sensitive material that would require an exception to disclosure). Based on the facts presented, we conclude that the trial court did not exceed its discretion in holding that an exception to the Open Records Act was present, which justified nondisclosure of the

settlement agreements until after the competitive-bid process was complete.

Zackery also contends that the protective order making the settlement amounts confidential is due to be vacated because, he says, the trial court failed to comply with the procedural requirements set forth in Holland v. Eads, 614 So. 2d 1012 (Ala. 1993), before entering that order. Holland holds that, "if a motion to seal is filed, then the trial court shall conduct a hearing" and "shall not seal records except upon a written finding that the moving party has proved by clear and convincing evidence that the information contained in the document sought to be sealed" falls within one of the six categories stated in Holland. Id. at 1016. Zackery did not raise this issue at either of the evidentiary hearings. Rather, he states that he raised the issue in his "proposed order and final judgment," in which he "pointed out" that the leading case on the "sealing of court documents" is Holland. Although Zackery raised the issue in his proposed order and final judgment, the trial court did not address the argument in its final judgment, nor did Zackery raise the issue in a proper postjudgment motion. Accordingly, we find that the issue is not preserved for our review. See Andrews v. Merritt Oil Co., 612

So. 2d 409, 410 (Ala. 1992) ("This court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court."); and Green v. Taylor, 437 So. 2d 1259, 1260 (Ala. 1983) (stating that "[t]he rationale behind ... the general rules regarding the necessity for post-trial motions is that, ordinarily, issues not raised before the trial court may not be raised for the first time on appeal"). Even if Zackery had preserved this issue for appellate review, however, it appears that Holland is inapplicable insofar as it concerns the procedure a trial court must follow before entertaining a motion to seal judicial records. In this case, there is no motion to seal in the record, nor is there any indication that the trial court placed the settlement agreements under seal. As previously indicated, there is also no evidence to indicate that the settlement agreements were filed with the trial court, thus making them judicial records. See note 1, supra. Further, it is beyond the scope of this opinion to compare, contrast, or distinguish the actions necessary for a court to properly seal records versus those necessary for a court to enter a protective order to limit disclosure of specific case information.

## IV. Conclusion

Based on the foregoing, we affirm the judgment of the trial court holding that the settlement agreements between the Board and the defendants are not required to be disclosed until after the competitive-bid process required by the Competitive Bid Law is complete.

AFFIRMED.

Wise, Mendheim, and Stewart, JJ., concur.

Parker, C.J., and Shaw and Bryan, JJ., concur in the result.

Mitchell and Cook, JJ., recuse themselves.