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**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

GOLDWATER INSTITUTE,
Petitioner,

vs.

CITY OF PHOENIX, a municipal
corporation, and MARIO PANIAGUA, in
his official capacity as City Clerk for the
City of Phoenix,
Respondents.

Case No.

CV2010-003266

**COMPLAINT for statutory special
action and injunctive relief**

and

**APPLICATION FOR ORDER TO
SHOW CAUSE**

**PERMANENT ASSIGNMENT
TO JUDGE MANGUM ECB 514**

INTRODUCTION

1. This is an action on behalf of the Goldwater Institute to compel the City of Phoenix to provide public records pursuant to Arizona Public Records Law (A.R.S. Title 39).

PARTIES, JURISDICTION, AND VENUE

2. Petitioner Goldwater Institute is a nonprofit research, public policy, and public interest litigation center in Phoenix, Arizona.

3. Respondent City of Phoenix is a municipal corporation organized under the laws of the State of Arizona.

4. Respondent Mario Paniagua is the City Clerk for the City of Phoenix and is charged with responding to public records requests. He is sued in his official capacity only.

5. Jurisdiction over this action and its claims is provided by A.R.S. §§ 39-121.02 and 12-123, and Rule 4, Ariz. R. P. for Spec. Actions.

6. Venue is proper pursuant to A.R.S. § 12-401 and Rule 4(b), Ariz. R. P. for Spec. Actions.

FACTS

7. The Goldwater Institute believes that information is power, and that power must not be jealously guarded by government employees and elected officials to the exclusion of the public. The Institute began an Open Government Project to make government more transparent and enable Arizonans to hold government accountable for its actions, particularly its use of public resources and compliance with Arizona laws.

8. The Institute has been called on by its members, residents and businesses of Arizona and the City of Phoenix, and members of the media to examine the City's Redevelopment Agreement with Phoenix Hotel Ventures, LLC to benefit the Wyndham Hotel located at 50 E. Adams St., and to consider filing a lawsuit should the Agreement violate Arizona law.

9. On December 16, 2010, the City enacted Ordinance S-36761 authorizing the City Manager to enter into a Redevelopment Agreement, leases, easements, and other agreements "as necessary . . . for the Wyndam[sic] Hotel." The Ordinance also authorizes the City Controller to accept and disburse necessary funds, with all proceeds from the lease to be deposited in the Downtown Community Reinvestment Fund.

10. The City's agenda indicated that Wyndham requested an emergency clause be included, but meeting minutes show the Council moved to remove it.

11. The Ordinance does not limit the City Manager's discretion to enter agreements, leases, and easements "as necessary . . . for the Wyndam[sic] Hotel." It does not specify the purpose or scope of agreements, leases, or easements for the Wyndham, nor does it identify the City resources that may or may not be committed in such agreements.

12. The Ordinance authorizes the City Manager to enter into agreement(s) with a single developer for a single project. It does not authorize him to engage in a competitive bidding process for a needed public good or service, or negotiate simultaneously with multiple bidders or on multiple projects.

13. The City Council Report presented to the Council with the Ordinance describes "the issue" as Phoenix Hotel Ventures partnering with Marriott to renovate the existing Wyndham Hotel at a cost of \$10 million.

14. The Report states that the agreement will include "performance benchmarks," though it does not identify what those benchmarks will be.

15. The Report describes an agreement whereby the Wyndham Hotel property will receive tax exempt treatment for 20 years.

16. In 2009, over \$700,000 in taxes were assessed for real property at the Wyndham Hotel.

17. According to the City Council Report, the tax exempt treatment agreement is accomplished when the City, which does not pay taxes on real property, assumes ownership of the Wyndham property, then leases it right back at a price hundreds of thousands of dollars

lower than the property tax. The Report identifies that annual lease payments will be \$5,000 in the first year, increasing to \$265,000 in year 20 (a fraction of the \$700,000 in property taxes assessed on the Wyndham property in 2009).

18. It also appears from the Report that the City will agree to relinquish ownership of the property immediately on Wyndham's request at any time for a price significantly lower than the annual property taxes otherwise owed. The Report identifies an option for Wyndham to buy back the property at any time during the 20 year lease for \$50,000 (again, a fraction of the \$700,000 assessed in property taxes in 2009).

19. The City Council Report identifies several indirect public benefits associated with the Ordinance, including job creation, increased tax revenue, marketing and name recognition for Downtown Phoenix, and increased capacity to attract and support Convention Center business. Specifically, the Report states, "Hotel operations over 20 years will result in approximately \$31 million of bed, restaurant and bar tax to the City," and "[o]ver the 20 year period, this project is estimated to produce over \$57 million of taxes to the State of Arizona, almost \$6 million in taxes to Maricopa County and over \$33 million in taxes to the City of Phoenix for a total impact of over \$96 million in total tax revenues."

20. At the City Council meeting, Mayor Phil Gordon stated, and City Manager David Krietor confirmed, that after improvements Wyndham Hotel employment is expected to increase from 270 to 550 full-time employees and 442 to 902 part-time employees. Mr. Krietor also stated based on "an economic analysis conducted by independent consultants" that approximately \$4.8

million is expected flow to the state as a result of the Wyndham improvements, and that there will be “performance criteria” in Wyndham’s transaction with the City.

21. The Wyndham agreement(s) appear to involve the public’s acquisition of property valued at over \$30 million, a 20 year lease of such property, a surrender for up to 20 years of over \$700,000 in annual property tax payments, an annual deposit of funds into the Downtown Community Reinvestment Fund, and an obligation that the City sell public property to a third party for \$50,000 at any time over the next 20 years at the third party’s will. Thus, the agreement(s) intimately involve public resources and are of immediate interest to the public.

22. On January 5, 2010, the Goldwater Institute sent a public records request to the Phoenix City Clerk requesting a copy (for noncommercial purposes) of “development agreements, tax rebate agreements, or agreements using the government property lease excise tax system entered during the last 2 months regarding improvements to the Wyndham,” including terms showing “the amount of annual fees and projected excise taxes to be paid” and all “drafts, proposals, emails, notes, correspondence, memoranda, communications, and other records.”

23. The following week, City of Phoenix Public Information Officer Sina Matthes informed the Institute that the City categorically denied the public records request for the following reason:

As of the date of this request, the city has not executed a Development Agreement or other form of agreement related to improvements to the Wyndham Hotel. . . . [A]ll drafts, proposals, emails, notes[,] correspondence, memoranda, communications and other records concerning the improvements to the Wyndham Hotel is documentation that is in use for the preparation of the Redevelopment Agreement related to the project. The city is willing to respond to this request at such time as the Redevelopment Agreement is

signed by the parties. As long as the parties are negotiating the Development Agreement, there is not a public record subject to disclosure.

24. The Institute requested clarification on the distinction, if any, between the “Development Agreement” and the “Redevelopment Agreement” in the City’s response.

25. Ms. Matthes responded, “The statement was in reference to the list of documents that you are seeking. The city hasn’t drafted the agreement yet, but it will probably be a redevelopment.”

26. The Institute requested that the City reconsider its position that there were no records to disclose and to identify the legal basis for withholding them. The Institute also notified the City that it should not destroy any documents relating to the Wyndham project while the issue is pending.

27. Ms. Matthes responded:

After consulting with our attorney, the following is my response to your request.

Until the development agreement is executed with the developer, the City asserts that the balancing test mandated by a long string of Arizona cases, starting with *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952), permits the City to protect the documentation from disclosure. To require us to disclose documentation at this point in the negotiation process could have a very negative effect on our ability to negotiate an agreement that utilizes City resources in the most effective manner possible.

28. The case cited by the City does not provide legal justification for withholding all public records associated with the Wyndham agreement(s) at this time, and in fact there is none.

Arizona public records law requires the City to promptly disclose the requested records for the reasons below.

LEGAL CLAIM

29. Officers and public bodies must maintain all records of their official activities and all activities supported by public funds, and they must promptly furnish copies of public records to any person upon request. A.R.S. § 39-121.01.

30. “The core purpose of the public records law is to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees.” *Phoenix News., Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P.3d 105, 112 (App. 2001) (citation omitted).

31. “[A]ll records required to be kept . . . are presumed open to the public,” and Arizona statutes “evinced a clear policy favoring disclosure.” *Carlson v. Pima County*, 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984).

32. Although there are “statutory exemptions to the general ‘open access’ policy toward public records,” *id.* at 490, 687 P.2d at 1245, the City did not offer any upon the Institute’s request. Instead, the City offered as a legal basis “the balancing test mandated by a long string of Arizona cases, starting with *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952).” In that case, the Court “qualified the statutory right of public inspection, recognizing the countervailing interests where the document is either confidential or disclosure would be detrimental to the best interests of the state.” *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245 (citing *Mathews*, 75 Ariz. at 80, 251 P.2d at 896).

33. Where the interest in disclosure of public records competes with another interest, “a practical alternative to the complete denial of access would be deleting specific . . . information.” *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246.

34. A court’s *in camera* inspection of the records is appropriate for that purpose. *Id.* The public officer is given authority in the first instance to deny the right of access to public records that are privileged or confidential or detrimental to the state’s interests, but “under no circumstances should his determination be final. It rests within the jurisdiction of the courts of the state to determine these questions.” *Mathews v. Pyle*, 75 Ariz. at 81, 251 P.2d at 896.

35. In Petitioner’s public records request, there is no countervailing interest to overcome the presumption of disclosure.

36. To the extent that requested records reveal confidential or private information, such as personal identifying information, that information should be redacted and the records produced. *See Carlson, supra.*

37. To the extent that requested records reveal the City’s internal negotiating position (i.e., information that would be demonstrably harmful to the City should it be released before negotiations are complete), that information should also be redacted while negotiations are pending and the records should be immediately produced.

38. Countervailing interests must be considered on a case-by-case basis, not only for each request but for each individual record. *Bolm v. Custodian of Records of the Tucson Police Dep’t*, 193 Ariz. 35, 40, 969 P.2d 200, 205 (App. 1998).

39. The government has the burden to “specifically demonstrate” how a competing interest overcomes the presumption of disclosure. *Phoenix News., Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (App. 2007) (quotation omitted). The probability of “specific, material harm” must be shown. *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984). “[G]eneralized claims of broad state interest” are insufficient, and the Arizona Supreme Court has rejected using a blanket rule exempting categories of documents from disclosure. *Cox Ariz. Publications, Inc. v. Collins*, 175 Ariz. 11, 13-14, 852 P.2d 1194, 1197-98 (1993).

40. Obligating a city to a development agreement, including the terms of buying, selling and leasing public property for the benefit of a private Hotel, is “not meant to be clothed in secrecy, but to be subject to open discussion and debate.” *Moorehead v. Arnold*, 130 Ariz. 503, 505 637 P.2d 305, 307 (App. 1981).

41. For these reasons, the City has violated Arizona Public Records Law and the Goldwater Institute’s rights under it.

APPLICATION FOR ORDER TO SHOW CAUSE

As set forth above, Respondents are plainly prohibited by law from withholding the requested records. Accordingly, pursuant to Rule 6(d), Ariz. R. Civ. P., and Rule 4(c), Ariz. R. of P. for Spec. Actions, it is appropriate and proper for this Court to issue an Order to Show Cause why the requested relief should not be granted.

REQUEST FOR RELIEF

To serve the interests of equity and justice, the Goldwater Institute respectfully requests that this honorable Court award the following relief:

A. Issue an order compelling the City to immediately provide copies of the requested public records, and if necessary, conduct an *in camera* inspection to redact protected information;

B. Issue a preliminary and permanent injunction enjoining the City from withholding the requested records;

C. Award damages, costs, and attorneys' fees pursuant to A.R.S. §§ 12-341, 12-348, 12-2030, and 39-121.02; Rule 4(g), Ariz. R. P. for Spec. Actions; and the private attorney general doctrine; and

D. Order such additional relief as may be just and proper.

RESPECTFULLY SUBMITTED this 4th day of February, 2010 by:

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Verification

Pursuant to Rule 80(i), Ariz. R. Civ. P., Carrie Ann Sitren verifies under penalty of perjury that the foregoing is true and correct:

1. I am a full-time employee of Petitioner Goldwater Institute.
2. I have read the foregoing Complaint and know the contents thereof.
3. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.

Dated this 4th day of February, 2010.

Carrie Ann Sitren