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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

CONGRESS ELEMENTARY SCHOOL DISTRICT NO. 17 OF YAVAPAI COUNTY, Plaintiff, vs. JEAN WARREN, JENNIFER RENEE HOGE, CYNDI REGIS, AND BARBARA REJON, Defendants.	Case No. CV 201000162 **REPLY ON MOTION TO DISMISS** Oral Argument April 5, 2010 at 1:30 p.m. *Hon. David L. Mackey*

In its Motion to Dismiss, Defendants referenced and attached for the Court's convenience, Attorney General and Ombudsman findings of Open Meeting Law violations by the District. However, this does not convert their Motion into one for summary judgment. Referencing public records, of which the Court may take judicial notice, does not have the effect of converting a Motion to Dismiss into one for summary judgment. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2nd Cir. 1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6)"); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) ("On a motion to dismiss, we may consider . . . matters of public record"); Ariz. R. Evid. 201(b) (judicial notice is appropriate when a matter is "not subject to reasonable dispute in that it is . . . capable

of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Interstate Natural Gas Co. v. S. Calif. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (taking "judicial notice of records and reports of administrative bodies").

Similarly, the District's Affidavit is ineffective in converting the pleading to a summary judgment motion to the extent it merely reiterates the allegations. *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (Ariz. 1970). For the most part, this is what it does, as evidenced by the fact that the District rarely cited it in its brief without simultaneously citing to the Complaint. On the other hand, to the extent the Affidavit adds extraneous matters to the District's pleadings (*see* Resp. p. 14, lines 10-24 & p. 18, lines 21-22), the Court should exclude it from consideration. *See Green v. Garriott*, 221 Ariz. 404, 408, n.2, 212 P.3d 96, 100 n.2 (App. 2009) ("mere attachment" of a document does not convert a Motion to Dismiss into one for summary judgment because the Court may exclude it from consideration).

If, however, the Motion to Dismiss is to be treated as one for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." Ariz. R. Civ. P. 12(b). Until the Court provides such notice and opportunity, Defendants will treat their Motion to Dismiss as named.

I. Subject Matter Jurisdiction

The District does not dispute that its alleged constitutional source of jurisdiction (*see* Compl., ¶ 1) is misplaced. It also does not dispute its failure to allege jurisdiction for injunctive relief. The only disputed basis for jurisdiction is declaratory relief, and none of the District's cited cases are analogous to the situation here. The District cited that the public entity applied for a declaratory judgment *after a specific request for public records was made*, for a determination solely of whether specific documents should be disclosed. In each controlling case, the courts analyzed the specific records involved to come

to a judgment. *See Arpaio v. Citizen Publishing Co.*, 221 Ariz. 130, 131, 211 P.3d 8, 9 (App. 2008) (trial court determining "minor portions of the correspondence were protected attorney work product"); *Scottsdale Unified Sch. Dist. No. 48 of Maricopa County v. KPNX Broad. Co.*, 191 Ariz. 297, 301-03, 955 P.2d 534, 538-40 (1998) (weighing defendants' public purpose in knowing birthdates against teachers' privacy rights); *Ariz. Bd. of Regents v. Phoenix News., Inc.*, 167 Ariz. 254, 257-58, 806 P.2d 348, 351-52 (1991) (finding the "public's interest in ensuring the state's ability to secure the most qualified candidates for the university president's position is more compelling than its interest in, or need to know, the names of all the prospects").

Unlike in those cases, the District asks the Court to declare that it need not produce public records upon request without providing a context for the Court to decide. The test for whether a public entity must disclose records "must be applied on a case-by-case basis." *Bolm v. Custodian of Records of the Tucson Police Dep't*, 193 Ariz. 35, 40, 696 P.2d 200, 205 (App. 1998). There is a "clear policy favoring disclosure," and records "are presumed open to the public." *Carlson v. Pima County*, 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984). The public entity has the burden to "specifically demonstrate" reasons for not promptly disclosing records upon request, *Phoenix News., Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (App. 2007), and a "generalized claim[] of broad state interest" is insufficient. *Cox Ariz. Publications, Inc. v. Collins*, 175 Ariz. 11, 13, 852 P.2d 1194, 1197 (1993). Based on the District's Complaint, the Court is powerless to conduct a case-by-case analysis of records or requests; and under the law, it is powerless to issue a blanket judgment.

The proposed but rejected legislation the District cited (Resp. p. 5) as evidence of intent not to preclude it from filing this declaratory action pertained only to the situation where there was a "dispute over the requestor's right to inspect or copy the public records." S.B. 1225, 47th Leg. 2nd Reg. Sess.

(Ariz. 2006).[1] Here, there is no dispute over Defendants' right. The District concedes (Resp. p. 18) the right exists, it just seeks (without authority) to eviscerate it. Likewise, the District concedes (Resp. p. 18) that the right to complain to the Arizona Ombudsman is protected under A.R.S. §41-1378, but it offers no authority whatsoever that it or the Court can take it away. Claiming that a person lacks a constitutional or statutory right to see a particular document or make a particular statement is entirely different from preemptively terminating the right entirely, and the latter may not be done. The District fails to comprehend its duties under Public Records Laws. Whether a record must be produced is based on the *record*. A record is either subject to disclosure or it isn't. Courts may declare whether a specific document must be disclosed, but they may not prohibit a person from asking for it – and they certainly may not do so preemptively. *See United States v. Kaun,* 827 F.2d 1144, 1150 (7th Cir. 1987) (holding lower court's injunction against filing any records requests "constitutes a prior restraint, and as such is presumptively invalid" because it forbid the communication of ideas and subjects the speaker to contempt if he violates the order).

The controlling declaratory actions cited by the District are further distinguishable on their facts. First, the requestor in each of the three Arizona cases was a major media outlet with substantial resources to litigate and significant legal experience with Public Records Laws. In *Ariz. Bd. of Regents*, the newspapers did not move to dismiss the lawsuit but rather filed counterclaims against the Board. Similarly, the broadcast company in *Scottsdale Unified* appealed the lower court's judgment, clearly demonstrating the company's willingness to actively participate in the litigation. In *Arpaio*, the requestor of the public records was not required to be a party; the county attorney sued the sheriff because she believed she was legally obligated to disclose records to the requestor but the sheriff's

[1] The District cited (Resp. p. 6) for the same thing S.B. 1225, 47th Leg. 1st Reg. Sess. (Ariz. 2005), but that proposal made technical corrections to planned communities and is irrelevant here.

office was preventing her from doing so. In stark contrast to those cases, the women sued by the District are small-town mothers who cannot afford legal representation and are not employed in the lines of public attention. If the District's lawsuit is permitted to stand, it will have a severe chilling effect on the exercise of rights under Public Records Laws and compromises their purpose to encourage the public to monitor the performance of their elected officials and scrutinize government activity. *Phoenix News., Inc.*, 201 Ariz. at 351, 35 P.3d at 112; *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007).

II. Harassment

The District identifies no authority permitting it to state a claim for harassment. Only a "person" may make that claim, and the District is not one. The District is correct that A.R.S. § 1-215(29), which includes it under the definition of "person," generally controls as a matter of statutory construction – but only "unless the context otherwise requires." A statutory claim of harassment requires otherwise, for it would be senseless for an injunction to "[r]estrain the defendant from contacting [the District] or other specifically designated persons and from coming near the residence, place of employment or school of [the District] or other specifically designated locations or persons." *See* A.R.S. § 12-1809(F)(2) (identifying the remedies for harassment). The District offers (Resp. p. 10) to cure this defect by amending the Complaint to add the superintendent as a party. However, the superintendent lacks the power to sue. *Godbey v. Roosevelt Sch. Dist.*, 131 Ariz. 13, 19, 638 P.2d 235, 241 (App. 1981) ("[W]hile a superintendent may oversee the day-to-day administration of the district, he has no common-law powers but only those specifically granted to him by statute or lawfully delegated to him by the Board"); *see* A.R.S. 15-302 (identifying superintendent's limited powers, which do not include the power to sue). Thus, the defect cannot be cured and the District cannot state a claim for harassment.

The District also fails to state a claim for harassment because it fails to allege that each defendant committed a "series" (i.e., at least two) offending acts. *See Lafaro v. Cahill*, 203 Ariz. 482, 486, 56 P.3d

56, 60 (App. 2002). The District alleged in its Complaint (¶ 147) that the harassing acts were (1) filing Ombudsman complaints and (2) requesting public records. Curiously, it provided a table (p. 11) numbering (1) public records requests, and (2) letters requesting action. In this context, Table 2 still alleges no acts by Ms. Regis, so any allegation of harassment against her for letters requesting action should be dismissed. Likewise with the allegation of harassment against Ms. Behl-Hoge for requesting public records. Although the District's table states that she made 1 such request (which the District subdivides into two "sets of documents requested"), the District never alleged it in the Complaint. Thankfully, the District agrees (Resp. p. 18), "Student records are made confidential by law and, therefore are not public records."[2] Yet the only paragraph in the Complaint alleging that Ms. Behl-Hoge made a "public records request" is ¶ 62:

> In a letter dated February 20, 2003, Defendant Jennifer Renee Hoge filed a public records request with Plaintiff Congress requesting for [sic] the production of:
>
> a) Documentation demonstrating why Plaintiff Congress did not approve Purchase Order to pay for her son's treatment at Phoenix Children's Hospital.
>
> b) A copy of any check from Plaintiff Congress that demonstrates the service rendered by Phoenix Children's Hospital were paid.

Records relating to medical treatment for Ms. Behl-Hodge's son are, on their face, student records that should not be made public, and the District made no other allegation that she requested any public records.

Finally, the District fails to address the fact that an element of harassment is the offending conduct "serve[s] no legitimate purpose," yet Arizona courts hold it is perfectly permissible to request

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[2] The District promises (Resp. p. 19) that it "is not asking that the Court to [sic] regulate or limit parent rights for student records," which begs the question why so much of its Complaint alleged the exercise of those rights (¶¶ 62, 68, 69, 73, 74, 75, 76, 89, 90, 91, 92, 93, 96, 99, 100, 101, 103, 104, 105, 106, 107, 108, 111, 112) (requesting, for example, child's lunch account balance, attendance records, disciplinary file, instructions given to School by child's father, etc.).

public records without one. *Phoenix New Times, L.L.C., v. Arpaio*, 217 Ariz. at 544, 177 P.3d at 286 ("[I]t is well-established that the requestor's need, good faith, or purpose is entirely irrelevant to the disclosure of public records") (citing *Bolm*, 193 Ariz. at 39, 969 P.2d at 204). This makes perfect sense because, perhaps short of suffering excessive trash collection fees which the District does not allege, it is impossible to imagine that a public official could claim harassment in good-faith by having to put inappropriate requests in the garbage.

The District cannot be saved by asserting the "best interest" standard for public records requests (Resp. p. 19 (citing *Carlson*, 141 Ariz. at 491, 687 P.2d at 1242). Neither that nor any other Arizona case provides authority to reject public records requests *preemptively*, before it is submitted. To the contrary, that has been expressly held to constitute an unconstitutional prior restraint. *See Kaun*, *supra*.

III. Anti-SLAPP

The District confesses (Resp. 17, n.2) its heavy burden under the anti-SLAPP statute to prove that Defendants' statements lacked "reasonable factual support or arguable basis in law." A.R.S. § 12-752. It asserts only that of 18 administrative complaints, two resulted in findings that it violated the law.[3] Even if true, the mere assertion that 16 complaints over several years did not result in findings of violations bears no evidence that those complaints lacked reasonable factual support or arguable basis in law. As the Arizona Supreme Court has held, disagreeing with a position does not imply that the position lacks merit or was not filed in good faith. *Fritz v. City of Kingman*, 191 Ariz. 432, 435-36, 957 P.2d 337, 340-41 (1998). Additionally, the District must prove that Defendants' actions caused it actual

[3] The District misquotes (Resp. p. 17, n.2) the Motion to Dismiss (pp. 9-10) by characterizing Defendants as stating they "have filed complaints with the Attorney General 'and countless other offices and agencies of the State.'" In fact, the quote was used merely to demonstrate that Defendants' constitutionally protected right of petition, which the District sought to infringe by its lawsuit, "encompasses statements filed with the District . . . Attorney General . . . and countless other offices and agencies of the State."

compensable injury to avoid dismissal. A.R.S. § 12-752(B). The District has cited no authority for such and fails to meet its burden.

The District pleads (Resp. p. 18) that its unconscionably overbroad and constitutionally offensive request for relief is not relevant on a Rule 12(b)(6) motion to dismiss for failure to state a claim. But the sufficiency to state a claim is not tested under an anti-SLAPP motion to dismiss. Rather, that statute tests whether the action involves the right to petition. A.R.S. § 12-752(A). If the right is involved, the action must be dismissed. Here, there is no better way to determine that Defendants' right to petition is involved than by reading the District's requested relief, which seeks to prohibit them from filing all claims, charges and lawsuits against it.

It cannot be disputed that "letters requesting action" (Resp. p. 11) and "administrative complaints" (Resp. p. 15) are methods of exercising the right of petition. They can be made before or submitted to a legislative or executive body or other government proceeding in connection with an issue under consideration or review, for the purpose of influencing action, decision or result. *See* A.R.S. § 12-751(a) (defining the right of petition). Under the anti-SLAPP statute, the District may not file a lawsuit involving such rights, let alone one directly abridging them. The right to request public records is likewise protected. In *Kaun*, 827 F.2d at 1152-53, the court held that an injunction prohibiting nonfrivolous public records requests raises a constitutional problem. Here, the District seeks to enjoin *all* requests, not just frivolous ones – all without alleging that previous requests were ever frivolous. Even if the right to access public records is not protected by the First Amendment, the right to *request* them is. *See Norwood v. Slammons*, 788 F.Supp. 1020, 1028 (W.D. Ark. 1991). The mere act of requesting a record from a public body in connection with a matter under consideration may be done for the purpose of influencing action, which fits the bill for exercising the right of petition. At any rate, it is the District's burden to show the activities do "not contain any reasonable factual support or any

arguable basis in law." A.R.S. § 12-757(B). The District failed to meet this burden, and the action must be dismissed.

IV. The District's Request for Sanctions Is Sanctionable

Rule 11 "should not itself become a retaliatory device." *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 654 (9th Cir.1988). Every federal court which has addressed the issue has held that Rule 11 motions are properly subject to the provisions of Rule 11. *Leoco, S.A. v. Caribe Crown, Inc.*, 571 N.E.2d 759, 760 (Ct. App. Ill. 1991). A party may not bring a claim "totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence." *Aircraft Trading and Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir. 1987). When a party who requests fees fails to cite a single case and raises a claim "without any apparent thought, analysis, or research," a sanction request "is utterly meritless and doesn't warrant any discussion, except to caution his attorney that a frivolous request for sanctions is itself sanctionable." *Gold v. Wolpert*, 876 F.2d 1327, 1333 (7th Cir. 1989). Raising such a claim "was not harmless. It forced his opponents to research the issues and argue against the (unarticulated) positions." *Id.*

The District, without citing a single case or showing any thought, analysis, or research, makes a conclusory request for sanctions under Rule 11 and A.R.S. § 12-752(D), forcing Defendants here to respond. The District merely stated twice in conclusory terms (Resp. pp. 3 & 9) that one of our four grounds for dismissal is frivolous, namely that the Court lacks declaratory action jurisdiction. Yet the District even recognized (Resp. p. 8) that we cited a recent state Supreme Court case in support of our argument, and we distinguished the District's contrary cases here. It requests sanctions for having to respond to the entire Motion, though it articulates no position as to any of our other demonstrated grounds for dismissal. Our Motion unquestionably demonstrates that each of our arguments was based on multiple, well-reasoned arguments supported by dozens of authorities, exhibiting exhaustive

research. "[C]ounsel would do well to choose their Rule 11 battles with more care." *Quaker Oats Co. v. Uni-Pak Film Systems* 683 F.Supp. 1186, 1189 (N.D. Ill.1987).

RESPECTFULLY SUBMITTED this 2nd day of April, 2010 by:

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