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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. P1300 CV 201000162 **DEFENDANTS' RESPONSE TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT** **and** **REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** *Hon. David L. Mackey*

Rather than responding to a simple public records request as it is required to do by law, Plaintiff rehashes arguments that were already rejected by this Court. If officials could get out of public records requests solely by complaining that it takes them a long time to go through a lot of files to look for records, Arizona's open records policy would be a farce. Likewise, if a person can be successfully sued for requesting "too many" public records, the purpose of Public Records Laws would be defeated. The Congress School District fails to carry its burden of demonstrating an exception to Public Records Laws that overcomes the presumption requiring disclosure. Because the District is required as a matter of law to produce public records in

response to Defendant Warren's request, Defendants' motion for summary judgment should be granted and Plaintiff's cross-motion should be denied.

Memorandum of Points and Authorities

The two-step inquiry for determining whether a document must be disclosed is (1) is the document a public record; and (2) is there a countervailing interest sufficient to overcome the presumption of disclosure? *Griffis v. Pinal County*, 215 Ariz. 1, 5, 156 P.3d 418, 422 (2007). Countervailing interests are limited to privacy, confidentiality, and best interests of the state. *Id.* The District admits (p. 13) that the records Mrs. Warren requested are public records. Therefore, "the presumption favoring disclosure applies." *Griffis*, 215 Ariz. at 5, 156 P.3d at 422. The District also admits (*id.*) that the requested records do not contain private or confidential information. The District asserts (p. 1) that responding to Mrs. Warren's request is contrary to the best interests of the state, duplicative, unduly burdensome and harassing. This assertion fails as a matter of law both because it is untrue and because there is no exception for public records requests that are duplicative, unduly burdensome, or harassing, and the District fails to prove that responding is contrary to its interests.

I. "Duplicative" Nature of the Pending Public Records Request

The District's complaint that the records request at issue is "duplicative" can be easily dismissed. In her January 13, 2010 request, Mrs. Warren repeated her November 18, 2008 request for access to the District's complete stewardship list, which the District never disclosed, and she repeated her requests from 2009 for other public records that the District never produced (SOF ¶¶ 1, 8, 9).[1] It is clear that Mrs. Warren does not re-request any public record that the

[1] Although the District appears to dispute whether it failed to provide Mrs. Warren access, it does not identify which of the requested records it asserts it attempted to offer access, and it provides no proof of offering access (*see* Plaintiff's Objections to Defendant's SOF ¶¶ 8-9). To

District actually produced to her; rather, she merely repeats requests to which the District never responded (*see* SOF Exh. 1 ("My request to view the complete stewardship list has still not been met along with other Public Records Requests made in 2009")). Thus, the District's assertion that Mrs. Warren's request is "duplicative" is the result of its own failure to respond. It would be perverse if the District could ignore a public records request initially, and then successfully file a lawsuit against the requestor to be excused from ever responding due to "duplication" when the requestor asks again. The District's claims that Mrs. Warren's request is exempt as unduly burdensome and harassing are equally as unpersuasive.

II. Legal Exceptions to Public Records Laws

The District laments of the number of hours spent and "pages handled" in response to previous public records requests but provides no legal justification for excusing it from disclosing the records at issue here, to which the inquiry is limited. The District is incorrect to assert (p. 12) that "Arizona courts have interpreted state public records law to exclude requests that are unduly burdensome or harassing." In fact, the District fails to cite, and Defendants are not aware of, a single published decision in Arizona finding a request exempt from Public Records Laws because it was unduly burdensome *or* harassing. The closest Arizona Public Records Law case on the topic merely suggests, "Public records requests that are unduly burdensome or harassing *can be addressed under the existing law*, which recognizes that disclosure may be refused based on concerns or privacy, confidentiality, or the best interests of the state." *Lake v. City of Phoenix*, 222 Ariz. 547, 551, 218 P.3d 1004, 1008 (2009) (emphasis

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the contrary, the District admits that "no response was generated" to several of Mrs. Warren's public records requests that are at issue here (*e.g.*, p. 8, citing the District's SOF ¶ 22, Aff. ¶ 27, Bates No. 20).

added).[2] Thus, merely asserting that a request is unduly burdensome or harassing cannot justify an exception. Rather, the District must prove that the best interests standard is met.

The Arizona Court of Appeals has likewise implied that there is no independent exception for duplicative or harassing requests in Arizona Public Records Laws. *Arpaio v. Davis*, 221 Ariz. 116, 210 P.3d 1287 (App. 2009). In *Arpaio*, unlike this case, records were requested from the *court*. Thus, "Rule 123-not the Arizona Public Records Law-controls." *Id.*, 221 Ariz. at 120, 210 P.3d at 1291. Arizona Supreme Court Rule 123 "restrict[s] access to administrative records and bar[s] requests that would impose an undue financial burden, are duplicative or harassing or substantially interfere with court operations. Ariz. R. Sup.Ct. 123(f)(4)(A)(i)-(iv). This is consistent with, *though not congruent to*, access restrictions imposed under the Public Records Law." *Id.*, 221 Ariz. at 120-21, 210 P.3d at 1290-91 (footnote omitted; emphasis added). In other words, the court recognized, there is no congruent exception in Arizona Public Records Laws to bar requests that are duplicative, harassing, or interfere with operations. Instead, the District must show that Mrs. Warren's request is contrary to the best interests of the state. As far as we are aware, no Arizona court has ever found that an agency met the best interests standard by alleging that a request is "unduly burdensome" or "harassing." If there ever were an appropriate occasion to do so, it is certainly not here.

III. Balancing the Interests

When releasing public records is at odds with an agency's interests, the agency must "specifically demonstrate" that the harmful effect of disclosure outweighs the public's interest in being informed about the operations of its government. *Phoenix News., Inc. v. Ellis*, 215 Ariz.

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[2] Although *Lake* cites to *Griffis*, 215 Ariz. at 5, 156 P.3d at 422, the latter does not address unduly burdensome or harassing public records requests; instead, it is cited for "balancing interests to determine if the state's privacy or confidentiality concerns outweigh the presumption of disclosure." *Lake*, 222 Ariz. at 551, 218 P.3d at 1008.

268, 273, 159 P.3d 578, 583 (App. 2007) (quoting *Cox Ariz. Publs., Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993)). The 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). Although the agency's administrative interests are not necessarily excluded from the balancing test, "[t]he burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of disclosure, is on the party that seeks non-disclosure." *Ellis*, 215 Ariz. at 273, 159 P.3d at 583 (quoting *Mitchell v. Superior Court*, 142 Ariz. 332, 355, 690 P.2d 51, 54 (1984)). "[A]rguments based on generalized claims of broad state interest" fail to satisfy the agency's burden. *Cox*, 175 Ariz. at 13, 852 P.2d at 1197.

For example, the state disputed public access to criminal investigative reports involving former Phoenix Suns basketball players while legal proceedings were pending. *Id.*, 175 Ariz. at 12, 852 P.2d at 1196. The state's arguments—that "releasing the documents would jeopardize fair trials for the defendants, hamper ongoing investigations and prosecutions, burden prosecutors to an unreasonable extent, inhibit future witnesses from speaking with police, violate grand jury secrecy laws"—were too generalized to overcome the public's interest in access to the reports. *Id.*, 175 Ariz. at 13, 852 P.2d at 1197. Likewise, the District's assertions here are too generalized to justify withholding public records. The District asserts (p. 19) that responding to Mrs. Warren's request will divert staff and resources away from its primary mission of educating students (much as the state in *Cox* asserted that responding would unreasonably burden prosecutors). This could be said of *all* public records requests (and of *all* District duties that do not directly involve teaching students). Therefore, as in *Cox*, the District's asserted interest is too generalized to overcome the interest of disclosure. If the Legislature was concerned with

school districts diverting resources to respond to public records requests, it is free to propose an exception or limitation in the Public Records Laws. Such a task, however, is not in this Court's jurisdiction.

If the District's true concern is limiting the alleged diversion of resources on public records requests, it is unclear why the District focuses its Statement of Facts on previous requests by Mrs. Warren that are not included in the pending request. If the pending request itself is the alleged burden, Mrs. Warren's history is completely irrelevant. Further, citing the time the District previously spent on *anyone's* public records requests does not equate to proof, let alone the "specific demonstration" that is required, that responding to the request here is against the District's interests.[3] If anything, perhaps the *more* time the District previously spent on records requests, the *less time* it might be expected to take for future ones, as efficiency generally increases with experience.[4] But because the District fails to identify, let alone prove, the specific

[3] The amount of time the District cites responding to previous records requests raises more questions than answers. It is a mystery why, for example, it would take six hours of labor to allow Mrs. Warren access to 16 pages of certain POs (purchase orders) (District's SOF ¶ 17, citing Aff. ¶ 22, Bates No. 15); why it would take another six hours of labor and handling 12 pages to allow Mrs. Warren access to shed purchase orders (District's SOF ¶ 20, citing Aff. ¶ 25, Bates No. 17); why it would take two hours to find two pages that were passed around and discussed at the previous night's Board meeting (District's SOF ¶ 21, citing Aff. ¶ 26, Bates No. 18-19); why it would take half an hour for access to that month's meeting minutes (District's SOF ¶ 29, citing Aff. ¶ 34, Bates No. 32); why it would take 10.5 hours to produce meeting agendas, minutes, and supporting documents for that year's Board meetings (District's SOF ¶ 33, citing Aff. ¶ 38, Bates No. 38)—despite that meeting records are required by law to be permanently preserved (*see* Ariz. State Library, Archives & Public Records General Records Retention Schedules for School Districts and Charter Schools Management Records, Schedule No. 000-10-77 (June 22, 2010) at p. 1, Item No. 1 (citing A.R.S. § 39-101)). It is also thoroughly confounding why the District would complain (or even admit) that it spent half an hour to "review" a blank public records request form (District's SOF ¶ 31, citing Aff. ¶ 36, Bates No. 35). Surely, the District's inefficiency or the apparently disorganized state of its filing system cannot justify denying a public records request.

[4] Even if the District attempted to prove that time spent was a specific harm in responding to the public records request here, it fails to offer evidence that the harm "stems from the burdens

burdens that responding to the records request here might entail, it is impossible to credit the District's objection.

By contrast, Mrs. Warren's interest in access to public records is sizeable. As a resident and taxpayer in the Congress School District, she has a financial stake in the District's assets and an interest in its compliance with State laws (SOF 4). Her pending public records request includes a request for the complete inventory list of the District's assets, which must be maintained according to the Arizona Department of Education's Uniform System of Financial Records (USFR) (SOF 2). Just this year, the Arizona Auditor General's Office found the District in violation of the USFR (SOF 3), which heightens the interest in the public disclosure of the list.

The District's compliance with Arizona law also has been the subject of action by the Arizona Attorney General and the Arizona Ombudsman-Citizen's Aide on at least three occasions (*see* Exhibits attached to Defendants' Motion to Dismiss (March 11, 2010)). The Attorney General found multiple violations of Public Records Laws by the District, and just last year, the Ombudsman expressed concern "that District staff does not fully understand its responsibility and obligations under Arizona's Public Records Law."[5] Given these violations and concerns, the public has a particularly significant interest in accessing District records to "monitor the performance of government officials," which is the "core purpose of the public records law." *Phoenix News., Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P.3d 105, 112 (App. 2001) (quotation omitted). Assuming a "harassing" public records request (which the District does not

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imposed by the request itself," as the District asserts (p. 13), and not from a lack of organization or effective management within the District (*see* Note 3, *supra*).

[5] That the District continues to lump *complaints* (*e.g.*, p. 9, citing District's SOF ¶ 15, Aff. ¶ 20, Bates No. 103) and requests for District action (*e.g.*, SOF ¶ 40, citing Aff. ¶ 45, Bates 47-48) together with public records requests suggests that it still does not understand Public Records Laws, nor does it recognize the rights to free expression and petition for redress.

attempt to define or describe, let alone demonstrate), the District's history of violations makes it exceedingly difficult for the District to overcome the strong legal presumption in favor of disclosure.

Conclusion

That the District disagrees with this Court's ruling dismissing its complaints about the bulk of Defendants' actions is abundantly clear. The proper forum for the District to re-argue those issues is the Court of Appeals, to which it has taken those issues by interlocutory appeal. By contrast, the motions here pertain only to a single, discrete public records request, to which the legal inquiry ought also be confined. If the District spent a fraction of the time and expense of this legal action actually complying with the records request, everyone involved in this dispute would be better off. The District fails entirely to recognize the public's interests of open access and falls well short of its burden of specifically demonstrating, for each requested record, that its interests overcome the presumption of disclosure. For these reasons, Defendants' Motion for Summary Judgment should be granted, the District's Cross-Motion should be denied, and Defendants should recover their costs and fees.

RESPECTFULLY SUBMITTED this 21st day of October, 2010 by:

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