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

GOLDWATER INSTITUTE, Plaintiff/Petitioner, vs. CITY OF GLENDALE, a municipal corporation, and PAM HANNA, in her official capacity as City Clerk for the City of Glendale, Defendants/Respondents.	Case No. CV2009-020757 **RESPONSE TO GLENDALE'S BRIEF ON ORDER TO SHOW CAUSE** *Hon. Edward O. Burke*

Defendant City of Glendale did not notify Plaintiff Goldwater Institute until just a few hours ago that it has produced records for pick up in response to the Institute's now 23-day old request.[1] It continues to resist further disclosure. The presumption is in favor of disclosure, and the burden is on the government to specifically demonstrate why a particular record—or in this case, an entire

[1] The City asserts that "[p]rior to the filing of [the City's] Brief, Plaintiff was informed of . . . availability for review and copying" (City's Br. pp. 2-3 n.1). What the City actually informed Plaintiff of the morning of the day the City filed its brief was that documents were not available at that time.

category of records—may be withheld or production delayed. The City fails to overcome this burden. In fact, every case it cites held in *favor* of disclosure.[2]

The City (Br. p. 3) asserts that at the Order to Show Cause hearing, Plaintiff narrowed the scope of the request to "records of negotiations that evidence City concessions and incentives, if any." We have never narrowed the original request for "records of negotiations with potential new owners of the Phoenix Coyotes hockey team." Request (Exh. 1). At the hearing, we clarified that we do not consider proprietary financial information about potential owners to be "records of negotiations." We have never been mysterious in our purpose in requesting the records, to evaluate the legality of potential subsidies and concessions. However, we expect that the parties will disagree about what constitutes a concession or incentive, and narrowing the request that way would obstruct our purpose in requesting the records.

[2] *Ariz. Bd. of Regents v. Phoenix News., Inc.*, 167 Ariz. 254, 806 P.2d 348 (1991) (upholding order to disclose certain records); *Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984); *Cox Ariz. Publications, Inc. v. Collins*, 175 Ariz. 11, 852 P.2d 1194 (1993) (attorneys' fee award for arbitrary withholding of records); *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952); *Mitchell v. Superior Court*, 142 Ariz. 332, 690 P.2d 51 (1984); *Moorehead v. Arnold*, 130 Ariz. 503, 637 P.2d 305 (App. 1981); *Phoenix News., Inc. v. Keegan*, 201 Ariz. 344, 35 P.3d 105 (App. 2001) (upholding order to disclose certain records); *W. Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 165 P.3d 203 (App. 2007) (ordering ongoing disclosure); *Howard v. Sumter Free Press, Inc.*, 531 S.E.2d 698 (Ga. 2000) (ordering ongoing disclosure); *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Ed.*, 776 N.E.2d 82 (Ohio 2002).

Factual Background

For over a year, the current owner of the Phoenix Coyotes hockey team repeatedly requested financial assistance from the City of Glendale under their arena lease agreement. Declaration of Jeff Shumway ¶¶ 26-47 (Exh. 2); Declaration of Earl Scudder at ¶¶ 5-13 (Exh. 3). In addition to numerous meetings, bankruptcy records reveal that the owner sent a written letter to Glendale City Manager Ed Beasley requesting financial relief. Declaration of Jeff Shumway at Exhibit A & ¶ 26 (Exh. 2). Manager Beasley informed the owner that the "letter had caused problems for Glendale and he intended to tear up the letter and to pretend that he had never received it." *Id.* at ¶ 31. He had previously expressed that "he was concerned the public might obtain . . . audited financial statements and raise questions as to why the arena was losing approximately $7 million per year." *Id.* at ¶ 12. The City nonetheless now asks the Institute, the public, and this Court to "trust the government." Tr. p. 31 (Exh. 4).

The Coyotes recently filed for bankruptcy, and it will be sold to a new owner. Only if there is no acceptable bidder who will keep the team in Glendale will a new owner be permitted to relocate the team. Order Approving Bid Procedures (July 6, 2009) at ¶¶ 1-2 (Exh. 5). According to the expedited schedule set in bankruptcy court, potential Glendale bidders were required to complete an application last month. *Id.* at ¶ 5. A single Glendale bidder, Jerry Reinsdorf *et al.*, filed an application by the deadline. Debtors' Statement of Position and Limited

Objection with Respect to Discovery Requests at ¶¶ 6-7 (Exh. 6). He must submit his bid by July 24, 2009. Order Approving Bid Procedures at ¶ 10 (Exh. 5).

Reinsdorf's application for bid is contingent on negotiating a new lease with the City. Declaration of Kelly Singer Regarding Receipt of Summary Term Sheet at Exhibit A, p. 2 (Exh. 7). Taxpayers have only 11 business days from today to intervene in the bankruptcy proceeding and file any objections to the sale to Reinsdorf. Order Approving Bid Procedures at ¶ 33 (Exh. 5). On August 5, either the Reinsdorf sale will be conclusively approved, or a new bidding process will commence for bidders who would relocate the team. *Id.* at ¶¶ 1-2.

The City admits that it is already "engaged in due diligence discussions and negotiations" with Reinsdorf and his representatives. Omnibus Objection of the City of Glendale, Arizona to Motions of the Debtors Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedures at ¶ 2 (Exh. 8). According to bankruptcy documents, the City Manager previously discussed annual subsidies of up to $20 million for the team. Declaration of Earl Scudder at ¶¶ 6, 10, & 13 (Exh. 3). In November 2008, the Commissioner of the NHL reportedly "convinced Mr. Beasley to agree to provide future concessions in the range of $12-15 million to a new group of investors or a new purchaser of the Phoenix Coyotes hockey team." Declaration of Jeff Shumway at ¶ 43 (Exh. 2).

The Goldwater Institute requests records of only very recent negotiations, dating from May 11, 2009. It is necessary that the City immediately disclose these records so that the Institute can assess the legality of a potential City deal and

decide whether to intervene on behalf of taxpayers in the bankruptcy proceedings before it is too late to object to the sale. We are particularly concerned that a City subsidy or concession may violate the Gift Clause of the Arizona Constitution, which prohibits cities from offering "credit in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. Art. 9, § 7.

The legality of a possible subsidy may need to be decided even *before* the August 5 sale date. The Goldwater Institute may object on behalf of taxpayers that a Glendale bid that requires an unconstitutional subsidy is not an "acceptable" bid. The bankruptcy court could determine as a result that the team may not be sold to Reinsdorf, and the alterative bidding process should commence for bidders who would relocate the team. The court also could certify the question to the Arizona Supreme Court. Taxpayers must be ready to act immediately if they want to challenge an agreement in bankruptcy court or take other actions before the City Council, through referendum and/or through a state court action. The compressed bankruptcy court timeline does not permit waiting until after negotiations are formalized or finalized.

Initially, the City categorically denied Plaintiff's public records request. It is not now clear what standard the City is using to determine which records it will produce, redact, or withhold.

Argument

Officers and public bodies must maintain all records of their official activities and all activities supported by public funds. A.R.S. § 39-121.01(B). The purpose of Arizona's public records law is to allow 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). There is a "clear policy favoring disclosure," and records "are presumed open to the public." *Carlson*, 141 Ariz. at 490-91, 687 P.2d at 1245-46. The burden is on the government to justify withholding. *Id.*

The Arizona Supreme Court has articulated a two-part test for disclosure under public records law. *Griffis*, 215 Ariz. at 5, 156 P.3d at 422. The first step is to determine whether a document is a public record. *Id.* If so, the presumption favoring disclosure applies. *Id.* The second step is to determine whether one of three recognized countervailing interests justifies withholding records over the presumption of disclosure. *Id.* Countervailing interests are limited to privacy, confidentiality, and best interests of the state. *Id.* The government has the burden to specifically demonstrate how a countervailing interest overcomes the presumption of disclosure. *Phoenix News., Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (App. 2007).

1. <u>All of the requested records are public records.</u> The City has twice asserted, without authority, that drafts and notes are not public records (City's Br. p. 3; Tr. p. 7 (Exh. 4)). The City also claims the Goldwater Institute's request is

"overbroad" (Br. p. 3; Tr. p. 7 (Exh. 4)). First, drafts and unfinished reports of public records are public records subject to prompt disclosure upon request. *Lake v. City of Phoenix*, ___ Ariz. ¶ 36, 207 P.3d 725, 736 (App. 2009). Second, there is no authority to suggest that an agency may deny a clear and finite request for records as "overbroad." As long as a record is public and not specifically exempted from disclosure, it must be produced upon request. A.R.S. § 39-121.01(D)(1); *Carlson*, 141 Ariz. at 490-91, 687 P.2d at 1245-46.

Public records include books, papers, maps, photographs, and other documentary materials, regardless of physical form or characteristics, and prints and copies of items produced or reproduced on film or electronic media. A.R.S. § 41-1350. It is not the form or status of the record that determines whether it is public; rather, it is whether the record is "made or received by any governmental agency . . . in connection with the transaction of public business . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government." *Id.* In other words, "documents having a 'substantial nexus' with a government agency's activities qualify as public records." *Griffis*, 215 Ariz. at 4, 156 P.3d at 421. Certainly if the City renegotiates a contract to lease out City property, all records including drafts and notes of those discussions, have a substantial nexus with government activity.

There is no blanket exemption for records that are the subject of ongoing negotiations. The City has an absolute right to conduct negotiations outside the public records law so long as it follows the proper procedures. The Legislature

has outlined numerous negotiating contexts in which the City may delay or withhold disclosure of records. *See, e.g.*, A.R.S. § 41-2538 (competitive selection procedures for professional services); § 41-2534 (competitive sealed proposals); § 41-2533 (competitive sealed bidding); § 41-2540 (bidders and offerors). As the City admits (Tr. p. 64) (Exh. 4), none of those contexts apply here.

Outside those contexts, cities enjoy categorical and permanent confidentiality of negotiations during executive sessions. A.R.S. § 38-431.03(B). The City (Br. p. 5) lists subjects proper for executive sessions including discussing legal advice with attorneys; discussing with attorneys contracts in negotiations, litigation, or settlement; and discussing negotiations for the lease of real property. However, the Legislature requires that there be a public majority vote constituting a quorum of the members of a public body for an executive session to occur. A.R.S. § 38-431.03(A). There is no executive session when, for example, a City official discusses negotiations with a private individual, or when two City officials discuss negotiations with each other.

Here, the City does not assert that all or even some records responsive to the Goldwater Institute's request were generated in an executive session. That certain records could have been, but were not, presented in executive session does not exempt them from disclosure. *See State ex rel. Consumer News Servs., Inc.*, 776 N.E.2d at 90 ("The sunshine law does not permit deliberations concerning the employment of a public employee to be conducted during one-on-one conversations. Such deliberations, if not held in public, must be held during an

executive session at a regular or special meeting") (quoting *State ex rel. Floyd v. Rock Hill Local Sch. Bd. of Ed.*, 1988 WL 17190 (Feb. 10, 1988)).

2. The City has not specifically demonstrated a countervailing interest to justify withholding all records. 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, 696 P.2d 200, 205 (App. 1998). The government has the burden to specifically demonstrate how production of the documents is detrimental. *Ellis*, 215 Ariz. at 273, 159 P.3d at 583. Because of the presumption of disclosure, redacting the sensitive information is always preferable to completely withholding records. *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246.

The City asserts the requested records are confidential because some potential bidders may refuse to bid if their *names* are disclosed (City's Br. pp. 7-8). The name of the sole Glendale bidder, Jerry Reinsdorf, is already public. Regardless, the City fails to explain why it may not simply redact names. The case law expressly contradicts withholding names of individuals when they actively approach the City (*see Bd. of Regents*, 167 Ariz. at 258, 806 P.2d at 352), but for our purposes at this time, we are completely satisfied to access records with bidders' names redacted.

To justify withholding the records, the City also references the bankruptcy court's instructions delaying discovery into bidders (Br. p. 5). However, that segment of the bankruptcy hearing concerns delayed discovery *from Reinsdorf* and

potential bidders (City's Exh. A at time stamp 11:11:55-11:1235 and 11:13:55 – 11:15:20 a.m.) (*see also* City's Br. p. 7), whereas Plaintiff's request is for public records *from the City*.[3] Regardless, discovery rules do not apply for public records requests. *Lake*, ___ Ariz. at ¶ 17, 207 P.3d at 732. Therefore, any court order delaying discovery into bidders is irrelevant.

Lastly, the City (Br. pp. 7-8) cites *Cox* and *Mitchell* to suggest that its interests outweigh the presumption of disclosure while negotiations are pending. Glendale concedes that the Arizona Supreme Court affirmed disclosure in both those cases, but it otherwise misstates the facts and the law. The City asserts that in *Cox*, "the Arizona Supreme Court was faced with a request for police investigative reports" (City's Br. p. 7). The City then argues that disclosure of police reports is appropriate after a criminal investigation is complete, but not when it is ongoing (City's Br. pp. 7-8).

In *Cox*, the Arizona Supreme Court was not faced with the question of the disclosure itself, which was complete by then, but rather whether the delayed disclosure was arbitrary and capricious to support an award of attorneys' fees. *Cox*, 175 Ariz. at 15, 852 P.2d at 1199. The Court held that it was. *Id.* The Court further held that "reports of ongoing police investigations are not generally exempt from our public records law," *id.* at 14, 852 P.2d at 1198, a holding followed and

[3] The City also references Exh. A at time stamp 11:54:34 – 11:55:20 a.m. Plaintiff was unable to access the City's audio exhibit after approximately time stamp 11:41 a.m. with enough time to examine the remainder of the exhibit before filing this response.

extended six months ago when the Court of Appeals ordered the disclosure of reports relating to an unfinished criminal investigation. *Lake*, ___ Ariz. ¶ 36, 207 P.3d at 736. *Lake* answers and directly controverts the City's hypothetical (Br. p. 8) that disclosure of police reports is not required while investigation is ongoing.

This line of cases is also consistent with *Mitchell*, cited by the City, which held that a convicted offender's right to privacy did not outweigh the public's need for information. *Mitchell*, 142 Ariz. at 335, 690 P.2d at 54. The City (Br. p. 8) argues that the interest in not compromising the offender's rights prior to sentencing justifies delaying release of a report of the offender's personal history. Again, the City's hypothetical has already been addressed and its argument rejected. In *Cox*, the Arizona Supreme Court affirmed the trial court's fee award for arbitrary delay of disclosure after the court below held the government's interest in fair trials for the defendants was a "generalized claim[] of broad state interest" insufficient to justify withholding records. *Cox*, 175 Ariz. at 13, 852 P.2d at 1197 (vacating appellate court's reversal of trial court's fee award).

Next, the City asserts that revealing records of negotiating strategies, positions, and bottom lines during bargaining will not result in the best deal for the City, and that this interest overcomes the presumption of disclosure. That interest does not justify delaying disclosure when the process at issue is "not meant to be clothed in secrecy, but to be subject to open discussion and debate." *Moorehead*, 130 Ariz. at 505, 637 P.2d at 307. A taxpayer subsidy or concessions for a professional sports team, like a petition for annexation (*see id.*), is a topic for

public discussion and not legislative secrecy. To the extent the requested public records reveal "what the City is considering in the next round of discussions" (City's Br. pp. 10-11) or "how far is Glendale willing to go in its negotiations" (City's Br. p. 5), the records may be redacted to protect the City's negotiating interests. However, those interests do not justify withholding records of "what is currently on the table" (City's Br. p. 10).

The government has the "burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure." *Mitchell*, 142 Ariz. at 335, 690 P.2d at 54. The Arizona Supreme Court has rejected using a blanket rule exempting categories of documents from disclosure. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. The City fails to specifically demonstrate any interest to justify withholding terms that the City has already discussed with the other side; the positions the City has already taken; what the City has already put on the table for the bidder; or what the bidder has offered to and requested from the City.

Full disclosure of what the bidder has presented to the City finds particular authority in Arizona law. In *Bd. of Regents*, 167 Ariz. at 258, 806 P.2d at 352, the Court considered whether it was proper for a university to disclose the names and resumes of hiring prospects (who may not know that they were being considered for an open position) and of candidates (who actively sought the position). The Court upheld the prompt release of all candidate names precisely because "[c]andidates who actively seek a job run the risk of their desire becoming public

knowledge. Because they are candidates, they must expect that the public will, and should, know they are being considered." *Id.* Although most of the documents sought here are City documents, the bidder at this point has surrendered any privacy interest that might preclude disclosures of subsidy requests. We seek no proprietary information from the bidder whatsoever.

3. Glendale must provide the requested records on an ongoing basis. The City agreed before this Court and the Goldwater Institute that it could and would provide records on an ongoing basis. Tr. p. 30 ("On an ongoing basis we're going to look at what we can disclose as the process continues"); Tr. p. 30 ("We'll make some disclosure right away *and we'll continue to do that* within the limits that I described to Your Honor . . .") (emphasis added); Tr. pp. 28-29 ("So we're not going to hold it all and then just say, press conference, here's everything, it's a done deal. We'll do it on an ongoing basis"); Tr. p. 33 ("And we're going to make that available to everybody at the same time on a regular and ongoing basis that is reasonable" (Exh. 4).

Nonetheless, in its Brief (p. 3) the City contents that providing the requested records on an ongoing basis is "unduly burdensome." That defense is not grounded in legal authority, and the City makes no attempt to justify it. Should the Court entertain the City's most recent arguments to deny the ongoing request, those arguments should be rejected.

The only time an Arizona court addressed ongoing requests was in *W. Valley View*, 216 Ariz. at ¶ 17, 165 P.3d at 207, when the court ruled that an

agency can, under public records law, be compelled to produce a copy of a document not yet in existence. The court ordered the sheriff's office to comply. *Id.* The City (Br. p. 10) argues that *W. Valley View* does not apply here because there is no repeated practice of denying access or untimely productions, the requested records are not regularly generated, and the request is not for a narrowly defined, clearly identifiable category of documents.

Glendale has continued to deny the Goldwater Institute access to the requested records for nearly three weeks, until only a few hours ago. This production is already untimely. *See* Tr. pp. 29-30 & 33-34 (City stating two weeks ago, "I have some of it in my office now" and "That's what I'm telling them and the court now. I've got some of it") (Exh. 4); *see also State ex rel. Consumer News Servs., Inc.*, 776 N.E.2d at 89-91 (six-day delay in producing readily available documents was not prompt). Also, negotiations are and have been ongoing, and they will continue to occur on a regular basis while Reinsdorf prepares his bid (due July 31). *See* Omnibus Objection of the City of Glendale, Arizona to Motions of the Debtors Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedures at ¶ 2 (Exh. 8). The request is for a narrowly defined, clearly identifiable category of documents: records of negotiations with potential new owners of the Phoenix Coyotes hockey team. It is necessarily and strictly limited in time because the new Glendale owner will be decided (or else there will be no new Glendale owner) on August 5, 2009.

The alternative to an ongoing request is for the Institute to resubmit its request daily until August 5, which is even more burdensome than Plaintiff's suggestion to the Court that the City review and disclose records perhaps twice a week for the remaining three weeks.

Request for Relief

The Goldwater Institute respectfully requests that the Court order that the City: immediately produce to the Institute all records responsive to its original request, including drafts and notes; produce the records on an ongoing basis; and immediately produce to the Court for *in camera* review any records withheld or redacted because the City believes they reveal future bottom-line negotiating strategies. The Institute also requests that the Court order full disclosure of all information withheld promptly when an agreement between the City and bidder is reached that will be presented to the City Council.

Additionally, the Institute requests that the Court award 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. The City should be discouraged from arbitrarily and capriciously withholding public records until the day the requestor files a response in court, particularly considering that many requestors will lack the resources to file a lawsuit to compel disclosure.[4]

[4] The City's initial categorical rejection (and the beginning of its constantly shifting response to the Institute's records request) is attached as Exh. 9.

RESPECTFULLY SUBMITTED this 16th day of July, 2009 by:

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