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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 **COMBINED RESPONSE TO GLENDALE'S MOTION FOR PROTECTIVE ORDER** **and** **REPLY ON NOTICE OF SUPPLEMENTAL EVIDENCE IN SUPPORT OF PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE** *Hon. Edward O. Burke*

The narrow legal issue before the Court is whether Petitioner Goldwater Institute's deposition notice is overbroad. Respondent City makes next to no legal argument in support. Had the City seen fit to answer our inquiry about the nature of the documents it seeks to submit in a Seventh Motion for *In Camera* inspection, the deposition issue may not even be before the Court. Nonetheless, as typical, the bulk of the City's Motion is a list of general grievances that have nothing to do with the substance of its request. The Institute here repeats its previous email

responses to the City's objections to the deposition, and addresses the supplemental evidence provided to the Court following the most recent hearing.

It is not the Institute, but rather the City that has failed a good-faith attempt to resolve the issues about which it now complains. The City fails to respond to our inquiries, refuses to explain its contradictory and continually oscillating positions, and prevents us from litigating this case efficiently in this Court. To be clear from the outset, the Goldwater Institute *does not hope* that the City will violate Public Records laws, as the City has already done here, and force us to use scarce legal resources to bring a lawsuit.[1] The Institute certainly does not wish for the City to violate this Court's favorable July 21, 2009 ruling. Our mission is to analyze, in the context of the Arizona Constitution, *what* public entities are doing; that provides more than a generous workload for us, without having to drum up minutia or try to play "gotcha" games. But we cannot analyze *what* entities are doing without access to public records. And to the extent that an entity fails to create public records to document its official activities, it violates A.R.S. § 39-121.01(B). After five months and press-worthy City meetings with Coyotes owners, Glendale is either denying access to existing public records or is failing to create them as required. We need to determine which and proceed accordingly.

After receiving a favorable ruling from this Court in July but *still* failing to receive notice of continual submissions from the City as required, the Institute

[1] The Institute attempted to avoid filing a lawsuit in the first instance by pressing the City to reconsider its initial denial of our public records request, but the City refused. (Exh. 1.)

began nannying the City for compliance, at first by politely reminding and then directly asking when the City would next submit documents. The Institute did not even maintain records of these multiple inquiries because we never expected that the City would not comply. (Exh. 2, ¶¶ 6-8.) The City stated at the most recent hearing, "I mean, there is no communication. I mean, if they want to call and ask, you know, is it soup yet, I guess we could given an answer. But if the answer is no, we don't have anything, then we'd probably find ourselves here once again." (Exh. 3, pp. 26:23-25; 27:1-2) The Goldwater Institute did ask, multiple times. (Exh. 2, ¶¶ 7-9; Exh. 4, ¶ 3) The City did answer. But it was never, "no, we don't have anything." It was always, "we are preparing documents and will submit them soon." (*See id.*)

There being no prior indication that this fact would be disputed at the hearing, the Institute provided merely one email record of it, sent by Christina Parry. Reasonable minds would certainly find it perplexing that Ms. Parry would tell us in November, "We are preparing another motion for in camera inspection and will file it soon" and then to be told after the many months that followed that the City was *never* preparing another motion because the City had no documents. (*See* Exh. 4, ¶ 3.) Reasonable minds would find it perplexing that counsel for the City, who was copied on Ms. Parry's email, never followed up with us or her to correct the misstatement, and further proceeded to defend at the hearing, perhaps "conveniently," as the Court noted, that he had no "personal knowledge" of what Ms. Parry meant in her email. (Exh. 3, p. 32:3-21) However, as it turns out after

further review of correspondence between the Institute and the City, counsel did have personal knowledge, and he too assured the Institute in December that a submission was forthcoming. (Exh. 2, ¶ 9) (Glendale "is now preparing its next disclosure for release shortly.")[2]

Only at the hearing did the City state for the first time that it had failed to make disclosures for five months because "there are [no] records." (Exh. 3, p. 24:14-20) When the Institute subsequently asked counsel why he had earlier indicated that the City had documents to submit, counsel refused to explain, responding, "I answered the questions posed by the court on Friday to the best of my knowledge and recollection and I stand on those answers. To further engage in speculation and argument is senseless." (Exh 5.) So, consistent with the Court's suggestion (Exh. 3, p. 36:3-4), the Institute noticed a deposition to discern whether in fact the City ever had documents, and if not, whether it was maintaining records of official activities as required.

To add to the mystery about the City's shifting responses, the City requests that we reframe the deposition to include only matters regarding "*public records reflecting* communications with current and potential new owners of the Phoenix Coyotes hockey team . . . since September 2009 and regarding compliance with Court orders for continuing disclosures in this action *with the exception of those public records reflecting communications that are protected by this Court's July*

[2] The Institute provided this email in a Notice of Supplemental Evidence following the hearing during which counsel alleged he had no personal knowledge. The City responded to the Notice, but still failed to explain the contradictory positions.

21, 2009 and July 29, 2009 Orders." (*See* Exh. 6) (emphasis added) But if the City's position at the hearing was that there were no such records, then there would be no matters on which to depose the City. Why would the City demand that we limit our deposition to questions about records that the City says do not exist? The whole point of the deposition is to determine the existence of the very records the City seeks to have excluded from the deposition.

As long as the City continues to maintain its position at the hearing, that over the course of six months it created no public records and no records it believes should remain confidential (the latter which the City must disclose *in camera* pursuant to the Court's July 21 and December 7, 2009 orders), then we must determine whether the City is complying with its mandatory duty to "maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities" under A.R.S. § 39-121.01(B). We know the City did not cease all official activities relating to the Coyotes because its own press statement states during that time that "the city of Glendale had a very positive meeting with the NHL to reaffirm the process for keeping the team in Glendale. It was confirmed that the parties are all on the same page and we are moving forward to secure a new owner that will keep the team playing in our city for years to come." (http://www.glendaleaz.com/Coyotes/index.cfm.) If the City truly has no records documenting such significant meetings and progress, which the City tellingly deemed worthy enough of a press statement, then it is once again violating Public Records Laws by failing to document its official activities.

Alternatively, it is possible the City has shifted its position full circle. It recently filed a Motion to File Under Seal the Seventh Motion for *In Camera* Inspection and Motion for Protective Order.[3] We asked the City via telephone and three times via email, to no avail, the number and dates of the records the City seeks to submit in a Seventh Motion for inspection. (Exh. 7-8.) If the dates of those records are prior to the contempt hearing and contempt motion, then we know the City *did* keep at least some records of its official activities as required, and that its position at the hearing that it had no documents was untrue. In that case, we may cancel the deposition, whose purpose – as we indicated to the City four times – was to establish whether such records existed. On the other hand, if the documents include no records of official activities over the five months that gave rise to the contempt motion, then we must depose someone with knowledge of *all* official activities relating to Coyotes negotiations (not merely public records and non-protected records, which counsel for the City asserted do not exist) to determine whether the City complied with its duty to document official activities.

In a deposition (should one still be necessary), the Institute has already assured the City that we will not seek the substance of protected information: "the purpose of the deposition is to determine whether and the type of communications

[3] It is not clear why the City filed a "Motion to file a Motion" for inspection. The Court's July 21 and December 7, 2009 orders require the City to file continuing Motions for inspections, and the City has never previously filed a Motion to file a Motion for inspection. We asked the City why the added document (which of course creates added delay), but the City never responded. (*See* Exh 7.)

and records that exist and therefore knowledge of all communications is necessary. However, be assured that we are looking for the existence and general type/category of communications, not the particular substance of them. Of course you may object to questions as you see fit." (Exh. 5.) Rule 26(b)(1)(A), Ariz. R. Civ. P., limits discovery to matters not privileged, but the *fact* that the City met with Coyotes owners, emailed, conducted telephone calls, and negotiated are not privileged under Public Records Laws, the Court's orders, or any other rules. Establishing whether and how often the City engaged in these activities over the five months in question will prove whether the City failed to maintain records of its official activities as required. Similarly, the general types and categories of communications and records that exist are not privileged, and are important to establish whether the City is improperly withholding records.

The City continues to create the need for the Court's intervention by refusing to answer the Institute's questions, while alleging the Institute is the culprit. In its Motion for Protective Order (p. 3), the City falsely accuses the Institute of evading the City's questions regarding the scope of the deposition. We have never done so. The City initially requested us to limit the scope of our deposition notice. (Exh. 5.) We declined, explained why, and provided assurances to allay the City's fears that we sought protected information. (*Id.*) A week later, the City repeated the request (Exh. 6) and also filed a Motion to file a new Motion to for *in camera* inspection. As the Institute's litigation director was then on travel until the following week (*see* Exh. 9), we immediately replied that

we would respond to the City's concerns early the following week. While the City (Mot., p. 3) is quick to interpret this courtesy response as "off-putting" and "evasive," we fulfilled our promise on Tuesday, responding that in light of the City's new Motion, we may cancel the deposition altogether. We responded that our determination depended on the number and dates of the documents for the City's new *in camera* motion – information we still lack.

The deposition notice is not overbroad, and we request that the Court deny the Motion for Protective Order.

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

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ORIGINAL of the foregoing E-FILED this 4th day of March, 2010 with:

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Maricopa County Superior Court
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COPY of the foregoing HAND-DELIVERED this 4th day of March, 2010 to:

Hon. Edward O. Burke
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COPY of the foregoing E-MAILED and MAILED this 4th day of March, 2010 to:

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