

## **Goldwater Institute v. City of Phoenix – Backgrounder**

Date Filed: March 1, 2023

Last Step: Filed complaint and application for order to show cause.

Next Step: Prepare for possible show cause hearing and begin briefing.

### **Executive Summary**

The public's business should be done in public, not behind closed doors. Publicly funded negotiations between cities and government labor unions are no exception.

Unfortunately, the City of Phoenix (the City) and its union enablers have shut the public out of its most recent contract negotiations, a process that is funded by and affects all Phoenix residents. When the Goldwater Institute requested public records relating to the contracts, the City withheld them. These actions violate Arizona's Public Records Law and the right of all Arizonans to know what their government is up to.

Of course, the City is supposed to negotiate on the public's behalf, not shield union proposals and draft agreements from public scrutiny.

That is why the Goldwater Institute, through its Scharf-Norton Center for Constitutional Litigation, filed suit against the City, asking the court to stop the City from hiding records about union contracts from the public.

### **Background**

The City of Phoenix's "Meet and Confer Ordinance"<sup>1</sup> requires that public-sector unions submit proposed draft memoranda of understanding (MOUs) by December 1 in the year before an operative agreement expires to allow for public input prior to the start of the negotiation process. For several years, the Phoenix Law Enforcement Association (PLEA)—the union for most of the City's police officers—complied with the ordinance.<sup>2</sup>

This past December, however, PLEA ignored this legal requirement and refused to provide a draft agreement. By doing so, PLEA and the City prevented the public from providing input on the union's proposals prior to the start of negotiations.

On December 7, 2022, the City held a public meeting—also required by City Code—in which it purported to take public comment, despite there being no proposal or draft for the public to see. Several speakers objected to the lack of transparency and the inability to provide meaningful public comment without seeing the union's proposals.<sup>3</sup>

The Institute then submitted a public records request to the City on December 19, 2022, seeking

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<sup>1</sup> Phoenix City Code § 2-218.

<sup>2</sup> <https://www.azcentral.com/story/news/local/phoenix/2022/12/15/phoenix-public-denied-advance-look-at-police-union-contract-proposals/69729856007/>.

<sup>3</sup> See <https://www.youtube.com/watch?v=9VCAwm6HvZY>.

copies of any draft MOUs and MOU proposals.

The City initially claimed that there were no responsive records for draft MOUs or MOU proposals. However, after a renewed request for the information on January 20, the City later said that records of MOU proposals existed, but the City was denying the request because the MOU proposals were purportedly exempt from disclosure. The City claimed that “proposals exchanged during table discussions” are not subject to public release because “[r]eleasing those types of materials could create a chilling effect on the parties’ willingness to candidly engage with each other and it would hinder the negotiations process.”

On February 8, the Institute sent a letter to the City demanding production of the records, noting that the City had not asserted a legally recognized exception to Arizona’s public records laws.

On February 23, the City responded, admitting that it had some responsive records but was withholding them because disclosure “would harm the best interest of the City.”

The Institute filed suit on March 1, 2023 to compel production of the records.

### **Legal Analysis**

Arizona law and public policy require open and transparent government. To that end, Arizona has broad public records laws favoring disclosure of records made and kept by local government agencies.<sup>4</sup>

Pursuant to Arizona’s Public Records Law, “[a]ny person may request to examine or be furnished copies ... of *any public record* .... The custodian of such records shall *promptly* furnish such copies....”<sup>5</sup> There is a strong legal presumption in favor of disclosure of public records. “If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies.”<sup>6</sup>

The public’s right to inspect public records may only be curtailed if one of three narrow exceptions apply: (1) records made confidential by statute, (2) records that include privacy information, or (3) if the disclosure of the records would harm the best interests of the state.<sup>7</sup> If the City believes a specific, enumerated exception to the public records law applies to prevent disclosure of otherwise public records, the burden is squarely on the City to establish an exception in the law.<sup>8</sup>

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<sup>4</sup> See A.R.S. § 39-121.01(A)(2).

<sup>5</sup> A.R.S. § 39-121.01(D)(1) (emphasis added).

<sup>6</sup> *Griffis v. Pinal Cnty.*, 215 Ariz. 1, 5 ¶ 13 (2007); see also *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993) (holding that the “burden fell squarely upon [the] public official, to overcome the legal presumption favoring disclosure.”).

<sup>7</sup> See *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 300 ¶ 9 (1998).

<sup>8</sup> See *Mitchell v. Superior Ct.*, 142 Ariz. 332, 335 (1984) (the burden of demonstrating that some harm will result to the state in disclosure “is on the party that seeks non-disclosure rather than on the party that seeks access”).

Arizona’s public records laws do not have an exception for union contract proposals, including those created for or exchanged during the negotiation process. Indeed, if such an exemption existed, it would undermine the entire purpose of the public records law—open and transparent government—by shutting the public out of the meet and confer process meant to outline how public services will be provided with public funds.

This is particularly true in light of Phoenix City Code Section 2-218(B), which *requires* public transparency of the bargaining process between the City and government labor unions. Not only do the resulting agreements outline compensation and other policies for government employees, they are also sometimes used to hide wasteful, corrupt, and unconstitutional practices that harm the public.<sup>9</sup>

Although there is no express exception for these records, the City claims that the “best interests of the state” exception applies due to alleged confidentiality issues and concerns that disclosure would “chill” the negotiations process. However, publicly funded activities about crucial government operations such as these are “not meant to be clothed in secrecy, but to be subject to open discussion and debate.”<sup>10</sup>

Importantly, “[the] ‘best interests of the state’ standard is not confined to the narrow interest of either the official who holds the records or the agency he or she serves. It includes the overall interests of the government *and the people*.”<sup>11</sup>

Once it is established that the documents at issue are public records, “the court determines whether the government’s proffered explanation of public harm outweighs the policy in favor of disclosure.”<sup>12</sup> The government has the burden to “specifically demonstrate” how a competing interest overcomes the presumption of disclosure.<sup>13</sup> The probability of “specific, material harm” must be shown.<sup>14</sup> “[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.<sup>15</sup>

Through its Meet and Confer Ordinance, the City has already articulated that the best interests of the government include public transparency regarding meet and confer contracts and

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<sup>9</sup> These include taxpayer-funded release time and dues deduction revocation restrictions, both of which the City has agreed to in the past. See <https://www.goldwaterinstitute.org/policy-report/releasetimesolutions/>; and <https://arizonasuntimes.com/2023/02/22/the-goldwater-institute-demands-arizona-cities-cease-unconstitutional-labor-union-trapping-policies/>.

<sup>10</sup> *Moorehead v. Arnold*, 130 Ariz. 503, 505 (App. 1981).

<sup>11</sup> *Hodai v. City of Tucson*, 239 Ariz. 34, 38 ¶ 7 (App. 2016) (quoting *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348–49 ¶ 18 (App. 2001)) (emphasis added).

<sup>12</sup> *Id.* at 39 ¶ 8 (citing *Carlson v. Pima Cnty.*, 141 Ariz. 487, 491 (1984); *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 395 ¶ 10, 397 ¶¶ 17–18 (App. 2011)).

<sup>13</sup> *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273 ¶ 22 (App. 2007) (quotation omitted).

<sup>14</sup> *Mitchell v. Superior Court*, 142 Ariz. 332, 335 (1984).

<sup>15</sup> *Cox Ariz. Publ’ns*, 175 Ariz. 11, 13–14.

negotiations.<sup>16</sup> Further, by violating and disregarding its own ordinances and processes for public dissemination of information regarding the meet and confer process, the City has waived any claim that purported ongoing negotiations should remain confidential.

No other competing governmental interest warrants denying the Institute's records request. The City established a public process for entering MOUs with public-sector unions. That process is funded by the public, and the negotiations involve matters of pure public concern regarding how government employees will conduct the public's business.

Clothing the meet and confer process in secrecy by withholding MOU drafts and proposals from the public is not in the best interests of the City or its residents; it is contrary to those interests.

For these reasons, the City has violated Arizona's Public Records Law and the Goldwater Institute's rights to access to these public records.

### **Case Logistics**

The Goldwater Institute is suing the City of Phoenix and several public officials responsible for the requested records in their official capacities.

The case was filed in the Superior Court of Arizona in Maricopa County on March 1, 2023.

### **The Legal Team**

**Jon Riches** is the Vice President for Litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation and General Counsel for the Institute. He litigates in federal and state trial and appellate courts in the areas of economic liberty, regulatory reform, free speech, taxpayer protections, public labor issues, government transparency, and school choice, among others.

**Scott Day Freeman** is a Senior Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. He has more than 28 years of experience litigating complex commercial and tort defense cases at large international and regional law firms. Scott previously served as Vice Chair for the Arizona Independent Redistricting Commission during the 2011 redistricting cycle. He litigates free speech, associational rights, property rights, and election-related cases.

**Parker Jackson** is a Staff Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, where he focuses on taxpayer protection, free speech, associational rights, government transparency, education, and election-related issues.

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<sup>16</sup> Phoenix City Code § 2-218.