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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

BARRY GOLDWATER INSTITUTE FOR PUBLIC POLICY RESEARCH,

Plaintiff,

vs.

CITY OF PHOENIX, a municipal corporation; JEFF BARTON, in his official capacity as City Manager for the City of Phoenix; DENISE ARCHIBALD, in her official capacity as City Clerk for the City of Phoenix; and SHEREE RUCKER, in her official capacity as Human Resources Officer, Custodian of Records for the City of Phoenix,

Defendants,

Case No. CV2023-003250

PLAINTIFF'S REPLY IN SUPPORT OF STATUTORY SPECIAL ACTION AND INJUNCTIVE RELIEF

(Assigned to the Honorable Danielle Viola)

Defendants (collectively, "the City") admit that the *only* issue is whether the City has met its burden of proving that the "best interests of the state" outweigh the strong presumption in favor of public disclosure regarding written proposals and draft MOUs exchanged during the meet and confer process. *See* Resp. at 7–8.

Not only has the City failed to meet its burden of proof, but in attempting to, it repeatedly mischaracterizes its own ordinance, exaggerates its interests in confidentiality and the purported harms of disclosure, undervalues the critical role and interests of the public, obfuscates the limited exceptions to disclosure, and relies on distinguishable and nonbinding legal authorities. Plaintiff's requests for relief should be granted.

I. No "blackout period" prohibits disclosure here.

The City mischaracterizes the so-called "blackout period" in its Response. That period is narrow, does not apply to written MOU proposals (not even to all negotiations or discussions), and applies almost exclusively to a negotiation impasse. *See* P.C.C. § 2-220(A)(6), (B)(8).

Subsection (A)(6) states that "[t]he public employer is prohibited from … *[d]iscussing with members of the City Council* negotiation issues in dispute from the time the dispute is submitted to the fact-finding process and extending to the time that the fact-finder's report is made public." (emphasis added). **This restriction is triggered only upon impasse.**[1] Because no impasse occurred here, the City was *never* restricted from discussing MOU negotiations with the City Council.[2] More importantly, even if this "blackout period" was as expansive as the City claims, *see* Response at 3-4, it *only* restricts the City and its negotiators from communicating *with members of the City Council* regarding disputed negotiation issues that are before a fact-finder at impasse. It does not override the state Public Records Law or shield any records from disclosure. And

[1] *See* P.C.C. §§ 2-210(6); 2-219.

[2] Indeed, here it seems at least one City Council member was apprised of the status of MOU negotiations with PLEA. *See* Memo. of Law, Ex. 1 at Ex. A (Feb. 27, 2023 email to Isabel Garcia from Adriana Garcia Maximiliano, Chief of Staff to then-Councilmember Carlos Garcia, stating that PLEA's MOU negotiations "started in December [2022] and have been ongoing since then.").

disclosing such records—even if they reach the City Council—does not constitute "discussing" disputed issues with councilmembers in violation of the provision.

Additionally, Subsection (B)(8) only restricts union leaders from discussing certain negotiation matters with City Council members, and only under very limited circumstances, presumably so the City's designated negotiators are not bypassed.[3] But again, this triggers only in the event of impasse.[4]

In short, the purported "confidential 'blackout' period" really isn't confidential, it's not really a "blackout," and it appears to only apply when impasse occurs. Here, there was no impasse, so this so-called "blackout period" is merely a red herring.

II. The City's exaggerated interests do not overcome the presumption in favor of disclosure, nor do they outweigh the public interest in the requested records.

A. The City improperly evokes the "confidentiality exception" to public disclosure, which is not at issue in this case.

The only exception to public disclosure asserted here is the "best interests of the state" exception. *Other* limited exceptions to disclosure include records "made confidential by statute." *See Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 191 Ariz. 297, 300 ¶ 9 (1998). But the City has not claimed that state law makes the records at issue "confidential," and, of course, no state confidentiality law applies to MOU proposals. To the extent the City has any confidentiality interest in these public records—it does not—it is merely one of many interests that must be weighed against the public's interest in disclosure. *See Hodai v. City of Tucson*, 239 Ariz. 34, 39 ¶ 8 (App. 2016). But that purported interest is also unavailing because "generalized claims of broad state interest" are insufficient to overcome the public's interest in disclosure. *See Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 13 (1993). And the City has not come anywhere close to meeting its burden of proving that "specific, material harm," *Mitchell v. Superior Court*, 142 Ariz. 332, 335 (1984), would result in the disclosure of the MOU proposals.

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[3] Even this does not appear to be a significant concern. For example, Unit 3's Ground Rules specifically state, "This provision is not intended to prohibit or otherwise prevent the Union or the City from updating its members *or City Council* on the status and progress of negotiations." Resp. Ex. 1.

[4] *See* City Code 2-220(B)(8).

B. The City does not consistently require confidentiality during the meet and confer process.

The City claims that "[i]n this case, the City, and the residents and employees of the City, have strong interests in maintaining the confidentiality of the records at issue." Resp. at 8. Yet, the City's exhibits demonstrate otherwise. Specifically, the Ground Rules applicable to meet and confer negotiations vary widely and do not require blanket confidentiality of negotiations. For example, the Unit 2 Ground Rules *do not contain a confidentiality provision at all*. *See* Resp. Ex. 1. And for Unit 3, "[e]ither party can terminate the [confidentiality provision] with 24 hours notice to the other party." *Id.*

Although the City now claims it considers "confidentiality a vital part of the process," Resp. Ex. 6 at 2 ¶ 5; Ex. 7 at 2 ¶ 5, that claim is undermined in the very rules it sets out regarding negotiations with labor unions. Even if there is some interest in the confidentiality of internal deliberations or private discussions, no such interest exists for the requested records—written proposals and draft MOUs. In the negotiation process, written proposals are prepared *after* each side's negotiators have deliberated. They do not reflect private discussions among Union or City negotiators. They are, in effect, an offer from the Union to the taxpaying-public, or a response from the public to the Union. What a special interest group seeks from the government and how the government responds is quintessentially public information; that is, information about "the organization, functions, policies, decisions, procedures, operations, or other activities of the government." A.R.S. § 41-151(2)(a); *see also Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 8 (2009).

Moreover, the confidentiality provisions agreed to by other units—including PLEA—do not alter the disclosure analysis. In *Moorehead v. Arnold*, 130 Ariz. 503, 505 (App. 1981), the court squarely rejected an argument made by the City of Tucson that a promise of confidentiality to a third party could prevent disclosure of public records.

> If the promise of confidentiality were to end our inquiry, we would be allowing a city official to eliminate the public's rights under A.R.S. § 39-121. *Breach of this promise, when required by the law of this state, is not a sufficient harm to the public interest to prevent disclosure*.

Id. (emphasis added).

C. Most of the claimed harms of disclosure could occur without disclosure.

The City claims that disclosure would undermine "the legitimacy of the meet and confer process," lead to "collusive activities among the bargaining units," introduce politics into the negotiation process, allow public posturing by negotiators, increase the risk of impasse, result in "undue pressure from constituents," impact the "morale of City employees," compromise the quality of the "bargain," increase the cost to taxpayers, reduce service levels, and drive away public safety employees. Resp. at 8, 13–14. But what the City claims harm the "best interests of the state" are simply results of living in a free and democratic society.

The legitimacy of the meet and confer process would be decreased—not increased— if it were conducted behind closed doors. With greater transparency, on the other hand, the public has greater confidence that the City is representing the public's interests, and a better ability to hold City officials accountable for failing to do so.

What's more, nothing currently prevents unions from engaging in "collusive activities." All labor organizations already have access to each other's MOUs and understand that the terms vary due to the nature of the types of employees they cover. Additionally, no law prohibits any discussions between members or representatives of different unions. Union leaders no doubt already communicate with each other regularly. Indeed, any effort by the City to prevent union leaders or members from communicating with one another would itself raise serious First Amendment and other legal concerns.

The City's next contention that "politics" should not influence the allocation of public resources and the organization and operation of government and its law enforcement functions is dangerous and absurd. The City answers to the public, not solely to private, special interests like labor unions. And if the City is considering proposals that harm its constituents, the City should be aware of the public's concerns.

Rather than properly weigh the essential function of public input on government operations, the City instead casts its constituents' interests aside. *See* Resp. at 8 (fearing

"undue pressure from constituents"); Resp. Ex. 6 at 2 ¶ 7 (anticipating "unhappy constituents and minority interests" if parties forced to publicly defend exchanged proposals); Resp. Ex. 7 at 2 ¶ 7 (same). This is contrary to both the letter and spirit of the Public Records Law and democratic self-government. *See Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶ 33 (App. 2001) (public records law's core purpose is to allow the public to monitor government officials, employees); *see also* P.C.C. § 2-209(4) ("[T]he public employer was established by and is operated for the benefit of all the people … .").

But, fortunately, that is not how representative government works. And it is not how Arizona's Public Records Law (or even the City's Code) operates. *See Phoenix Newspapers,* 201 Ariz. at 351 ¶ 33. Instead, the City negotiates *on behalf of* its constituents, who have a *right* to know what proposals the government is making or accepting on their behalf. And, the City should engage in the meet and confer process *informed by* its constituents, not by closing them out of crucial decisions regarding the allocation of resources of the operations of government.

The risk of impasse, the morale of city employees, the value of the deal to each party, the cost to taxpayers, the level of services provided, and the retention of public employees each depend far more on the *substance* of the proposals and final agreement than on whether the content is made public. These can all be impacted regardless of whether the public gets to see the requested documents.

The union declarants each express an interest in protecting "certain bargaining strategies … that rely on the confidentiality of the process to be successful." Resp. Ex. 6 at 2 ¶ 7, Ex. 7 at 2, Ex. 8 at 2 ¶ 6 (fearing disclosure of tactics "may result in backlash"). A desire to protect questionable bargaining tactics—by either party—from public scrutiny is a poor reason to hide information from the public. Members of the public understand that initial bargaining positions may change during the negotiations, that give and take occurs, and that the final agreement may not completely match the information contained in the requested records. In any event, a private special interest's concern over its

"bargaining strategies" certainly does not outweigh the public's right to know crucial decisions about the expenditure of taxpayer funds and the operations of government. Nor can the public perform its function of holding the government accountable if it cannot evaluate the decisions the City makes on its behalf. If either the City or the union are not acting in good faith or are using poor tactics, the public should be able to consider those actions and the other party's responses.

The City has not proven any specific, material harm that is not either already present or that derives from the fact that we live in a free and democratic society. Its stated interest in secrecy is vastly outweighed by the public's right to know how the City spends money on and arrives at decisions regarding the provision of law enforcement services. *See Moorehead*, 130 Ariz. at 505.

D. The City argues for perpetual secrecy regarding MOU negotiations.

The City argues that not only should the requested records be withheld from the public during *this* round of negotiations, but that the records should also be held through the subsequent round of negotiations because "some proposals that are not realized in the current agreement may be brought again by either or both parties such that it is often advantageous to push an item into the next round, to 'kick the can' down the road."[5] Resp. at 16. But the Court of Appeals has rejected such a radical position. *See Church of Scientology v. Phoenix Police Dep't*, 122 Ariz. 338, 339–40 (App. 1979) (refusing to "permanently" shield disclosure of "inter or intra-agency communications" given "our statutory policy in favor of disclosure").

If the public does not know what was proposed and rejected during prior negotiations, the public cannot provide input to their elected officials regarding such proposals. This leads to a *less* informed process, not a more informed one.

[5] The Arizona Legislature has not adopted, and the Court of Appeals has specifically rejected a "deliberative process privilege" under Arizona's Public Records Law. *Rigel Corp. v. State*, 225 Ariz. 65, 73 ¶ 41 (2010).

E. The City undervalues the public interests at stake here, including the critical role constituents play in representative government.

The public has a clear interest in knowing how the City makes decisions and allocates resources regarding essential functions such as law enforcement.

In this case specifically, the public has expressed significant interest in the requested records and the most recent round of meet and confer negotiations. The City claims that the public's interest in these records "is purely speculative" based on the *Arizona Republic* providing media coverage regarding the public being shut out of the negotiation process. Resp. at 16. But, of course, media reporting of an event, like the records at issue here, is obvious evidence of the public's interest in a matter. *See* NEWSWORTHY, *Merriam Webster*[6] ("interesting enough to the general public to warrant reporting."). And multiple media outlets have covered the City's refusal to provide information regarding its MOU proposals with PLEA.[7]

Additionally, the December 14, 2022 City Council hearing regarding the non-existent MOU proposals featured significant public comment from various residents, public interest groups, and even a state legislator. *See* Compl. ¶ 29.[8] And on April 19, 2023, the City Council heard additional public comment, including renewed calls for transparency in the negotiation process.[9]

The City also incorrectly construes GI's position to claim that disclosure of the records at issue in this case would mean that "no public record would be immune from disclosure." Resp. at 15. This is false. Of course, records involving "official activities and of any … activities that are supported by monies from this state or any political subdivision of this state," A.R.S. § 39-121.01, are public records that are presumed open

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[6] https://www.merriam-webster.com/dictionary/newsworthy

[7] *See, e.g.,* Katya Schwenk, *City, Phoenix Cops Negotiate New Contract in Secret Despite Calls for Transparency*, Phoenix New Times (Jan. 19, 2023), https://www.phoenixnewtimes.com/news/phoenix-police-union-open-negotiations-for-new-contract-in-secret-15292143; Matthew Casey, *Goldwater Institute, Poder in Action sue Phoenix Over Contract Talks with Police Union*, KJZZ 91.5 (Mar. 2, 2023), https://kjzz.org/content/1840333/goldwater-institute-poder-action-sue-phoenix-over-contract-talks-police-union.

[8] *See also*, Phoenix City Council Formal Meeting (Dec. 14, 2022), https://www.youtube.com/watch?v=9VCAwm6HvZY.

[9] *See* https://www.youtube.com/watch?v=htsoEwHIg68.

for disclosure—*unless a recognized exception applies*. *See* Compl. Ex. 8 (Jan. 5, 2023 email to City articulating the exceptions); Compl. Ex. 13 at 2 (Feb. 8, 2023 letter outlining the same). To confuse the issue, the City cites records of criminal investigation documents, sensitive and classified documents, and internal transaction memoranda as faux collateral damage. Resp. at 15. But each of these would implicate completely different interests and/or recognized exceptions to disclosure, such as privacy information, or records confidential by statute.[10] *See Scottsdale Unified*, 191 Ariz. at 300 ¶ 9 (1993). None of those *other,* limited exceptions apply here.

III. The City relies on distinguishable and nonbinding legal authority.

A. The meet and confer process is not analogous to procurement or hiring.

The City attempts to analogize the records requested in this case to records involving competitive bidding or hiring. This comparison fails.

During the public procurement process, a government entity typically uses a confidential bidding process for a specific product or service that any number of businesses that compete on the open market could provide. Under such a system, the threat of "collusion, price-fixing, or bid-rigging tactics" may very well be real. *Michaelis, Montanari & Johnson v. Superior Court*, 136 P.3d 194, 199 (Cal. 2006). The purpose of procurement is to get the best product or service at the best price to *protect the taxpaying public.* That is nothing like a City negotiating with public sector labor unions regarding the provision of law enforcement services. PLEA has a monopoly on providing law enforcement to the City. As the *exclusive* bargaining representative for Unit 4, PLEA does

[10] A list of records made confidential by statute (at least as of 2018) can be found in Chapter 6, Appendices 6.1 and 6.2 of the Arizona Agency Handbook. https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_6_corrected.pdf. Such records include certain pending **criminal investigation documents**, A.R.S. § 11-593(F) (information gathered by medical examiner in death investigation); A.R.S. § 13-2812 (grand jury testimony); A.R.S. § 13-2813 (indictment, information, or complaint prior to service), **sensitive Homeland Security reports**, A.R.S. § 41-4273(B) (critical infrastructure reports), and various forms of **privilege**, *e.g.*, A.R.S. §§ 12-2231–12-2240. The extensive nature of the list, some 22 pages, shows that the legislature knows how to make records confidential if desired. *See, e.g., Moorehead*, 130 Ariz. at 505.

not have to compete with *any other entity* in providing those services. There is no bid, no price competition, and no collusion with direct competitors regarding those services.[11]

The *ABOR v. Phoenix Newspapers, Inc.* case cited by the City too is inapt. There, the court found that disclosing the *identity* of prospective university president candidates—in other words, invading the privacy of private individuals who merely *could* become public employees—may negatively impact the university's ability to attract the best possible candidate to the position, and *only during the hiring process*. *See* 167 Ariz. 254, 258 (1991) (quoting *Carlson v. Pima Cnty.,* 141 Ariz. 487, 491 (1984)) ("The 'countervailing interests of confidentiality, **privacy, [and]** the best interest of the state [were, therefore,] appropriately invoked to prevent inspection….'" (emphasis added)). Similarly, the *Scottsdale Unified* case concerned teacher birth dates—quintessential personal privacy information. 191 Ariz. at 302 ¶ 17. No personal privacy interests are at stake in the requested records.[12] The identities of all relevant parties are already known or ascertainable, and the records do not contain individualized privacy concerns. That distinction matters because violations of privacy are often impossible to rectify. However, many of the purported harms allegedly feared by the City—if to occur at all—are remediable. Impasses can be broken. Employee morale can be raised. And MOU deficiencies can be addressed in subsequent rounds of negotiations.

B. The City's claimed harms in disclosure are belied by other states that not only open labor negotiation records to public review, but negotiations themselves.

The City claims that its interests will be harmed by providing the public written MOU proposals. But such harm has not been realized in the several other states that not only open such records to public review, but also allow the public to observe direct negotiations between labor and government negotiations. For example, Texas explicitly

[11] Unlike MOU proposals, competitive sealed bids and related records are made confidential by statute under the Arizona Procurement Code, making them ineligible for public disclosure not under the "best interests of the state" exception, but under the "confidential by statute" exception. *See, e.g.,* A.R.S. § 41-2533(D).

[12] Therefore, not only is the recognized privacy *exception* not at issue here, but privacy itself is not even an interest to be weighed.

requires transparent and open negotiations. Tex. Local Gov't Code § 174.108. Idaho likewise requires that "[a]ll negotiations between a governing body and a labor organization shall be in open session and shall be available for the public to attend," though the government body may go into executive session to deliberate internally on offers and counteroffers or to "receiv[e] information about a specific employee, when the information has a direct bearing on the issues being negotiated and a reasonable person would conclude that the release of that information would violate that employee's right to privacy." Idaho Stat. § 74-206A. *See also* Fla. Stat. § 447.605 (subjecting collective bargaining negotiations to state open meetings and public records laws, but exempting internal deliberations and work product); Iowa Stat. § 20.17(3) ("bargaining sessions" where parties present initial proposals are open to the public, as are arbitration hearings); Minn. Stat. § 179A.14(3) ("All negotiations … between public employers and public employees … are public meetings except when otherwise provided by the commissioner."); Tenn. Stat. § 8–44–201(a) ("[L]abor negotiations … shall be open to the public … ."); Colo. Stat. §§ 24-6-402(1)(a)(II), (4)(e)(II), (III), 22–32–109.4(4) (requiring school district collective bargaining negotiations to be open, but allowing closed strategy meetings); *Dickinson Educ. Ass'n v. Dickinson Pub. Sch. Dist.,* 252 N.W.2d 205, 212 (N.D. 1977) (subjecting teacher contract negotiations to open meetings law).

Again, the records at issue here do not involve internal deliberations or personal privacy information. And while the Arizona legislature allows governmental bodies to enter executive session for discussions with legal counsel, A.R.S. § 38-431.03(A)(4) or internal "[d]iscussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body," A.R.S. § 38-431.03(A)(5), the legislature has omitted such an express allowance for negotiations themselves, just as it has not exempted MOU drafts or proposals from the public records laws. If the legislature shared the City's concerns, they know how to address them in the public

records and open meetings laws; the fact that they have not done so calls into question the validity and strength of the City's asserted interests. *See, e.g., Moorehead*, 130 Ariz. at 505 (noting the lack of a statutory prohibition against disclosure of requested records and ordering disclosure).

Jurisdictions that make transparency the rule rather than the exception for union contract negotiations experience clear benefits for all parties. *See* Mercier and Vernuccio, *Collective Bargaining Transparency*, Better Cities Project.[13]

Sunshine increases public confidence in the negotiations, improves bargaining behavior, and respects our form of representative government. Secrecy does the opposite.

IV. The Court should enter judgment in favor of Plaintiff.

On the record before the Court, the City has utterly failed to meet its burden of proving that the "best interests of the state" outweighs the presumption in favor of disclosing records involving public expenditures and the operations of law enforcement services in the City.

Consequently, and because the remaining question is a legal one, the Court can decide this case on the existing record.[14] Given the public's significant interest in the records at issue, and the continuing public harm in withholding the records, GI respectfully requests an expeditious resolution. *See* Opening Brief at 12–13.

CONCLUSION

For the foregoing reasons, GI's requests for relief should be granted.

[13] https://better-cities.org/wp-content/uploads/2020/11/BCP-collective-bargaining-transparency-final.pdf.

[14] Should the Court determine that additional evidence is required to conduct the "best interests of the state" balancing test, GI respectfully requests that an evidentiary hearing be held concurrently with any oral argument on the petition.

RESPECTFULLY SUBMITTED this 24th day of April, 2023.

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 24th day of April, 2023, with a copy delivered via the ECF system to:

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