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

GOLDWATER INSTITUTE, Plaintiff/Petitioner, vs. CITY OF GLENDALE, et al., Defendants/Respondents.	Case No. CV2009-020757 **COMBINED MOTIONS TO: (1) COMPEL PRODUCTION OF SUBPOENAED FILE OF MICHELE IAFRATE;** **(2) COMPEL PRODUCTION OF PUBLIC RECORDS WITHHELD AT THE REQUEST OF THE CITY'S MARKETING DEPARTMENT;** **(3) APPROVE TIMELINE FOR PRIVILEGE LOG;** **and** **(4) DEFINE AND PROHIBIT PRODUCTION OF DUPLICATE RECORDS** *Hon. Arthur T. Anderson* *Special Master Hon. Robert D. Myers*

Plaintiff/Petitioner Goldwater Institute combines four disputes in a single motion for the convenience of the newly-appointed Special Master, and the Institute requests that the Special

Master hear the issues simultaneously to promote efficiency. The Institute first requests that the City be ordered not to interfere with compliance of a Subpoena for Documents served on Michele Iafrate, a non-employee witness offered by the City of Glendale for deposition testimony. Second, we request that the City be ordered to produce public records that have been withheld at the request of the City's marketing department, which has no legal basis to justify withholding public records. Third, we request that a four-month timeline be ordered for the Defendant/Respondent City of Glendale to comply with the superior court's order to resubmit a meaningful privilege log. Finally, we request that the City be ordered to accept the common and legal understanding of "duplicate records" in complying with the superior court orders and produce all required records exclusive of duplicates.

I. Subpoenaed File of Michele Iafrate

The Goldwater Institute noticed a Rule 30(b)(6) deposition of the City of Glendale to ascertain the City's compliance (or lack thereof) with court orders and Public Records Laws. Consistent with its prior practice of "ignoring" counsel (*see* Exh. 1), the City ignored our repeated requests to identify the witnesses it intended to produce for the deposition.[1] On September 7, 2011, the City produced Michele Iafrate to testify on its behalf. Ms. Iafrate is not the City's employee (Dep. Tr. (Exh. 2) 5:20-24) or its agent (Dep. Tr. 102:15-20), and she was never regarded as a "control person" for the City (Dep. Tr. 103:25 & 104:1-4). Although Ms.

[1] The City identified City Attorney Craig Tindall as one witness to testify on one matter noticed in the 30(b)(6) deposition, but refused to identify the other witness to testify on the other matters.

Iafrate is a licensed attorney (Dep. Tr. 9:8-12), she is not the City's attorney or legal representative in this action (*see* Dep. Tr. 13:4-7; 74:11-12; 85:3).

Ms. Iafrate testified that "This was my first involvement [in this action] when I was asked to get prepared for this deposition" (Dep. Tr. 13:7-8). The City's counsel asked her to be the City's Rule 30(b)(6) witness in this matter (Dep. Tr. 13:9-18), and the City paid her to testify (Dep. Tr. 17:3-5). Ms. Iafrate testified that she was "in the 30(b)(6) language" not an officer, director, or managing agent, but instead was the "other person that can be appointed to testify on behalf of the City" (Dep. Tr. 102:20-24). The only knowledge Ms. Iafrate possessed from the City in this case was gained from reviewing "portions" of the court record and discovery, reviewing public records laws, and interviewing City employees involved in the City's compliance procedures who did have firsthand knowledge of its procedures, practices and policies (Dep. Tr. 8:15-25 & 9:1-4).

The Arizona Court of Appeals has held that naming a 30(b)(6) witness with no prior knowledge or case-based relationship to the organization is not only improper, but in bad faith. *Groat v. Equity Amer. Ins. Co.*, 180 Ariz. 342, 347, 884 P.2d 228, 233 (App. 1994). In *Groat*, an insurance company designated a 30(b)(6) witness who was not an officer, director or managing agent of the company, did not make decisions for the company, and had no prior role in the particular case with the insured. *Id.*, 180 Ariz. at 345-46, 884 P.2d at 231-32. The City's designation of Ms. Iafrate here was equally as improper.

The City further exhibited bad faith by failing to instruct its witness to bring her case file to the deposition. Given that Ms. Iafrate could only testify as to matters she learned by

interviewing City employees with first-hand knowledge and reading records the City gave her for the purpose of giving testimony, it is no surprise that she was not able to recall information at the deposition – information that she could have testified to if she had brought her case file. She testified that she did not bring her file because she was not asked to:

> So in preparing for today's deposition, you did not review any of the communications that led to the communications in Exhibit 5?
>
> A. I don't know. I may have.
>
> Q. How would we ascertain whether you have?
>
> A. I guess you would ask me the question, and if I remembered, I would answer. . . . Or if you had done a subpoena duces tecum, I would have provided the documents to you.

(Dep. Tr. 152:3-13). Indeed, Ms. Iafrate argued in her testimony,

> you had the opportunity to ask me to bring documents. And no one ever asked me to bring documents. Therefore, that's why I didn't bring them. If you wanted to see them, you had the capability of asking for them

(Dep. Tr. 65:17-21). In fact, the Goldwater Institute did not have the "capability" of asking her for them because the City refused to tell us who she was before the deposition.

Perhaps for a good reason. Ms. Iafrate has a failing track record in the Arizona Court of Appeals for Public Records Laws. That court held that her client wrongfully denied access in eight separate public records requests (*Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 539-47, 177 P.3d 275, 281-89 (App. 2008)), and it also assessed attorneys' fees against her client for wrongfully withholding public records under claims of the state's best interests and attorney-client privilege (*Arpaio v. Citizen Publ. Co.*, 221 Ariz. 130, 211 P.3d 8 (App. 2008)).

Ms. Iafrate (and the City) are wrongfully obstructing access to documents again. Ms. Iafrate failed to produce documents in response to a Subpoena for Documents served on her. With no apparent standing as her personal attorney, and no legal basis whatsoever, the City's attorneys have asserted that the documents in her file are protected by attorney-client privilege and the work product privilege. Those assertions are groundless.

Privileges are narrowly construed, and the burden is on the party asserting the privilege (the City) to prove it exists. *Ariz. Indep. Redist. Comm'n v. Fields*, 206 Ariz. 130, 136, 75 P.3d 1088, 1094 (App. 2003); *State ex rel. Corbin v. Weaver*, 140 Ariz. 123, 129, 680 P.2d 833, 839 (App. 1984). When the client is a governmental entity, the attorney-client privilege is limited to a communication between the attorney for the entity and "any employee, agent or member of the entity." A.R.S. § 12-2234(B). The communication must regard "acts or omissions of or information obtained from the employee, agent or member," and it must be for the purpose of either (1) "providing legal advice to the entity . . . or to the employee, agent or member," or (2) "obtaining information in order to provide legal advice to the entity . . . or to the employee, agent or member." *Id.*

The City cannot meet the most basic element of an attorney-client communication, that is, an attorney and a client. There can be no attorney-client privileged information in Ms. Iafrate's file because Ms. Iafrate is neither attorney nor client. She is not the City's attorney by her own admission, nor is she an "employee, agent or member" of the City (A.R.S. § 12-2234(B)). She testified that she is not the City's employee, agent, or control person, but rather she is merely an "other person" offered to give testimony as a witness. Any communication in

Ms. Iafrate's file was either not an attorney-client communication at all, or else her access to the communication waived any privilege that may have existed.

The attorney-client privilege also does not apply because it serves no intended purpose, except the improper purpose of shielding relevant, discoverable information from the Goldwater Institute that we cannot access by other means. By contrast, "[t]he purpose of the attorney-client privilege is to encourage a client to confide in his or her attorney all the information necessary in order that the attorney may provide effective legal representation." *Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238, 1240 (1982). The attorney-client privilege "recognizes that sound legal advice . . . depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Here, Ms. Iafrate did not possess any information to confide in the City's attorneys for their purpose of providing the City legal representation. Ms. Iafrate acquired information from the City, for the sole purpose of giving deposition testimony. She was neither "providing legal advice" to the City, nor was she "obtaining information in order to provide legal advice" (A.R.S. § 12-2234(B)). She was a mere witness, and nothing in her file can be protected by the attorney-client privilege.

The work product privilege is likewise unavailable to protect any documents in Ms. Iafrate's file. First, Ms. Iafrate testified that her file contained no work product. Work product is "memoranda, briefs and writings prepared by counsel for his own use, as well as related writings which reflect an attorney's mental impressions, conclusions, opinions of legal theories prepared by the attorney in anticipation of litigation." *Zimmerman v. Superior Court*, 98 Ariz. 85, 88, 402 P.2d 212, 214 (1965) (internal quotations omitted). According to her testimony, Ms.

Iafrate received no such documents that reflect the City attorneys' legal conclusions or theories or confidential information (*e.g.*, Dep. Tr. 34:13-22; 55:4-10; 57:9-12; 85:4-6).

Even if Ms. Iafrate's file contained documents that could have been protected as work product, the City waived that protection by sharing them with her and then choosing to present her as a testifying witness. Sharing work product with a *non-testifying* consultant may not waive the privilege – for attorneys may confidentially share work product with outside colleagues, experts, and others in furtherance of effective legal representation. But once the City elected to offer Ms. Iafrate as a witness to provide testimony, the City waived any privilege. *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 193, 777 P.2d 686, 691 (1989) ("If defendants elect to present Scott as a witness, the work product doctrine will no longer provide the protection"). Ms. Iafrate acted much like an investigator, attempting to acquire knowledge from the City for the purpose of testifying on the City's behalf. The City's attorneys could have retained her to confidentially conduct interviews and investigations to prepare the attorneys' legal defense. But the City, "by electing to present the investigator as a witness, waived the privilege" of work product. *United States v. Nobles*, 422 U.S. 225, 239 (1975).

Because Ms. Iafrate is neither attorney nor client and did not acquire any work product, nothing in her file is privileged. Even if documents in her file could have enjoyed a privilege, the City waived that privilege by sharing them with Ms. Iafrate and then offering her to testify as a witness. Privileges are construed narrowly, and the City cannot meet its burden to prove that they protect Ms. Iafrate's file. The Goldwater Institute requests that the City be ordered not to obstruct the Institute's access to the subpoenaed file.

II. Role of the City's Marketing Department

In response to the Institute's Subpoena, Ms. Iafrate produced Exh. 3. The notes appear to document Ms. Iafrate's interviews with City officials with first-hand knowledge of the City's compliance with court orders and public records requests (often abbreviated PRR). The notes appear to document the City's steps for complying, including "submit prr to Nick," "christina [sic] Parry redacts," "Wells reviews the redactions," and so on (*id.*, pp. I&A0455-56). Among the steps in Ms. Iaftrate's notes are:

> call mktg to review docs (for political sensitivity)
> has happened in Goldwater that mktg request some docs be removed

Withholding public records "for political sensitivity" is not authorized.

In *Dunwell v. Univ. of Ariz.*, 134 Ariz. 504, 508, 657 P.2d 917, 921 (App. 1982), the court affirmed that the university could not withhold records of a football team's slush fund as "damage control" to avoid "embarrassing questions." City records are presumed open unless the City meets the burden to demonstrate either privacy, confidentiality, or a specific, material harm sufficient to overcome the public's interest in disclosure. *Carlson v. Pima County*, 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984); *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984). The City's marketing department has no legal grounds to request that the City withhold public records, and review by marketing before "Nick notifies goldwater that they can pick up docs" (Exh. 3, p. I&A0456) appears to merely delay the Goldwater Institute's "prompt" access to records in violation of the law. A.R.S. § 39-121.01(D)(1).

The Goldwater Institute requests that the City immediately disclose all records that were withheld at the request of its marketing department, and order the City to prohibit a review by marketing from delaying the City's production of public records. Alternatively, the Institute requests that the City immediately identify and properly log those records and offer an adequate legal basis to overcome the presumption of disclosure that is sufficient to permit the Institute to challenge it as warranted.

III. Timeline for Resubmitting a Meaningful Privilege Log

On August 15, 2011, Hon. Arthur Anderson agreed with the Goldwater Institute's complaint that the City's privilege log was insufficient. Judge Anderson ordered the City to "resubmit the privilege log providing appropriate, meaningful description that captures the subject matter of each document. The revised privilege log shall be drafted in chronological order and separate by category as to why it should not be disclosed, e.g. work product or attorney/client privilege" (*see* Exh. 4, p. 1). Upon the Goldwater Institute's request, Judge Anderson further ordered the City to "provide a time frame in which the privilege log will be completed." After multiple inquiries by the Goldwater Institute over a month-long period, the City finally offered a time frame. However, it suggested resubmitting the log over an extremely protracted period of two years and two months, not beginning until November 1. This case – filed barely two years ago – involves no documents older than May of 2009 and presents no circumstances of which the Goldwater Institute is aware to justify such an unusually protracted time to revise a routine privilege log.

The City represented that there are approximately 13,000 pages to re-log, and that it could re-log 500 pages per month. The City represented this process would take five minutes per page, and that it would not re-log any pages before November 1, 2011 (two and one-half months after Judge Anderson's order). This time period is unreasonably excessive. Attorneys at the Goldwater Institute consulted internally and with an outside local class action attorney and outside public records law attorney. All agreed that a 13,000-page privilege log should not take over two years to create anew – let alone to merely revise. Instead, it typically takes less than one minute to properly log a new document with a full page of text that is completely unfamiliar. At this rate, it is generous for the City to resubmit a meaningful privilege log within four months. We request that it be ordered to do so. We further request that incremental resubmissions over those four months be provided in reverse chronological order. Even this time is generous for the City to provide a meaningful privilege log with sufficient descriptions that the City should have provided the first time around.

IV. Production of "Duplicate" Records

We also request that a dispute between the Goldwater Institute and the City be resolved with respect to the production of duplicate records. Specifically, we request that the City be ordered not to force the Goldwater Institute to bear the expense of viewing duplicate records. Multiple court orders require the City to provide access to requested public records on a continuing basis. Under Arizona Public Records Laws, cities may charge a reasonable fee for the cost of producing copies upon request; otherwise, the requestor may view public records inside city offices during city hours at no charge. A.R.S. § 39-121.01(D)(1); *Media Amer. Corp.*

v. Phoenix Police Dep't, 1993 WL 540485 at *2 (Ariz. Super. Aug. 10, 1993). In this case, the City has typically notified the Goldwater Institute via email when requested public records are available, and the Institute has either paid the City's demanded rate of $0.20 per page for copies or scheduled a time(s) for the Institute's legal staff to visit city offices during city hours to view records.

The City has indicated on multiple occasions that duplicate documents may have been released to us on previous occasions in connection with this action. For example, the City indicated that documents are sometimes "revisited or shared with new individuals" at the City, and it is "easier and safer" for the City to disclose them to us again. Most recently, the City indicated that of 1,324 pages of documents available on September 13, 2011, "many of these documents have been previously released" but are made available again, despite that they "may be duplicative of previously released documents."

The City demands that the Goldwater Institute bear the costs of not only our time to re-read potentially duplicative documents, but also the cost of either $264.80 for copies or 20-miles of daily roundtrip travel for review at the City. The Institute bore these costs in the past in an effort to be accommodating and ensure our access to records as "promptly" as possible, which is what Arizona Public Records Law requires. A.R.S. § 39-121.01(D)(1). The City has abused us long enough. It is unreasonable, overly burdensome, and unprofessional for the City to offer 1,324 pages of documents that we may have already read, and paid for, each time a City officer "revisits" a document or walks it down the hall to "share" it with his colleague. This process is akin to a party providing thousands of pages pursuant to Rule 26.1 disclosures one day, and

providing thousands more pages "many" of which were already provided, in Supplemental Rule 26.1 disclosures the next day – a very definition of the "document dumping" that is neither permitted under the rules of procedure nor those for professional conduct. And worse here, the City demands that the Institute also bear the expenses of its document dumping in the costs of copies or travel to access. We request that the City be ordered not to continue requiring the Goldwater Institute to bear the costs and time to access records that we have already born the cost and time to review previously.

We also request that the City accept a standard definition of "duplicate documents." Over the course of attempting to resolve the dispute over duplicative records, the City offered the following additional examples of "duplicates," which are clearly not duplicates:

1. Email strings. A sends an email to B; then B responds to or forwards to C. A's initial email is disclosed. B's response includes A's email (duplicate); B forwards to C (another duplicate).

2. Email Attachments. Documents may be disclosed and then the same documents (duplicates) may be attached to emails later exchanged among various individuals.

No basic understanding of public records or legal disclosure requirements would identify (1) email strings or (2) email attachments as duplicates in the City's illustrations. They are unquestionably different documents. We request that the City be ordered to accept this basic understanding of document production and produce all the required records, exclusive of truly "duplicate" documents.

V. Request for Fees and Costs

The Goldwater Institute requests that the City be ordered to bear the fees and costs of resolving these disputes. The City's production of Ms. Iafrate as an outside testifying witness, and without first identifying her, was improper, and its obstruction of a Subpoena served on Ms. Iafrate is inappropriate and without legal basis. The City's review and withholding of documents for "political sensitivity" is out of line with Arizona's Public Records Law and the presumption of disclosure. The City's proposed timeline for resubmitting the privilege log it should have submitted initially pursuant to normal litigation practice was unreasonable, non-negotiable, and not in good faith. Finally, the City's definition of "duplicate records" is out of line with the definition under the most basic litigation and public records practices, and its insistence that the Goldwater Institute bear the significant time and costs of its "easier" document-dumping practices is unprofessional. The Institute requests that the Special Master consider these matters simultaneously as efficiency may require.

RESPECTFULLY SUBMITTED this 25th day of October, 2011 by:

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