

CV 2009-020757  
Goldwater v. Glendale

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MICHAEL K. JEANES, Clerk  
By L. Nixon  
L. Nixon, Deputy

Goldwater Institute v. City of Glendale CV 2009-020757

**Special Master Report #1 – December 22, 2011**

The Special Master (hereinafter “Master”) has carefully reviewed Goldwater Institute’s (hereinafter “Goldwater”) Combined Motions, City of Glendale’s (hereinafter “Glendale” or “City”) Response and Goldwater’s Reply. Master has also heard extended oral argument on these motions on December 19, 2011 with counsel for Plaintiffs and counsel for Defendant. The written documents comprised 32 pages of authorities and argument and 33 exhibits, some of which were many pages in length. It is clear that the parties and some of their lawyers are extremely confrontational and have not treated each other with civility. I could, but need not at this time, assess “blame” to or identify the most offending party but if all the lawyers do not refrain from inappropriate conduct or language, I will do so and assess not only blame but sanctions, fees and costs. At oral argument, I implored counsel to try to resolve their differences without incivility. I also requested that each side give me a recommendation, in 5 pages or less, advising me what further discovery needs to be done and what, if any, discovery motions are ripe for ruling – this shall be completed within 15 days from the date of this Order.

My Rulings and Orders are as follows and I start with the legal admonition learned by every first year law student that: “Justice delayed is justice denied”. This case must be concluded in a reasonable amount of time and so far, it does not appear that much has been accomplished when left to the lawyers own efforts:

**1. Compel Production of the file of Michele Iafrate:**

Ms. Iafrate, a lawyer, apparently with special expertise in Public Records law matters, was hired specifically by Glendale, not as counsel (although she had been hired by Glendale on other occasions as counsel in Public Records cases) but as the designated

person to testify on Glendale's behalf pursuant to Goldwater's subpoena for a 30(b)(6) A.R.Civ.P., deposition. Ms. Iafrate interviewed various employees, examined numerous documents and, apparently without reasonable advance notice, Glendale produced her identity on or shortly before the date the deposition was to be taken to "respond" for the City at the deposition. Counsel for the City referred to her as a "contract employee" but it seems to me that this is a *non sequitur*. She must either be an employee or an independent contractor.

Glendale does not deny that it has not given up Ms. Iafrate's entire file. Furthermore the portions of her lengthy deposition which were provided to me indicate that she was evasive in many of her answers that some objections made by Glendale's counsel were in violation of the discovery rules and that no reasonable and proper notice of her appearance was given prior to her deposition. Glendale denies that Ms. Iafrate was hired to "investigate" the case but Ms. Iafrate herself states that that is at least part of the reason she was retained. She denies that she was an "agent" of the City but calls herself the "other person that can be appointed to testify on behalf of the City of Glendale as it relates to the procedures regarding public records requests" and that she "tried to steer clear of any legal analysis or conclusion". I am not unmindful of the Arizona law on these issues, such as *American Family Mutual Insurance v. Grant*, 222 Ariz 507, 217 P.3d 1212 (App. 2009). But I note Judge Anderson's previous rulings (see Order of August 15, 2011) in this case which have never been complied with by Glendale.

I conclude that she was clearly hired by the City as a non-lawyer "expert" and as such her entire file, including billing and records for payment of her services which she has or will bill or collected and every discussion she had with any City employee or counsel is

subject to discovery. It is Ordered that the City comply within 15 days of the date of this Order by delivering these documents to Goldwater.

Furthermore, there is evidence in the record submitted to me, including an e-mail dated May 11, 2011, which indicate that the City's conduct in avoiding reasonable requests for deposition dates, and production of documents subject to the Public Records laws and rules of discovery has been intentional. The City shall provide Goldwater with a list of each employee who Ms. Iafrate interviewed shall be provided within 15 days from the date of this Order and shall include the witnesses' professional address, job title and meaningful brief description of the type of work performed for the City.

It is further Ordered that Goldwater may retake the deposition of Ms. Iafrate upon reasonable notice after all the documents mentioned above are produced and that the City shall pay the costs of an additional deposition including Ms. Iafrate's fees and the court reporter's fees and transcript for Goldwater. Hopefully, the parties will start reasonably collaborating for dates for all depositions. If the objections of counsel do not conform to the Rules the deposition shall be terminated and a new date will be set at my convenience and I will sit in on the depositions to enforce the Rules. All future disclosure of documents which deponents may reasonably rely upon or have relied upon shall be provided in a reasonably timely manner so as to give deposing counsel an opportunity to be prepared. Furthermore, at Goldwater's request, any additional employees may be deposed as 30(b)(6) witnesses based upon the list provided above.

The City shall provide 30(b)(6) witnesses in accordance with that Rule, i.e., "The person so designated shall testify as to matters known or reasonably available to the

organization.” And they shall be an “officer, director or managing agent or other person” as provided in the rule and not a person hired specially to testify as a 30(b)(6) witness.

**2. Compel Production of Public Records Withheld at the request of the City’s Marketing Department.**

During oral argument the City indicated that there were no documents withheld at the request of the Marketing Department notwithstanding that Ms. Iafrate’s notes state, in part: “call mktg to review docs (for political sensitivity)” and “has happened in Goldwater that mktg request some docs be removed.”. It is ordered that if any documents were “removed” and not conveyed because they were politically sensitive or at the request of the Marketing Department, they do not fall within any legal exception to the Public Records laws and shall be turned over to Goldwater within 15 days from the date of this order. Furthermore these documents shall be identified even if they were not removed and have already been turned over to Goldwater. The Marketing Department shall have no role in determining the City’s production of public records unless there is some legal basis for non-disclosure, as determined by counsel

**3. Approve Timeline For Privilege Log and 4. Define And Prohibit Production of Duplicate Records.**

The parties’ views of what is a reasonable timeline for submission are very disparate. Goldwater wants 4 months and Glendale wants 2+ years. The City complains that they have no budgeted funds in the legal department for this extraordinary case. However, the Defendant in this case is not the legal department but rather the City of Glendale and it is the City’s budget that will be impacted. Certainly I am not unmindful of the burdens of

municipal funding but this case needs to be attended to and concluded in a reasonable amount of time. During oral argument, Glendale suggested that this is a case about litigation and beating the City into submission, to be “as disruptive as possible to Glendale’s operations”, that Goldwater has an “illicit agenda” and that Goldwater pursuit of this case is not about responses to Public Record requests. I suggested that if this were factually and legally so, Glendale should file a Motion to Dismiss the case. There was no response to that suggestion that I recall. If there is evidence of bad intent, Glendale should bring it to the Court’s attention. I find no evidence of it in the matters that I have become familiar with herein. If this case is meritless, there are legal processes available for that determination by the Court.

Goldwater has requested that the because of the duplication that the City has imposed on the release of documents to date and the Order of Judge Anderson on August 15, 4 months is reasonable for completion of a privilege log. Glendale, at oral argument requested two years to comply with Judge Anderson’s Order. His order stated, in part:

Defense counsel shall review all claimed privilege log documentation and 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 separated by category as to why it should not be disclosed....Counsel shall provide a time frame in which the privilege log will be completed.

Furthermore Glendale complains that Judge Burke ordered that “only limited discovery” is necessary in this case. Actually, he said in his June 28<sup>th</sup> Order that this case “requires the limited discovery requested by Goldwater.” Obviously Judge Anderson agrees with

that principle and as Goldwater points out, no document older than May of 2009 is requested.

Goldwater has suggested that Glendale has not complied with that order and the City does not appear to disagree. Goldwater has suggested that the privilege log be created in reverse chronological order, and complains that not all of the documents have been Bates stamped and some of the Bates lettering is different with no explanation. Goldwater also complains that they have been given duplicate records with no explanation. Glendale denied none of these allegations at oral argument.

I therefore order that:

- A. The privilege log shall be in reverse chronological order commencing on November 31 and working backward.
- B. There shall either be no duplication at all provided by Glendale or if it is necessary, such as a string of e-mails, it shall be noted. It is much easier and more economical for Glendale to do this and one would surmise that the City itself would want to be aware of precisely what documents have been provided, including duplicates.
- C. Glendale shall complete the log ordered by Judge Anderson within 6 months from the date of this order. And shall add those last 6 months of logs on a monthly basis so that at the end of 6 months, the log will be complete to that final date.
- D. The log and documents shall be numbered and Bates stamped in a logical consecutive order with no confusing letters. There shall be no re-production of

documents that are revisited or shared with new individuals unless accompanied by a clear notation that this is being done and the reasons for it.

- E. On a continuing and regular basis the logs shall be submitted to the Master and, if necessary, objections or motions shall be presented pursuant to the Rules of Civil Procedure and Local Rules of Practice.
- F. No further order is being made relative to costs, fees and sanctions at this time but if there is further confrontational, uncivil or wrongful conduct by the parties or counsel, they will be ordered.

Dated this 22<sup>nd</sup> day of December, 2011

By Judge Robert D. Myers