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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, a municipal
corporation, and PAM HANNA, in her
official capacity as City Clerk for the City
of Glendale,

Defendants/Respondents.

Case No. CV2009-020757

**RESPONSE TO GLENDALE'S
MOTION FOR *IN CAMERA*
INSPECTION AND PROTECTIVE
ORDER**

Hon. Edward O. Burke

This Court ordered Respondent City of Glendale to produce public records "including, but not limited to, any such documentation which evidences concessions made and incentives proposed to be given" to potential new owners of the Phoenix Coyotes hockey team (order at No. 2). In its motion, the City requests that the Court not deem the production of documents to be evidence of concessions or incentives. Petitioner Goldwater Institute does not believe that the City's production would be construed as evidence of concessions or incentives, but we do not object to the Court's stating this.

The City also requests further delay of disclosure or, alternatively, the permanent withholding of the requested public records based on another judge's order in another case on a different subject matter than this public records lawsuit. The scope of that order and Arizona public records law compel the City's immediate response to the Goldwater Institute's now month old request for the following reasons.

Discussion

I. Judge Baum's order in the bankruptcy proceedings.

The City asserts that Judge Baum's order regarding the exchange and use of information in the bankruptcy proceedings and this Court's order mandating the City's disclosure of public records present conflicting duties. That is entirely false. Judge Baum's order governs only documents and discovery materials "produced pursuant to any mandatory disclosure obligations or in response to any formal or informal discovery requests in these [bankruptcy] proceedings," particularly documents "produced pursuant to Rules 26, 34 or 45 of the Federal Rules of Civil Procedure and Rules 2004, 9014 and 1018 of the Federal Rules of Bankruptcy Procedure, 2004 examination, [and] deposition and/or trial transcripts" (City's Mot., Exh. A at ¶ 2). By contrast, the Institute's request for documents is under Arizona public records law. There are no discovery requirements, nor was the Institute's request made in the bankruptcy proceedings.

Judge Baum's order was expressly "entered solely for the purpose of facilitating the exchange of documents and information among parties to this proceeding without involving the Court unnecessarily in the process" (City's Mot., Exh. A at ¶ 20). The Goldwater Institute is not a party to the bankruptcy proceedings, and it is not appropriate for the Institute, or presumably

the City, to attempt to unnecessarily involve Judge Baum in the matter before this Court. Thus, there is nothing in Judge Baum's order that conflicts with the City's duties imposed by this Court.

Additionally, nothing in Judge Baum's order "shall be construed as limiting in any way a party's use of its own Confidential or Highly Confidential Information" (City's Mot., Exh. A at ¶ 16). The Goldwater Institute's public records request is for the City's own information. Therefore, even under Judge Baum's order, there is no requirement, as the City (Mot. p. 2) asserts, to obtain "the various bidders' consent" to release any of the requested records. Judge Baum's order relates to consent of the *producing* party—who in this case is the City. We request only records of City negotiations with new potential owners, not as the City (Mot. p. 2) characterizes it, "all bid-related documents." To the extent the City *receives* documents from bidders through the discovery process in connection with the bankruptcy proceedings, we do not consider those documents independently encompassed in our public records request for City documents except insofar as they evidence requests for or negotiations over City subsidies, incentives, or concessions. *Contrast* City's Mot. p. 2 (referring to confidentiality of "all of [bidders'] bid-related documents furnished in connection with the bankruptcy proceedings"). Thus, no outside consent is necessary or appropriate for the City to comply with this Court's order of disclosure.

Judge Baum's order limits *his involvement* regarding *discovery rules* in the *bankruptcy proceeding* and sets terms for releasing information with the consent of the *producing* party. For all these reasons, Judge Baum's order on its face has no bearing on the public records

lawsuit before this Court. Beyond those facts, discovery rules do not apply for public records requests under Arizona law. *Lake v. City of Phoenix*, ___ Ariz. at ¶ 17, 207 P.3d 725, 732 (App. 2009). Additionally, a person's desire for City records to remain confidential, or even an agreement or promise of confidentiality by the government, is not controlling under the disclosure mandates of Arizona public records law. *Moorehead v. Arnold*, 130 Ariz. 503, 505, 637 P.2d 305, 307 (App. 1981) (ordering the disclosure of names in public records despite a city's promise of confidentiality, and further holding that breach of a promise of confidentiality "is not a sufficient harm to the public interest to prevent disclosure").

II. The City's Lack of Good Faith.

The City (Mot. p. 2) asserts that its request to further delay or withhold disclosure because of Judge Baum's order is made in "good faith." By the language of Judge Baum's order as discussed above, it is clear that disclosure of public records to the Goldwater Institute pursuant to this Court's order does not even questionably "violate" Judge Baum's bankruptcy order (*see* City's Mot. p. 3). The City's motion, in an attempt to further delay and protract the matters in this case, evidences a continuing pattern of bad faith. That behavior began when the City categorically and repeatedly refused to disclose any of the requested public records and provided conflicting reasons not grounded in the law (*see* Exh. 1). After the Institute filed this lawsuit to compel disclosure, the City assured us and this Court that it suddenly intended to produce some records (Tr. pp. 29-30 & 33-34) (Exh. 2).¹ Yet even after statements that the

¹ The City also wavered in its position on providing records on an ongoing basis. *Contrast* the City's initial response (Exh. 1) (refusing ongoing disclosure), *with* admissions at the Order to Show Cause hearing (Tr. pp. 28-33) (Exh. 2) (admitting that it fully intended to comply with

City's attorney had records "in my office now," the City delayed another two weeks before making those records available. When the City finally did disclose some documents, it redacted nonproprietary financial information that it had previously disclosed publicly without redactions in the bankruptcy proceedings. *Compare* the redactions in records produced to the Goldwater Institute on July 16, 2009 (Exh. 3) *with* the un-redacted information disclosed by the City on June 5, 2009 in a bankruptcy filing (Exh. 4).

At least two documents confirm that the requested records exist,² yet nearly all of the 177 pages the City has disclosed to us thus far are unresponsive to our request for records of City negotiations from May 11, 2009. The disclosed records consist predominantly of redacted records of financial information about the hockey team, newspaper articles relating to the team, public records requests filed by various members of the media, records outside of the requested time period, and other unresponsive records. None of the records produced to date reflect the content of any negotiations between the City and potential bidders, even though documents refer to such negotiations and such records are the entire point of our public records request.

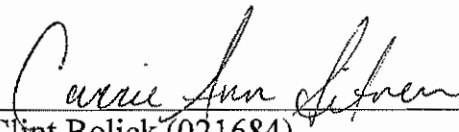
The City's attempt to further delay and prevent disclosure should not be permitted. Up to \$20 million annually could be at stake for Glendale taxpayers, and it is imperative that we have immediate access to the public records so that we can take any necessary steps over the rapidly

ongoing disclosure) *with* the arguments in the written Brief on Order to Show Cause (p. 3) (again arguing against ongoing disclosure).

² See Exh. 5 (email from attorney for potential bidder Jerry Reinsdorf to City Manager Ed Beasley, City Attorney Craig Tindall, and others requesting a conference call on July 7, 2009 "to see if our group has a deal with the City"); Exh. 6 (similar email on July 21, 2009); *see also* Exh. 7 (City admitting in a bankruptcy filing to ongoing negotiations with Reinsdorf).

passing days to protect the taxpayers' interests and uphold the anti-subsidy provisions of the Arizona Constitution, particularly given that the deadline to file objections in the bankruptcy proceeding is this Friday, July 31, 2009. Petitioner still has no idea what, if anything, is on the table by way of incentives due to the City's persistent evasive tactics.

RESPECTFULLY SUBMITTED this 27th day of July, 2009 by:



Clint Bolick (021684)

Carrie Ann Sitren (025760)

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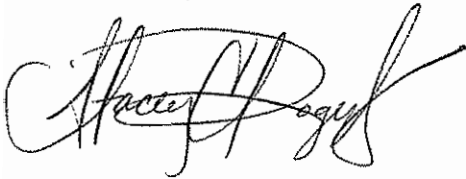
Clerk of Court
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, AZ 85003

COPY of the foregoing HAND-DELIVERED this 27th day of July, 2009 to:

Hon. Edward O. Burke
Maricopa County Superior Court
125 West Washington Street
Phoenix, AZ 85003

COPY of the foregoing MAILED AND E-MAILED this 27th day of July, 2009 to:

Nicholas C. DiPiazza
City Attorney's Office
5850 W. Glendale Ave., Ste. 450
Glendale, AZ 85301
Attorney for Defendants

A handwritten signature in black ink, appearing to read "Nicholas C. DiPiazza", with a stylized flourish at the end.