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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. D. DOUGLAS METCALF

CASE NO. C20141225

DATE: December 11, 2014

BEAU HODAI
Plaintiff

VS.

THE CITY OF TUCSON and
TUCSON POLICE DEPARTMENT
Defendants

R U L I N G

IN CHAMBERS RULING RE PLAINTIFF'S REQUEST FOR PUBLIC RECORDS

Plaintiff, Beau Hodai, an investigative reporter, seeks the Court's order compelling the City of Tucson to produce records under Arizona's public records law, A.R.S. § 39-121 *et seq.* The City has produced some records to Mr. Hodai, withheld others and provided them to the Court for its *in camera* inspection, and not responded to certain requests for records.

Arizona's public records law provides that: "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. Arizona's public records law further provides that: "[a]ny person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours …." A.R.S. § 39-121.01(D)(1).

"Arizona's public records law serves to open government activity to public scrutiny." *Lake v. City of Phoenix,* 222 Ariz. 547, 550, ¶ 7, 218 P.3d 1004 (2009). "The core purpose of the public records law is to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees." *Phoenix Newspapers, Inc. v. Keegan,* 201 Ariz. 344, 351, ¶ 33, 35 P.3d 105 (App. 2001).

Not all records maintained by public officers are subject to public inspection. When the public officer shows that access to the public records "might lead to substantial and irreparable private or public harm" or that a "countervailing interest[] of confidentiality, privacy or the best interests of the state" exists, then the records

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are not subject to public inspection. *Carlson v. Pima County,* 141 Ariz. 487, 491, 687 P.2d 1242 (1984). "This '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." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. at 348-349, ¶18.

The public officer has the burden of proving this countervailing interest. *Cox Ariz. Pub., Inc. v. Collins,* 175 Ariz. 11, 14, 852 P.2d 1194 (1993) ("It [is] incumbent upon [the public officer] to specifically demonstrate how production of the documents would violate rights of privacy or confidentiality, or would be 'detrimental to the best interests of the state.'"). This requires a particularized showing of harm. *Mitchell v. Superior Court,* 142 Ariz. 332, 335, 690 P.2d 51 (1984) ("The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access.").

If the public officer comes forward with a countervailing interest against disclosure, that countervailing interest must be weighed against the importance of the specific public interest in disclosure. *Scottsdale Unified School Dist. v. KPNX Broadcasting Co.*, 191 Ariz. 297, 303, ¶¶ 22-25, 955 P.2d 534 (1998); *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. at 351, ¶ 30 ("The specific public interest in disclosure must be weighed in balancing that interest against the State's asserted harm.").

A person who has requested production of public records from an officer "and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." A.R.S. § 39-121.02(A).

In this case, Plaintiff has presented two issues for the Court to decide. The first issue is whether the City has properly withheld records responsive to Plaintiff's public records request based on the best interests of the state. The second issue is whether the City has failed to fully respond to Plaintiff's request for public records.

1. *Did The City Properly Withhold Records Responsive To Plaintiff's Public Records Request*?

On October 11, 2013, Plaintiff made a written request to the Tucson Police Department Public Information Officer for records concerning "Stingray" or "Stingray II" cell phone tracking equipment for the time period January, 2010 to October 11, 2013. Plaintiff also requested records pertaining to Harris Corporation. Plaintiff explained in his request that Harris Corporation manufactures the "Stingray" and "Stingray II" cell phone tracking systems.

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The City has located records that are responsive to Plaintiff's October 11, 2013 public records request. The City has produced some of the records but is withholding others on the ground that production is not in the best interests of the state. The City submitted the withheld records to the Court for its *in camera* review and filed an index describing the withheld records and why it is withholding them. The Court has reviewed the records submitted *in camera*. These records, and the reasons the City is withholding them, are as follows.

(1) Quick Reference Sheets. These records are instructions on how to use the cell phone tracking equipment. The City is withholding these records on the ground that "releasing this information would compromise sensitive law enforcement techniques and national security interests by making the technology available to criminals. Even small bits of information concerning the operation and specifications for this technology can be pieced together to create a body of information that allows the technology to be defeated by criminals and others seeking to do harm."

(2) Data Dump Exemplar From TPD Case Ordered Not Disclosed. These records consist of a print out of data from cell tracking equipment concerning the ongoing criminal investigation that the Court previously ordered was not subject to inspection due to the sensitive nature of that criminal investigation. For the reasons previously stated on the record, the Court will not order the release of these records.

(3) Training and Protocol Materials Created by TPD. These records include an equipment worksheet and a PowerPoint presentation that explains how the cell tracking equipment works. The City is withholding these records on the ground that "disclosure to the public would compromise the effectiveness and use of this technology by both local and federal law enforcement agencies. Disclosure of such information will also educate persons on how to employ such techniques themselves or undermine the effectiveness of the technology. The City believes that the release of these items would effectively educate the public about how this surveillance technology works and is used, and consequently how it can be defeated. If these documents are disclosed, the public will have access to tactical government surveillance information that could compromise not only local law enforcement efforts but also national security efforts."

The City has also filed a sworn statement from Bradley S. Morrison, who is a supervisory special agent with the Federal Bureau of Investigation, assigned as the Chief, Tracking Technology Unit, Operational Technology Division, in Quantico, Virginia.

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Agent Morrison explains that the FBI considers information concerning cell site simulators to be exempt from the federal Freedom of Information Act, 5 U.S.C. § 552, under exemption 7(E), 5 U.S.C. § 552(b)(7)(E).[1] According to Agent Morrison, this would include operational details such as how, when, where, and under what circumstances the FBI uses cell site simulators, and technical details, such as the particular technology and equipment that the FBI uses.

Agent Morrison explains that "[d]isclosure of even minor details about the use of cell site simulators may reveal more information than their apparent insignificance suggests because, much like a jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself. Thus, disclosure of what appears to be innocuous information about the use of cell site simulators would provide adversaries with critical information about the capabilities, limitations, and circumstances of their use, and would allow those adversaries to accumulate information and draw conclusions about the use and technical capabilities of this technology. In turn, this would provide them the information necessary to develop defensive technology, modify their behaviors, and otherwise take countermeasures designed to thwart the use of this technology. Doing so would thus allow them to evade detection by law enforcement and circumvent the law."

Agent Morrison further explains that "discussion of the capabilities and use of the equipment in court would allow criminal defendants, criminal enterprises, or foreign powers, should they gain access to the items, to determine the FBI's techniques, procedures, limitations, and capabilities in this area. This knowledge could easily lead to development and employment of countermeasures to FBI tools and investigative techniques by subjects of investigations and completely disarm law enforcement's ability to obtain technology-based surveillance data in criminal investigations. This, in turn, could completely prevent the successful prosecution of a wide variety of criminal cases involving terrorism, kidnappings, murder, and other conspiracies where cellular location is frequently used."

Agent Morrison further explains that investigative tools such as the cell site simulator equipment "used in criminal cases are often used in counterterrorism and counterintelligence investigations. Thus, the

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[1] 5 U.S.C. § 552(b)(7)(E) provides: "This section does not apply to matters that are … records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

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compromise of the law enforcement community's investigational tools and methods in a criminal case or public records disclosure could have a significant detrimental impact on the national security of the United States."

Plaintiff has not controverted Agent Morrison's sworn statements. Nor did Plaintiff request an evidentiary hearing as to Agent Morrison's statements. Consequently, the Court will consider Agent Morrison's factual statements without the need to hold an evidentiary hearing.

Agent Morrison also raised legal arguments in his statement that the cell site simulator technology used by state and local law enforcement remains under the control of the FBI under 6 U.S.C. § 482 and is subject to the non-disclosure provisions of the International Traffic In Arms Regulations, 22 C.F.R. Parts 120-130. The Court will not consider these legal arguments as neither the FBI, the U.S. Department of Justice, nor the United States has sought to intervene as a party in this matter. Because the FBI agent is a witness, not a party, he cannot raise legal arguments in this proceeding.

The City has invoked the common law "best interests of the state" exception to justify not producing these records. Because the records concern the use of a technology that is used not only by TPD, but by law enforcement authorities throughout the United States, the Court must consider how disclosure of these records could affect the interests of those law enforcement agencies and the public they serve.

As Agent Morrison explained, disclosure of how this cell site simulator equipment works, or even bits of information about it, and how law enforcement uses this technology in criminal investigations, could jeopardize its use in future investigations. Persons engaged in criminal activity who seek to avoid detection may alter their behavior based on the disclosure of how this technology works.

Moreover, the Court finds that the withheld records are subject to a qualified privilege to not disclose sensitive law enforcement investigative techniques. This privilege has been recognized by several courts, including the Eleventh Circuit in *United States v. Van Horn*, 789 F.2d 1492, 1507-08 (11th Cir. 1986) ("We recognize a qualified government privilege not to disclose sensitive investigative techniques."). The Eleventh Circuit's reasoned that "[d]isclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance. Electronic surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised. Disclosure of such information will also educate persons on how to employ such techniques themselves, in violation of Title III."[2] *Id*. at 1508. The privilege not to disclose sensitive

[2] "Title III" is Title III of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520.

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investigative techniques is a qualified one, which can be overcome by a defendant's need for the information. *Id.*

While our Supreme Court has not had the occasion to address the privilege identified in *United States v. Van Horn*, it has recognized a privilege against disclosure of a confidential informant on the ground that "non-disclosure of a confidential informant is [in] the furtherance and protection of the public interest in effective law enforcement." *State v. Tisnado*, 105 Ariz. 23, 24, 458 P.2d 957 (1969). Thus, our Supreme Court has recognized the need not to disclose certain criminal investigative techniques when doing so could undermine effective law enforcement. This is consistent with the qualified privilege the Eleventh Circuit recognized in *United States v. Van Horn*.

The City's interest in not disclosing these records is compelling. These records concern confidential investigative techniques that law enforcement uses to investigate violations of criminal law. Disclosure of these records may hinder law enforcement's ability to use this technology in the future.

The countervailing public interest in favor of disclosure cannot be to discover how law enforcement uses this technology to investigate violations of criminal law. That is the purpose of the qualified privilege not to disclose sensitive investigative techniques recognized in *United States v. Van Horn*. Rather, some other public purpose must be served to justify the disclosure of these documents.

Plaintiff has identified several public purposes that may be served by the disclosure of information concerning the City's use of cell phone tracking equipment. To summarize, Plaintiff wants to know whether the public's privacy is compromised by TPD's use of cell phone tracking equipment, whether TPD obtains a warrant before using the equipment, and whether TPD is transparent about its use of this technology. These are legitimate and important public purposes.

The records the City has provided to the Court for its *in camera* review do not answer the questions Plaintiff has posed as to whether the City's use of this technology violates the public's civil liberties. Rather, the records show how to use the equipment. That is not to say that the City has not tried to answer Plaintiff's questions. In its answer to the complaint, the City avers that it does not seek a pen register order before using the equipment. In a sworn affidavit attached to its answer, TPD Lieutenant Kevin Hall states that he knows the equipment has been used five times during the relevant time period and to his knowledge TPD did not obtain a warrant in any of those five cases. The City has produced four of those five case files. The fifth case file concerns an ongoing case that the Court has previously ruled is not subject to public disclosure. Lieutenant Hall

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also stated that the data generated by the technology is overwritten and not saved at the conclusion of the investigation.

Based on the foregoing, the Court finds that the City has shown a countervailing interest of the state in effective law enforcement that outweighs the public's right to know how this investigative tool works.

2. *Has The City Fully Responded To Plaintiff's Public Records Requests*?

In addition to his October 11, 2013 request, Plaintiff made two additional written requests to the City for public records. On November 15, 2013, Plaintiff asked the City to produce records pertaining to device known as "Hailstorm" produced by Harris Corporation; records pertaining to a recent purchase from the Harris Corporation referenced in a document that the City had produced; and a new non-disclosure agreement between the FBI and TPD. Then, on December 9, 2013, Plaintiff made a third public records request to TPD. Plaintiff asked TPD to produce any applications for pen register orders or search warrants for using the Stingray II system or similar technology. Plaintiff also asked TPD to produce records concerning the Police Counter Narcotics Alliance Unit. Finally, Plaintiff asked TPD to produce any and all records of communications generated between January 1, 2013 and December 9, 2013 that pertain in any way to the FBI. As to this last request, Plaintiff said this included any communications between TPD personnel and FBI personnel. The City has asked Plaintiff to narrow his requests but he has refused.

The City says it has either produced or submitted for *in camera* inspection all the records in its possession regarding Harris Corporation and its use of the Harris Corporation technology. The City also says that it does not have a non-disclosure agreement with the FBI. As for records of pen registers and search warrants obtained to use the cell phone tracking equipment, the City has said that no such records exist.

The City has the initial burden of proof to show that it has produced the public records Plaintiff seeks. *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 538-539, ¶¶ 15-16, 177 P.3d 275 (App. 2008). To meet its burden of proof, the City must show that it has adequately searched for records responsive to the public records request. *Id.* at 539, ¶ 16. The City's search for requested records must be "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1486 (D.C. Cir. 1984); *Phoenix New Times, L.L.C.*, 217 Ariz. at 539, n. 3 ("When interpreting Arizona's public records statutes, it is appropriate to look to FOIA for guidance.").

Once the City has shown that it has searched for and produced the records responsive to Plaintiff's public records request, the burden shifts to Plaintiff to prove that the City's search was not adequate or that the City is in possession of additional records that are responsive to the request. *Maynard v. C.I.A.*, 986 F.2d 547,

560 (1st Cir. 1993) ("[I]f an agency demonstrates that it has conducted a reasonably thorough search, the FOIA requester can rebut the agency's affidavit [showing the reasonableness of the search] only by showing that the agency's search was not made in good faith."); *see generally Graham Co. v. Graham Co. Elec. Co-op, Inc.*, 109 Ariz. 468, 470, 512 P.2d 11 (1973) (once party produces prima facie evidence to meet burden of proof the burden shifts to opposing party to come forward with evidence to rebut it); 2 *McCormick on Evidence*, 478-483, § 338 (6th Ed. 2006) (same).

The City says that it has searched for and produced all records responsive to Plaintiff's requests for records concerning Harris Corporation and its use of the Harris Corporation technology. Lieutenant Hall, who is knowledgeable about the City's use of this technology, stated in his affidavit that he has thoroughly searched for the records and identified those that exist. Accordingly, under *Phoenix New Times, L.L.C. v. Arpaio*, the burden shifts to Plaintiff to show that the City's search for records was not reasonable. Plaintiff has not made that showing.

The next issue is whether the City has failed to search for records concerning the Police Counter Narcotics Alliance Unit and records that mention the term "FBI."

As for Plaintiff's request for records concerning the Police Counter Narcotics Alliance Unit, the City says that it has produced some records, but not others because it does not know what specific records Plaintiff seeks. Plaintiff has not attempted to explain what records he wants. Rather, in his brief, he appears to claiming that he wants every document in the City's possession that relates to the Police Counter Narcotics Alliance Unit. The City complains that this is overbroad and does not identify specific records.

As for Plaintiff's request for records concerning the FBI, the City says that as a large metropolitan police force, TPD would have to search voluminous records to find those that might include the term "FBI."

The question becomes, does the Arizona public records law require the City to search every record in its possession for records that may include certain identified terms?

Plaintiff argues that under *Star Publishing Co. v. Pima Co. Attorney's Office*, 181 Ariz 432, 891 P.2d 899 (App. 1994), a public officer cannot refuse to produce public records just because the requested records are voluminous. In that case, the newspaper sought copies of computer backup tapes that included emails for 1993. While the requested information was voluminous, it was a specific record, *i.e.* records that the Board of Supervisors had subpoenaed and reviewed. Unlike this case, the records were clearly identifiable. The Court does not believe that *Star Publishing Co*. requires the City to search all its records to find those that may include certain identified terms.

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The Arizona public records law provides that a "person may request to examine … any public record." A.R.S. § 39.121.01(D)(1). In order to examine the record, the person must identify it. A New Jersey appellate court, in addressing this issue, held that under New Jersey's Open Public Records Act, "agencies are required to disclose only 'identifiable' governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files." *MAG Entertainment, LLC v. Division of Alcohol Beverage Control*, 868 A.2d 1067, 1076 (N.J. Sup. Ct., App. Div. 2005). The New Jersey court's reasoning is persuasive because it adopts the majority rule in the United States that a government agency is not required to respond to an overbroad request that does not request specific records. *Id*. at 1074, citing *Capitol Information Ass'n v. Ann Arbor Police*, 360 N.W.2d 262, 263 (1985) ("A request for disclosure pursuant to the act must describe the requested record sufficiently to enable the public body to find it."); *Hangartner v. City of Seattle*, 90 P.3d 26, 28 (2004) ("[A] party seeking documents must, at a minimum, provide notice that the request is made pursuant to the PDA and identify the documents with reasonable clarity to allow the agency to locate them."); and *Krohn v. Dep't of Justice*, 628 F.2d 195, 198 (D.C. Cir. 1980) ("A reasonable description requires the requested record to be reasonably identified as a record not as a general request for data, information and statistics to be gleaned generally from documents which have not been created and which the agency does not generally create or require."). In the same vein, the Ohio Supreme Court has held that "it is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue." *State ex rel. Morgan v. Strickland*, 906 N.E.2d 1105, 1108, ¶ 14 (Ohio 2009).

The New Jersey court also cited a New York case that is especially relevant here. In that case, the requester sought all records related to the adoption of a village's zoning code prohibiting commercial activity. The New York appellate court affirmed the lower court's denial of the request as overbroad and unduly burdensome, inasmuch as it would require the village clerk to manually search through every document filed with the village for the past 45 years. *Bader v. Bove*, 273 A.D.2d 466, 710 N.Y.S.2d 379 (N.Y. App. Div. 2000). Likewise, a request for records made to the Ann Arbor, Michigan police department for all correspondence with federal law enforcement was held to be "absurdly overbroad. Compliance would require defendants to search their files for correspondence with a wide spectrum of federal agencies dealing with any of more than 100,000 persons during an extensive period of time." *Capitol Information Ass'n v. Ann Arbor Police*, 360 N.W.2d at 264.

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In this case, Plaintiff is asking the City to search for voluminous records to find those records that contain certain words. The City is under no obligation to do so because it is not a proper request for records.

Based on the foregoing,

IT IS ORDERED that Plaintiff's motions to strike are not well taken and are DENIED.

IT IS FURTHER ORDERED that Plaintiff's request for records that the City did not produce but provided to the Court for its *in camera* inspection is DENIED.

IT IS FURTHER ORDERED that Plaintiff's remaining request for records is DENIED.

cc: Daniel J Pochoda, Esq.
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