MEMORANDUM

DATE: August 27, 2009

TO: SONIA CUELLO. CITY CLERK

FROM: GLENN GIMBUT, CITY ATTORNEY

RE: PUBLIC RECORDS REQUEST – CELL PHONE BILLS

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This memorandum constitutes a formal legal opinion of the Office of City Attorney. Recently Mr. David Lara, and others with whom he is politically allied, have decided to seek, as a public records request, cell phone bills of certain members of Council. When this office made its determination, after seeking the advice of several other municipal attorneys in Arizona, namely Steve Kemp, Ellen Van Riper, Susan Goodwin, Donna Bronski, and David Merkel, General Counsel to the League of Arizona Cities and Towns, who were all in agreement on the issue, this office took the position that since cell phones could properly be used for personal business, that there was a right for members of council to delete information about calls from the bills before they were disclosed. This author met with Mr. Lara who did not like the answer. His response was to ask for my bills. This does not change either the law or the answer. He also demanded, as a public records request, the case law on the subject. This is an improper public records request. The public records laws cannot be used to do legal research for someone. That being said, this author provided a copy of the leading case to Mr. Lara as a courtesy. Because of the appearance of a possible continuing argument, it is prudent to present a formal legal opinion on the matter.

Not everything at public offices is a public record, and not every request need be answered. And Arizona has recognized if the purpose is to harass or annoy, the request can be ignored altogether. In *Arpaio v. Davis*, 221 Ariz. 116, 210 P.3d 1287 (Ariz.App. Div. 1,2009), the Court of Appeals reviewed a public records request of the Sheriff of Maricopa County. As stated in *Arpaio v. Davis*, 210 P.3d 1287, 1289 (Ariz.App. Div. 1,2009):

> "Chagolla initially sent two judicial records requests to Reinkensmeyer pursuant to the Arizona Public Records Law, Arizona Revised Statutes (A.R.S.) sections 39-121 (2001) through -121.03 (2001). The first request was a letter to Reinkensmeyer dated December 7, 2007 asking for all e-mails, memoranda, notes and letters sent to or from Maricopa County Superior Court Presiding Judge Barbara Rodriguez Mundell (Judge Mundell), the Adult Probation Administrator Barbara Broderick (Broderick), Maricopa County Superior Court employee and special court counsel Jessica Funkhouser (Funkhouser), and all e-mails to or from the administrative assistants assigned to the named individuals for the period of time from November 1, 2007, through December 7, 2007.
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> Ten days later, Chagolla sent another similar request to Reinkensmeyer, requesting he make available all e-mails received by or sent from Reinkensmeyer

himself or on his behalf by his administrative assistant(s) for the period of time from November 1, 2007 through December 17, 2007. Chagolla requested that all records be provided by December 21, 2007."

As is stated in a footnote in *Arpaio v. Davis*, 210 P.3d 1287, 1291 (Ariz.App. Div. 1,2009):

"However, not all records are public records. The Arizona Supreme Court has held that "the mere fact that a writing is in the possession of a public officer or public agency does not make it a public record." Salt River Pima-Maricopa Indian Cmty. v. Rogers, 168 Ariz. 531, 538, 815 P.2d 900, 907 (1991). "Only those documents having a 'substantial nexus' with the government agency's activities qualify as public records." Griffis v. Pinal County, 215 Ariz. 1, 4, ¶ 10, 156 P.3d 418, 421 (2007) (citing Salt River, 168 Ariz. at 541, 815 P.2d at 910)."

The Court went on to further state at pages 1291 -1292:

"Consistent with application of the public records statutes, the court held that at times, "the benefits of public disclosure must yield to the burdens imposed on the government" by such disclosure requests. *London*, 206 Ariz. at 493, ¶ 9, 80 P.3d at 772. "Such circumstances have spawned common-law limitations on public disclosure to protect privacy interests, confidential information, and certain governmental interests." Id. These limitations on public disclosure allow for withholding of documents if there are "sufficiently weighty reasons to tip the balance away from the presumption of disclosure and toward non-disclosure." Id.

Rule 123(c)(1) mirrors the limitations placed on public records requests under the public record statutes by providing "in view of the possible countervailing interests of confidentiality, privacy or the best interests of the state[,] public access to some court records may be restricted...." Ariz. R. Sup.Ct. 123(c)(1). Under that rationale the rules restrict access to administrative records and bar requests that would impose an undue financial burden, are duplicative or harassing or substantially interfere with court operations. Ariz. R. Sup.Ct. 123(f)(4)(A)(i)-(iv). This is consistent with, though not congruent to, access restrictions imposed under the Public Records Law."

In *Arpaio* large sections of the request were not provided, and the Court of Appeals upheld found that the trial judge did not abuse his discretion in finding that review of sheriff's request for all e-mails, memoranda, notes and letters sent to or from county superior court presiding judge, Adult Probation Administrator, court employee and special court counsel, and all e-mails to or from administrative assistants assigned to named individuals for one-month period of time

would require unreasonable expenditure of resources and time under normal circumstances they need not be provided.

Mr. Lara has also demanded that action be taken within "five days". That is not the law either. The law requires that the response be prompt, and reasonable, but does not set a specific time. In the *Arpaio* matter a delay of over seven months occurred between request and response due to the sheer volume of the request.

On the issue of cell phone records, the following needs to be considered. First, city employees pay for use of the phones. While a limited stipend is provided, it frequently does not cover the entire cost. The balance is deducted from wages. Second it is the policy of the City, and pursuant to provisions of federal tax law, that the phones may be used for personal business. This is materially different from the facts of the lead case of *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418 (Ariz.,2007). Stan Griffis was the former County Manager of Pinal County. A public records request was made for his e-mails. These were e-mails to and from his government address on a Pinal County server. The policy of Pinal County was that government computers were only to be used for government business. This is ***different*** than the San Luis policies with respect to cell phones which ***permit*** personal use. In *Griffis* the Supreme Court held that e-mails generated or maintained on a government-owned computer system are not automatically public records. It held it was permissible to not disclose personal emails. If personal emails may not be disclosed under the circumstances of a public server which should not be used for personal business, it stands to reason that personal phone calls should not be disclosed from cell phone records where use of the phone for personal calls is permitted. Again, as stated in *Arpaio*, "...not all records are public records...the mere fact that a writing is in the possession of a public officer or public agency does not make it a public record... 'Only those documents having a 'substantial nexus' with the government agency's activities qualify as public records.' *Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 10, 156 P.3d 418, 421 (2007) (citing Salt River, 168 Ariz. at 541, 815 P.2d at 910)."