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May 21, 2012

Janet Johnson
Clerk, Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85007-3329

Re: Phoenix Newspapers, Inc. (Comment on Petition No. R-12-0003 Regarding
Access to Court Employee Disciplinary Records)

Dear Ms. Johnson:

On behalf of Phoenix Newspapers, Inc., which publishes *The Arizona Republic* (“PNI”), I write to oppose Petition No. R-12-0003 and the draft amendment to Ariz. R. Sup. Ct. 123(e)(1)(H) (the “Petition”). While the draft amendment would open a few records of court employee disciplinary actions to public inspection, it presumptively closes investigative files “and any other disciplinary records” in a sweeping manner that is contrary to Rule 123 and the Arizona Public Records Law, which governs access to the same records relating to other public employees. For the reasons below, I urge the Court to revisit this proposal and consider less-restrictive language, such as the draft language attached hereto as Exhibit 1.

Factual Background

When the Petition was presented to the Arizona Judicial Council on December 15, 2011, PNI raised several concerns about the proposed revision to Ariz. R. Sup. Ct. 123(e)(1)(H). First, PNI expressed reservations about the use of the undefined term “final” in the first clause of the proposal, and noted that this language could preclude disclosure of records until an employee has exhausted all administrative appeals related to the disciplinary action. Second, the Petition prohibited public access to far too many records of disciplinary actions, including “[s]upporting documentation, investigation files, and any other disciplinary records[.]” PNI believes such disciplinary records relating to court employees should be open to inspection just as they are for most other public employees. Third, the Petition flipped Rule 123’s presumption of openness on its head, creating a class of records that are presumptively *closed* to public inspection. *Cf.* Ariz. R. Sup. Ct. 123(c)(1) (“Historically, this state has always favored open government and an informed citizenry. In the tradition, the records in all courts and administrative offices of the Judicial Department of the State of Arizona are presumed to be open to any member of the public for inspection . . .”).

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At the December 15, 2011 meeting, Court staff proposed an amendment to the Petition that addressed several of PNI's concerns. The proposal would have revised the second sentence of the draft Rule 123(e)(1)(H) as follows: "Supporting documentation, investigation files, and any other disciplinary records ~~are closed~~ shall be accessible by the public only on a showing of good cause pursuant to the process set forth in paragraph (f) of this rule." While the language did not address the ambiguity in the first sentence relating to finality of disciplinary actions, it provided a means for the public to inspect additional disciplinary records upon a showing of "good cause." Court staff suggested that it would file an Amended Petition to address PNI's concerns.

Counsel for PNI and Court staff attorneys discussed the language in early 2012 and exchanged drafts of an amended Rule 123(e)(1)(H). On May 2, 2012, Court staff informed PNI's counsel that it would not be filing an Amended Petition due to opposition from the Court's Committee on Probation.

The Court Should Revise the Proposed Amendment to Rule 123(e)(1)(H).

As drafted, the Petition would place Rule 123 at odds with its own history of access and transparency, and with recent amendments to the Arizona Public Records Law. In 2008, the Arizona Legislature adopted A.R.S. § 39-128(A), which clarified that records of disciplinary actions of public employees "shall be open to inspection and copying pursuant to [the Arizona Public Records Law], unless inspection or disclosure of the records or information in the records is contrary to law." Under A.R.S. § 39-128(A), public employee disciplinary records are presumptively open to public inspection, unless disclosure would violate the interests of privacy, confidentiality or best interests of the state. *See, e.g., Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 8, 218 P.3d 1004, 1006 (2009). In many ways, the 2008 statute merely codified existing law, which recognized that the public has a strong interest in monitoring the official conduct – and misconduct – of public employees. *See Lake*, 222 Ariz. at 549 ¶ 7, 218 P.3d at 1006 (citation omitted) ("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.").

By contrast, the Petition would prohibit public inspection of *all* investigative files and "any other disciplinary records" for *all* court employees. This sweeping exemption would prohibit the public from inspecting an array of records concerning disciplinary actions for court employees. For example, the public would have no right to inspect – and a court administrator could not make available for inspection – investigative reports concerning allegations of public corruption by a court employee. *Cf. Lake*, 222 Ariz. at 548 ¶ 7, 218 P.3d at 1006. In certain cases, the public may have a profound interest in reviewing such records, yet the Petition would automatically prohibit inspection of these documents in every case. Simply put, the Petition blocks too much information from public inspection and should be revised to reflect Rule 123's presumption of access.

PNI's Proposed Revision to Rule 123(e)(1)(H)

In discussions with Court staff, PNI proposed the attached revision to Rule 123(e)(1)(H), which would amend the language in two significant ways. First, PNI's revision omits the reference to

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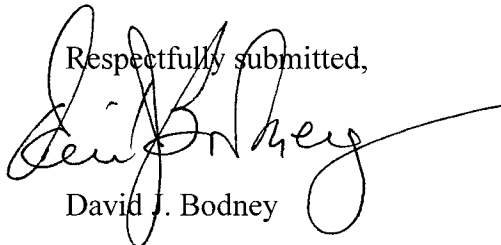
the disciplinary action being “final” before records could be disclosed in response to a request. This would eliminate any potential confusion about the term, which is undefined in the Petition.

Second, PNI’s proposed language clarifies that the normal rule of disclosure under Rule 123 applies to records of disciplinary actions: namely, the records may be disclosed except where disclosure would violate “the possible countervailing interests of confidentiality, privacy or the best interests of the state[.]” Ariz. R. Sup. Ct. 123(c)(1). Put another way, PNI’s language would *not* require disclosure of disciplinary records, but it would permit court administrators to balance the interests under Rule 123 and disclose the records where appropriate. *E.g., London v. Broderick*, 206 Ariz. 490, 494, ¶ 13, 80 P.3d 769, 773 (2003) (balancing public interest in disclosure against privacy and confidentiality interests).

In some cases, such as those involving non-supervisory employees, this balance may be struck to protect confidentiality. In others, particularly those involving allegations of public corruption or violation of official duties by high-ranking court employees, the balance may tip in favor of disclosure. PNI’s approach, however, is more consistent with Arizona’s tradition of open courtrooms and records than the Petition, which seals entire categories of court records from public view. *See* Ariz. R. Sup. Ct. 123(c)(1).

For these reasons, PNI urges the Court to revise the Petition’s amendments to Rule 123(e)(1)(H) in a manner more consistent with the Court’s longstanding commitment to open government.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David J. Bodney", with a long, sweeping horizontal stroke extending to the right.

David J. Bodney

Exhibit 1

Exhibit 1

Proposed Revision to Amendment to Ariz. R. Sup. Ct. 123(e)(1)(H)

(1) *Employee Records*. Records maintained concerning individuals who are employees or who perform volunteer services are closed except for the following information:

(A) – (E) [No change]

(F) Name of current or last known supervisor; ~~and~~

(G) Information authorized to be released by the individual to the public unless prohibited by law; and

(H) ~~After a disciplinary action is final, t~~The notice of intent to discipline and the final disciplinary action that resulted in a written reprimand or warning, suspension, loss of pay, demotion, or termination and the employee's response to the disciplinary action. Supporting documentation, investigation files, and any other disciplinary records ~~are closed~~ shall be subject to inspection and copying by the public upon request pursuant to Rule 123(c)(1) and Rule 123(f). Employee access to the records identified in this subsection shall be governed by the applicable provisions of the Arizona Code of Judicial Administration and local personnel policies.