IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ACLU OF ARIZONA, *Plaintiff/Appellant*,

v.

ARIZONA DEPARTMENT OF CORRECTIONS, *Defendant/Appellee*.

No. 1 CA-CV 16-0150
FILED 6-8-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-013531
The Honorable Arthur T. Anderson, Judge

REMANDED

COUNSEL

ACLU Foundation of Arizona, Phoenix
By Darrell Hill
Counsel for Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Charles A. Grube
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

T H U M M A, Judge:

¶1 The American Civil Liberties Union Foundation of Arizona (ACLU) appeals from the superior court's entry of summary judgment in favor of the Arizona Department of Corrections (DOC) in a special action to compel production of records in response to a public records request. For the following reasons, this case is remanded for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 This case arises out of the ACLU's request, under Arizona's public records law, to obtain documents about drugs used by the DOC in conducting executions. In September 2013, the ACLU submitted a public records request to the DOC, seeking records relating to the then-scheduled executions of Edward Harold Schad, Jr., and Robert Glen Jones, Jr. The records requested included "the expiration dates of the lethal injection drugs; [DOC]'s procurement of lethal injection drugs; [DOC]'s federal authorization to procure, possess and administer narcotic(s); and correspondence between [DOC], the drug supplier, manufacturer, distributer and any Federal regulatory body concerning the lethal injection drug." In responses provided later that month, the DOC provided a number of documents (some of which were redacted) and stated that if any other responsive documents existed, they were confidential. *See* Ariz. Rev. Stat. (A.R.S.) § 13-757(C) (2017).[1]

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

¶3 In early October 2013, the ACLU filed a statutory special action in superior court challenging the DOC's responses and seeking to compel the DOC to provide additional documents. *See* A.R.S. § 39-121.02. The next day, the United States District Court for the District of Arizona, in a case filed by Schad and Jones against various Arizona elected officials including the DOC Director, held that the plaintiff inmates "established a First Amendment right to access information regarding" the lethal injection drugs used by the DOC. The District Court ordered the DOC to disclose the manufacturer of the drugs that would be used in the inmates' executions, the National Drug Code of those drugs, the lot numbers of those drugs and the expiration dates of those drugs. That disclosure was made the next day.

¶4 The DOC unsuccessfully claimed the District Court's order mooted the ACLU's claims in this case. After a hearing, the superior court denied the ACLU's request for provisional relief and directed the ACLU to "identify any viable claims which may remain in this action." The ACLU identified various issues, including that: (1) A.R.S. § 13-757(C) (which protects from disclosure "[t]he identity of executioners and other persons who participate or perform ancillary functions in an execution") does not protect the identity of corporations and (2) the DOC should have produced additional documents.

¶5 After discovery, the parties filed cross-motions for summary judgment. After oral argument, the superior court ordered the DOC to submit to the court copies of the redacted documents produced to the ACLU and unredacted copies of those same documents for in camera review, with the ACLU receiving redacted copies. The DOC timely complied with that order. At a status conference after the court reviewed the documents, the court directed the DOC to provide "a reference key identifying the redacted information and reason for the redaction" for each redacted document. The DOC provided the reference key to the court, under seal; the ACLU was not provided that reference key.[2] At a status conference after the court reviewed the reference key, the court directed the DOC to "identify an individual most familiar with" the reference key to provide the court "further details on a number of redacted items." The court noted it would then hold a hearing, with the DOC representative, "'in camera,'

[2] The ACLU is not arguing that the DOC was required to provide it an index of responsive documents withheld from those produced in response to the records request. *See* A.R.S. § 39-121.01(D)(2) (exempting DOC from agencies potentially subject to such a requirement).

transcribed, and filed under seal." The DOC identified Carson McWilliams as the person most familiar with the reference key.

¶6 The ACLU filed a motion asking to be present during that in camera hearing, to question any witness the DOC offered and "to review all records submitted to the court in camera under whatever protective order the court deems necessary." The court denied that motion.

¶7 The court then met with the DOC's counsel and McWilliams (but not the ACLU's counsel) and "conduct[ed] the 'in-camera' interview of the witness." Following that meeting, which apparently lasted about 30 minutes, the court issued a minute entry stating as a "LATER:"

> The Court has conducted an "in-camera" review of the six pages of material submitted by . . . [the DOC]. The review included questioning of DOC witness, Carson Anton McWilliams. The purpose of the examination was to clarify how certain redacted information "when used with other documents and information" would lead to the identity of the distributor or manufacture[r] of the execution drugs.
>
> Plaintiff, ACLU, object[s] to the redactions and the "in-camera" questioning process because it does not include its counsel.
>
> Having considered the briefing and arguments of counsel and the clarification provided during the "in-camera" session,
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> **THE COURT FINDS** that the D.O.C. appropriately redacted information from the submitted pages consistent with Arizona law.
>
> **IT IS ORDERED** denying Plaintiff's objections to the DOC's redactions.

¶8 The superior court subsequently entered summary judgment in the DOC's favor. In doing so, the court found that (1) a corporation is a "person" under A.R.S. § 13-757(C), meaning the identity of the corporation that made or manufactured the drug was protected under that statute; (2)

the DOC had produced all responsive documents[3] and (3) a drug-packaging box bearing the expiration date of the drugs was not a public record. After entry of a final judgment, *see* Ariz. R. Civ. P. 54(c), the ACLU timely appealed and this court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶9 The ACLU presses four substantive arguments on appeal:[4] (1) that a corporation is not a "person" under A.R.S. § 13-757(C); (2) a drug packaging box bearing the expiration date of the drugs is a public record; (3) the DOC did not demonstrate it adequately searched for all responsive records and (4) the decision to hold an in camera review hearing in the presence of only the DOC's witness and counsel was improper.

¶10 This court reviews the entry of summary judgment de novo, "viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion," *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003), to determine "whether any genuine issues of material fact exist," *Brookover v. Roberts Enter., Inc.*, 215 Ariz. 52, 55 ¶ 8 (App. 2007); *see also Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249 ¶ 14 (App. 2006); *Desilva v. Baker*, 208 Ariz. 597, 600 ¶ 10 (App. 2004). This court will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103 (App. 1995). When uncontroverted, "facts alleged by

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[3] More specifically, the superior court noted "The ACLU disputes that [the DOC] has produced all responsive public records. The ACLU points to federal law and [the DOC's] policies and procedures, which, the ACLU posits, require [the DOC] to maintain records that were requested but not produced. The ACLU also points out that many of these records were produced in connection with a 2011 execution, which belies [the DOC's] protestations that it does not have them in connection with the executions at issue. This dispute is predicated more on a legal argument regarding what records [the DOC] should have than on what records it does have but did not produce. The Court finds that this dispute is outside the relief sought in the Complaint."

[4] Although the ACLU makes several statements that one of the manufacturers is already publicly known, it provides no argument or support for why that should alter the analysis of the legal issues presented. The cases it cites do not analyze whether such a fact waives the State's statutory obligations under A.R.S. § 13-757(C).

affidavits attached to motions for summary judgment may be considered as true." *Portonova v. Wilkinson*, 128 Ariz. 502, 502 (1981).

I. A Corporation Is A "Person" For Purposes Of A.R.S. § 13-757(C).

¶11 By statute, "the identity of executioners *and other persons* who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure." A.R.S. § 13-757(C) (emphasis added). Citing the DOC's prior actions and purported "legislative intent," the ACLU claims that the term "persons" does not include a corporation, an issue this court addresses de novo. *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 227 ¶ 13 (2005). "'[T]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.'" *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345 ¶ 8 (2014) (quoting *State v. Hansen*, 215 Ariz. 287, 289 ¶ 6 (2007)). If the plain language of a statute is clear and unambiguous, then it is given effect without resort to secondary statutory construction principles. *See, e.g.*, *Martinez v. Industrial Comm'n*, 175 Ariz. 319, 321 (1993).

¶12 The ACLU is correct that A.R.S. § 13-757(C) does not expressly define "person." Arizona's Criminal Code as set forth in A.R.S. Title 13, however, defines "person" as meaning "a human being and, as the context requires, an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government, a governmental authority or an individual or entity capable of holding a legal or beneficial interest in property." A.R.S. § 13-105(30). In construing liability for, and potential consequences of, criminal offenses, this court has observed "[t]here is nothing to indicate that by inclusion of the phrase 'as the context requires,' the legislature sought to exclude corporations from the definition of 'person' for certain offenses." *State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 186 ¶ 32 (App. 2010).

¶13 Nor is this criminal law definition an isolated or unique statutory definition under Arizona law. In A.R.S. Title 1, containing Arizona's "Dictionary Act," the Legislature broadly directs that "[i]n the statutes and laws of this state, unless the context otherwise requires:"

> "Person" includes a corporation, company, partnership, firm, association or society, as well as a natural person. When the word "person" is used to designate the party whose property

> may be the subject of a criminal or public offense, the term includes the United States, this state, or any territory, state or country, or any political subdivision of this state that may lawfully own any property, or a public or private corporation, or partnership or association. When the word "person" is used to designate the violator or offender of any law, it includes corporation, partnership or any association of persons.

A.R.S. § 1-215(28). The ACLU has made no showing that the "context otherwise requires" excluding corporations from the definition of "person" in A.R.S. § 13-757(C).

¶14 That the legislative Fact Sheet contains "no mention of concealing the identity of businesses," as the ACLU suggests, is of no moment. The Fact Sheet does not trump the statutory language, something that the ACLU's reading of the Fact Sheet would require.[5] Similarly, although A.R.S. § 13-757(D) protects from suspension or revocation a board license of any "person who participates or performs ancillary functions in an execution," that group is, by definition, a subset of those subject to the confidentiality protections under A.R.S. § 13-757(C). Accordingly, A.R.S. § 13-757(D) does not, somehow, direct that "persons" as used in A.R.S. § 13-757(C) means only human beings. And that the DOC may have taken actions inconsistent with the court's interpretation of A.R.S. § 13-757(C) does not change this conclusion. This court through its analysis, not a party through its conduct, resolves issues of statutory construction.

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[5] Adopting the ACLU's argument -- that confidentiality under A.R.S. § 13-757(C) is limited to "(c)onceal[ing] the identity of those who participate in executions" as stated in the Fact Sheet -- would mean confidentiality would not apply to "other persons who participate or perform ancillary functions in an execution" as the statute directs. No statutory construction principle known to Arizona law would authorize such a result. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 8 (App. 2007) ("each word, phrase, clause and sentence [in a statute] must be given meaning so that no part will be void, inert, redundant, or trivial"); *P&P Mehta LLC v. Jones*, 211 Ariz. 505, 507 ¶ 11 (App. 2005) ("A standard interpretive directive to courts is to construe statutes to reach sensible results").

¶15 For these reasons, "persons" as used in A.R.S. § 13-757(C) includes corporations. *See Martinez*, 175 Ariz. at 321; *see also State v. Pledger*, 236 Ariz. 469, 471 ¶ 8 (App. 2015) (if language is clear, courts "give effect to that language and do not employ other methods of statutory construction").

II. The Packaging Box With The Expiration Date May Be A Public Record.

¶16 "Whether a document is a public record under Arizona's public records laws presents a question of law," which this court reviews de novo. *Griffis v. Pinal County*, 215 Ariz. 1, 3 ¶ 7 (2007) (citation omitted). By statute, "[a]ll officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from [Arizona] or any political subdivision" of Arizona. A.R.S. § 39-121.01(B). The phrase "public record," however, "is not expressly defined by statute." *Griffis*, 215 Ariz. at 4 ¶ 8.

¶17 As directed by the Arizona Supreme Court, "'[i]t is the nature and purpose of the document, not the place where it is kept, which determines'" whether a document is a public record. *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 538 (1991) (citation omitted). Arizona recognizes "three alternative definitions of public records:" (1) those "'made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference;'" (2) those "'required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done,'" focusing on, among other things, whether a public officer used or consulted the document "in performing his duties;" and (3) "'any written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not.'" *Griffis*, 215 Ariz. at 4 ¶ 9 (2007) (quoting *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 538-39 (1991)). If a record fits within one of these alternative definitions, it is properly considered a public record. *Id.* The question, then, is whether the drug packaging containing the expiration date sought by the ACLU's public record request falls within one of these three alternative definitions.

¶18 There is no argument that the packaging box was "made by a public officer," meaning it does not fit within the first definition. And for purposes of this appeal, the court assumes that no law required the DOC to keep the box and that it is not a written record of transactions by the DOC. The question remains, however, whether it was necessary to be kept in the discharge of a duty imposed by law or directed by law focusing on, among other things, whether the DOC used or consulted the document in performing its duties. *See Griffis*, 215 Ariz. at 4 ¶ 9 (quoting *Rogers*, 168 Ariz. at 538-39 in discussing the second alternative definition).

¶19 The record on the point demonstrates disputed issues of material fact. Although the parties dispute whether the record shows the box was the only record with the drug-expiration date, no document provided by the DOC in response to the ACLU's public records request contains that date. In addition, testimony provided by the DOC's representative conceded that it would be a public concern if lethal injection drugs were used beyond their expiration date. In the deposition of the DOC's representative, the following exchange took place:

> ACLU: "Okay. But let me ask you then, because we weren't provided the expiration dates. Somewhere in the department you would have known the expiration dates on the drugs that you had purchased or obtained for the executions of Mr. Schad and Mr. Jones, is that correct?"
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> DOC Representative: "Probably only by looking at the actual box."

This testimony, coupled with the fact that the DOC retained the box reflecting the expiration date, could support a conclusion that the DOC used or consulted the box "'in performing [its] duties.'" *Griffis*, 215 Ariz. at 4 ¶ 9 (2007) (quoting *Rogers*, 168 Ariz. at 538-39). Accordingly, on the disputed factual record presented, the issue could not be resolved by summary judgment.

III. The DOC Did Not Establish That It Adequately Searched For Responsive Documents.

¶20 The parties dispute whether the DOC met its burden of establishing that it adequately searched for documents responsive to the public records request. The primary bases relied upon by the DOC to argue that it did are a declaration that the documents produced "consisted of all

the [DOC] public records that were responsive to the" request; that the complaint concedes the DOC "provided everything requested except" the names of individuals and entities involved and that the ACLU informally narrowed its request. But the DOC had the burden to show "that it adequately searched" for responsive documents, which can be done by reliance "on affidavits or declarations that provide reasonable detail of the scope of the search." *Phx. New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 539 ¶ 16 (App. 2008) (citations omitted). The evidence provided by the DOC fails to meet that standard and, accordingly, summary judgment on that point cannot stand.[6]

IV. The Ex Parte In Camera Review Was Error.

¶21 As noted above, to assess the redactions in the documents produced by the DOC, the superior court conducted a review (1) of both redacted and unredacted documents; (2) using a reference key prepared by the DOC and provided to the superior court (but not included in the record on appeal); (3) with the aid of testimony by a DOC representative and (4) assisted by counsel for the DOC. These materials and this review was conducted by order of the superior court. The ACLU (1) was not allowed to review the unredacted documents; (2) was not allowed to review the reference key the DOC prepared; (3) was not present when the DOC representative testified; and (4) was not given a copy of the transcript of that testimony. The ACLU challenges this process, claiming it "denied [it] the opportunity to rebut, contest, examine and disprove key evidence supplied to the court concerning the confidentiality of information that [DOC's] claims would reveal the identity of a publicly known entity."

¶22 The DOC argues there was no such prejudice and Arizona case law "expressly authorizes in camera inspections in public records cases." As support, the DOC cites several cases dealing with in camera proceedings where the court reviews documents submitted under seal and without any counsel or witness present. None of those cases implicitly or explicitly authorize a process where one party's counsel and witness, but not the other party's counsel, participate in the proceeding. For this reason,

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[6] In reaching this conclusion, the court is mindful that the superior court properly observed that the ACLU's argument on this point "is predicated more on a legal argument regarding what records [the DOC] should have" created and maintained. On remand, the issue is procedural (what measures the DOC took to respond to the public record's request), not substantive (what documents the ACLU alleges the DOC should have created and maintained).

the DOC is in error in claiming that the procedure used by the superior court is exactly the procedure this Court approved in *Phoenix Newspapers, Inc. v. Superior Court of Maricopa County*, 140 Ariz. 30, 33 (App. 1983). There, the in camera proceeding included counsel for both parties, *id.* at 32, not the one-party review conducted here.

¶23 Although Arizona clearly authorizes in camera review of sensitive documents, the DOC has cited no case authorizing the ex parte in camera review here where one side, through counsel and a witness, were authorized to speak with the court outside of the presence of the other side. Nor can this court conclude, as a matter of law on the record presented, that the procedure used here was not prejudicial. Accordingly, the superior court's ex parte in camera review was in error.

CONCLUSION

¶24 Disputed issues of material fact preclude summary judgment on whether the packaging box with the expiration date was a public record and the adequacy of the DOC's search for documents responsive to the public record's request. Accordingly, that portion of the superior court's order granting the DOC summary judgment is vacated. In addition, the superior court erred in conducting an ex parte in camera review to determine whether the redactions on documents produced by the DOC were proper, meaning that portion of the superior court's order finding those redactions were proper is vacated. Those issues are remanded, with a direction that a different superior court judge consider those matters on remand.[7]

¶25 The ACLU requests attorneys' fees and costs pursuant to A.R.S. § 39-121.02 (B) and (C). Because it has not yet been determined whether the ACLU has "substantially prevailed" in its action or that it was "wrongfully denied access to public records," its request is denied without prejudice to its reassertion upon the final conclusion of this case. *See* A.R.S. § 39-121.02 (B) and (C). For the same reasons, the DOC's request for fees

[7] On remand, the superior court will have substantial discretion in deciding how to proceed, provided such proceedings are consistent with this decision. Among other things, the superior court could direct the DOC to provide a more descriptive key, could appoint its own expert witness pursuant to Ariz. R. Evid. 706, or it could allow the ACLU's counsel to be present at an in camera hearing subject to a protective order. The exercise of that discretion, however, is for the superior court to undertake in the first instance.

and costs on appeal is denied without prejudice to its reassertion upon the ultimate conclusion of this case.

AMY M. WOOD • Clerk of the Court
FILED: AA