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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

CITY OF PHOENIX, a municipal corporation of the State of Arizona,

Defendant.

Case No. CV2010-015452

PLAINTIFF'S REPLY IN SUPPORT OF ITS APPLICATION FOR ORDER TO SHOW CAUSE

(Assigned to the Honorable Judge Rea)

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Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this Reply in support of its Application for Order to Show Cause ("Application"). Defendant City of Phoenix has submitted a Response to Plaintiff's Application ("Response"). Putting aside the City's histrionics, including inappropriate attacks on Plaintiff's motives in submitting the records request at issue, the City has failed to establish a proper basis to withhold the requested records. In addition, as the Court recognized at the recent hearing on the City's unsuccessful motion to dismiss this matter, factual issues exist that must be resolved through discovery and at the Evidentiary Hearing now scheduled for September 27, 2010. Hence, this memorandum focuses on the evolving factual claims by the City and the legal

arguments asserted in the City's Response.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE CITY SHOULD BE COMPELLED TO PRODUCE ALL RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST.

The City's Response reveals previously undisclosed information that significantly affects the issues in this case. The City now claims that it has in its possession a version of the Mayor's "public calendar" that is, in fact, more than just a calendar. While not disclosed, or even hinted at, in the City's January 4, 2010 denial letter, the City now claims that this "annotated public calendar" includes detailed handwritten notes by members of the Mayor's security detail that may be responsive to Plaintiff's request. Plaintiff submits that if the City had previously disclosed and produced these annotated public calendars, it may have helped avoid unnecessary factual disputes before this Court.

In any event, this revelation by the City confirms that Plaintiff properly filed this special action when it received what, on its face, was an outright denial of its records request. *See* Exhibit 1 (Declaration of Christopher J. Farrell ("Farrell Decl.") at ¶¶ 5-6). Contrary to the City's claims, Plaintiff was never informed that the City possessed a version of the Mayor's public calendar that had been annotated by members of the security detail. *Id.* at ¶ 6. Plaintiff similarly had no reason, and certainly no obligation, to accept the unannotated version of the Mayor's public calendars previously offered by the City. Moreover, because the City's January 4, 2010 denial letter did not indicate any uncertainty by the City as to the denial of the records Plaintiff sought, Plaintiff had no reason to seek further contact with the City. Hence, the City's allegation (Response at 7) that Plaintiff "purposefully chose not to accept and review the City's records so it could allege the City failed to produce records responsive to its request" is entirely baseless.

Instead, these facts demonstrate that Plaintiff properly sought relief from this Court for a violation of the public records law following its receipt of a denial of its request.

[1] The City complains that the Complaint erroneously states the date of Plaintiff's request as November 16, 2009. Response at 4. The correct date of December 11, 2009 is reflected on the letter requesting the records and is attached as Exhibit A to Plaintiff's Application. Because Plaintiff has not claimed that the City's response was untimely, this typographical error is of no consequence.

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The City claims a self-selected sample of the newly-disclosed annotated calendars attached to its Response "proves" that the City complied with Plaintiff's records request. (Response at 7.) As these annotated calendars were never offered to Plaintiff, the City plainly failed to comply with Plaintiff's records request.

The City also plainly denied Plaintiff's records request for the security detail's activity logs, and instead offered to produce only other records that on their face were unresponsive. It is obvious from City's January 4, 2010 letter that the activity logs, now described by the City as "Unscheduled Worksheets," were responsive. The City continues to withhold these responsive records despite no proper basis to do so.

II. The City Has Not Established A Lawful Basis To Withhold the "Worksheets."

A. The City's Assertion of "Privacy" Does Not Overcome the Presumption of Disclosure.

The City asserts that the Mayor has a privacy right that overcomes the presumption of disclosure and also outweighs the public's interest in disclosure of the Worksheets. (Response at 9-13.) As demonstrated in Plaintiff's Application, in order to rebut the presumption of disclosure, a "public official must demonstrate specifically how production of the records would violate rights of privacy or confidentiality or would be detrimental to the best interests of the state." (Application at 8 (citing *KPNX v. Superior Court*, 183 Ariz. 589, 592, 905 P.2d 598, 601 (App. 1995)).) The City has failed to make this specific demonstration.

As an initial matter, it is important to recognize that the Worksheets are "public records" and therefore subject to disclosure. The Arizona Public Records Law specifically "requires that '[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 the state or any political subdivision of the state.'" *Griffis*, 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007) (*quoting* A.R.S. § 39-121.01.B). Stated another way, "[t]he public records law requires all public officials to make and maintain records 'reasonably necessary to provide knowledge of all activities they undertake in furtherance of their duties.'" *Id.* (*quoting Carlson v.*

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Pima County, 141 Ariz. 487, 490, 251 P.2d 833, 835 (Ariz. 1984) (emphasis original)). Documents "with a 'substantial nexus' to government activities" constitute "public records" subject to the Arizona Public Records Law. *Lake v. City of Phoenix*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009).

Only documents prepared or maintained by public officials or public employees that are of "a purely private or personal nature" are not public records. *Griffis*, 215 Ariz. at 4, 156 P.3d at 421. "[A] grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's report card stored in a desk drawer in a government employee's office" are examples of materials that are not public records. *Id.* In other words, a public record includes any record created or maintained by a government employee that bears some relation to an employee's official duties.

In this case, the City does not attempt to argue that the requested records are of "a purely private or personal nature." *Griffis*, 215 Ariz. at 4, 156 P.3d at 835. The City even admits that the Worksheets are created by and "exclusively" consist of notes taken by police officers in the fulfillment of their official duties. (Fricke Aff. Number 2 at ¶ 7.) The City also concedes that the purpose of the Worksheets is not to collect details of the Mayor's personal life, but rather to record information such as "the name/number of Detail officers for each day or event; specific date, time, location information on personal and private business meetings; names of people or groups the Mayor met with; and short descriptions of some events." (Fricke Aff. 2 at 7(d).) In other words, the requested records plainly are public records, created by police officers, for an official purpose, in fulfillment of their duties.

The City's allegation that there may be some overlap between the Worksheets and some personal activities of the Mayor is of no consequence. The records have a clear, direct, irrefutable, and obviously substantial nexus to government activity – the activities of the security detail. As such, records are entirely different than the "purely" personal records discussed in *Griffis*, such as a grocery list, a child's report card, or a personal calendar or to-do list that happen to be kept in a government office. *Griffis*, 215 Ariz. at

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4, 156 P.3d at 835. Based on the City's own admissions, the records at issue are public records, and are therefore subject to disclosure under the Arizona Public Records Law. To the extent that any factual question exists as to the purpose and nature of the Worksheets, this will be determined through discovery and at the evidentiary hearing in this case.

B. The City's Attempt to Invoke the Deliberative Process Privilege Must Fail.

At the same time the City asserts the Worksheets must be withheld in their entirety because they contain "private" information about the Mayor, the City openly acknowledges that Worksheets include "information on the Mayor's government activity." (Response at 13.) Without any apparent recognition of the incongruity between these positions, the City claims that the Worksheets are protected in their entirety under the deliberative process privilege.

The deliberative process privilege simply is not applicable. Critically, less than one week ago, on July 22, 2010, the Arizona Court of Appeals in *Rigel Corp. v. State,* ____ P.3d ____, 2010 WL 2858456 *7 (App. July 22, 2010),[2] held that the deliberative process privilege does not apply in Arizona. Explaining its holding the appellate court stated:

> As a threshold matter, ***the deliberative process privilege has not heretofore been adopted in Arizona but instead is a federal privilege preserved in "exemption 5" of the Freedom of Information Act*** ("FOIA"), 5 U.S.C. § 552(b)(5). ... Arizona recognizes a legal presumption in favor of disclosing public records. Moreover, we have held that government agencies do not ordinarily have a privilege to refuse to produce evidence unless a statute has specifically created an exemption. ***We will not, via decisional law, create this privilege at this time.***

Id. at *7 (internal citations omitted and emphasis added). After explicitly holding that ***no*** deliberative process privilege existed under Arizona statute, the appellate court affirmed the trial court's decision to compel the state to produce internal memoranda and correspondence, which included the state's internal deliberations. *Rigel* applies squarely

[2] *Rigel* is attached hereto as Exhibit 2.

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here. The City cannot refuse to produce documents relying on a privilege that does not exist in Arizona.

Moreover, even if a deliberative process privilege somehow existed in Arizona, it would not apply here. As demonstrated by Plaintiff (Application at 9), the City does not claim, much less prove disclosure of the Worksheets will reveal any information about subjects that may have been discussed or any advice that may have been provided in "private" meetings the Mayor may have attended.

The City's attempt to rely on the deliberative process exemption under the federal Freedom of Information Act ("FOIA") is particularly unpersuasive. Response at 14-15; 5 U.S.C. § 552(b)(5). FOIA Exemption 5 protects from disclosure documents that are *predecisional* and form part of an agency's *deliberative* process. *See Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997); *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975) (to qualify for the deliberative process privilege, a document must be both "predecisional" and "deliberative."). The "deliberative process" exemption covers, for example, drafts of reports that reflect the views of the author, rather than those of the agency, and whose release would "inaccurately reflect or prematurely disclose the views of the agency." *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (citation omitted). "A document will be considered 'predecisional' if the agency can (i) pinpoint the specific agency decision to which the document correlates . . ." and (ii) "verify that the document precedes, in temporal sequence, the 'decision' to which it relates." *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 557 (1st Cir. 1992) (internal quotation and citations omitted); *see also Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985) (FOIA's deliberative process privilege does not protect communications by interested parties seeking to influence government decisions).

In this case, the City has not identified any deliberative process, or even any particular decision, that relates to any specific information included in the Worksheets. It does not claim, much less prove, that disclosure will reveal any specific opinions,

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recommendations, or advice given to the Mayor by any of the participants of these unidentified "private" meetings. (Response at 13.) On the other hand, as previously demonstrated by Plaintiff, disclosure of the logs will provide significant information to the public about both the Mayor's activities and his taxpayer-funded police detail. (Application at 8; Farrell Decl. ¶ 4.)

The City's attempt to invoke the deliberative process privilege relies heavily on *Times Mirror Company v. Superior Court*, 53 Cal. 3d 1325, 813 P.2d 240 (1991), a nearly 20 year-old decision that is, at best, anomalous in its application of public records law. *Cf. DR Partners v. Board of County Comm'nrs*, 116 Nev. 616, 624, 6 P.3d 465, 470 (Nev. 2002) ("the names of persons with whom government officials have consulted are not protected from disclosure under a deliberative process privilege"). The *Times Mirror* decision itself, which relies on case law developed under FOIA, is outdated. *Cf. Consumer Federation of Am. v. Dep't of Agriculture*, 455 F.3d 283 (D.C. Cir. 2006) (holding that FOIA's deliberative process privilege did not apply to appointment calendars of certain agency officials). In addition, as correctly noted in one of the two strong dissenting opinions in *Times Mirror*, disclosure of the identity of participants in policy formulation occurs routinely in FOIA cases (noting the use of "Vaughn indexes," named after *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). *Times Mirror*, 53 Cal. 3d at 1356-57 (Mosk, J., dissenting).

The City has wholly failed to establish the basis for deliberative process exemption. The City makes only a blanket assertion that disclosure of the Worksheets would reveal information about the Mayor's "private" meetings and thus undermine the deliberative process of the Mayor's Office. This sweeping claim fails to demonstrate with any degree of specificity how production of the logs would violate any rights of privacy or confidentiality or be detrimental to the best interests of the state. *See KPNX*, 183 Ariz. at 592, 905 P.2d at 601. If the meetings were "private," then they would not impact government decision-making in any way. If the meetings were "official" in nature, then the City has failed to establish that the Worksheets are "predecisional" or "deliberative."

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C. The City Has Not Established That Security Concerns Outweigh the Interest in Disclosure.

The City contends that the Mayor's security concerns require a blanket denial of disclosure of the Worksheets. (Response at 20-23.) This argument, which relies on a variety of factual assertions in affidavits attached to the Response, must be rejected.

Plaintiff does not dispute that public officials may be subject to threats, or that a security detail is important for the Mayor's safety. On the other hand, the City fails to provide any objective, quantifiable evidence to substantiate the number, frequency, veracity, likelihood, or seriousness of the claimed "threats" to the Mayor.

Instead, the City tries to invoke the specter of prior attacks on public officials, such as the shooting of Maricopa County Supervisor Mary Rose Wilcox thirteen years ago outside a meeting of the Board of Supervisors. (*See* Response at 22.[3]) This example, however, demonstrates only that public officials may always be exposed to some risk. As the dissent in *Times Mirror* observed, while "total secrecy" in government might provide "greater safety" for public officials, the "price" of nondisclosure "would be unacceptably high." *Times Mirror*, 53 Cal. 3d at 1357. Simply put, the City has not established how disclosure of the Worksheets – some of which are more than two and a half years old – threatens the Mayor's security by revealing a "patterns" of prior behavior that could "be used by anyone to determine the time and location of the Mayor." (*See* Application Exh. B.)

In any event, the issue here is whether the City is permitted to exempt an entire category of records by fiat. In this regard, it is helpful to consider exactly what type of records the Worksheets are. It is Plaintiff's understanding, and Plaintiff plans to present evidence to this effect, that the Worksheets are routine police department documents, used to document man-hours, vehicles, and other resources, expended in support of the mayor's protection. Plaintiff also understands that worksheets are routinely used throughout the Police Department, including in disciplinary proceedings. Plaintiff also has been

[3] The City erroneously states that the shooting of Supervisor Wilcox occurred in the Phoenix City Council Chamber. *See* LOS ANGELES TIMES, "Official Blames 'Hate Radio' for Her Shooting Over Stadium Tax," (Aug. 15, 1997) (available at http://articles.latimes.com/1997/aug/15/news/mn-22704).

informed that worksheets are often made public, such as in response in public records requests.

When viewed in this context, the City has not proven that disclosure of the Worksheets, or even a portion thereof, elevates the risk to the Mayor in any meaningful way. As set forth in Plaintiff's Application, the City must demonstrate why disclosure of records of past activity is significant when many of the Mayor's planned locations are publicly announced *in advance*, sometimes even "tweeted," to any interested party. Application at 6-8. The City must also demonstrate how any "patterns" discernable from the Worksheets are any different from numerous historical "patterns" of behavior that would be readily available to anyone who took the time to follow the Mayor's public comings and goings, such as the Mayor traveling from his residence to City Hall and back, or the Mayor's public disclosure that he regularly takes his son to the bus stop at 7:50 a.m. every school day. (*See* annotated calendar entries for January 11, 2008 and January 14, 2008 (attached to Exh. D-6 (Fricke Aff. 2)).)

Furthermore, the City must overcome an apparent contradiction in its own supporting affidavits. The City relies on the fact that the Mayor apparently has established easily identifiable, publicly observable, patterns of behavior, including regular travel routes, coffee breaks and favorite restaurants. *See* Fricke Aff. 2 at ¶ 12, 13; Masino Aff. ¶ 6. Assuming this is accurate, it would seem reckless, if not dangerous, for a public official under constant threat, as the City asserts, to engage in such readily predictable behavior. Moreover, it would raise significant questions as to whether the protective service being provided to the Mayor is being performed in an appropriate manner.

Yet other unanswered questions undercut the City's alleged security concerns. While the City demands across-the-board withholding of the Worksheets, it fails to explain why records that do not reveal any alleged pattern of behavior are not releasable. Certainly one-time events or occurrences do not constitute a "pattern." The City also does not explain what is the threshold number of events constituting a "pattern." Do three stops to the same coffee shop constitute a pattern? If so, over what period of time, and

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how recently must these visits have occurred, for a "pattern" to exist. If a record reveals a single non-recurring event, why is that record not releasable? And candidly, does the City really believe is it likely that a would-be assailant actually is going to access and analyze historical records of the security detail in an attempt to predict the Mayor's whereabouts on a particular date and at a particular time, especially when the Mayor openly discloses his current and upcoming activities nearly every day? The City must address all these questions and inconsistencies before it can establish the necessity of a blanket withholding of the Worksheets and overcome the significant public interest in disclosure.

III. CONCLUSION.

For the foregoing reasons, the City should be compelled to produce the requested records in their entirety.

RESPECTFULLY SUBMITTED this 26th day of July 2010.

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By */s/ Todd Feltus*

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ORIGINAL of the foregoing
filed this 26th day of July, 2010.

COPY of the foregoing mailed
this 26th day of July, 2010 to:

Honorable Judge Rea
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Exhibit 1

DECLARATION OF CHRISTOPHER J. FARRELL

I, Christopher J. Farrell, hereby declare as follows:

1. I am the Director of Investigations and Research at Judicial Watch, Inc. ("Judicial Watch"), a nonprofit, educational organization that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Judicial Watch regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

2. On or about December 11, 2009, at my direction, Judicial Watch sent a letter to the Phoenix Police Department requesting that it provide access to the following public records pursuant to A.R.S § 39-121.01:

> All activity logs for Mayor Phil Gordon's Security Detail. The time frame for this request is December 30, 2007 to the present.

3. As the elected chief executive of the City of Phoenix, the Mayor's daily activities are of substantial interest to residents and taxpayers of the City of Phoenix. It was my understanding that the activity logs of the Mayor's police detail identify the Mayor's daily activities by date, time, and location and also may contain additional, descriptive information, such as meetings or appointments the Mayor had, persons with whom the Mayor met, places to which the Mayor traveled, and persons accompanied or traveled with the Mayor. It also was my understanding that at least one reporter, Monica Alonzo-Dunsmoor of *The Arizona Republic*, requested these same activity logs in July 2009, but that the reporter's request was denied.

4. It is my belief that disclosure of the requested logs will help the public to

appreciate the size, scope, and duties of the Mayor's police detail and the activities of the officers assigned to it, including whether the detail has been used for official purposes only or if it also has been used for non-official or personal purposes as well. Disclosure of the requested logs thus will assist residents and taxpayers of the City of Phoenix in assessing whether the Mayor's publicly funded police detail is an appropriate use of public resources.

5. In a letter dated January 4, 2010, the City denied Judicial Watch access to the requested activity logs. In its denial letter, the City stated that disclosure of the logs, some of which are now more than two and half years old, would "demonstrate a pattern which could easily be used by anyone to determine the time and location of the Mayor." It also claimed that disclosure of the logs would reveal "the location and time that [the Mayor] may be alone, without the protection of the security detail," that the logs "reflect private, confidential information relating to the Mayor and his family members," and that they also "contain[] information related to private meetings held by the Mayor." The letter further claimed that disclosing information about the Mayor's "private" meetings would undermine the deliberative process of the Mayor's office, without making any attempt to demonstrate how any such allegedly "private" meetings were related to any way to any governmental process or how disclosure of the logs could even reveal the substance of any governmental deliberations. *Id.*

6. I interpreted this letter as nothing other than a complete denial of Judicial Watch's request. The City did not state that is was unclear as to the specific records Judicial Watch was seeking or indicate in any way that the City was open to discussion as to release of any portion of the records. While the City offered to produce the Mayor's

"public calendar," I had no reason to believe that the public calendar was anything significantly different than what was is usually posted by the Mayor's office on the Internet. The City did not indicate that the copies of the public calendar included any handwritten notes or other information added by the security detail.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 26, 2010 in Washington, D.C.

Christopher J. Farrell

Exhibit 2

--- P.3d ----, 2010 WL 2858456 (Ariz.App. Div. 1)
(Cite as: 2010 WL 2858456 (Ariz.App. Div. 1))

Only the Westlaw citation is currently available.

Court of Appeals of Arizona,
Division 1, Department T.
RIGEL CORPORATION, a Nebraska corporation that is qualified to do business in Arizona as Aksarben Pizza Corporation dba Krispy Kreme, Plaintiff-Appellant,
v.
STATE of Arizona; Arizona Department of Revenue, Defendants-Appellees.
No. 1 CA-TX 08-0006.

July 22, 2010.

Background: Taxpayer appealed from denial by Department of Revenue (DOR) of refund claims for transaction privilege tax assessments on taxpayer's retail sales of doughnuts. The Arizona Tax Court, Cause No. TX 2006-050010, Thomas Dunevant, III, J., granted taxpayer's motion to compel production of certain documents by DOR, and, on cross-motions for partial summary judgment, entered judgment for DOR. Taxpayer appealed.

Holdings: The Court of Appeals, Gemmill, J., held that:
(1) taxpayer did not qualify for statutory exemptions from transaction **privilege** taxes granted to retailers whose primary business is not the sale of food, but who sell food in a manner similar to grocery stores;
(2) sales from drive-through windows did not qualify for exemption granted to retailers who sell food and do not provide facilities for consumption on the premises;
(3) taxpayer did not conduct a delicatessen business within the meaning of another exemption; and
(4) Court of Appeals would decline to create a **privilege** extending to pre-decisional materials that reflect a government official's **deliberative process**, including opinions, recommendations, and advice about agency policies.

Judgment affirmed.

West Headnotes

[1] Taxation 371 ⚿0

371 Taxation
The Court of Appeals reviews the tax court's grant of summary judgment de novo.

[2] Taxation 371 ⚿0

371 Taxation
The Court of Appeals reviews de novo the tax court's construction of statutes and findings that combine fact and law, but reviews the tax court's factual findings for clear error.

[3] Taxation 371 ⚿0

371 Taxation
The transaction privilege tax is akin to a sales tax with two differences: (1) the transaction privilege tax is levied on gross receipts instead of individual sales, and (2) the transaction privilege tax is levied on the seller, whereas a sales tax may be levied directly upon the buyer. A.R.S. § 42-5008(A).

[4] Taxation 371 ⚿0

371 Taxation
Taxpayer's primary business was the sale of doughnuts for home consumption, such that it did not qualify for statutory exemption from transaction privilege taxes granted to retailers whose primary business is not the sale of food, but who sell food in a manner similar to grocery stores; only about five percent of taxpayer's customers consumed the doughnuts and beverages on premises of seller's franchise locations. A.R.S. §§ 42-5101(3), 42-5102(A)(2).

[5] Statutes 361 ⚿0

361 Statutes
When the legislature has not defined a word or phrase in a statute, court may consider the definitions of respected dictionaries.

[6] Taxation 371 ⚿0

371 Taxation

--- P.3d ----, 2010 WL 2858456 (Ariz.App. Div. 1)
(Cite as: 2010 WL 2858456 (Ariz.App. Div. 1))

Taxpayer's sale of doughnuts from drive-through windows at its franchise locations did not qualify for statutory exemption from transaction privilege taxes granted to retailers who sell food and do not provide or make available any facilities for the consumption of food on the premises; taxpayer provided tables and chairs for its customers' use on the premises, and drive-through window was part of the same space in which tables and chairs were provided, although taxpayer may have separately recorded its drive-through and in-store sales. A.R.S. §§ 42-5101(2, 6), 42-5102(A)(3).

[7] Taxation 371 🔑0

371 Taxation
Retail doughnut seller did not conduct a "delicatessen business" within the meaning of statutory exemption from transaction privilege taxes, regardless of whether seller's stores sold "perishable food." A.R.S. § 42-5102(A)(4).

[8] Taxation 371 🔑0

371 Taxation
Court of Appeals had jurisdiction, on appeal by taxpayer from judgment holding it liable for transaction **privilege** taxes, to address on the merits a challenge by Department of Revenue (DOR) to tax court's rejection of a **deliberate process privilege** regarding certain documents and evidence sought by taxpayer, though DOR did not file a cross-appeal, as decision of Court of Appeals with respect to claimed **privilege** could not operate to enlarge DOR's relief under the judgment. 17B A.R.S. Civil Appellate Proc.Rules, Rule 13(b)(3).

[9] Privileged Communications and Confidentiality 311H 🔑0

311H Privileged Communications and Confidentiality
The Court of Appeals would decline to create, by decisional law, a **privilege** extending to pre-decisional materials that reflect a government official's **deliberative process**, including opinions, recommendations, and advice about agency policies.

[10] Appeal and Error 30 🔑0

30 Appeal and Error
Whether a privilege exists is a question of law that appellate court reviews de novo.

[11] Records 326 🔑0

326 Records
Arizona recognizes a legal presumption in favor of disclosing public records.

Appeal from the Arizona Tax Court; Cause No. TX 2006-050010; The Honorable Thomas Dunevant, III, Judge (Retired). AFFIRMED.Cavanagh Law Firm By JeffreyB. Smith, Peter C. Guild, Phoenix, Attorneys for Plaintiff-Appellant.

Terry Goddard, Attorney General By KimberlyJ. Cygan, Assistant Attorney General, Lisa A. Neuville, Phoenix, Attorneys for Defendants-Appellees.

OPINION

GEMMILL, Judge.

*1 ¶ 1 Rigel Corporation, doing business as Krispy Kreme ("Rigel"), appeals an Arizona Tax Court ruling holding Rigel liable for transaction privilege taxes under the retail classification. *See* Ariz.Rev.Stat. § 42-5061(A) (Supp.2009).[FN1] The issue presented is whether Rigel is a qualified retailer, exempt from the transaction privilege tax, under one or more of the enumerated exceptions in Arizona Revised Statutes ("A.R.S.") section 42-5102(A) (2006). The tax court concluded that Rigel did not come within any of these exceptions to taxation, and we agree.

¶ 2 Additionally, the Arizona Department of Revenue ("Department") challenges the tax court's rejection of **a deliberative process privilege** regarding certain documents and evidence. We agree with the tax court that this privilege does not exist under Arizona law.

¶ 3 We therefore affirm the judgment of the Arizona Tax Court in its entirety.

FACTS AND PROCEDURAL BACKGROUND

¶ 4 Between June 1, 1999 and April 30, 2004, Rigel sold doughnuts to the general public in Arizona.[FN2] At least 75 percent of its doughnut sales to the public were in quantities of a dozen or more and were boxed

"to go." This percentage did not include Rigel's "wholesale" doughnut sales to retail vendors.

¶ 5 Rigel did not ask its customers where they intended to eat the doughnuts, and the doughnuts were placed in boxes or bags when sold. Rigel provided tables and chairs at each of its Arizona franchise locations for the estimated 5 percent of those customers who chose to consume the doughnuts on the premises.

¶ 6 Rigel also maintained cash registers with keys for recording all sales of a dozen or more doughnuts. Rigel's clerks were required to use these keys to implement the policy of providing a $1 discount for all sales of a dozen or more doughnuts. With the exception of its "wholesale" transactions, Rigel added a transaction privilege tax component to the price it charged its customers for doughnuts, whether they bought one doughnut, a dozen, or more.

¶ 7 Rigel made approximately 50 percent of its total retail sales at its drive-through windows. It recorded these sales on cash registers dedicated to such window sales, and did not use these registers for its walk-up retail business.

¶ 8 The Department assessed Arizona transaction privilege taxes on Rigel's take-out and on-premises consumption sales. Rigel responded by filing a series of refund claims for transaction privilege taxes. The last amended refund claim, filed on June 2, 2004, requested $2,332,393.15 for the June 1999 to April 2004 period. When the Department denied the claims, Rigel filed an unsuccessful protest with the Office of Administrative Hearings in accordance with A.R.S. §§ 42-1119 to -1251 (2006 & Supp.2008).[FN3]

¶ 9 Rigel then appealed to the tax court pursuant to A.R.S. § 42-1254(C) (2006). The parties litigated whether the **deliberative process privilege** shielded some of the Department's documents from production. These documents included memos to the Department's "Uniformity Committee" regarding policy on the food tax exemption and notes from a 1999 Uniformity Committee meeting. The tax court granted Rigel's motion to compel, and this court declined to exercise jurisdiction over the Department's ensuing petition for special action challenging the tax court's ruling.

***2** ¶ 10 Meanwhile, the parties cross-moved for partial summary judgment on the application of the exemption statute. The tax court ruled in the Department's favor, denied the refund claims, and entered judgment for additional tax and accrued interest of $121,743.45.[FN4] This appeal followed.

RIGEL IS NOT A QUALIFIED RETAILER EXEMPT FROM THE ARIZONA TRANSACTION PRIVILEGE TAX

[1][2] ¶ 11 This court reviews the tax court's grant of summary judgment de novo. *Wilderness World, Inc. v. Ariz. Dep't of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). We likewise review de novo the tax court's construction of statutes and findings that combine fact and law, but review its factual findings for clear error. *Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, 383, ¶ 15, 166 P.3d 934, 938 (App.2007).

[3] ¶ 12 Arizona levies "privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities." A.R.S. § 42-5008(A) (2006). The transaction privilege tax is akin to a sales tax with two differences: (1) the transaction privilege tax is levied on gross receipts instead of individual sales, and (2) the transaction privilege tax is levied on the seller, whereas a sales tax may be levied directly upon the buyer. *See Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973) (the transaction privilege tax is imposed on gross revenues instead of on individual transactions); *Ariz. Dep't of Revenue v. Action Marine, Inc.*, 218 Ariz. 141, 142, ¶ 7, 181 P.3d 188, 189 (2008) ("The liability for TPT falls on the taxpayer, not on the taxpayer's customers.") (citing A.R.S. § 42-5024 (2006)).

¶ 13 In this case, the Department assessed the transaction privilege tax pursuant to the retail classification, A.R.S. § 42-5061(A) (2006), which provides in relevant part:

> The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business. The tax imposed on the retail classification does not apply to the gross proceeds of sales or gross income from:
>
> * * *

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> (15) Food, as provided in and subject to the conditions of article 3 of this chapter and § 42-5074.

This exception for sales of "food" in A.R.S. § 42-5061(A)(15) is significantly limited by "the conditions of article 3 of this chapter" and the definition of "food."

¶ 14 Article 3 includes A.R.S. § 42-5102, which provides several exemptions from transaction privilege taxes:

> A. Except for the gross proceeds of sales or gross income from the sale of food for consumption on the premises, the taxes imposed by this chapter do not apply to the gross proceeds of sales or gross income from sales of food by any of the following:
>
> * * *
>
> 2. A retailer who conducts a business whose primary business is not the sale of food but who sells food which is displayed, packaged and sold in a similar manner as an eligible grocery business.
>
> *3 3. A retailer who sells food and does not provide or make available any facilities for the consumption of food on the premises.
>
> 4. A retailer who conducts a delicatessen business either from a counter which is separate from the place and cash register where taxable sales are made or from a counter which has two cash registers which are used to record taxable and tax exempt sales or a retailer who conducts a delicatessen business and who uses a cash register which has at least two tax computing keys which are used to record taxable and tax exempt sales.
>
> A.R.S. § 42-5102(A). Food sales by anyone other than a qualified retailer-i.e., the classifications described in § 42-5102(A)-do not qualify for an exemption. Ariz. Admin. Code ("A.A.C.") R15-5-1860(12)(a).

¶ 15 Arizona law presumes that all gross proceeds of sales comprise the tax base for the business until the contrary is established. A.R.S. § 42-5023 (2006). Rigel claims that its sales are exempt because it is a qualified retailer under A.R.S. § 42-5102(A)(2), (3), and (4). We will examine Rigel's arguments for exemption from taxation under each of these three subsections of § 42-5102(A).[FN5]

Rigel Does Not Qualify Under A.R.S. § 42-5102(A)(2)

[4] ¶ 16 Rigel contends that it qualifies under A.R.S. § 42-5102(A)(2) as a "retailer who conducts a business whose primary business *is not the sale of food* but who sells food which is displayed, packaged and sold in a similar manner as an eligible grocery business." (Emphasis added.) "Food" is defined as "any food item intended for human consumption which is *intended for home consumption* as defined by rules adopted by the department pursuant to § 42-5106." A.R.S. § 42-5101(3)(2006) (emphasis added).

¶ 17 Arizona Administrative Code R15-5-1860(12)(b)(ii) provides further guidance regarding the exemption granted in § 42-5102(A)(2) by defining a "qualified retailer" as:

> Retailers whose primary business is not the sale of food, but who sell food in a manner similar to grocery stores. This category includes stores such as department stores, drug stores, and gas stations.

As the Department has pointed out, examples of such qualified retailers could include Walgreens, Circle K, Target, Walmart, and Costco. Each is an entity whose primary business is not the sale of food intended for home consumption but which sells food which is displayed, packaged and sold in a similar manner as an eligible grocery business. *See* A.R.S. § 42-5102(A)(2).

¶ 18 According to Rigel, only about 5 percent of its customers consumed the doughnuts and beverages on the premises. Food sold for consumption on the premises therefore constituted a small percentage of Rigel's overall retail sales, and Rigel does not dispute that the doughnuts sold for consumption off the premises were "food" intended for home consumption. We conclude on this record that Rigel does not satisfy the requirement of § 42-5102(A)(2) exemption as a retailer whose "primary business is not the sale of food."

*4 [5] ¶ 19 Rigel contends that its *primary* business

was as a restaurant and that it was not primarily selling "food"-meaning food intended for home consumption.[FN6] We are not persuaded by this challenge to the interpretation of the word "primary" in § 42-5102(A)(2). The tax court understood "primary" in this context to mean more than 50 percent. The statutes do not define "primary" as used here. When the legislature has not defined a word or phrase in a statute, we may consider the definitions of respected dictionaries. *DeVries v. State*, 221 Ariz. 201, 207, ¶ 21, 211 P.3d 1185, 1191 (App.2009); *Urias v. PCS Health Sys., Inc.*, 211 Ariz. 81, 85, ¶ 22, 118 P.3d 29, 33 (App.2005). *See also* A.R.S. § 1-213 (2002) ("Words and phrases shall be construed according to the common and approved use of the language."). "Primary" means "[f]irst or best in degree, quality, or importance." *Webster's II New Riverside University Dictionary* 934 (1994). *See also The New Oxford American Dictionary* 1345 (2d ed.2005) (defining "primary" as "of chief importance; principal"). We need not, however, determine a precise definition of "primary" in § 42-5102(A)(2) because it is unmistakable on this record that Rigel's primary business is the sale of doughnuts for home consumption. Therefore, we agree with the tax court that Rigel does not qualify for the transaction privilege tax exemption provided by § 42-5102(A)(2).

¶ 20 Rigel further maintains that it is antithetical to the statute's intent to tax food differently based upon a retailer's business. But § 42-5102 makes clear that the exemption only may be claimed by qualified retailers. This point is driven home by a corresponding regulation that specifies that "[a] retailer other than a qualified retailer must pay a tax measured by the sale of otherwise exempt food even though the sale of such items would be exempt if sold by a qualified retailer." A.A.C. R15-5-1860(12)(a).

¶ 21 Tax distinctions based upon the nature of a retailer's business are not unique to this statute. As the Department points out, the federal government distinguishes between retailers with respect to food stamps. A customer may use food stamps to purchase doughnuts at a grocery store, but may not use them for purchases at a specialty doughnut shop. *See* 7 C.F.R. § 278.1(b)(1)(iv).

¶ 22 Rigel counters that a former Department legislative liaison once wrote that the legislature intended to create a level playing field for all grocery stores and restaurants. But the liaison testified at deposition in this case that the summary of her alleged statement at an internal Uniformity Committee meeting in 2003 was incorrect. She clarified that while taxpayers may have believed that food sold in bulk for home consumption should not be taxable, that was not what the statute said or what the Department's position was.

¶ 23 Rigel also asserts that the Department at one time interpreted the exemption in A.R.S. § 42-5102(A)(2) to include bulk sales by doughnut shops. In 1999, the Department's Food Subcommittee asked the Department to consider interpreting the statutes to include a restaurant as a qualified retailer if the restaurant's primary business was not the sale of food intended for home consumption, but one part of its business was to sell food in bulk the way grocery stores do. Thus, Marie Callender's could be a qualified retailer because its primary business was the sale of food for consumption on the premises, but it also had a separate counter from which it sold baked goods in bulk for home consumption. The then-director of the Department eventually directed Department section heads to provisionally apply A.R.S. § 42-5102(A)(2) as set forth in a memo that substantially adopted the subcommittee's recommendations. To date, however, the Department has not created a rule or issued a ruling adopting the recommendation that it interpret A.R.S. § 42-5102(A)(2) to include restaurants as qualified retailers; rather, the applicable rule continues to be that restaurants are generally not qualified retailers. A.A.C. R15-5-1862(A). Moreover, the recommendations underscore that the primary business of the taxpayers under discussion was not the sale of food for home consumption. In addition, the Department has long held that Dunkin' Donuts, a retailer similar to Rigel, is not a qualified retailer. *See* Arizona Sales Tax Ruling No. 5-17-80.

***5** ¶ 24 Nor are we persuaded by Rigel's reliance upon a Department information letter concluding that Rigel falls within the scope of A .R.S. § 42-5102(A)(2). The letter, from the then-manager of the Tax Research and Analysis Section, does not state that Rigel or other doughnut businesses are qualified retailers. It merely provides that "the exemption for sales of food may extend to retailers whose primary business is not the sale of food for home consumption." Further, the letter cautions that the Department could later determine that its advice was erroneous and the only consequence would be that the Department could abate

penalties and interest to the taxpayer receiving the letter.

¶ 25 We cannot attach the same significance to the letter that Rigel does. The letter responded to correspondence from a public accounting company, which stated that "all the items we are inquiring about are purchased from a qualified retailer listed in A.R.S. § 42-5102" and inquired whether items such as prepared salads qualified for exemption. Because the author of the letter was provided minimal information about the taxpayer's operations, and no information about what was provided with the food and how the food was displayed, the letter hardly qualifies as a binding determination regarding whether Rigel is a qualified retailer.

¶ 26 Finally, there is no evidence that Rigel relied on the letter. With the exception of its separately identified wholesale transactions, Rigel added a charge for the transaction privilege tax to the purchase price it charged customers.

Rigel Does Not Qualify Under A.R.S. § 42-5102(A)(3)

[6] ¶ 27 Alternatively, Rigel contends that its sale of doughnuts from drive-through windows qualifies for exemption from taxation under A.R.S. § 42-5102(A)(3), which provides:

> A. Except for the gross proceeds of sales or gross income from the sale of food for consumption on the premises, the taxes imposed by this chapter do not apply to the gross proceeds of sales or gross income from sales of food by any of the following:
>
> * * *
>
> 3. A retailer who sells food and *does not provide or make available any facilities for the consumption of food on the premises* .

(Emphasis added.) "Facilities for the consumption of food" include tables, chairs, benches, booths, stools, counters, and similar conveniences. A.R.S. § 42-5101(2).

¶ 28 Rigel admits that it provides tables and chairs for customers' use on the premises, but argues that its drive-through window represents a separate business activity with separately defined hours. Section 42-5101(6), A.R.S., defines "premises" as:

> the total space and facilities in or on which a retailer conducts his business and which are owned or controlled, in whole or in part, by a retailer or which are made available for the use of customers of the retailer or group of retailers, including any building or part of a building, parking lot or grounds.

¶ 29 Under this definition, Rigel's drive-through window is part of the same space in which tables and chairs are provided. Therefore, notwithstanding that Rigel may have separately recorded drive-through sales and in-store sales, Rigel fails to qualify under A.R.S. § 42-5102(A)(3) because its premises includes tables and chairs for use by customers to consume doughnuts and beverages.[FN7]

Rigel Does Not Qualify Under A.R.S. § 42-5102(A)(4)

*6 [7] ¶ 30 Finally, Rigel argues that it is a qualified retailer under A.R.S. § 42-5102(A)(4), which applies to a retailer who conducts a *delicatessen business* (1) from a counter separate from the place and cash register where taxable sales are made, or (2) from a counter which has two cash registers which are used to record taxable and tax exempt sales, or (3) using a cash register with at least two tax computing keys which are used to record taxable and tax exempt sales.

¶ 31 The statute does not define "delicatessen," but the Department's rules state that it is "a business which sells specialty food items, such as prepared cold meats, perishable food and grocery items kept under refrigeration." A.A.C. R15-5-1860(5). Another rule directs a delicatessen to report its sales of taxable food, including hot and cold sandwiches, under the restaurant classification. A.A.C. R15-5-1862(C).

¶ 32 Rigel argues that its stores were delicatessens because they sold "perishable food," but we are not persuaded. Rigel points us to a Department information letter dated March 29, 1999, indicating that a doughnut shop is similar to a delicatessen and could qualify under A.R.S. § 42-5102(A)(4) if it uses a dual cash register method. The main problem with this argument is that the Department's Uniformity Committee opted in November 1999 to *not* extend the

delicatessen definition to doughnut and ice cream shops. Specifically, the Committee determined: "The definition of 'delicatessen' should not be broadened to include donut [sic] shops, ice cream shops, etc." Similarly, the aforementioned 1980 tax ruling concluded that doughnut shops are not delicatessens. *See* Arizona Sales Tax Ruling # 5-17-80.

¶ 33 Nor can we accept Rigel's contention that specialty food stores, apart from delicatessens, did not exist when Arizona adopted the qualified retailer exemption statutes in 1980. As the Department points out, Winchell's Donuts opened in 1948 and Dunkin' Donuts opened in 1955. Had the legislature wished to exempt specialty doughnut stores as qualified retailers it could have done so in 1980 or anytime since.

¶ 34 Moreover, Rigel fails to satisfy the two cash register and dual key requirements of A.R.S. § 42-5102(A)(4). Rigel admittedly did not have dual keys for taxable and non-taxable items, and it charged taxes on all sales. It consequently did not key in any doughnut sales as non-taxable, and did not distinguish between doughnuts consumed on the premises and those ordered for take-out. Rigel claims sales of a dozen or more doughnuts were rung up separately, but that is not sufficient under A.R.S. § 42-5102(A)(4).

¶ 35 In sum, we agree with the tax court that Rigel does not fall within the definition of a qualified retailer under A.R.S. §§ 42-5102(A)(2), (3), or (4). Therefore, its receipts from doughnut and associated sales do not qualify for tax exemption. *See* A.A.C. R15-5-1860(12)(a).

THE DELIBERATIVE PROCESS PRIVILEGE

*7 [8] ¶ 36 The Department challenges the tax court's rejection of its assertion that the **deliberative process privilege** protected certain discussions and deliberations within the Department regarding tax policy and tax code interpretations. Before reaching the merits of this issue, however, we must consider Rigel's challenge to the Department's ability to raise this argument on appeal. According to Rigel, this court lacks jurisdiction to consider this argument because the Department did not cross-appeal.

¶ 37 The Department did not need to file a cross-appeal to challenge the tax court's privilege ruling. *See* ARCAP 13(b)(3) ("The brief of the appellee may, without need for a cross-appeal, include in the statement of issues presented for review and in the argument any issue properly presented in the superior court."). "Essentially no issues which could lead to the same practical result as that embodied in the judgment will be foreclosed by lack of a cross-appeal." ARCAP 13 State Bar Committee Note.; *see also Ariz. Health Care Cost Containment Sys. Admin. v. Carondelet Health Sys.*, 188 Ariz. 266, 269, 935 P.2d 844, 847 (App.1996). Our decision with respect to the claimed privilege could not operate to enlarge the Department's relief under this judgment. Accordingly, we have jurisdiction to address the **deliberative process privilege** argument on the merits.

¶ 38 We recognize that because the Department is the successful party on appeal, the tax court's ruling concerning the **deliberative process privilege** is not essential to the ultimate result in this case. Nonetheless, we choose in our discretion to address the question for several reasons. First, the Department contends that recognition of a **deliberative process privilege** is important and necessary to its efficient operation. Second, the Department properly preserved this issue in the tax court, sought special action review of the tax court's ruling, and now presses for a ruling on appeal. Questions of privilege frequently are decided by special action before the conclusion of the underlying case because the wrongful denial of a privilege's protection constitutes an independent harm that cannot be cured by a favorable result on the merits. *See Sun Health Corp. v. Myers*, 205 Ariz. 315, 317, ¶ 2, 70 P.3d 444, 446 (App.2003) ("Because an appeal offers no adequate remedy for the prior disclosure of privileged information, special action jurisdiction is proper to determine a question of privilege."). This court, however, declined to accept jurisdiction when the Department petitioned for special action relief from the tax court's rejection of this privilege in this case. Third, by their very nature, questions of privilege involve the adjudication of rights that exist independently of the merits of the underlying case. A party that is successful on the merits of an action may nonetheless be aggrieved if its privileged communications have been wrongly disclosed by court order. If we decline to review such questions except in those cases where compelled disclosure plainly affects the result in the underlying case, legal errors affecting statutory privilege rights may often, as a practical matter, be capable of repetition while evading review.

The Tax Court Did Not Err In Rejecting The Department's Deliberative Process Privilege Argument

*8 [9][10] ¶ 39 During discovery in this action, Rigel requested that the Department produce various documents. The Department resisted production of certain documents by asserting the **deliberative process privilege**. Rigel persuaded the tax court that this privilege did not preclude the Department's production of internal memoranda and correspondence. Whether a privilege exists is a question of law that we review de novo. *Blazek v. Superior Court*, 177 Ariz. 535, 537, 869 P.2d 509, 511 (App.1994).

¶ 40 As a threshold matter, the **deliberative process privilege** has not heretofore been adopted in Arizona but instead is a federal **privilege** preserved in "exemption 5" of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5). *Ariz. Indep. Redist. Comm'n v. Fields*, 206 Ariz. 130, 141, ¶ 33, 75 P.3d 1088, 1099 (App.2003). The statute shields "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The **privilege** extends to pre-decisional materials that reflect a government official's **deliberative process**, including opinions, recommendations, and advice about agency policies. *Fields*, 206 Ariz. at 141, ¶ 33, 75 P.3d at 1099. A litigant may obtain the materials if the need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure. *Federal Trade Comm'n v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984). The litigant's ability to overcome the privilege under FOIA is subject to the court's evaluation of various factors, including "(1) the relevance of the evidence[,] (2) the availability of other evidence[,] (3) the government's role in the litigation[,] and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.*

[11] ¶ 41 Arizona recognizes a legal presumption in favor of disclosing public records. *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). Moreover, we have held that government agencies do not ordinarily have a privilege to refuse to produce evidence unless a statute has specifically created an exemption. *Gordon v. Indus. Comm'n*, 23 Ariz.App. 457, 460, 533 P.2d 1194, 1197 (1975) (citing Udall, Ariz. Law of Evid. § 102 (1960)). To date, our legislature has not codified any such privilege in the Arizona Public Records statutes. *See* A.R.S. §§ 39-121 to -161 (2001 & Supp.2008). We will not, via decisional law, create this privilege at this time. Because this asserted privilege was the sole basis of the Department's refusal to produce specific documents, the tax court did not err in ordering the items to be produced.[FN8]

CONCLUSION

¶ 42 We affirm the tax court's grant of summary judgment to the Department and its decision to compel production of the Department's documents.

CONCURRING: PETER B. SWANN, Presiding Judge, and DIANE M. JOHNSEN, Judge.

FN1. This statute, as amended in 2008, applies retroactively to taxable periods beginning from and after December 31, 1999. 2008 Ariz. Sess. Laws, ch. 194, § 5. The statute was amended again in 2010. The 2010 amendments, however, do not impact any issues in this appeal.

FN2. Rigel also sold beverages and promotional items.

FN3. During the administrative process, Rigel claimed that it was an eligible grocery business under A.R.S. § 42-5102(A)(1)(2006) and later contended in the tax court that the Department had violated the equal protection clause. Rigel has not raised these arguments on appeal, and we therefore consider them waived and do not address them. *See Nelson v. Rice*, 198 Ariz. 563, 567 n. 3, ¶ 11, 12 P.3d 238, 242 n. 3 (App.2000).

FN4. Rigel stipulated to judgment regarding additional transaction privilege tax exemptions it had claimed on some wholesale transactions and on machinery and equipment used in a manufacturing operation.

FN5. Rigel does not claim to be a qualified

retailer, exempt from transaction privilege taxes, under subsections (1), (5), or (6) of § 42-5102(A).

FN6. Both parties acknowledged at oral argument that some of these definitions and concepts are "counter-intuitive," at least at first blush.

FN7. We also reject Rigel's argument that the meaning of "premises" for this purpose should be derived primarily by reference to A.R.S. § 42-5101(4), which provides examples of "food for consumption on the premises."

FN8. We agree with Rigel that *Grimm v. Ariz. Bd. of Pardons & Paroles* fails to support the Department's **deliberative process privilege** argument. 115 Ariz. 260, 564 P.2d 1227 (1977). The Arizona Supreme Court held in *Grimm* that the board could be liable only for grossly negligent or reckless release of a prisoner, and thus "any inquiry into the mental processes of a parole decision is improper." *Id.* at 269, 564 P.2d at 1236. In other words, any such inquiry would not be reasonably calculated to lead to the discovery of admissible evidence. This holding and the court's protective order thus are based on the discovery rules, not on a privilege. *Id.* at 269-70, 564 P.2d at 1236-37.

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