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December 23, 2009

VIA FACSIMILE  
AND U.S. MAIL

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Re: Journal Communications, Inc. / Douglas Unified School District No. 27 (Right to Inspect Public Records Regarding Superintendent Earl Pettit)

Dear Mr. Hoyack and Mes. Carl and Parker:

This firm represents Journal Communications, Inc. and KGUN-9, which produces "KGUN-9 News," and KGUN News Director Forrest Carr (collectively, "KGUN"). In that capacity, I write to secure your prompt compliance with KGUN's requests to inspect records reflecting the job performance of Douglas Unified School District Superintendent Earl Pettit. Like KGUN's earlier requests, this renewed demand to inspect public records is made for a non-commercial, newsgathering purpose, pursuant to A.R.S. § 39-121 *et seq.* (the "Arizona Public Records Law").

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### Factual Background

On October 19, 2009, KGUN submitted a public records request to the Douglas Unified School District (“DUSD” or the “District”), seeking (1) the entire personnel file of Superintendent Pettit, and (2) any correspondence between Superintendent Pettit and members of the DUSD Governing Board. KGUN later narrowed the second request to correspondence over the past year “in which board members express[ed] dissatisfaction with Mr. Pettit’s job performance, or which could serve to explain why Mr. Pettit is now the target of a termination investigation.”

On October 30, 2009, KGUN submitted a second public records request, seeking (1) letters, e-mails or memoranda sent to DUSD Governing Board (“Board”) members since January 1, 2008 requesting public records or detailing a public records request, (2) any correspondence to or from any Board member discussing any public records request, and (3) copies of any records that were produced in response to any such public records request. Three Board members have now substantially complied or are in the process of complying with this request. Board Members Lopez and Rivera, however, have not responded to KGUN’s request.

KGUN submitted another public records request to DUSD on November 9, seeking (1) any letters written since September 2008 between any district employee or any member of the public and any member of the Board discussing or complaining about the performance of Pettit, or discussing any proposal for Pettit’s termination, suspension or reassignment; (2) any correspondence between Board members discussing or complaining about Pettit’s job performance or decision-making since September 2008; (3) any correspondence sent on or after March 1, 2009 between Pettit and Attorney General Terry Goddard discussing Pettit’s difficulties with the Board; and (4) any correspondence sent on or after October 1, 2009 between DUSD staff and any member of the Board, or between any Board members, in response to KGUN public records requests.

Although DUSD Human Resources Director Mary Good has made some records available for inspection and copying, DUSD has denied many of KGUN’s requests to inspect public records. To be clear, KGUN renews its demand to inspect and copy the following public records: (1) Private Investigator Patrick Cooper’s report on Pettit, together with all notes, memoranda and interview transcripts; (2) any and all correspondence to or from Mr. Cooper and any DUSD employee, Board member or DUSD attorney; and (3) any and all correspondence, including email, since September 2008 sent or received by members of the Board relating to Pettit’s performance, termination, suspension or reassignment (i.e., KGUN’s November 9, 2009 request), or the investigation of the foregoing matters (collectively, the “Records”).

In a December 14, 2009 letter to Forrest Carr, Deputy Cochise County Attorney Anne E. Carl – who presumably represents DUSD on these issues – denied KGUN’s outstanding requests citing the attorney-client privilege. For the reasons explained below, DUSD has not met its burden to withhold the Records, and copies should be made available for KGUN’s inspection forthwith.

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### The Arizona Public Records Law

DUSD's failure to allow inspection of these Records violates the Arizona Public Records Law, which provides a broad right of public inspection and copying of public records. The statute commands that "[p]ublic records and other matters in the custody of any officer *shall be open to inspection by any person at all times during office hours.*" A.R.S. § 39-121 (emphasis added). The statute "evinces a clear policy favoring disclosure." *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984). Indeed, "access and disclosure is the strong policy of the law . . ." *Id.* at 491, 687 P.2d at 1246. The statute "defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007). In view of this strong public policy in favor of disclosure, the Arizona Supreme Court has recognized that "all records required to be kept under A.R.S. § 39-121.01(B) are *presumed* open to the public for inspection as public records." *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246 (emphasis added). In applying the statute, "[d]oubts should be resolved in favor of disclosure." Ariz. Op. Att'y Gen. No. R75-781 at 145 (1975-76).

To overcome the heavy presumption in favor of disclosure, the record custodian must produce facts to "specifically demonstrate" that release of the requested records "would violate rights of privacy or confidentiality" or harm the "best interests of the state." *Cox Arizona Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). The custodian cannot meet this burden by speculating or "argu[ing] in global generalities of the possible harm that might result from the release." *Cox*, 175 Ariz. at 14, 852 P.2d at 1198; *Star Publ'g Co. v. Pima County Attorney's Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (Ct. App. 1994) (party opposing disclosure must "demonstrate a *factual basis* why a particular record ought not be disclosed") (emphasis added). The custodian also must demonstrate that any such harm outweighs the public's right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, 35 P.3d 105, 112 (Ct. App. 2001) ("[t]he public's right to know any public document is weighty in itself").

### The Application of the Law to the Records

There can be no doubt that all of the records sought by KGUN are public records, and that they are presumptively subject to public inspection. See A.R.S. § 39-121.01(B) ("All 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."); *Lake v. City of Phoenix*, No. CV-09-0036-PR, 2009 WL 3461304, at \*2, ¶ 9 (Oct. 29, 2009) (recognizing that A.R.S. § 39-121.01(B) "supplements" definition of "public record" in case law). Indeed, all of the records sought by KGUN reflect the official activities of a public body and expenditures of public money. According to the Arizona Department of Education, DUSD had an operating budget of roughly \$20 million in public funds in fiscal year 2008-2009. The Records also reflect official conduct or alleged misconduct by Superintendent Pettit, and DUSD's official investigation of Pettit's job performance and official conduct. A.R.S. § 39-128(A)

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(disciplinary records of public employees are public records subject to public inspection); *e.g.*, *Griffis*, 215 Ariz. at 4, 156 P.3d at 421 (holding definition of public record includes “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.”). As such, the Records are public records presumptively subject to public inspection. *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246.

To withhold the Records, DUSD must “specifically demonstrate” that release of the records would cause harm. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. Speculation about *potential* harm is insufficient to justify blanket secrecy. Rather, DUSD must “point to specific risks with respect to specific disclosures.” *Star Publ’g Co.*, 181 Ariz. at 434, 891 P.2d at 901; *Mitchell*, 142 Ariz. at 335, 690 P.2d at 54 (“The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure . . .”).

#### The Investigative Report

As an initial matter, the investigative report prepared by Patrick Cooper (the “Report”) should be released promptly. A.R.S. § 39-121.01(D)(1) (custodian “shall promptly furnish” public record on request). Because the Report was ordered and apparently received by DUSD and reflects performance of official duties – namely, the performance in office of Superintendent Pettit and the District’s official investigation of Pettit’s performance – it is a public record.

The fact that Pettit may remain under investigation by the District provides no basis to withhold the Report. The Arizona Supreme Court has explicitly held that records of ongoing investigations are subject to inspection under the law. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198 (“We cannot support such a sweeping exemption from the public records law of this state.”). Moreover, one Arizona court held that witness interview transcripts in an internal investigation into an illegal “slush fund” were public records. *Dunwell v. Univ. of Ariz.*, 134 Ariz. 504, 508, 657 P.2d 917, 921 (Ct. App. 1982) (observing that fear of “embarrassing questions” is no basis for non-disclosure).

Similarly, there is no exception to the law that permits DUSD to withhold Records until the Board takes action. *E.g.*, *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (Ct. App. 2007) (holding notices of claim filed against public bodies are public records in absence of a statutory exception; “[w]ithout an express statutory exemption[,] a bare assertion of confidentiality does not make a document any less a public record.”).

In fact, then-Governor Jane Dee Hull vetoed a bill in 1999 that would have designated as confidential – and exempted from public disclosure under the Public Records Law – the performance evaluations of school superintendents. A.R.S. § 15-537(G) provides that evaluations of certified teachers are “confidential” and “do not constitute a public record . . .” By contrast, A.R.S. § 15-503,

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which governs performance evaluations for school superintendents, contains no similar exemption. In vetoing the bill, Gov. Hull emphasized the public's ability to monitor school districts:

[T]his bill was vetoed because I believe parents have a right to know. *School districts supported with taxpayer dollars should not withhold any information from the public.* Some argue that school officials are not as forthright in preparing evaluations because this is disclosed to the public. The problem . . . lies not with this process but with the districts who are unwilling to honestly report the evaluations of their employees.

As you know, I am a strong supporter of our public school system. This support, however, does not extend into allowing assessments of school administrators and psychologists from becoming public record. *Recent events in various school districts and charter schools make it clear that our task is to insure parents have complete access to information; only then can parents make the best decisions on behalf of their children.*

My administration stands for openness in government no matter how unpleasant: A veto of this bill reinforces our commitment to full public disclosure.

[6 Ariz. Leg. Serv. 1999, 44<sup>th</sup> Leg., Veto Messages, at A-9) (emphasis added)] Plainly, there is no basis to withhold the Report.

#### Public Records Reflecting the Conduct at Issue and the Underlying Investigation

KGUN's requests also sought correspondence and source records underlying DUSD's investigation of Pettit, including interview transcripts, notes and memoranda prepared by Cooper, and correspondence between Cooper and DUSD employees, attorneys and Board members. These Records – which include e-mails, reports or other documents relating to alleged misconduct by the DUSD superintendent – are also presumptively subject to public inspection. *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245 (right of inspection includes all records “reasonably necessary to provide knowledge of all activities [officers] undertake in the furtherance of their duties.”)

As a matter of well-settled law, all records that reflect the management of the school district, any decision to terminate Superintendent Pettit and DUSD's investigation of alleged misconduct are subject to public inspection. Given DUSD's roughly \$20 million operating budget, the public has a strong interest in knowing how District employees are carrying out their duties. *E.g., Keegan*, 201 Ariz. at 351, 35 P.3d at 112 (“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.”). The public – whose tax dollars fund the District – has an acute interest in monitoring DUSD's investigation of these allegations of wrongdoing. *Id.*

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The requested correspondence also may show that Board members violated the Arizona Open Meetings Law, as alleged by Superintendent Pettit's attorney. [See Dec. 22, 2009 letter from Gary L. Lassen to District Governing Board] Given that violations of the Open Meetings Law could result in Board members being removed from office, Board actions being declared "null and void," the imposition of civil penalties and an investigation by the Arizona Attorney General's Office, the public has a strong interest in examining any such correspondence. *E.g.*, A.R.S. §§ 38-431.05, 38-431.06, 38-431.07.

The Attorney-Client Privilege Does *Not* Provide a Basis to Withhold the Records.

The only basis offered by the District in Ms. Carl's December 14 letter for denying KGUN's request is the attorney-client privilege. That privilege, however, does not exempt the Records from disclosure. To be sure, some communications between DUSD and the Cochise County Attorney's Office (or the District's lawfully designated attorney) may be protected by the attorney-client privilege. The privilege, however, "protects only communications between a client and his or her attorney." *Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238, 1240 (1982). Indeed, the scope of the privilege is limited to "confidential" communications between DUSD and its attorney(s) and does *not* exempt underlying facts and records in DUSD's possession from disclosure. *Id.* It does not prohibit disclosure of the Report, which was drafted by a private investigator and serves as the District's official investigation of the allegations.

In addition, the Records do not suddenly become privileged communications simply because DUSD transmits them to counsel. *Fisher v. United States*, 425 U.S. 391 (1976) (holding for privilege to apply, documents must be privileged in hands of client and must have been transmitted to attorney for purpose of obtaining legal advice); *State v. Weaver*, 140 Ariz. 123, 129, 680 P.2d 833, 839 (Ct. App. 1984); *cf. U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (absent *Upjohn* warnings, executive's statements to outside counsel during internal investigation are *not* privileged). To be clear, KGUN does not seek a list of the records that DUSD shared with its attorneys. It does seek to inspect, however, all non-privileged documents that reflect potential misconduct by Superintendent Pettit and the District's resulting investigation.

At bottom, the protections of the attorney-client privilege are limited and cannot be used to cloak *all* of the public records sought by KGUN in secrecy. Accordingly, if these public records have not already been gathered and reviewed for a careful examination of the limited applicability of the attorney-client privilege, we ask that DUSD undertake that effort now, and that it produce redacted versions of these public records promptly. Because the precise identity of the District's counsel (and authority to designate such counsel) in this public records matter seems to be the subject of some disagreement, I have addressed this letter to both attorneys who purport to represent the District.

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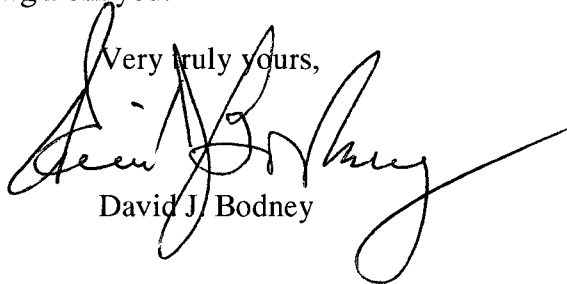
KGUN's Request for DUSD's Compliance with Arizona Law

As you may know, Arizona law subjects DUSD to an award of a requestor's attorneys' fees and costs where a legal challenge is necessary to combat wrongful denials of public record requests. *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246; A.R.S. § 39-121.02(B) ("The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed."). The District has advanced no lawful reason for withholding the Records in their entirety, and KGUN is entitled to *prompt* compliance with its request. A.R.S. § 39-121.01(E) (access deemed denied where custodian failed to "promptly" respond). KGUN wishes to avoid the unnecessary costs and delay associated with litigation, and this letter is intended to give DUSD another opportunity to release the Records without further delay.

Accordingly, KGUN requests that DUSD provide a copy of the Records by 5:00 p.m. on Monday, December 28, 2009.

I look forward to hearing from you.

Very truly yours,



David J. Bodney

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