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SHEILA POLK
Yavapai County Attorney

August 26, 2013

Re: *Yarnell Hill Fire – Public Records Requests for Photographs and Autopsy Records*

Dear Media Representative:

Following the tragedy at the Yarnell Hill fire, the Yavapai County Sheriff's Office ("YCSO") and the Maricopa County Medical Examiner's Office, where the autopsies were conducted for the Yavapai County Medical Examiner's Office ("YCME"), received many public records requests, including yours, related to the deaths of the nineteen Granite Mountain Hotshots on June 30, 2013. The requests from various media and newsgathering organizations seek one or more of the following: the YCSO departmental report generated in this matter, the 911 calls, photographs and other images of the Yarnell Hill fire scene, and the autopsy records and photos.

This office represents the Yavapai County Sheriff, Scott Mascher, the Yavapai County Medical Examiner, Dr. Mark Fischione, and the Maricopa County Medical Examiner, Dr. Jeffrey Johnston, in responding to these media requests. The YCSO has already released the departmental report and the 911 recordings to the media representatives who requested them, but has not authorized the release of any of the requested photos or other images. The YCME has not authorized the release of the autopsy reports or photos. The Sheriff, the Medical Examiner, and I have determined that the YCSO photos and images and the YCME reports and photos are not appropriate for public disclosure under the public records law. Therefore, absent a court order, these items will not be released.

We have made this determination only after a careful review of the requests and the items requested, and after carefully reviewing Arizona's public records statutes and case law. While we recognize the law favors disclosure and the burden of overcoming the presumption of disclosure is on the government, we also take seriously our obligation to limit disclosure so as to avoid the infliction of substantial and irreparable private harm.

The Sheriff and the Medical Examiner concede that the requested records are "public records" pursuant to A.R.S. §39-121 and that they are "officers" pursuant to A.R.S. §39-121.01(A)(1), but conclude that recognized exceptions exist sufficient to overcome the presumption favoring access such that the records ought not be released. "Despite the unlimited disclosure expressed by the wording of § 39-121, the availability of records for public inspection is **not without qualification.**" *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984) (emphasis added).

Public records are not available when they are made confidential by statute or when the public interest and right to disclosure are outweighed by privacy concerns. *Id.* In this case, we have concluded that the privacy concerns of the firefighters' families outweigh the public's interest. We further conclude that disclosure of the requested records does not further the purpose of the public records laws.

The Public Records Law serves the primary purpose of ensuring that the people are able to monitor the activities of their government, not the lives of their fellow citizens. See *Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 7, 218 P.3d 1004, 1006 (2009). Therefore, when the performance of important government functions is implicated, the interest in disclosure is strong and privacy interests must often yield. **But when records of government action are merely incidental to an otherwise private matter, including the death of an individual, privacy interests weigh more heavily.**

Schoeneweis v. Hamner, 223 Ariz. 169, 175, 221 P.3d 48, 54 (App. 2009) (emphasis added).

The photographs and images are being protected because the privacy interests of the families, when balanced against the public's interest in disclosure, outweigh the public's right to know and release of the records would cause private and irreparable harm. Within the context of the public records law, "public interest" is **not** synonymous with "public curiosity." *Id.* (emphasis added).

An Attorney General Opinion from 1988 is relevant in considering the harm that would result from releasing public records. That harm would be certain and irreparable as once released, the records could be used for any number of purposes in any number of media venues.

[N]otwithstanding the general applicability of the public records law, the Arizona Supreme Court has recognized that "an unlimited right of inspection might lead to substantial and irreparable private or public harm...." *Carlson* at 491, 687 P.2d at 1246. Accordingly, *Carlson* directs that "where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection," the officer may refuse inspection. *Id.* In *Mitchell v. Superior Court*, the Court elaborated on the right to withhold, explaining that the official must be able to show "the probability that specific, material harm will result from disclosure...." *Id.* at 335, 690 P.2d at 54.

1988 Ariz. Op. Att'y Gen. 174.

For all the above reasons, and only after the conscientious application of our duties under the law as custodians of the requested records, we decline your request for the release of the YCSO photos and images and the YCME autopsy reports and photos. If you have any questions

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pertaining to this letter, have law that would indicate our legal conclusion is incorrect, or would like to discuss the matter further, please contact Deputy Yavapai County Attorney Carol Kennedy at (928) 777-7259.

Very truly yours,



Sheila Sullivan Polk
Yavapai County Attorney

c: Scott Mascher, Yavapai County Sheriff
Dr. Mark Fischione, Yavapai County Medical Examiner
Dr. Jeffrey Johnston, Maricopa County Medical Examiner
Michael Mitchell, Maricopa County Attorney's Office
Andrew Pacheco, Arizona Attorney General's Office