

William E. Morris Institute for Justice

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June 28, 2019

The Honorable Douglas Ducey
Governor of Arizona
1700 West Washington Street
Phoenix, Arizona 85007

Attn: Annie Foster

Re: Request that Transparency and Public
Oversight be an Affirmative Part of the
Regulatory Sandbox Programs

Dear Governor Ducey:

The William E. Morris Institute for Justice (“Institute”) is a non-profit public interest program that works on issues that are of importance to low-income Arizonans. Public transparency and oversight is such an issue. The hallmark of our democracy is that we value the public’s right to know what our government is doing. Unfortunately, in the last two years, two regulatory sandbox laws were enacted but for both statutes, public records requests are specifically not allowed. We write to emphasize the importance of transparency and public oversight in our state government functions and ask you to require that the regulatory sandbox programs allow public records requests.

I. In 2018 the First Regulatory Sandbox Program Is Created without Transparency

In 2018, the Legislature created the “Regulatory Sandbox Program” that went into effect in August 2018 to allow applicants to test certain “innovative” financial products and services without a state license and meeting other requirements. *See* A.R.S. §§ 41-5601 – 5612. Although the program went into effect in August 2018, this past legislative session House Bill 2177 expanded the new sandbox program to more “innovations” in the financial products and services arena. While initially, the bill was called a “clean-up,” the proponents refused to reconsider the prohibition on public records requests in the

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current statute. Thus, the new sandbox program which has no track record continues to suffer from the lack of transparency and public oversight.

We understand that you support the regulatory sandbox program. We think you should be concerned by the lack of transparency and public oversight for the program. As explained below, this is a new program with no track record that is being administered by the Arizona Attorney General out of public view.

In administering the program, the Attorney General in his/her sole discretion decides what information is required to be submitted with the sandbox application, A.R.S. § 41-5603(F) (information that “may” be required) and if the application is approved. A.R.S. § 41-5603(I). The Attorney General is not required to make any findings concerning whether or not the application is approved and the decision to deny an application is not appealable. A.R.S. §§ 41-5603(J); 5604(B).

The only information the Attorney General is required to make public is the form application. A.R.S. §§ 41-5603(F). The Attorney General in his/her sole discretion posts on the Arizona Attorney General website “Frequently Asked Questions” about the program and the name of entities approved to be in the sandbox, their start date and general product description.

The regulatory sandbox statute provides that “[r]ecords that are submitted to or obtained by the attorney general in administering [the program] *are not public records or open for inspection by the public.*” A.R.S. § 41-5610(A) (emphasis added). The financial regulatory sandbox has garnered a lot of attention from consumer advocates who are concerned about the new program’s administration. When members of the public interested in the administration and operation of the financial regulatory sandbox program submitted public records requests to the Attorney General for those records, the Attorney General refused to produce the documents relying on the above prohibition on producing documents. Specifically, the public members requested records concerning the information provided to the Attorney General and documents concerning any requirements placed on the participants by the Attorney General to protect the public.

This lack of public records disclosure conflicts with the Department of Financial Institutions’ (“DFI”) public records provision. There are two types of entities regulated by the DFI; financial institutions and enterprises (those under the jurisdiction of the DFI who are not a financial institution). *See* A.R.S. § 6-101 (8) and (6), respectively. For enterprises, pursuant to A.R.S. § 6-129.01, *all* documents are open for public inspection unless the public welfare or welfare of the enterprise requires the document to be withheld. The entities in the sandbox are expected to be enterprises because they are not

licensed. Thus, if these enterprises are in the regulatory sandbox program, the records are secret. If the enterprises are out of the financial regulatory sandbox program, the records are subject to public disclosure. *This difference in treatment fosters a lack of confidence in our government and makes it look like the government has something to hide. This secrecy violates the public's trust in our government.*

The financial regulatory sandbox program is administered in secrecy by the Attorney General. The public has a right to know what is going on. Proprietary and other confidential information can be redacted from responses to public records requests and such redactions occur all the time when the DFI and other state agencies respond to public records requests.

For all of these reasons, we request that you propose legislation next legislative that requires the Attorney General to follow the current public records request process in A.R.S. § 6-129.01 for unlicensed entities who are participants in the financial regulatory sandbox program.

II. In 2019 the Second Regulatory Sandbox Program Is Created without Transparency

This past legislative session, House Bill 2673 created a new regulatory program in the area of “property products and services.” This law suffers from the same lack of transparency and public oversight as the original law concerning financial products described above.

As explained below, approval of innovations in the property sandbox are totally in the discretion of the Chief Executive Officer of the Arizona Commerce Authority (“Commerce Authority CEO”). Despite this total discretion, the law also specifically prohibits public records requests.

In order to get into the property technology sandbox program, an application is required. The decision on what information to request on the application is solely in the discretion of the Commerce Authority CEO. A.R.S. § 18-603(F) (information that “may” be required). The CEO in his/her sole discretion decides if the application is approved. A.R.S. § 18-603(I). In making that decision, the CEO is not required to make any findings concerning whether or not the application is approved and the decision to deny an application is not appealable. A.R.S. §§ 18-603(J); 604(B).

Except for the form application, there is no requirement that the CEO make any other information publicly available. A.R.S. § 18-603(F). Thus, the public is left in the

dark on the how the program will be administered. That is clearly intended because the bill specifically provides that “[r]ecords that are submitted to or obtained by the chief executive officer in administering [the program] *are not public records or open for inspection by the public.*” A.R.S. § 18-609(A) (emphasis added). As explained above, this is the same secrecy provision in the regulatory sandbox for financial products and services administered by the Attorney General that was enacted last year. *See* A.R.S. § 41-5610(A). With the same secrecy provision in this bill, the CEO also will be allowed to withhold the records from public disclosure as the Attorney General has withheld documents in the financial regulatory sandbox.

This failure to allow public records requests in this bill is contrary to the Commerce Authority’s own public records provision, A.R.S. § 41-1504(L). That provision provides:

Any tangible or intangible record submitted to or compiled by the board or the authority in connection with its work, including the award of monies, is subject to title 39, chapter 1, unless an applicant shows, or the board or authority determines, that specific information meets either of the following:

1. If made public, the information would divulge the applicant's or potential applicant's trade secrets, as defined in section 44-401.
2. If made public, the information could potentially harm the applicant's, the potential applicant's or this state's competitive position relating to potential business development opportunities and strategies.

This public records provision gives the Commerce Authority sufficient discretion to withhold some documents without precluding all public disclosures.

In addition, the Commerce Authority, like many other state entities, recognized the need for transparency in its activities and has a public records request form on its website for ease. On its website the Commerce Authority states that “The Arizona Commerce Authority is dedicated to providing you with timely information when requested.”

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Thus, in every other situation when the Commerce Authority conducts business, the public has a right to access the documents. In stark contrast, this new program that has no track record, will have no public right of access. The public has a right to know what is going on with this new program. Proprietary and other confidential information can be redacted from responses to public records requests. Such redactions occur all the time when the Commerce Authority and other state agencies respond to public records requests.

For all these reasons, we request that you propose legislation next legislative that requires the Commerce Authority to follow the current public records request process in A.R.S. § 41-1504(L) for participants in the property technology sandbox program.

Conclusion

Therefore, for all the above reasons, the Institute requests that you work to ensure that transparency and public oversight are a recognized part of every regulatory sandbox program. We request that, at a minimum, you require that the two regulatory sandbox programs described above have provisions for public records requests added to each statute. In addition, any future regulatory sandbox programs should be required to have public records requests.

Please let me know if you have any questions or if I can provide you with any additional information. I am available to meet with you if you think such a meeting would be helpful.

Sincerely,

Handwritten signature of Ellen Sue Katz in cursive script.

Ellen Sue Katz