IN THE SUPREME COURT OF ARIZONA

CYBER NINJAS, INC., Petitioner, vs. THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, PHOENIX NEWSPAPERS, INC., an Arizona Corporation, and KATHY TULUMELLO; ARIZONA STATE SENATE, a public body of the State of Arizona; KAREN FANN, in her official capacity as President of the Arizona State Senate; WARREN PETERSEN, in his official capacity as Chairman of the Arizona Senate Committee on the Judiciary; and SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate, Real Parties in Interest.	Case No. CV-21-0281-PR Arizona Court of Appeals Division One No. 1 CA-SA 2021-0173 Maricopa County Superior Court Case No. LC2021-000180-001

REAL PARTIES IN INTEREST PHOENIX NEWSPAPERS, INC.'S AND KATHY TULUMELLO'S RESPONSE IN OPPOSITION TO PETITIONER CYBER NINJAS, INC.'S APPLICATION FOR STAY

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Pursuant to this Court's November 24, 2021 Order, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello (together, "PNI") hereby respond in opposition to Petitioner Cyber Ninjas, Inc.'s Application for Stay (the "Application").

Introduction

This Application should be denied because it is Cyber Ninjas' continued attempt to dodge the consequences of its failure to comply with its obligations under the Public Records Law, multiple court orders (including the Court of Appeals ruling it challenges here), and its contract with the Arizona State Senate to preserve, maintain, and prepare for production tens of thousands of public records related to the Audit of voting materials from the 2020 election. The Application suffers from at least three fatal flaws.

First, the Application is premature because Cyber Ninjas has filed a motion for reconsideration in the Court of Appeals, which automatically stays this petition for review. Second, a stay would be superfluous if Cyber Ninjas actually has, as its CEO asserted in a sworn statement, produced to the Senate all of the non-exempt records subject to the court orders at issue in this petition for review. Third, even if its request were

procedurally proper, Cyber Ninjas has not met its burden to show that it meets any of the criteria for a stay: a likelihood of success on the merits, irreparable harm that outweighs the harm to PNI and the public, and public policy favoring the stay.

This Court therefore should deny the Application because Cyber Ninjas has not shown, and cannot show, that a stay is warranted.

Argument

I. The Application Is Premature Because This Action Is Stayed.

The day after Cyber Ninjas filed its Petition for Special Action and the Application in this Court, it filed a Motion to Reconsider in the Court of Appeals. A true and correct copy of that Motion to Reconsider is attached hereto as Exhibit A. Filing that motion automatically stays this petition to review the special action decision of the Court of Appeals pursuant to Ariz. R. Civ. App. P. 23(c), as applied to appellate special actions by Ariz. R.P. Spec. Act. 7(i). Until that automatic stay is lifted, this Court cannot issue the stay of the lower courts' orders that Cyber Ninjas seeks. However, to expedite resolution of this matter and because the issue is now fully briefed, PNI respectfully requests that this Court

deny the Application as promptly as possible after the automatic stay expires.

II. Cyber Ninjas Claims It Has Complied With the Court Orders It Seeks to Stay.

The Application fails to mention the fact that Cyber Ninjas has asserted, including in a sworn declaration from its CEO, that it has *already complied* with the court orders it now claims should be stayed. If that is true, then the Application should be denied because it is unnecessary.[1] Regardless, Cyber Ninjas should not be rewarded with a stay when it has made contradictory representations elsewhere.

Hours after the Court of Appeals issued its Memorandum Decision, Cyber Ninjas' counsel sent a letter via email to the Senate's counsel with a copy to undersigned counsel for PNI, purporting to comply with its obligations under the court orders to confer regarding which public records should be withheld as privileged or exempt. A true and correct copy of that correspondence is attached hereto as Exhibit B.

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[1] PNI does not concede that Cyber Ninjas' productions of Audit-related records to date satisfy its obligations under the Public Records Law and the orders of the courts below. It appears Cyber Ninjas knows that it has not satisfied these obligations because, if it had, its petition for review and Application would be unnecessary.

Cyber Ninjas' counsel noted that the Superior Court and Court of Appeals defined public records as those documents with a substantial nexus to governmental activities, asserted the relevant activity was the production of the Audit report, and stated that Cyber Ninjas "has already produced to the Senate all of its records with a substantial nexus to the report," except for three listed categories of purportedly exempt records. *Id.* at 1. The correspondence also included a declaration under penalty of perjury by Cyber Ninjas' CEO Douglas Logan reiterating the contention that the company had provided the Senate with all records with a substantial nexus with the Audit report. *Id.* at 4. Cyber Ninjas represented, in other words, that it had complied with the court orders at issue here requiring it to provide to the Senate all potential public records in its possession (albeit pursuant to Cyber Ninjas' own, extremely narrow view of what records would qualify).

Cyber Ninjas cannot have it both ways. Either it has already complied with the court orders to provide public records to the Senate for production, in which case a stay of those orders is unnecessary, or it needs a stay because it has not, its CEO's sworn statement to the contrary notwithstanding. No matter which is the case, this Court should not

grant a stay in circumstances where the party seeking a stay has made such contradictory statements to the parties and the Court.

III. Cyber Ninjas Has Not Met and Cannot Meet the Necessary Criteria for a Stay.

To obtain a stay, Cyber Ninjas must establish that (1) it has "a strong likelihood of success on the merits;" (2) it will suffer irreparable harm if the stay is not granted; (3) the harm to Cyber Ninjas absent a stay outweighs the harms to other parties if the stay is granted; and (4) "public policy favors granting of the stay." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 (2006). These criteria are considered on a sliding scale; "'the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply' in favor of the moving party." *Id.* at 410-11 (citations omitted).

Here, this Court should deny the requested stay because none of the elements favors Cyber Ninjas.

A. Cyber Ninjas Is Unlikely To Succeed On the Merits.

This Court should deny the requested stay because Cyber Ninjas has shown neither a strong likelihood of success on the merits nor that

any serious questions exist regarding the Court of Appeals' ruling. To the contrary, Cyber Ninjas cannot show the lower courts' reasoning was incorrect regarding the status of the public records in its possession and the propriety of its being joined as a party in this special action.

i. Audit-Related Records in Cyber Ninjas' Possession Are Public Records.

Every court to consider the issue – including two Court of Appeals panels – has held that records in Cyber Ninjas' possession with a substantial nexus to the Audit are public records. *See* Mem. Decision at 4 ¶ 9 (reiterating prior holding that "documents relating to the audit are public records subject to the PRL even if they are in the possession of Cyber Ninjas rather than the Senate"); *Fann v. Kemp* ("*Fann*"), No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834, at *11-12 (Ct. App. Aug. 19, 2021) (Audit-related records "are no less public records simply because they are in the possession of a third party, Cyber Ninjas"). This Court denied the Arizona Senate's petition for review challenging the *Fann* ruling. *Fann v. Kemp*, No. CV-21-0197-PR, 2021 Ariz. LEXIS 333, at *1 (Sep. 14, 2021).

The Court of Appeals' holding below also is consistent with prior case law. For example, the Court of Appeals has held that police officers'

personal cell phone records may be public records if they reflect the use of the phone for government purposes. *Lunney v. State*, 244 Ariz. 170, 179 (Ct. App. 2017). The fact that the individual employees (or their phone companies), not the government, would have had physical custody of those records did not factor into the Court of Appeals' analysis. *Id.* So too, here. As this Court has held, "[i]t is the nature and purpose of the document, not the place where it is kept, which determines its status" as a public record. *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538, 541 (1991) (citation omitted); *see also Fann*, 2021 Ariz. App. Unpub. LEXIS 834, at *11 (same).

Thus, by creating and maintaining possession of public records related to the Audit, Cyber Ninjas became the Senate's custodian of Audit-related records in its possession. That the Senate has outsourced its legal responsibility to preserve and maintain Audit-related public records to Cyber Ninjas does not relieve the Senate or Cyber Ninjas of that duty, nor does it mean that the records are not public records. A public record "does not become immune from production simply by virtue of the method the [government] employs to catalogue the document."

Lake v. City of Phx., 220 Ariz. 472, 481 (Ct. App. 009), v*acated in part on other grounds,* 222 Ariz. 547, 549 (2009).

Cyber Ninjas cannot show a likelihood of success on the merits because its position is contrary to the language and intent of the Public Records Law. If Cyber Ninjas' view of the statute were adopted, it would allow public bodies to thwart the Public Records Law by outsourcing government activities and the possession of public records to private parties, contrary to the law's intent and this state's strong public policy in favor of government transparency. *E.g.*, *Carlson v. Pima Cty.*, 141 Ariz. 487, 490-91 (1984) ("access and disclosure is the strong policy of the law").[2]

[2] Cyber Ninjas also argues that this Court's holding in *Salt River* means that "records that belong to non-governmental or private bodies" cannot be public records. App. at 11. However, this argument has been waived because Cyber Ninjas raised it for the first time in its reply brief in the Court of Appeals. *See State v. Jean*, 243 Ariz. 331, 342 (2018) (argument raised for first time in reply brief in Court of Appeals was waived). Even if it had not been waived, this argument is unavailing; this Court held in *Salt River* that possession by a public body is not the *sine qua non* of a document's status as a public record. *Salt River*, 168 Ariz. at 538.

ii. Cyber Ninjas Is a Custodian of Public Records Properly Joined in PNI's Action.

Cyber Ninjas also cannot show a likelihood of success on the merits because the Court of Appeals was correct in holding that custodians of public records such as Cyber Ninjas may be joined as parties in special actions under the Public Records Law.

Cyber Ninjas' primary assertion regarding this issue is that the Court of Appeals improperly inserted a word into A.R.S. § 39-121.02(A). App. at 7-8. The Court of Appeals referenced the statute as saying the requestor "may appeal the [custodian's] denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." Mem. Decision at 5 ¶16 (quoting A.R.S. § 39-121.02(A)). Cyber Ninjas claims that the Court of Appeals "capriciously inserted the word 'custodian' into the statute." App. at 8.

Cyber Ninjas is incorrect. The section of the Public Records Law immediately prior to § 39-121.02(A) states that access to a public record "is deemed denied if *a custodian* fails to promptly respond to a request." A.R.S. § 39-121.01(E) (emphasis added). Thus, the reference in § 39-121.02(A) to "the denial," is a reference to the *custodian's* denial, as a

matter of statutory interpretation, logic, and common sense. *See, e.g.*, *Stambaugh v. Killian*, 242 Ariz. 508, 509 (2017) (statutory construction considers statute as a whole; "if the statute is subject to only one reasonable interpretation, we apply it without further analysis") (citation omitted).

Nor does the statute prohibit joining records custodians as parties in public records special actions. Cyber Ninjas claims that the statute requires public records special actions to be against the "officer in custody" of the public records, which it says means "the chief 'officer' of a public body." App. at 3, 7. But Cyber Ninjas simply invented that language, which appears nowhere in the statute. Relying on such nonexistent statutory language to improperly narrow the Public Records Law would be capricious indeed.

Further, as the Court of Appeals noted, the rules for special actions expressly allow a person other than the officer or public body to be joined as a party in a special action regarding public records. Mem. Decision at 5-6, ¶ 16 (citing Ariz. R.P. Spec. Act. 2(a)(1), (b)). The Court of Appeals' holding in *Arpaio v. Citizen Publishing Co.* that a third party can be joined – and be held liable for a fee award – in a public records special

action was correct and has stood undisturbed for more than a dozen years without causing any of the parade of horribles that Cyber Ninjas conjures up. 221 Ariz. 130, 133, ¶ 10 n.4. (Ct. App. 2008).[3]

Prohibiting a records custodian from being joined as a party to a public records action would allow a custodian to unlawfully withhold records, despite demands to produce those records from the public body that employs or contracts with them, without any recourse by the requestor. That is the unlawful and untenable situation Cyber Ninjas has created here, and it should not be allowed to continue or proliferate.

In sum, this Court should deny Cyber Ninjas' application for a stay because there is neither a substantial likelihood it will prevail on the merits nor any serious question regarding the Court of Appeals' reasoning.

B. Cyber Ninjas Will Not Suffer Irreparable Harm Absent a Stay.

Cyber Ninjas' Application also should be denied because it will not suffer irreparable harm if a stay is not granted.

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[3] Moreover, as the Court of Appeals also observed, Cyber Ninjas might not have been a necessary party had it not refused the requests by the Senate – its employer/principal – to turn over the public records at issue to the Senate. Mem. Decision at 6, ¶17.

Cyber Ninjas claims that if it "must produce its private documents to members of the public" it will be irreparably harmed because that publication cannot be undone. App. at 1-2. Even if the records at issue were private (they are not), the orders Cyber Ninjas challenges do not require records to immediately be provided to PNI and the public. The order affirmed by the Court of Appeals requires Cyber Ninjas to produce the public records at issue *to the Senate*, and specifically permits Cyber Ninjas and the Senate to confer regarding which public records, if any "should be withheld based on a purported privilege or for any other legal reason." Mem. Decision at 7, ¶ 20. The ruling requires Cyber Ninjas to produce public records directly to PNI only if it fails to provide them to the Senate first. *Id.* In other words, there is no final order requiring Cyber Ninjas to produce any records to PNI and the public.[4]

Moreover, if the "harm" arises from Cyber Ninjas' production of the disputed records to the government, a stay would not prevent that harm because Cyber Ninjas contends it has already produced the relevant

[4] The Superior Court's orders in this case also permit Cyber Ninjas to assert that records in its possession responsive to PNI's request are not public records, so long as it lists them on a privilege log so that PNI and the court may evaluate those claims on a document-by-document basis. *See* 9/23/21 Minute Entry at 2; 10/11/21 Minute Entry at 2.

records to the Senate. If Cyber Ninjas is correct that it has met the requirements of the court orders, the cat is already out of the bag and no stay could change that.

The fact that Cyber Ninjas has received other public records requests that could subject it to potential litigation and fee awards, App. at 3, is neither irreparable nor a "harm" that would to justify a stay.[5] Litigation is a risk for any business; Cyber Ninjas' position would allow for the imposition of a stay of *any* court order that could be used in litigation by other parties in the future. Further, if Cyber Ninjas has, as it claims, provided the Senate with all non-exempt records in its possession subject to the court orders (or if it fully complies with those orders in the future absent a stay), Cyber Ninjas may respond to additional requests by directing the requestor to the previously produced records. In other words, it is by withholding Audit-related records that Cyber Ninjas is subjecting itself to any burden associated with additional public records requests. Cyber Ninjas also could appeal any final order

[5] Cyber Ninjas offers no argument as to why Cyber Ninjas' compliance with PNI's public records requests should be stayed based on other public records requests issued by entities unrelated to PNI.

requiring it to produce records it claims are privileged or otherwise properly withheld.[6]

The Application should be denied because there is no irreparable harm a stay could prevent.

C. The Balance of Harms Does Not Favor Cyber Ninjas.

Even if providing public records to the Senate would harm Cyber Ninjas (it has not and will not), any such harm would not outweigh the harm to PNI and the public by continued delay in obtaining access to public records regarding an issue of the utmost importance.

The Public Records Law mandates that "the custodian of such records shall *promptly*" provide them upon request. A.R.S. § 39-121.01(D)(1) (emphasis added). Nearly six months have passed since PNI made its request to Cyber Ninjas on June 2 of this year. That delay cannot constitute prompt action. *See, e.g.*, *Phoenix New Times, LLC v. Arpaio,* 217 Ariz. 533, 541 (App. 2008) (holding that 141-day delay

[6] The orders do not threaten Cyber Ninjas' federal and state constitutional rights, as it hyperbolically claims. App. at 2, 7. It is not a constitutional violation to require the custodian of public records to produce those records to the relevant public body or public officer for which the person is acting as a custodian. Nor would it violate any constitutional provision to require Cyber Ninjas to turn over documents the Senate has demanded pursuant to its contract.

violated promptness requirement). The promptness requirement in the Public Records Law, and similar provisions in other government transparency statutes, recognize that the public deserves to have up-to-date information about what their government is doing. *See, e.g.*, *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770, 778 (D.C. Cir. 2018) ("stale information is of little value") (citation omitted).

Further, the Court of Appeals' memorandum decision is unpublished and non-precedential. Therefore, it does not threaten to unleash on other government contractors the flood of public records requests that Cyber Ninjas imagines. *See* App. at 4.

This Court should deny the Application because a stay would harm PNI and the public by further delaying their access to records about the Senate's unprecedented undertaking of an electoral audit, while Cyber Ninjas would not be harmed if a stay is not granted.

D. A Stay Would Violate Arizona's Strong Public Policy Favoring Government Transparency.

Cyber Ninjas does not identify any public policy that would favor a stay, nor could it. To the contrary, a stay would violate Arizona's strong and longstanding public policy in favor of government transparency. *See,*

e.g., *Griffis v. Pinal Cty.*, 215 Ariz. 1, 5 (2007) (noting "Arizona's strong policy of public access and disclosure of public records"). This factor weighs heavily against granting the Application.

In sum, Cyber Ninjas' Application should be denied because it simply cannot show that it meets any of the criteria necessary to justify a stay.

Conclusion

For all of the foregoing reasons, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello respectfully request that this Court deny the stay requested by Petitioner Cyber Ninjas, Inc. upon dissolution of the automatic stay pursuant to Ariz. R. Civ. App. P. 23(c).

Respectfully submitted this 30th day of November, 2021.

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