**ARIZONA SUPREME COURT**

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| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**JUDGE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,**<br><br>**Real Parties in Interest.** | **Arizona Supreme Court**<br>**Case No._____**<br><br>**Court of Appeals**<br>**Division One**<br>**Case No. 1 CA-SA 21-0173**<br><br>**Maricopa County Superior Court**<br>**Case No.: LC2021-00180-001** |

# PETITION FOR SPECIAL ACTION, OR IN THE ALTERNATIVE PETITION FOR REVIEW

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Petitioner Cyber Ninjas, Inc. ("**CNI**") hereby files this Petition for Special Action, or in the alternative Petition for Review of the Court of Appeals' Decision filed on November 9, 2021.

1. **The issues that were decided by the Court of Appeals that the petitioner is presenting for Supreme Court review.**

   A. Can a non-public body or officer be sued under A.R.S. § 39-121.02, which provides only for "special actions against the officer or a public body," after a person is denied access to "public records and other matters in the custody of any officer"? (And where A.R.S. § 39-121.01(A)(1) defines an "officer" as "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body"?)

   B. Can documents that a public body or officer does not own, create, and or have custody over, such as emails on a private server, be considered "public records and other matters in the custody of any officer" under Arizona Public Records Law, A.R.S.§ 39-101, *et seq*.?

   C. Does "public record" mean any record with a "substantial nexus" to government activity, regardless of whether the government actually owns or has custody of it?

   D. Can any "custodian" of records, including a government employee or private contractor, be subject to a lawsuit under A.R.S. § 39-121.02? Or is just the "officer in custody" of records, meaning the

chief "officer" of a public body pursuant to A.R.S. §§ 39-121, 39-121.01(A), and 39-121.02?

E. Can attorneys' fees be awarded against a private body under A.R.S. § 39-121.02(B)?

**2. <u>Additional issues presented to, but not decided by, the Court of Appeals that the Supreme Court may need to decide if it grants review.</u>**

A. None.

**3. <u>The facts material to consideration of the issues presented to the Supreme Court for review, with appropriate references to the record on appeal.</u>**

The Arizona Senate (the "**Senate**) hired CNI, a private corporation formed under the laws of Florida, to prepare an audit report regarding voting equipment used and ballots cast in Maricopa County in the 2020 general election. (App. at 21, ¶ 2). Respondent Phoenix Newspapers, Inc. ("**PNI**") sent a request to CNI to inspect documents relating to the audit under public records law. (*Id.*, ¶ 3). Because CNI is not a public officer or a public body, it declined the request. PNI then filed a statutory special action against CNI, the Senate, and Senate officials. CNI moved to dismiss the Complaint on the grounds that CNI is not a public officer or a public body, *inter alia,* (the "**Motion**"). (*Id.*, App. at 22, ¶ 4). The trial court denied the Motion, finding that CNI holds public office. CNI filed a special action appealing from that decision, and the Court of Appeals accepted jurisdiction because "the issues raised in the petition are pure questions of law and are of statewide

importance." (*Id.*, App. at 22, ¶ 6).

On appeal, CNI again argued that it is not a public officer or a public body. (App. at 28). PNI argued that CNI is a public officer or a public body; and in the alternative that CNI is a "custodian" and that "custodians" are subject to suit. (*See* App. at 211). PNI also claimed for the first time on appeal that CNI had "admitted" that CNI had public records, which CNI denied; and CNI pointedly argued in its Reply that its records are not public as a matter of law because the government does not own or control them, much less rely on or even have access to them. (*See* App. at 258). To deem CNI's records, such as its own internal emails regarding performance of its contract or related matters, or its emails/contracts with its own subcontractors, to be "public records" defies common sense and the plain language of the statute.

First, the Court of Appeals erroneously determined that "custodians" of records are subject to being sued. This decision not only contradicts the plain wording of the statute, but it opens up every state employee or contractor to being sued under public-records statutes, which was clearly never the intent of these statutes. Second, the Court of Appeals erroneously decided that all "documents relating to the audit are public records," irrespective of whether the government actually owns them, much less possesses them. (App. at 23 ¶ 17). Even though the Court of Appeals accepted jurisdiction because this case presents issues of

"statewide importance" and "pure questions of law," the Court of Appeals incongruously decided that CNI was a proper party only "under the unusual facts of this case" – without even specifying what those "unusual facts" might be. (App. at 25, ¶ 17). And in a transparent effort to avoid review by this Court, the Court of Appeals declared that its ruling would not apply to "businesses that contract with the government to provide ordinary goods or services" – just CNI, apparently – even though that distinction has neither a legal nor factual basis. Further, it would subject any contractor or government employee who works in elections to being sued for their private records, since none of them provide "ordinary goods or services" and they are "custodians" of records that "relate" to their government work.

The Court of Appeals' decision that a private company can be sued for private documents simply because those documents relate to government work, is far beyond the realm of what is statutorily permitted under the public-records statute. It also defies common sense: private company's documents are not and cannot be public documents. The Court of Appeals' definition of "public record" captures documents that the government clearly has no right or reason to have or see, like private documents regarding a company's costs of performance, financing, thoughts on its government contract or other matters. As things stand, the Court of Appeals' order is so outrageous that it violates the Fourth and Fourteenth

Amendments and Arizona constitutional privacy clause, because it effectively compels a private company to produce documents to the government which the government does not own and has no right to see. No government employee or contractor expects this when they sign up for government work, and it is utterly without a genuine basis in law.

Further, the practical consequence of the Court of Appeals' decision is that CNI is now receiving records requests from members of the public and the Maricopa County Attorney, who are expressly citing the Court of Appeals' decision. (Appendix at 272, 275). It is axiomatic that CNI does not have a taxpayer-funded public records department, and it does not have a taxpayer-funded lawyer in the form of the Attorney General's Office. It is a private company that simply cannot deal with this logistically and financially. The award of fees and costs against it just adds to the burden and impossibility of dealing with future public records requests and suits like this. (It also lacks any genuine statutory support, as discussed below.) The Court of Appeals' decision is clearly erroneous but also has far-reaching and chilling consequences for state contractors and employees. Thus, this Court should accept review.

**4. <u>The reasons the petition should be granted</u>**

No Arizona law decision controls the point of law in question, and important issues of law have been incorrectly decided. These issues are also of statewide

importance and pure questions of law. Further, CNI has no other adequate and equally speedy relief. It is being compelled to produce private documents that are not "public records" by any statutory or even rational definition, which is of a constitutional dimension because these are private records being produced to the government. This infringes on persons' right to privacy under the Arizona Constitution and the Fourth and Fourteenth Amendment rights to be free from unreasonable search-and-seizure.

The plain language of the public records statutes unambiguously provides that an action for denial of access to public records can ***only*** be filed against an "***officer or a public body***" who has "denied access" to public records in the "***custody of any officer***". A.R.S. §§ 39-121.02(A), 39-121 (emphasis added). The Court of Appeals' answer to this was to insert a word into A.R.S. § 39-121.02(A) that is not there. The A.R.S. § 39-121.02(A) actually states:

> Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions ***against the officer or public body***.

(Emphasis added). The Court of Appeals' decision misquoted the statute by stating that the person denied access "may appeal the ***[custodian's]*** denial through a special action in the superior court…" (*See* App. at 24, ¶16.) The Court of Appeals capriciously inserted the word "custodian" into the statute..

The Court of Appeals' fallacious argument that any "custodian" of public records can be sued, and that "custodian" means any person, public or private, who purportedly has records relating to government work is contrary to the plain language of the statutes. The word "custodian," which is used only in A.R.S. §§ 39-121.01 and 39-121.03, distinctly refers to the "officer in custody" of records under A.R.S. § 39-121, to whom record requests are made. This is consistent with the language in the public records statutes, which provide that only public officers or public bodies may be sued, and "[p]ublic records and other matters in the custody of any ***officer***" shall be open to inspection. A.R.S. §§ 39-121.02(A), 39-131 (emphasis added). Under the Court of Appeals' interpretation, members of the public can now sue any government employee or contractor under public and to being hold them personally responsible for their fees as well, as the Court of Appeals did here.

The Court of Appeals' citation to the Rules of Special Action and Rule 19 of the Rules of Civil Procedure (governing joinder) does not provide a substantive basis for a lawsuit by a member of the public against CNI, and certainly no basis for an award of fees against CNI. The Court of Appeals also provided no explanation for why "in [CNI]'s absence, the court cannot accord complete relief among existing parties." CNI's documents are clearly not in the "custody of any public officer" and its participation is not needed. Further, the Court of Appeals'

reasoning here is so terrifyingly broad that any member of the public could sue any government employee or contractor for purportedly having public records and sue them under this interpretation of the statutes and Ariz. R. Civ. P. 19, rendering the "against the officer or public body" language in A.R.S. § 39-121.02(A) completely nugatory.

The Court of Appeals' argument that CNI must be treated differently because it allegedly does not provide "ordinary goods or services" is legally and factually baseless.[1] There is no authority which supports holding a private company liable under the public records statutes (including for fees) turns on whether they provide "ordinary services." It is obvious that the Court of Appeals was trying to arbitrarily justify applying a different rule of law to CNI – in contravention to the basic idea that justice is blind, and that laws are supposed to be neutrally applied regardless of who is in front of the court. Such a "rule" is also dangerous, confusing, and unpredictable – what is "unusual" about CNI's services as an auditor? Is it because CNI audited an election, which is not "ordinary" and is "an important" government function? In which case, isn't the contractor who makes the vote-tabulation machines now subject to public records requests and suits (and fee awards), because

[1] The Court of Appeals also seems to say that this case is somehow unique because the Senate is acting in an "oversight" capacity. This is strictly inaccurate, since the ballot investigation was conducted by the judiciary (not oversight) committee; but it also totally legally irrelevant, for the reasons below.

the government has "entirely outsourced" the "important" government function of counting ballots? Or the election auditor that the county hired? And all election auditors in the future?

The Court of Appeals argues that the government "entirely outsourced" a government function. It is apodictic that whenever the government hires a private contractor, it is "entirely outsourcing" something – that is the definition of a private contractor. And whether something is "important" or "unique" is at once arbitrary and true of every government function—they are all important and unique because the government itself is important and unique. Even the examples that the Court of Appeals gives of "entirely outsourced" – construction companies and office-supply vendors—could be characterized as important and unique in the same way that CNI has been here. The construction company that built the Court of Appeals' building engaged in an "important" undertaking that was "unique," since there is only one. Or the office-supply vendor who provides the legal notepads for jurors – surely that is an "important" and "unique" undertaking. The Court of Appeals made its rule up out of whole cloth in a thinly veiled effort to stop this Court from reviewing its decision, by trying to make it seem as if this case turns on unique or unusual facts which it clearly does not. What we are dealing with here is an obvious but nevertheless far-reaching misapplication of a basic law, the law of public records, which threatens every contractor and employee in this state.

This Court has previously held that documents which the State does not own must not be produced in response to a public records request—even in cases where the State is in possession of the records, which is not the case here. In the seminal case of *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 534, 815 P.2d 900, 903 (1991), this Court addressed whether records that belong to non-governmental or private bodies may be considered "public records," relying heavily on federal FOIA law. *See also Church of Scientology v. Phoenix Police Dep't,* 122 Ariz. 338, 340, 594 P.2d 1034,1036 (App. 1979) (FOIA offers guidance to Arizona courts in construing Arizona public records statute). This Court noted that federal courts have "uniformly held that an agency must control a record before it is subject to disclosure"; and "[t]he control test is helpful in analyzing our statute, which also exempts private information from disclosure even when it is held by a government agency." *Id.*, 168 Ariz. at 541, 815 P.2d at 910. "An agency has control over the documents when they have come into the agency's possession in the legitimate conduct of its official duties." *Id.*, 168 Ariz. at 541-42, 815 P.2d at 910-11 (*quoting U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 145 (1989))(quotation marks omitted). Where documents are not in control of the government, they were not generated by the government, they never entered the government's files, and they were not used by the government for any purpose, then they are not "public

records." *Id.*, 168 Ariz. at 542, 815 P.2d at 911 (*citing Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980)).

The Respondent newspaper failed to allege that CNI has exclusive possession of *any* document that the Senate controls, generates, or that even entered the Senate's files, much less that the Senate used for any purpose. What we are talking about are emails and contract that CNI has with its own private contractors, its own private subcontracts, and the like. Under CNI's contract with the Senate, the only document that the Senate was entitled to have and control is the final audit report that CNI agreed to prepare, which has now been completed and produced to the Senate and undisputedly a public record because the Senate owns and possess it. But CNI's own records are not public records simply because they may relate to that audit report, which is what the Court of Appeals erroneously found here. Further, in *Salt River*, the Arizona Supreme Court cited with approval (several times) two FOIA decisions that squarely address the kind of issues at bar: *Forsham v. Harris*, 445 U.S. 169 (1980) and *Ciba–Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y.1977) (discussed immediately below).

In *Forsham v. Harris*, 445 U.S. 169 (1980), the United States Supreme Court considered a FOIA request for the raw data underlying a study conducted by a private medical research organization. Although a federal agency funded the study, the data was generated and possessed by the private company, and it never passed

into the hands of the federal agency. The United States Supreme Court found the fact that the study was financially supported by a FOIA-covered government agency did not transform the data into "agency records"; nor did the agency's right of access to the materials under federal regulations change the result. The United States Supreme Court explained that "FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id.*, 445 U.S. at 186 (emphasis in original). In denying the FOIA claim, the United States Supreme Court explained that federal funds do not convert a private organization into an "agency" for purposes of the FOIA without "extensive, detailed, and virtually day-to-day supervision" by the agency of the private organization. *Id*., 445 U.S. at 180. Of course, nothing of the sort has been alleged here; and in general, the notion that "Cyber Ninjas Inc." is so intertwined with the government as to be a "government agency" is meritless. Ultimately, the Supreme Court held that "[w]ith due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency … but which data has not at any time been obtained by the agency, are not 'agency records' accessible under the FOIA. Without first establishing that the agency has created or obtained the document, the agency's reliance on or use of the document is similarly irrelevant." *Id*., 445 U.S. at 170. Again, the case at bar contains no allegation that CNI holds any records that were generated by the Senate,

or that CNI exclusively holds any records created by the Senate; and while there has also been no allegation that the Senate "relied on" CNI's records, such an allegation would be "irrelevant" anyway. *Id.*

The other closely-related FOIA decision discussed by this Court in *Salt River* (*Ciba–Geigy Corp*. *v. Matthews*) is very much on-point. It concerned a private group of researchers (called the "UGDP") who applied for and received federal grants to conduct diabetes studies. *Ciba*, 428 F.Supp. at 532. Under federal regulations, the UGDP was required to submit interim and final reports to the government and to allow the government "access" to their raw data; but the *Ciba* court noted that the government customarily relied on the UGDP's reports rather than accessing the underlying data. The plaintiff questioned "the manner in which the UGDP [handled its own] raw data," as well as "the accuracy of the results reported," so the plaintiff made a FOIA request for the UGDP's underlying data and claimed that the data was a public record (or "agency record," in FOIA parlance). *Id.,* 428 F. Supp. at 526. On a familiar note, the plaintiff made three arguments: first, that the UGDP was a "de facto federal agency and that its records are therefore agency records"; second, that "even if the UGDP is not a federal agency in itself, it nevertheless served as an extension of a federal agency" (essentially an "agent" argument); and third, that even if those arguments failed then

the "disclosure of [UGDP's] records may still be compelled if those records can be characterized as Government agency records." *Id.*, 428 F. Supp. at 526.

The *Ciba* court rejected all three arguments. First the court held that even though the UGDP received public funding, it was not an "agency." *Id.* To reach this decision the court looked at obvious factors like "whether the organization has the authority in law to perform the decision-making functions of a federal agency and whether its organizational structure and daily operations are subject to substantial federal control." *Id.*, 428 F. Supp. at 527. With respect to the plaintiff's other two arguments, the court disposed of them by finding that the plaintiff had not proven that "the records were either Government-owned or subject to substantial Government control or use. In other words, it must appear that there was significant Government involvement with the records themselves in order to deem them agency records." *Id.*, 428 F. Supp. at 529. The *Ciba* court held "that federal funding, regardless of amount, [was] not sufficient to vest the underlying raw data of the UGDP research with a public character. To hold otherwise at a time when public monies flow to numerous private endeavors would surely have a chilling effect on [them]…" *Id.*, 428 F. Supp. at 530. The *Ciba* court also found that "Government access to and reliance upon" the data did not mean that the government owned or "controlled" it. *Id.* The *Ciba* court logically explained that "[a]lthough the federal defendants have access to the underlying data, there is no evidence that they have

used it to exercise regular dominion and control over the raw data." *Id.,* 428 F. Supp. at 530–31. "Mere access without ownership and mere reliance without control will not suffice to convert the UGDP data into agency data." *Id.* "Just as the Government cannot be compelled to obtain possession of documents not under its control or furnish an opinion when none is written, it should not be compelled to acquire data it neither referred to directly nor relied upon in making decisions." *Id.,* 428 F. Supp. at 531. "The distinction between direct reliance, in whole or in part, upon a summary report and direct reliance (via usage or control) on supporting documentation is necessary to preserve a salutary balance between the public's right to be informed of the grounds for Government decisionmaking and the protection of private interests." *Id.,* 428 F. Supp. at 532.

In other words, while the Senate has received CNI's report—which is undisputedly a public record—the Senate does not own or control CNI's company records even though its records may relate to the final audit report (and even if, in some sense, the Senate has "relied" on CNI's records because the records support the final audit report. According to the United States Supreme Court, this is "irrelevant.") For example, PNI has asked for all of CNI's communications regarding this audit, including subcontractors specifically. This would include things like CNI's internal emails discussing issues with its ability to perform under the contract, discussing its relationship with the Senate, and evaluating the

performance of its own subcontractors or issues with their performance, etc. In PNI's universe, CNI must not only produce such emails to the Senate but must make them public. Not only is this patently unfair, but it runs against common sense and is legally baseless. The foregoing are not "public records" by any stretch of the imagination, nor do they meet any intellectually honest legal definition.

Finally, the award of attorneys' fees against CNI not only demonstrates how unfair and impossible it will be for CNI to deal with these kinds of requests and suits in the future, but it also lacks a genuine statutory basis. The Court of Appeals' reasoning on this point (as expressed in the case of *Arpaio v. Citizen Pub. Co*., 221 Ariz. 130, 211 P.3d 8 (App. 2008)) seems to be that although the statute expressly says that only public officers and public bodies can be sued (A.R.S. § 39–121.02(A)), the statute does not repeat the same language in the subsection that immediately follows it regarding attorneys' fees (A.R.S. § 39–121.02(B)). The subsection regarding attorneys' fees (A.R.S. § 39–121.02(B)) must be read in conjunction with the previous subsection regarding who can be sued (A.R.S. § 39–121.02(A)) to say that fees awards are authorized only against the public body or public officer. This is consistent with the general rule that fees may only be awarded where expressly authorized by statute and the general public policy here of not overburdening government employees and especially contractors who do not have "free" lawyers in the Attorney General's Office or taxpayer-funded public-

records/legal budgets. Also, whereas the *Arpaio* case involved claims for declaratory judgment that were asserted against a public officer (Arpaio), this case involves only unfounded public-records claims against a private entity—CNI.

The bottom line here is that CNI is clearly not a proper party to be sued under the public records statute; none of the records at issue are public records *because the Government does not own much less possess them*, and the Court of Appeals' decision opens up every single contractor and employee of the government to being sued. None of this makes any legal or practical sense and there is no way that any state contractor could reasonably deal with any of this. The Court must grant review because of the obvious and far-reaching issues involved in this case, *inter alia*.

**5. If the party claims attorneys' fees on appeal or in connection with a petition or cross-petition for review, the party must include the information required by Rule 21(a).**

None.

**RESPECTFULLY SUBMITTED** November 23, 2021.

**WILENCHIK & BARTNESS, P.C.**

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**ARIZONA SUPREME COURT**

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| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**JUDGE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,**<br><br>**Real Parties in Interest.** | **Arizona Supreme Court**<br>**Case No._____**<br><br>**Court of Appeals**<br>**Division One**<br>**Case No. 1 CA-SA 21-0173**<br><br>**Maricopa County Superior Court**<br>**Case No.: LC2021-00180-001** |

# APPENDIX TO PETITION FOR SPECIAL ACTION, OR IN THE ALTERNATIVE PETITION FOR REVIEW

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IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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CYBER NINJAS, INC., *Petitioner*,

*v.*

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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate, *Real Parties in Interest*.

No. 1 CA-SA 21-0173
FILED 11-9-2021

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Petition for Special Action from the Superior Court in Maricopa County
No. LC2021-000180-001
The Honorable John Hannah, Judge

**JURISDICTION ACCEPTED; RELIEF DENIED**

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**MEMORANDUM DECISION**

Judge Maria Elena Cruz delivered the decision of the Court, in which Acting Presiding Judge David B. Gass and Judge Randall M. Howe joined.

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**C R U Z**, Judge:

**¶1** Petitioner Cyber Ninjas, Inc. ("Cyber Ninjas") seeks relief from the superior court's order denying its motion to dismiss the special action complaint filed against it by Phoenix Newspapers, Inc. and Kathy Tulumello (collectively "PNI"). For the following reasons, we accept jurisdiction but deny relief.

**FACTUAL AND PROCEDURAL HISTORY**

**¶2** The Arizona Senate initiated an audit of voting equipment used and ballots cast in Maricopa County in the 2020 general election, and it retained Cyber Ninjas, a private corporation, to serve as its primary vendor for that audit. Cyber Ninjas then hired multiple private companies to assist it in the audit.

**¶3** In June 2021, the Arizona Republic, published by Phoenix Newspapers, Inc., served a request on Cyber Ninjas to inspect documents relating to the audit. The newspaper asserted the documents were public records subject to inspection under Arizona's Public Records Law ("PRL"), Chapter 1 of Title 39, Arizona Revised Statutes ("A.R.S"). Cyber Ninjas did not produce any records to the Arizona Republic in response to its request.

**¶4** PNI then filed a statutory special action under the PRL against Cyber Ninjas, the Senate, Senate President Karen Fann and other Senate

officials. Cyber Ninjas moved to dismiss the complaint, which the superior court denied. Citing A.R.S. § 39-121.02, the court ordered Cyber Ninjas to produce copies of public records related to the audit in its possession, custody, or control. Cyber Ninjas then petitioned for special action seeking relief from: (1) the superior court's denial of its motion to dismiss and (2) the order to produce any public records directly to PNI. At Cyber Ninjas' request, we temporarily stayed the superior court's order that it produce all documents directly to PNI.[1]

## SPECIAL ACTION JURISDICTION

**¶5** Special action review is generally appropriate if a party has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a); *see generally Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, 201, ¶¶ 5-7 (App. 2012). Our decision to accept special action jurisdiction is discretionary and is "appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again." *State v. Superior Court (Landeros)*, 203 Ariz. 46, 47, ¶ 4 (App. 2002).

**¶6** Here, the issues raised in the petition are pure questions of law and are of statewide importance. Accordingly, we accept special action jurisdiction.

## DISCUSSION

**¶7** This case presents a question of statutory interpretation, which we review de novo. *McHale v. McHale*, 210 Ariz. 194, 196, ¶ 7 (App. 2005).

**¶8** The PRL requires "[a]ll officers and public bodies" to "maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of

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[1] The Senate is not a party to this special action proceeding from the superior court's ruling against Cyber Ninjas. We note that, as a consequence of our ruling in *Fann v. Kemp*, 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. App. Aug. 19, 2021) (mem. decision), the Senate has formally asked Cyber Ninjas to produce to the Senate certain documents relating to the audit that remain in Cyber Ninjas' possession. Per the parties' agreement, we ordered Cyber Ninjas to promptly begin processing the Senate's request to disclose those documents to the Senate for it to review on an ongoing basis.

this state." A.R.S. § 39-121.01(B). Arizona law imposes additional duties on those responsible for public records. For example, "[e]ach public body shall be responsible for the preservation, maintenance and care of that body's public records, and each officer shall be responsible for the preservation, maintenance and care of that officer's public records." Each public body also has a duty "to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction . . . ." A.R.S. § 39-121.01(C).

**¶9** We recently addressed a request for audit documents made to the Arizona Senate under the PRL. *Fann*, 1 CA-SA 21-0141, at *4-5, ¶¶ 23-25. In that case, we rejected the Senate's contention that records relating to the audit that remain in Cyber Ninjas' possession are not subject to the PRL and we ruled the Senate must obtain from Cyber Ninjas any records that were requested under the PRL. *Id.* at ¶¶ 21-25 (holding Cyber Ninjas was the Senate's agent in performing an "important legislative function"). To be clear, and because Cyber Ninjas continues to argue to the contrary, we reiterate our holding in *Fann* 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. *Id.* at *4, ¶ 23.

**¶10** Cyber Ninjas also argues it cannot be subject to suit under the PRL because it is not a public entity, an issue that, as PNI acknowledges, was not before this court in *Fann*. In support of the superior court's ruling, PNI first argues Cyber Ninjas is subject to suit under the PRL because it is an "officer" of the Senate or a "public body." We disagree.

**¶11** Section 39-121.01(A) defines "Officer" and "Public body" as follows:

> A. In this article, unless the context otherwise requires:
>
> 1. "Officer" means any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.
>
> 2. "Public body" means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state

> or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.

A.R.S. § 39-121.01(A)(1), (2).

**¶12** Cyber Ninjas has performed a public function in undertaking the audit and was paid with public funds to do so. Nevertheless, although the Senate delegated its legislative responsibilities with respect to the audit to Cyber Ninjas, Cyber Ninjas is not a "public body" or "officer" as the PRL defines those terms. Neither definition in A.R.S. § 39-121.01 encompasses a private contractor, and Cyber Ninjas cannot fairly be characterized as either. *See supra* ¶ 11.

**¶13** PNI also argues it may obtain relief against Cyber Ninjas under the PRL because Cyber Ninjas is the sole "custodian" of documents that are public records subject to disclosure under the PRL. We agree.

**¶14** As PNI contends, the PRL requires a "custodian" of public records to "promptly furnish" requested records. A.R.S. § 39-121.01(D)(1). Although the PRL does not define "custodian," that word commonly means "[a] person or institution that has charge or custody (of a child, property, papers, or other valuables)," or "[s]omeone who carries, maintains, processes, receives, or stores a digital asset." *Black's Law Dictionary* 483 (11th ed. 2019). "Custody" means "[t]he care and control of a thing or person for inspection, preservation, or security." *Id.*; *W. Valley View Inc. v. Maricopa Cnty. Sheriff's Office*, 216 Ariz. 225, 229, ¶ 16 (App. 2007).

**¶15** To the extent Cyber Ninjas is in sole possession of audit-related public records because of its contract with the Senate, Cyber Ninjas has become the custodian of those records under the PRL. And as to those records, Cyber Ninjas has assumed the obligations the PRL assigns to a "custodian" of public records. Under the PRL, a person seeking public records must make its request to the "custodian" of the records. A.R.S. § 39-121.01(D)(1). "Access to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record." A.R.S. § 39-121.01(E).

**¶16** In the event a custodian of public records refuses a request for those records, the person denied access "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." A.R.S. § 39-121.02(A). As noted, PNI's special action complaint also properly named the Senate and various Senate officials. Although the PRL does not

specify that a suit for damages may be brought against a custodian of public records, *see* A.R.S. § 39-121.02(C), in these circumstances, nothing prevents a party from joining a custodian of records as a party to a statutory special action under the PRL. *See* Ariz. R.P. Spec. Act. 2(a)(1), (b) (court may order joinder of persons[2] other than the "body, officer or person against whom relief is sought."). *See also Arpaio v. Citizen Publ'g Co.*, 221 Ariz. 130, 133, ¶ 10 n.4 (App. 2008); *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 21 (App. 1998) (citing Ariz. R. Civ. P. 19(a)(1)(A) (where feasible, joinder may be required of a person "if, in that person's absence, the court cannot accord complete relief among existing parties.")).

**¶17** Here, Cyber Ninjas was properly joined as a necessary party in PNI's special action because, even though it is a private company, as a contractor and agent of the Senate, it is alleged to be the sole custodian of records pertaining to the audit that are subject to disclosure under the PRL. In other words, joinder of Cyber Ninjas is necessary only because the Senate does not have the public records that are in Cyber Ninjas' custody. Under the unusual facts of this case, the custodian necessarily must be joined. Cyber Ninjas would not be a necessary party if it had turned over the public records requested by the Senate—it is a necessary party by its own actions.

**¶18** To hold otherwise would circumvent the PRL's purpose, which "exists to allow citizens to be informed about what their government is up to." *Scottsdale Unified Sch. Dist. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 302-03, ¶ 21 (1998) (citation and internal quotation marks omitted). We noted in *Fann* that "[t]he requested records are no less public records simply because they are in the possession of a third party, Cyber Ninjas." 1 CA-SA 21-0141, at *4, ¶ 23. In *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986), the city of Fargo contracted a consulting firm to assist in the search of a new city chief of police. *Id.* at 170. A publishing company obtained a writ of mandamus from the District Court ordering the city to deliver applications and records disclosing the names and qualifications of applicants. *Id.* The city appealed. *Id.* In affirming the issuance of the writ of mandamus the North Dakota Supreme Court aptly observed:

> We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in possession of PDI. . . . [The] purpose of the open-

[2] Section 1-215(29) defines "person" as "a corporation, company, partnership, firm, association or society, as well as a natural person."

> record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records.

*Id.* at 172.

**¶19** Cyber Ninjas argues that the logic of the superior court's order would open the files of all government contractors to public inspection. We need not decide the extent to which the PRL applies to businesses that contract with the government to provide ordinary goods or services that government regularly purchases for the public. Contrary to Cyber Ninjas' contention, our ruling does not mean that construction companies and office-supply vendors will have to rush to establish new "public records" departments. "Only documents with a substantial nexus to government activities qualify as public records." *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8 (2009) (citation and internal quotation marks omitted). Here, the Senate's decision to undertake the audit was premised on its oversight authority, an important legislative function, which it then entirely outsourced to Cyber Ninjas and its subvendors. Nothing in the superior court's order or in this decision imposes obligations under the PRL on contractors that provide ordinary goods or services to the government.

**¶20** In sum, the superior court did not err in determining that PNI properly joined Cyber Ninjas, the custodian of audit records subject to the PRL, when it filed a statutory special action to compel disclosure of those records. As noted above, we understand the Senate has asked Cyber Ninjas to turn over to the Senate certain documents related to the audit. To the extent Cyber Ninjas fails to deliver to the Senate any audit documents requested by PNI, it must "promptly furnish" those records directly to PNI. *See* A.R.S. § 39-121.01(D)(1). As the superior court ordered, the Senate and Cyber Ninjas may confer about which public records in the possession, custody, or control of either party should be withheld based on a purported privilege or for any other legal reason.

**¶21** PNI requests attorneys' fees and costs incurred in responding to the petition under A.R.S. §§ 39-121.02(B), 12-341, -342, and Ariz. R.P. Spec. Act. 4(g). Because PNI has substantially prevailed, we award it its reasonable costs and attorneys' fees upon compliance with ARCAP 21 and Ariz. R.P. Spec. Act. 4(g).

**CONCLUSION**

**¶22** For the foregoing reasons we accept jurisdiction, deny relief and lift the stay of proceedings previously issued regarding the superior court's August 24, 2021 order.


AMY M. WOOD • Clerk of the Court
FILED: AA

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

| | |
|---|---|
| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate;**<br><br>**Real Parties in Interest.** | **Court of Appeals Case No.**<br>_____<br><br>**Maricopa County Superior Court Case No.: LC2021-00180-001**<br><br>**(Oral Argument Requested)** |

# PETITION FOR SPECIAL ACTION

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## INTRODUCTION

Defendant Cyber Ninjas, Inc. ("Petitioner," "Defendant," or "CNI"), by and through undersigned counsel, hereby files this Petition for Special Action appealing from the lower court's order filed on August 24, 2021 (hereinafter referred to as the "Order," **Exhibit 1** hereto), requiring CNI to produce around sixty thousand (60,000) documents by today (technically – the Order has been stayed, as explained immediately below).

The Arizona Supreme Court has effectively stayed enforcement of the Order;[1] but that stay may terminate as soon as September 14, 2021. Cyber Ninjas therefore reserves the right to file a "backup" Motion to Stay as part of this proceeding, to the extent necessary (i.e., in the event that this proceeding is not concluded before September 14).

Because of the immediacy of the lower court's orders—and also because the issue of whether a mere private contractor can be deemed a "public officer or public body," with the responsibility to receive and respond to public records requests, is clearly of statewide importance—Cyber Ninjas asks the Court to take jurisdiction over this special action.

### 1. Background

[1] The Order itself provides that it is stayed with respect to CNI, so long as the Arizona Supreme Court's stay (of another order, in another matter) remains in effect (Arizona Supreme Court Case No. CV-21-0197-PR. The order in that case required the Senate to request/obtain documents from CNI and is presently on appeal.) On August 24, the Arizona Supreme Court extended that stay through at least September 14, 2021. (See Appendix, hereinafter "App.," at 171)

By the admission of all parties, Cyber Ninjas, Inc. is a private corporation that was contracted by the Senate. (See paragraph 8 of the Complaint: "Defendant/Real Party in Interest Cyber Ninjas, Inc., a corporation organized under the laws of the state of Florida, was engaged by the Arizona Senate to conduct the Senate's audit of ballots in Maricopa County in the 2020 election.") (App. 22)

On June 2, 2021, CNI received a demand from the Arizona Republic for an "inspection of public records," which alleged without basis that CNI was a "public officer[]" or "public bod[y]" and therefore responsible for receiving/responding to a public records request made under A.R.S. §§ 39-121 *et seq*. By the admission of all parties, CNI is a private contractor for the Senate (and it owes contractual duties of confidentiality to the Senate). Accordingly, CNI did not produce any records to the Arizona Republic in response to the request.

The publisher of the Republic (Phoenix Newspapers, Inc., or "PNI") then sued CNI under the public records law, again alleging that CNI is a public officer or public body. CNI filed a Motion to Dismiss, which was fully briefed. (App. at 119. 126, and 162)

The case was assigned to Judge John Hannah—who, in another case that was unrelated to CNI or the Senate's audit, made a snide comment on the record about the "wisdom" of the audit. As soon as the case was assigned to Hannah, CNI promptly moved to disqualify and remove him (both for cause and without cause), which remains on appeal with the Arizona Supreme Court (and is set for conference on Sep. 14th, CV-21-0185-PR). In the meantime, Hannah summarily denied CNI's Motion to Dismiss and signed a proposed order that PNI submitted to him

immediately before an August 23rd hearing, ordering CNI to produce around 60,000 records to PNI within less than a week (by August 31st). (Exhibit 1.) While Hannah's order contained no reasoning, Hannah made comments during the August 23rd hearing indicating that he believed that CNI was in some kind of "joint venture" with the Senate. Finally, the only claim that PNI brought against CNI in the case was for wrongful denial of access to public records pursuant to A.R.S. §§ 39-121 *et seq*., in which PNI alleged that: "In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendant Cyber Ninjas Inc., as a 'public officer' and/or 'public body' by virtue of its performing a core governmental function funded in part by state taxpayer dollars, was required to maintain these Public Records and make them available for inspection and copying promptly upon request by PNI and its journalists. Yet, Cyber Ninjas refused to do so. For all these reasons, Defendant Cyber Ninjas, Inc. has failed to perform its duties required under the Arizona Public Records Law, and it therefore has wrongfully denied PNI access to inspect and copy the Records as a matter of law." (Complaint, paragraphs 66-67, App. at 35-36)

**2. <u>Argument</u>**

The trial judge has not yet given his reasoning – but given the immediacy of his Order, *inter alia*, CNI has no time or reason to delay in this appeal. The denial of CNI's Motion to Dismiss is also a pure issue of law, which is subject to *de novo* review.

The only claim against CNI in this case is clearly subject to dismissal. And that claim – for wrongful withholding of public records against a public "officer or public body" under A.R.S. § 39-121.02—is the only claim that could possibly

entitle PNI to the relief that was granted here. In other words, it is the only claim that could entitle PNI to an order directing CNI to produce documents directly to PNI, *i.e.,* to produce records to "any person" who has requested to inspect CNI's records. This is, for example, materially different from requiring CNI to produce any Senate public records to the *Senate* or requiring Senate to obtain them from CNI. This was an order for CNI to produce its own records, whether private or public, directly to a member of the public (PNI).

This distinction is critical, for a number of apparent reasons. Pursuant to the public records statutes, it is clear that only the chief "officer" of a public body is responsible for receiving and responding to records requests. But the trial court's ruling would subject every private contractor, as well as every state employee – including the members of this court and their staff – to a legal responsibility to receive and respond to records requests from literally any member of the public, under the penalty of being sued and subject to court order if they refuse. The trial court's order would result in every private contractor for the government having to operate and fund their own public-records departments, in order to receive and respond to public-records requests from literally any member of the public—not to mention new protocols, responsibilities and liabilities for state employees, who are now subject to the responsibility of receiving public records requests, even though they are clearly not the chief administrator of the public body or authorized by the chief administrator to receive such requests on their behalf. Further, if the statute required anyone other than the "officer" of a "public body" to receive and respond to records requests made directly by members of the public, then the actual

officer/public body to whom the records belong – in this case, the Arizona Senate – would have no say over how or what/when their own records are produced.

In a nutshell, the trial court completely ignored everything about the public-records statutes – including the plain wording; the public policy inherent in not subjecting every private contractor/state employee to receiving, responding to, and being sued over public-records requests; the public policy of allowing public bodies to exercise control over their own records; and even the statute's application to the basic undisputed facts of this case, such as that CNI is a private contractor with narrow (and nearly finished) contractual duties to the State—in order to reach a pre-ordained conclusion and simply grant PNI all of the that relief it wanted. The trial-court judge's order requiring CNI to produce documents directly to PNI must be reversed, and the claim against CNI under the public-records statutes dismissed with prejudice.

Finally – to date, the Senate (to whom any "public records" would belong) has not requested any records from CNI or authorized/directed CNI to make productions to the Senate. All that CNI has received is an illegal public-records request from PNI, which groundlessly alleged that CNI was an officer of a public body and which demanded that CNI produce records directly to PNI—a request that CNI properly denied. What follows is a short memorandum of legal points and authorities in support of this special action.[2]

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[2] Due to time constraints imposed by the immediacy of the lower court's order, this memorandum is largely repetitive of CNI's briefs in support of its Motion to Dismiss and Reply, which were previously filed with the trial court on July 27 and August 17. (App. at 119 and 162, respectively)

### a. Only a public body, by and through its chief officer, is responsible for receiving and responding to public-records requests

PNI brought only one claim against CNI, which was under A.R.S. § 39-121.02—claiming wrongful denial of access to public records by a public officer or public body. However, CNI is neither of those things; it is a private contractor that was hired by the President of the Arizona State Senate. PNI's Complaint alleged that CNI was subject to being sued for public records because it is an "agent" of the Senate ("performing a core government function"), and because it is being paid by the Senate (see Complaint at paragraphs 8, 10, and 50, App. at 21 and 32); but this argument has absolutely no legal or statutory basis whatsoever. Moreover, if PNI were correct then it would subject every single employee or contractor of the State – including hard-working people like the staff of this Court, peace officers, firefighters, etc. – to having to respond to public records requests and being sued for denial of access. This is plainly not how the statutes read. The statues clearly define the persons or entities subject to a records request – i.e. a "officer" and "public body" – as consisting only of elected or appointed officials or chief administrative officers, chairmen, "head[s]," "director[s]," and "supervisors[s]" of a "public body" (and "public bod[ies]" consist of the State and "public organization[s] or agenc[ies]" that receive taxpayer funds). *See* A.R.S. § 39 121.01(A)(1), (A)(2), discussed *infra*. A private contractor like CNI is clearly none of these things; to hold otherwise would be to subject every government contractor to having to form their own public records departments, and/or suffer liability for

not "promptly" responding to intensive records requests from literally any member of the public. This is plainly not allowed by the statutes.

The public records statutes are contained at A.R.S. §§ 39-121 *et seq*. First, A.R.S. § 39-121 provides 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." (Emphasis added.) Second, A.R.S. § 39-121.01(A)(1) defines "officer" as: "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." Again, CNI is none of these things, as PNI admits. PNI merely alleges that CNI is an "agent" of a public body – which is to say, CNI is not even an employee of a public body, and certainly far less than an "officer"/administrator. To quote the Arizona Supreme Court: "[a]n 'office' is defined as 'an employment on behalf of the government in any station of public trust not merely transient, occasional, or incidental.' It is a 'special trust or charge created by competent authority.' The officer is distinguished from the employee in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of being called to account as a public offender for misfeasance or nonfeasance in office and usually, though not necessarily, in the tenure of his position.'" *Winsor v. Hunt*, 29 Ariz. 504, 519, 243 P. 407, 412 (1926). CNI – which again is merely a private contractor, as PNI admits – is not even an employee of the State, much less a tenured, oath-taking "officer." The public-records request statute clearly does not

apply to CNI, and PNI's claim that CNI must respond directly to any member of the public on a request for its records is groundless.

Because A.R.S. § 39-121 only provides that an "officer" must respond to a public records request, and CNI is clearly not an "officer" of a public body within the meaning of the statute, then that ends the analysis. But if for no reason other than academic interest: the definition of "public body" is also contained at A.R.S. § 39 121.01(A)(2), which provides that "public body" means: "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." Part of PNI's argument – specifically, its argument that CNI must honor a public records request because it is getting paid by the State – sort of apes the last phrase in this definition of a "public body" (i.e., the part which says "supported in whole or in part….or expending moneys provided by this state…"). But that phrase plainly applies only to "any public organization or agency" – which again, CNI is not. And public records requests must be directed to an "officer" within the meaning of A.R.S. §§ 39-121, 39-121.01(A)(1), which we have already established that CNI is not. If merely getting paid by the State caused someone to be subject to a public-records request, then literally any employee of the State – not to mention other private contractors, like the Arizona Republic even (which occasionally prints

government notices, see below) – would be subject to responding to public records requests and being sued on them.

Finally, A.R.S. § 39-121.02(A),(C) state that "[a]ny person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions *against the officer or public body*." (Emphasis added.) And "[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action *against the officer or public body* for any damages resulting from the denial." (Emphasis added.) But again, CNI is not an officer or public body within the meaning of these statutes; nor was PNI's public-records request to CNI made "pursuant to this article," since the request was not directed to a public officer within the meaning of these statutes.

PNI has sort of argued that CNI was appointed to be the Senate's "custodian of records." PNI does not actually allege anywhere in this record facts to support that CNI has somehow become the Senate's official custodian of Senate records. But moreover, PNI fails to point to any legal authority which supports the notion that even an official "custodian of records" for a public body may be directly named and sued in a statutory public-records claim. In other words, the statute under which PNI sued –A.R.S. § 39-121.02 – is clear that it only creates a cause of action against an "officer or public body," and not even against a mere custodian who may be under their supervision. *See* A.R.S. § 39-121.02(A),(C). And again, CNI is not a public officer or body. In fact, a substantial piece of CNI's contract work for the

Senate is nearly finished. This is a far cry from CNI being a sworn officer of the state, with serious administrative duties and long-term obligations. CNI isn't even one of the state's employees, who may have substantial and/or long-term – but not necessarily administrative – duties. CNI is a private contractor, with short-term and narrowly defined contractual duties, period.

In its briefs, PNI has offered a reading of the statutory definition of "officer" that (1) stretches the definition of a public "office" past any reasonable breaking point (such that it would include, again, literally any government contractor or employee); and (2) shockingly ignores most of the statute's actual language, namely: "…and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1). This language is highly significant in demonstrating the meaning of "officer" under A.R.S. § 39-121.01(A)(1), owing to several fundamental canons of statutory interpretation. "The rule of statutory construction, *noscitur a sociis*, directs our attention to the accompanying words as we undertake to learn the meaning to be given" to particular statutory language. *Planned Parenthood Comm. of Phoenix, Inc. v. Maricopa Cty*., 92 Ariz. 231, 235, 375 P.2d 719, 722 (1962); *see also Est. of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, 266 P.3d 349, 352 (2011)("*noscitur a sociis*—a canon closely related to *ejusdem generis*—dictates that a statutory term is interpreted in context of the accompanying words"). The "chief administrative officer, head, director" etc. language clearly demonstrates the kind of "elective or appointed office of any public body" that the statute is talking about. Further, if the phrase "elective or appointed office of any public body" could

be applied to any state employee or contractor, irrespective of their non-administrative and/or temporary role, then it would render superfluous the "chief administrative officer" (etc.) language that is found in the same sentence. This violates another basic rule of statutory interpretation, which is that "[i]nterpreting statutory language requires that we give meaning to each word, phrase, clause, and sentence within a statute so that no part will be superfluous, void, contradictory, or insignificant." *Champlin v. Sargeant In & For Cty. of Maricopa*, 192 Ariz. 371, 374, 965 P.2d 763, 766 (1998). Finally, it also violates the doctrine of *expressio unius est exclusio alterius* — which is that "the expression of one or more items of a class indicates an intent to exclude omitted items of the same class." *Id.* By enumerating only the "chief administrative officer, head, director, superintendent," etc. of a public body, the legislature indicated an obvious intent to exclude lesser roles. Finally, PNI's argument that the language "any person elected or appointed to hold any elective or appointive office of any public body" was intended to apply to private fictional entities/non-natural persons like CNI is groundless. Suffice to say, Arizona statutes clearly define the requirements for public office, "whether elective or appointive," as including that a person must be "not less than eighteen years of age, [and must be] a citizen of the United States and a resident of this state," *inter alia*. A.R.S. § 38-201.

To further highlight the unreasonableness of PNI's position on this case: if PNI were correct in its interpretation of the public-records statutes, then it could be argued with equal force that PNI itself – namely, the publisher of the Arizona Republic (and one of its editors) – are subject to public records statutes. The Arizona

Republic has received over four hundred thousand dollars in government funds since 2003,[3] on behalf of organizations like the VA, the HHS, DHS, and the DOD. In all cases, PNI was performing "core government functions" (to borrow Plaintiffs' phraseology) by helping the government to find employees (through want ads) or publishing important government public notices—"core" government functions that the government "lacks the ability to perform…itself" and that are "initiated and funded with public dollars." (to quote from PNI's briefs below, pages 10-11 of its Response to the Motion to Dismiss *inter alia*). PNI argues that CNI's contract is somehow special because it allegedly offers a service that is "exclusive" to government; but there is nothing more "exclusive" about CNI's ability to conduct an audit for the government, than about PNI's ability to write and publish things for the government. (Both entities are capable of providing the "same goods and services to a governmental entity that [they] could provide to a nongovernmental customer," to quote Plaintiffs—not that any legal authority supports this as being a test anyway.) And eighteen years is certainly a longer period of time (and four hundred grand is a lot more in public funding) than CNI has or ever will receive from the government (especially since CNI is nearly done with a substantial part of its audit, after far less than one year). By PNI's logic, PNI is an "agent" and "officer" of the government that is performing "government functions"; and therefore it is subject to being named by any citizen, at any time, in a public-records suit (and at risk of paying attorneys' fees on the claim).

[3] *See e.g.* "usaspending.gov" or "govtribe.com."

PNI cites a case which it believes supports its position in this case, but which actually supports exactly what CNI is arguing here (if anything): *Arpaio v. Citizen Pub. Co*., 221 Ariz. 130, 133, 211 P.3d 8, 11 (App. 2008). The case merely addressed whether attorneys' fees under the public-records statute could be awarded against a public officer (Arpaio) where the underlying public records request was actually sent to another officer (the Pima County Attorney). Arpaio had allegedly "caused" the Pima County Attorney to refuse to honor the records request, by invoking his attorney-client privilege with the county attorney. The Court of Appeals found that because the language in the attorneys' fees provision of the public-records statute was uniquely *not* limited to just the public officer or public body responsible for providing records – in contrast to "most of the provisions of Arizona's public records law," including the section which "creates the cause of action" – then an award of fees was accordingly not limited to being against just the party to whom the records request was actually sent. "[U]nlike most of the provisions of Arizona's public records law, § 39–121.02(B) [the fees provision] does not refer to the officer or public body having custody of the requested records. In further contrast, the other subsections of § 39–121.02 *specifically refer to that officer or public body*. Subsection (C) of § 39–121.02 *creates a cause of action by the person requesting the records against 'the officer or public body' who 'wrongfully denied access to [the requested] public records'* for any damages 'resulting from the denial.' Subsection (A) permits the person requesting the records to appeal the denial of his or her request by special action 'against the officer or public body.'" *Arpaio*, 221 Ariz. at 133, 211 P.3d at 11. (Emphasis added.) In other

words, the *Arpaio* case – while mostly inapposite—actually supports CNI's contention in this case, by acknowledging that a cause of action under the statute only exists against the "officer or public body" to whom a valid records request was sent.

Finally, PNI points to the Rules of Special Action for the idea that it can simply name CNI as a "Real Party in Interest" and force CNI to pay for attorneys' fees and costs in defending this suit, when there is no actual legally-cognizable claim asserted against CNI. The Rules of Special Action were not intended to justify naming any person with any kind of articulable connection to a lawsuit as a defendant in it by calling them a "Real Party in Interest"[4]—or else Rule 12(b)(6), which requires that an actual cognizable claim be asserted against every defendant, would be meaningless in such suits. Rule 12(b)(6) means what it says. PNI must assert a legally-cognizable claim against Defendant CNI; and because it does not, then the Complaint against CNI must be dismissed for failure to state a claim for which relief can be granted. Because CNI is clearly not an officer or public body under A.R.S. § 39–121.02, and PNI has only named CNI in a claim under that statute for denial of records access, then PNI's Complaint fails to state a claim against CNI and it must be dismissed with prejudice. CNI reserves its right to seek attorneys' fees and costs under ARCAP 21, A.R.S. §§ 12-349, 12-341 *inter alia*.

[4] In actuality, the special action rule to which PNI points – which acknowledges that Real Parties in Interest may be named in certain special actions – was intended to address the common legal fiction of naming the judge as the "defendant" or "respondent" in a special-action of a judicial ruling (like this one). The actual defendants are instead named as the "real parties in interest." The first comment to the Rule makes this abundantly clear.

**RESPECTFULLY SUBMITTED** August 31, 2021.

**WILENCHIK & BARTNESS, P.C.**

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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

| | |
|---|---|
| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate;**<br><br>**Real Parties in Interest.** | **Court of Appeals Case No.**<br>_____<br><br>**Maricopa County Superior Court Case No.: LC2021-00180-001**<br><br>**(Oral Argument Requested)** |

**APPENDIX TO PETITION FOR SPECIAL ACTION**

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# APPENDIX 1

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO,

Plaintiffs,

vs.

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; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.,

Defendants, and

CYBER NINJAS, INC.,

Real Party in Interest

NO. LC2021-000180-001

**COMPLAINT FOR STATUTORY SPECIAL ACTION TO SECURE ACCESS TO PUBLIC RECORDS**

(Assigned to the Honorable _____)

Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com, and its News Director, Kathy Tulumello (together, "PNI"), submit this Complaint for Statutory Special Action to Secure Access to Public Records pursuant to A.R.S. § 39-121, *et seq.* (the "Arizona Public Records Law") and Ariz. R. Special Actions 1-6, and allege as follows:

## PARTIES, JURISDICTION AND VENUE

1. Plaintiff Phoenix Newspapers, Inc. publishes *The Arizona Republic*, a newspaper of general circulation in Maricopa County, Arizona, and operates the website azcentral.com. Phoenix Newspapers, Inc. is an Arizona corporation with its principal place of business in Phoenix, Arizona.

2. Plaintiff Kathy Tulumello is the News Director for *The Arizona Republic* and azcentral.com. She oversees PNI's news coverage of the Arizona Senate's audit of the Maricopa County ballots cast in the 2020 election, including PNI's public records requests for information concerning the Senate audit.

3. By statute and case law, PNI may request to examine or be furnished copies of any public record, and public officers and public bodies are required to furnish copies of such records "promptly." *See* A.R.S. §§ 39-121.01(D)(1) and (E).

4. Defendant Arizona State Senate (Defendant "Arizona Senate") and the Arizona House of Representatives comprise the Legislative Department of the State of Arizona pursuant to Article IV, Part 2, Section 1 of the Arizona Constitution, and as such the Arizona Senate is a "[p]ublic body" within the meaning of A.R.S. § 39-121.01(A)(2).

5. Defendant Karen Fann is the President of the Arizona Senate, and is named in her official capacity only. President Fann is an "[o]fficer" within the meaning of A.R.S. § 39-121.01(A)(1).

6. Defendant Warren Petersen is the Chairman of the Arizona Senate Judiciary Committee, and is named in his official capacity only. Chairman Petersen is an "[o]fficer" within the meaning of A.R.S. § 39-121.01(A)(1).

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7. Defendant Susan Aceves is the Secretary of the Arizona State Senate, and is named in her official capacity only as custodian of records for the Arizona State Senate. Secretary Aceves is an "[o]fficer" within the meaning of A.R.S. § 39-121.01(A)(1).

8. Defendant/Real Party in Interest Cyber Ninjas, Inc. ("Cyber Ninjas"), a corporation organized under the laws of the state of Florida, was engaged by the Arizona Senate to conduct the Senate's audit of ballots cast in Maricopa County in the 2020 election. Cyber Ninjas is an "[o]fficer" and/or a "[p]ublic body" within the meaning of A.R.S. § 39-121.01(A), acting as, or as an agent of, the Arizona Senate and/or Defendant President Fann, supported by and/or expending monies provided by the state, to conduct the audit.

9. By law, Defendants Arizona Senate, President Karen Fann, Judiciary Committee Chairman Warren Petersen, Secretary Susan Aceves and Cyber Ninjas (together, "Defendants") "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." A.R.S. § 39-121.01(B).

10. Cyber Ninjas, acting as, or as the agent of, the Arizona Senate, has custody and control of certain public records required to be maintained and provided to the public by Defendants. A.R.S. § 39-121.01(B).

11. The Court has personal jurisdiction over the parties in this action, and venue is proper in Maricopa County, Arizona.

12. This petition seeks inspection and copying of public records in accordance with A.R.S. § 39-121.02(A), which provides that "[a]ny person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or

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public body." By law, "[a]ccess to public records is deemed denied if a custodian [of such records] fails to promptly respond to a request for production of a public record." A.R.S. § 39-121.01(E).

## FACTS

13. On November 3, 2020, Arizona held a general election, including for federal offices that include President and members of Congress. More than 3.3 million Arizonans cast ballots, including 2 million voters in Maricopa County, who accounted for approximately 60 percent of the statewide total.

14. Democrat Joe Biden won a narrow victory over Republican incumbent President Donald Trump in Arizona, with Biden's slate of electors garnering 10,457 more votes than Trump's slate. *Ward v. Jackson*, --- Ariz. --, 2020 Ariz. LEXIS 313, at *1 (Ariz. Dec. 8, 2020), *cert. denied,* 141 S. Ct. 1381 (2021). Although the margin was more than the one-tenth of one percent required for an automatic recount, *id.*, the close vote prompted several recounts and more than a half-dozen lawsuits challenging the results.

15. None of those lawsuits was successful. In a suit brought by the head of the state Republican Party challenging the Maricopa County vote count, the Arizona Supreme Court held that the County's "November 9, 2020 hand count audit revealed no discrepancies in the tabulation of votes," and an examination of more than 1,600 questioned ballots found only a "statistically negligible error" (a net gain of five votes for Trump electors) that would not change the outcome. *Id.* at *6. Accordingly, the Arizona Supreme Court affirmed dismissal of the lawsuit and "confirm[ed] the election of the Biden Electors." *Id.* at *7.

16. On December 15, 2020, the Arizona Senate Judiciary Committee served two subpoenas on the Maricopa County Board of Supervisors, seeking access to the County's election tabulation equipment and all ballots and related records from the 2020

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general election.[1] The Board of Supervisors and the Senate filed suit in this Court seeking to quash and enforce the subpoenas, respectively.

17. On January 12, 2021, President Fann and Chairman Petersen served another set of subpoenas seeking access to the ballots, tabulating equipment and related materials from the 2020 general election on Maricopa County's Board of Supervisors, Recorder and Treasurer.[2] The Maricopa County officials also challenged this second set of subpoenas in this Court in an action eventually consolidated with their first one seeking to quash the original subpoenas.

18. In a news release responding to the second Maricopa County lawsuit, the Arizona Senate Republican Caucus, which President Fann leads, stated that "[a]ny firm hired by the Senate will perform everything we have required in the subpoenas." News release, "Statement from Senate Republicans on court filing by Maricopa County Board of Supervisors," Arizona Senate Republican Caucus (Feb. 8, 2021), https://www.azsenaterepublicans.com/post/statement-from-senate-republicans-on-court-filing-by-maricopa-county-board-of-supervisors.

19. President Fann and Chairman Petersen asserted in that litigation that their subpoenas sought the ballots and materials for a "manifestly . . . valid legislative purpose" in accordance with "the Arizona Constitution's express directive that the Legislature must enact 'laws to secure the purity of elections and guard against abuses of the elective franchise.' Ariz. Const. art. VII, § 12." Fann & Petersen Mot. for Judgment on the Pleadings at 8, *Maricopa Cty. v. Fann*, Nos. CV2020-016840, CV2021-002092

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[1] Copies of these subpoenas are available at https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1992/637441427303430000 and https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/1994/637441427310130000.

[2] Copies of the second set of subpoenas are available at https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2187/637483674854430000.

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(Super. Ct. Maricopa Cty. Feb. 22, 2021).[3] The senators continued: "The Senate intends to use data and information gleaned through the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and the competence of county officials in performing their statutory duties, with an eye to enacting potential reforms." *Id.* The senators also stated that "[h]ow the Senate chooses to use materials obtained by the Subpoenas and to whom it permits access are, simply put, far above the County's pay grade," suggesting that whatever they chose to do with the subpoenaed materials would be "privileged legislative activity." *Id.* at 11 (citation omitted).

20. On February 25, 2021, Judge Timothy Thomason of this Court ruled that the subpoenas were lawful and valid. The Senate and Maricopa County officials eventually agreed on a protocol to transfer the ballots and other requested materials.

21. Rather than performing this "legislative activity" itself, the Senate instead chose to hire a contractor to do the job. Thus, on March 31, 2021, President Fann and the Republican leadership of the Arizona Senate announced that they had "hired a team of independent auditors to complete a comprehensive, full forensic audit of the 2020 election in Maricopa County, including a hand recount of all ballots."[4] President Fann's statement said that Defendant Cyber Ninjas would lead that team. The statement said that "[t]he audit will validate every area of the voting process to ensure the integrity of the vote."

22. Although the subpoenas were issued by President Fann and Chairman Petersen in their individual capacities as Senate President and Judiciary Committee Chairman, respectively, Cyber Ninjas' Master Services Agreement ("MSA") and

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[3] Available at https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2393/637498369159700000.

[4] News Release, "Arizona Senate hires auditor to review 2020 election in Maricopa County," Arizona Senate Republican Caucus (Mar. 31, 2021), https://www.azsenaterepublicans.com/post/arizona-senate-hires-auditor-to-review-2020-election-in-maricopa-county.

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Statement of Work ("SOW"; together, the "Contract") state that the Contract is between Cyber Ninjas and the Arizona State Senate. A true and correct copy of the MSA is attached hereto as Exhibit 1. A true and correct copy of the SOW is attached hereto as Exhibit 2.

23. President Fann signed the MSA and SOW on behalf of the Arizona Senate. MSA at 18; SOW at 11.

24. The SOW describes Cyber Ninjas' duties as overseeing "a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona. This audit will attempt to validate every area of the voting process to ensure the integrity of the vote." SOW at 2.

25. The MSA states that the Senate "shall retain continuous and uninterrupted custody of the ballots being tallied." MSA at 8.

26. The MSA also includes a provision stating that its agreement with Cyber Ninjas shall not "result in the breach of any term or provision of . . . any . . . law to which [the Senate] is a Party or which otherwise is applicable to [the Senate]." MSA at 10.

27. The MSA requires the Senate to indemnify Cyber Ninjas from claims asserting that Cyber Ninjas violated any law "or the rights of any third party" while performing its duties under the agreement. MSA at 13. Further, in the event of such legal action, the agreement requires Cyber Ninjas to "fully cooperate with the [Senate] by providing information or documents requested by the [Senate] that are reasonably necessary to the defense or settlement of the claim." *Id.* at 14.

28. The Contract obligates the Arizona Senate to pay Cyber Ninjas $150,000, with $50,000 to be paid at the Contract's execution and the remaining $100,000 due within 30 days of completion of the audit. SOW at 11.

29. The MSA states that the ballots and other materials subpoenaed by President Fann and Chairman Petersen "are the sole and exclusive property of the

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[Senate] or of the applicable political subdivision or governmental entity." MSA at 7.

30. President Fann's statement announcing Cyber Ninjas' leadership of the audit said the "Senate leadership expects this audit to be done in a transparent manner."

31. That transparency has been lacking, however, as Defendants have refused to provide public records responsive to PNI's requests that are in the custody or control of Cyber Ninjas.

32. The audit began on April 22, 2021, with the ballots' delivery to the Arizona Veterans Memorial Coliseum, the venue for the by-hand recount. On that day, reporter Andrew Oxford emailed a public records request to President Fann pursuant to A.R.S. §§ 39-121, *et seq.* ("Senate Request A"). A true and correct copy of Senate Request A, along with an initial response, is attached hereto as Exhibit 3.

33. As pertinent here, Senate Request A sought all emails and text messages between Ken Bennett, the Senate-appointed "liaison" for the audit, and Doug Logan,[5] the CEO of Cyber Ninjas, during 2021.

34. Senate Request A also requested audit-related emails and text messages between President Fann and Mr. Bennett or Christina Bobb[6] and all emails and text messages between Mr. Bennett and Ms. Bobb or Sen. Sonny Borrelli.

35. On May 19, PNI wrote to President Fann and Norm Moore, then the Senate's public records counsel, noting that PNI had *not* received *any* response to Senate Request A and that PNI considered that failure to amount to a constructive denial of the request. A true and correct copy of that correspondence is attached hereto as Exhibit 4.

36. Later that day, President Fann and the Senate provided 27 pages of records

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[5] Senate Request A erroneously refers to Mr. Logan as "Doug Jones," an error counsel for PNI have corrected in response to questions from counsel for President Fann and the Arizona Senate.

[6] Ms. Bobb is a reporter for One America News Network ("OANN"), the entity which owned and operated the video cameras providing a live feed from inside the coliseum during the ballot count. Ms. Bobb also has solicited donations for a private entity she heads that she said was assisting with funding the audit.

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in partial response to Senate Request A.

37. On May 24, 2021, undersigned counsel for PNI wrote to President Fann and Mr. Moore seeking "prompt and full compliance" with Senate Request A, noting that PNI had *not* received *any* additional responsive records. A true and correct copy of that correspondence is attached hereto as Exhibit 5.

38. Three days later, on May 27, 2021, President Fann and the Senate provided another nine pages of records in partial response to Senate Request A.

39. In an email accompanying that production, Mr. Moore explained that the nine pages had been inadvertently left out of the May 19 production. He stated that the Senate did not have a system in place to capture public records stored on senators' personal mobile phones, but that President Fann had agreed to collect and provide all "non-privileged," responsive public records from her phone. Mr. Moore said that the Senate's position was that it is not "legally obligated" to maintain or produce records from Mr. Bennett, but that the Senate had agreed to collect and provide responsive public records from him. A true and correct copy of that email is attached hereto as Exhibit 6.

40. That afternoon, counsel for PNI spoke with Mr. Moore and Kory Langhofer, counsel for President Fann.

41. Messrs. Langhofer and Moore stated that neither the Senate nor President Fann would produce any records in the possession of Cyber Ninjas because they took the position that such documents were not public records. Noting that the Senate and President Fann were in litigation with another requester regarding records in Cyber Ninjas' possession – and that the Maricopa County Board of Supervisors had sent the Senate a litigation hold notice – Mr. Langhofer said that he had provided the supervisors' notice to Cyber Ninjas and assumed that it would preserve any potentially responsive records.

42. Messrs. Langhofer and Moore stated that the Senate would provide responsive, non-privileged records from Mr. Bennett but did not waive their position that

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Mr. Bennett was not subject to the public records statute.

43. Also on May 27, 2021, four PNI journalists, including Ms. Tulumello, sent a follow-up public records request to President Fann and Mr. Moore ("Senate Request B"). A true and correct copy of Senate Request B is attached hereto as Exhibit 7.

44. Senate Request B sought the following records:

a. All invoices involving Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present;

b. All audit related invoices in the possession of Cyber Ninjas, Wake Technology Services, CyFIR, LLC and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present;

c. All financial documents involving Cyber Ninjas, Wake Technology Services and CyFIR, LLC, and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present;

d. All audit-related correspondence (texts, emails, other) to/from Cyber Ninjas, Wake Technology Services, CyFIR, LLC and any other unnamed contractors/subcontractors and:

i. Ken Bennett

ii. Randy Pullen

iii. Warren Petersen

iv. Karen Fann

v. Doug Logan

vi. Eugene Kern

vii. Anthony Kern

viii. Mark Finchem

ix. Andy Biggs

x. Paul Gosar

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xi. Kelli Ward

xii. Sonny Borrelli

xiii. Leo Biasiucci

xiv. Wendy Rogers

xv. Jack Sellers

xvi. Bill Gates

xvii. Clint Hickman

xviii. Steve Chucri

xix. Steve Gallardo

xx. Stephen Richer

xxi. Sidney Powell

xxii. Patrick Byrne

xxiii. Lin Wood

xxiv. Donald Trump

xxv. Sen. Sonny Borrelli

xxvi. Leo Biasiucci

xxvii. Wendy Rogers

e. All audit-related correspondence (texts, emails, other) to/from [the same individuals listed in part (d) above];

f. A full list of ballot counters who participated in the Arizona Audit from April 23, 2021 to present and any records of payments to them;

g. A full list of organizations and individuals who participated in recruiting efforts for the Arizona Audit from Jan. 1, 2021 to present and any records of payments to them;

h. Any body camera or head camera footage (Go Pro, etc.) recorded by audit employees, contractors and agents at Veteran's Memorial Stadium [sic];

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i. A full list of observers of the Arizona Audit from April 23, 2021 to present;

j. All sign in/ sign out logs to the Veterans Memorial Coliseum from April 23, 2021 to present, including: visitors, volunteers, contracted employees, counters, observers, vendors and anyone else who gained admittance to the coliseum during the audit;

k. Any records of payments to the Arizona Rangers for security during the audit from April 23, 2021 to present;

l. Any audit-related correspondence (texts, messages, email, posts, other) on third-party messaging systems and apps such as Telegram, Twitter, WhatsApp, SnapChat and Signal from Jan. 1, 2021 to present. Those would include all to/from/by:

   i. Any agent or member of the Arizona Senate

   ii. Any agent or member of Cyber Ninjas

   iii. Any agent or member of Wake Technology Services

   iv. Any agent or member of CyFIR, LLC and any other unnamed contractors/subcontractors

m. All resumes and CVs for employees/ agents of Cyber Ninjas, Wake Technology Services, CyFIR, LLC and any other unnamed contractors/subcontractors.

45. On June 2, 2021, counsel for PNI transmitted to Mr. Bennett and Randy Pullen, a Senate-appointed spokesman regarding the audit, requests for public records pursuant to A.R.S. §§ 39-121, *et seq.* (the "Bennett Request" and "Pullen Request," respectively). True and correct copies of the Bennett Request and Pullen Request are attached hereto as Exhibits 8 and 9, respectively.

46. Each of the Bennett and Pullen Requests sought from its recipient audit-related communications, invoices and financial documents, and all other records

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regarding the performance of any audit-related duties.

47. Counsel for the Senate has represented to undersigned counsel for PNI that, although the Senate has not waived its argument that Messrs. Bennett and Pullen are not subject to the Arizona Public Records Law, each has provided all responsive records to the Senate, which has posted all responsive, non-privileged records to its online "reading room" collection of audit-related public records.

48. Also on June 2, 2021, counsel for PNI transmitted to Cyber Ninjas a request for public records pursuant to A.R.S. §§ 39-121, *et seq.* (the "Cyber Ninjas Request"). A true and correct copy of the Cyber Ninjas Request is attached hereto as Exhibit 10.

49. The Cyber Ninjas Request sought the following records:

a. all financial records related to the Audit, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts and records of all payments or donations for such Audit-related work;

b. all communications regarding the performance, funding and/or staffing of the Audit between or involving any officer, director, employee or agent of Cyber Ninjas and:

1. any member of the Arizona Senate or any employee or agent communicating on behalf of any Senator;
2. any "liaison" for the Arizona Senate or any Senator, including Ken Bennett and Randy Pullen, or anyone communicating on their behalf;
3. any member of the Maricopa County Board of Supervisors, Maricopa County Recorder Steven Richer, Maricopa County Sheriff Paul Penzone or anyone communicating on their behalf;

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4. member of the Arizona House of Representatives Mark Finchem and former member of the Arizona House of Representatives Anthony Kern, or anyone communicating on their behalf;

5. any member of the United States Congress who represents an Arizona congressional district, or anyone communicating on their behalf;

6. former U.S. President Donald Trump or anyone communicating on his behalf; and

7. Christina Bobb of One America News Network, or anyone communicating on her behalf.[7]

c. all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any subcontractor, including without limitation Wake Technology Services, Inc., CyFir LLC and Strat Tech Solutions LLC; and

d. all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any contractor engaged by Maricopa County, including without limitation Pro V&V and SLI Compliance.

50. The Cyber Ninjas Request explained that the Arizona Public Records Law applied in this circumstance because Cyber Ninjas "is operating as an instrumentality of the Arizona Senate in performing a core governmental function" partially paid for with

[7] The Cyber Ninjas Request further stated: "As used here, "communications" should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.

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taxpayer funds, and therefore is a public officer and/or public body for purposes of the statute. Exhibit 10 at 3.

51. On June 11, 2021, counsel for Cyber Ninjas, John D. Wilenchik, responded to PNI's counsel. A true and correct copy of that correspondence is attached hereto as Exhibit 11.

52. Mr. Wilenchik refused to produce any records and stated Cyber Ninjas' position that it is neither a public officer nor a public body, and that the public records statute does not apply to it because it is a "private contractor." Exhibit 11 at 1. Mr. Wilenchik also stated, "[i]n the event that your client files such an action against CNI, then please consider this letter to be my client's advance notice that it deems such an action to be groundless under the statute and will demand that it be withdrawn under Rule 11, as well as seek its attorneys' fees and costs as appropriate." *Id.* at 2.

53. Counsel for PNI had further discussions with Messrs. Langhofer and Moore during June 2021. During those discussions, counsel for PNI agreed that PNI would narrow its requests for audit-related communications, and counsel for the Senate agreed that the Senate would process and post to the reading room all responsive, non-privileged communications.

54. Upon information and belief, the Senate's processing of responsive emails is ongoing. PNI hereby expressly reserves its right to seek redress from this Court should that process prove to be incomplete or not prompt within the meaning of the Arizona Public Records Law. Assuming the Senate complies with its counsel's commitment to produce the requested emails, this special action is limited to the Senate's, President Fann's and Cyber Ninjas' duty to make available for inspection and copying those records responsive to Senate Requests A and B in the custody or control of Cyber Ninjas, as well as records responsive to the Cyber Ninjas Request (collectively, the "Public Records").

55. When counsel for PNI expressed concern regarding whether Cyber Ninjas

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and its subcontractors for the audit were preserving potential public records, Mr. Langhofer requested that PNI provide the suggested text of a records retention request. Counsel for PNI provided such proposed language the next day, and Mr. Langhofer later stated that he had provided the suggested language to Cyber Ninjas and its subcontractors. Correspondence including the suggested language from counsel for PNI to Messrs. Langhofer and Moore is attached hereto as Exhibit 12.

56. By their failure to provide access to or copies of all of the requested records promptly, Defendants have "denied" PNI's public records requests, and they have done so "wrongfully." *See* A.R.S. § 39-121.01(E) and §39-121.02(C).

**COUNT ONE: Violation of A.R.S. §§ 39-121 *et seq.***
**by Defendants Arizona Senate, Karen Fann, Warren Petersen and Susan Aceves**

57. PNI realleges and incorporates by reference the allegations set forth in paragraphs 1 through 56 of this Complaint.

58. The Arizona Public Records Law provides 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.

59. The Records requested by PNI in Senate Requests A and B are indeed "public records" within the meaning of the Arizona Public Records Law. *See* A.R.S. § 39-121.01(B); *Lake v. City of Phoenix*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009) ("Arizona law defines 'public records' broadly and creates a presumption requiring the disclosure of public information.").

60. The Arizona Senate's audit of Maricopa County ballots is a matter of the most urgent public concern. Nothing is more fundamental to our democracy than the administration of our elections. Defendants themselves have stressed the importance of public confidence in voting and elections as justifications for the audit, and have pledged transparency in performing the audit. But the public cannot properly evaluate the conduct of and findings of the audit without prompt and full access to the very public

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records that Defendants are unlawfully withholding.

61. In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendants Arizona Senate, President Fann, Chairman Petersen and Secretary Aceves were required to maintain and make available records responsive to Senate Requests A and B that are in the custody or control of Defendant/Real Party in Interest Cyber Ninjas, but have refused to do so.

62. There is a strong public benefit in honoring the public's statutory right to inspect these Public Records, and Defendants Arizona Senate, President Fann, Chairman Petersen and Secretary Aceves have failed to articulate any specific harm that would arise from the release of any portion of the Public Records. There is no such harm, and PNI has given them ample and repeated opportunities to assert any.

63. For all these reasons, Defendants Arizona Senate, President Fann, Chairman Petersen and Secretary Aceves have failed to perform their duties required under the Arizona Public Records Law regarding requested records in the custody or control of Cyber Ninjas, and they have wrongfully denied PNI access to inspect and copy these records as a matter of law. *See* Ariz. R. Special Actions 3.

**COUNT TWO: Violation of A.R.S. §§ 39-121 *et seq.***
**by Defendant/Real Party in Interest Cyber Ninjas, Inc.**

64. PNI realleges and incorporates by reference the allegations set forth in paragraphs 1 through 63 of this Complaint.

65. The Records requested by PNI in the Cyber Ninjas Request are "public records" within the meaning of the Arizona Public Records Law. *See* A.R.S. § 39-121.01(B); *Lake*, 222 Ariz. at 549, 218 P.3d at 1006.

66. In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendant Cyber Ninjas Inc., as a "public officer" and/or "public body" by virtue of its performing a core governmental function funded in part by state taxpayer dollars, was required to maintain these Public Records and make them available for inspection and copying promptly upon

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request by PNI and its journalists. Yet, Cyber Ninjas has refused to do so.

67. For all these reasons, Defendant Cyber Ninjas, Inc. has failed to perform its duties required under the Arizona Public Records Law, and it therefore has wrongfully denied PNI access to inspect and copy the Records as a matter of law. *See* Ariz. R. Special Actions 3.

## PRAYER FOR RELIEF

Wherefore, PNI prays for relief from this Court as follows:

A. For an order setting an expeditious time for Defendants to produce all of the Public Records to PNI for inspection and copying;

B. For an award of PNI's reasonable attorneys' fees and other legal costs pursuant to A.R.S. § 39-121.02(B); and

C. For such other and further relief as the Court deems just and proper.

DATED this 30th day of June, 2021.

BALLARD SPAHR LLP

By: /s/ David J. Bodney
David J. Bodney
Craig C. Hoffman
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555

Matthew E. Kelley (application for admission *pro hac vice* forthcoming)
1909 K Street, NW, 12th Floor
Washington, DC 20006

*Attorneys for Phoenix Newspapers, Inc. and Kathy Tulumello*

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## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2021, the foregoing document was filed with the Office of the Clerk of the Superior Court, Maricopa County.

I further certify that a complete copy of the foregoing was emailed and sent for hand-delivery via process server this same date upon the following:

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*Chairman Warren Petersen and*
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# 1

# Cyber Ninjas, Inc. Master Services Agreement

This Master Services Agreement (the "Master Agreement") is entered into as of the 31 day of March, 2021 (the "Effective Date"), between Cyber Ninjas, Inc., a Florida Corporation, (the "Contractor"), and the Arizona State Senate (the "Client"). Contractor and Client are referred to herein individually as a "Party" and collectively as the "Parties".

WHEREAS, Client desires to retain Contractor, and Contractor desires to provide to Client the consulting and/or professional services described herein; and

WHEREAS, Client and Contractor desire to establish the terms and conditions that will regulate all relationships between Client and Contractor.

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

## 1 SCOPE OF AGREEMENT

This Master Agreement establishes a contractual framework for Contractor's consulting and/or professional services as described herein. The Parties agree to the terms and conditions set forth in this Master Agreement and in any Statement of Work executed by the Parties referencing this Master Agreement. Each Statement of Work is incorporated into this Master Agreement, and the applicable portions of this Master Agreement are incorporated into each Statement of Work. The Statement(s) of Work and this Master Agreement are herein collectively referred to as the "Agreement."

## 2 STRUCTURE OF AGREEMENT.

2.1 Components of the Agreement. The Agreement consists of:

(a) The provisions set forth in this Master Agreement and the Exhibits referenced herein;

(b) The Statement(s) of Work attached hereto, and any Schedules referenced therein; and

(c) Any additional Statements of Work executed by the Parties pursuant to this Agreement, including the Schedules referenced in each such Statement of Work.

2.2 Statement(s) of Work. The Services (as defined in Article 4) that Contractor will provide for Client will be described in and be the subject of (i) one or more Statements of Work executed by the Parties pursuant to this Agreement, and (ii) this Agreement. Each Statement of Work shall be substantially in the form of, and shall include the set of Schedules described in, "Exhibit 1-Form of Statement of Work", with such additions, deletions and modifications as the Parties may agree.

2.3 Deviations from Agreement, Priority. In the event of a conflict, the terms of the Statements of Work shall be governed by the terms of this Master Agreement, unless an applicable Statement of Work expressly and specifically notes the deviations from the terms of this Master Agreement for the purposes of such Statement of Work.

# 3 TERM AND TERMINATION.

3.1 Term of Master Agreement. The Term of the Master Agreement will begin as of the Effective Date and shall continue until terminated as provided in Section 3.3 (the "Term").

3.2 Term of Statements of Work. Each Statement of Work will have its own term and will continue for the period identified therein unless terminated earlier in accordance with Section 3.4 (the "Service Term"). In the event that the Service Term on any applicable Statement of Work expires and Services continue to be provided by Contractor and received and used by Client, the terms and conditions of the Master Agreement shall apply until the Services have been terminated.

3.3 Termination of Master Agreement. Either Party may terminate this Agreement immediately upon written notice to the other Party if there is no Statement of Work in effect.

3.4 Termination of Statement of Work by Client. A Statement of Work may be terminated by Client, for any reason other than Contractor's breach, upon fourteen (14) days prior written notice to Contractor. In such event, (i) Contractor shall cease its activities under the terminated Statement of Work on the effective date of termination; and (ii) Client agrees to pay to Contractor all amounts for any amounts due for Services performed through the effective termination date. (iii) In the case of fixed price work whereby the effective date of termination is after Contractor has or will commence the Services, Client agrees to pay Contractor an amount that will be determined on a pro-rata basis computed by dividing the total fee for the Service by the number of days required for completion of the Services and multiplying the result by the number of working days completed at the effective date of termination. (iv) Client agrees to pay to Contractor all costs in full associated with equipment or other non-Service related costs that were incurred before the effective termination date.

3.5 Termination for Breach. Either party may terminate the Agreement in the event that the other party materially defaults in performing any obligation under this Agreement (including any Statement of Work) and such default continues un-remedied for a period of seven (7) days following written notice of default. If Client terminates the Agreement and/or any Statement of Work as a result of Contractor's breach, then to the extent that Client has prepaid any fees for Services, Contractor shall refund to Client any prepaid fees on a pro-rata basis to the extent such fees are attributable to the period after such termination date.

3.6 Effect of Termination. Upon termination or expiration of this Agreement and/or a Statement of Work: (i) the parties will work together to establish an orderly phase-out of the Services; (ii) Client will pay Contractor for any amounts due under the Agreement, including all Services rendered under the terminated Statement of Work up to the effective date of the termination; and (iii) each Party will promptly cease all use of and destroy or return, as directed by the other Party, all Confidential Information of the other Party except for all audit records (including but not limited to work papers, videotapes, images, tally sheets, draft reports and other documents generated during the audit) which will be held in escrow in a safe approved by the GSA for TS/SCI material for a period of three years and available to the Contractor and Client solely for purposes of addressing any claims, actions or allegations regarding the audit (the "Escrow"), provided that, pursuant to Section 15.4, the Parties shall provide to each other documents and information that are reasonably necessary to the defense of any third party claims arising out of or related to the subject matter of this Agreement.

# 4 SERVICES.

4.1 Definitions.

4.1.1 "Services" shall mean consulting, training or any other professional services to be provided by Contractor to Client, as more particularly described in a Statement of Work, including any Work Product provided in connection therewith.

4.1.2 "Work Product" shall mean any deliverables which are created, developed or provided by Contractor in connection with the Services pursuant to a Statement of Work, excluding any Contractor's Intellectual Property.

4.1.3 "Contractor's Intellectual Property" shall mean all right, title and interest in and to the Services, including, but not limited to, all inventions, skills, know-how, expertise, ideas, methods, processes, notations, documentation, strategies, policies, reports (with the exception of the data within the reports, as such data is the Client's proprietary data) and computer programs including any source code or object code, (and any enhancements and modifications made thereto), developed by Contractor in connection with the performance of the Services hereunder and of general applicability across Contractor's customer base. For the avoidance of doubt, the term shall not include (1) the reports prepared by Contractor for Client (other than any standard text used by Contractor in such reports) pursuant to this Agreement or any Statement of Work, which shall be the exclusive property of Client and shall be considered "works made for hire" within the meaning of the Copyright Act of 1976, as amended; and (2) any data or process discovered on or obtained from the Dominion devices that will be the subject of the forensic review.

4.2 Obligation to Provide Services. Starting on the Commencement Date of each Statement of Work and continuing during each Statement of Work Term, Contractor shall provide the Services described in each such Statement of Work to, and perform the Services for, Client in accordance with the applicable Statement of Work and the Agreement.

4.3 Contractor's Performance. Contractor will perform the Services set forth in each Statement of Work using personnel that have the necessary knowledge, training, skills, experience, qualifications and resources to provide and perform the Services in accordance with the Agreement. Contractor shall render such Services in a prompt, professional, diligent, and workmanlike manner, consistent with industry standards applicable to the performance of such Services.

4.4 Client's Obligations. Client acknowledges that Contractor's performance and delivery of the Services are contingent upon: (i) Client providing full access to such information as may be reasonably necessary for Contractor to complete the Services as described in the Statement(s) of Work including access to its personnel, facilities, equipment, hardware, network and information, as applicable; and (ii) Client promptly obtaining and providing to Contractor any required licenses, approvals or consents necessary for Contractor's performance of the Services. Contractor will be excused from its failure to perform its obligations under this Agreement to the extent such failure is caused by Client's delay in performing or failure to perform its responsibilities under this Agreement and/or any Statement of Work.

4.5 Location of Services. Contractor shall provide the Services at the site designated in the applicable Statement of Work.

4.6 Status Reports. Contractor shall keep Client informed of the status of the Services and provide Client with such status reports and other reports and information regarding the Services as reasonably requested by Client.

4.7 New Services. During the Term, Client may request that Contractor provide New Services for Client. New Services may be activities that are performed on a continuous basis for the remainder of the Term or activities that are performed on a project basis. Any agreement of the Parties with respect to New Services will be in writing and shall also become a "Service" and be reflected in an additional Statement of Work hereto or in an amendment to an existing Statement of Work hereunder.

4.8 Change of Services. "Change of Services" means any change to the Services as set forth in the Statement of Work that (i) would modify or alter the delivery of the Services or the composition of the Services, (ii) would alter the cost to Client for the Services, or (iii) is agreed by Client and Contractor in writing to be a Change. From time to time during the Term, Client or Contractor may propose Changes to the Services.

The following process is required to effectuate a Change of Services by either Party:

4.9 A Project Change Request ("PCR") will be the vehicle for communicating change. The PCR must describe the change, the rationale for the change, and the effect the change will have on the Services.

4.10 The designated project manager of the requesting Party will review any proposed change prior to submitting the PCR to the other Party.

4.11 Contractor and Client will mutually agree upon any additional fees for such investigation, if any. If the investigation is authorized, the Client project manager will sign the PCR, which will constitute approval for the investigation charges. Contractor will invoice Client for any such charges. The investigation will determine the effect that the implementation of the PCR will have on Statement of Work terms and conditions.

4.12 Upon completion of the investigation, both parties will review the impact of the proposed change and, if mutually agreed, a written addendum to the Statement of Work must be signed by both Parties to authorize implementation of the investigated changes that specifically identifies the portion of the Statement of Work that is the subject of the modification or amendment and the changed or new provision(s) to the Statement of Work.

4.13 End Client Requirements. If Contractor is providing Services for Client that is intended to be for the benefit of a customer of Client ("End Client"), the End Client should be identified in an applicable Statement of Work. The Parties shall mutually agree upon any additional terms related to such End Client which terms shall be set forth in a Schedule to the applicable Statement of Work.

4.14 Client Reports; No Reliance by Third Parties. Contractor will provide those reports identified in the applicable Statement of Work ("Client Report"). The Client Report is prepared uniquely and exclusively for Client's sole use. The provision by Client of any Client Report or any information therein to any third party shall not entitle such third party to rely on the Client Report or the contents thereof in any manner or for any purpose whatsoever, and Contractor specifically disclaims all liability for any damages whatsoever (whether foreseen or unforeseen, direct, indirect, consequential, incidental, special, exemplary or punitive) to such third party arising from or related to reliance by such third party on any Client Report or any contents thereof.

4.15 Acceptance Testing. Unless otherwise specified in an Statement of Work, Client shall have a period of fourteen (14) days to perform Acceptance Testing on each deliverable provided by Contractor to determine whether it conforms to the Specifications and any other Acceptance criteria (collectively as the "Acceptance Criteria") stated in the Statement of Work. If Client rejects the deliverable as non-conforming, unless otherwise agreed to by the parties, Contractor shall, at its expense, within fourteen (14) days from the date of notice of rejection, correct the deliverable to cause it to conform to the Acceptance Criteria and resubmit the deliverable for further Acceptance testing in accordance with the process specified in this Section 4.15. In the event that the deliverable does not conform to the Acceptance Criteria after being resubmitted a second time, Client, may at its option, (i) provide Contractor with another fourteen (14) days to correct and resubmit the deliverable or (ii) immediately terminate the Statement of Work and obtain a refund of any amounts paid for the non-conforming Services pursuant to the applicable Statement of Work.

# 5 FEES AND PAYMENT TERMS.

5.1 Fees. Client agrees to pay to Contractor the fees for the Services in the amount as specified in the applicable Statement of Work.

5.2 Invoices. Contractor shall render, by means of an electronic file, an invoice or invoices in a form containing reasonable detail of the fees incurred in each month. Upon completion of the Services as provided in the Statement of Work, Contractor shall provide a final invoice to Client. Contractor shall identify all taxes and material costs incurred for the month in each such invoice. All invoices shall be stated in US dollars, unless otherwise specified in the Statement of Work.

5.3 Payment Terms. All invoices are due upon receipt. Payment not received within 30 days of the date of the invoice is past due. Contractor reserves the right to suspend any existing or future Services when invoice becomes thirty (30) days past due. Client shall pay 1.5% per month non-prorated interest on any outstanding balances in excess of thirty days past due. If it becomes necessary to collect past due payments, Client shall be responsible for reasonable attorney fees required in order to collect upon the past-due invoice(s).

5.4 Taxes. The applicable Statement of Work shall prescribe the parties' respective responsibilities with respect to the invoicing and payment of state sales, use, gross receipts, or similar taxes, if any, applicable to the Services and deliverables to be provided by Contractor to Client. Client shall have no responsibility with respect to federal, state, or local laws arising out of Contractor's performance of any Statement of Work, including any interest or penalties.

# 6 PERSONNEL.

6.1 Designated Personnel. Contractor shall assign employees that are critical to the provision and delivery of the Services provided (referred to herein as "Designated Personnel") and except as provided in this Article 6, shall not be removed or replaced at any time during the performance of Services in a Statement of Work, except with Client's prior written consent.

6.2 Replacement of Designated Personnel by Contractor. Notwithstanding the foregoing, if any Designated Personnel becomes unavailable for reasons beyond Contractor's reasonable control or Designated Personnel's professional relationship with Contractor terminates for any reason,

Contractor may replace the Designated Personnel with a similarly experienced and skilled employee. In such event, Contractor shall provide immediate notification to Client of a change in a Designated Personnel's status.

6.3 Replacement of Designated Personnel by Client. In the event that Client is dissatisfied for any reason with any Designated Personnel, Client may request that Contractor replace the Designated Personnel by providing written notice to Contractor. Contractor shall ensure that all Designated Personnel are bound by the terms and conditions of this Agreement applicable to their performance of the Services and shall be responsible for their compliance therewith.

6.4 Background Screening. Contractor shall have performed the background screening described in Exhibit 2 (Background Screening Measures) on all of its agents and personnel who will have access to Client Confidential Information prior to assigning such individuals or entities to provide Services under this Agreement.

# 7 PROPRIETARY RIGHTS.

7.1 Client's Proprietary Rights. Client represents and warrants that it has the necessary rights, power and authority to transmit Client Data (as defined below) to Contractor under this Agreement and that Client has and shall continue to fulfil all obligations with respect to individuals as required to permit Contractor to carry out the terms hereof, including with respect to all applicable laws, regulations and other constraints applicable to Client Data. As between Client and Contractor, Client or a political subdivision or government entity in the State of Arizona owns all right, title and interest in and to (i) any data provided by Client (and/or the End Client, if applicable) to Contractor; (ii) any of Client's (and/or the End Client, if applicable) data accessed or used by Contractor or transmitted by Client to Contractor in connection with Contractor's provision of the Services (Client's data and Client's End User's data, collectively, the "Client Data"); (iii) all intellectual property of Client ("Client's Intellectual Property") that may be made available to Contractor in the course of providing Services under this Agreement.

7.2 License to Contractor. This Agreement does not transfer or convey to Contractor any right, title or interest in or to the Client Data or any associated Client's Intellectual Property. Client grants to Contractor a limited, non-exclusive, worldwide, revocable license to use and otherwise process the Client Data and any associated Client's Intellectual Property to perform the Services during the Term hereof. Contractor's permitted license to use the Client Data and Client's Intellectual Property is subject to the confidentiality obligations and requirements for as long as Contractor has possession of such Client Data and Intellectual Property.

7.3 Contractor's Proprietary Rights. As between Client and Contractor, Contractor owns all right, title and interest in and to the Services, including, Contractor's Intellectual Property. Except to the extent specifically provided in the applicable Statement of Work, this Agreement does not transfer or convey to Client or any third party any right, title or interest in or to the Services or any associated Contractor's Intellectual Property rights, but only grants to Client a limited, non-exclusive right and license to use as granted in accordance with the Agreement. Contractor shall retain all proprietary rights to Contractor's Intellectual Property and Client will take no actions which adversely affect Contractor's Intellectual Property rights. **For the avoidance of doubt and notwithstanding any other provision in this Section or elsewhere in the Agreement, all documents, information, materials, devices, media, and data relating to or arising out of the administration of the November 3, 2020 general election in Arizona, including but not limited to voted ballots, images of voted ballots, and any other materials prepared by, provided by, or originating from the Client or any political subdivision or governmental entity in the State of Arizona, are the sole and exclusive property of the Client or of the applicable political subdivision or governmental entity, and Contractor shall have no right or interest whatsoever in such documents, information, materials, or data.**

# 8 NONDISCLOSURE.

8.1 Confidential Information. "Confidential Information" refers to any information one party to the Agreement discloses (the "Disclosing Party") to the other (the "Receiving Party"). The confidential, proprietary or trade secret information in the context of the Agreement may include, but is not limited to, business information and concepts, marketing information and concepts, financial statements and other financial information, customer information and records, corporate information and records, sales and operational information and records, and certain other information, papers, documents, studies and/or other materials, technical information, and certain other information, papers, documents, digital files, studies, compilations, forecasts, strategic and marketing plans, budgets, specifications, research information, software, source code, discoveries, ideas, know-how, designs, drawings, flow charts, data, computer programs, market data; digital information, digital media, and any and all electronic data, information, and processes stored on Maricopa County servers, portable storage media and/or cloud storage (remote servers) technologies, and/or other materials, both written and oral. Notwithstanding the foregoing, Confidential Information does not include information that: (i) is in the Receiving Party's possession at the time of disclosure; (ii) is independently developed by the Receiving Party without use of or reference to Confidential Information; (iii) becomes known publicly, before or after disclosure, other than as a result of the Receiving Party's improper action or inaction; or (iv) is approved for release in writing by the Disclosing Party.

8.2 Nondisclosure Obligations. The Receiving Party will not use Confidential Information for any purpose other than to facilitate performance of Services pursuant to the Agreement and any applicable Statement of Work. The Receiving Party: (i) will not disclose Confidential Information to any employee or contractor or other agent of the Receiving Party unless such person needs access in order to facilitate the Services and executes a nondisclosure agreement with the Receiving Party, substantially in the form provided in Exhibit 3; and (ii) will not disclose Confidential Information to any other third party without the Disclosing Party's prior written consent. Without limiting the generality of the foregoing, the Receiving Party will protect Confidential Information with the same degree of care it uses to protect its own Confidential Information of similar nature and importance, but with no less than reasonable care. The Receiving Party will promptly notify the Disclosing Party of any misuse or misappropriation of Confidential Information that comes to the Receiving Party's attention. Notwithstanding the foregoing, the Receiving Party may disclose Confidential Information as required by applicable law or by proper legal or governmental authority; however, the Receiving Party will give the Disclosing Party prompt notice of any such legal or governmental demand and will reasonably cooperate with the Disclosing Party in any effort to seek a protective order or otherwise to contest such required disclosure, at the Disclosing Party's expense. For the avoidance of doubt, this provision prohibits the Contractor and its agents from providing data, information, reports, or drafts to anyone without the prior written approval of the Client. The Client will determine in its sole and unlimited discretion whether to grant such approval.

8.3 Injunction. The Receiving Party agrees that breach of this Article 8 might cause the Disclosing Party irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, the Disclosing Party will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.

8.4 Return. Upon the Disclosing Party's written request and after the termination of the Escrow, the Receiving Party will return all copies of Confidential Information to the Disclosing Party or upon authorization of Disclosing Party, certify in writing the destruction thereof.

8.5 Third Party Hack. Contractor shall not be liable for any breach of this Section 8 resulting from a hack or intrusion by a third party into Client's network or information technology systems unless the hack or intrusion was through endpoints or devices monitored by Contractor and was caused directly by Contractor' gross negligence or wilful misconduct. For avoidance of doubt, Contractor shall not be liable for any breach of this Section 8 resulting from a third-party hack or intrusion into any part of Client's network, or any environment, software, hardware or operational technology, that Contractor is not obligated to monitor pursuant to a Statement of Work executed under this Agreement.

8.6 Retained Custody of Ballots. The Client shall retain continuous and uninterrupted custody of the ballots being tallied. For the avoidance of doubt, this provision requires Contractor and each of its agents to leave all ballots at the counting facility at the conclusion of every shift.

8.7 Survival. This Section 8 shall survive for three (3) years following any termination or expiration of this Agreement; provided that with respect to any Confidential Information remaining in the Receiving Party's possession following any termination or expiration of this Agreement, the obligations under this Section 8 shall survive for as long as such Confidential Information remains in such party's possession.

# 9 NO SOLICITATION.

Contractor and Client agree that neither party will, at any time within twelve (24) months after the termination of the Agreement, solicit, attempt to solicit or employ any of the personnel who were employed or otherwise engaged by the other party at any time during which the Agreement was in effect, except with the express written permission of the other party. The Parties agree that the damages for any breach of this Article 9 will be substantial, but difficult to ascertain. Accordingly, the party that breaches this Article 9, shall pay to other party an amount equal to two times (2x) the annual compensation of the employee solicited or hired, which amount shall be paid as liquidated damages, as a good faith effort to estimate the fair, reasonable and actual damages to the aggrieved party and not as a penalty. Nothing in the Agreement shall be construed to prohibit either party from pursuing any other available rights or remedies it may have against the respective employee(s).

# 10 DATA PROTECTION

10.1 Applicability. This Article 10 shall apply when Contractor is providing Services to Client which involves the processing of Personal Data which is subject to Privacy Laws.

10.2 Definitions. For purposes of this Article 10:

(a) "Personal Data" means any information relating to an identified or identifiable natural person which is processed by Contractor, acting as a processor on behalf of the Client, in connection with the provision of the Services and which is subject to Privacy Laws.

(b) "Privacy Laws" means any United States and/or European Union data protection and/or privacy related laws, statutes, directives, judicial orders, or regulations (and any amendments or successors thereto) to which a party to the Agreement is subject and which are applicable to the Services.

10.3 Contractor's Obligations. Contractor will maintain industry-standard administrative, physical, and technical safeguards for protection of the security, confidentiality, and integrity of Personal Data. Contractor shall process Personal Data only in accordance with Client's reasonable and lawful instructions (unless otherwise required to do so by applicable law). Client hereby instructs Contractor to process any Personal Data to provide the Services and comply with Contractor's rights and obligations under the Agreement and any applicable Statement of Work. The Agreement and any applicable Statement of Work comprise Client's complete instructions to Contractor regarding the processing of Personal Data. Any additional or alternate instructions must be agreed between the parties in writing, including the costs (if any) associated with complying with such instructions. Contractor is not responsible for determining if Client's instructions are compliant with applicable law, however, if Contractor is of the opinion that a Client instruction infringes applicable Privacy Laws, Contractor shall notify Client as soon as reasonably practicable and shall not be required to comply with such infringing instruction.

10.4 Disclosures. Contractor may only disclose the Personal Data to third parties for the purpose of: (i) complying with Client's reasonable and lawful instructions; (ii) as required in connection with the Services and as permitted by the Agreement and any applicable Statement of Work; and/or (ii) as required to comply with Privacy Laws, or an order of any court, tribunal, regulator or government agency with competent jurisdiction to which Contractor is subject, provided that Contractor will (to the extent permitted by law) inform the Client in advance of any disclosure of Personal Data and will reasonably co-operate with Client to limit the scope of such disclosure to what is legally required.

10.5 Demonstrating Compliance. Contractor shall, upon reasonable prior written request from Client (such request not to be made more frequently than once in any twelve-month period), provide to Client such information as may be reasonably necessary to demonstrate Contractor's compliance with its obligations under this Agreement.

10.6 Liability and Costs. Contractor shall not be liable for any claim brought by Client or any third party arising from any action or omission by Contractor or Contractor's agents to the extent such action or omission was directed by Client or expressly and affirmatively approved or ratified by Client.

# 11 DATA RETENTION

11.1 Client's Intellectual Property and Confidential Information. All Client Intellectual Property and Client Confidential Information (to include Client Intellectual Property or Client Confidential Information that is contained or embedded within other documents, files, materials, data, or media) shall be removed from all Contractor controlled systems as soon as it is no longer required to perform Services under this Agreement and held in the Escrow. In addition, pursuant to Section 15.4, the Parties shall provide to each other documents and information that are reasonably necessary to the defense of any third party's claims arising out of or related to the subject matter of this Agreement.

# 12 REPRESENTATIONS AND WARRANTIES.

12.1 Representations and Warranties of Client. Client represents and warrants to Contractor as follows:

(a) Organization; Power. As of the Effective Date, Client (i) is a government entity in the State of Arizona, duly organized, validly existing and in good standing under the Laws of the State of Arizona, and (ii) has full corporate power to conduct its business as currently conducted and to enter into the Agreement.

(b) Authorized Agreement. This Agreement has been, and each Statement of Work will be, duly authorized, executed and delivered by Client and constitutes or will constitute, as applicable, a valid and binding agreement of Client, enforceable against Client in accordance with its terms.

(c) No Default. Neither the execution and delivery of this Agreement or any Statement of Work by Client, nor the consummation of the transactions contemplated hereby or thereby, shall result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, agreement (subject to any applicable consent), order, or law to which Client is a Party or which is otherwise applicable to Client.

12.2 Representations and Warranties of Contractor. Contractor represents and warrants to Client as follows:

(a) Organization; Power. As of the Effective Date, Contractor (i) is a corporation, duly organized, validly existing and in good standing under the Laws of the State of Florida, and (ii) has full corporate power to own, lease, license and operate its assets and to conduct its business as currently conducted and to enter into the Agreement.

(b) Authorized Agreement. This Agreement has been, and each Statement of Work will be duly authorized, executed and delivered by Contractor and constitutes or will constitute, as applicable, a valid and binding agreement of Contractor, enforceable against Contractor in accordance with its terms.

(c) No Default. Neither the execution and delivery of this Agreement or any Statement of Work by Contractor, nor the consummation of the transactions contemplated hereby or thereby, shall result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, agreement (subject to any applicable consent), order or law to which Contractor is a Party or that is otherwise applicable to Contractor.

12.3 Additional Warranties of Contractor. Contractor warrants that:

(a) The Services shall conform to the terms of the Agreement (including the Statement of Work);

(b) Contractor will comply with all applicable laws, rules and regulations in delivering the Services (including without limitation any privacy, data protection and computer laws);

(c) The Services shall be performed in a diligent and professional manner consistent with industry best standards;

(d) Contractor and its agents possess the necessary qualifications, expertise and skills to perform the Services;

(e) Contractor and all individuals handling Client Confidential Information are either U.S. citizens, or U.S. entities that are owned, controlled, and funded entirely by U.S. citizens.

(f) Services requiring code review will be sufficiently detailed, comprehensive and sophisticated so as to detect security vulnerabilities in software that should reasonably be discovered given the state of software security at the time the Services are provided;

(g) Contractor shall ensure that the Services (including any deliverables) do not contain, introduce or cause any program routine, device, or other undisclosed feature, including, without limitation, a time bomb, virus, software lock, drop-dead device, malicious logic, worm, trojan horse, or trap door, that may delete, disable, deactivate, interfere with or otherwise harm software, data, hardware, equipment or systems, or that is intended to provide access to or produce modifications not authorized by Client or any known and exploitable material security vulnerabilities to affect Client's systems (collectively, "Disabling Procedures");

(h) If, as a result of Contractor's services, a Disabling Procedure is discovered by Contractor, Contractor will promptly notify Client and Contractor shall use commercially reasonable efforts and diligently work to eliminate the effects of the Disabling Procedure at Contractor's expense. Contractor shall not modify or otherwise take corrective action with respect to the Client's systems except at Client's request. In all cases, Contractor shall take immediate action to eliminate and remediate the proliferation of the Disabling Procedure and its effects on the Services, the client's systems, and operating environments. At Client's request, Contractor will report to Client the nature and status of the Disabling Procedure elimination and remediation efforts; and

(i) Contractor shall correct any breach of the above warranties, at its expense, within fourteen (14) days of its receipt of such notice. In the event that Contractor fails to correct the breach within the specified cure period, in addition to any other rights or remedies that may be available to Client at law or in equity, Contractor shall refund all amounts paid by Client pursuant to the applicable Statement of Work for the affected Services.

## 13 LIMITATION OF LIABILITY.

IN NO EVENT SHALL CONTRACTOR BE HELD LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL CONSEQUENTIAL, OR PUNITIVE DAMAGES ARISING OUT OF SERVICES PROVIDED HEREUNDER INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, BUSINESS INTERRUPTION, LOSS OF USE OF EQUIPMENT, LOSS OF GOODWILL, LOSS OF DATA, LOSS OF BUSINESS OPPORTUNITY, WHETHER CAUSED BY TORT (INCLUDING NEGLIGENCE), COSTS OF SUBSTITUTE EQUIPMENT, OR OTHER COSTS. If applicable law limits the application of the provisions of this Article 13, Contractor's liability will be limited to the least extent permissible.

EXCEPT FOR EACH PARTY'S INDEMNIFICATION OBLIGATIONS UNDER ARTICLE 15 AND NON-SOLICITATION OBLIGATIONS UNDER ARTICLE 9, LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT WILL NOT EXCEED THE TOTAL OF THE AMOUNTS PAID AND PAYABLE TO CONTRACTOR UNDER THE STATEMENT OF WORK(S) TO WHICH THE CLAIM RELATES. THE ABOVE LIMITATIONS WILL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY.

## 14 DISCLAIMER OF WARRANTIES.

EXCEPT AS EXPRESSLY SET FORTH HEREIN, CONTRACTOR MAKES NO EXPRESS OR IMPLIED WARRANTIES WITH RESPECT TO ANY OF THE SERVICES PROVIDED UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, OR SUITABILITY OR RESULTS TO BE DERIVED FROM THE USE OF ANY SERVICE, SOFTWARE, HARDWARE, DELIVERABLES, WORK PRODUCT OR OTHER MATERIALS PROVIDED UNDER THIS AGREEMENT. CLIENT UNDERSTANDS THAT CONTRACTOR'S SERVICES DO NOT CONSTITUTE ANY GUARANTEE OR ASSURANCE THAT THE SECURITY OF CLIENT'S SYSTEMS, NETWORKS AND ASSETS CANNOT BE BREACHED OR ARE NOT AT RISK. CONTRACTOR MAKES NO WARRANTY THAT EACH AND EVERY VULNERABILITY WILL BE DISCOVERED AS PART OF THE SERVICES AND CONTRACTOR SHALL NOT BE LIABLE TO CLIENT SHOULD VULNERABILITIES LATER BE DISCOVERED.

# 15 INDEMNIFICATION.

"Indemnified Parties" shall mean, (i) in the case of Contractor, Contractor, and each of Contractor's respective owners, directors, officers, employees, contractors and agents; and (ii) in the case of Client, Client, and each of Client's respective members, officers, employees, contractors and agents.

15.1 Mutual General Indemnity. Each party agrees to indemnify and hold harmless the other party from (i) any third-party claim or action for personal bodily injuries, including death, or tangible property damage resulting from the indemnifying party's gross negligence or wilful misconduct; and (ii) breach of this Agreement or the applicable Statement of Work by the indemnifying Party, its respective owners, directors, officers, employees, agents, or contractors.

15.2 Contractor Indemnity. Contractor shall defend, indemnify and hold harmless the Client Indemnified Parties from any damages, costs and liabilities, expenses (including reasonable and actual attorney's fees) ("Damages") actually incurred or finally adjudicated as to any third-party claim or action alleging that the Services performed or provided by Contractor and delivered pursuant to the Agreement infringe or misappropriate any third party's patent, copyright, trade secret, or other intellectual property rights enforceable in the country(ies) in which the Services performed or provided by Contractor for Client or third-party claims resulting from Contractor's gross negligence or wilful misconduct ("Indemnified Claims"). If an Indemnified Claim under this Section 15.2 occurs, or if Contractor determines that an Indemnified Claim is likely to occur, Contractor shall, at its option: (i) obtain a right for Client to continue using such Services; (ii) modify such Services to make them non-infringing; or (iii) replace such Services with a non-infringing equivalent. If (i), (ii) or (iii) above are not reasonably available, either party may, at its option, terminate the Agreement will refund any pre-paid fees on a pro-rata basis for the allegedly infringing Services that have not been performed or provided. Notwithstanding the foregoing, Contractor shall have no obligation under this Section 15.2 for any claim resulting or arising from: (i) modifications made to the Services that were not performed or performed or provided by or on behalf of Contractor; or (ii) the combination, operation or use by Client, or anyone acting on Client's behalf, of the Services in connection with a third-party product or service (the combination of which causes the infringement).

15.3 Client Indemnity. Client shall defend, indemnify and hold harmless the Contractor Indemnified Parties from any Damages actually incurred or finally adjudicated as to any third-party claim, action or allegation: (i) that the Client's data infringes a copyright or misappropriates any trade secrets enforceable in the country(ies) where the Client's data is accessed, provided to or received by Contractor or was improperly provided to Contractor in violation of Client's privacy policies or applicable laws (or regulations promulgated thereunder); (ii) asserting that any action undertaken by Contractor in connection with Contractor' performance under this Agreement violates law or the rights of a third party under any theory of law, including without limitation claims or allegations related to the analysis of any third party's systems or processes or to the decryption, analysis of, collection or transfer of data to Contractor; (iii) the use by Client or any of the Client Indemnified Parties of Contractor's reports and deliverables under this agreement; and (iv) arising from a third party's reliance on a Client Report, any information therein or any other results or output of the Services. Notwithstanding the foregoing or any other provision of this Agreement, Client shall have (i) no indemnification obligations other than defense costs in connection with any third-party claim, action or allegation arising out of or relating to Contractor

Indemnified Parties' statements or communications to the media or other third-parties; and (ii) no indemnification obligations in connection with any third-party claim, action or allegation arising out of or relating to Contractor Indemnified Parties' material breach of this Agreement.

15.4 Indemnification Procedures. The Indemnified Party will (i) promptly notify the indemnifying party in writing of any claim, suit or proceeding for which indemnity is claimed, provided that failure to so notify will not remove the indemnifying party's obligation except to the extent it is prejudiced thereby, (ii) allow the indemnifying party to solely control the defence of any claim, suit or proceeding and all negotiations for settlement, and (iii) fully cooperate with the Indemnifying Party by providing information or documents requested by the Indemnifying Party that are reasonably necessary to the defense or settlement of the claim, and, at the Indemnifying Party's request and expense, assistance in the defense or settlement of the claim. In no event may either party enter into any third-party agreement which would in any manner whatsoever affect the rights of the other party or bind the other party in any manner to such third party, without the prior written consent of the other party. If and to the extent that any documents or information provided to the Indemnified Party would constitute Confidential Information within the meaning of this Agreement, the Indemnified Party agrees that it will take all actions reasonably necessary to maintain the confidentiality of such documents or information, including but not limited to seeking a judicial protective order.

This Article 15 states each party's exclusive remedies for any third-party claim or action, and nothing in the Agreement or elsewhere will obligate either party to provide any greater indemnity to the other. This Article 15 shall survive any expiration or termination of the Agreement.

# 16 FORCE MAJEURE

16.1 Neither party shall be liable to the other for failure to perform or delay in performance of its obligations under any Statement of Work if and to the extent that such failure or delay is caused by or results from causes beyond its control, including, without limitation, any act (including delay, failure to act, or priority) of the other party or any governmental authority, civil disturbances, fire, acts of God, acts of public enemy, compliance with any regulation, order, or requirement of any governmental body or agency, or inability to obtain transportation or necessary materials in the open market.

16.2 As a condition precedent to any extension of time to perform the Services under this Agreement, the party seeking an extension of time shall, not later than ten (10) days following the occurrence of the event giving rise to such delay, provide the other party written notice of the occurrence and nature of such event.

# 17 INSURANCE

During the of the Agreement Term, Contractor shall, at its own cost and expense, obtain and maintain in full force and effect, the following minimum insurance coverage: (a) commercial general liability insurance on an occurrence basis with minimum single limit coverage of $2,000,000 per occurrence and $4,000,000 aggregate combined single limit; (b) professional errors and omissions liability insurance with a limit of $2,000,000 per event and $2,000,000 aggregate; Contractor shall name Client as an additional insured to Contractor's commercial general liability and excess/umbrella insurance and as a loss payee on Contractor's professional errors and omissions liability insurance and Contractor's employee fidelity bond/crime insurance, and, if required, shall also name Client's End Customer. Contractor shall furnish to Client a certificate showing compliance with these insurance requirements within two (5) days of Client's written request. The certificate will provide that Client will receive ten (10) days' prior written notice from the insurer of any termination of coverage.

# 18 GENERAL

18.1 Independent Contractors-No Joint Venture. The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other nor may neither bind the other in any way, unless authorized in writing. The Agreement (including the Statements of Work) shall not be construed as constituting either Party as partner, joint venture or fiduciary of the other Party or to create any other form of legal association that would impose liability upon one Party for the act or failure to act of the other Party, or as providing either Party with the right, power or authority (express or implied) to create any duty or obligation of the other Party.

18.2 Entire Agreement, Updates, Amendments and Modifications. The Agreement (including the Statements of Work) constitutes the entire agreement of the Parties with regard to the Services and matters addressed therein, and all prior agreements, letters, proposals, discussions and other documents regarding the Services and the matters addressed in the Agreement (including the Statements of Work) are superseded and merged into the Agreement (including the Statements of Work). Updates, amendments, corrections and modifications to the Agreement including the Statements of Work may not be made orally but shall only be made by a written document signed by both Parties.

18.3 Waiver. No waiver of any breach of any provision of the Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof.

18.4 Severability. If any provision of the Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby, and such provision shall be deemed to be restated to reflect the Parties' original intentions as nearly as possible in accordance with applicable Law(s).

18.5 Cooperation in Defense of Claims. The parties agree to provide reasonable cooperation to each other in the event that either party is the subject of a claim, action or allegation regarding this Agreement or a party's actions taken pursuant to this agreement, including, but not limited to, providing information or documents needed for the defence of such claims, actions or allegation; provided that neither party shall be obligated to incur any expense thereby.

18.6 Counterparts. The Agreement and each Statement of Work may be executed in counterparts. Each such counterpart shall be an original and together shall constitute but one and the same document. The Parties agree that electronic signatures, whether digital or encrypted, a photographic or facsimile copy of the signature evidencing a Party's execution of the Agreement shall be effective as an original signature and may be used in lieu of the original for any purpose.

18.7 Binding Nature and Assignment. The Agreement will be binding on the Parties and their respective successors and permitted assigns. Neither Party may, or will have the power to, assign the Agreement (or any rights thereunder) by operation of law or otherwise without the prior written consent of the other Party.

18.8 Notices. Notices pursuant to the Agreement will be sent to the addresses below, or to such others as either party may provide in writing. Such notices will be deemed received at such addresses upon the earlier of (i) actual receipt or (ii) delivery in person, by fax with written confirmation of receipt, or by certified mail return receipt requested. A notice or other communication delivered by email under this Agreement will be deemed to have been received when the recipient, by an email sent to the email address for the sender stated in this Section 19.7 acknowledges having received that email, with an automatic "read receipt" not constituting acknowledgment of an email for purposes of this section 19.7.

**Notice to Contractor:**

Cyber Ninjas Inc
ATTN: Legal Department
5077 Fruitville Rd
Suite 109-421
Sarasota, FL 34232

Email: legal@cyberninjas.com

**Notice to Client:**

Arizona State Senate
Attn: Greg Jernigan
1700 W. Washington St.
Phoenix, AZ 85007
gjernigan@azleg.gov

18.9 No Third-Party Beneficiaries. The Parties do not intend, nor will any Section hereof be interpreted, to create for any third-party beneficiary, rights with respect to either of the Parties, except as otherwise set forth in an applicable Statement of Work.

18.10 Dispute Resolution. The parties shall make good faith efforts to resolve any dispute which may arise under this Agreement in an expedient manner (individually, "Dispute" and collectively "Disputes"). In the event, however, that any Dispute arises, either party may notify the other party of its intent to invoke the Dispute resolution procedure herein set forth by delivering written notice to the other party. In such event, if the parties' respective representatives are unable to reach agreement on the subject Dispute within five (5) calendar days after delivery of such notice, then each party shall, within five (5) calendar days thereafter, designate a representative and meet at a mutually agreed location to resolve the dispute ("Five-Day Meeting").

18.10.1 Disputes that are not resolved at the Five-Day Meeting shall be submitted to non-binding mediation, by delivering written notice to the other party. In such event, the subject Dispute shall be resolved by mediation to be conducted in accordance with the rules and procedures of the American Arbitration Association , and mediator and administrative fees shall be shared equally between the parties.

18.10.2 If the dispute is not resolved by mediation, then either party may bring an action in a state or federal court in Maricopa County, Arizona which shall be the exclusive forum for the resolution of any claim or defense arising out of this Agreement. The prevailing party shall be entitled to an award of its reasonable attorneys' fees and costs incurred in any such action.

18.10.3 Governing Law. All rights and obligations of the Parties relating to the Agreement shall be governed by and construed in accordance with the Laws of the State of Arizona without giving effect to any choice-of-law provision or rule (whether of the State of Arizona or any other jurisdiction) that would cause the application of the Laws of any other jurisdiction.

18.11 Rules of Construction. Interpretation of the Agreement shall be governed by the following rules of construction: (a) words in the singular shall be held to include the plural and vice versa and words of one gender shall be held to include the other gender as the context requires, (b) the word "including" and words of similar import shall mean "including, without limitation," (c) the headings contained herein are for reference purposes only and shall not affect in any way the meaning or interpretation of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Master Service Agreement to be effective as of the day, month and year written above.

Accepted by:

Client

DocuSigned by:

By: Karen Fann, President
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Title: Karen Fann, President

Accepted by:

Contractor: Cyber Ninjas, Inc.

By:
Douglas Logan

Title: CEO & Principal Consultant

# EXHIBIT 1. FORM OF STATEMENT OF WORK

This Statement of Work (the "Statement of Work") is effective as of as of the _____ day of _____, 20__ (the "Effective Date"), between Cyber Ninjas, Inc., a Florida Corporation, (the "Contractor"), and the Arizona State Senate (the "Client"), and is deemed to be incorporated into that certain Master Service Agreement dated the 31 day of March, 2021 (the "Master Agreement") by and between Contractor and Client(collectively, this Statement of Work and the Master Agreement are referred to as the "Agreement".

## 1 GENERAL PROVISIONS

1.1 Introduction. The terms and conditions that are specific to this Statement of Work are set forth herein. Any terms and conditions that deviate from or conflict with the Master Agreement are set forth in the "Deviations from Terms of the Master Agreement" Schedule hereto. In the event of a conflict between the provisions of this Statement of Work and the Master Agreement, the provisions of Section 2.4 of the Master Agreement shall control such conflict.

1.2 Services. Contractor will provide to the Client the Services in accordance with the Master Agreement (including the Exhibits thereto) and this Statement of Work (including the Schedules hereto). The scope and composition of the Services and the responsibilities of the Parties with respect to the Services described in this Statement of Work are defined in the Master Agreement, this Statement of Work, [and any Schedules attached hereto].

## 2 SCOPE & SERVICES DESCRIPTION

## 3 TECHNICAL METHODOLOGY

## 4 DELIVERABLE MATERIALS

## 5 COMPLETION CRITERIA

## 6 FEES / TERMS OF PAYMENT

The charges for the Services are: $_____ to be paid as follows:

[$_____ upon execution of the Agreement and $_____ upon completion of the Services]. Invoicing and terms of payment shall be as provided in Article 5 of the Agreement.

# 7 TERM/PROJECT SCHEDULE

# 8 SIGNATURE & ACKNOWLEDGEMENT

**THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS STATEMENT OF WORK, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. FURTHER, THE PARTIES AGREE THAT THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES RELATING TO THIS SUBJECT SHALL CONSIST OF 1) THIS STATEMENT OF WORK, 2) ITS SCHEDULES, AND 3) THE AGREEMENT (INCLUDING THE EXHIBITS THERETO), INCLUDING THOSE AMENDMENTS MADE EFFECTIVE BY THE PARTIES IN THE FUTURE. THIS STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES SUPERSEDES ALL PROPOSALS OR OTHER PRIOR AGREEMENTS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT DESCRIBED HEREIN.**

IN WITNESS WHEREOF, the parties hereto have caused this Statement of Work to be effective as of the day, month and year written above.

Accepted by:

Client:

By:_____

_____

Title:_____

Accepted by:

Contractor: Cyber Ninjas, Inc.

By:_____

Douglas Logan

Title: CEO & Principal Consultant

## EXHIBIT 2. BACKGROUND SCREENING MEASURES

The pre-employment background investigations include the following search components for U.S. employees and the equivalent if international employees:

- 10-Year Criminal History Search – Statewide and/or County Level
- 10-Year Criminal History Search – U.S. Federal Level
- Social Security Number Validation
- Restricted Parties List

**Criminal History – State-wide or County:**

Criminal records are researched in the applicant's residential jurisdictions for the past seven years. records are researched through State-wide repositories, county/superior courts and/or lower/district/municipal courts. Generally, a State-wide criminal record search will be made in states where a central repository is accessible. Alternately, a county criminal record search will be conducted and may be supplemented by an additional search of lower, district or municipal court records. These searches generally reveal warrants, pending cases, and felony and misdemeanor convictions. If investigation and/or information provided by the applicant indicate use of an aka/alias, additional searches by that name must be conducted.

**Criminal History – Federal:**

Federal criminal records are researched through the U.S. District Court in the applicant's federal jurisdiction for the past seven years. This search generally reveals warrants, pending cases and convictions based on federal law, which are distinct from state and county violations. The search will include any AKAs/aliases provided or developed through investigation.

**Social Security Trace:**

This search reveals all names and addresses historically associated with the applicant's provided number, along with the date and state of issue. The search also verifies if the number is currently valid and logical or associated with a deceased entity. This search may also reveal the use of multiple social security numbers, AKAs/aliases, and additional employment information that can then be used to determine the parameters of other aspects of the background investigation.

**Compliance Database or Blacklist Check:**

This search shall include all of the specified major sanctioning bodies (UN, OFAC, European Union, Bank of England), law enforcement agencies, regulatory enforcement agencies, non-regulatory agencies, and high-profile persons (to include wanted persons, and persons who have previously breached US export regulation or violated World Bank procurement procedures including without limitation the lists specified below:

A search shall be made of multiple National and International restriction lists, including the Office of Foreign Asset Control (OFAC) Specially Designated Nationals (SDN), Palestinian Legislative Council (PLC), Defense Trade Controls (DTC) Debarred Parties, U.S. Bureau of Industry and Security Denied Persons List, U.S. Bureau of Industry and Security Denied Entities List, U.S. Bureau of Industry and Security Unverified Entities List, FBI Most Wanted Terrorists List, FBI Top Ten Most Wanted Lists, FBI Seeking Information, FBI Seeking Information on Terrorism, FBI Parental Kidnappings, FBI Crime Alerts, FBI Kidnappings and Missing Persons, FBI Televised Sexual Predators, FBI Fugitives – Crimes Against Children, FBI Fugitives – Cyber Crimes, FBI Fugitives – Violent Crimes: Murders, FBI Fugitives – Additional Violent Crimes, FBI Fugitives – Criminal Enterprise Investigations, FBI Fugitives – Domestic Terrorism, FBI Fugitives – White Collar Crimes, DEA Most Wanted Fugitives, DEA Major International Fugitives, U.S. Marshals Service 15 Most Wanted, U.S. Secret Service Most Wanted Fugitives, U.S. Air Force Office of Special Investigations Most Wanted Fugitives, U.S. Naval Criminal Investigative Services (NCIS) Most Wanted Fugitives, U.S. Immigration and Customs Enforcement (ICE) Most Wanted Fugitives, U.S. Immigration & Customs Enforcement Wanted Fugitive Criminal Aliens, U.S. Immigration & Customs Enforcement Most Wanted Human Smugglers, U.S. Postal Inspection Service Most Wanted, Bureau of Alcohol, Tobacco, and Firearms (ATF) Most Wanted, Politically Exposed Persons List, Foreign Agent Registrations List, United Nations Consolidation Sanctions List, Bank of England Financial Sanctions List, World Bank List of Ineligible Firms, Interpol Most Wanted List, European Union Terrorist List, OSFI Canada List of Financial Sanctions, Royal Canadian Mounted Police Most Wanted, Australia Department of Foreign Affairs and Trade List, Russian Federal Fugitives, Scotland Yard's Most Wanted, and the World's Most Wanted Fugitives.

## EXHIBIT 3. FORM OF NONDISCLOSURE SUBCONTRACT

# Nondisclosure Agreement

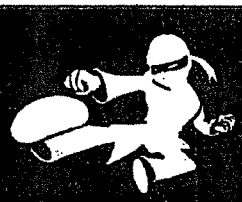
1. I am participating in one or more projects for Cyber Ninjas, Inc., as part of its audit of the 2020 general election in Maricopa County, performed as a contractor for the Arizona State Senate (the "Audit").
2. In connection with the foregoing, I have or will be receiving information concerning the Audit, including but not limited to ballots or images of ballots (whether in their original, duplicated, spoiled, or another form), tally sheets, audit plans and strategies, reports, software, data (including without limitation data obtained from voting machines or other election equipment), trade secrets, operational plans, know how, lists, or information derived therefrom (collectively, the "Confidential Information").
3. In consideration for receiving the Confidential Information and my participation in the project(s), I agree that unless I am authorized in writing by Cyber Ninjas, Inc. and the Arizona State Senate, I will not disclose any Confidential Information to any person who is not conducting the Audit. If I am required by law or court order to disclose any Confidential Information to any third party, I will immediately notify Cyber Ninjas, Inc. and the Arizona State Senate.
4. Furthermore, I agree that during the course of the audit to refrain from making any public statements, social media posts, or similar public disclosures about the audit or its findings until such a time as the results from the audit are made public or unless those statements are approved in writing from Cyber Ninjas, Inc and the Arizona Senate.
5. I agree never to remove and never to transmit any Confidential Information from the secure site that the Arizona State Senate provides for the Audit; except as required for my official audit duties and approved by both Cyber Ninjas, Inc and the Arizona Senate.
6. I further understand that all materials or information I view, read, examine, or assemble during the course of my work on the Audit, whether or not I participate in the construction of such materials or information, have never been and shall never be my own intellectual property.
7. I agree that the obligations provided herein are necessary and reasonable in order to protect the Audit and its agents and affiliates. I understand that an actual or imminent failure to abide by these policies could result in the immediate termination of my work on the Audit, injunctive relief against me, and other legal consequences (including claims for consequential and punitive damages) where appropriate.

**Signature:** _____

**Printed Name:** _____

**Date:** _____

# 2



Cyber Ninjas
Phone: (941) 3-NINJAS
Fax: (941) 364-6527
www.CyberNinjas.com
5077 Fruitville Rd #109-421, Sarasota, FL 34232

# Statement of Work

This Statement of Work (the "Statement of Work") is effective as of as of the 31 day of March, 2021 (the "Effective Date"), between Cyber Ninjas Inc., a Florida Corporation, ("Contractor"), and Arizona State Senate ("Client"), and is deemed to be incorporated into that certain Master Service Agreement dated March 31, 2021 (the "Master Agreement") by and between Contractor and Client (collectively, this Statement of Work and the Master Agreement are referred to as the "Agreement").

## 1 Why Cyber Ninjas

Cyber Ninjas is a cyber security company with a focus on application security and ethical hacking. We perform work across the financial services and government sectors. Our expertise allows us to both understand complex technology systems, as well as understand how a malicious attacker could potentially abuse those systems to meet his or her own agenda. This allows us to effectively enumerate the ways a system could be exploited, and with our partners to fully review if that scenario did in fact occur. This is very different from the compliance focused way that election systems are typically evaluated.

Both our company and our partners have extensive experience working specifically with Dominion Voting Systems. In addition, our subcontractors and partners are adept at digital forensic acquisition, and on implementing ballot hand-counting procedures. Two of our team members authored a hand-count ballot process that has been utilized in audits in two states; and has further been perfected for transparency and consistency. This combination of skills, abilities, and experience is what uniquely qualifies our team for the outlined work.

## 2 Our Team

Cyber Ninjas will serve as the central point-of-contact and organizer of all work conducted over the course of this agreement. However, there are different teams involved in each phase of the outlined work. Each of these teams have specialities and experience within the outlined areas of their coverage. This expertise is highlighted below.

### 2.1 Registration and Votes Cast Team

The Registration and Votes Cast Team has worked together with a number of individuals to perform non-partisan canvassing within Arizona related to the 2020 General election in order to statistically identify voter registrations that did not make sense, and then knock on doors to confirm if valid voters actually lived at the stated address. This brought forth a number of significant anomalies suggesting significant problems in the voter rolls.

They will be continuing this work as part of this effort to validate that individuals that show as having voted in the 2020 General election match those individuals who believe they have cast a vote.

2.2 Vote Count & Tally Team - Wake Technology Services

Members of the Wake Technology Services group have performed hand-count audits in Fulton County, PA and in New Mexico as part of the 2020 General Election cycle. In addition, team members have been involved in investigating election fraud issues, dating back to 1994. In that particular case in 1994, this team member worked closed with the FBI during the investigation.

As part of these audits in 2020, the Wake Technology Services team has developed an in-depth counting process that reduces opportunities for errors. This counting process has been expanded to make it more robust, and more transparent. As a result, they will be leading all ballot hand-counting processes.

2.3 Electronic Voting System Team – CyFIR, Digital Discovery & Cyber Ninjas, Analysts

Digital Forensic Acquisition will be performed either by CyFIR or Digital Forensics, and the analysis work will be performed by Cyber Ninjas, CyFIR and a number of additional analysts, the identities and qualifications of whom shall be made available to Client upon request.

CyFIR is a digital security and forensics company and a subcontractor on the contract for DHS's Hunt and Incident Response Team (HIRT). As specialists for DHS, they are familiar with responding to nation-state cyber activity including Advanced Persistent Threats (APT).

# 3 General Provisions

3.1 Introduction. The terms and conditions that are specific to this Statement of Work are set forth herein. Any terms and conditions that deviate from or conflict with the Master Agreement are set forth in the "Deviations from Terms of the Master Agreement" Schedule hereto. In the event of a conflict between the provisions of this Statement of Work and the Master Agreement, the provisions of Section 2.34 of the Master Agreement shall control such conflict.

3.2 Services. Contractor will provide to the Client the Services in accordance with the Master Agreement (including the Exhibits thereto) and this Statement of Work (including the Schedules hereto). The scope and composition of the Services and the responsibilities of the Parties with respect to the Services described in this Statement of Work are defined in the Master Agreement, this Statement of Work, and any Schedules attached hereto.

# 4 Scope & Services Description

This Statement of Work outlines the proposed methodology and scope for a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona. This audit will attempt to validate every area of the voting process to ensure the integrity of the vote. This includes auditing the registration and votes cast, the vote counts and tallies, the electronic voting system, as well as auditing the reported results. The final report will attempt to outline all the facts found throughout the investigation and attempt to represent those facts in an unbiased and non-partisan way. The final report will not include factual statements unless the statements can be readily substantiated with evidence, and such substantiation is cited, described, or appended to the report as appropriate.

The following sub-sections provides additional details of what will be conducted at each stage of the audit.

## 4.1 Registration and Votes Cast Phase

During the Registration and Votes Cast Phase, it will be validated that Maricopa County properly registers who voted during an election, and that this system properly prevents duplicate voting. This will be performed on a minimum of three precincts.

Proposed scope of work:

- Review of Arizona's SiteBook system for checking in and tracking voters;
- Complete audit of a minimum of 3 precincts, based on statistical anomalies and precinct size;
- Analysis of existing research and data validating the legitimacy of voter rolls; and/or
- Comparing results against known lists of invalid voters (e.g. deceased voters, non-citizens, etc.).

This phase may help detect:

- Problems that could result in voters being able to vote more than once;
- Voters that voted but do not show in the list of those who voted;
- Voters who likely did not vote but showed as having voted;
- Potential invalid voters who cast a vote in the 2020 general election; and/or
- Inconsistencies among vote tallies between the various phases.

This phase is NOT expected to detect:

- Individual ballots that are either wrong and/or invalid.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results; and/or
- Redacted spreadsheet of a list of those who voted in the target precincts.

## 4.2 Vote Count & Tally Phase

During the Vote Count & Tally Phase, the counts and tallies for votes and the voting machines will be validated. This will include a hand-tally and examination of every paper ballot.

Proposed scope of work:

- Physically inspecting and hand-counting of ballots in Maricopa County;
- Counting of the total number of provisional ballots;
- Capture of video footage of the hand-counting of ballots; and/or
- Scanning of ballots in Maricopa County
    - NOTE: Provisional ballots which still have signatures attached to them will be counted to be sure they match the expected numbers but will not be scanned nor will the contents be visible in video.

This phase may help detect:

- Counts that do not match the expected results;
- Ballots that are visually different and possibly fraudulent; and/or
- Inconsistencies among vote tallies between the various phases.

This phase is NOT expected to detect:

- Destroyed or otherwise missing ballots

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results;
- Unedited camera footage of the counting of every ballot, provided that, absent express judicial approval, any such footage cannot be streamed, recorded or broadcast in such a manner that the candidate or ballot proposition selections on each ballot is visible or discernible; and/or
- Ballot images of every scanned ballot, provided that, absent express judicial approval, any such images cannot be released or published to any third party.

## 4.3 Electronic Voting System Phase

During the Electronic Voting System Phase the results from the electronic voting machines will be validated to confirm they were not tampered with. This will be done on all systems related to SiteBook with Maricopa data, as well as all Election Management System related machines besides the Ballot Marking Devices (BMD)'s utilized for accessibility.

Proposed scope of work:

- Forensic Images of Arizona's SiteBook System including the database server, as well as any client machines associated with Maricopa County;
- Forensic images captured of the Election Management System main server, adjudication machines, and other systems related to the Election Management System;
- Forensic images of all Compact Flash, USB drives, and related media;
- Inspection to identify usage of cellular modems, Wi-Fi cards, or other technologies that could be utilized to connect systems to the internet or wider-area-network;
- Review of the Tabulator Paper Tally print-outs;
- Reviewing the exports from the EMS for "Audit File", "Audit Images" and "CVR";
- Reviewing ballot images captured by the tabulators
- Reviewing forensic images for possible altering of results or other issues; and/or
- Reviewing of tabulator and other logs.

This phase may help detect:

- Problems where the tabulator incorrectly tabulated results;
- Problems where the tabulator rejected results;
- Issues where results may have been manipulated in the software;
- Issues with the improper adjudication of ballots; and/or
- Inconsistencies among vote tallies between the various phases.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results;
- Ballot images and AuditMark images showing how the tabulator interpreted the ballot for counting, provided that, absent express judicial approval, such images cannot be released or published to any third party;
- CVR Report as generated from the software; and/or
- Log Files from the Tabulators (Redacted if Dominion Desires).

## 4.4 Reported Results Phase

During the Reported Results Phase, results from all phases are compared against those expected results and those results which were publicly totalled as the official results to identify any inconsistencies.

Proposed scope of work:

- Results from various phases will be reviewed and tallied; and
- Results will be compared against the official, certified results.

This phase may help detect:

- Issues where result tallies were not properly transmitted to the official results; and/or
- Inconsistencies among vote tallies between the various phases.

Anticipated artifacts for transparency and/or validation of results for the public:

- Final report outlining the discovered results

# 5 METHODOLOGY

The following section outlines the proposed methodology utilized in the various phases of the audit. When appropriate, these sections may reference more detailed procedures. Such procedures are considered proprietary and the intellectual property of Cyber Ninjas, our subcontractors or our Partners and can be made available for review but are not explicitly part of this agreement.

## 5.1 Registration and Votes Cast Phase

During the "Registration and Votes Cast Phase", Contractor may utilize precincts that have a high number of anomalies based on publicly available voting data and data from prior canvassing efforts to select a minimum of three precincts to conduct an audit of voting history related to all members of the voter rolls. A combination of phone calls and physical canvassing may be utilized to collect information of whether the individual voted in the election. No voters will be asked to identify any candidate(s) for whom s/he voted. This data will then be compared with data provided from Maricopa County Board of Elections.

## 5.2 Vote Count & Tally Phase

The goal of the "Vote Count & Tally Phase" is to attempt to, in a transparent and consistent manner, count all ballots to determine the accuracy of all federal races, and to identify any ballots that are suspicious and potentially counterfeit. Ballots will be counted in a manner designed to be accurate, all actions are transparent, and the chain of custody is maintained.

### 5.2.1 Counting Personnel

Non-partisan counters will be utilized that are drawn from a pool of primarily former law enforcement, veterans, and retired individuals. These individuals will undergo background checks and will be validated to not have worked for any political campaigns nor having worked for any vendor involved in the voting process. These individuals will also be prevented from bringing any objects other than clothing items worn on their persons into the counting area or taking any objects out of the counting area.

### 5.2.2 Accurate Counting

Counting will be done in groups with three individuals independently counting each batch of ballots, and an individual supervising the table. All counts will be marked on a sheet of paper as they are tallied. If, at the end of the hand count, the discrepancies between counting personnel aggregate to a number that is greater than the margin separating the first and second place candidates for any audited office, the ballots with discrepant total from the Contractor's counting personnel will be re-reviewed until the aggregate discrepancies within the hand count are less than the margin separating the first and second place candidates.

### 5.2.3 Transparent Counting

All activity in the counting facility will be videotaped 24 hours a day, from the time that Maricopa County delivers ballots and other materials until the time that the hand count is complete and all materials have been returned to the custody of Maricopa County. Such videotaping shall include 24-hour video monitoring of all entrances and exits, as well as activity at the counting tables.

### 5.2.4 Chain of Custody

All movement with ballots, cutting of seals, application of seals, and similar actions will be appropriately documented and logged, as well as captured under video to be sure the custody of ballots is maintained at all times. Access to the counting area will be restricted to duly authorized and credentialed individuals who have passed a comprehensive background check, with mandatory security searches and ingress/egress logs whenever entering or exiting the counting area.

## 5.3 Electronic Voting System Phase

The proposed scope of the "Electronic Voting System Phase" is to confirm that the system accurately tallied and reported the votes as they were entered into the system and that remote access was not possible. All systems related to the voting will be forensically imaged, these machines will be booted up and checked for wireless signal usage, and the images will be reviewed to determine the accuracy of results and any indication of tampering.

### 5.3.1 Forensic Images

A digital forensics capture team will forensically capture all data on in-scope systems, utilizing industry best practices. This will create a digital copy of every single machine, Compact Flash Card, and USB drive in scope without altering the contents of the machines. Chain-of-custody documentation will be created to preserve these images in a manner sufficient to be utilized in a court-of-law.

### 5.3.2 Physical Analysis

The Election Management System equipment will be turned on and scanned with a wireless spectrum analysis tool to determine if the device is emitting any signals consistent with a known wireless frequency such as cellular, Bluetooth, WiFi or similar. Devices that show signs of emitting signals will be flagged and documented, and when possible without damaging the equipment; they will be physically inspected to determine the source of any detected signals.

### 5.3.3 Digital Analysis

The forensic images will be reviewed to validate reported totals from the tabulators, results stored within the Election Management System (EMS) Results Tally and Reporting software. These will be compared against the tabulator print-outs; and the machine will be checked for physical or digital tampering and any known ways of remote access to the machines.

### 5.3.4 Opportunity for Observation

Before commencing the imaging or analysis steps described above (except for the Digital Analysis process), the Contractor will work with Maricopa County to provide at least five (5) days advance notice to any vendors of Maricopa County whose products will be the subject of imaging, inspection, or analysis. Such vendors will be permitted the opportunity to attend and observe the Contractor's imaging or inspection of the vendors' products. The vendor will not be allowed to be present for the analysis of the captured images. Such vendors are third party beneficiaries of this provision and will have standing to challenge and secure injunctive relief against any denial of their right to observe the inspection of their products.

## 5.4 Reported Results Phase

During the Reported Results phase, results from all phases are compared to find differences between tallies or other anomalies. These results are then compared against data at the Secretary of State and Maricopa Board of Elections layers. Any inconsistencies will be reported and highlighted.

# 6 RESPONSIBILITIES

The following section outlines the key responsibilities for the proper execution of the Agreement between the Contractor and the Client for all outlined work within the scope.

## 6.1 Registration and Votes Cast Phase

**Contractor Responsibilities**

- Provide the proper personnel to conduct the analysis of the data required to execute the scope of this phase.

**Client Responsibilities**

- Arrange for a database export of SiteBook to be provided to the Client which includes all fields normally found in a publicly requested copy of the voter rolls, in addition to any other non-sensitive fields related to the data such as modifications or other time-stamps, voter history, last user edited, IP address of edit; or anything similar.

## 6.2 Vote Count & Tally Phase

**Contractor Responsibilities**

- Provide the proper personnel and equipment to execute all aspects of the phase including scanning, counting, the setup of equipment for recording of the counting, and the supervision of activities.
- Ensure that all onsite personnel follow any in-place COVID requirements.

**Client Responsibilities**

- Provide security of the building during the course of the engagement. This includes having sufficient security to prevent access to the building 24/7 during the entire time, including ensuring that safe working conditions can exist during the entirety of the audit;
- Provide electricity and access to the facilities and tables necessary for up to 120 people at a time following any current COVID requirements. This is estimated to be about 7,200 square feet;
- Provide access to all paper ballots from the November 2020 General Election within Maricopa County. This includes early voting, election day ballots, provisional ballots, spoiled ballots, printed unused ballots and any other ballot categories that are part of the 2020 General Election. For all ballots this should include the original hard copies of the ballots that were electronically adjudicated ballots.
- Provide a mechanism to allow for the proper equipment to be brought into the facility where the counting will take place.

- Full chain of custody documentation for all ballots from the point they were cast to the point where we gain access to the ballots, to the extent such documentation is in Client's possession.
- Purchase orders for all purchased ballots, or ballot paper, including counts of each, as well as delivery receipts of the quantity of ballots received, to the extent such documentation is in Client's possession.
- Full counts from any ballots printed on demand, as well as the location for which they were printed, to the extent such documentation is in Client's possession.
- Provide wired access to internet to be able to stream the counting video capture, provided that any such video footage must be streamed, recorded or broadcast in such a manner that the candidate or ballot proposition selections on each ballot shall not be visible or discernible.

## 6.3 Electronic Voting System Phase

**Contractor Responsibilities**

- Provide the proper personnel to execute all aspects of the phase including the capture of forensic digital images of all systems related to the Election Management System; and
- Ensure that all onsite personnel during the forensic capture follow any in-place COVID requirements.

**Client Responsibilities**

- Provide physical access to the EMS Server, Adjudication machines, ImageCast Central, ImageCast Precinct, ImageCast Ballot Marking Devices, SiteBook, NOVUS systems, and any other Election Management System equipment or systems utilized in the November 2020 General Election to the forensic capture team;
- Provide access to Compact Flash Cards, USB Drives, and any other media utilized in the November 2020 General Election for the forensic capture team to image;
- Provide electricity and sufficient access to the machines in scope in order to provide a team of up to 15 forensic capture individuals to work and boot up the systems;
- Provide any needed credentials for decrypting media, decrypting computer hard drives, the EMS machines, or other systems that may be required for a proper forensic capture of the machines;
- Provide the output of the "Audit File," "Audit Images," and CVR exports from the Dominion machines which includes all ballot images and AuditMark images of every ballot processed by the machines; and
    - NOTE: The above may be able to be captured from the forensic images; but Maricopa County assistance could be needed in identifying where the AuditMark files are located.
- Provide any needed technical assistance allowing all the above to be successfully captured.

## 6.4 Reported Results Phase

**Contractor Responsibilities**

- Provide the proper personnel to conduct the analysis of the data required to execute the scope of this phase.

**Client Responsibilities**

- Provide the official results per precinct for all counts associated with the November 2020 General Election.

# 7 DELIVERABLE MATERIALS

The primary deliverable for the Election Audit will be a report detailing all findings discovered during the assessment. The parties agree that the report is provided AS IS, without any promise for any expected results. Additional artifacts as collected during the work will also be provided, as outlined within the scoping details.

This final report will include:

- An executive summary outlining the overall results of the audit from the various phases;
- A methodology section outlining in detail the methodology and techniques utilized to capture and validate the results;
- Tables, charts, and other data representing the findings of the data;
- Appendices or attached files demonstrating all evidence utilized to come to the outlined conclusions (if applicable); and
- Recommendations on how to prevent any detected weaknesses from being a problem in future elections (if applicable).

In addition to the report, various anticipated artifacts for public consumption will be generated over the course of this work, as outlined under the "Scope of Work." Client will determine in its sole and unlimited discretion whether, when, and how the Contractor should release those resources to the public. This will include all videos, ballot images, and other data.

# 8 COMPLETION CRITERIA

Contractor shall have fulfilled its obligations when any one of the following first occurs:

- Contractor accomplishes the Contractor activities described within this Statement of Work, including delivery to Client of the materials listed in the Section entitled "Deliverable Materials," and Client accepts such activities and materials without unreasonable objections; or
- If Client does not object or does not respond to Contractor within seven (7) business days from the date that the deliverables have been delivered by Contractor to Client, such failure to respond shall be deemed acceptance by Client.

# 9 TERM / PROJECT SCHEDULE / LOCATION

The following table outlines the expected duration of the various proposed work outlined within the Agreement. Work will commence on a date mutually agreeable to both Contractor and Client according to a schedule which is outlined via email.

Each phase outlined below can be conducted simultaneously, with the exception of the Reported Results phase which must be completed at the end. Roughly an additional week of time at the conclusion of all phases is needed to complete and finalize reporting. Lead times before a phase can start as well as their duration can be found below. Faster lead times can potentially be accommodated on a case-by-case basis.

| Service Name | Required Notice / Lead Time | Est. Duration in Days | Additional Details / Location |
|---|---|---|---|
| Registration and Votes Cast Phase | 1 Week | 20 | This work will be done remotely. |
| Vote Count & Tally Phase | 2-3 Weeks | 20* | The entire time will be onsite at the location designated by the Client.<br><br>Access will be required 4 days before the start to setup the space.<br><br>*Race recounts as outlined in 5.2.2 may require the timeline to be extended beyond the listed days. |
| Electronic Voting System Phase | 1-2 Weeks | 35 | It is estimated that 15 will be onsite. The remainder of the time will be remote.<br><br>Review of location setup is requested the week prior to ensure proper workspace. |
| Reported Results Phase | Completion of Other Phases | 5 | This phase will be completed offsite.<br><br>Final Report Delivered 1 Week After Completion |

# 10 Fees / Terms of Payment

The following table outlines the costs associated with the proposed work. A third of the fees will be due at the execution of the contract. The remaining balance will be payable within 30 days from the completion of the audit.

| Selected | Name | Price Each | Total |
|---|---|---|---|
| 1 | Maricopa County – Full Audit | $150,000 | $150,000.00 |
| | | **Total:** | $150,000.00 |

# 11 Signature & Acknowledgement

**THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS STATEMENT OF WORK, UNDERSTAND IT, AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. FURTHER, THE PARTIES AGREE THAT THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES RELATING TO THIS SUBJECT SHALL CONSIST OF 1) THIS STATEMENT OF WORK, 2) ITS SCHEDULES, AND 3) THE AGREEMENT (INCLUDING THE EXHIBITS THERETO), INCLUDING THOSE AMENDMENTS MADE EFFECTIVE BY THE PARTIES IN THE FUTURE. THIS STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES SUPERSEDES ALL PROPOSALS OR OTHER PRIOR AGREEMENTS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT DESCRIBED HEREIN.**

IN WITNESS WHEREOF, the parties hereto have caused this Statement of Work to be effective as of the day, month and year written above.

Accepted by:

Client: Arizona State Senate

DocuSigned by:

By: Karen Fann, President
748CFF81BCF340B...

Title: Karen Fann, President

Accepted by:

Contractor: Cyber Ninjas, Inc.

By:

Douglas Logan

Title: CEO & Principal Consultant

# 3

## Tulumello, Kathy

**From:** Buchanan, Wyatt
**Sent:** Thursday, May 20, 2021 1:13 PM
**To:** Tulumello, Kathy
**Subject:** FW: PRR for emails and text messages re: President Fann, Ken Bennett and others
**Attachments:** Oxford_A - AZRepublic - PRR42221 - Responsive documents - 27 pages - KFann.pdf

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**From:** Oxford, Andrew <Andrew.Oxford@gannett.com>
**Sent:** Thursday, May 20, 2021 1:12 PM
**To:** Buchanan, Wyatt <Wyatt.Buchanan@gannett.com>
**Subject:** FW: PRR for emails and text messages re: President Fann, Ken Bennett and others

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**From:** Norm Moore <NMoore@azleg.gov>
**Sent:** Wednesday, May 19, 2021 4:30 PM
**To:** Oxford, Andrew <Andrew.Oxford@gannett.com>
**Cc:** Anglen, Robert <robert.anglen@arizonarepublic.com>
**Subject:** RE: PRR for emails and text messages re: President Fann, Ken Bennett and others

Andrew,

I apologize for the delay in sending you these responsive documents. I thought I had already sent this to you on Monday but that obviously was not the case.

The attached pdf file contains 27 pages of responsive documents regarding you request.

If you have any questions or need further clarification please contact me at your earliest convenience.

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

---

**From:** Oxford, Andrew <Andrew.Oxford@gannett.com>
**Sent:** Thursday, April 22, 2021 10:23 AM

**To:** Norm Moore <NMoore@azleg.gov>
**Subject:** PRR for emails and text messages re: President Fann, Ken Bennett and others

Good morning,

Pursuant to A.R.S. §§ 39-121 through 39-121.03 (the "Arizona Public Records Law"), as a reporter for The Arizona Republic, I request that you make available to me for examination the following documents:

1) All emails and text messages between Senate President Karen Fann and Ken Bennett, the Senate's liaison for the audit during, CY 2021;
2) All emails and text messages between Senate President Karen Fann and Christina Bobb during CY 2021;
3) All emails and text messages between Sen. Sonny Borrelli and Ken Bennett, the Senate's liaison for the audit, during CY 2021;
4) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Doug Jones, of Cyber Ninjas during CY 2021;
5) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Christina Bobb during CY 2021.

As you know, state law provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. While I expect that you will send me all non-exempt portions of the records I have requested, I respectfully reserve the right to challenge your decision to withhold any materials.

Since some of the documents listed above may be more readily available than others, please provide the documents that are available as soon as possible without waiting to provide access to all the documents.

The foregoing request is for the noncommercial purpose of gathering the news, and copies of the foregoing documents will not be used for a commercial purpose.

If you can provide copies of the records electronically, please send them to me at this email address. If they can be made available by disk, I would be happy to make arrangements to pick up a copy.

I would appreciate your communicating with me by email (andrew.oxford@arizonarepublic.com), rather than by mail, if you have any questions regarding this request.

Thank you for your attention to this request.

All the best,

Andrew Oxford
The Arizona Republic
480-417-8946

# 4

azcentral. | THE ARIZO

05/19/21

Norm Moore
Arizona State Senate
Public Records Attorney
1700 W Washington
Phoenix, AZ 85007

Karen Fann
Arizona Senate President
1700 W Washington
Phoenix, AZ 85007

Re; Arizona audit/ denial of records

Mr. Moore/ Ms. Fann:

This notice is to advise you that you have improperly denied *The Arizona Republic* (PNI) access to public records requested under the provisions of the Arizona Public Records Law (ARS. Sec. 39-121 through 39-121.03).

On April 22, Arizona Republic reporter Andrew Oxford requested records from the Arizona Senate involving the Arizona audit.

Specifically, Oxford asked for:

1) All emails and text messages between Senate President Karen Fann and Ken Bennett, the Senate's liaison for the audit from Jan. 1, 2021 to current
2) All emails and text messages between Senate President Karen Fann and Christina Bobb from Jan. 1, 2021 to current
3) All emails and text messages between Sen. Sonny Borrelli and Ken Bennett, the Senate's liaison for the audit from Jan. 1, 2021 to current
4) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Doug Logan of Cyber Ninjas from Jan. 1, 2021 to current
5) All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Christina Bobb from Jan. 1, 2021 to current

To date you have not responded to any of these records requests.

We believe your refusal to release the requested records – or even acknowledge PNI's request – is a breach of duty and constitutes a statutory denial.

The failure to turn over these records violates the Arizona Public Records Law, which provides a broad right of public inspection and copying of public records. That 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 "evince[s] 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. Furthermore, "[a]ccess to a public record is deemed denied if a custodian fails to *promptly* respond to a request for production of a public record." A.R.S. § 39-121.01(E) (emphasis added).

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." *Id.* (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 records 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. 1993) (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").

Arizona law subjects government entities to awards of attorneys' fees and costs where a legal challenge is necessary to combat the wrongful denial 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.").

You have advanced no lawful reason for withholding the requested records and PNI is entitled to prompt compliance with its request. A.R.S. § 39-121.01(D)(1) (public officers "shall promptly furnish" public records upon request).

It makes no difference whether the records are kept on public or personal devices. We maintain the law requires you to make these records regarding this public business available to us.

As you are no doubt aware, Arizona courts have ruled that records on a public official's private device can be considered a public record if those records involve public business.

Arizona Attorney General Mark Brnovich has also advised that "public officials cannot use private devices and accounts for the purpose of concealing official conduct." (No. I17-004 (R15-026) Re: Whether Arizona's Public Records Law Extends Beyond its Terms and Applies to Privately Sent Messages, July 7, 2017).

Arizona law provides specific exemptions under which records can be withheld. But simply declining to acknowledge a request does not meet even the minimum threshold requirements under the Arizona Open Records Law.

Exemptions are spelled out in ARS Sec. 39-123 through Sec. 139-128. In general, the only itemized prohibitions pertain to those of law enforcement officers, court officials, certain people involved in criminal justice proceedings, and certain current and former elected officials.

Even in cases where there is a valid state interest, absent any express prohibition, the state may exercise its discretion and choose to release records.

Failure to immediately release the requested records constitute a continued violation of ARS. Sec. 39-121 through 39-121.03 and would leave no alternative but to seek relief from court.

We ask that you respond to this request within the next seven days. Should you have any questions, please feel free to call Robert Anglen at 602-316-8395 or Andrew Oxford at 480-417-8946.

Sincerely,

Robert Anglen
Consumer Investigations
The Arizona Republic | azcentral | The USA Today Network
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Robert.anglen@arizonarepublic.com

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The Arizona Republic | azcentral | The USA Today Network
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# 5

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May 24, 2021

*Via E-Mail (kfann@azleg.gov, nmoore@azleg.gov,) and U.S. Mail*

Karen Fann, Senate President
Norm Moore, Public Records Attorney
Arizona State Senate
1700 West Washington Street
Phoenix, Arizona 85007-2809

Re: Phoenix Newspapers, Inc./Access: Right to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Moore and Sen. Fann:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com ("PNI"). On PNI's behalf, I write to secure your prompt and full compliance with PNI's request to inspect certain public records – specifically, records related to the Arizona Senate's audit of Maricopa County ballots. This time-sensitive 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").

## Factual Background

On April 22, 2021, *Arizona Republic* reporter Andrew Oxford requested the following records (the "Request"):

1. All emails and text messages between Senate President Karen Fann and Ken Bennett, the Senate's liaison for the audit, during CY 2021;

2. All emails and text messages between Senate President Karen Fann and Christina Bobb during CY 2021;

3. All emails and text messages between Sen. Sonny Borrelli and Ken Bennett, the Senate's liaison for the audit, during CY 2021;

4. All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Doug Jones, of Cyber Ninjas during CY 2021; and

5. All emails and text messages between Ken Bennett, the Senate's liaison for the audit, and Christina Bobb during CY 2021.

On May 19, 2021, you provided 27 pages of responsive documents consisting of six emails between Senator Fann and Ken Bennett. It is not clear if there are additional records responsive to section 1 of the Request, although both the content of the released records and the context of the events surrounding the audit strongly suggest that more records exist. Even more concerning is the fact that to date, you have not provided *any* records in response to sections 2-5 of the Request.

PNI is particularly concerned that you have not provided a copy of a March 8, 2021 email exchange between Sen. Fann and Ms. Bobb – which is responsive to section 2 of the Request – that you disclosed to another requester, Carrie Levine of the Center for Public Integrity. The content and tone of that email exchange also indicates that there are likely other responsive emails between Sen. Fann and Ms. Bobb that have not been produced. This discrepancy raises serious questions regarding the thoroughness of the search for responsive records and compliance with the law.

PNI has not received any explanation for why the Senate has failed to respond fully to these requests or made copies of all of the records available for inspection. By this letter, we renew PNI's request for *prompt* and *full* access to inspect and secure copies of the Records from the Senate pursuant to A.R.S. §39-121 et seq. (the "Arizona Public Records Law"). We trust you will take this opportunity to comply with PNI's request promptly and fully for the reasons explained more fully below.

## The Arizona Public Records Law

The Senate's refusal to provide all of the requested 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 "evince[s] a clear policy favoring disclosure." *Carlson v. Pima County*, 141 Ariz. 487, 490 (1984). Indeed, "access and disclosure is the strong policy of the law . . . . " *Id.* at 491. The statute "defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4 (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 inspections as public records." *Carlson*, 141 Ariz. at 491 (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 presumption in favor of disclosure, the Senate 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 (1993). *See also Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The Senate cannot meet this burden by speculating or "argu[ing] in global generalities of the possible harm that might result from release." *Cox*, 175 Ariz. at 14. Rather, the Senate must provide a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub'g Co. v. Pima County Attorney's Office*. 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). The Senate also must demonstrate that any such harm outweighs the public's strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) ("[t]he public's right to know any public document is weighty in itself.").

The requested materials – emails about the audit of Maricopa County ballots involving Senators and the Senate's liaison to the audit – are unquestionably public records. These records directly involve the official duties of state legislators and the conduct of Senate business, and are therefore subject to disclosure. *See Carlson*, 141 Ariz. at 490 (noting that Arizona Public Records Law covers those records "reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties"); 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.").

The Senate has failed to specifically demonstrate *any* ground for not providing copies of *all* of the requested materials promptly. It has provided no justification for withholding the Records, let alone one that would outweigh the public's "weighty" interest in access. *Keegan*, 201 Ariz. at 351. While the Senate may try to justify certain redactions on privacy grounds, it has not done so here. In these circumstances, the requested materials should be released forthwith in accordance with A.R.S. §39-121 *et seq*.

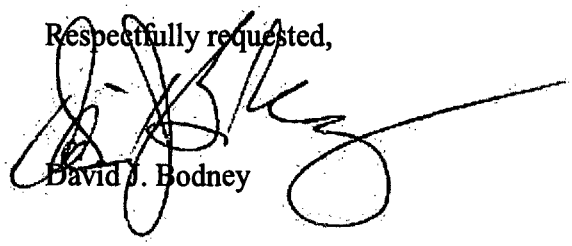
The Requested Materials Should Be Released Without Further Delay

Arizona law subjects the Senate to an award of attorneys' fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; 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 Senate has not advanced a lawful reason for withholding the requested materials, and PNI is entitled to prompt compliance with its requests. A.R.S. § 39-121.01(E) (access deemed denied where custodian failed to "promptly" respond); *Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 538-39 (App. 2008) (finding that the burden is on the agency to demonstrate that a response to a public records request is timely).

This letter is intended to give the Senate one further opportunity to release the requested materials as Arizona law requires – promptly. Accordingly, PNI requests that you provide copies of the requested materials by 5:00 p.m. on Friday, May 28, 2021. PNI reserves the right to take any and all further steps it deems appropriate to secure access to the requested materials under the Arizona Public Records Law, including the filing of a special action to secure judicial enforcement of its rights. Of course, we would prefer to resolve this matter amicably and constructively, without resort to litigation.

I look forward to hearing from you.

Respectfully requested,



David J. Bodney

DJB

# 6

**From:** Norm Moore <NMoore@azleg.gov>
**Sent:** Thursday, May 27, 2021 12:29 PM
**To:** Bodney, David J. (PHX) <BodneyD@ballardspahr.com>
**Cc:** Kory Langhofer <kory@statecraftlaw.com>; Thomas Basile <tom@statecraftlaw.com>
**Subject:** Response to letter of 5/24/21 regarding production of records

⚠ EXTERNAL
Mr. Bodney,

I am writing in response to your letter that was forwarded to me by President Fann of May 24, 2021 regarding the right to inspect public records relating to the Maricopa County ballot audit.

On May 19, 2021, as you stated in your letter I did provide 27 pages of responsive documents consisting of emails between President Fann and Ken Bennett. Those emails are the responsive email records regarding paragraph 1.

As you may be aware, the Arizona State Senate (Senate) does not pay for nor provide members of the Senate a cellular phone for use in connection with the transaction of public business as a Senator nor does the Senate reimburse

members for the cost of their own private personal cellular phone or the monthly cost charged by the service provider to the member for the use of their private cellular phone. Since the Senate doesn't pay for or provide cellular phones to the members, the Senate has no government managed system in place to search for and produce any records from a member's personal private cellular phone. However, it is my understanding that President Fann has agreed to produce any responsive nonprivileged text messages between herself and Ken Bennett in paragraph 1 and Christina Bobb in paragraph 2.

There was in fact an inadvertent mistake that was made by not including responsive emails between President Fann and Christina Bobb in paragraph #2. The mistake was not an attempt to fail to produce records or to not comply with the law. The mistake was a clerical one for which I apologize and take full responsibility. The attached pdf contains 9 pages of responsive documents concerning emails between President Fann and Christina Bobb during calendar year 2021 as specified in paragraph 2.

In regards to paragraph 3, the only email between Senator Borrelli and Ken Bennett is the very first email that was included in the responsive documents sent to Mr. Oxford on May 19, 2021. That particular email from Ken Bennett was sent to a number of people including both President Fann and Sonny Borrelli. Since that document was already included as a responsive document regarding paragraph #1 it was not produced again and included in the responsive documents in paragraph #3 as it was a duplicative responsive document. Senator Borrelli has indicated he has no responsive text messages to Ken Bennett.

Although the Senate's position is that it is not legally obligated to provide records as requested in paragraphs 4 and 5, the Senate is agreeing to search and produce documents as requested in paragraphs 4 and 5. I do want to ask for a clarification regarding paragraph #4. The request for email and text messages between Ken Bennett specifies "Doug Jones" but I am speculating that it is really intended to specify "Doug Logan", the CEO of Cyber Ninjas. Please advise.

It is my understanding that you and Mr. Langhofer are supposed to communicate in the near future regarding this matter. I would welcome an opportunity to participate in those discussions.

Again, I do apologize for my clerical error made for not originally including the responsive nonprivileged emails between President Fann and Christina Bobb to Andrew Oxford.

Sincerely,

Norm Moore
Arizona State Senate
Public Records Attorney
nmoore@azleg.gov

# 7

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May 27, 2021

Norm Moore
Arizona State Senate
Public Records Attorney
1700 W Washington
Phoenix, AZ 85007

Karen Fann
Arizona Senate President
1700 W Washington
Phoenix, AZ 85007

Re; Arizona audit/new records request

Under the provisions of the Arizona Public Records Law (ARS. Sec. 39-121 through 39-121.03), we are sending this request for prompt inspection of public records held by your office.

Specifically, we are requesting a range of records related to the ongoing audit of 2.1 million ballots cast in Maricopa County 2020 general election.

This request not only seeks records in the possession of the Arizona Senate, the Senate president and the Senate's audit liaison. It also seeks records in the possession of contractors authorized to conduct public's business (ie; the audit) by public officials. *See discussion below re; ARS Sec. 35-149, responsibility of public bodies receiving private monies.*

The requested records include:

- All invoices involving Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present
- All audit related invoices in the possession of Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present

- All financial documents involving Cyber Ninjas Wake Technology Services and CyFIR, LLC., and any other unnamed contractors/subcontractors from Jan. 1, 2021 to present
- All audit-related correspondence (texts, emails, other) to/from Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors and:
    - Ken Bennett
    - Randy Pullen
    - Warren Petersen
    - Karen Fann
    - Doug Logan
    - Eugene Kern
    - Anthony Kern
    - Mark Finchem
    - Andy Biggs
    - Paul Gosar
    - Kelli Ward
    - Sonny Borrelli
    - Leo Biasiucci
    - Wendy Rogers
    - Jack Sellers
    - Bill Gates
    - Clint Hickman
    - Steve Church
    - Steve Gallardo
    - Stephen Richer
    - Sidney Powell
    - Patrick Byrne
    - Lin Wood
    - Donald Trump
    - Sen. Sonny Borrelli
    - Leo Biasiucci
    - Wendy Rogers

- All audit-related correspondence (texts, emails, other) to/from:
    - Ken Bennett

- Randy Pullen
- Warren Petersen
- Karen Fann
- Doug Logan
- Eugene Kern
- Anthony Kern
- Mark Finchem
- Andy Biggs
- Paul Gosar
- Kelli Ward
- Sonny Borrelli
- Leo Biasiucci
- Wendy Rogers
- Jack Sellers
- Bill Gates
- Clint Hickman
- Steve Church
- Steve Gallardo
- Stephen Richer
- Sidney Powell
- Patrick Byrne
- Lin Wood
- Donald Trump

- A full list of ballot counters who participated in the Arizona Audit from April 23, 2021 to present and any records of payments to them
- A full list of organizations and individuals who participated in recruiting efforts for the Arizona Audit from Jan. 1, 2021 to present and any records of payments to them
- Any body camera or head camera footage (Go Pro, etc.) recorded by audit employees, contractors and agents at Veteran's Memorial Stadium
- A full list of observers of the Arizona Audit from April 23, 2021 to present
- All sign in/ sign out logs to the Veterans Memorial Coliseum from April 23, 2021 to present, including: visitors, volunteers, contracted employees, counters, observers, vendors and anyone else who gained admittance to the coliseum during the audit.

- Any records of payments to the Arizona Rangers for security during the audit from April 23, 2021 to present
- Any audit-related correspondence (texts, messages, email, posts, other) on third party messaging systems and apps such as Telegram, Twitter, WhatsApp, SnapChat, and Signal from Jan. 1, 2021 to present. Those would include all to/from/by:
    - Any agent or member of the Arizona Senate
    - Any agent or member of Cyber Ninjas
    - Any agent or member of Wake Technology Services
    - Any agent or member of CyFIR, LLC., and any other unnamed contractors/subcontractors
- All resumes and CVs for employees/ agents of Cyber Ninjas, Wake Technology Services, CyFIR, LLC., and any other unnamed contractors/subcontractors.

Recognizing this is a lengthy list, we are asking you to provide information as soon as it is available rather than waiting until you have collected all of the documents requested.

We do, however, look forward to your complete response within 10 days, a time frame we believe adequately suffices under the "reasonable" requirement evinced by statute.

Should you need to more time, we will happily work with you to create a mutually agreeable timetable for the continued release of documents.

We want to make clear that we believe you are the proper custodian for these records, whether or not you have them in your immediate possession or if they are in the possession of one of your agents, contractors or subcontractors.

The fact is, the Arizona Audit – the so called "people's audit" as described by Arizona GOP Chair Kelli Ward in livestream interviews with Arizona Senate Audit Liaison Ken Bennett – is a public undertaking using public funds.

Any argument that you are not the proper custodian, or that you simply don't have the records in your possession, flies in the face of Arizona statutes and previous court rulings.

Arizona laws covering the disposition of private monies make clear that a public entity can only accept such fun for activities it is statutorily authorized to perform.

The statute commands that "Every department, institution, board or commission receiving private monies or contributions available for its support or for the purpose of defraying expenses or work done under its direction, other receipts that are subject to refund or return to the sender or receipts that have not yet accrued to the state shall ... shall keep an accounting of each such fund or contribution." A.R.S. § 35-149.

The law requires public entities to keep records of: The sources of private monies; the terms and conditions under which and the purpose for which the monies were received; the names of the trustees or administrators of the monies or contributions.

There can be no argument that all the records pertaining to the Arizona Audit are covered here. And the Arizona Public Records makes explicit that any such records are de facto public records.

Arizona's Public Records Law requires public bodies to maintain records of expenditures, and makes those records open to public inspection.

In view of the 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." *Id.* (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).

If any part of this request is denied, please cite the specific exemptions under the law that you think justifies your refusal to release the information and inform us of your administrative appeal process.

While the law allows you to charge for the actual cost of copying these documents, we request that you waive any such fee since we are reporters working for a newspaper, which is not considered a commercial enterprise under the law.

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Should you feel the need to charge for this request, we would ask that you inform us of any charge prior to making copies.

Be advised that we are prepared to pursue whatever legal remedy necessary to obtain the requested records.

We again ask that you respond to this request within the next 10 days. Should you have any questions, please call Robert Anglen at 602-316-8395.

Sincerely,

Robert Anglen
Consumer Investigations
The Arizona Republic | azcentral | The USA Today Network
602-316-8395
Robert.anglen@arizonarepublic.com

Andrew Oxford
State Capitol Reporter
The Arizona Republic | azcentral | The USA Today Network
480-417-8946
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Jen Fifield
Phoenix/ Maricopa County Reporter
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602-444-8763
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# 8

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June 2, 2021

*Via E-Mail (kbazsos@gmail.com)*

Ken Bennett
kbazsos@gmail.com

Re: Phoenix Newspapers, Inc./Access: Request to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Bennett:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com ("PNI"). On PNI's behalf, I write pursuant to A.R.S. § 39-121, *et seq.* (the "Arizona Public Records Law") to inspect public records you have received or generated while performing your duties as an appointed public officer in connection with the Arizona Senate's audit of Maricopa County ballots from the 2020 election. This time-sensitive request to inspect public records is made for a non-commercial, newsgathering purpose.

The requested records include:

- All communications that you received or sent while performing your Senate-appointed duties regarding the audit from January 1, 2021, to the present, including all communications regarding the audit involving you and any member, officer, employee or agent of the Arizona Senate or any person involved in the performance of the audit, including any officer, employee or agent of Cyber Ninjas, Wake Technology Services, CyFIR or any other corporate entity involved. As used here, "communications" should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.

- All invoices and financial documents reflecting work performed, services rendered or goods delivered, rented or used in connection with the audit and all records of any payments to any person or corporate entity in connection with the audit.

- All other documents regarding the performance of your duties, or the duties of others, in connection with the audit.

PNI recognizes that this may involve a substantial amount of information. However, I understand that counsel for the Arizona Senate and President Fann have indicated that you have agreed to preserve and produce such records in connection with public records requests to the Senate from PNI and other parties. Accordingly, I look forward to your response to this request within ten (10) days, which should suffice as reasonably prompt under the statute.

The Arizona Public Records Law 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 "evince[s] a clear policy favoring disclosure." *Carlson*, 141 Ariz. at 490. The statute "defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).

The Arizona Public Records Law applies in this instance because you are a "public officer" within the meaning of A.R.S. § 39-121.01 as the liaison appointed by the Arizona Senate in connection with the audit. The statute requires public officers to maintain "all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." *Id.* § 39-121.10(B); *see also Carlson v. Pima County*, 141 Ariz. 487, 491 (1984) (Arizona Public Records Law "requires the keeping of records sufficient to provide the public with 'knowledge' of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty"). In view of the 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 inspections as public records." *Carlson*, 141 Ariz. at 491 (emphasis added).

The audit is a core governmental function being performed on behalf of the Arizona Senate and funded in part by an expenditure of state taxpayer funds. Nothing is more fundamental to the operation of state government than the administration and oversight of elections. Any activity you undertook pursuant to your appointment by the Arizona Senate was, therefore, a governmental duty that must have the greatest possible transparency to the public. If one purpose of the audit is to reinforce public confidence in the elections process, then maximum transparency is not only required by state law, it is also necessary to fulfil the purpose of the entire exercise.

Overcoming the presumption in favor of disclosure requires the production of 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 (1993). *See also Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The burden cannot be met through speculation or "argu[ing] in global generalities of

the possible harm that might result from release." *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub'g Co. v. Pima County Attorney's Office.* 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm also must outweigh the public's strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) ("[t]he public's right to know any public document is weighty in itself.").

Because of the urgent need to inform the public about the operations of the audit, please notify me immediately if you intend to decline this request in whole or in part so that PNI can prepare for litigation. Should litigation ensue, Arizona law provides for an award of attorneys' fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; 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."). Of course, PNI hopes that litigation can be avoided by the prompt and complete compliance with the Arizona Public Records Law by the public bodies and officers involved in the audit.

I look forward to hearing from you or your counsel.

Respectfully requested,

David J. Bodney

DJB/MEK

# 9

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bodneyd@ballardspahr.com

June 2, 2021

*Via E-Mail (rpullen@gmail.com)*

Randy Pullen
rpullen@gmail.com

Re: Phoenix Newspapers, Inc./Access: Request to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Pullen:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com ("PNI"). On PNI's behalf, I write pursuant to A.R.S. § 39-121, *et seq.* (the "Arizona Public Records Law") to inspect public records you have received or generated while performing your duties as a public officer in connection with the Arizona Senate's audit of Maricopa County ballots from the 2020 election. This time-sensitive request to inspect public records is made for a non-commercial, newsgathering purpose.

The requested records include:

- All communications that you received or sent while performing your Senate-appointed duties regarding the audit from January 1, 2021, to the present, including all communications regarding the audit involving you and any member, officer, employee or agent of the Arizona Senate or any person involved in the performance of the audit, including any officer, employee or agent of Cyber Ninjas, Wake Technology Services, CyFIR or any other corporate entity involved. As used here, "communications" should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.

- All invoices and financial documents reflecting work performed, services rendered or goods delivered, rented or used in connection with the audit and all records of any payments to any person or corporate entity in connection with the audit.

- All other documents regarding the performance of your duties, or the duties of others, in connection with the audit.

I look forward to your response within ten (10) days, which should suffice as reasonably prompt under the statute.

The Arizona Public Records Law 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 "evince[s] a clear policy favoring disclosure." *Carlson*, 141 Ariz. at 490. The statute "defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).

The Arizona Public Records Law applies in this instance because you are a "public officer" within the meaning of A.R.S. § 39-121.01 as the liaison appointed by the Arizona Senate in connection with the audit. The statute requires public officers to maintain "all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." *Id.* § 39-121.10(B); *see also Carlson v. Pima County*, 141 Ariz. 487, 491 (1984) (Arizona Public Records Law "requires the keeping of records sufficient to provide the public with 'knowledge' of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty"). In view of the 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 inspections as public records." *Carlson*, 141 Ariz. at 491 (emphasis added).

The audit is a core governmental function being performed on behalf of the Arizona Senate and funded in part by an expenditure of state taxpayer funds. Nothing is more fundamental to the operation of state government than the administration and oversight of elections. Any activity you undertook pursuant to your appointment by the Arizona Senate was, therefore, a governmental duty that must have the greatest possible transparency to the public. If one purpose of the audit is to reinforce public confidence in the elections process, then maximum transparency is not only required by state law, it is also necessary to fulfil the purpose of the entire exercise.

Overcoming the presumption in favor of disclosure requires the production of 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 (1993). *See also Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The burden cannot be met through speculation or "argu[ing] in global generalities of the possible harm that might result from release." *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub'g Co. v. Pima County*

*Attorney's Office.* 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm also must outweigh the public's strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) ("[t]he public's right to know any public document is weighty in itself.").

Because of the urgent need to inform the public about the operations of the audit, please notify me immediately if you intend to decline this request in whole or in part so that PNI can prepare for litigation. Should litigation ensue, Arizona law provides for an award of attorneys' fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; 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."). Of course, PNI hopes that litigation can be avoided by the prompt and complete compliance with the Arizona Public Records Law by the public bodies and officers involved in the audit.

I look forward to hearing from you or your counsel.

Respectfully requested,

David J. Bodney

DJB/MEK

# 10

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June 2, 2021

*Via E-Mail (dlogan@cyberninjas.com) and U.S. Mail*

Cyber Ninjas Inc.
Doug Logan, CEO
5077 Fruitville Road
Ste. 109-421
Sarasota, FL 34232

Re: Phoenix Newspapers, Inc./Access: Request to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Mr. Logan:

This firm represents Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com ("PNI"). On PNI's behalf, I write pursuant to A.R.S. § 39-121, *et seq.* (the "Arizona Public Records Law") to inspect public records Cyber Ninjas Inc. has received or generated while performing its duties in connection with the Arizona Senate's audit of Maricopa County ballots from the 2020 election (the "Audit"). This time-sensitive request to inspect public records is made for a non-commercial, newsgathering purpose.

The requested records include:

- all financial records related to the Audit, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts and records of all payments or donations for such Audit-related work;

- all communications regarding the performance, funding and/or staffing of the Audit between or involving any officer, director, employee or agent of Cyber Ninjas and:

    - any member of the Arizona Senate or any employee or agent communicating on behalf of any Senator;

    - any "liaison" for the Arizona Senate or any Senator, including Ken Bennett and Randy Pullen, or anyone communicating on their behalf;

- any member of the Maricopa County Board of Supervisors, Maricopa County Recorder Steven Richer, Maricopa County Sheriff Paul Penzone or anyone communicating on their behalf;

- member of the Arizona House of Representatives Mark Finchem and former member of the Arizona House of Representatives Anthony Kern, or anyone communicating on their behalf;

- any member of the United States Congress who represents an Arizona congressional district, or anyone communicating on their behalf;

- former U.S. President Donald Trump or anyone communicating on his behalf; and

- Christina Bobb of One America News Network, or anyone communicating on her behalf.

As used here, "communications" should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Signal, Wickr, Twitter, SnapChat, Facebook, Parler, or Telegram.

- all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any subcontractor, including without limitation Wake Technology Services, Inc., CyFir LLC and Strat Tech Solutions LLC; and

- all communications regarding the performance, funding and/or staffing of the Audit between any officer, director, employee or agent of Cyber Ninjas and any officer, director, employee or agent of any contractor engaged by Maricopa County, including without limitation Pro V&V and SLI Compliance.

I look forward to your response within ten (10) days, which should suffice as reasonably prompt under the statute.

The Arizona Public Records Law 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 "evince[s] a clear policy favoring disclosure." *Carlson*, 141 Ariz. at 490. The statute "defines 'public records' broadly

and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).

The Arizona Public Records Law applies to this particular request because Cyber Ninjas is operating as an instrumentality of the Arizona Senate in performing a core governmental function: namely, a review of the ballots cast in Maricopa County for the 2020 election. *See* A.R.S. § 39-121.01(A). The stated intent by the Senate leaders who commissioned the Audit was that the contractor they hired would "perform everything we have required in the subpoenas." *See* https://www.azsenaterepublicans.com/post/statement-from-senate-republicans-on-court-filing-by-maricopa-county-board-of-supervisors.

The Audit is a core governmental function being performed on behalf of the Arizona Senate and funded in part by an expenditure of state taxpayer funds. Nothing is more fundamental to the operation of state government than the administration and oversight of elections. Any activity Cyber Ninjas has taken pursuant to its contract with the Arizona Senate is, therefore, a governmental duty that must have the greatest possible transparency to the public. If the Audit is meant to reinforce public confidence in the elections process, then maximum transparency is not only required by state law, it is also necessary to fulfil the Audit's purpose. Simply put, Cyber Ninjas is subject to this particular request under the Arizona Public Records Law because it is doing *government* work, directed by *government* officials, and paid for, at least in substantial part, with *government* funds.

The Arizona Public Records Law requires public officers and public bodies to maintain "all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." *Id.* § 39-121.10(B); *see also Carlson v. Pima County*, 141 Ariz. 487, 491 (1984) (Arizona Public Records Law "requires the keeping of records sufficient to provide the public with 'knowledge' of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty"). In view of the 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 inspections as public records." *Carlson*, 141 Ariz. at 491 (emphasis added).

Overcoming the presumption in favor of disclosure requires the production of 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 (1993). *See also Lake v. City of Phoenix*, 222 Ariz. 547, 549-50 (2009). The burden cannot be met through speculation or "argu[ing] in global generalities of the possible harm that might result from release." *Cox*, 175 Ariz. at 14. Rather, nondisclosure must be supported by a specific, concrete factual basis capable of justifying an exception to the usual rule of full disclosure of public records. *See, e.g., Star Pub'g Co. v. Pima County Attorney's Office.* 181 Ariz. 432, 434 (App. 1994) (party opposing disclosure must demonstrate a factual basis why a particular record ought not to be disclosed). Any such harm

also must outweigh the public's strong right of access to public records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 (App. 2001) ("[t]he public's right to know any public document is weighty in itself.").

Because of the urgent need to inform the public about the operations of the Audit, please notify me immediately if you intend to decline this request in whole or in part so that PNI can prepare for litigation. Should litigation ensue, Arizona law provides for an award of attorneys' fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; 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."). Of course, PNI hopes that litigation can be avoided by the prompt and complete compliance with the Arizona Public Records Law by the public bodies and officers involved in the Audit, including their agents.

I look forward to hearing from you or your counsel.

Respectfully requested,

David J. Bodney

DJB/MEK

Cc: Kory Langhofer
Norman Moore
Rod Thomson
Dennis Wilenchik

# 11

John "Jack" D. Wilenchik, Esq.

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June 11, 2021

**VIA EMAIL ONLY**

David Bodney
bodneyd@ballardspahr.com

Re: Cyber Ninjas

David:

Thank you for your letter dated June 2nd. As you know, this law firm represents Cyber Ninjas, Inc. (hereinafter referred to as "CNI").

Your letter, which was directed to CNI, purports to be a request for inspection of public records under A.R.S. § 39-121 (the "Public Records Law").

However, it is apparent from a reading of A.R.S. §§ 39-121 *et seq.* that requests for inspection of public records should be directed to an "officer or public body" – and/or, that any action for wrongful denial of access to public records may only be filed against an "officer or public body." A.R.S. § 39.121.02(C)("[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action *against the officer or public body* for any damages resulting from the denial")(emphasis added); *see also e.g.* A.R.S. § 39-121 ("[p]ublic records and other matters *in the custody of any officer* shall be open to inspection...")(emphasis added); A.R.S. § 39-121.01(B)("[a]ll officers and public bodies shall maintain all records...")

CNI is not an "officer" within the definition of A.R.S. § 39-121.01(A)(1), nor is it a "public body" within the definition of A.R.S. § 39-121.01(A)(2). The foregoing statute provides that "officer" means "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." CNI is not a person elected or appointed to hold any elective or appointive office of a public body, etc. "Public body" is defined as "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." CNI is clearly not the "state" or a "political subdivision," etc.; nor is it a "public organization or agency..." It is a private contractor.

Therefore, your letter was not properly directed to CNI. Moreover, your client may not file an action against my client under A.R.S. § 39.121.02. In the event that your client files such an action against CNI, then please consider this letter to be my client's advance notice that it deems such an action to be groundless under the statute and will demand that it be withdrawn under Rule 11, as well as seek its attorneys' fees and costs as appropriate.

Finally, in accordance with the above analysis, CNI will not be producing any records in response to the letter. Please feel free to contact my office with any questions.

Sincerely,

John "Jack" D. Wilenchik, Esq.

# 12

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June 4, 2021

*Via E-Mail (kory@statecraft.com; nmoore@azleg.gov,) and U.S. Mail*

Kory Langhofer
Statecraft PLLC
649 North Fourth Avenue, First Floor
Phoenix, AZ 85003

Norm Moore, Public Records Attorney
Arizona State Senate
1700 West Washington Street
Phoenix, Arizona 85007-2809

Re: Phoenix Newspapers, Inc./Access (Arizona Senate): Right to Inspect Public Records Relating to Maricopa County Ballot Audit

Dear Kory and Norm:

I write to follow up on our telephone conversation yesterday afternoon regarding the April 22, May 27 and June 2 public records requests by Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and azcentral.com ("PNI"). Again, thank you both for taking the time to talk with my colleague, Matt Kelley, and me about these issues.

This letter addresses three main topics of our discussion.

*First*, you had asked me to provide suggested language for a records retention request from the Arizona Senate and Pres. Fann to the audit "vendor" and "sub-vendors" that would encompass what, in our view, are public records. Here is that language:

> Please preserve all documents and communications related to the funding, performance, and staffing of the audit, including without limitation all contracts, agreements, invoices, receipts, and other records of payments or donations made or received in connection with the audit; all communications with any current or former elected officials regarding the audit; all records regarding all persons involved in performing any task related to the audit, whether a volunteer, employee, agent or independent contractor, including their

tasks assigned or performed; and any documents reflecting performance standards and reviews.

We believe the foregoing document retention directive would provide clear guidance to the vendor and sub-vendors and enable them to maintain and preserve documents that the Senate would be obliged to preserve as part of this governmental activity. We believe such a directive is essential, especially in light of the Senate's current position: namely, its decision *not* to make responsive records in the possession of its vendor and sub-vendors available for inspection and copying absent a court order.

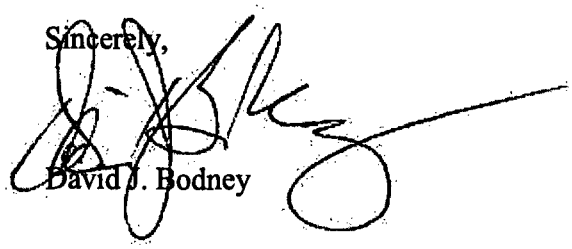
*Second*, in our discussion regarding the volume of emails responsive to PNI's records requests, you said that the vast majority of emails to members of the Senate, perhaps numbering in the hundreds of thousands, are from constituents voicing their varying opinions regarding the election audit. You asked if PNI wanted copies of all of those emails, or whether PNI would agree to narrow its requests in some fashion. I appreciate your candor and willingness to assist PNI in prioritizing the records that may be the most newsworthy. To that end, PNI has a few alternative proposals to consider. One, we could prioritize production of audit-related Senate emails to or from any current or former elected officials (or their agents), and to or from any other persons with direct roles in the audit (*e.g.*, Cyber Ninjas employees). Two, as an alternative, the Senate could provide a list of the senders and recipients of each email, so we could identify which emails our client most urgently wants to review. Three – and this could be done regardless of which other options are chosen – you could start processing and producing the outgoing messages from the Senators and circle back to the incoming ones next. All of these proposals come with the caveat that PNI reserves its right to secure access to all responsive records as promptly as possible. Please let us know which of these proposals would be an acceptable way to prioritize the Senate's response to PNI's requests.

*Third*, to avoid any confusion down the road, I want to set forth my understanding of the key points of our discussion yesterday. You said that because of the large number of both public records and requests for them, the Senate plans not to respond specifically to those requests but instead to create an online "reading room" where it will post public records regarding the vote audit. You indicated that you would make records available on a rolling basis as they have been reviewed for responsiveness and privilege. You also said that, although you do not concede they are subject to the public records law, you have asked Ken Bennett and Randy Pullen to provide audit-related communications for your review, and you will provide all such responsive, non-privileged records to the reading room. You stated that Mr. Bennett provided two sets of documents, and that you had reviewed the first set but had not had the opportunity to review the second; you said you hoped to have the review of the full complement of Mr. Bennett's documents completed by the end of next week (i.e., June 11). I assume they would then be posted in the reading room, with other records, for inspection and copying.

I also confirmed with my client that their journalists have received a copy of the lease agreement between the Senate and the State Fairgrounds for use of the Coliseum, the contract between the Senate and Cyber Ninjas and a screenshot evidencing the Senate's payment of the first $50,000 owed to Cyber Ninjas. Thank you for bringing those facts to our attention. You also agreed that you would produce to us – or at least post in the reading room – those documents that the Senate and Cyber Ninjas provided to the Arizona Democrats, Secretary of State Hobbs and other parties in that litigation (e.g., policies and procedures, including a counting policy and, if available, an HR policy). Please let me know when copies of those records will be available to PNI.

I look forward to hearing from you and continuing our dialogue.

Sincerely,



David J. Bodney

DJB/MEK

# APPENDIX 2

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*Attorneys for Defendant Cyber Ninjas, Inc.*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

**PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO,**

**Plaintiffs,**

**vs.**

**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.;**

**Defendants, and**

**CYBER NINJAS, INC.,**

**Real Party in Interest.**

**Case No.: LC2021-00180-001**

**MOTION TO DISMISS**

**(Oral Argument Requested)**

**(Assigned to Judge Hannah[1])**

[1] Defendant has filed a Notice of Change of Judge and Affidavit of Bias and Prejudice to remove Judge Hannah from this case, which is presently on appeal. By filing this Motion, Defendant does not waive its position that this action must be immediately transferred to another division.

Defendant Cyber Ninjas, Inc. ("Defendant," or "CNI"), by and through undersigned counsel, hereby files this Motion to Dismiss with prejudice the Complaint filed against it by Plaintiffs Phoenix Newspapers, Inc. and Kathy Tulumello ("Plaintiffs," "PNI" or "The Arizona Republic").

This is an action that The Arizona Republic filed under A.R.S. § 39-121.02, claiming wrongful denial of access to public records by a public officer or public body. However, Defendant is neither of those things; it is a private contractor that was hired by the President of the Arizona State Senate. (See paragraph 8 of the Complaint: "Defendant/Real Party in Interest Cyber Ninjas, Inc., a corporation organized under the laws of the state of Florida, was engaged by the Arizona Senate to conduct the Senate's audit of ballots in Maricopa County in the 2020 election.") As explained below, there is no good-faith argument under the plain wording of the statutes that Cyber Ninjas is a public "officer" or "public body" that can be sued for wrongful denial of access to public records under A.R.S. § 39-121.02. Plaintiff's Complaint vaguely argues that Defendant is subject to being sued for public records because it is an "agent" of the Senate ("performing a core government function") and because it is being paid by the Senate (see Complaint at paragraphs 8, 10, and 50); but this argument has absolutely no legal or statutory basis whatsoever. Further, if Plaintiffs were correct, then it would subject every single employee or contractor of the State – including hard-working people like the staff of this Court, peace officers, firefighters, etc. – to having to respond to public records requests and being sued for denial of access. This is plainly not how the statutes read. As discussed below, the statues clearly define the persons or entities subject to a records request – i.e. a "officer" and "public body" – as consisting only of elected or appointed officials or chief administrative officers, chairmen, "head[s]," "director[s]," and "supervisors[s]" of a "public body" (and "public bod[ies]" consist of the State and "public organization[s] or agenc[ies]" that receive taxpayer funds). *See* A.R.S. § 39-121.01(A)(1), (A)(2), discussed *infra*. A private contractor like Defendant is clearly none of these things; and to hold otherwise would be to subject every government contractor to having to form their own public records departments, and/or suffer liability for not "promptly"

responding to intensive records requests from literally any member of the public. This is plainly not allowed by the statutes, and Plaintiffs' argument is groundless.

As Plaintiffs acknowledge, Defendant expressly warned Plaintiffs about this issue in a letter dated June 11th (to which Plaintiffs did not respond) and told Plaintiffs that if they named Defendant in an action for wrongful denial of access to public records (and did not promptly withdraw the claims), then Defendant would seek its fees and costs. Defendant therefore seeks not only dismissal with prejudice of the claims against it but also reserves the right to seek its attorneys' fees and costs pursuant to Rule 11, A.R.S. §§ 12-349, 12-341, or any other applicable authority, pursuant to Rule 54(g). A short memorandum follows, concerning the legal authorities at issue.

***The Public Records Statues***

The public records laws are contained at A.R.S. §§ 39-121 *et seq.*

First, A.R.S. § 39-121 provides 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."

Second, A.R.S. § 39-121.01(A)(1) defines "officer" as: "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." Defendant is clearly none of these things, as Plaintiffs admit. Plaintiffs merely allege that Defendant is an "agent" of a public body – which is to say, Defendant is not even an employee of a public body, and certainly far less than an "officer"/administrator. To quote the Arizona Supreme Court: "[a]n 'office' is defined as 'an employment on behalf of the government in any station of public trust not merely transient, occasional, or incidental.' It is a 'special trust or charge created by competent authority.' The officer is distinguished from the employee in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of being called to account as a public offender for misfeasance or nonfeasance in office and usually, though not necessarily, in the tenure of his position.'" *Winsor v. Hunt*, 29 Ariz. 504, 519, 243 P. 407, 412 (1926). Defendant – which again is merely a private contractor, as Plaintiffs admit – is not even an employee of the State, much less a tenured, oath-taking "officer."

The public-records request statute therefore clearly does not apply to Defendant, and Plaintiffs' demand that Defendant respond to a public records request is frivolous.

Since A.R.S. § 39-121 only provides that an "officer" must respond to a public records request, and Defendant is clearly not an "officer" of a public body within the meaning of the statute, then that ends the analysis. But if for no reason other than academic interest: the definition of "public body" is also contained at A.R.S. § 39-121.01(A)(2), which provides that "public body" means: "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." Part of the Plaintiffs' argument – specifically, their argument that Defendant must honor a public records request because it is getting paid by the State – sort of recalls the last phrase in this definition of a "public body" –i.e., the part which says "supported in whole or in part....or expending moneys provided by this state..." But that phrase plainly applies only to "any public organization or agency" – which again, Defendant is not.[2] And again, public-records requests must be directed to an "officer" within the meaning of A.R.S. §§ 39-121, 39-121.01(A)(1), which we have already established that Defendant is not.

Finally, A.R.S. § 39-121.02(A),(C) state that "[a]ny person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." And "[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial." But again, Defendant is not an officer or public body within the meaning of these statutes; nor was Plaintiff's

[2] The relevant definition for "agency" in Black's Law is "[a] governmental body with the authority to implement and administer particular legislation. Also termed *government agency*; *administrative agency*; *public agency*; *regulatory agency*."

public-records request to Defendant made "pursuant to this article," since the request was not directed to a public officer within the meaning of these statutes.

**Conclusion**

For the foregoing reasons, Defendant asks the Court to dismiss the claims against it with prejudice. Pursuant to Rule 54(g)(1), Defendant expressly reserves the right to seek its attorneys' fees and costs against Plaintiffs.

**RESPECTFULLY SUBMITTED** this 27th day of July, 2021.

**WILENCHIK & BARTNESS, P.C.**

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Jordan C. Wolff, Esq
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*Attorneys for Defendant Cyber Ninjas, Inc.*

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**ORIGINAL** of the foregoing filed on July 27, 2021 with the Clerk of the Maricopa County Superior Court

**COPY** of the foregoing hand-delivered on July 27, 2021 to the Honorable Judge John Hannah.

**COPY** of the foregoing emailed on July 27, 2021 to:

Kory Langhofer, Esq.
Thomas Basile, Esq.
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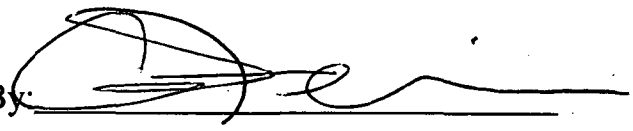
By: 

# APPENDIX 3

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO,

Plaintiffs,

vs.

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; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.,

Defendants, and

CYBER NINJAS, INC.,

Real Party in Interest.

NO. LC2021-000180-001

**PLAINTIFFS' RESPONSE IN OPPOSITION TO (1) SENATE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND (2) CYBER NINJAS' MOTION TO DISMISS, AND PLAINTIFFS' REPLY IN SUPPORT OF THEIR APPLICATION FOR ORDER TO SHOW CAUSE**

(Oral Argument Set: August 23, 2021, at 9:30 a.m.)

(Assigned to the Honorable John Hannah)



Preliminary Statement

When the Arizona Senate launched its recount of the nearly 2.1 million ballots cast in Maricopa County last November and hired Cyber Ninjas, Inc. to run the audit, Senate President Karen Fann promised a "transparent" audit that would boost public confidence in the electoral process. But when asked to keep that promise – and comply with the Arizona Public Records Law, A.R.S. § 39-121, *et seq.* – the response from Senate leaders and Cyber Ninjas has been to deflect, delay and deny. They deflect, saying the records sought by Plaintiffs (the "Records") are in the hands of a "private" company, and therefore

are nobody's business but Cyber Ninjas'. They delay, arguing the Senate Defendants have no duty to ask Cyber Ninjas for the Records. They deny, rejecting the public's right to inspect and copy *any* records held by Cyber Ninjas of (a) communications between Cyber Ninjas and government officials relating to the audit, or (b) financial records about who besides Arizona taxpayers is footing the bill for, or assisting with, this exercise of legislative power. Indeed, these Defendants deny the authority of this Court to adjudicate whether the public is entitled to see these Records under the law.

Since Plaintiffs filed this special action, Defendants' briefs and events outside this litigation have clarified the issues before this Court. As for Defendants' briefs, Cyber Ninjas and the Senate Defendants have told this Court:

- Cyber Ninjas "estimates" it has "around" 60,000 "digital communications" in its "system" that are potentially responsive to Plaintiffs' public records requests, and to the requests of other, unrelated requestors, *see* Cyber Ninjas' Response to Application for Order to Show Cause ("Cyber Ninjas' Resp.") at 3;
- Despite requests from Plaintiffs and other parties under the Public Records Law, the four named Senate Defendants ("Senate Defendants") have affirmatively chosen *not* to ask Cyber Ninjas to turn over potentially responsive records to the Senate – and President Fann, as "steward" of the Senate's interests, will *not* do so unless ordered by a court, *see* Senate Defendants' Motion for Judgment on the Pleadings ("Senate Defs.' Mot.") at 9; and
- Senate Defendants consider Cyber Ninjas and its subcontractors to be their "authorized agents" for the "collection, review and analysis of data and information at the behest and on the behalf of elected Arizona legislators to facilitate the quintessential lawmaking function of crafting legislative proposals," *id.* at 17.

Further, Superior Court Judge Michael Kemp has issued two rulings in a separate case brought by another requestor seeking access to similar audit records. *See* Minute Entries, *American Oversight v. Fann*, No. CV 2021-008265 (Ariz. Super. Ct. Maricopa Cty., dated July 14, 2021) (the "July 14 *AO* Order," attached hereto as Exhibit A); *Id.* dated Aug. 2, 2021 (the "August 2 *AO* Order," attached hereto as Exhibit B). While those rulings are not binding, PNI submits that Judge Kemp's reasoning regarding some of the overlapping issues in favor of public access is persuasive. *See* Sections I, II and VI, *infra.*

Defendants' admissions and these other recent developments put into sharp relief one important issue here: namely, whether Cyber Ninjas, which is *not* a party to the *American Oversight* litigation, may be compelled *by this Court* to preserve, protect and

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ultimately produce public records in its custody for prompt public inspection and copying, as required by the Arizona Public Records Law, where Senate Defendants have abdicated, if not scorned, their legal obligations to do so.

All Defendants assert that the Public Records Law does not apply to Cyber Ninjas, which they characterize as "merely a private contractor." *See, e.g.,* Cyber Ninjas' Motion to Dismiss ("Cyber Ninjas' Mot.") at 2-3. Cyber Ninjas' arguments begin and end there. Senate Defendants go much further, arguing, first, that no documents in Cyber Ninjas' hands could possibly be public records because the Senate does not have them and will not ask for them. *See* Senate Mot. at 3-11. Next, Senate Defendants take the remarkable position that they and Cyber Ninjas are "immune" from this special action altogether under the Arizona Constitution's Speech or Debate clause. *See id.* at 11-17.

Senate Defendants' Motion should be denied because regardless of whether Cyber Ninjas has *physical* custody of public records concerning the audit, the Senate has a *legal* duty under the Public Records Law to maintain, preserve and provide those records for public inspection and copying. *See, e.g.*, A.R.S. §39-121.01(B); *Lake v. City of Phoenix*, 222 Ariz. 547, 550 (2009). Their Motion also fails because "legislative immunity" is inapplicable to this statutory special action, which seeks to hold Senate Defendants to their ministerial, statutory duties to comply with the Arizona Public Records Law. Likewise, Cyber Ninjas' Motion to Dismiss should be denied because it too is subject to the Public Records law, whether it is seen as the "custodian" of these Records, or as a "public official," appointed to head up the Senate's tax-supported audit, or both, according to the statute's terms. Finally, because none of these Defendants has identified any triable issues of fact, as required by this Court's July 16, 2021 Order, this Court should grant PNI's Application and order them to produce the Records[1] forthwith.

[1] In their Complaint, Plaintiffs focused on those records in Cyber Ninjas' possession that are responsive to Senate Requests A and B and the request to Cyber Ninjas. *See* Compl. ¶ 54. However, Plaintiffs expressly reserved the right to secure records in the Senate Defendants' physical possession responsive to Requests A and B *if* the Senate Defendants did *not* honor their counsel's estimate that those records would be disclosed publicly by July 15. *Id.* Although Senate Defendants have posted some records to their online "reading room," the number of records provided is a small fraction of the number of documents Senate Defendants' said were being reviewed. *See id.* ¶¶ 53-54. (cont.) Accordingly, the

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## I. SENATE DEFENDANTS HAVE A LEGAL DUTY TO MAINTAIN, PRESERVE AND PRODUCE THE PUBLIC RECORDS AT ISSUE.

Senate Defendants attempt to wash their hands of any statutory duty to maintain, preserve and provide access to public records regarding the vote audit. They argue: Cyber Ninjas has physical possession of the Records; the Records are not in the Senate's "custody"; and, therefore, Records of their audit exist beyond the reach of the Public Records Law. Their argument fails for many reasons.

### a. Legal Custody of Public Records Is Not Limited to *Physical* Custody.

Senate Defendants cite no authority that limits Arizona's Public Records Law to only those records in the physical possession of a government entity or official. To the contrary, the Arizona Supreme Court has repeatedly held that "documents with a 'substantial nexus' to government activities qualify as public records," and the "nature and purpose" of the documents, *not* the place where they are kept, determines their status. *Lake*, 222 Ariz. at 549 (internal citations omitted). For example, keeping government records in a database comingled with third-party data does not shield those documents from the Public Records Law. *Lake v. City of Phx.*, 220 Ariz. 472, 481, 207 P.3d 725, 734 (Ct. App. 2009), *vacated in part on other grounds,* 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009) (a public record "does not become immune from production simply by virtue of the method the [government] employs to catalogue the document"). Plainly, the Records bear a *substantial nexus* to *government activities*, and their *nature and purpose, being a publicly funded audit of the 2020 election*, support public disclosure.

Further illustrating that physical possession by the government is not necessary for a document to be a public record, the Arizona Court of Appeals 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, 418 P.3d 943, 952 (Ct. App. 2017). The fact that the individual employees, not the government, would have had physical custody of those records did not factor into the Court of Appeals' analysis. *Id.*

Court should order Senate Defendants to provide all public records responsive to Requests A and B in their possession as well as all those in Cyber Ninjas' possession that are responsive to Plaintiffs' requests.

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Senate Defendants try to distinguish *Lunney* by asserting it means only that government employees, as "officers" under the Public Records Law, "can have their work-related documents commandeered for production by their public body employer" pursuant to the statute. Senate Defs.' Mot. at 4. But if the Public Records Law applies only to records in the government's physical possession, as Senate Defendants argue, then an officer's work-related records cease to be public records once they are removed from government premises. That is *not* what the Arizona Court of Appeals held in *Lunney*, and that is *not* the law. *See Griffis v. Pinal Cnty*, 215 Ariz. 1, 4 ¶ 10 (2007) ("mere possession" of a document does not determine its public records status). Senate Defendants give no good reason why a government contractor performing an essential government function using public dollars should be treated differently from a government employee performing the same governmental function.

Embracing Senate Defendants' crabbed, illogical view of the Public Records Law would render it a nullity. They contend this law applies only when the government has *physical* possession of public records. If so, then public bodies could contract with vendors to store all of their electronic documents in the cloud, and all of their hard-copy records in off-site warehouses, and then deny every public records request they get because they lack "physical custody" of the records. Their view of the law would violate both clear statutory commands and the policy behind them. *E.g.*, *Carlson v. Pima Cty.*, 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984) ("access and disclosure is the strong policy of the law").

Judge Kemp previously rejected the identical argument made by three of these four Senate Defendants. *See* Ex. A at 3-4. Noting Senate Defendants' legal duty to maintain records related to the audit, Judge Kemp held that "actual physical possession of those records is not relevant for purposes of" the Public Records Law. *Id.* at 3. He continued:

> Nothing in the statute absolves Senate Defendants' responsibilities to keep and maintain records for authorities by public monies by merely retaining a third-party contractor who in turn hires subvendors. The plain text makes no such exception to exclude records maintained by these third-party service providers. Allowing the Senate Defendants to circumvent the PRL by retaining private companies to perform valid legislative and/or constitutional functions would be an absurd result and undermine Arizona's strong policy in favor of permitting access to records reflecting governmental activity.

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*Id.* at 3-4. Judge Kemp held that these Senate Defendants "have at least constructive possession of the documents in question." *Id.* at 4. PNI respectfully submits that this holding is correct as a matter of law, and this Court should hold the same in this case.

**b. <u>The Senate's View of its Contract with Cyber Ninjas Is Plainly Erroneous.</u>**

Senate Defendants claim that the only way they can be deemed to have custody of the Records is if the Senate is compelled to exercise its *indemnity* rights under its Master Services Agreement ("MSA") with Cyber Ninjas and demand that its contractor provide the records to the Senate. *See* Senate Defs.' Mot. at 9. This argument, too, fails. Months ago, the Senate could have compelled Cyber Ninjas to provide the Records, but it declined to do so. Instead, working hand in glove with Cyber Ninjas, the Senate has chosen to conceal these public records, making this action against *all* Defendants necessary.

To obfuscate the issue, Senate Defendants falsely argue that the only possible provision in the MSA that PNI could invoke is the indemnification clause in Section 15.4. *See* Senate Defs.' Mot. at 9. Senate Defendants claim that provision is not applicable here, because requiring Cyber Ninjas to share the requested records with the Senate for possible public disclosure is not "reasonably necessary to the defense or settlement of the claim[s]." *Id.* Senate Defendants assert that because Defendant Fann purportedly believes this indemnification provision has not been triggered, she "cannot and will not invoke any discretionary prerogative under Section 15.4 of the MSA." *Id.*

Senate Defendants, however, ignore a separate provision of the MSA – Section 18.5 – that *requires* Cyber Ninjas to "provide reasonable cooperation . . . in the event that either party is the subject of a claim, action or allegation regarding this Agreement or a party's actions taken pursuant to this agreement, including, but not limited to providing . . . documents needed for the defense of such claims." *See* Compl. Ex. 1 (MSA) § 18.5. This provision is *automatically* triggered here, because Senate Defendants (and Cyber Ninjas) have been subject to a claim and the requested Records are the very thing that caused this special action to be filed. As such, the Senate can demand that Cyber Ninjas provide the requested records to Plaintiffs, the Senate or this Court, for review and disclosure pursuant

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to the Arizona Public Records Law. *See, e.g., Carlson*, 141 Ariz. at 491 (approving redaction and *in camera* inspection as practical alternatives to wholesale denial).

Indeed, Senate Defendants take the remarkable position that they cannot be compelled to invoke Cyber Ninjas' contractual obligation to comply with their duties under the Public Records Law. *See* Senate Defs.' Mot. at 9-10. This argument is absurd. Compliance with the Public Records Law does not depend on the exercise of discretion to invoke a contractual option: rather, it is a mandatory, "ministerial" act, as Senate Defendants elsewhere admit. *See* Senate Defs.' Mot. at 10-11. The Senate cannot evade its legal obligations simply by signing a contract with a third party. *Cf. Moorehead v. Arnold*, 130 Ariz. 503, 505, 637 P.2d 305 (App. 1981) ("The promise of confidentiality standing alone is not sufficient to preclude disclosure. If the promise of confidentiality were to end our inquiry, we would be allowing a [government] official to eliminate the public's rights under A.R.S. [§] 39-121.") (citation omitted).

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**c. Senate Defendants Have an Independent Duty to Maintain and Make Available Their Public Records.**

Even if Senate Defendants were correct that Records are not public unless they are in the physical custody of an officer or public body (they are not), they still must maintain and release the public records at issue in this special action. The plain language of the Public Records Law states that public officers such as Defendants Fann, Petersen and Aceves, and public bodies such as the State Senate, "*shall maintain all records . . .* reasonably necessary or appropriate to maintain an *accurate knowledge* of their official activities and of *any of their activities that are supported by monies from this state*[.]" A.R.S. § 39-121.01(B) (emphasis added).[2]

> Moreover, the Arizona Public Records Law mandates an exacting duty of care:
>
> Each public body shall be responsible for the *preservation, maintenance and care of that body's public records*, and each officer shall be responsible for the *preservation, maintenance and care of that officer's public records*. It

[2] In *Lake*, quoting *Carlson*, the Arizona Supreme Court reiterated: "For purposes of inspection and access, all records required to be maintained by § 39-121.01(B) and preserved by (C) are to be available for inspection under § 39-121 and copying under § 39-121.01(D), subject to [overriding interests of "privacy, confidentiality, or the best interests of the state . . . ."]. 222 Ariz. at 550.

> shall be the duty of each such body to *carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction*, unless disposed of pursuant to [statute].

*Id.* § 39-121.01(C) (emphasis added). If Senate Defendants cannot themselves produce for inspection and copying the Records, their decision to allow Cyber Ninjas to keep and conceal such records violates their statutory duty to "carefully secure, protect and preserve" them, and to make them available to the public. *Id.* Thus, as one form of relief, Senate Defendants should be ordered to comply with their statutory duties and secure for public disclosure the Records they outsourced to Cyber Ninjas.[3] Because Senate Defendants have a clear legal duty to maintain, preserve and provide the public records at issue, their Motion for Judgment on the Pleadings must be denied.

## II. CYBER NINJAS IS SUBJECT TO THE PUBLIC RECORDS LAW BECAUSE IT IS AN OFFICIAL OF THE SENATE FOR PURPOSES OF THE AUDIT.

Both Cyber Ninjas and Senate Defendants assert that the Public Records Law does not apply to Cyber Ninjas because it is not an officer or public body pursuant to statute. *See* Senate Defs.' Mot. at 3-6; Cyber Ninjas' Mot. at 3-5. They are mistaken.

The Arizona Public Records Law defines an "officer" as "*any person* . . . appointed to hold *any* . . . *appointive office* of *any public body* and *any chief administrative officer, head,* director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1) (emphasis added). In other words, "officers" are those vested by a public body such as the Senate with supervisory authority over the performance of governmental functions.[4] The statute does *not* limit the definition of "officer" to natural persons, meaning that corporate persons such as Cyber Ninjas can be officers subject to the Public Records Law. *See* A.R.S.

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[3] Even if Cyber Ninjas were not directly responsible for compliance with the Public Records Law (and it is), this Court has the power to order Cyber Ninjas to provide records to Plaintiffs, and to this Court for *in camera* review if necessary, because Cyber Ninjas is named as both defendant and real party in interest in this action. *See infra* Section IV.

[4] Struggling to remove itself from the law's command, Cyber Ninjas relies on a nearly century-old Arizona Supreme Court opinion. Cyber Ninjas' Mot. at 3 (quoting *Winsor v. Hunt*, 29 Ariz. 504, 519, 243 P. 407, 412 (1926)). But *Winsor* is inapposite because it was not interpreting the specific definition of "officer" the Legislature enacted many decades later in the Arizona Public Records Law. As the Supreme Court more recently noted, *Winsor* "construed a since-replaced constitutional provision and did not purport to adopt a general definition of 'public office.'" *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 129, 136, 254 P.3d 367, 375 (2011).

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§ 1-215(28) (a statutory reference to a "person" "includes a corporation, company, partnership, firm, association or society, as well as a natural person").

Here, the Senate has hired Cyber Ninjas to lead the vote audit, and Defendant Fann publicly announced that Cyber Ninjas would be paid with *public* funds to head up this government activity. *See* Compl. ¶ 21; Answer ¶ 21. Its contract with the Senate states that Cyber Ninjas "will serve as the central point-of-contact and organizer of all work conducted over the course of" the agreement, which it describes as conducting "a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona." Compl. Ex. 2 at 1-2 (Statement of Work). Senate Defendants *admit* that Cyber Ninjas is their "authorized agent[]" for the "collection, review and analysis of data and information at the behest and on the behalf of elected Arizona legislators to facilitate the quintessential lawmaking function of crafting legislative proposals." Senate Defs.' Mot. at 17. In short, the Senate appointed Cyber Ninjas to perform the vote audit on the Senate's behalf. By definition, it is an "official" under the Public Records Law and therefore has a duty to maintain and provide public records regarding the audit. For this reason alone, Cyber Ninjas' Motion should be denied.

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## III. CYBER NINJAS IS THE SENATE'S *DE FACTO* CUSTODIAN OF AUDIT RECORDS.

Regardless of whether Cyber Ninjas meets the definition of public body or officer, it is subject to the Arizona Public Records Law, and the jurisdiction of this Court, because it is acting as the Senate's custodian of public records for the vote audit.

By its terms, the Public Records Law applies not only to public bodies and officers but also to "custodians" of public records. *See* A.R.S. §§ 39-121.01 (D)-(E); 39-121.03(A)-(C). By referring separately to officers, public bodies and custodians, the statute anticipates the possibility that, as a practical matter, the custodian of public records may be either a subordinate government employee, contractor or other person who is not an "officer" as defined by the statute. *See Carlson*, 141 Ariz. at 491, 687 P.2d at 1246 (an "officer *or* custodian" may invoke the "countervailing interests of confidentiality, privacy or the best

interests of the state" to withhold records) (emphasis added). As mentioned *supra*, Senate Defendants call Cyber Ninjas their "authorized agent[]" for conducting the vote audit, Senate Defs.' Mot. at 17, and they disavow Defendant Aceves' role as a records custodian, saying she has "no legal authority or control over the records at issue."[5] Senate Defendants' Motion to Transfer and Consolidate at 3, fn. 1. By allowing *Cyber Ninjas* to have physical custody of these essential public records, Senate Defendants have made Cyber Ninjas the *de facto* custodian of these records. As such, Cyber Ninjas must provide these records in response to PNI's request. A.R.S. § 39-121.01(D)-(E). Again, Cyber Ninjas' Motion to Dismiss should be denied.

## IV. CYBER NINJAS IS A PROPER PARTY TO THIS SPECIAL ACTION.

Cyber Ninjas asserts it is not a proper defendant because it is not a public body or official subject to the Public Records Law. Cyber Ninjas' Mot. at 4-5. Cyber Ninjas is properly before this Court, and subject to its jurisdiction, even apart from its status as an officer, records custodian, or both, as reasonably defined by the Public Records Law.

Parties who are not officials, public bodies or custodians may be joined as defendants in special actions pursuant to the Public Records Law. *Arpaio v. Citizen Publ'g Co.*, 221 Ariz. 130, 133 n.4, 211 P.3d 8, 11 n.4 (Ct. App. 2008) (in drafting the statute, "our legislature was aware that persons or organizations other than the requestor and custodian could be parties to an action under our public records law"). Indeed, not only may Cyber Ninjas be joined as a party regardless of its status as an officer or custodian, it can be held liable to pay Plaintiffs' legal fees should Plaintiffs prevail. The Court of Appeals held in *Arpaio* that a third party may be subject to the fee-shifting provision "when the third party engendered the dispute over access and is a party to the action." *Id.* 221 Ariz. at 134, 211 P.3d at 12. Such is the case with Cyber Ninjas here.[6]

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[5] Yet Defendant Aceves, as Senate Secretary, "shall have custody of all . . . "communications, or other measures, instruments and [Senate] papers, and shall be held strictly accountable for the safekeeping of same." (Senate Rule 3.B, Ex. C. hereto).

[6] Likewise, private parties may intervene in special actions under the Public Record Law to assert confidentiality. *See Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351-52 (App. 2001) (developer of AIMS test intervened to raise "trade secrets" argument against disclosure, unsuccessfully).

Further, naming Cyber Ninjas as a defendant and real party in interest was necessary to ensure Plaintiffs could obtain complete relief (and to ensure due process to Cyber Ninjas) in this special action. Because Senate Defendants refuse to exercise dominion over public records in Cyber Ninjas' physical possession, and because Cyber Ninjas disavows any duty to follow the Public Records Law, it is necessary to "secure, protect and preserve public records," A.R.S. §39-121.01.C, and to safeguard the public's right to inspect and copy them, A.R.S. §39-121.01.D. As such, this Court must order Cyber Ninjas to preserve, protect and produce these public records, whether to Plaintiffs directly or to this Court for immediate in camera review. The Court has the power to issue such an order – to require Cyber Ninjas to review the records, create a privilege log, if one be needed, and produce them – because Cyber Ninjas is rightly named as a defendant and real party in interest. For this reason as well, Cyber Ninjas' Motion to Dismiss should be denied.

## V. THE CLAIM THAT DISCLOSURE WOULD SUBJECT "EVERY" CONTRACTOR TO THE PUBLIC RECORDS LAW IS SPECIOUS.

Cyber Ninjas and Senate Defendants spin apocalyptic predictions of what would happen should Plaintiffs prevail. "[E]very single employee or contractor of the State," Cyber Ninjas says, "including hard-working people like the staff of this Court, peace officers, firefighters, etc.," would be required "to respond to public records requests and be[] sued for denial of access." Cyber Ninjas' Mot. at 2. Every government contractor, Cyber Ninjas continues, would have "to form their own public records departments, and/or suffer liability for not 'promptly' responding to intensive records requests from literally any member of the public." *Id.* at 2-3. Senate Defendants similarly assert that every "vendor of any state, county or local government agency or unit in Arizona will be swept under the auspices of the" Public Records Law, such that all of their documents with a substantial nexus to government activity "will be presumptively subject to indefinite preservation and ultimately disclosure as a public record." Senate Defs.' Mot. at 7.

Nonsense. The implications of Plaintiffs' arguments are nowhere near that broad. PNI's position is only that the Public Records Law applies in *this* circumstance, where

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Cyber Ninjas is performing an essential and exclusive government function, initiated and funded with public dollars, where the Senate lacks the ability to perform this core government activity itself. Cyber Ninjas is unlike any typical government contractor that provides the same goods or services to a governmental entity that it could provide to a nongovernmental customer. PNI is not contending that the Public Records Law would directly apply to such run-of-the-mill government contractors.

On the other hand, accepting Senate Defendants' contentions would permit them to continue to keep Arizonans in the dark about how and by whom the vote audit is being funded and performed, despite their pledges of transparency. And accepting Cyber Ninjas' contentions would allow it and any other corporation to exercise the powers of government without bothering with the statutory responsibilities that come with those powers, such as compliance with the Public Records Law. They cannot have it both ways.

## VI. NONE OF THE DEFENDANTS HAS LEGISLATIVE IMMUNITY.

Senate Defendants make the remarkable assertion that they and Cyber Ninjas have an all-encompassing, constitutional immunity from this (and presumably any other) special action. Senate Defs.' Mot. at 11-17. Whether legislative immunity applies is a question of law for the Court. *Mesnard v. Campagnolo*, No. CV-20-0209-PR, 2021 Ariz. LEXIS 238, at *8 (June 30, 2021). Here, it is clear that legislative immunity does *not* extend to shield every legislator and legislative body from compliance with non-discretionary, statutory mandates. The immunity claimed by Senate Defendants does not extend to this action, and the Senate's actions in refusing to comply with the Public Records Law are not discretionary legislative activities. Further, because the individual Defendant Senators are not immune, neither are the Senate, its Secretary, nor Cyber Ninjas.

### a. Legislative Immunity Is Inapplicable in Special Actions.

PNI agrees with Senate Defendants that special actions such as this one seeking compliance with the Public Records Law are a contemporary form of what in the past would have been a writ of mandamus. Senate Mot. at 10-11; *see also, e.g., Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370 ¶ 19, 295 P.3d 943 (2013) ("An

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action is in the nature of mandamus if it seeks to compel a public official to perform a non-discretionary duty imposed by law."). Because a public records special action like this one seeks a court order requiring the performance of a non-discretionary duty required by statute, legislative immunity is inapplicable.

Plaintiffs are unaware of any case in which the Arizona Supreme Court has applied legislative privilege in a mandamus case or its special action equivalent. To the contrary, the Court just last year forcefully rejected the argument Senate Defendants make here. Addressing the Arizona Board of Regents' claim that legislative immunity barred the Attorney General's special action against it, the Arizona Supreme Court said:

> This argument fundamentally misperceives the concept of legislative immunity, which is extended to shield individual officials from personal liability for their legislative acts. *It has nothing to do with shielding governmental entities from challenges to claimed illegal actions.*

*State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307, 314 (Ariz. 2020) (emphasis added). That ruling could not have been clearer, and it forecloses Senate Defendants' legislative immunity argument in this special action.

By footnote, Senate Defendants strain to distinguish this binding authority, asserting the holding in *Brnovich* is inapplicable because no individual members of the Board of Regents were defendants in that case. Senate Mot. at 12 n.7. All that means, however, is that the Supreme Court did not address the issue of whether an individual legislator would have immunity from a challenge to an allegedly illegal action. Even if individual legislators would be immune from a special action under the Public Records Law (and there is no reason to believe that is so), that has no practical relevance here. The Arizona Senate *is* a defendant in this case, and thus under the clear holding of *Brnovich* is *not* immune from this challenge to its failure to comply with the Public Records Law.

Attempting to dodge this fatal flaw, Senate Defendants misconstrue the Arizona Supreme Court's holding. *Brnovich* cannot apply here, they argue, because "confining all claims of legislative immunity or privilege to only disputes involving claims of monetary damages" would contravene "decades of federal and Arizona jurisprudence holding that

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the immunity encompasses all claims against legislators acting in the course of their duties." Senate Mot. at 12 n.7. But that is *not* what the Supreme Court did. Rather, the court held that legislative immunity does not apply in special actions challenging alleged failures to follow the law, not in all actions other than those seeking monetary damages. *Brnovich*, 476 P.3d at 314.[7]

Senate Defendants belatedly made a similar immunity argument in the *American Oversight* action in opposing entry of an order requiring production of the records at issue there. *See* Ex. B at 3-5. Judge Kemp rejected Senate Defendants' claim of blanket immunity, holding that the Speech or Debate clause in the Arizona Constitution did not apply. *Id.* at 5. He further ruled that Senate Defendants' "broad interpretation" of the immunity "would render the [Public Records Law] meaningless and unenforceable as to any legislator at any time under any circumstances," which "is surely not within the legislative intent of" the statute. *Id.*

**b. <u>Plaintiffs Do Not Seek to Hold Defendants Liable for Any Legislative Act.</u>**

The *Brnovich* holding is no anomaly. It simply reflects the well-defined limits of legislative immunity. As the Arizona Supreme Court recently reiterated, "[n]ot everything done by a legislator 'in any way related to the legislative process' is afforded absolute immunity as a legislative function." *Mesnard*, 2021 Ariz. LEXIS 238, at *9 (citation omitted). Legislative immunity applies to statements made in committee hearings and floor debate, as well as "to acts that are 'an integral part of the deliberative and communicative processes" by which the legislative body carries out its constitutionally authorized functions, "but 'only when necessary to prevent indirect impairment of such deliberations.'" *Id.* (citations omitted); *see also Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, 75 P.3d 1088, 1095 (Ct. App. 2003) (same). The immunity does *not* attach to "administrative matters" or "other activities incidentally related to legislative affairs but not a part of the legislative process itself." *Mesnard*, 2021 Ariz.

[7] The Arizona Supreme Court's ruling in *Brnovich* interpreted Arizona law, and thus controls even if it contradicts earlier precedents. Senate Defendants may disagree with *Brnovich*, but they cannot escape the fact that it is binding and dispositive precedent.

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LEXIS 238, at *11 (citations omitted); *see also State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 122-23, 290 P.3d 1226, 1245-46 (Ct. App. 2012).

Here, Senate Defendants themselves acknowledge that producing documents in response to a public records request is a "ministerial" act. Senate Defs.' Mot. at 11. But they sidestep any discussion of the limitations on legislative immunity, instead declaring that "whether and to what extent to release audit-related documents" is a legislative function for which they are immune. *Id.* at 13. Not so. The Public Records Law, not the whims of the Senate, individual senators or their agents, controls whether and to what extent these Defendants must release audit-related documents.

Plaintiffs agree that the vote audit is a legislative function, as Senate Defendants acknowledge. *See* Senate Defs.' Mot. at 13. But Plaintiffs are not challenging Defendants' *conduct* of the audit. Rather, the issue here is whether Senate Defendants complied with their non-discretionary, statutorily mandated duties to maintain and provide access to public records involving the audit. Legislative immunity plays no role here.

*Mesnard* does not compel a different result. There, an expelled former state representative sued the Speaker of the House for, among other things, allegedly defaming him in an investigative report the Speaker provided to lawmakers and the public. *Mesnard*, 2021 Ariz. LEXIS 238, at *11. The Arizona Supreme Court held that the Speaker's public release of the report was a legislative act because it was part of the constitutionally authorized expulsion process and because the Public Records Law authorized the report's release. *Id.* at *14-15. The Supreme Court noted that it was unclear from the record whether anyone actually requested access to the report under the Public Records Law. *Id.* at *15. *Mesnard* is inapposite because it involved a tort claim premised on the allegedly defamatory content of a House report released by the Speaker. It did not involve any claim that the Speaker had unlawfully withheld any records after receiving a public records request or otherwise failed to comply with any statutory obligation. This case involves no tort claim; it is a special action that seeks to compel Senate Defendants to fulfill their mandatory duties under the Public Records Law. *Mesnard* does not overrule the principle

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in *Brnovich* that legislative immunity does not shield governmental entities from challenges, such as this one, to allegedly illegal actions. *See Brnovich*, 476 P.3d at 314; *see also* August 2 *AO* Order at 5 (holding *Mesnard* inapposite because it involved a tort claim, not a special action).

Moreover, adopting Senate Defendants' boundless interpretation of legislative immunity would render legislators and legislatures "'super-citizens,' immune from responsibility" – a result that legislative immunity does not and was never intended to create. *Mesnard*, 2021 Ariz. LEXIS 238, at *9 (citation omitted). Senate Defendants' Motion should be denied because they are not "immune" from this special action.

### C. DEFENDANTS FAILED TO IDENTIFY ANY TRIABLE ISSUE OF FACT.

In its July 16, 2021 Minute Entry, this Court ordered:

> defendants to address, *in their responses to the Application*, the question whether Application [for Order to Show Cause] raises *any triable issues of fact*. If a defendant takes the position that the Court will have to resolve factual issues in order to adjudicate this matter fully, that defendant's response *shall specifically identify the issue(s)* as to which there is a good faith dispute, *with citations to the paragraphs of the Complaint* in which the plaintiff alleges the disputed facts.

Minute Entry at 2 (emphasis added).

*No Defendant has identified any triable issues of fact.* Rather, the Responses of both Cyber Ninjas and Senate Defendants speculate about what objections they *might* raise if the Court orders them to produce public records, but *they do not "specifically identify" the issues as to which there is a good faith dispute, nor do they provide "citations to the paragraphs of the Complaint" for any alleged factual dispute*. *See* Senate Defs.' Resp. at 3-4; Cyber Ninjas' Resp. at 3-6. It is too late for them to comply with the Order now.

Accordingly, there are no material facts in dispute and the question now before the Court is one of law. *See, e.g., Griffis v. Pinal Cty.*, 215 Ariz. 1, 3, 156 P.3d 418, 420 (2007) ("Whether a document is a public record under Arizona's public records law presents a question of law."). Any disputes premised on the content of the records, including whether any privileges apply or whether any records may be properly withheld, can be resolved in the event the Court enters an order requiring production of public records.

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## Conclusion

For all of the foregoing reasons, and for all of the reasons set forth in Plaintiffs' Application for Order to Show Cause, this Court should (a) deny Senate Defendants' Motion for Judgment on the Pleadings and Cyber Ninjas' Motion to Dismiss; (b) grant Plaintiffs' Application for Order to Show Cause; (c) order Defendants to produce copies of these public records forthwith; and (d) permit Plaintiffs' to file an application for award of its reasonable attorneys' fees incurred for having to file this action against Defendants to safeguard public records and enforce its statutory rights.

DATED this 10th day of August, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2021, the foregoing document was filed with the Office of the Clerk of the Superior Court, Maricopa County.

I further certify that a complete copy of the foregoing was sent for hand-delivery this same date upon the following:

The Honorable John Hannah
Maricopa County Superior Court
East Court Building 811
101 West Jefferson Street
Phoenix, Arizona 85003

I further certify that a complete copy of the foregoing was emailed and sent for hand-delivery this same date upon the following:

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# A

Clerk of the Superior Court
*** Electronically Filed ***
07/15/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-008265 07/14/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT
K. Ballard
Deputy

AMERICAN OVERSIGHT ROOPALI HARDIN DESAI

v.

KAREN FANN, et al. THOMAS J. BASILE

DAVID JEREMY BODNEY
KEITH BEAUCHAMP
DAVID ANDREW GAONA
KORY A LANGHOFER
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE KEMP

MINUTE ENTRY

The Court has reviewed Defendants' Motion to Dismiss, Plaintiff's Response and Reply in Support of Application for Order to Show Cause, and Defendants' Reply. The Court has also reviewed Plaintiff American Oversight's Complaint. The Court heard oral argument on July 7, 2021.

Plaintiff seeks to obtain access to records relating to an audit of the Maricopa County 2020 elections for the office of the President of the United States and a United States Senate race. No other election results are being audited. Defendants Karen Fann, President of the Arizona Senate, Warren Petersen, Chairman of the Senate Judiciary Committee, and the Arizona Senate ("Senate Defendants") take the position that records in the physical possession or custody of third-party vendors hired by the Senate to perform the audit (Cyber Ninjas, Inc. ("CNI") and CNI's subvendors) are not subject to disclosure under Arizona's Public Records Law, A.R.S. § 39-121, et seq. ("PRL") since they are private vendors and not "public bodies" within the

meaning of the statute. Defendants have agreed to produce any documents in the physical custody of any of the Defendants or of former Secretary of State Ken Bennett that are responsive to the public records requests and not protected by any constitutional, statutory or common law privilege or confidentiality. Defendants also take the position that the question of whether these records are subject to disclosure is a nonjusticiable question and beyond the scope of this Court's power.

**Factual Background**

The Arizona Senate is conducting an audit of voting equipment used and ballots cast in the November 3, 2020 general election in Maricopa County for the office of President of the United States and a United States Senate seat. The Arizona Senate issued legislative subpoenas to the Maricopa Board of Supervisors requesting custody of tabulation equipment, software, ballots, and other election data. The Senate declared that the audit is the exercise of its legislative constitutional powers and has an important and valid legislative purpose to evaluate whether reforms or changes are needed in the voting laws and voting procedures for the State of Arizona.

The Senate then hired a private company, CNI, to conduct the audit. The Senate also retained Ken Bennett to serve as the Senate's liaison to CNI. CNI in turn hired a number of subvendors. The Senate agreed to pay $150,000 to CNI which appears to be far short of paying for the full cost of the audit. The public does not know who is financing the remaining costs or what compensation is being made to subvendors or any other entity involved in the audit.

Prior to the filing of this Complaint, Plaintiff and Senate Defendants engaged in negotiations regarding the records being sought. Senate Defendants refused to disclose any documents or records related to the audit in the physical possession or physical control of Mr. Bennett, CNI, or CNI's subvendors. Although some records were produced from Mr. Bennett, no privilege log or listing of documents withheld has been offered.

**Legal Analysis**

Senate Defendants seek to dismiss the Complaint for failure to state a claim upon which relief may be granted. Ariz. R. Civ. P. 12(b)(6). In considering such a motion, all material allegations of the complaint are taken as true and read in the light most favorable to the plaintiff. *Logan v. Forever Living Products Intern., Inc.*, 203 Ariz. 191 (2002). A motion to dismiss at the initial pleading stage is not favored. *Acker v. CSO Chevira,* 188 Ariz. 252 (1997).

**A. PRL and the Records of Private Vendors**

There is no dispute that Defendants Fann and Peterson are "officers" who hold an elective office of a public body (the Arizona Senate) under the PRL. A.R.S. § 39-121.01(A)(1). Defendant Arizona Senate is clearly a "public body" under the PRL. As officers of a public body, Senate Defendants must 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 this state or any political subdivision of this state. A.R.S. § 39-121.01(B). As publicly stated by Defendant Fann, the audit is an important public function being conducted by the Arizona Senate pursuant to the Arizona Constitution.

The Court agrees with Senate Defendants that CNI and its subvendors are not officers or public bodies but rather private companies. Plaintiff does not argue that they are officers or public bodies or *de facto* public officers or public bodies. However, the Court does not agree with Senate Defendants that this ends the inquiry as to whether the PRL applies to records kept by third-party vendors. CNI and the subvendors are clearly agents of the Senate Defendants. CNI and the subvendors' records would not be subject to disclosure under the PRL if they had not been hired to conduct the audit on behalf of the Senate Defendants.

Whether a document is a public record under Arizona's public records law presents a question of law which is reviewed de novo. *Cox Ariz. Publ'ns, Inc. v. Collins,* 175 Ariz. 11 (1993). Arizona law defines public records broadly and creates a presumption requiring the disclosure of public documents. *Carlson v. Pima County,* 141 Ariz. 487 (1984). A.R.S. § 39-121 affirms the presumption of openness.

The broad definition of public records is not unlimited, but the law requires public officials to make and maintain records "reasonably necessary to provide knowledge of all activities they undertake *in the furtherance of their duties*. *Id.* at 490 (emphasis added). Only those documents having a "substantial nexus" with a government agency's activities qualify as public records. *Salt River Pima-Maricopa Indian Community v. Rogers,* 168 Ariz. 531 (1991).

The audit is clearly an official activity, an "important" public function. The Senate financed the audit, at least partially, by compensating CNI $150,000 in public funds. One definition of a public record includes records "required to be kept, or necessary to be kept in the discharge of a duty imposed by law to serve as a memorial and evidence of something written, said or done." *Griftis v. Pinal Cty.*, 215 Ariz. 1 (2007).

Senate Defendants have a duty to keep and maintain all records relating to this audit. The actual physical possession of those records is not relevant for purposes of the PRL. Nothing in the statute absolves Senate Defendants' responsibilities to keep and maintain records for

authorities supported by public monies by merely retaining a third-party contractor who in turn hires subvendors. The plain text makes no such exception to exclude records maintained by these third-party service providers. Allowing the Senate Defendants to circumvent the PRL by retaining private companies to perform valid legislative and/or constitutional functions would be an absurd result and undermine Arizona's strong policy in favor of permitting access to records reflecting governmental activity. Such a result would set an unsound precedent, chilling future requests from the public to gain access to public records. It would also erode any sense of transparency for conduct on the part of government officials. These documents are no less public records simply because they are in the possession of a third-party. The statute does not require the government body to have physical possession and control of the records.

The Court completely rejects Senate Defendants' argument that since CNI and the subvendors are not "public bodies" they are exempt from the PRL. The "substantial nexus" requirement also narrows the scope of what has to be disclosed which undermines Senate Defendants' concern that requiring the disclosure of these records would result in an overbroad and unduly burdensome public policy to comply with public record requests. The core purpose of the public records law is to allow public access to official records and other government information so that the public may monitor the performance of government officials and their employees. *Phoenix Newspapers, Inc. v. Keegan,* 201 Ariz. 344 (2001). Arizona Courts have consistently interpreted the PRL as being broadly construed to encourage access to public records and clearly favors the policy of disclosure. *Carlson,* 141 Ariz. at 490-91.

The Court finds that any and all documents with a *substantial nexus* to the audit activities are public records. This does not mean that all internal files of all government vendors constitute public records of the officer or public body with whom they contracted their services. The Court further finds that CNI and the subvendors are agents for the Senate Defendants who have at least constructive possession of the documents in question. In Court filings in a related case, *Arizona Democratic Party, et al. v. Fann, et al.*, CV2020-006646, Defendant Fann admitted that CNI and Mr. Bennett were the Senate's authorized agents. All documents and communications relating to the planning and execution of the audit, all policies and procedures being used by the agents of the Senate Defendants, and all records disclosing specifically who is paying for and financing this legislative activity as well as precisely how much is being paid are subject to the PRL. Senate Defendants must demand the records from CNI and the subvendors or invoke the indemnification clause of the contract now that Senate Defendants are engaged in litigation. CNI is contractually obligated, in the event of litigation, to fully cooperate with the Senate by providing information or documents requested by the indemnifying party that are reasonably necessary to the defense or settlement of the claim. The records are, at a minimum, in the constructive possession of Senate Defendants who now find themselves in litigation over records maintained by third-party vendors.

Nor can the Senate Defendants hide behind the notion that records which could have been obtained need not be disclosed if the Senate Defendants have not in fact obtained the records. It is unknown if the Senate Defendants already have these documents in their actual control. It is also irrelevant since the PRL does not give the Senate Defendants cover to not disclose relevant public documents merely because they were generated by a third-party vendor.

The unpublished Superior Court ruling in *Stuart v. City of Scottsdale,* 1 CA-CV 18-0154, 2020 WL 7230239 (App. Dec. 8, 2020) is clearly distinguishable. That case involved a vendor of a city-owned golf course who prepared annual financial statements. The citizen plaintiff sought the records based upon the argument that the contract between the vendor and the City obligated the City to keep and maintain those documents. *Id.* at *9. The Court of Appeals held that the contract established the City's *right* to receive the records but did not create an *obligation* for the City to keep and hold those records. *Id.* (Emphasis in original). The issues of whether the financial statements were necessary to maintain an accurate knowledge of official activities or whether those records related to activities supported by monies from a government entity were not addressed in *Stuart.*

The 1980 United States Supreme Court case, *Forsham v. Harris,* 445 U.S. 169 (1980), is also distinguishable. The Court held that the records of a private company, who received federal study grants for medical research, were not agency records within the meaning of FOIA where the granting agency had not received the data. Hiring a private company to perform an important legislative function, an election audit, is substantially different than a grant to do scientific research. The other federal cases cited by the Senate Defendants are likewise distinguishable. One case concerned FOIA's legislative history on the definition of agency records which requires an agency to acquire records to trigger FOIA's requirements, *Rocky Mountain Wild, Inc. v. United States Forest Serv.,* 878 F.3d 1258 (10th Cir. 2018), and the other held that a non-profit organization did not become a federal agency by performing certain services for the Forest Service. *State of Missouri ex. rel. Garstang v. U.S. Dep't of Interior,* 297 F.3d 745 (8th Cir. 2002). None of the cases cited in the pleadings are on point with this case. This case involves records relating to a county election audit under the Arizona Public Records Law, a statute specific to Arizona and distinct from the requirements of FOIA. This unprecedented audit of voting machines and ballots for only two elective offices in one county is a matter of first impression for this Court, the State of Arizona and the United States of America.

**2. The Political Question Doctrine**

The Arizona Constitution entrusts some matters solely to the political branches of government, not the judiciary. *Ariz. Indep. Comm'n v. Brewer,* 229 Ariz. 347 (2012). Based upon the basic principle of separation of powers, a nonjusticiable political question is presented when there is a textually demonstrable constitutional commitment of the issue to a coordinate

political department or a lack of judicially discoverable and manageable standards for resolving it. *Kromko v. Ariz. Bd. Of Regents,* 216 Ariz. 190 (2007). Political questions are decisions that the Constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards. *Forty-seventh Legislature v. Napolitano,* 213 Ariz. 482 (2008).

The Senate Defendants cite *Mecham v. Gordon,* 156 Ariz. 297 (1988) as authority. In *Mecham,* the political doctrine applied when former governor Evan Mecham challenged the schedule and procedures used in impeachment proceedings against him. The Arizona Supreme Court upheld the separation of powers doctrine and stated that the courts will not tell the Legislature when to meet, what its agenda should be, what bills it may draft or consider, or how to conduct an impeachment inquiry. *Id.* at 302. Neither the Constitution nor any body of law provided the judiciary with standards it could enforce and judicial management was specifically excluded from the process. *Id.* at 301.

Such is not the case here. The PRL has specific mandates that public bodies and public officers are compelled to follow. Impeachment inquiries have no such mandates. The case of *Chavez v. Brewer,* 222 Ariz. 309 (2009) is instructive. In *Chavez,* the Court of Appeals rejected the Secretary of State's argument that certification of voting machines for use in Arizona was a nonjusticiable political question. *Id.* at 316. There is a statutory scheme for complying with the PRL in A.R.S. § 39-121.01. The United States Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. *Cf. El-Shifa Phamm. Indus. Co. v. United States,* 607 F.3d 836 (D.C. Cir. 2010).

The PRL does not in any way proscribe how the audit or any other business is to be conducted by the Legislature but merely requires the preservation and disclosure of public records subject to public scrutiny. As a practical matter, the Court cannot dictate how the Legislature is to conduct an audit that is near completion. There is no Arizona precedent to preclude the application and enforcement of a statutory scheme designed and drafted by the Legislature itself that applies to legislative functions. Plaintiff is not seeking judicial oversight that infringes on legislative authority but rather the enforcement of a statute drafted by the Legislature. In fact, the Legislature recently amended A.R.S. § 39-121.01 and chose not to exempt itself from the PRL which supports the conclusion that the Legislature intended to bind itself to comply with the PRL.

The out-of-state cases cited by the Senate Defendants, persuasive authority at best, are not on point. Records sought from the Iowa Senate involved a nonjusticiable issue because the Iowa legislature had specific rules of its own creation for telephone call records which were in conflict with Iowa's public records law. *Des Moines Reg. & Trib. Co. v. Dwyer,* 542 N.W. 2d 491 (Iowa 1996). An Indiana Appeals Court did find that a public records law issue was

justiciable but did not order disclosure because of a specific exemption adopted by the Indiana legislature. *Citizens Action Coal. Of Indiana v. Koch,* 51 N.E. 3d 236 (Ind. 2016). There is no conflict with the Arizona Public Records Law or any written exemption or specified rules adopted by the Arizona Legislature inconsistent with the PRL. Some of the other cases involve open meeting laws which are clearly distinguishable since open meeting laws have specific legal requirements about notice and procedures which are clearly within the purview of legislative and executive powers.

Finally, there is not a lack of judicially discoverable and manageable standards for resolving this issue. Plaintiff does not seek every record maintained by the third-party vendors and financial backers paying for the audit. The "substantial nexus" standard narrows the scope of the inquiry. Records concerning how the audit was planned and conducted, the identity of third-parties subsidizing the audit, and the source and specifics of the audit procedures are matters of public record subject to disclosure under the PRL.

It is difficult to conceive of a case with a more compelling public interest demanding public disclosure and public scrutiny. The Motion to Dismiss is denied.

B

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2021008265 08/02/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT
P. McKinley
Deputy

AMERICAN OVERSIGHT

v.

KAREN FANN, ET AL.

ROOPALI HARDIN DESAI

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JUDGE KEMP

**MINUTE ENTRY**

The Court has reviewed a Notice of Filing Proposed Form of Order Compelling Production of Public Records by Plaintiff American Oversight ("AO"), Senate Defendants' Response to Notice of Filing Proposed Form of Order, and AO's Reply in Support of Notice of Filing Proposed Form of Order Compelling Production of Public Records.

AO seeks an Order to produce public records consistent with the Court's Findings and Ruling in a July 15, 2021, Minute Entry. Senate Defendants (Karen Fann, Warren Peterson and the Arizona Senate, collectively "Senate Defendants") object on procedural grounds, that such an order would operate as a final judgment on the merits when the Court denied Senate Defendants' Motion to Dismiss; that the case requires further discovery and pleadings on the merits; and that Senate Defendants have legislative immunity which shields them from disclosing records relative to this audit, an affirmative defense that was not raised in the Motion to Dismiss.

Rule 4(c) of the Arizona Special Actions Rules of Procedure provides that if a show cause procedure is used, the court should set a speedy return date. If that procedure is not used, the usual time periods established by the Rules of Civil Procedure shall apply, but all times may be specially modified by court order to achieve expeditious determination of the cause. The State Bar Committee Note goes on to explain that the object of this Rule is "to retain that potential for speedy justice by establishing what are in effect two tracks for special actions. Special actions which require urgent disposition may be expedited under the show cause procedure established by the Rule, with complete flexibility in the Court to control timing."

Here, AO's Verified Complaint clearly states its reliance on Rule 4(c) by alleging this is a statutory special action and a show cause procedure is being used. (See ¶ 11, Verified Complaint). The Verified Complaint was filed on May 20 and a return hearing conducted on May 27, which set a briefing schedule for the briefing of Senate Defendants' Motion to Dismiss. Oral Argument was heard on July 7 and the Court issued its Findings and a Ruling on July 15. AO then filed a Proposed Order on July 19 and the above referenced Response and Reply were expeditiously filed.

In the July 15 Minute Entry, this Court made a number of significant legal findings outlined as follows:

(1) Defendants Fann and Peterson are "officers" who hold a public office of a public body (the Arizona Senate) under the Arizona Public Records Law ("PRL") pursuant to A.R.S. § 39-121.01(A)(1).
(2) Defendant Arizona Senate is a "public body" under the PRL.
(3) As officers of a public body, Senate Defendants must maintain all records reasonably necessary or appropriate to maintain all accurate knowledge of their official activities or any activities supported by public monies.
(4) The audit is an important public function being conducted by the Arizona Senate pursuant to the Arizona Constitution and is an official legislative activity.
(5) Cyber Ninjas, Inc. ("CNI") and its subvendors are not officers or public bodies but rather private companies.
(6) CNI and its subvendors are clearly agents of the Senate Defendants.

(7) CNI and its subvendors are subject to the disclosure requirements of the PRL.
(8) Senate Defendants have a duty to keep and maintain all records relating to this audit including all records of CNI and any subvendors.
(9) Whether these public documents are in the actual physical control or possession of Senate Defendants is irrelevant to their duties and obligations under the PRL.
(10) All records and documents with a "substantial nexus" to the audit activities are subject to disclosure under the PRL.
(11) CNI and the subvendors are agents for the Senate Defendants who have at least constructive possession of the records.
(12) CNI and Ken Bennett are authorized agents on behalf of the Senate. Defendant Fann conceded this fact in related litigation, *Arizona Democratic Party, et al. v. Fann, et al.*, CV2020-006646.
(13) All documents and communications relating to the planning and execution of the audit, all policies and procedures being used by the agents of the Senate Defendants, and all records disclosing specifically who is paying for and financing this legislative activity as well as precisely how much is being paid are subject to the PRL.
(14) CNI is contractually obligated to fully cooperate with Senate Defendants when Senate Defendants are engaged in litigation by providing information or documents relating to that litigation.
(15) The PRL has specific statutory mandates that public bodies and public officers are compelled to follow.
(16) This case does not present a nonjusticiable political question since the request to preserve and disclose records under the PRL does not in any way interfere with or dictate how the Senate Defendants conduct this audit.
(17) This case presents a compelling public interest demanding public disclosure and public scrutiny.

After the filing of the Verified Complaint, the parties agreed to a briefing schedule for the Motion to Dismiss. The parties also agreed that the Motion to Dismiss would serve as Senate Defendants response to the Application for Order to Show Cause and in turn resolve AO's request for relief. Legislative immunity was not raised as an issue or asserted as an affirmative defense in the Motion to Dismiss. This was done pursuant to Ariz. R.P. Spec. Action 4(c) with a clear intent to resolve this case in an expedited manner. The need for an expedited ruling may be even more apparent since Senate Defendants have failed to provide assurances that the public records at issue are in fact being preserved. The parties have clearly chosen to use the fast track provisions of Rule 4(c), Ariz. R.P. Spec. Action.

Senate Defendants' concern that the Proposed Order would serve as a final disposition on the merits with Rule 56(c) language is misplaced. No such language is in the Proposed Order

and claims of constitutional or common law privileges, or valid non-disclosure claims, may still be asserted. There is likewise no Rule 54(b) or (c), Ariz. R. Civ. P. language in the Proposed Order that would result in finality or resolve the case in its entirety. The Proposed Order merely compels Senate Defendants to comply with the legal findings made by this Court on July 15. The Court agrees with Senate Defendants that the denial of a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., does not dispose of any claims. Nor does the denial of a motion to dismiss provide an appealable order. *Sisemore v. Farmers Ins. Co. of Arizona,* 161 Ariz. 564 (1989). The Court's adoption of the Proposed Order does not preclude Senate Defendants from challenging the disclosure of any document or communication based upon privilege or any other valid legal objection. Senate Defendants can also seek Special Action relief from the Court of Appeals based upon the Court adopting the Proposed Order.

Nor does the Court accept Senate Defendants' position that further discovery is warranted. The findings outlined above involve undisputed issues of fact. There are no material issues of fact in dispute and the Court fails to see how further discovery, pleading practice or development of the record could change the findings already made by this Court. Both Rule 4(c) and the PRL demand prompt resolution.

The issue raised in the Verified Complaint, whether the records relating to this audit are subject to the PRL and Senate Defendants' response objecting to the application of the PRL as outlined in the Motion to Dismiss, constitutes purely legal argument. The Courts, rather than government officials, are the final arbiter of what qualifies as a public record. *Griffis v. Pinal County,* 215 Ariz. 15 (2007). Whether a document is a public record under Arizona's public records law presents a question of law. *Cox Ariz. Publ'ns, Inc. v. Collins,* 175 Ariz. 11, 14 (1993). Further discovery or more legal briefing will not alter, enhance or diminish the court's findings on this narrow legal issue.

Although the affirmative defense of Legislative Immunity may not have been waived in the context of specific actions, statements, communications, or documents, the Court categorically rejects Senate Defendants' blanket assertion that Legislative Immunity protects Senate Defendants from the mandates of the PRL. None of the cases cited by Senate Defendants supports their legislative immunity position since they are all clearly distinguishable, nor does the case law cited support the broad and sweeping proposition that legislative immunity can be raised "at any time, in any context, and at any procedural juncture."

Legislators are protected from liability for their "words spoken in debate." Ariz. Const. art. IV, pt. 2, § 7. This protection of immunity is much narrower than that contemplated by Senate Defendants. Legislative immunity is extended to shield individual officials from personal liability for their legislative acts and is not applicable when officials are not being sued for personal liability in their individual capacities. *State ex rel. Brnovich v. Ariz. Bd. Of Regents,*

250 Ariz. 127 (2020). The Proposed Order is akin to a Writ of Mandamus compelling Senate Defendants to comply with their duties and obligations under the PRL. The Verified Complaint is in no way a tort claim against any member of the Senate for personal liability in their individual capacities. The Proposed Order and the Court's findings do not, in any way, interfere with or dictate how the legislature conducts its business or its deliberative processes. The Court is not dictating how the audit is conducted nor interfering in the audit process in any way.

Whether legislative immunity applies is a legal question for the court. *Green Acres Trust v. London,* 141 Ariz. 609(1984). *Mesnard v. Campagnolo in and for County of Maricopa,* 2021 WL 2678473, does not support Senate Defendants. In that case, a legislator was sued for defamation, a well established claim in tort. The legislature was not protected from maintaining an investigative report about sexual harassment by another legislator under the PRL. The Arizona Supreme Court in *Mesnard* found that Mesnard performed a legislative function when he released the report. *Id.* at ¶ 23. Legislative immunity protected Mesnard from the tort claim of defamation but he was required to keep and maintain records of the investigation, which was subject to the PRL.

Here, Senate Defendants are refusing to disclose public records and claim legislative immunity. Again, this is not a tort action for damages sought against legislators engaged in legislative functions. The Verified Complaint merely seeks the preservation and disclosure or records subject to a PRL request.

The audit is being conducted pursuant to the Senate's legislative functions as outlined in the Arizona Constitution. This was confirmed by Defendant Fann herself. The documents in question are clearly subject to the PRL. The preservation and disclosure of these public records pursuant to the PRL are definitely not subsumed within the Speech and Debate immunity clause of the Arizona Constitution. Such a broad interpretation would render the PRL meaningless and unenforceable as to any legislator at any time under any circumstances. This is surely not within the legislative intent of the PRL.

Defendant Fann has the authority, and statutory obligation under the PRL, to compel CNI and its subvendors to produce all internal emails and correspondence outlined in the Proposed Order. Senate Defendants' claim that they have not even seen the documents of CNI and its subvendors does nothing to advance their position. Willful blindness does not relieve Senate Defendants from their duties and obligations under the PRL.

The relief requested by AO is granted. The language in the Proposed Order quotes specific findings from the July 15 Minute Entry. The Court will sign the Proposed Order simultaneously with this Minute Entry. This Order will be effective immediately given the

demands of expediency under Rule 4(c) Ariz. R.L. Spec. Action and the PRL, as well as the demands for public scrutiny and substantial public interest.

# C

# SENATE RULES

## FIFTY-FOURTH
## LEGISLATURE

## STATE OF ARIZONA

2019-2020

J. The President shall refer all proposed measures or other legislative matters to the appropriate committees. Every bill, resolution and memorial shall be referred by the President to one or more standing committees, except resolutions or memorials to be adopted by unanimous consent and House bills to be substituted on third reading pursuant to Rule 11-H. All proposed measures or other legislative matters shall automatically be assigned to the Rules Committee without action upon the part of the President. If three-fifths or more of the members of the Senate petition the President to discharge committees from further consideration of a bill, resolution or memorial, the measure shall be withdrawn by the President from assigned committees which have not reported the measure. If a committee hearing has not been held on the measure, the President shall direct that a hearing be held by a committee within seven days and upon withdrawal or hearing, the matter shall be placed by the President on the active calendar of the Committee of the Whole. If the measure is reported favorably by the Committee of the Whole, it shall be placed by the President on the third reading calendar. If a discharge petition is presented to the President less than seven days before the Senate adjourns sine die, the President shall not be required to act upon the petition.

K. All debts incurred by the Senate, either during session or between sessions of the legislature, shall be subject to approval by the President and if so approved shall be paid by claims drawn on the Finance Division of the Department of Administration.

L. The office of the President shall keep the accounts for the pay, mileage and subsistence of members and attaches, and shall maintain these records for inspection by the membership.

M. The President is authorized to call meetings of standing committees of the Senate during periods when the Senate is not in session, and to approve claims for travel and subsistence incurred by members of such committees in attendance.

## RULE 3
## The Secretary

The Secretary shall have the following powers and duties:

A. It shall be the duty of the Secretary to keep a Journal of each day's proceedings, and to provide a typewritten copy of the same for examination by the President. The Secretary shall each day prepare a calendar of the Orders and Business of the Day and a like calendar for the Committee of the Whole, and such other dockets and calendars as may be ordered, and shall cause a copy to be placed on the desk of each member, at or before the hour of convening.

B. The Secretary shall have the custody of all bills, resolutions, memorials, petitions, communications, or other measures, instruments and papers introduced in or submitted to the Senate, subject to such disposition thereof as may be provided by the rules of the Senate or the order of the President, and shall be held strictly accountable for the safekeeping of the same. The Secretary shall keep a record of all such measures or instruments, showing at all times the exact standing of each.

C. The Secretary shall perform such other duties as may be required of the Secretary by the Senate or by the President.

D. The Assistant Secretary shall act under the direction of the Secretary and in the absence of the Secretary shall perform the duties of the Secretary.

## RULE 4
## Sergeant at Arms

The Sergeant at Arms shall have the following powers and duties:

A. It shall be the duty of the Sergeant at Arms to attend the Senate and the Committee of the Whole during their sittings, to maintain order under the direction of the President or Chairman, to execute the commands of the Senate, and all processes issued by authority thereof, directed to the Sergeant at Arms by the Presiding Officer.

# APPENDIX 4

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

**PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO,**

**Plaintiffs,**

**vs.**

**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.;**

**Defendants, and**

**CYBER NINJAS, INC.,**

**Real Party in Interest.**

**Case No.: LC2021-00180-001**

**REPLY IN SUPPORT OF MOTION TO DISMISS**

**(Assigned to Judge John H. Hannah Jr.)**[1]

**(Oral Argument Set: August 23, 2021 at 9:30 a.m.)**

[1] By filing this Reply, Defendant does not waive its argument that this action must be immediately transferred to another division of this Court, which remains on appeal.

First – Defendant Cyber Ninjas, Inc. ("CNI") actually agrees with Plaintiff (Phoenix Newspapers Inc., or "PNI") that at least part of Judge Kemp's ruling in the related matter (CV2021-008265) should be persuasive here. "[C]ourts take judicial notice of other actions involving similar parties and issues and of the pleadings therein, and...in passing upon the pleadings in one action they may and should consider the record in the other." *Regan v. First Nat. Bank*, 55 Ariz. 320, 327, 101 P.2d 214, 217 (1940)(citation omitted).

Judge Kemp ruled: "The Court agrees with Senate Defendants that CNI and its subvendors are not officers or public bodies but rather private companies." (*See* p. 3 of the Ruling filed on July 15, 2021 in CV2021-008265.) The public-records statute only provides for claims against public officers or public bodies. Not only would construing the statute in order to allow public-records claims against a private contractor like CNI be utterly groundless, but it would be devastating to the State's ability to find and hire contractors, much less employees. It would expose all government employee and contractors – including this Court and its staff – to the responsibility of responding to public-records requests, and of being sued under the public records statute, with the associated fees and costs and risk of the court even awarding fees and costs against them.

Contrary to PNI's argument, CNI has never been appointed the Senate's official "custodian of records." Nor does PNI actually allege that CNI has mysteriously become the Senate's official custodian. But moreover, PNI fails to point to any legal authority which supports the notion that even an official "custodian of records" for a public body may be directly named and sued in a statutory public-records claim. In other words, the statute under which Plaintiffs sued – A.R.S. § 39-121.02 – is clear that it only creates a cause of action against an "officer or public body," and not even against a mere custodian who may be under their supervision. *See* A.R.S. § 39-121.02(A),(C). And again, CNI is not a public officer or body. In fact, a substantial piece of CNI's contract work for the Senate is nearly finished. This is a far cry from CNI being a sworn officer of the state, with serious administrative duties and long-term obligations. CNI isn't even one of the state's employees, who may have substantial and/or long-term – but non-

administrative – duties. CNI is a private contractor, with short-term and narrowly-defined contractual duties—period.

On page 8 of its brief, PNI offers a reading of the statutory definition of "officer" (1) that stretches the definition of a public "office" past any reasonable breaking point (such that it would include, again, literally any government contractor or employee); and (2) that shockingly omits the rest of the actual statutory language, which is: "...and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1). This language is highly significant in demonstrating the true meaning of "officer" under A.R.S. § 39-121.01(A)(1), owing to several fundamental canons of statutory interpretation. "The rule of statutory construction, *noscitur a sociis*, directs our attention to the accompanying words as we undertake to learn the meaning to be given" to particular statutory language. *Planned Parenthood Comm. of Phoenix, Inc. v. Maricopa Cty.*, 92 Ariz. 231, 235, 375 P.2d 719, 722 (1962); *see also Est. of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, 266 P.3d 349, 352 (2011)("*noscitur a sociis*—a canon closely related to *ejusdem generis*—dictates that a statutory term is interpreted in context of the accompanying words"). The "chief administrative officer, head, director" etc. language clearly demonstrates the kind of "elective or appointed office of any public body" that the statute is talking about. Further, if the phrase "elective or appointed office of any public body" could be applied to any state employee or contractor, irrespective of their non-administrative and/or temporary role, then it would render superfluous the "chief administrative officer" (etc.) language that is found in the same sentence. This violates another basic rule of statutory interpretation, which is that "[i]nterpreting statutory language requires that we give meaning to each word, phrase, clause, and sentence within a statute so that no part will be superfluous, void, contradictory, or insignificant." *Champlin v. Sargeant In & For Cty. of Maricopa*, 192 Ariz. 371, 374, 965 P.2d 763, 766 (1998). Finally, it also violates the doctrine of *expressio unius est exclusio alterius* — which is that "the expression of one or more items of a class indicates an intent to exclude omitted items of the same class." *Id.* By enumerating only the "chief administrative officer, head, director, superintendent," etc. of a public body, the legislature indicated an obvious intent to exclude lesser roles. Finally, PNI's argument that the language "any

person elected or appointed to hold any elective or appointive office of any public body" was intended to apply to private fictional entities/non-natural persons is hardly deserving of a response. But it should suffice to say that Arizona statutes clearly define the requirements for public office, "whether elective or appointive," as including that a person must be "not less than eighteen years of age, [must be] a citizen of the United States and a resident of this state." A.R.S. § 38-201.

To further highlight the unreasonableness of the Plaintiffs' position on this case: if Plaintiffs were correct in their interpretation of the public-records statutes, then it could be argued with equal force that the Plaintiffs themselves – consisting of the owner of the Arizona Republic, and one of its editors– are subject to public records statutes. The Arizona Republic has received over four hundred thousand dollars in government funds since 2003,[2] on behalf of organizations like the VA, the HHS, DHS, and the DOD. In all cases, PNI was performing "core government functions" (to borrow Plaintiffs' phraseology) by helping the government find employees (through want ads) or publishing important government public notices—"core" government functions that the government "lacks the ability to perform…itself" and that are "initiated and funded with public dollars." (Plaintiffs' brief, pages 10-11 *inter alia.*) And there is nothing more "exclusive" about CNI's ability to conduct an audit, than PNI's ability to write and publish things. (Both entities are capable of providing the "same goods and services to a governmental entity that [they] could provide to a nongovernmental customer," to quote Plaintiffs—not that any legal authority supports this test anyway.) And eighteen years is certainly a longer period of time (and four hundred grand is a lot more in public funding) than CNI has or ever will receive from the government (especially since CNI is nearly done with a substantial part of its audit, after far less than one year). By Plaintiffs' logic, the Plaintiffs are "agents" and "officers" of the government who are performing "government functions" and therefore subject to being named by any citizen, at any time, in a public-records suit (and who are further at risk of paying attorneys' fees on the claim).

[2] See e.g. "usaspending.gov" or "govtribe.com."

The *Arpaio* case cited by Plaintiffs actually supports exactly what CNI is arguing here. *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130, 133, 211 P.3d 8, 11 (Ct. App. 2008). The case addressed whether attorneys' fees under the public-records statute could be awarded against a public officer (Arpaio), where the underlying public records request was actually sent to another officer (the Pima County Attorney). Arpaio had allegedly "caused" the Pima County Attorney to refuse to honor the records request, by invoking his attorney-client privilege with the county attorney. The Court of Appeals found that because the language in the attorneys' fees provision of the public-records statute was uniquely *not* limited to just the public officer or public body responsible for providing records – in contrast to "most of the provisions of Arizona's public records law," including the section which "creates the cause of action" – then an award of fees was accordingly not limited to being against the party responsible for providing records. "[U]nlike most of the provisions of Arizona's public records law, § 39–121.02(B) [the fees provision] does not refer to the officer or public body having custody of the requested records. In further contrast, the other subsections of § 39–121.02 *specifically refer to that officer or public body.* Subsection (C) of § 39–121.02 *creates a cause of action by the person requesting the records against 'the officer or public body' who 'wrongfully denied access to [the requested] public records'* for any damages 'resulting from the denial.' Subsection (A) permits the person requesting the records to appeal the denial of his or her request by special action 'against the officer or public body.'" *Arpaio*, 221 Ariz. at 133, 211 P.3d at 11. (Emphasis added.) In other words, the *Arpaio* case actually supports that only the "officer or public body" that is responsible for public records can properly be sued in a special action for wrongful denial of a public records request.

Finally, Plaintiffs cannot simply invent the idea that CNI is a "Real Party in Interest" that must spend attorneys' fees and costs defending this suit, when there is no actual legally-cognizable claim asserted against it. The language in the Rules of Special Action regarding allowing "Real Parties in Interest" was not intended to justify naming any person with any kind of articulable

connection to a lawsuit as a defendant in it[3]—or else Rule 12(b)(6), which requires that an actual cognizable claim be asserted against every defendant, would be meaningless. Rule 12(b)(6) means what it says. Plaintiffs must assert a legally-cognizable claim against Defendant CNI; and because they do not, then the Complaint against CNI must be dismissed for failure to state a claim for which relief can be granted. Because CNI is clearly not an officer or public body under A.R.S. § 39–121.02, and Plaintiffs have only named CNI in a claim under that statute for denial of records access, then Plaintiffs' Complaint fails to state a claim against CNI and it must be dismissed with prejudice. CNI reserves its right to seek attorneys' fees and costs under A.R.S. §§ 12-349, 12-341 *inter alia*.

**RESPECTFULLY SUBMITTED** this 17th day of August, 2021.

**WILENCHIK & BARTNESS, P.C.**

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**ORIGINAL** of the foregoing filed on August 17, 2021 with the Clerk of the Maricopa County Superior Court

**COPY** of the foregoing hand-delivered on August 17, 2021 to the Judge John Hannah

...

...

...

[3] In actuality, the special action rule was intended to address the common legal fiction of naming the judge as the "defendant," or "respondent," in a special-action of a judicial ruling. The actual defendants are instead named as the "real parties in interest."

**COPY** of the foregoing emailed and mailed on August 17, 2021 to:

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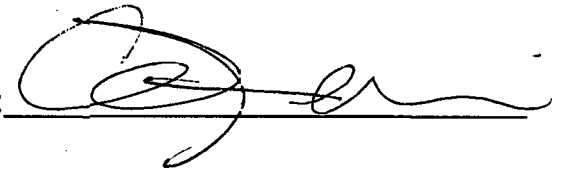
By: 

# APPENDIX 5

SUPREME COURT OF ARIZONA

| | |
|---|---|
| KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; the ARIZONA SENATE, a house of the Arizona Legislature,<br><br>Petitioner,<br><br>v.<br><br>THE HONORABLE MICHAEL KEMP, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,<br><br>Respondent Judge,<br><br>AMERICAN OVERSIGHT,<br><br>Real Party in Interest. | Arizona Supreme Court<br>No. CV-21-0197-PR<br><br>Court of Appeals<br>Division One<br>No. 1 CA-SA 21-0141<br><br>Maricopa County<br>Superior Court<br>No. CV2021-008265<br><br>**FILED 08/24/2021** |

**O R D E R**

The Court en banc[1] has considered "Petitioners' Emergency Motion for Stay" filed by Petitioners Fann, *et al.* and "American Oversight's Opposition to Petitioners' Emergency Motion for Stay" filed by real party in interest American Oversight. On August 20, 2021, the Court entered an order temporarily staying the superior court's order to produce public records entered on August 2, 2021 to allow the Court to consider the stay pleadings.

[1]Chief Justice Brutinel has recused himself from participating in this matter.

Upon consideration,

**IT IS ORDERED** extending the stay to enable the Court to fully consider the issues raised in the petition for review. However, this order does not relieve the Petitioners from continuing to review and produce documents Petitioners have already agreed to produce, as noted on pages 2-3 of Petitioners' Petition for Review ("The Senate has produced, or will produce, to American Oversight any documents in the physical possession or physical custody of any of the Senate or of Secretary Bennett that are (1) responsive to American Oversight's public records requests; and (2) not protected from disclosure by any constitutional, statutory or common law privilege or confidentiality.").

**IT IS FURTHER ORDERED** that any amicus briefs are due no later than 4:00 p.m. on Tuesday, August 31, 2021. Any responses to the amicus briefs are due no later than 4:00 p.m. on Tuesday, September 7, 2021.

The Court will conference this matter on the September 14, 2021 regular agenda.

DATED this 24th day of August, 2021.

_____/s/_____
KATHRYN H. KING
Duty Justice

TO:

Kory A Langhofer
Thomas J Basile
L Keith Beauchamp
Roopali H Desai
D Andrew Gaona
Hon. Michael W Kemp
Hon. Jeff Fine
Amy M Wood

# EXHIBIT 1

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO,

Plaintiffs,

vs.

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; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.,

Defendants, and

CYBER NINJAS, INC.,

Real Party in Interest.

NO. LC2021-000180-001

**ORDER TO PRODUCE PUBLIC RECORDS**

On June 30, 2021, Plaintiffs Phoenix Newspapers, Inc. and Kathy Tulumello (collectively, "Plaintiffs") filed an Application for Order to Show Cause (the "Application") and a Complaint for Statutory Special Action to Secure Access to Public Records (the "Complaint") against Defendants Arizona State Senate, Karen Fann, Warren Peterson and Susan Aceves (collectively, the "Senate Defendants") and Cyber Ninjas, Inc., as a Defendant and Real Party in Interest ("Cyber Ninjas"), seeking inspection and copying of the following records from the Senate Defendants and Cyber Ninjas, as described particularly in the following Exhibits to the Complaint:

(a) **Exhibit 3** (requested by email dated April 22, 2021 from Mr. Oxford to Mr Moore) (Senate Request A);

(b) **Exhibit 7** (requested by letter dated May 27, 2021 from Mr. Oxford, et al. to Mr. Moore and Sen. Pres. Fann) (Senate Request B); and

(c) **Exhibit 10** (requested by letter dated June 2, 2021 from Mr. Bodney to Mr. Logan) (Cyber Ninjas Request) (collectively, **Exhibits 3, 7 and 10**, the "Public Records").

Plaintiffs also expressly reserved the right by this special action to secure copies of any and all email records listed in **Exhibits 3, 7 and 10** to the Complaint that had not been completely or promptly produced by the Senate Defendants (collectively, the "Remaining Emails"). Plaintiffs contend that the Senate Defendants still have not produced copies of all of the Remaining Emails.

After the Plaintiffs' Complaint was filed, Senate Defendants filed an Answer and subsequently filed a July 27, 2021 Response to Plaintiffs' Application for Order to Show Cause (the "Senate Response") and a Motion for Judgment on the Pleadings (the "Senate Motion"). On July 27, 2021, Cyber Ninjas filed a Response to Application for Order to Show Cause (the "Cyber Ninjas Response") and a Motion to Dismiss (the "Cyber Ninjas' Motion").

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On August 10, 2021, Plaintiffs filed their Response in Opposition to (1) Senate Defendants' Motion for Judgment on the Pleadings and (2) Cyber Ninjas' Motion to Dismiss, and (3) Reply in Support of Plaintiffs' Application for Order to Show Cause. On August 17, 2021, Senate Defendants filed their Reply in Support of Motion for Judgment on the Pleadings and Cyber Ninjas filed its Reply in Support of its Motion to Dismiss.

This Court also acknowledges a separate case pending in Maricopa County Superior Court in Case No. CV2021-008265, *American Oversight v. Karen Fann et al.* in which the Honorable Michael W. Kemp issued an August 2, 2021 order (the "First AO Order") that required the Arizona Senate to produce documents responsive to public records requests issued to the Arizona Senate by American Oversight related to the Maricopa County 2020 election audit (the "Audit") either directly in the possession of the Arizona Senate or in the possession or control of the privately owned contractors and subcontractors performing the Audit for the Senate. The portion of the First AO Order related to the production of documents in the possession or control of the Arizona Senate's privately owned contractors and subcontractors was temporarily stayed on August 11, 2021 ("the Stay") in the course of a Special Action before the Arizona Court of Appeals. On August 19, 2021, the Arizona Court of Appeals, by Memorandum Decision, accepted jurisdiction over the Senate Defendants' special action, denied relief and lifted the Stay. Then, on August 20, 2021, Justice Kathryn King of the Arizona Supreme Court re-imposed the Stay. On August 24, 2021, the full Supreme Court ordered the Stay extended and announced that the Senate Defendants' Petition for Review of the Special Action Decision of the Court of Appeals will be conferenced on September 14, 2021. Meanwhile, on August 18, 2021, Judge Kemp issued another order ("the Second AO Order") directing the Arizona Senate to produce or identify in a privilege log those documents responsive to American Oversight's public records requests that were in the physical possession or custody of the Senate or Secretary Bennett (and therefore *not* subject to the Stay) by 5:00 p.m. on August 31, 2021. The Second AO order remains in effect.

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After consideration of the aforementioned pleadings, memoranda and orders, and after oral argument on August 23, 2021 before this Court on Plaintiffs' Application for Order to Show Cause, Senate Defendants' Motion for Judgment on the Pleadings and Cyber Ninjas' Motion to Dismiss,

IT IS HEREBY ORDERED AS FOLLOWS:

Defendants have failed to show cause why the relief requested by Plaintiffs in this special action should not be granted. ACCORDINGLY:

Senate Defendants and Cyber Ninjas are ORDERED to comply with A.R.S. § 39-121 *et seq.* immediately by causing copies of the Public Records in the possession, custody or control of the Senate Defendants and/or Cyber Ninjas to be produced to Plaintiffs by **August 31, 2021 at 5:00 p.m.** Cyber Ninjas and the Senate Defendants may confer regarding which Public Records in the possession, custody or control of one Defendant or another should be withheld on the basis of a purported privilege or for any other reason. Any Public Records, whether maintained by Cyber Ninjas or the Senate Defendants, or any one of them, that are withheld on the basis of a purported privilege or for any other reason shall be listed on a log with individual descriptions of each withheld record in sufficient detail to allow Plaintiffs to challenge the basis for withholding the record, if necessary. Descriptions of records on the log shall not be so detailed as to undermine the alleged basis for withholding any record from public inspection. Defendants may produce one privilege log that references the specific Defendant (or Defendants) that calls for a record to be withheld, or Cyber Ninjas and the Senate Defendants may each produce their own separate logs, as required by this Order. Defendant(s)' log(s) shall be produced to Plaintiffs by **August 31, 2021 at 5:00 p.m.** To the extent that Plaintiffs wish to challenge any of the documents on a log, they shall have fifteen (15) court days to file a motion challenging the designation(s). Documents subject to such a motion shall be turned over to the Court for an *in camera* inspection and determination of the validity of the designation within two (2) court days of such a motion being filed. The Court will make a final determination as to

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whether the assertion of privilege or any other exemption from disclosure is justified and, to the extent the Court determines there is no such justification for the record(s) being withheld, the Public Records shall be produced to Plaintiffs within two (2) court days.

Senate Defendants are further ORDERED to comply with A.R.S. § 39-121 *et seq.* immediately by causing copies of any and all Remaining Emails to be produced to Plaintiffs by **August 31, 2021 at 5:00 p.m.** Any Remaining Emails that are withheld on the basis of a purported privilege or for any other reason shall be listed on a log with individual descriptions of each withheld record in sufficient detail to allow Plaintiffs to challenge the basis for withholding the record, if necessary. Descriptions of records on the log shall not be so detailed as to undermine the alleged basis for withholding any record from public inspection. This log shall be produced to Plaintiffs by **August 31, 2021 at 5:00 p.m.** To the extent that Plaintiffs wish to challenge any of the documents on the log, they shall have fifteen (15) court days to file a motion challenging the designation(s). Documents subject to such a motion shall be turned over to the Court for an *in camera* inspection and determination of the validity of the designation within two (2) court days of such a motion being filed. The Court shall make a final determination as to whether the assertion of privilege or any other exemption from disclosure is justified and, to the extent the Court determines there is no such justification for the record(s) being withheld, the record(s) shall be produced to Plaintiffs within two (2) court days.

It is further ORDERED the orders entered herein are stayed to the extent they direct the Senate or the Cyber Ninjas to produce records (or a privilege log describing records) that are subject to the Stay of the First AO Order, but not otherwise. This partial stay will remain in effect until the Arizona Supreme Court lifts the Stay of the First AO Order or the Stay otherwise expires. Defendants shall have 5:00 p.m. on the third business day after the Stay is lifted or expires to comply with all orders previously subject to this partial stay, except to the extent that the Arizona Supreme Court relieves the Senate of the duty to comply in a ruling on the merits of the pending Petition for Review.

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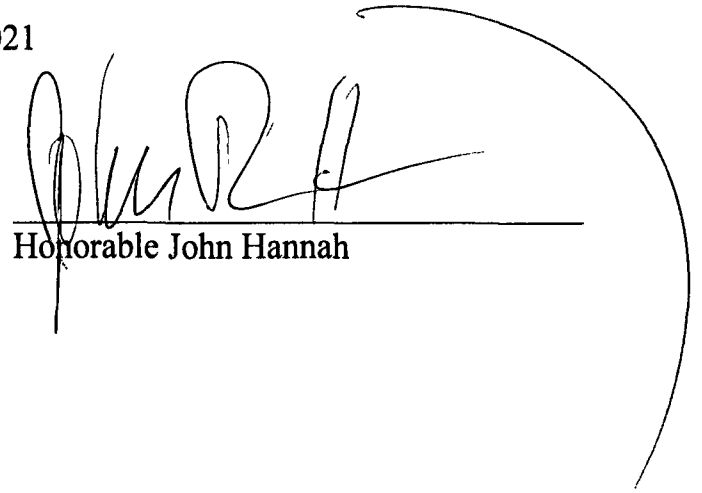
Notwithstanding the foregoing paragraph, all Defendants, including Cyber Ninjas, are ORDERED to carefully secure, protect and preserve from deterioration, mutilation, loss or destruction any and all records in their custody, possession or control that are reasonably necessary or appropriate to maintain an accurate knowledge of their official activities concerning the 2020 Maricopa County election audit, including records of the performance, funding and staffing of said audit.

It is further ORDERED that the Senate Defendants' Motion for Judgment on the Pleadings and Cyber Ninjas' Motion to Dismiss are DENIED.

LET THE RECORD REFLECT the Court will issue a separate minute entry explaining the reasoning underlying this order.

Dated this 24th day of August, 2021



Honorable John Hannah

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**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

CYBER NINJAS, INC.,

Petitioner/Defendant,

v.

THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge, and

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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,

Real Parties in Interest.

Case No. 1 CA-SA 21-0173

Case No. 1 CA-SA 21-0176

Maricopa County Superior Court
Case No. LC2021-00180-001

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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,

Petitioners,

v.

THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge, and

PHOENIX NEWSPAPERS, INC., KATHY TULUMELLO, CYBER NINJAS, INC.

Real Parties in Interest.

**RESPONSE OF PHOENIX NEWSPAPERS, INC. AND KATHY TULUMELLO TO CYBER NINJAS, INC.'S PETITION FOR SPECIAL ACTION**

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## Introduction

The Arizona Senate's recount of millions of Maricopa County voter ballots from the November 2020 elections (the "Audit") was supposed to be both swift and transparent. It has been neither. To shed light on the Audit, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello (together, "PNI") issued public records requests pursuant to A.R.S. § 39-121, *et seq*. (the "Arizona Public Records Law"), to (1) the Arizona Senate and certain of its members (the "Senate") and (2) Petitioner Cyber Ninjas, Inc. ("Cyber Ninjas"), the Florida corporation that the Senate hired to conduct the Audit for $150,000.00 in public funds.

In June 2021, after months of the Senate and Cyber Ninjas refusing to review, much less produce, public records concerning the Audit, PNI commenced a statutory special action in the Maricopa County Superior Court, naming the Senate as a defendant and Cyber Ninjas as a defendant and real party in interest. Following motion practice and multiple hearings, the Hon. Judge John Hannah issued an Order to Produce Public Records on August 24, 2021 (the "Superior Court Order") that called for Cyber Ninjas and the Senate to preserve, review and

produce certain public records that PNI had requested and the Senate and Cyber Ninjas had concealed.

The Superior Court Order that is the subject of Cyber Ninja's Petition for Special Action (the "Petition") followed extensive briefing and a lengthy hearing on August 23, 2021. The Superior Court Order contains the trial court's detailed procedures for *in camera* review of records that are withheld due to a purported privilege or any other basis. At a hearing on September 17, 2021, Judge Hannah and counsel for PNI and the Senate developed a plan for the orderly review of the Senate's privilege log and a select set of 25 records as to which the Senate has asserted privilege. At that hearing, the Senate agreed to dismiss its appellate special action (Case No. 1 CA-SA 21-176) voluntarily. Cyber Ninjas' counsel elected not to participate in the September 17 hearing.

Also on September 17, after the hearing referenced above, the Hon. Judge Hannah issued a five-page Minute Entry (the "Minute Entry") explaining the legal reasoning behind the issuance of the Superior Court Order. A copy of the Minute Entry is attached hereto as Exhibit A (App.

28).[1] The Minute Entry acknowledges the parallel litigation pending between American Oversight and the Senate (the "American Oversight Case") over access to public records concerning the Audit. The Minute Entry also recognizes the critical facts that Cyber Ninjas is a party to this matter, and not the American Oversight Case, and *only* in this litigation can Cyber Ninjas be compelled to comply with the Arizona Public Records Law rather than, at best, belatedly coaxed to comply through the Senate.[2] *See* Ex. A (App. 33) ("Even if the Senate were to change course, by aggressively demanding compliance from [Cyber Ninjas], the Senate

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[1] References to "App" are to the Appendix to this Response.

[2] The Senate has ***not*** been cooperative in securing records from Cyber Ninjas to disclose to the public. In fact, Senate ***refused*** to request that Cyber Ninjas provide the Senate access to Audit-related records in Cyber Ninjas' physical custody for review and disclosure until the denial of the Senate's Petition for Review on September 14, 2021 (*see* Pet. at 5; 9/14/2021 Letter from K. Fann attached hereto as Exhibit B (App. 34)). Indeed, it has now become clear, based on emails exchanged just days ago between counsel for Cyber Ninjas and the Senate, that Cyber Ninjas only intends to produce documents to the Senate "out of goodwill" but "does not concede the existence or scope of any involuntary legal obligation to do so." *See* 9/17/2021 email exchange attached hereto as Exhibit C (App. 36). In fact, as of the date of this filing, and despite Cyber Ninjas' assertion that it has approximately 60,000 records that are potentially responsive to PNI's requests, Cyber Ninjas has provided ***only four records*** to the Senate, which placed them in its online "reading room" for Audit records. *See* *https://statecraftlaw.app.box.com/v/senateauditpublicreadingroom.*

would have no way to enforce its demands without doing what PNI has already done: making [Cyber Ninjas] a party to the litigation. The same goes for any order that the courts might direct to the Senate attempting to secure [Cyber Ninjas'] compliance.").

The Minute Entry concludes that Cyber Ninjas was subject to suit under the Arizona Public Records Law because "under the unique circumstances of this case, [Cyber Ninjas is] a 'public officer' within the meaning of the Public Records Law" and because it has "the obligations that the Public Records Law assigns to a 'custodian' of public records." Ex. A (App. 30-31). As this Response will show, the Superior Court Order and the Minute Entry that explains its reasoning are legally sound, and jurisdiction over Cyber Ninjas' Special Action should be denied.

However, if this Court does grant jurisdiction, the relief sought by Cyber Ninjas in its Petition should be denied. Cyber Ninjas' primary argument – that it is a "private" company and therefore any records in its possession are beyond the scope of Arizona's Public Records Law – was considered and rejected by this Court just a few weeks ago. *See Fann et al. v. Hon. Kemp,* 2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 No. 1. CA-SA 21-0141 at *8 (Aug. 19, 2021) ("The requested records are

no less public records simply because they are in the possession of a third party, Cyber Ninjas.").[3]

The logic of this Court's Memorandum Decision, as well as the analysis expressed in the Superior Court's Minute Entry, are solid and dispositive of the relief sought in the Petition. In PNI's statutory special action in Superior Court, Cyber Ninjas is rightly joined as a party with duties under the Arizona Public Records Law for no less than three reasons: by acting as (1) an "agent" of the Senate, (2) a "public official" as that term is used in the Public Records Law, and (3) a "custodian" of public records within the meaning of that statute, all in performing and overseeing the Audit. Plainly, the Audit represents the performance of a core government function that Cyber Ninjas was contracted to carry out by the Senate using public monies.

In fact, Cyber Ninjas concedes in its Petition that it *does* have custody of certain public records that are "owned" by the Senate.[4] *See*

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[3] This decision has persuasive value and can be cited under Arizona Supreme Court Rule 111(c)(1). Moreover, the decision will not be overturned by the Arizona Supreme Court, which denied the Petition for Review filed by the Senate on September 14, 2021.

[4] The fact that Cyber Ninjas concedes it holds documents "owned" by the Senate but simultaneously claims it has no "legal" obligation to

Pet. at 4-5. Thus, by its own admission, Cyber Ninjas is a custodian of those records, which must be disclosed in response to PNI's requests under the plain terms of the Arizona Public Records Law, especially on these facts, where the Senate affirmatively chose not to review, take physical custody of or disclose them itself. *See, e.g.,* A.R.S. §§39-121.01(D)(1) and (3).

To rule otherwise would allow Arizona's Public Records Law to be circumvented by a public body's offloading of public records into private hands, thereby violating the right of public inspection and copying. *Id.* This result would undermine the purpose of the Arizona Public Records Law – namely, to ensure that Arizona's government is conducted openly and subject to review by the public that it serves. *See, e.g., Lake v. City of Phoenix*, 222 Ariz. 547, 549 ¶ 7 (2009) ("Arizona's Public Records Law serves to 'open *government* activity to public scrutiny.'") (citing *Griffis v.*

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share those records with the Senate (*see* Ex. C (App. 37-38)), despite the Superior Court Order and Minute Entry, is troubling. However, by virtue of its status as a party to this litigation and the language of the Superior Court Order, Cyber Ninjas is bound to "carefully secure, protect and preserve" those records (*see* Superior Court Order at 6), and if Cyber Ninjas' Petition is denied, it will be directly obligated under the Superior Court Order to produce those public records under the review process the trial court is developing with PNI and the Senate.

*Pinal* County, 215 Ariz. 1, 4 (2007). For ample good reasons, the relief sought in Cyber Ninjas' Petition – which would slam the door on public scrutiny of *government* activity – should be denied.

**Jurisdictional Statement**

Special action jurisdiction is discretionary, "reserved for 'extraordinary circumstances,'" and unavailable "where there is an equally plain, speedy, and adequate remedy by appeal." *Stapert v. Arizona Bd. of Psych. Examiners*, 210 Ariz. 177, 182 ¶ 7 (App. 2005). In deciding whether jurisdiction is proper, courts consider whether a case raises "issues of statewide importance, issues of first impression, pure legal questions, or issues that are likely to arise again." *AEA Fed. Credit Union v. Yuma Funding, Inc.*, 237 Ariz. 105, 111, ¶ 21 (App. 2015) (citations omitted).

The issue raised in Cyber Ninjas' Petition – whether Cyber Ninjas is immune from Arizona's Public Records law because it is a government contractor, even though it is performing a core governmental activity on behalf of the Senate – does *not* justify special action jurisdiction. This Court has already provided appropriate guidance in its Memorandum Decision issued on August 19, 2021 in the American Oversight Case over

public records requests concerning this same Audit. For this reason alone, Cyber Ninjas should never have commenced this special action, and jurisdiction should be denied.

## Discussion

### I. CYBER NINJAS IS ACTING AS AN AGENT OF THE SENATE FOR PURPOSES OF THE AUDIT AND IS THEREFORE SUBJECT TO THE ARIZONA PUBLIC RECORDS LAW.

Cyber Ninjas' Petition hinges on the assertion that the Public Records Law cannot apply to a government contractor because it is not an "officer" or "public body" within the meaning of the statute. *See* Pet. at 3-5. This argument fails for many reasons, not the least of which is that, by undertaking the Audit at the direction of the Senate, Cyber Ninjas is acting as an *agent* of the Senate.

The Senate hired Cyber Ninjas to lead the Audit, and Defendant Fann publicly announced that Cyber Ninjas would be paid with public funds to manage this government activity. *See* Compl. ¶ 21; Pet. App. p. 24.[5] Its contract with the Senate states that Cyber Ninjas "will serve as the central point-of-contact and organizer of all work conducted over the

[5] References to the "Pet. App." are to the appendices that accompanied Cyber Ninjas' Petition.

course of" the agreement, which it describes as conducting "a full and complete audit of 100% of the votes cast within the 2020 November General Election within Maricopa County, Arizona." Compl. Ex. 2 at 1-2; Pet. App. pp. 64-65 (Statement of Work).

Even Cyber Ninjas concedes that it was contracted by the Senate to conduct the Senate's audit of ballots in Maricopa County in the 2020 election. *See* Pet. at 2. In short, the Senate appointed Cyber Ninjas to perform the Audit on the Senate's behalf. Therefore, by definition, Cyber Ninjas is an agent of the Senate and has a duty under the Public Records Law to maintain, preserve and disclose public records regarding the Audit. Unfortunately, the Senate refused to demand that Cyber Ninjas make available *any* of the requested records in Cyber Ninjas' physical custody for inspection by the Senate until *September 14, 2021*, after the Arizona Supreme Court dissolved its temporary stay of Judge Kemp's disclosure order in the American Oversight case.

If the Senate had conducted the Audit directly, its Audit-related records would unquestionably be subject to the Arizona Public Records Law. The Senate cannot thwart the public's right to monitor a core government activity by outsourcing that activity to companies that may

not themselves be "public" entities. *See Forum Pub. Co. v. City of Fargo,* 391 N.W.2d 169, 172 (N.D. 1986) ("We do not believe the open record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [an independent contractor] . . . [The] purpose of the open-records law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records.") (cited with approval in *Fann et al. v. Hon. Kemp,* 2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at *8); *see also Carlson v. Pima Cnty.,* 141 Ariz. 487, 490 (1984) (Arizona's Public Records law evinces "a clear policy favoring disclosure."). Because Cyber Ninjas has been engaged in a core governmental activity, "supported in whole or part by monies from this state," A.R.S. § 39-121.01(A)(2), Cyber Ninjas is an agent of the Senate and is obligated to maintain records related to the Audit, which are subject to the Arizona Public Records Law.[6]

[6] While Cyber Ninjas was found to be an "agent" of the Senate for purposes of this Court's decision in the American Oversight case, it is important to note that Cyber Ninjas was not named as a party in that case, so whether Cyber Ninjas was subject to direct suit by virtue of its status as a "public official" or "custodian" of public records was not at

In fact, this Court has already reached the conclusion that Cyber Ninjas is functioning as an agent of the Senate. In ruling on a Petition for Special Action filed by the Senate related to the Audit, this Court concluded:

> Here, the Senate defendants, as officers and a public body under the [Public Records Law], have a duty to maintain an produce public records related to their official duties. This includes the public records created in connection with the audit of a separate governmental agency, authorized by the legislative branch of state government ***and performed by the Senate's agents***. *See* A.R.S. § 39-121.01(B). The requested records are no less public records simply because they are in the possession of a third party, Cyber Ninjas.

*See Fann et al. v. Hon. Kemp,* Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at *8 (emphasis added). This Court further observed that "[t]here is no dispute that the audit is being conducted with public funds, and Cyber Ninjas and its sub vendors are agents of the Senate."[7] *Id.* at *7.

The same conclusion is appropriate here. Cyber Ninjas is the Senate's agent for purposes of the Audit, having undertaken at the

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issue.

[7] As this Court observed, the Senate admitted in its answer in the public records-related lawsuit brought by American Oversight that Cyber Ninjas is the Senate's "authorized agent." *Id.* at 7 n. 1.

Senate's direction what is an official duty of the Senate – an audit of a separate governmental entity – utilizing public dollars. As such, any public records in Cyber Ninjas' possession are subject to disclosure under the Public Records Law. *See Griffis,* 215 Ariz. at 4 (recognizing that a document's content is a *content-driven* inquiry); *Salt River Pima-Maricopa Indian Cmty v. Rogers,* 168 Ariz. 531, 538 (1991) ("It is the nature and purpose of the document, not the place where it is kept, which determines its status").

## II. CYBER NINJAS IS SUBJECT TO THE PUBLIC RECORDS LAW BECAUSE IT FUNCTIONS AS AN "OFFICER" OF THE SENATE FOR PURPOSES OF THE AUDIT.

Even if it were not an agent of the Senate, Cyber Ninjas is functioning as a public officer for purposes of the Audit. The Arizona Public Records Law defines an "officer" as "*any person* . . . appointed to hold *any* . . . *appointive office* of *any public body* and any *chief administrative officer*, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1) (emphases added). In other words, "officers" are those persons vested by a public body such as the Senate with supervisory authority over the performance of governmental functions.

The statute does *not* limit the definition of "officer" to natural persons, as Cyber Ninjas contends (*see* Pet. at 11), which means that corporate persons such as Cyber Ninjas can indeed function as officers subject to the Public Records Law. *See* A.R.S. § 1-215(28) (a statutory reference to a "person" "includes a corporation, company, partnership, firm, association or society, as well as a natural person"); *cf. Arizona Bd. of Regents v. Phoenix Newspapers,* 167 Ariz. 254, 266 (1991) (leaving undisturbed trial court's conclusion that each member selected to serve as an Arizona State University presidential search committee consisting entirely of private individuals was "a 'public officer' as defined in A.R.S. § 39-121.01(A)(1).").

The Minute Entry identifies Cyber Ninjas as a public officer because it was appointed by the Senate to perform the Audit, which is being enabled by subpoenas issued by the Senate, and the Senate is paying Cyber Ninjas to perform the Audit using public dollars. *See* Ex. A (App. 31).

To be sure, officers and public bodies are obligated by law to maintain all records reasonably necessary to maintain an accurate knowledge of their official activities and of any of their activities which

are supported by monies from the state.[8] *See* A.R.S. § 39-121.01(B). Though it is admittedly a private corporation, Cyber Ninjas agreed to perform a core governmental function in connection with the Audit – a function it could only perform in a management capacity – as an officer at the behest of the Senate.

Cyber Ninjas argues in its Petition that public bodies can only have a single chief officer that is responsible for receiving and responding to public records requests. *See* Pet. at 6. Because Cyber Ninjas is not the chief officer of the Senate, it claims, it cannot be subject to the Public Records Law. *Id.* This argument, however, ignores the plain definition of "[o]fficer" in the Public Records Law, which extends to "*any* person elected or appointed to hold any elective or appointive office of any public body and *any* chief administrative officer, head, director, superintendent or chairman of any public body." *See* A.R.S. § 39-121.01(A)(1) (emphases

[8] Cyber Ninjas also meets the definition of "public body" under A.R.S. § 39-121.01(A)(2) because it is "expending monies provided by this state" to conduct the Audit. A.R.S. §39-121.01(A)(2). Like officers, public bodies "shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and any of their activities which are supported by monies from this state . . ." A.R.S. § 39-121.01(B).

added). The plain language of this statute makes clear that there can be more than one officer for a public body subject to the Public Records Law.[9]

## III. CYBER NINJAS IS SUBJECT TO THE ARIZONA PUBLIC RECORDS LAW AS THE SENATE'S *DE FACTO* CUSTODIAN OF AUDIT RECORDS.

Regardless of whether Cyber Ninjas meets the definition of an "agent" or "officer" of the Senate, it is subject to the Arizona Public Records Law, and the jurisdiction of this Court, because it is acting as the Senate's *custodian* of public records for the vote audit. As the record indisputably shows, the Senate *never* deigned to request access to inspect any public records relating to the Audit *in Cyber Ninjas' custody* for purposes of complying with its duties under the Public Records Law – that is, not until Sen. Fann finally requested their production "immediately" by letter dated September 14, 2021, some *five months after* PNI first requested copies of them. *See* Ex. B (App. 34). And, in tandem

[9] Cyber Ninjas cites to nearly century-old Arizona case law distinguishing between officers and employees. *See* Pet. at 7 (citing *Windsor v. Hunt,* 29 Ariz. 504, 519 (1926)). This case law cannot displace the statutory definition of "officer" as set forth in Arizona's Public Records Law. Nor did the *Windsor* case have anything to do with Arizona's Public Records Law. Instead, nearly 100 years ago, it addressed a distinction between public employees and "public officers" for *compensation* purposes. *Id.*

with the Senate's position, Cyber Ninjas refused to share *any* records relating to the Audit in its custody with the Senate or PNI until its counsel agreed to do so during this Court's telephonic hearing on Cyber Ninjas' stay motion on September 15.

By Senate Rule, the Secretary of the Senate is the person who "shall have custody of all communications, or other measures, instruments and papers . . . introduced in or submitted by the Senate . . . and shall be held strictly accountable for the safekeeping of the same." Rule 3, Senate Rules. For that reason, Secretary Aceves was named as a Defendant, in her official capacity, in this action, too. But the Senate has represented in this litigation that "she has no authority or control over the records at issue." *See* Exhibit D (App. 42 n.1.).

Therefore, the *only* party exercising *any* custodial control over the *public records* in Cyber Ninjas' sole custody – from the Senate's appointment of Cyber Ninjas to oversee the Audit on March 31, 2021 until Sen. Fann's September 14, 2021 letter requesting access to such records – has been *Cyber Ninjas*. In fact, the only arguable exception to that statement is the Superior Court Order, by which Judge Hannah ordered Cyber Ninjas on August 24, 2021 to "carefully secure, protect and

preserve" such public records from loss or destruction. Superior Court Order at 6.

In brief, Cyber Ninjas is a proper party in this action in its capacity as the sole "custodian" of these public records before, during and after copies were requested. *See, e.g.,* A.R.S. §39-121.01(D) (1) ("The *custodian* of such records shall promptly furnish such copies [of public records] . . . ." (emphasis added). Similarly, "access to a public record is deemed denied if a *custodian* fails to promptly respond to a request for production of a public record . . . ." A.R.S. §39-121.01(E) (emphasis added); *see also* Minute Entry at 3 (recognizing Cyber Ninjas is a "custodian" of the requested records and a proper party under Arizona's Rules of Procedure for Special Actions).

By its terms, the Public Records Law applies not only to public bodies and officers but also to "custodians" of public records. *See* A.R.S. §§ 39-121.01 (D)-(E); §§ 39-121.03(A)-(C). By referring separately to officers, public bodies and custodians, the statute anticipates the possibility that, as a practical matter, the custodian of public records may be either a subordinate government employee, contractor or other person who is not an "officer" as defined by the statute. *See Carlson*, 141 Ariz.

at 491 (an "officer *or* custodian" may invoke the "countervailing interests of confidentiality, privacy or the best interests of the state" to withhold records) (emphasis added). By allowing (if not enabling) Cyber Ninjas to have sole physical custody of these essential public records, the Senate has made Cyber Ninjas the *de facto* custodian of these records. As such, Cyber Ninjas must provide these records in response to PNI's request. A.R.S. § 39-121.01(D)-(E). Indeed, the Superior Court Order allows Cyber Ninjas to "confer" with the Senate about the documents produced or withheld, and to produce one joint privilege log or "their own separate logs." *See* Superior Court Order at 4.

Cyber Ninjas openly concedes that it has custody of certain public records that are, according to Cyber Ninjas, "owned" by the Senate. *See* Pet. at 4-5 (if the Public Records Law "required anyone other than the 'officer' of a 'public body' to receive and respond to records requests made directly by members of the public, then the actual officer/public body to whom the records belong – ***in this case, the Senate*** – would have no say over how or what/when their own records are produced.") (emphasis added); *id.* at 5 ("[T]o date, the Senate (to whom any "public records" would belong) has not requested any records from [Cyber Ninjas] or

authorized/directed [Cyber Ninjas] to make productions to the Senate.").[10]

These remarkable concessions demonstrate Cyber Ninjas possesses records of the Senate and that those records indeed qualify as public records. However, according to Cyber Ninjas, by virtue of the fact that those public records are in its sole custody (in no small part because the Senate refused to request that they be turned over until the denial of the Senate's Petition for Review on September 14, 2021 (*see* Pet. at 5; Ex. B (App. 34)), they are beyond the reach of the Public Records Law. This "shell game" of technical custody was previously rejected by this Court and should be rejected again in this case.[11] *See Fann et al. v. Hon. Kemp,*

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[10] The Master Services Agreement between the Senate and Cyber Ninjas provides that all Client Confidential Information that is contained or embedded within other documents, files, materials data, or media shall be removed from Cyber Ninjas' controlled systems as soon as it is no longer required to perform Services under the Master Services Agreement. *See* Master Services Agreement § 11 (Pet. App. 49). This underscores the importance of Cyber Ninjas being a named party subject to the Superior Court Order to prevent the potential destruction of critical public records.

[11] The Superior Court Order does allow Cyber Ninjas and the Senate to coordinate regarding what documents they claim are subject to any privilege or otherwise protected from disclosure. *See* Superior Court Order at 4 ("Cyber Ninjas and the Senate Defendants may confer regarding which Public Records in the possession, custody or control of

2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at *8; *Arpaio v. Citizens Publ'g Co.,* 221 Ariz. 130, 134 (App. 2008) (finding public records of Maricopa County Sheriff held by Pima County Attorney, as custodian, were public records subject to disclosure and awarding attorneys' fees against Sheriff's office for improperly attempting to prevent their disclosure).

The fact that records responsive to PNI's requests are in the physical custody of Cyber Ninjas is of no import – they still must be disclosed. Indeed, the Arizona Supreme Court has repeatedly held that "documents with a 'substantial nexus' to government activities qualify as public records," and the "nature and purpose" of the documents, not the place where they are kept, determines their status. *Lake* 222 Ariz. at 549 (internal citations omitted); *see also Lunney v. State*, 244 Ariz. 170, 179 (App. 2017) (holding that police officers' personal cell phone records may be public records if they reflect the use of the phone for government

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one Defendant or another should be withheld on the basis of a purported privilege or any other reason.") (the Superior Court Order is Exhibit 1 to Appendix 2 to the Petition). Thus, Cyber Ninjas' argument that the Superior Court Order excludes the Senate from weighing in on what should be disclosed by Cyber Ninjas in response to PNI's public records requests (*see* Pet. at 5) is demonstrably false.

purposes, even though the individual employees or their cellular provider had physical custody); *Griffis* 215 Ariz. at 4 ¶ 10 ("mere possession" of a document does not determine its public records status).

## IV. THE CLAIM THAT DISCLOSURE WOULD SUBJECT "EVERY" GOVERNMENT CONTRACTOR TO THE PUBLIC RECORDS LAW IS SPECIOUS.

Cyber Ninjas spins apocalyptic predictions of what would happen should the Superior Court Order be permitted to stand. "[E]very single employee or contractor of the State," Cyber Ninjas says, "including hard-working people like the staff of this Court, peace officers, firefighters, etc.," would be required "to respond to public records requests and be[] sued for denial of access." Pet. at 6. Every government contractor, Cyber Ninjas continues, would have "to form their own public records departments, and/or suffer liability for not 'promptly' responding to intensive records requests from literally any member of the public." *Id.* at 6-7.

The implications of the Superior Court Order are nowhere near that broad. The Superior Court Order merely found that the Public Records Law applies in *this* circumstance and under *this* set of facts, where Cyber Ninjas is performing an essential and exclusive government function,

initiated and funded with public dollars, and where the Senate declined to perform this core government activity itself or exercise dominion over these public records. Cyber Ninjas is unlike any typical government contractor that provides the same goods or services to a governmental entity that it could provide to a nongovernmental customer, such as landscapers that maintain the capitol grounds and vendors that supply coffee that is consumed by government employees. The "parade of horribles" that Cyber Ninjas cites are simply not implicated by the plain terms of the Superior Court Order.

To be sure, a similar argument was raised by the Senate in the previous Audit-related public records case that this Court heard. *See Fann et al. v. Hon. Kemp,* 2021 Ariz. App. Unpub. LEXIS 834, 2021 WL 3674157 at *9 ("The senate argues that the superior court's order would open the files of all government vendors to public inspection."). This Court correctly rejected this argument in light of the unique set of circumstances at issue. *Id.* at 9-10 ("In this case, the Senate outsourced its important legislative function to Cyber Ninjas and its sub-vendors. However, as noted *supra* in Paragraph 18, only documents with a substantial nexus to government activities qualify as public records.

There is no reason why vendors providing ordinary services rather than performing core government functions would be subject to the [Public Records Law].").

An identical conclusion is warranted here. Those documents held by Cyber Ninjas related to the Audit that are the subject of PNI's requests have a substantial nexus to government activities and should be disclosed "promptly." *See* A.R.S. §39-121.01(D)(1) and (E). By requiring these parties to produce these Audit records, the Superior Court Order did not somehow subject every government vendor to disclosure duties under the Public Records Law. To accept Cyber Ninjas' argument, however, would be tantamount to inviting government to outsource its duties to private parties whose work would be forever hidden from public view.

**Rule 21(a) Notice**

Under Rule 21(a), Ariz. R. Civ. App. P. and Rule 4(g), Ariz. R. P. Spec. A., PNI requests an award of its attorneys' fees and costs incurred in responding to the Petition under A.R.S. § 39-121.02(B), A.R.S. § 12-341, A.R.S. § 12-342, the private attorney general doctrine, or any other applicable statute or equitable doctrine.

## Conclusion

For the reasons stated above, the Court should decline jurisdiction over this Special Action, which is unwarranted. In the alternative, if this Court accepts special action jurisdiction, it should promptly deny the relief sought by Cyber Ninja because the Superior Court Order and Minute Entry are based on sound legal principles and precedent, which are essential to the enforcement of a person's rights under Arizona's Public Records Law.

Respectfully submitted this 20th day of September, 2021.

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**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

| | |
|---|---|
| CYBER NINJAS, INC.,<br><br>Petitioner/Defendant,<br><br>v.<br><br>THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,<br><br>Respondent Judge, and<br><br>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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,<br><br>Real Parties in Interest. | Case No. 1 CA-SA 21-0173<br><br>Case No. 1 CA-SA 21-0176<br><br>Maricopa County Superior Court<br>Case No. LC2021-00180-001 |

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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,

Petitioners,

v.

THE HONORABLE JOHN HANNAH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge, and

PHOENIX NEWSPAPERS, INC., KATHY TULUMELLO, CYBER NINJAS, INC.

Real Parties in Interest.

**APPENDIX TO RESPONSE OF PHOENIX NEWSPAPERS, INC. AND KATHY TULUMELLO TO CYBER NINJAS, INC.'S PETITION FOR SPECIAL ACTION**

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## TABLE OF CONTENTS

# Exhibit A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2021-000180-001 DT 09/17/2021

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

PHOENIX NEWSPAPERS INC
KATHY TULUMELLO

DAVID JEREMY BODNEY

v.

ARIZONA STATE SENATE (001)
KAREN FANN (001)
WARREN PETERSEN (001)
SUSAN ACEVES (001)
CYBER NINJAS INC (001)

THOMAS J. BASILE
JOHN DOUGLAS WILENCHIK

KORY A LANGHOFER
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE HANNAH
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Order to Produce Public Records filed August 24, 2021 (the "Order") directed the parties to move forward in this case, a special action pursuant to A.R.S. section 39-121 *et seq.* (the "Public Records Law") in which petitioner Phoenix Newspapers, Inc., *et al.* (PNI) seeks access to records in the possession of the Arizona State Senate and its officials (the Senate) and Cyber Ninjas, Inc. (the Ninjas). The Order promised an explanation of the Court's reasoning. That explanation follows. Because the decision in *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. App. August 19, 2021) has become final since the issuance of the Order, the explanation will focus on the reasons that the Ninjas are a proper party to the case.

The Order was not entirely clear about what has been decided and what may be raised in future proceedings. Though both defendants have special action petitions pending in the Court of Appeals, in Cyber Ninjas v. Hannah, Nos. 1 CA-SA 21-0173 and 1 CA-SA 21-0176 (consolidated), the superior court retains jurisdiction absent an active stay order. *Coffee v. Ryan-Touhill*, 247 Ariz. 68 ¶¶14-15, 445 P.3d 666 (App. 2019). The only stay that this Court is aware of, at this writing, applies to the provisions of the Order that (1) set deadlines for disclosure of records not in the Senate's physical possession and (2) require the Cyber Ninjas to produce records directly to PNI. Order Granting Stay in Nos. 1 CA-SA 21-0173 and 1 CA-SA 21-0176 (consolidated), filed Sept. 16, 2021. The Court is willing to entertain requests to modify other provisions of the Order, including provisions that the defendant have challenged for the first time in the Court of Appeals (concerning, for example, *in camera* review of records).

On the other hand, the Court welcomes guidance from the Court of Appeals that might avert additional delays caused by piecemeal litigation. Though the Court respects the need for careful consideration of the legal rights of all parties, the Court also submits that the "prompt compliance" requirement of A.R.S. section 39-121.01(E) militates against allowing a public records holder to play out its legal arguments and then, if unsuccessful, to begin the process of responding to the substance of a disclosure request. The impending release of the audit report makes prompt compliance even more urgent that it was when the Order was issued. Time is now truly of the essence.

**THE LAW ALLOWS PNI TO JOIN THE NINJAS AS A PARTY**

Asking to be dismissed from the case, the Ninjas argue that the Public Records Law does not permit a cause of action against them. To the extent that their argument mirrors the Senate's argument that the Public Records Law does not apply to records not in the Senate's physical possession, the Court of Appeals has rejected it. The question here is whether PNI has the right to ask the courts to compel the Ninjas to disclose public records in their possession, as opposed to asking for an order that directs the Senate to obtain the records from the Ninjas and then to disclose them. The Court holds, for two separate and independent reasons, that PNI does have that right.

First, under the unique circumstances of this case the Ninjas are a "public officer" within the plain meaning of the Public Records Law. "Officer' means any person . . . appointed to hold any office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1). "Person' includes a corporation, company, partnership, firm, association or society, as well as a natural person." A.R.S. § 1-215(29). "Public body' means . . . any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." § 39-121.01(A)(2).

The Ninjas have been "appointed" by the Senate as the "head" of the "public organization" conducting what the Ninjas describe as an "ongoing investigation of how [Maricopa County] conducted [the 2020] election." Response to Application for Order to Show Cause at 4. The Senate is exercising its official powers in support of the audit organization by (among other things) issuing subpoenas to the County. *Id.* The Senate is also partly funding the audit with public monies, which makes the audit organization a "public body" for purposes of the statute. The Ninjas are a "person" because they are a corporation. The Ninjas are therefore an "officer" with responsibility (alongside the Senate) for maintaining and disclosing public records relating to the audit. It follows that PNI may file an action against the Ninjas, under section 39-121.02(A), appealing the denial of PNI's request for audit-related public records.

Second, the Ninjas have the obligations that the Public Records Law assigns to a "custodian" of public records. The relevant provision expressly commands persons seeking public records to direct their requests to the "custodian" of the records. A.R.S. § 39-121.02(D). The "custodian" is responsible for collecting the required fees from the requestor, and for screening out requests made for commercial purposes. A.R.S. § 39-121.03. A request is deemed denied if the "custodian" fails to respond promptly. A.R.S. § 39-121.02(E). In the event of a denial, the requesting party has a judicial remedy through a special action like this one. A.R.S. § 39-121.02(A). This Court holds that section 39-121.02(A) permits the requestor -- here, PNI -- to name the custodian -- the Ninjas -- as a defendant in the action.

Section 39-121.02(A) says that a person whose public records request has been denied "may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." The Ninjas argue that the quoted language authorizes a special action against "the officer or public body" only. That reading violates Arizona's statutory construction rules.

Arizona recognizes the "last antecedent" rule of statutory construction. The "last antecedent" rule requires a court interpreting a statute to apply a qualifying phrase to the word or phrase immediately preceding as long as there is no contrary intent indicated. *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309 ¶ 16, 294 P.3d 147 (App. 2013). Applying the last antecedent rule here, the phrase "against the officer or public body" must be read to modify "rules of procedure for special actions," not (as the Ninjas would have it) "special action in the superior court." Thus the statute requires the requestor to pursue the appeal "pursuant to the rules of procedure for special actions against [an] officer or public body."

PNI has framed this case in accordance with the rules of procedure for special actions. The special action rules permit the addition of parties as necessary for the plaintiff to obtain complete relief. *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130 ¶ 10 n. 4, 211 P.3d 8 (App. 2008); *see* Ariz. R. Special Action Proc, 2(b) (court may order joinder as parties of persons other than the body,

officer, or person against whom relief is sought). PNI's complaint alleges that the Ninjas are *both* "an officer or public body" with a statutory responsibility for maintaining and disclosing public records, *and* a "custodian" that has effectively denied PNI's request for disclosure of the records at issue. That framing is consistent with the special action rules and, therefore, with section 39-121.02(A).

*Arpaio v. Citizen Pub. Co.* supports PNI's position. In *Arpaio*, as here, the issue was the application of section 39-121.02 to a "third party" to a public records dispute. 221 Ariz. 130 ¶ 12. As here, the "third party" (an intervenor who had objected to the release of the records) argued that the legislature intended to limit the application of section 39-121.02's relevant provision (subsection (B), authorizing an award of attorneys' fees to a prevailing requestor) to "the officer or public body responsible for providing access to the public records." *Id.*, ¶ 10. Based on the text and history of the Public Records Law, the Court of Appeals refused to read that limitation into the statute, and upheld the fee award against the third party intervenor. This Court likewise rejects the Ninjas' attempt to avoid involvement by reading a non-existent limitation into section 39-121.02.

Subsection (C) of section 39-121.02, which creates an action for damages, also supports PNI's interpretation of subsection (A). Subsection (C) says, "[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial." In that provision, unlike in subsection (A), the phrase "against the officer or public body" modifies "cause of action." Thus subsection (C) authorizes a cause of action for damages only against the "officer or public body" responsible for deciding whether to allow access to the records, not against a custodian that may simply be following the officer's directions.

Disallowing damages lawsuits against the records custodian makes perfect sense as a matter of policy -- just as it makes sense as a matter of policy, when the action seeks only access to the records, to allow the custodian to be made a party to the action. The Ninjas vehemently argue the other side of this policy question, but nothing in the statute suggests that the policymakers who wrote the statute saw it their way. To put it in terms of the "last antecedent" statutory construction rule, "there is no contrary intent indicated" anywhere in the statute. *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309 ¶ 16, 294 P.3d 147. The statute therefore must be interpreted, by its terms, to permit PNI to make the Ninjas a party to this action.

Viewed through the public interest end of the policy lens, a construction of the Public Records Law that disallows direct enforcement against a records custodian contradicts the purpose of the law and the Court of Appeals holding in *Fann v. Kemp*. *Fann v. Kemp* forecloses the Senate's argument that it has no obligation to ask the Ninjas to cooperate with PNI's public records request, but it may leave open the question whether the Senate can compel the Ninjas to cooperate.

The Senate's contractual right to obtain records from the Ninjas has been a subject of debate throughout this case. The Ninjas, in turn, may think they lack authority to obtain records from audit subcontractors. In addition, the Ninjas are likely to disagree with the Senate on questions whether specific documents are public records, since whether a particular document has "a substantial nexus" to the audit depends on "the nature and purpose" of that document. *Fann v. Kemp*, 2021 WL 3674157 ¶ 18. If the Ninjas are not a party to the litigation, PNI will have no reliable way even to know about issues like those, let alone to bring them to court for resolution in a way that complies with the Public Records Law, unless the Senate chooses to take a position adverse to the Ninjas and asks for judicial intervention.

This will not do. *Fann v. Kemp* makes clear that the Public Records Law makes the courts, not the legislature, the final arbiters of this public records disclosure dispute. If the Ninjas are beyond the courts' authority, the Senate will effectively remain in a position to decide which of the records in the Ninjas' possession are public records – precisely where *Fann v. Kemp* says the Senate should not be. Thus far the Senate has not been inclined to disclose audit-related records to the public on any terms other than its own. Even if the Senate were to change course, by aggressively demanding compliance from the Ninjas, the Senate would have no way to enforce its demands without doing what PNI has already done: making the Ninjas a party to the litigation. The same goes for any order that the courts might direct to the Senate attempting to secure the Ninjas' compliance.

The Ninjas' participation as a party does not derogate the Senate's right to oppose disclosure of specific records based on exceptions to the statutory disclosure obligation or privileges like attorney-client privilege. The existing Order to Produce Public Records invites the Senate and the Ninjas to "confer regarding which Public Records in the possession, custody or control of one Defendant or another should be withheld on the basis of a purported privilege or for any other reason." Order at 4. If the parties have a better plan for facilitating cooperation to ensure that all parties are heard, the Court remains open to suggestions. But procedural problems created by multiple record holders are not a reason to compromise the public's right to know what its government is up to.

For all of those reasons, the Order affirms PNI's right to insist on keeping the Ninjas a party to this case.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

# Exhibit B

KAREN FANN
SENATE PRESIDENT
FIFTY-FIFTH LEGISLATURE
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PHOENIX, ARIZONA 85007-2844
PHONE: (602) 926-5874
TOLL FREE: 1-800-352-8404
kfann@azleg.gov
DISTRICT 1

COMMITTEES:
Rules, Chairman

# Arizona State Senate

September 14, 2021

Cyber Ninjas Inc.
c/o Doug Logan & Legal Department
5077 Fruitville Road, Suite 109-421
Sarasota, Florida 34232
dlogan@cyberninjas.com
legal@cyberninjas.com

To whom it may concern at Cyber Ninjas Inc.:

Pursuant to the Arizona Public Records Act, Sections 15.4 and 18.5 of our Master Services Agreement dated March 31, 2021, and the orders entered by Judges Kemp and Hannah in *American Oversight v. Fann* and *Phoenix Newspapers, Inc. v. Arizona State Senate*, please immediately make available to the Arizona State Senate all records within your custody or control, or within the custody or control of your subcontractors or other agents, with a substantial nexus to the audit. For the avoidance of doubt, documents with a substantial nexus to the audit include without limitation all documents and communications relating to the planning and performance or execution of the audit, all policies and procedures used in connection with the audit, all records concerning audit funding or staffing, and all records that are reasonably necessary or appropriate to maintain an accurate knowledge of activities concerning the 2020 Maricopa County election audit.

Respectfully,

Karen Fann

Karen Fann, President
Arizona State Senate

# Exhibit C

**Subject:** Cyber Ninjas, Inc. Response to Senate re Status
**Date:** Friday, September 17, 2021 at 11:33:14 AM Mountain Standard Time
**From:** Jack Wilenchik
**To:** Kory Langhofer, Thomas Basile
**CC:** Jordan Wolff, Dennis Wilenchik
**Priority:** High
**Attachments:** image152104.png, Policies and Procedures.zip

Kory – thank you for communicating to our client that the Court in Maricopa County Superior Court Case No. CV2021-008265 (the "American Oversight" case) has requested a status report from the Senate.

First, I must strongly emphasize that my client Cyber Ninjas, Inc. (CNI) is in the final "throes" of completing its work for the Senate. CNI is finishing its long-awaited written report (consisting of over one hundred pages), which will be produced to the Senate on or by next Friday, September 24th. CNI is a small private company, and the Senate's request for records is causing CNI to take time away from the completion of its report. Just yesterday, the CEO of CNI spent approximately 12 hours dealing with trying to process the Senate's request, which was time directly taken away from the duties that CNI has actually contracted to perform for the Senate.

I also emphasize that, while CNI intends to produce documents out of goodwill and its commitment to transparency, by sending this communication CNI does not concede the existence or scope of any involuntary legal obligation to do so.

The Senate requested records with "a substantial nexus to the audit," including certain enumerated items, from CNI and its subcontractors. At this time, CNI has been able to reach out to most of its subcontractors (all but one) to notify them that it has received this request.

The phrase "a substantial nexus to the audit" is not defined, and it is difficult to define. For example, CNI's internal company emails re: staffing or performance of the contract are not the kind of items that should be subject to production in a public-records request. If the case were otherwise, then it would set an extremely unsettling precedent for all government contractors in this state and make it impossible for the State to do business. For example, if CNI has private internal emails discussing its own contractual relationship with the Senate or its own performance of its contract with the Senate, then such emails would be subject to not only production to the Senate but also to the public. That is not practical, workable, fair or legal.

Attached hereto are copies of CNI's current policies and procedures, which is one of the items enumerated in the Senate's request. CNI acknowledges that these have been previously made public and it confirms that these continue to represent its existing policies and procedures. CNI is endeavoring to determine whether its subcontractors have any new or updated policies or procedures at this time and expects to have answers to that in the near future.

With respect to communications, CNI intends to produce copies of its communications with the Senate and its officials that have a substantial nexus to the contract/audit. CNI is unable to make that production at this moment in time because it needs to focus on completing its contractual duty of producing a written report. Once that report has been finished and the report has been produced (by next Friday Sep. 24), then it will promptly focus on the production of such communications (and of course earlier if and as it is able to do so).

With respect to financial disclosures (another item requested) – CNI intends to release full financial statements on the audit either as part of its report or shortly thereafter. With respect to "records…concerning

staffing" (another requested item): as with CNI's internal communications (above), CNI's private records concerning its own staff are not public records.

The Senate also enumerated a request for "all records that are reasonably necessary or appropriate to maintain an accurate knowledge of activities concerning the 2020 Maricopa County election audit." This is undefined; but CNI believes that the Senate already has such records as may be reasonably necessary or appropriate to main an accurate knowledge of activities concerning the 2020 audit, with the important exception of our final report (whose release date you already know). The Senate had several liaisons who were present to watch audit operations daily and regular reports were made. There was 24/7 public live-streaming of all audit activities. Those records are already in the Senate's possession and are public records.

If there are any activities that the Senate would like to request more details or specific records on, then please communicate them to us and my client would be glad to sit down with the Senate or its representatives after the final report is released.

Sincerely – Jack Wilenchik, Esq. on behalf of Cyber Ninjas, Inc.

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# Exhibit D

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*Attorneys for the Senate Defendants*

**IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

KAREN FANN, *et al.*,

Defendants.

PHOENIX NEWSPAPERS, *et al.*

Plaintiffs,

v.

ARIZONA STATE SENATE, *et al.*,

Defendants,

and

CYBER NINJAS, INC.,

Real Party in Interest.

No. CV2021-008265
Assigned to the Hon. Katherine Cooper

No. LC2021-000180-001
Assigned to the Hon. Daniel Kiley

**SENATE DEFENDANTS' MOTION TO TRANSFER AND CONSOLIDATE**

Pursuant to Arizona Rule of Civil Procedure 42(a)(2) and Local Rule 3.1(c)(1) and (c)(2), Defendants Karen Fann, in her official capacity as President of the Arizona Senate; Warren Petersen, in his official capacity as the Chairman of the Arizona Senate Judiciary Committee; Susan Aceves, in her official capacity as the Secretary of the Arizona State

Senate, and the Arizona Senate (collectively, the "Senate Defendants") respectfully move that the Court transfer the proceeding captioned *Phoenix Newspapers, Inc. v. Arizona State Senate*, LC2021-000180-001 and consolidate it with the proceeding captioned *American Oversight v. Fann*, CV2021-008265.

**FACTUAL BACKGROUND**

American Oversight initiated this litigation on May 19, 2021. As set forth in American Oversight's Complaint and in the parties' briefing on the Senate Defendants' pending Motion to Dismiss, the question in dispute is whether the Arizona Public Records Act, A.R.S. § 39-121, *et seq.*, entitles American Oversight to a court order requiring the Senate Defendants to obtain and produce the internal records of Cyber Ninjas, a contractor retained by the Senate to assist in its audit of the November 2020 election in Maricopa County. A hearing on the Motion to Dismiss has been set for July 7, 2021.

Concomitant with the commencement of the American Oversight proceedings, Phoenix Newspapers sought from the Senate the same universe of records—*i.e.*, the contractor's internal documents relating to the audit. Counsel for the Senate Defendants apprised counsel for Phoenix Newspapers of the existence of American Oversight's lawsuit, updated him on the briefing schedule, provided a copy of the Motion to Dismiss, and advised him that the status of the disputed records would be imminently resolved by this Court. Counsel for the Senate Defendants further informed counsel for Phoenix Newspapers that if American Oversight ultimately obtained a final judgment (inclusive of all appeals) in its favor, the Senate would make available to Phoenix Newspapers (and any other third party that requested them) the same records produced to American Oversight.

Nevertheless, on June 30, 2021—some six weeks after the initation of American Oversight's lawsuit and two days after briefing on the Senate Defendants' Motion to Dismiss closed—Phoenix Newspapers filed its own action raising substantively identical claims and seeking production of the same documents. A copy of Phoenix Newspapers' Complaint is attached hereto as Exhibit A.

## ARGUMENT

The parallel proceedings do not merely "involve a common question of law or fact." Ariz. R. Civ. P. 42(a). Phoenix Newspapers' lawsuit is wholly duplicative of American Oversight's action. It features the same claims against the same parties,[1] is premised on the same legal theories, and demands the production of the same corpus of disputed records. While Phoenix Newspapers certainly may expend its resources on redundant lawsuits if it so chooses, it is not entitled to inflict on the Senate Defendants the inefficiency, delay, expense, and risk of inconsistent judgments that inevitably ensue from litigating the same claims twice in the two different fora. *See* Local Rule 3.2(c)(1) (transfer is proper when two cases involve "substantially the same" parties or legal questions, and would "would entail substantial duplication of labor if heard by different judges").

Counsel for Cyber Ninjas has represented to the undersigned that Cyber Ninjas does not object to the relief requested by this Motion.

## CONCLUSION

For the foregoing reasons, the Court should order the transfer of the LC2021-000180-001 action and its consolidation with the CV2021-008265 action.

RESPECTFULLY SUBMITTED this 1st day of July, 2021.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
*Attorneys for the Senate Defendants*

[1] In addition to Cyber Ninjas, Phoenix Newspapers' Complaint also names as a defendant the Secretary of the Senate, although she has no legal authority or control over the records at issue.

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

| | |
|---|---|
| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate;**<br><br>**Real Parties in Interest.** | **Court of Appeals**<br>**Case No. 1 CA-SA 21-0173**<br><br>**Maricopa County Superior Court**<br>**Case No.: LC2021-00180-001**<br><br>**(Oral Argument Requested)** |

# REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION

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Petitioner Cyber Ninjas Inc. ("CNI") wants to make one thing very clear: it does *not* concede that it has custody of any "public records" of any kind, nor does it have any "public records." (*See* Response to Petition for Special Action, bottom of page 5; pages 18-19.) Phoenix Newspaper Inc.'s ("PNI") claim that CNI has "conceded" that it has "essential" records is just something that PNI is very familiar with – "fake news." The Court need look no further than what PNI claims to be the basis for this contention, at pages 18-19 of its Response, in which PNI merely quotes CNI's legal arguments in support of the Motion to Dismiss. And this appears to be the biggest point in PNI's Response: it groundlessly argues that the Court is somehow allowing PNI to hide "essential" "public records," while at the same time failing to even identify what exactly these "public records" are or why they are "public" under Arizona law. As discussed below, PNI has failed to allege any factual or legal basis for determining that CNI has custody of any "public records," as that term is actually defined by the caselaw—even if resolving the issue were necessary to dispose of PNI's claim against CNI, which it is not.

CNI's case here is very simple: PNI has failed to bring a claim against CNI for which relief can be granted, under the plain wording of the public-records law. It is not for courts to decide what public-records statutes or policy "should be," or to create special rules for defendants like CNI in derogation of the law, simply because of who that defendant is. Courts are the one forum that parties can turn to and expect a fair and "blind" treatment in accordance with the plain wording of the law, without respect to politics or publicity – but this is clearly not what CNI received from the trial court in hits this case. CNI is a private auditor that is not capable of being sued under the public-records statutes, period; and its Motion to Dismiss must be granted. The Court should accept jurisdiction of this Special Action because there is clearly no equally speed means of relief.

PNI argues that CNI is an "agent" of the Senate, without commenting on the scope of that agency—an agency that was narrowly defined by contract and that consisted only of investigating and preparing an audit report for the Senate. All government employees and contractors are by definition "agents" of the government, in some capacity or another; but the public-records statutes do not provide that mere "agents" have the responsibility to respond to public records requests or to be sued on them, only officers of public bodies. *See* A.R.S. §§ 39-121 *et. seq*.

PNI further argues that CNI is an "officer" of the Senate, which is groundless. The only facts that PNI points to are that the Senate hired CNI and paid CNI. Again, these facts apply to every employee or contractor of the Senate. Toward the end of its brief, PNI tries to claim that CNI should be treated differently and that the Court should create special rules just for CNI—in contradiction to the basic idea that justice is blind and that courts serve to neutrally apply laws, not change them based on who is before the court. PNI argues that "Cyber Ninjas is unlike any typical government contractor that provides the same goods or services to a governmental entity that it could provide to a nongovernmental customer, such as landscapers that maintain the capitol grounds and vendors that supply coffee that is consumed by government employees." (Response, page 22.) While this distinction has no basis in law, it is not even true – CNI provides auditing services which it can do for any governmental or non-governmental entity and merits no fundamentally different treatment under the public-records statutes. It makes no sense to create special rules just for auditors, or even election auditors, where there is zero basis in law. If the legislature wishes to create such special duties for auditors, or even election contractors/employees, then it may do so by passing a law; but the courts cannot make one up. Otherwise, PNI seems to be arguing that every contractor or employee relating to an election must be subject to public records requests (because such

persons can only provide their official "election" services to the government). This would mean that every employee or contract involved in an election, from government poll workers on down to the company that makes the ballot-tabulation machines, are suddenly subject to public-records requests and lawsuits, without any basis in law.

PNI asserts that CNI is "performing an essential and exclusive government function, initiated and funded with public dollars, and where the Senate declined to perform this core government activity itself" (and declined to "exercise dominion" over CNI's records) – but to the extent that this is true, it is true of literally every government contractor. The company that erects light poles on the freeway is "performing an essential and exclusive government function, initiated and funded with public dollars"; and the government "declined to perform this core government activity itself" (or to "exercise dominion over [the company's records]"), which is precisely why it hired a private contractor. This is perfectly normal and well within the contemplation of the public-records statutes. Simply because PNI – or even other members of the public – have an intense interest in CNI's company records (which, in PNI's case, is simply because it believes that it can write more stories and profit off of them) does not render the company's records any more "public," or make CNI any more of an "officer" of a "public body" under Arizona law.

Finally, and even though this issue is not strictly needed to dispose of the case: PNI fails to allege or show that CNI actually has "public records" of any kind. In the seminal case of *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 534, 815 P.2d 900, 903 (1991), the Arizona Supreme Court addressed when records that belong to non-governmental or private bodies may be considered "public records," relying heavily on federal FOIA law. *See also Church of Scientology v. Phoenix Police Dep't*, 122 Ariz. 338, 340, 594 P.2d 1034,1036 (App. 1979)(FOIA offers guidance to Arizona courts in construing Arizona public records

statute). The Supreme Court first noted that federal courts have "uniformly held that an agency must control a record before it is subject to disclosure"; and "[t]he control test is helpful in analyzing our statute, which also exempts private information from disclosure even when it is held by a government agency." *Id.,* 168 Ariz. at 541, 815 P.2d at 910. "An agency has control over the documents when they have come into the agency's possession in the legitimate conduct of its official duties." *Id.,* 168 Ariz. at 541-42, 815 P.2d at 910-11 (*quoting U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 145 (1989))(quotation marks omitted). Where documents are not in control of the government, they were not generated by the government, they never entered the government's files, and they were not used by the government for any purpose, then they are not "public records." *Id.,* 168 Ariz. at 542, 815 P.2d at 911 (*citing Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980)).

PNI failed to allege that CNI has exclusive possession of *any* document that the Senate controls, that the Senate generated, that ever entered the Senate's files, or that was used by the Senate for any purpose. Under CNI's contract with the Senate, the only document that the Senate was entitled to have and control is the final audit report that CNI agreed to prepare, which has now been completed and produced to the Senate and is now clearly a public record. But CNI's own records are not public records simply because they may relate to that audit report, which seems to be PNI's contention here. Further, in *Salt River*, the Arizona Supreme Court cited with approval (several times) two FOIA decisions that squarely address the kind of issues at bar: *Forsham v. Harris*, 445 U.S. 169 (1980) and *Ciba–Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y.1977)(discussed immediately below).

**ARIZONA SUPREME COURT**

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|---|---|
| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate;**<br><br>**Real Parties in Interest.** | **Arizona Supreme Court**<br>**Case No._____**<br><br>**Court of Appeals**<br>**Division One**<br>**Case No. 1 CA-SA 21-0173**<br><br>**Maricopa County Superior Court**<br>**Case No.: LC2021-00180-001** |

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## APPENDIX TO PETITION FOR SPECIAL ACTION, OR IN THE ALTERNATIVE PETITION FOR REVIEW

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In *Forsham v. Harris*, 445 U.S. 169 (1980), the United States Supreme Court considered a FOIA request for the raw data underlying a study conducted by a private medical research organization. Although a federal agency funded the study, the data was generated and possessed by the private company and it never passed into the hands of the agency. The Supreme Court found the fact that the study was financially supported by a FOIA-covered government agency did not transform the data into "agency records"; nor did the agency's right of access to the materials under federal regulations change the result. The Supreme Court explained that "FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id.*, 445 U.S. at 186 (emphasis in original). In denying the FOIA claim, the Supreme Court explained that federal funds do not convert a private organization into an "agency" for purposes of the FOIA without "extensive, detailed, and virtually day-to-day supervision" by the agency of the private organization. *Id*., 445 U.S. at 180. Of course, nothing of the sort has been alleged here; and in general the notion that "Cyber Ninjas Inc." is so intertwined with the government as to be a "government agency" is meritless. Ultimately, the Supreme Court held that "[w]ith due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency … but which data has not at any time been obtained by the agency, are not 'agency records' accessible under the FOIA. Without first establishing that the agency has created or obtained the document, the agency's reliance on or use of the document is similarly irrelevant." *Id*., 445 U.S. at 170. Again, in the case at bar there is no allegation that CNI holds any records that were generated by the Senate, or that CNI exclusively holds any records created by the Senate; and while there has also been no allegation that the Senate "relied on" CNI's records, such an allegation would be "irrelevant" anyway. *Id.*

The other closely-related FOIA decision discussed by the Arizona Supreme Court in *Salt River* (*Ciba–Geigy Corp. v. Matthews*) concerned a private group of researchers (called the "UGDP") who applied for and received federal grants to conduct diabetes studies. *Ciba,* 428 F.Supp. at 532. Under federal regulations, the UGDP was required to submit interim and final reports to the government and to allow the government "access" to their raw data; but the *Ciba* court noted that the government customarily relied on the UGDP's reports rather than accessing the underlying data. The plaintiff questioned "the manner in which the UGDP [handled its own] raw data," as well as "the accuracy of the results reported," so the plaintiff made a FOIA request for the UGDP's underlying data and claimed that the data was a public record (or "agency record," in FOIA parlance). *Id.,* 428 F. Supp. at 526. On a familiar note, the plaintiff made three arguments: first, that the UGDP was a "de facto federal agency and that its records are therefore agency records"; second, that "even if the UGDP is not a federal agency in itself, it nevertheless served as an extension of a federal agency" (essentially an "agent" argument); and third, that even if those arguments failed then the "disclosure of [UGDP's] records may still be compelled if those records can be characterized as Government agency records." *Id.,* 428 F. Supp. at 526.

The *Ciba* court rejected all three arguments. First the court held that even though the UGDP received public funding, it was not an "agency." *Id.* To reach this decision the court looked at obvious factors like "whether the organization has the authority in law to perform the decisionmaking functions of a federal agency and whether its organizational structure and daily operations are subject to substantial federal control." *Id.*, 428 F. Supp. at 527. With respect to the plaintiff's other two arguments, the court disposed of them by finding that the plaintiff had not proven that "the records were either Government-owned or subject to substantial Government control or use. In other words, it must appear that there was significant

Government involvement with the records themselves in order to deem them agency records." *Id.*, 428 F. Supp. at 529. The *Ciba* court held "that federal funding, regardless of amount, [was] not sufficient to vest the underlying raw data of the UGDP research with a public character. To hold otherwise at a time when public monies flow to numerous private endeavors would surely have a chilling effect on [them]…" *Id.*, 428 F. Supp. at 530. The *Ciba* court also found that "Government access to and reliance upon" the data did not mean that the government owned or "controlled" it. *Id.* The *Ciba* court logically explained that "[a]lthough the federal defendants have access to the underlying data, there is no evidence that they have used it to exercise regular dominion and control over the raw data." *Id.*, 428 F. Supp. at 530–31. "Mere access without ownership and mere reliance without control will not suffice to convert the UGDP data into agency data." *Id.* "Just as the Government cannot be compelled to obtain possession of documents not under its control or furnish an opinion when none is written, it should not be compelled to acquire data it neither referred to directly nor relied upon in making decisions." *Id.*, 428 F. Supp. at 531. "The distinction between direct reliance, in whole or in part, upon a summary report and direct reliance (via usage or control) on supporting documentation is necessary to preserve a salutary balance between the public's right to be informed of the grounds for Government decisionmaking and the protection of private interests." *Id.*, 428 F. Supp. at 532.

In other words, while the Senate has received CNI's report—which is undisputedly a public record—the Senate does not own or control CNI's company records even though they may relate to the final audit report (and even if, in some sense, the Senate has "relied" on CNI's records because its records support the final audit report. According to the United States Supreme Court, this is "irrelevant.") For example, PNI has asked for all of CNI's internal company records concerning communications about its audit. This would include things like CNI's internal

emails discussing issues with its ability to perform under the contract, discussing its relationship with the Senate, and evaluating the performance of its own subcontractors or issues with their performance, etc. In PNI's universe, CNI must not only produce such emails to the Senate but must make them public. Not only is this patently unfair, but it runs against common sense and is legally-baseless. The foregoing are not "public records" by any stretch of the imagination, nor do they meet any intellectually-honest legal definition.

The bottom line here is that (even though it is not necessary to dispose of the case), PNI has failed to articulate or allege how CNI has *anything* that meets the actual definition of a "public record." PNI failed to allege, much less prove, that CNI has records that were generated or controlled by the Senate, or even that – despite it being "irrelevant," according to the United States Supreme Court – the Senate has directly relied on CNI's records. The only thing that CNI agreed for the Senate to own or control is CNI's final audit report, which has been produced to the Senate and is now public. The Senate did not generate, and does not own/control or even use CNI's own company records, period, and PNI failed to make allegations to support/prove the contrary.

## CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction over this special action and grant CNI's requested relief. The only claim that has PNI asserted against CNI must be dismissed for failure to state a claim, and the trial court's order for CNI produce to produce records must be reversed.

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**RESPECTFULLY SUBMITTED** September 27, 2021.

**WILENCHIK & BARTNESS, P.C.**

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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

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|---|---|
| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate;**<br><br>**Real Parties in Interest.** | **Court of Appeals**<br>**Case No. 1 CA-SA 21-0173**<br><br>**Maricopa County Superior Court**<br>**Case No.: LC2021-00180-001** |

**CERTIFICATE OF COMPLIANCE REGARDING**
**REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION**

The undersigned certified that the accompanying Reply in Support of Petition for Special Action complies with Rule 7 (e), Arizona Rules of Procedure for Special Actions. The Petitions for Special Action uses proportionately spaced Times New Roman typeface, with a point size 14, is double-spaced and contains 2,705 words.

**RESPECTFULLY SUBMITTED** September 27, 2021.

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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

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| **CYBER NINJAS, INC.,**<br><br>**Petitioner/Defendant,**<br><br>**THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,**<br><br>**Respondent,**<br><br>**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 the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate;**<br><br>**Real Parties in Interest.** | **Court of Appeals**<br>**Case No. 1 CA-SA 21-0173**<br><br>**Maricopa County Superior Court**<br>**Case No.: LC2021-00180-001** |

**CERTIFICATE OF SERVICE OF**
**REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION**

Pursuant to ARCAP 4(g) and in compliance with Rule 5(c) of the Arizona Rules of Civil Procedure, I certify that on September 27, 2021, I filed

Petitioner/Defendant's Reply in Support Petition for Special Action and Appendix via AZTurboCourt.com.

I certify that on September 27, 2021, I served the same by e-mail to all counsel:

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**RESPECTFULLY SUBMITTED** September 27, 2021.

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**From:** Jeremy Duda <jduda@azmirror.com>
**Sent:** Wednesday, November 10, 2021 12:25 PM
**To:** Douglas Logan <dlogan@cyberninjas.com>; Rod Thomson <rod@thomsonpr.com>
**Subject:** Public records request

Please acknowledge receipt of this public records request, which I'm filing pursuant to the Arizona Court of Appeals' Nov. 10, 2021, decision in *Cyber Ninjas v Hannah*.

--

**Jeremy Duda**
Arizona Mirror
Associate editor
Cell: (602) 315-3108
<Records request-Cyber Ninjas 11-10-21.pdf>

Nov. 10, 2021

Jeremy Duda
Arizona Mirror
1820 W. Washington Street Room 105
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**RECORDS REQUEST**

Dear Mr. Logan,

Pursuant to the provisions of the Arizona Public Records Law, A.R.S. 39-121, as well as to the Arizona Court of Appeals' Nov. 9, 2021, opinion in *Cyber Ninjas v. Hannah*, I am requesting an electronic copy of the following public records, or other matters[1]:

1. All records of payments to Cyber Ninjas or any of its employees, subcontractors or other people or entities for work performed in relation to the recount and audit of the 2020 general election in Maricopa County, including payments from the Arizona Senate, as well as payments from private individuals, nonprofit organizations or other private entities, and including money that is paid directly from private individuals or entities to the Cyber Ninjas, Doug Logan, or any affiliated entities, and its subcontractors, that doesn't use the Senate as a pass-through.
2. All invoices, bills or other requests for payment submitted to Cyber Ninjas, the Arizona Senate or other individuals or entities for work performed in relation to the recount and audit of the 2020 general election in Maricopa County.
3. Any budgets, cost projections or other documents created by Cyber Ninjas or other entities or individuals related to the audit and recount of the 2020 general election in Maricopa County.
4. All documents, notes, written or electronic communications and other data or materials generated by volunteers or audit team members, or provided by volunteers to the audit team, relating to "voter registrations that did not make sense," as referenced in Section 2.1 of the Cyber Ninjas Statement of Work signed by Karen Fann and Douglas Logan. This request includes the report titled "Summary of 2020 General Election Initial Findings: Maricopa & Pima Counties," dated March 1, 2021 and signed by Elizabeth Harris on March 2, 2021, as well as any related affidavits or other supporting documents.
5. All contracts, subcontracts, memoranda of understanding or other written agreements that Cyber Ninjas has with subcontractors or other entities that have performed work related to the recount and audit of the election in Maricopa County, including, but not limited to, contracts with Wake Technology Services, Inc. (Wake TSI), StratTech Solutions, CyFIR, Digital Discovery, Bobby Pitton, and Jovan Hutton Pulitzer, AKA Jeffry Jovan Philyaw.
6. All written or electronic communications between employees of Cyber Ninjas and any other individuals or entities that are providing paid or volunteer services for the Arizona Senate's audit of the 2020 general election in Maricopa County. This request excludes communications regarding subjects that are not pertinent to the audit.
7. Copies of any and all visitor logs and sign in sheets to the audit of the Maricopa County 2020 election results.
8. All written or electronic communications pertaining to the audit, including, but not limited to, emails, text messages and social media messages, between contractors, subcontractors or audit employees.

9. Any reports, status updates or other written or electronic communications created by employees or Cyber Ninjas or other audit contractors or subcontractors detailing the findings or progress of the audit.
10. Any other audit-related records provided to other parties in response to public records requests.

This request includes any pertinent records that are in the possession of Cyber Ninjas or other audit contractors, subcontractors or employees, regardless of whether they are in the possession of the Arizona Senate. I submit this request in accordance with the Court of Appeals' decision that "Cyber Ninjas has become the custodian" of various audit-related records under Arizona's public records law.

If challenges arise with this please contact me, as I will likely be able to help find ways to mitigate these perceived barriers to providing access to public records.

If there are ever fees associated with compiling or transmitting these records, please contact me so I can make appropriate arrangements.

If there are any segregable portions of the records responsive to this request available before the entirety, please provide those as they become available.

If you choose to deny this request, 1) please provide a written explanation for the denial, including a reference to the specific statutory exemption(s) upon which you rely. 2) Also please provide all segregable portions of otherwise exempt material. 3) Also please provide a written, itemized log of all records or other matters being denied.

If you are not the person, office or agency who has the authority or ability to comply with this records request, inform me as soon as possible who the proper person, office or agency is.

This request is separate from and in no way nullifies any other outstanding records request.

The Arizona Public Records Law requires that public bodies provide access to public records "promptly." Accordingly, I request that you provide the requested records as soon as possible.

I appreciate your cooperation in this matter.

Sincerely,

Jeremy Duda

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[1] Please see Carlson v Pima County, 1984; Griffis v. Pinal County, 2007; Lake v City of Phoenix, 2009; Ariz Atty Gen. Op. 70-1, Lake v. City of Phoenix, 2009

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# Maricopa County Attorney

**ALLISTER ADEL**

November 19, 2021

**VIA EMAIL AND U.S. MAIL**

Mr. Doug Logan
Founder
Cyber Ninjas
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Sarasota, Florida 34232
dlogan@cyberninjas.com

Re: Public Records Request

Mr. Logan,

This is a public records request. The Arizona Public Records Law, A.R.S. § 39-121 *et seq.* (hereafter, the "PRL") applies to custodians of records that are reasonably necessary or important to obtain an accurate knowledge of official governmental activities that are supported with public money. A.R.S. § 39-121.01(B). The PRL allows "any person" to request copies of these public records that are within the custodian's custody. A.R.S. § 39-121.01(D)(1). Upon receiving such a request, the custodian must "promptly respond." A.R.S. § 39-121.01(E).

The Arizona Court of Appeals ruled that Cyber Ninjas is subject to the PRL for records related to its examination of Maricopa County's ballots, tabulation equipment, and other election-related materials. *Cyber Ninjas, Inc. v. The Honorable John Hannah et al.*, No. 1CA-SA 21-0173 (Ariz. Ct. App. Nov. 9, 2021) (hereafter "*Cyber Ninjas*"). A copy of that decision is included with this request. The Court of Appeals expressly ruled 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." *Id.* at 4 ¶9. It also ruled that Cyber Ninjas is the custodian of those records, and anyone wishing to obtain them under the PRL must make their requests to Cyber Ninjas. *Id.* at 5 ¶15.

The Maricopa County Attorney represents the Maricopa County Board of Supervisors. On behalf of our Client and pursuant to the PRL and the *Cyber Ninjas* decision, I make the following public records request for the records identified in **Appendix A, attached**. This request is not made for

commercial purposes, but rather to benefit the public by allowing the public to better understand the relevant facts related to Cyber Ninjas' examination of Maricopa County's ballots, tabulation equipment, and other election-related materials. The requested records are also necessary for the Board of Supervisors to fully respond to numerous questions posed to it by the Arizona Attorney General. The Board of Supervisors agrees to pay up to $100 for copying and related charges, if applicable. If the fees will exceed $100, please notify me before incurring any such costs.

If you have already provided any of the requested records to the Arizona Senate and prefer that the Board of Supervisors direct its request to the Senate, please let me know. Otherwise, please promptly provide the records identified in Appendix A. Should you refuse to promptly respond as required by the PRL, the Board of Supervisors may instigate litigation against you to obtain the records. If such litigation ensues, Arizona law provides for an award of attorneys fees and costs where litigation is necessary to obtain records pursuant to the PRL. A.R.S. § 39-121.01(B). Of course, the Board of Supervisors hopes that litigation can be avoided by Cyber Ninjas' prompt and complete compliance with the PRL.

Sincerely,

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

Thomas P. Liddy
Division Chief, Civil Services Division

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# APPENDIX A

Pursuant to the Arizona Public Records Law, A.R.S. § 39-121 *et seq.*, and the Arizona Court of Appeals' decision *Cyber Ninjas, Inc. v. The Honorable John Hannah et al.*, No. 1CA-SA 21-0173 (Ariz. Ct. App. Nov. 9, 2021), please provide copies of the following records:

- All documents, communications of any type, and other records created by Cyber Ninjas or any of its subcontractors, upon which Cyber Ninjas or its subcontractors relied when preparing Cyber Ninjas "Maricopa County Forensic Election Audit" Report, Volumes I – III, dated September 24, 2021, copies of which are available on the Arizona State Senate's Republican Caucus's website, at https://www.azsenaterepublicans.com/cyber-ninjas-report.

- To the extent not already produced, all documents, communications of any type, and other records related to Cyber Ninjas' hand count of Maricopa County's ballots, irrespective of whether those records were relied upon for preparing the Cyber Ninjas' Report. This request includes, without limitation:

    - All records related to, concerning, supporting, or disagreeing with Cyber Ninjas' conclusion, reported in the Cyber Ninjas' Report, that Cyber Ninjas' hand count resulted in President Biden gained 99 votes and Mr. Trump lost 261 votes as compared with the official Maricopa County canvass;

    - All versions of instructions provided to individuals who participated in the hand count of Maricopa County's ballots, whether those individuals were Cyber Ninjas' employees, Cyber Ninjas' subcontractors' employees, or volunteers;

    - The names of all those who participated in conducting the hand count audit of Maricopa County's ballots, whether those were Cyber Ninjas' employees, Cyber Ninjas' subcontractors' employees, or volunteers;

- All documents, communications of any type, and other records concerning or related to Ben Cotton's statement on or about May 12, 2021, alleging that databases and/or files had been deleted from the materials provided by Maricopa County to the Senate.

- All documents, communications of any type, and other records concerning or related to Ben Cotton's statement that he had been able to locate the data that he had alleged had been deleted. Mr. Cotton made this statement on or about May 18, 2021, at the Senate's hearing concerning Cyber Ninjas' examination of Maricopa County's election materials.

- All financial records related to Cyber Ninjas' examination of Maricopa County's election materials, including without limitation all bids, requests for bids or requests for proposals, contracts, amendments to contracts, invoices, bills, receipts, and records of all payments or donations.

- All communications of any type, between October 1, 2020 and November 15, 2021, regarding the proposal, planning, performance, funding, staffing, conducting, or

otherwise concerning Cyber Ninjas' and its subcontractors' examination of Maricopa County's election materials, between or involving any officer, director, employee, or agent of Cyber Ninjas and any officer, director, employee, or agent of any subcontractor, including without limitation:

- Wake Technology Services, Inc;
- CyFir LLC, including without limitation:
  - Ben Cotton, or anyone communicating on his behalf; and,
- Strat Tech Solutions LLC.

- All communications of any type, between October 1, 2020 and November 15, 2021, regarding the proposal, planning, performance, funding, staffing, or otherwise concerning Cyber Ninjas' and its subcontractors' examination of Maricopa County's election materials, between or involving any officer, director, employee, or agent of Cyber Ninjas and:
  - Any member of the Arizona Senate or any employee or agent communicating on behalf of any Arizona State Senator, including without limitation:
    - Senate President Karen Fann, or anyone communicating on her behalf;
    - Senator Warren Petersen, or anyone communicating on his behalf;
    - Senator Kelly Townsend, or anyone communicating on her behalf;
    - Senator Wendy Rogers, or anyone communicating on her behalf;
    - Senator Sonny Borelli, or anyone communicating on his behalf.
  - Any member of the Arizona House or any employee or agent communicating on behalf of any Arizona State Representative, including without limitation:
    - Rep. Mark Finchem, or anyone communicating on his behalf.
  - Ken Bennett, or anyone communicating on his behalf;
  - John Brakey, or anyone communicating on his behalf;
  - Randy Pullen, or anyone communicating on his behalf;
  - Any member of the United States Congress, or anyone communicating on their behalf, including without limitation:
    - Rep. Paul Gosar, or anyone communicating on his behalf;
    - Rep. Andy Biggs, or anyone communicating on his behalf;

- Rep. Louie Gohmert, or anyone communicating on his behalf;
- Rep. Marjorie Taylor Greene, or anyone communicating on her behalf;
- Rep. Lauren Boebert, or anyone communicating on her behalf;
- Rep. Matt Gaetz, or anyone communicating on his behalf.

- Former President Donald Trump, or anyone communicating on his behalf, including without limitation:
  - Mark Meadows, or anyone communicating on his behalf;
  - Jenna Ellis, or anyone communicating on her behalf.
- Rudy Giuliani, or anyone communicating on his behalf;
- Michael Flynn, or anyone communicating on his behalf;
- Steve Bannon, or anyone communicating on his behalf;
- Mike Lindell, or anyone communicating on his behalf;
- Patrick Byrne, or anyone communicating on his behalf;
- Sidney Powell, or anyone communicating on her behalf;
- Alexander Kolodin, or anyone communicating on his behalf;
- Christopher Viskovic, or anyone communicating on his behalf;
- Howard Kleinhendler, or anyone communicating on his behalf;
- Kory Langhofer, or anyone communicating on his behalf;
- Tom Basille, or anyone communicating on his behalf;
- Kelli Ward, or anyone communicating on her behalf;
- Jordan Conradson of Gateway Pundit, or anyone communicating on his behalf, regardless of whether the communication relates to Mr. Conradson's role as a reporter for Gateway Pundit;
- Christina Bobb of One America News Network, or anyone communicating on her behalf, regardless of whether the communication relates to Ms. Bobb's work as a reporter for One America News Network;
- Jovan Pulitzer, or anyone communicating on his behalf;

- Anthony Kern, or anyone communicating on his behalf;

- Staci Burk, or anyone communicating on her behalf.

**DEFINITIONS:**

As used in the above public records requests:

"Communications" should be interpreted in its broadest possible terms to include, without limitation, mail; email; text messages; voicemail messages; and messages using applications such as WhatsApp, Twitter, Facebook, SnapChat, Wickr, Parler, or Telegram.

"Records" should be interpreted in its broadest possible terms to include, without limitation, both drafts and final versions of documents, papers, charts, spreadsheets, notes, and communications, whether electronic or on paper.