

IN THE SUPREME COURT OF ARIZONA

CYBER NINJAS, INC.,

Petitioner,

vs.

THE HONORABLE JOHN HANNAH,
Judge of the SUPERIOR COURT OF
THE STATE OF ARIZONA, in and for
the County of MARICOPA,

Respondent Judge,

PHOENIX NEWSPAPERS, INC., an
Arizona Corporation, and KATHY
TULUMELLO; ARIZONA STATE
SENATE, a public body of the State
of Arizona; KAREN FANN, in her
official capacity as President of the
Arizona State Senate; WARREN
PETERSEN, in his official capacity
as Chairman of the Arizona Senate
Committee on the Judiciary; and
SUSAN ACEVES, in her official
capacity as Secretary of the Arizona
State Senate,

Real Parties in Interest.

Case No. CV-21-0281-PR

Arizona Court of Appeals

Division One

No. 1 CA-SA 2021-0173

Maricopa County Superior Court

Case No. LC2021-000180-001

**REAL PARTIES IN INTEREST PHOENIX NEWSPAPERS, INC.'S
AND KATHY TULUMELLO'S BRIEF IN OPPOSITION TO
PETITIONER CYBER NINJAS, INC.'S PETITION FOR SPECIAL
ACTION, OR IN THE ALTERNATIVE PETITION FOR REVIEW**

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Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello (together, “PNI”) hereby respond in opposition to Petitioner Cyber Ninjas, Inc.’s Petition for Special Action, or in the Alternative Petition for Review (the “Petition” or “Pet.”).

Introduction

This action is yet another attempt by Cyber Ninjas to delay its compliance with Arizona law, repeated court orders and its contract with the Arizona Senate to turn over public records regarding its financing, staffing and conduct of the Senate’s audit of the 2020 election in Maricopa County. At every turn, Cyber Ninjas has refused to acknowledge that it is bound by the Arizona Public Records Law, let alone that it must comply with the orders of Arizona courts to disclose public records in its custody. It is time to bring this litigation toward its conclusion, and accordingly Cyber Ninjas’ Petition should be denied or, in the alternative, this Court should affirm the courts below.

Statement of the Facts and Statement of the Case

When leaders of the Arizona Senate decided to audit the ballots cast and tabulation equipment used in Maricopa County for the 2020 general election (the “Audit”), rather than performing the task with Senate staff,

they outsourced the entire operation to a private company, Cyber Ninjas. *See* Mem. Decision (Nov. 9, 2021) (App’x 21-27) at 2 ¶2. Seeking to inform the public about the Audit, PNI submitted requests for Audit-related materials under the Arizona Public Records Law to the Senate. *Id.* ¶3. When the Senate denied having “physical” custody of the records and directed PNI to Cyber Ninjas instead, PNI requested that Cyber Ninjas disclose communications and other records regarding the performance, funding and staffing of the Audit, including records regarding Cyber Ninjas’ dealings with the subcontractors it hired to perform the Audit work. *See* App’x at 107-110.

When both Cyber Ninjas and the Senate refused to provide the requested public records, PNI filed a special action in Maricopa County Superior Court against the Senate, Senate officials and Cyber Ninjas pursuant to A.R.S. § 39-121.02(B). Mem. Decision at 2-3 ¶4. The Superior Court denied Cyber Ninjas’ subsequent motion to dismiss. *Id.*

On August 24, the Superior Court issued its Order to Produce Public Records, which required the Senate and Cyber Ninjas to produce to PNI copies of the public records in their possession, custody or control, and permitted Cyber Ninjas and the Senate to confer regarding which

public records should be withheld. *See* App'x at 205-210. The August 24 Order was, however, subject to this Court's stay issued in connection with the Senate's Petition for Review in a similar case filed against it by the nonprofit group American Oversight. *Id.* at 209.

On September 14, this Court denied the Senate's Petition for Review in the American Oversight case and lifted its stay. Later that same day, Defendant Senate President Fann wrote to Cyber Ninjas requesting that it provide to the Senate those records in Cyber Ninjas' custody or control, or in the custody or control of Cyber Ninjas' subcontractors, that have a "substantial nexus" to the Audit. *See* App'x at 250. Three days later, after the Court of Appeals partially reimposed the stay in response to a motion by Cyber Ninjas, counsel for Cyber Ninjas responded, asserting that it had no binding legal obligation to produce anything but asserting it would provide some records "out of good will and its commitment to transparency." *Id.* at 252-53.

Meanwhile, on August 31, Cyber Ninjas filed a special action in the Court of Appeals challenging the denial of its motion to dismiss, which resulted in the Memorandum Decision at issue here. *See* App'x at 28-45. The Court of Appeals held that Cyber Ninjas was subject to the Public

Records Law as a custodian of Audit-related public records – those records with a substantial nexus to the Audit. *Id.* at 24-26 ¶¶13-20. Cyber Ninjas therefore is a necessary party to PNI’s special action, must comply with court orders to provide public records to the Senate or directly to PNI, and is subject to an award of reasonable attorneys’ fees under the Public Records Law, the Court of Appeals held. *Id.* at 25-26 ¶¶17, 20-21.

Hours later, Cyber Ninjas’ counsel sent a letter to the Senate’s counsel with a copy to undersigned counsel for PNI, purporting to comply with its court-ordered obligations to confer regarding which public records should be withheld. A true and correct copy of that letter is attached hereto as Exhibit A.

Cyber Ninjas’ counsel noted that the Superior Court and Court of Appeals defined public records as those documents with a substantial nexus to governmental activities, asserted the relevant activity was the production of the Audit report, and stated that Cyber Ninjas “has already produced to the Senate all of its records with a substantial nexus to that report,” except for three listed categories of purportedly exempt records. Ex. A at 1. The letter also included a sworn declaration by Cyber Ninjas

CEO Douglas Logan reiterating the contention that the company had provided the Senate with all records with a substantial nexus to the Audit report. *Id.* at 4. In other words, Cyber Ninjas represented that it had complied with the court orders requiring it to provide to the Senate all potential public records in its possession (albeit subject to Cyber Ninjas' own, extremely narrow view of what records qualified).

The records Cyber Ninjas provided to the Senate include a smattering of financial documents and some 300 emails, *id.* at 1-2, only some of which the Senate has made public. These documents represent a tiny fraction of the approximately 60,000 records that Cyber Ninjas told the lower courts were potentially subject to the courts' orders. *See, e.g.*, App'x at 31, 33. (Cyber Ninjas' Petition is conspicuously silent regarding both the number of documents purportedly at issue and the fact it already produced several hundred to the Senate.)

Last Thursday, counsel for Cyber Ninjas sent another letter to the Senate's counsel, again refusing to produce any records to the Senate or PNI. A true and correct copy of that letter is attached hereto as Exhibit B. Cyber Ninjas falsely asserted that this Court's denial of its application for a stay in this matter means the Superior Court's order to produce

records “has been effectively stayed/overruled by the Arizona Supreme Court.” Ex. B at 1. Cyber Ninjas further asserted that it “has no documents to produce to either the Senate or to PNI” and claimed it “does not have the money” to compile the privilege log required under the Superior Court’s order. *Id.* at 1-2. Cyber Ninjas also claimed, despite the operative rulings from the Superior Court and Court of Appeals, that the requested documents were not public records because they “are not owned by, created by, or even relied on by the government” and demanded a total of \$67,273 from the Senate to process and produce the records. *Id.* at 3-6.

Here, although Cyber Ninjas attempts to break down its appeal into five separate questions, Pet. at 1-2, its arguments can be summarized in two broad categories. First, Cyber Ninjas claims that it is not a custodian of public records but a private, third party that cannot be joined as a defendant in a special action (and therefore cannot be subject to an award of attorneys’ fees) under the Public Records Law. *See id.* at 3-4, 6-9, 16-17. Second, Cyber Ninjas asserts that the Audit-related records it possesses cannot be subject to the Public Records Law because they are

not owned, created by or in the custody of the Senate. *See id.* at 4-5, 10-16.

Argument

This Court should deny Cyber Ninjas' Petition or grant the Petition and affirm because the courts below correctly applied well-settled principles of Arizona law in a manner that gives effect to the Public Records Law's purpose to open government activities to public scrutiny. Because this action turns on issues of statutory interpretation, this Court's review is *de novo*. *Moreno v. Jones*, 213 Ariz. 94, 98 ¶23 (2006).

I. CYBER NINJAS IS A CUSTODIAN OF PUBLIC RECORDS PROPERLY JOINED AS A DEFENDANT IN PNI'S SPECIAL ACTION.

The Court of Appeals correctly held that under the Public Records Law, custodians of public records may be joined as parties in special actions and required to pay fee awards when they lose. Cyber Ninjas is the *de facto* custodian of public records related to the Audit because the Senate hired it to perform the Audit and has allowed Cyber Ninjas to hold onto thousands of documents with a substantial nexus to the Audit.

A. The Public Records Law Applies By Its Terms to Custodians of Public Records.

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). The law calls for public records requests to be made to and a prompt response provided by “the custodian” of those public records, *id.* § 39-121.01(D), and states that “[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,” *id.* § 39-121.01(E) (emphasis added). The statute thus anticipates the practical reality that 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 v. Pima Cty.*, 141 Ariz. 487, 491 (1984) (an “officer or custodian” may invoke exceptions to withhold records (emphasis added)).

B. Cyber Ninjas Is a Custodian of Audit-Related Public Records.

The Senate’s decision to allow Cyber Ninjas to keep sole physical custody of records with a substantial nexus to the Audit made Cyber Ninjas the custodian of those public records, as the Court of Appeals

correctly held. Mem. Decision at 5 ¶15. Cyber Ninjas therefore must provide these records in response to PNI's request. *See, e.g.*, A.R.S. §39-121.01(D)(1); *id.* § 39-121.01(E).

Cyber Ninjas has repeatedly admitted that it has many thousands of documents that qualify as public records under the lower courts' orders. *See* pp. 4-6, *supra*. Because Cyber Ninjas by its own admission has physical control of many documents with a substantial nexus to the Audit, it therefore is the Senate's custodian of those records.

C. As a Records Custodian, Cyber Ninjas Is a Proper Defendant in PNI's Special Action.

Cyber Ninjas claims the Court of Appeals "capriciously inserted the word 'custodian'" into this statutory provision: the requestor "may appeal the [custodian's] denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." Pet. at 6 (quoting Mem. Decision at 5 ¶16 (quoting A.R.S. § 39-121.02(A))). Cyber Ninjas is mistaken.

The sections of the Public Records Law immediately prior to § 39-121.02(A) state that public records requests are answered by "*the custodian of such records*" and state that "[a]ccess to a public record is deemed denied if *a custodian* fails to promptly respond to a request."

A.R.S. § 39-121.01(D)-(E) (emphasis added). Thus, the reference in § 39-121.02(A) to “the denial,” is a reference to the *custodian’s* denial, as a matter of statutory interpretation, logic and common sense. *See, e.g., Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶7 (2017) (courts consider statute as a whole; if it “is subject to only one reasonable interpretation, we apply it without further analysis”).

The statute does not prohibit joining records custodians as parties in public records special actions, either. *See* A.R.S. § 39-121.02. Cyber Ninjas claims that the statute’s reference to an action “pursuant to the rules of procedure for special actions against the officer or public body” requires such actions to be against the “officer in custody” of the public records, which it says means “the chief ‘officer’ of a public body.” Pet. at 1-2, 7. But Cyber Ninjas simply pulled that language out of thin air; it appears nowhere in the statute or the case law applying it. Relying on such imaginary statutory language to improperly narrow the Public Records Law would be capricious indeed.

As the Court of Appeals noted, the rules for special actions expressly allow a person other than the officer or public body to be joined as a party in a special action regarding public records. Mem. Decision at

5-6 ¶16 (citing Ariz. R.P. Spec. Act. 2(a)(1), (b)). Such joinder is nothing new; the Court of Appeals held that public records of the Maricopa County Sheriff's office held by the Pima County Attorney, as custodian, were public records subject to disclosure; that the Sheriff's office was properly joined as a defendant; and that an award of attorneys' fees against the Sheriff's office for improperly attempting to prevent their disclosure was proper. *Arpaio v. Citizens Publ'g Co.*, 221 Ariz. 130, 134 ¶¶12-15 (App. 2008). That ruling has stood undisturbed for more than a dozen years without causing any of the parade of horrors that Cyber Ninjas conjures up.

D. The Court of Appeals' Ruling Does Not Apply to Ordinary Government Contractors.

Cyber Ninjas takes issue with the Court of Appeals' rejection of its apocalyptic predictions that government employees and state contractors would be overwhelmed by public records requests if the Superior Court's order is not reversed. Pet. at 8-9. Again, Cyber Ninjas is wrong.

The Court of Appeals correctly noted that a distinguishing feature of this case is the fact that the Senate completely outsourced the Audit, an important legislative function, to Cyber Ninjas. Mem. Decision at 7 ¶19. Cyber Ninjas responds with the irrational contention that *every*

state contract with a private entity amounts to entirely outsourcing an important government function, from constructing buildings to providing notepads for jurors. Pet. at 8-9. Awarding a contract to build one building is quite different from hiring a private contractor to plan, design, and build *all* government construction projects, however. That would be akin to what the Senate did here – it hired Cyber Ninjas to completely operate the Audit, a uniquely and exclusively governmental function that has no private-sector equivalent.

Affirming the Memorandum Decision would affect other government contractors only, if at all, to the extent they are records custodians like Cyber Ninjas. One can easily envision other public bodies – unlike the Senate here – exercising appropriate control over the public records in the physical custody of their contractors, securing them for public accountability and inspection, and not making requestors “go fish” for them, whether in the waters of the contractors’ files or the courts of this state.

Prohibiting a records custodian from being joined as a party to a public records action would allow a custodian to unlawfully withhold records, despite demands to produce those records from the public body

that employs or contracts with them, without any recourse by the requestor. That is the unlawful and untenable situation Cyber Ninjas has created here. Accordingly, this Court should affirm the Court of Appeals.

II. DOCUMENTS WITH A SUBSTANTIAL NEXUS TO GOVERNMENT ACTIVITIES ARE PUBLIC RECORDS UNDER ARIZONA LAW, REGARDLESS OF WHETHER THE GOVERNMENT PHYSICALLY POSSESSES THEM.

Cyber Ninjas further attacks the Court of Appeals' ruling by asserting that this Court has held that only documents owned by government bodies are subject to the Public Records Law. Pet. at 10. Not so. The Superior Court and Court of Appeals should be affirmed because they simply applied both the plain language of the statute and the well-settled interpretation of that statute by this Court.

All of the Arizona judges who have considered the issue – two Court of Appeals panels and two Superior Court judges – have concluded that records in Cyber Ninjas' possession with a substantial nexus to the Audit are public records. *See* Mem. Decision at 4 ¶9 (reiterating prior holding that “documents relating to the audit are public records subject to the PRL even if they are in the possession of Cyber Ninjas rather than the

Senate”); *Fann v. Kemp* (“*Fann*”), No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834, at *11-12 ¶23 (App. Aug. 19, 2021) (Audit-related records “are no less public records simply because they are in the possession of a third party, Cyber Ninjas”).¹ These holdings are entirely consistent with the statute and relevant case law, and should be affirmed.

A. Documents With a Substantial Nexus to Government Activities Are Public Records.

The Public Records Law requires all government officers and public bodies to maintain, and make public on request, 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” government funds. A.R.S. § 39-121.01(B). It is firmly established that under Arizona law, “documents with a ‘substantial nexus’ to government activities qualify as public records.” *Lake v. City of Phx.*, 222 Ariz. 547, 549 ¶8 (2009) (quoting *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 541 (1991)); see also, e.g., *Griffis v. Pinal Cnty.*, 215 Ariz.

¹ This Court denied the Arizona Senate’s petition for review challenging the *Fann* ruling. *Fann v. Kemp/Am. Oversight*, No. CV-21-0197-PR, 2021 Ariz. LEXIS 333, at *1 (Sept. 14, 2021).

1, 4 ¶10 (2007) (same); *Lunney v. State*, 244 Ariz. 170, 174 ¶8 (App. 2017) (same). It is equally well settled that determining whether a document qualifies as a public record is a content-driven inquiry in which “the nature and purpose of [a] document’ determine its status as a public record.” *Griffis*, 215 Ariz. at 4 ¶10.

The Court of Appeals did *not* hold, as Cyber Ninjas incorrectly asserts, that “all ‘documents relating to the Audit are public records.’” Pet. at 3 (purporting to quote Mem. Decision at 6 ¶17). Rather, the Court of Appeals observed that Cyber Ninjas “is alleged to be the sole custodian of records pertaining to the audit *that are subject to disclosure under the PRL.*” Mem. Decision at 6 ¶17 (emphasis added).

B. Documents Held By Third-Party Custodians Such As Cyber Ninjas Can Be Public Records.

Cyber Ninjas bases its argument that none of its Audit-related documents can be public records on this Court’s opinion in *Salt River*, which Cyber Ninjas says stands for the proposition that “documents which the State does not own” are not public records. Pet. at 10.² That is not what this Court held, however.

² This argument based on *Salt River* has been waived because Cyber Ninjas raised it for the first time in its reply brief in the Court of Appeals.

The records at issue in *Salt River* arose from the state’s purchase of right-of-way over federal trust land on the Salt River Pima-Maricopa Indian Community’s reservation for the Pima Freeway. *Salt River*, 168 Ariz. at 533. To facilitate the payments, the Arizona Department of Transportation’s contractor created a computer program that calculated the appraised value of each parcel, which the federal government’s escrow agent used to generate a list of the amounts to be paid to each allottee. *Id.* at 534-35. The state treasurer’s office ended up with a copy of the list, *id.* at 535-36, and in litigation resulting from a request for it, this Court held that its task was to “determine whether there is a nexus between the treasurer’s office and the check distribution list,” *id.* at 541.

This Court concluded that the list was not a public record because there was no nexus between it and the state treasurer’s official duties. *Id.* at 538-39, 542. The list aided the distribution of federal funds by the federal government’s escrow agent, not the payment of state monies or any other public function of the treasurer’s office. *Id.* Thus, the key to

See State v. Jean, 243 Ariz. 331, 341-42 ¶39 (2018) (argument raised for first time in reply brief in Court of Appeals was waived). PNI nevertheless addresses it here to demonstrate its lack of merit.

this Court's holding in *Salt River* was the lack of a substantial nexus to the treasurer's official duties, *not* the document's ownership. Pet. at 10.

This Court analyzed whether the facts that the document was (a) in the possession of a government office, and (b) generated by a computer program paid for with state funds, created a substantial nexus with state government activities sufficient to render the list a public record. 168 Ariz. at 540-42. Finding no Arizona or other state court's precedents on point, this Court turned to federal FOIA cases, which it held stand for the proposition that "the public has no right of access to private records located in government offices that have no relation to the agency's activities." *Id.* at 540-41.

Cyber Ninjas' argument is the flip side of that coin – the notion that a document can never be a public record if it is not owned or controlled by the government. Pet. at 10-15. But this Court held no such thing in *Salt River*, and has reasoned otherwise in more recent rulings. *E.g.*, *Griffis*, 215 Ariz. at 4-5 ¶¶8-15.

The lower courts' holdings here also are consistent with prior case law. For example, the Court of Appeals has held that police officers'

personal cell phone records may be public records if they reflect the use of the phone for *government* purposes. *Lunney*, 244 Ariz. at 179 ¶28.

By holding that the nature and purpose of the document, not its physical possession by the government, controls whether it is a public record, the *Salt River* ruling and its progeny support the lower courts' holdings here that documents controlled by a third party engaged by a public body as its "agent" and records "custodian" *can* be public records if they bear a substantial nexus to government activities.

Cyber Ninjas notes this Court's observation that cases interpreting the federal FOIA "offer[] some guidance" in construing Arizona's Public Records Law. 168 Ariz. at 541. Cyber Ninjas picks up that ball and runs far afield with it, discussing portions of federal FOIA cases that this Court neither adopted as Arizona law nor even cited. Pet. at 10-15. The fact that federal FOIA cases can be useful in construing the Public Records Law does not mean that the two statutes apply identically in all circumstances, of course. Significantly, the FOIA is *narrower* than the Arizona Public Records Law because it does not apply to all records with a substantial nexus to government activities as Arizona's statute does. Arizona law controls here, not federal law.

If the Senate had conducted the Audit directly, its Audit-related records would unquestionably be subject to the Public Records Law. The Senate cannot thwart the public’s right to monitor a core government activity by outsourcing that activity and possession of records about it to companies that may not themselves be “public” entities. *See Forum Publ’g 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].” (cited with approval in *Fann*, 2021 Ariz. App. Unpub. LEXIS 834, at *11-12 ¶23)). The rulings below should be affirmed to avoid this impairment of the Public Records Law.

III. THE COURT OF APPEALS PROPERLY AWARDED FEES TO PNI.

Cyber Ninjas complains that the Court of Appeals’ fee award against it “lacks a genuine statutory basis.” Pet. at 16. What lacks any basis, statutory or otherwise, is Cyber Ninjas’ argument.

PNI sought a fee award pursuant to, *inter alia*, A.R.S. §§ 39-121.02(B) and Ariz. R. P. Spec. Act. 4(g). Mem. Decision at 7 ¶21. The

Court of Appeals correctly awarded fees to PNI because it “substantially prevailed” under Section 39-121.02(B). *Id.*

As the Court of Appeals noted in *Arpaio*, that provision originally provided for fee awards against *custodians* who withheld public records arbitrarily, capriciously or in bad faith. 221 Ariz. at 134 ¶13. That the Legislature *broadened* the statutory language “suggests the legislature intended that a party other than the custodian could be liable for attorney fees awarded under the amended statute.” *Id.* In other words, Cyber Ninjas is liable for fees under the statute not just because it is a custodian of public records but also because the statute provides for joinder of and fee awards against third parties responsible for blocking access to the public records at issue. *Id.* at 133 ¶¶8-11.

Because Cyber Ninjas was properly joined and there can be no doubt that PNI “substantially prevailed,” the Court of Appeals’ fee award to PNI should be sustained.

Rule 21(a) Notice

Under Ariz. R. Civ. App. P. 21(a) and Ariz. R. P. Spec. Act. 4(g), PNI requests an award of its attorneys’ fees and costs incurred in responding

to the Petition under A.R.S. §§ 39-121.02(B), 12-341, 12-342, or any other applicable statute or equitable doctrine.

CONCLUSION

For all of the foregoing reasons, Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello respectfully request that this Court deny the Petition or, if it determines to accept it, deny Cyber Ninjas all of the relief that it seeks, affirm the Court of Appeals, and award PNI its reasonable fees and costs incurred in responding to this meritless Petition.

Respectfully submitted this 21st day of December, 2021.

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