Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2021-000180-001 DT 10/11/2021

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
COURT OF APPEALS
DOCKET-CIVIL-CCC
JUDGE HANNAH
REMAND DESK-LCA-CCC

RULING

At the September 24, 2021 oral argument, the Court took Plaintiffs' Motion for Preliminary *In Camera* Review under advisement with respect to six records as to which the parties were unable to resolve their Public Records Law dispute. The Senate does not dispute that the records listed on its privilege log, including the six at issue here, are public records. The Senate objects to disclosure of these six records, however, on the ground of legislative privilege. The Senate maintains that the objections should be sustained on the strength of the information in the Senate's privilege log and the additional facts proffered by the Senate in response to the motion, without *in camera* review of the records.

The Court finds that the Senate has not carried its burden of overcoming the legal presumption favoring disclosure. The record as it stands does not establish that the documents are privileged and that the Senate is entitled to withhold them from the public on that ground. Because a review of the records may afford enough additional information to sustain the privilege assertion, the Senate has the option of submitting the records for *in camera review.* Otherwise the Senate must disclose the documents forthwith.

IT IS ORDERED that the Senate must produce the six disputed records to the Court for *in camera review* not later than the close of business on Tuesday, October 12, 2021, so that the Court can determine whether the Public Records Law obligates the Senate to allow inspection and copying of the records. Alternatively, the Senate may produce the records to the plaintiff, Phoenix Newspapers, Inc., for inspection and copying.

The reasons are as follows.

ARIZONA LEGISLATIVE PRIVILEGE LAW

The Speech and Debate Clause of the Arizona Constitution says, "No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate." Ariz. Const. Art. 4, part 2 § 7. This provision bars criminal prosecution or civil lawsuits against legislators for legitimate legislative activities. *Mesnard v. Campagnolo in & for Cty. of Maricopa*, 489 P.3d 1189 ¶12 (Ariz. 2021). Legislative immunity "does not exist for legislators' personal benefit but instead supports the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Id.* (cleaned up).

The courts have liberally expanded the reach of Arizona's Speech and Debate Clause, and its facially broader counterpart in the U.S. Constitution, well beyond the actual words. *See id.*, ¶44 (Bolick, J., concurring). Among other things, the Speech and Debate Clause has been interpreted to create a testimonial and evidentiary privilege, meaning that a legislator may not be made to testify about his or her acts as a legislator. *Ariz. Indep. Redistricting Comm. v. Fields*, 206 Ariz. 130 ¶18, 75 P.3d 1088 (App. 2003). The privilege extends to legislative aides and independent contractors retained by a legislator to perform or assist with tasks that would be privileged legislative conduct if personally performed by the legislator, though the privilege is held solely by the legislator and may only be invoked by the legislator or by an aide on his or her behalf. *Id.*, ¶30.

To the extent the legislative privilege protects against inquiry about a legislative act or communications about that act, the privilege also shields from disclosure written documents reflecting those acts or communications. *Id.*, ¶32. Arizona law differs from the law of some other jurisdictions in this respect. *Id.*, ¶31 n.10 (citing cases). The theory is that the mere disclosure of

records "could 'chill' legislators from freely engaging in the deliberative process necessary to the business of legislating." *Id.*, ¶32 (cleaned up).

The legislative privilege does not apply to everything a legislator says or does that is somehow related to the legislative process. *Steiger v. Superior Court*, 112 Ariz. 1, 4, 536 P.2d 689, 693 (1975). The shield extends only as far as necessary "to preserve the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531 (1972). The privilege therefore covers matters beyond pure speech or debate in the legislature only when such matters are "an integral part of the deliberative and communicative processes" relating to proposed legislation or other matters placed within the jurisdiction of the legislature, and the application of the privilege "is necessary to prevent indirect impairment of such deliberations." *Ariz. Indep. Redistricting Comm. v. Fields*, 206 Ariz. 130 ¶18, 75 P.3d 1088 (cleaned up). Acts that are "legislative in nature," and therefore privileged, "bear the hallmarks of traditional legislation by reflecting a discretionary, policymaking decision that may have prospective implications, as distinguished from an application of existing policies." *Id.*, ¶ 21 (cleaned up).

The courts have tried to circumscribe the legislative privilege by identifying situations in which it does not apply. For example, the privilege does not apply to "political" acts routinely engaged in by legislators, such as speech-making outside the legislative arena, performing constituent service tasks, sending newsletters and issuing news releases. *Mesnard v. Campagnolo*, 489 P.3d 1189 ¶15 *(citing Brewster*, 408 U.S. at 512, 92 S.Ct. at 2537). Under this rubric, the Senate concedes that communications relating to media or public relations matters are not privileged.

The privilege also does not apply to the performance of "administrative" tasks. *Id. (citing Gravel v. United States*, 408 U.S. 606, 617, 92 S.Ct. 2614 (1972)). The Court of Appeals held on this ground that the legislative privilege did not apply to documents related to the Independent Redistricting Commission's hiring of a mapping consultant. *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 290 P.3d 1226 (App. 2012). Whether to hire a mapping consultant and whom to hire were discretionary decisions, related to and meant to facilitate the "legislative" process of drawing legislative districts, but they did not "in themselves bear the hallmarks of . . . [a] *policymaking* decision." *Id.*, ¶79 (cleaned up) (emphasis in original). Moreover, the discretionary decision to hire a mapping consultant cannot be said to have the "force of law" with "prospective application." *Id.*, ¶80. Acknowledging the application of that decision to this case, the Senate is not asserting a privilege for records concerning the selection of audit personnel or vendors and negotiation of their contracts.

The legislative privilege is generally subject to the same interpretive rules as other evidentiary privileges. Perhaps most important, the courts narrowly construe all privileges, including those with a constitutional basis, "for they are in derogation of the search for truth."

Ariz. Indep. Redistricting Comm. v. Fields, 206 Ariz. 130 ¶14, 75 P.3d 1088 (quoting *U. S. v. Nixon*, 418 U.S. 683, 709–10, 94 S.Ct. 3090 (1974)). That makes sweeping assertions of legislative privilege as disfavored as blanket claims of attorney-client or physician-patient privilege. It also means that the cases applying Speech and Debate Clause immunity liberally to protect legislators against criminal or civil liability for legislative acts, like *Mesnard v. Campagnolo*, 489 P.3d 1189 ¶13, do not translate to privilege cases like this one, where the issue is disclosure.

The legislative privilege, like other privileges, can also be waived by the holder. Unlike a waiver of legislative immunity, a legislative privilege waiver need not be explicit and unequivocal. *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 671 (D. Ariz. 2016) (Campbell, J.); *Favors v. Cuomo*, 285 F.R.D. 187, 211-212 (E.D.N.Y. 2012). The privilege is waived as to all communications relating to a particular subject when the privilege holder acts in a manner inconsistent with the claim of privilege. *Ariz. Indep. Redistricting Comm. v. Fields*, 206 Ariz. 130 ¶48, 75 P.3d 1088. Again, the constitutional origins of the legislative privilege do not make it different from other privileges in this regard. *Id.* Acts that waive the privilege include testifying as to otherwise privileged matters and sharing otherwise privileged communications with persons who have no confidential relationship with the privilege holder. *Puente Arizona v. Arpaio*, 314 F.R.D. at 671.

Finally, though there is no Arizona authority, other jurisdictions have held that the legislative privilege is limited by a "misconduct" exception analogous to the crime-fraud exception to the attorney-client privilege. *See, e.g., Libertarian Party of Ohio v. Husted*, 33 F.Supp.3d 914, 919-920 (S.D. Ohio 2014) ("possible government misconduct or deficiencies in the deliberative process are factored into any analysis and, where present, weigh in favor of denying the privilege."); *Hall & Assocs. v. U.S. E.P.A.*, 14 F.Supp.3d 1, 9 (D.D.C. 2014) ("'where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied. . . ."); *American Petroleum Tankers Parent, LLC v. United States*, 952 F.Supp.2d 252, 268-269 (D.D.C. 2013) ("'To invoke the government-misconduct exception, the party seeking discovery must provide an adequate basis for believing that the requested discovery would shed light upon government misconduct."); *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F.Supp.2d 57, 67 (D.D.C. 2012) ("a showing of bad faith or improper behavior" vitiates the privilege); *Convertino v. U.S. Dep't of Justice*, 674 F.Supp.2d 97, 104 (D.D.C. 2009) ("'[T]he privilege disappears altogether when there is any reason to believe government misconduct occurred.'). The claimed government misconduct generally must rise to the level of "nefarious or extreme" wrongdoing. *See Wisdom v. U.S. Tr. Program*, 266 F.Supp.3d 93, 105-107 (D.D.C. 2017) *Neighborhood Assistance v. U.S. Dep't of Housing*, 19 F.Supp.3d 1, 14 (D.D.C. 2013). The conduct during the otherwise protected discussions must be "so out of bounds that merely discussing . . . was evidence of a serious breach of the responsibilities of representative government . . . ." *Judicial Watch, Inc. v. U.S. Dep't of State*, 285 F.Supp.3d 249, 254 (D.D.C. 2018).

LEGISLATIVE PRIVILEGE AND THE PUBLIC RECORDS LAW

The legislative privilege by its nature is at tension with the Arizona Public Records Law, A.R.S. section 39-121 *et seq.* Having existed in essentially the same form since 1901, the Public Records Law ("PRL") predates the adoption at statehood of the Speech and Debate Clause from which the legislative privilege flows. *See* Note, Public Access to Governmental Records and Meetings in Arizona, 16 Ariz.L.Rev. 891, 907 (1974). The Public Records Law establishes "a strong policy" of access and disclosure, *Carlson v. Pima County*, 141 Ariz. 187, 190-191, 687 P.2d 1242, 1245-1246 (1984). The law defines "public records" broadly and creates a "presumption" of access to such records "so that that the public may monitor the performance of public officials and their employees." *Lake v. City of Phoenix*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (2009) (cleaned up).

The holding of *AIRC v. Fields* -- that the legislative privilege applies to written records -- seems intended to apply beyond the litigation subpoena context of the case. *See* 206 Ariz. 130 ¶32, 75 P.3d 1088 (disclosure of documents reflecting legislative confidences could "chill" the deliberative process "even though such documents will not be used in any evidentiary proceeding"); *but see id.*, ¶¶33-34 (acknowledging but not deciding the question whether, in light of the Public Records Law, Arizona recognizes the common-law "deliberative process privilege" for internal legislative records). As a result, PNI's right to inspect and copy Senate records, under the Public Records Law, is subject to the Senate's assertions of legislative privilege.

At the same time, however, the Public Records Law necessarily limits the scope of the privilege. The doctrine of legislative immunity does not exempt the legislature from the Public Records Law. *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. Ct. App. Aug. 19, 2021). Through the Public Records Law, the Arizona Legislature has enacted a strong policy favoring public access to information *and applied that policy to itself.* The question is the extent to which the public interest in affording legislators a confidential space in which to debate public policy overrides the public right to know what the legislators are up to.

The courts, not the current members of the legislature, are responsible for defining the scope of the legislative privilege by balancing the public interest in legislator confidentiality against the robust disclosure policy of the Public Records Law. *See Mathews v. Pyle*, 75 Ariz. 76, 81, 251 P.2d 893, 896 (1952) (holding, with respect to public records request directed to Governor, that "under no circumstances should [the Governor's] determination be final. It rests within the jurisdiction of the courts of the state to determine these questions.") But the problem of striking the balance is not squarely confronted in any reported Arizona public records case. *AIRC v. Fields* merely notes the issue, without trying to resolve it. *See* 206 Ariz. 130 ¶¶33-34, 75 P.3d 1088.

Though *AIRC v. Fields* says that federal cases are "persuasive in interpreting the scope of the immunity and privilege afforded by the Arizona Constitution," *id.*, ¶16 n.4, on the issue at bar

the federal cases have limited persuasive value. The reason is that Arizona's Public Records Law has no federal counterpart. The PRL's federal cousin, the Freedom of Information Act, by its terms does not apply to Congress. *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C.Cir.2004) (citing 5 U.S.C. §§ 551(1), 552(f)). As a result, the federal cases that expansively apply the legislative privilege to Congress are pushing against an open door. In Arizona, by contrast, the Public Records Law creates a presumption of public access to records of both the executive *and* legislative branches. That presumption weighs against extending the legislative privilege broadly to activities that could be characterized as "legislative acts," because a privilege that broad would drastically limit the public's right of access to legislative records. But the question remains where to draw the line.

The parties' debate over whether the legislative privilege is "absolute" rather than "qualified" is mostly beside the point. When the federal courts say that the state legislative privilege is "qualified," they mean that the privilege may have to give way in litigation when the federal interests at stake outweigh the state interests protected by the privilege. *See, e.g., Puente Arizona v. Arpaio*, 314 F.R.D. at 671-672 (setting out "five-factor balancing test"). Considerations include the importance of the federal policy at issue and the availability of other evidence to establish the relevant facts. *Id.* Those factors do not bear on an Arizona public agency's obligation to disclose public records, so an Arizona court reviewing legislative privilege objections to a public records request need not consider them. The most important factor that an Arizona court must weigh against an assertion of privilege is the public's interest in access to information. Again, the balance between the two policies determines the scope of the legislative privilege.

The kernel of a solution, to the problem of how to balance the public interest in legislator confidentiality against the robust disclosure policy of the Public Records Law, lies in the definition of the privilege itself. The privilege as defined in Arizona cases stops short of swallowing the Public Records Law because it attaches only to what is "integral" to the legislature's deliberative and communicative processes, and then only when "necessary to prevent indirect impairment of [legislative] deliberations." *Ariz. Indep. Redistricting Comm. v. Fields*, 206 Ariz. 130 ¶18, 75 P.3d 1088. What is "integral" to the legislative process, and "necessary" to be kept secret to protect the integrity of the legislative process, must be determined with the strong policy favoring public disclosure in mind. In close or doubtful situations, the Public Records Law prioritizes public access over legislative secrecy.

At this point in this case, it is not possible to fashion a one-sentence formula or test to determine which of the various records and communications at issue are public records. In general, whether a specific record is exempt from public disclosure will depend on the nature of the communication and on how closely it relates -- in time, or place, or persons involved -- to the core legislative function of drafting and debating legislation. A more definite boundary, between

privileged and unprivileged records, can only emerge through the process of reviewing the records. The six records now at issue will start the process.

RECORD REVIEW PROCEDURES

The analytic framework for contested public records requests parallels the rubric for adjudicating privilege claims. These rules dictate the procedure by which this Court must resolve disputes over disclosure of specific records, including the six records presently at issue.

When the facts of a particular case "raise a substantial question as to the threshold determination of whether the document is subject to the [Public Records Law]," the court must first determine whether that document is a public record. *Griffis v. Pinal County*, 215 Ariz. 1 ¶12, 156 P.3d 418 (2007). A document that has "a substantial nexus" with government activities qualifies as a public record. *Id.*, ¶10. "The nature and purpose of the document determine its status as a public record. Determining a document's status, therefore, requires a content-driven inquiry." *Id.* (cleaned up).

If a document falls within the scope of the public records statute, the presumption favoring disclosure applies. The court then performs a balancing test, if necessary, to determine whether the exceptions to the general disclosure rule -- privacy, confidentiality, or the best interests of the state -- outweigh the policy in favor of disclosure. *Id.*, ¶13. The government agency has the burden of overcoming the legal presumption favoring disclosure. *Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

The public records review process accords with the privilege inquiry. Indeed, in this case the Senate essentially argues that the State's interest in confidentiality outweighs the public interest in disclosure *because* the legislative privilege protects the records at issue. On the threshold question whether a communication is privileged, as on the question whether a document is a public record, the party opposing disclosure has the burden of establishing the existence of the privilege. *See Clements v. Bernini*, 249 Ariz. 434 ¶8, 471 P.3d 645 (2020). After the party claiming the privilege makes the necessary showing, the burden shifts to the party seeking disclosure to establish a privilege waiver or an exception like the crime-fraud exception. *See id.*, ¶18; *State v. Wilson*, 200 Ariz. 390 ¶29, 26 P.3d 1161 (App. 2001).

In camera review of disputed documents may be conducted in the course of adjudicating either a public record issue or a privilege issue. The first Arizona published opinion to endorse *in camera* review in the context of a privilege dispute actually borrowed the idea from the "landmark" public records case of *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952). *State ex rel. Babbitt v. Arnold*, 26 Ariz.App. 333, 335, 548 P.2d 426 (1976). Though *Mathews* was decided almost 75 years ago, that case created the template for this one.

In *Mathews,* the Governor took the position that his decision in response to a public records request was final and not subject to judicial review. 75 Ariz. at 78, 251 P.2d at 894. Rejecting that view, the Arizona Supreme Court ordered the governor to produce the disputed records for "the private examination of the trial judge in order that the court may determine whether [the documents at issue] are confidential and privileged or whether their disclosure would be detrimental to the best interests of the state. In no other way can such questions be determined." *Id.* at 81, 251 P.2d at 896-897.

In *State ex rel. Babbitt v. Arnold,* the Court of Appeals applied the logic of *Mathews* to a case in which the trial court had rejected a privilege claim without reviewing the documents at issue. The court stated, "we think it is incumbent upon a trial court not to assume the facts which would give rise to a privilege, but rather, when a *prima facie* showing of a privilege is made, to decide whether disclosure should be required after an *in camera* inspection." 26 Ariz.App. at 336, 548 P.2d at 429. Accordingly, the court vacated the "arbitrary" lower court order that had required production of purportedly privileged documents without first examining them. *Id.*

The injunction of *State ex rel. Babbitt v. Arnold,* instructing trial courts "not to assume the facts that would give rise to a privilege" but rather to decide on disclosure after an *in camera* inspection, applies to legislative privilege just as it does to other kinds of privileges. *See Ariz. Indep. Redistricting Comm. v. Fields,* 206 Ariz. 130 ¶51, 75 P.3d 1088 (directing the petitioning state agency to "submit any documents it deems privileged and not waived to the trial court for *an in camera* inspection. The court shall then decide whether these documents are shielded by the legislative privilege.") Where, as here, the party claiming the privilege opposes *in camera review,* the court may view the documents only after determining, as to each document, that *in camera* review is necessary to resolve the privilege claim. *Lund v. Myers*, 232 Ariz. 309 ¶15, 305 P. 3d 374 (2013). That threshold, however, is not very high. The party seeking review need only make "a factual showing to support a reasonable, good faith belief that the document is not privileged." *Id.*[1]

[1] The facts of the cases that establish this proposition, *Lund* and *Clements v. Bernini*, 249 Ariz. 434, 471 P.3d 645, confirm that the "factual showing" requirement should not be interpreted too strictly. In *Lund*, the court was asked to review a client file that the client's former lawyer had sent to the opposing party in litigation by mistake. In *Clements*, the request for *in camera* review was by a prosecutor who had obtained recorded phone conversations between a jail inmate and a criminal defense attorney who avowedly was giving the inmate legal advice. The common thread is that the party seeking disclosure was a fortuitous possessor of potentially privileged documents who came into court with, at best, a tenuous basis for contesting the validity of the privilege claim.

The Senate argues that the bar for *in camera* review of legislative records is higher than for other kinds of potentially privileged communications because judicial review of legislative records implicates the separation of powers. Response at 8-10. The Senate goes so far as to say that PNI must make "a substantial showing" that a Senate privilege assertion was "clear error" before it is entitled to have the court "commandeer [the] materials for *in camera* review." *Id.* at 10.

No Arizona case says anything remotely like this. The cases the Senate cites are almost all from federal jurisdictions, where the relevant public records disclosure policy (FOIA) does not apply to the legislature. The lone non-federal case, from Virginia, extols the policy behind legislative privilege at great length without saying a word about any opposing policy that favors public access. *Edwards v. Vesilind*, 790 S.E.2d 469 (Va. 2016). As noted above, none of those cases are very persuasive in Arizona, in light of the public records statutes that reflect our legislature's choice to require itself to comply with the state's robust disclosure policy.

The Senate also argues that legislative privilege claims can be addressed without *in camera* review because the privilege depends on the relationship of the participants rather than the content of the communication. Response at 10. The premise of that argument is largely wrong. For starters, there is no way to distinguish between privileged legislator communications relating to "legislative acts" on the one hand, and unprivileged communications relating to "political acts" or "administrative acts," on the other, without knowing the content of the communication. That issue extends beyond the communications of the legislators themselves, to the people the Senate identifies as "consultants," because some of those individuals had multiple roles in the audit – most prominently Mr. Bennett and Mr. Pullen, who served as spokespeople for the Senate.

Moreover, the Senate outright contradicts the premise of its objection to *in camera* review by arguing that the applicability of the privilege to third-party contractors "pivots on the nature and purpose of the communication, not the structural attributes of the communicants' relationship." Response at 12. The Senate's privilege log, which repeatedly asserts a privilege for records containing "discussions regarding [the] audit," confirms that the Senate's privilege claims do in fact depend on the content of the communications. A judge cannot possibly assess those claims without knowing what the records say.

The discussion that follows does not address PNI's global privilege waiver argument, Reply at 9, or the possible forfeiture of the privilege by misconduct. As noted above, PNI, as the

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Here, by contrast, PNI offers several reasonable, fact-based arguments that the Senate does not have a valid privilege claim for most of the documents on its privilege log. The fact that the Senate conceded on 19 of the 25 records that PNI originally asked the Court to review demonstrates the potentially broad merit of PNI's objections to the Senate's privilege claims.

party seeking disclosure, has the burden of establishing that the privilege has been waived or that the misconduct exception applies. To the extent that PNI bases its opposition to the Senate's privilege claims on any facts beyond those proffered in the privilege log or in response to PNI's motion, PNI will have to make its own formal proffer or present evidence at a hearing.

THE SIX CONTESTED RECORDS

The Court now turns to the six disputed records for which PNI has requested *in camera review*. As to all six, the Court finds that PNI has made a factual showing to support (at least) a reasonable belief that the legislative privilege does not apply. In other words, the existing record is insufficient to carry the Senate's burden of establishing that the documents are privileged. At this juncture, then, the Senate must choose between *in camera* review and disclosure to PNI. The Court's order for production of the records assumes that the Senate prefers *in camera* review, but it allows the Senate, in the alternative, to go ahead and disclose the records to PNI.

Fann/Waldron Text String

The Senate describes this record (Privilege Log p. 265 #6) as a string of text messages exchanged between Senate President Fann and Phil Waldron, an "election security analyst," from January 26, 2021 to July 15, 2021. Waldron had no "formal contract" with the Senate at the time of the communications. Response at 12. The Senate says it will release specific text messages from this string "that pertain only to the selection of vendors for the Audit," Response at 11 n.2, but legislative privilege is claimed for the rest.

PNI has demonstrated a reasonable basis in the record for challenging the Senate's assertion that this record contains privileged communications. PNI has a right to judicial review of Senate counsel's judgment that the purpose of the communications was "legislative" as opposed to "administrative" or "political." *In camera* review is appropriate for that reason alone.

In addition, the Senate's claim of privilege for legislators' communications with informal "advisors" like Mr. Waldron is dubious. That claim goes well beyond what any reported Arizona case has approved to date. *AIRC v. Fields* extended the privilege only to "independent contractors *retained by*" legislators. 206 Ariz. 130 ¶30, 75 P.3d 1088 (emphasis added). That modest step kept the privilege within appropriate limits because, as the court pointed out, there is "no practical difference, for purposes of applying the privilege, between placing a consultant temporarily 'on staff'. . . and retaining that consultant as an independent contractor." *Id.*, ¶28.

The same cannot be said for a further expansion of the privilege to informal advisors. If the legislative privilege were to cross the "hired or paid" bright line, it would quickly balloon. Lobbyists are, in effect, informal advisers. So are representatives of interest groups and business

associations. So are members of the public with opinions about policy. An "informal advisor" privilege would logically apply to all of a legislator's communications with all of these interests, and, ultimately, to all communications of any kind that touch on policy formation. The Arizona Supreme Court has expressly rejected this "expansive view" of the "legislative process," for purposes of legislative privilege, precisely because "there are few activities in which a legislator engages that could not be somehow related to the legislative process." *Steiger v. Superior Court*, 112 Ariz. at 4, 536 P.2d at 692.

At oral argument, the Senate itself disavowed what its counsel termed the "strong view" of legislative privilege. The Court understood that to mean that the Senate does not intend to claim a privilege for all communications touching on policy issues, such as constituent mail. But the Senate here, as a practical matter, is making just that kind of sweeping privilege claim. The "strong view" of the privilege is articulated, in a variety of ways, in the cases the Senate cites in support of its privilege argument for the Waldron texts. Response at 12 (*citing Miller v. Transamerican Press*, 709 F.2d 524, 530 (9th Cir. 1983) (privilege protects source from which former congressman obtained a magazine article that he later placed in the Congressional record); *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 668-671 (D.Ariz. 2016) (privilege applies to emails between legislator and "various third party attorneys, lobbyists, and constituents"); *Jewish War Veterans of the U.S.A., Inc. v. Gates*, 506 F.Supp.2d 32, 56-57 (D.D.C. 2007) (privilege applies to legislators' "informal" information-gathering communications). But those cases, like the other federal cases the Senate cites, dealt with subpoenas rather than public records requests. None touched on the public records disclosure policy that applies to the Arizona Legislature because of the Public Records Law. As a result, their relevance here is questionable regardless of whether the Senate endorses them.[2]

Draft Contract with Ayyadurai Notes

The Senate describes this record (Privilege Log p. 264 #4, ARZN_REV00100781) as "a draft contract with Cyber Ninjas, Inc. containing several mark-ups from Shiva Ayyudurai, whom the Senate has since retained to conduct a review of early ballot envelopes for the Audit." Response at 11. According to the privilege log, this record was in the possession of Mr. Bennett or Mr. Pullen, and it contains "internal legislative discussions regarding Audit."

[2] *Steiger* reaches the opposite result from *Jewish War Veterans* even without reference to the Public Records Law. Congressman Steiger objected, on Speech and Debate Clause grounds, to deposition questions to a former aide concerning "an investigation related to legislative activities" that "was being conducted for the Congressman." 112 Ariz. at 3, 536 P.2d at 691. Our Supreme Court held that aide's investigation was not "within the protected area of the 'legislative process." *Id.* at 4, 536 P.2d at 692.

PNI has demonstrated a reasonable basis in the record for challenging the Senate's assertion that this record contains privileged communications. This communication, like Mr. Waldron's texts, raises the question whether the privilege applies to communications involving informal "advisers." In addition, it is unclear with whom exactly Mr. Ayyadurai was communicating, and why, when he wrote the notes. The circumstances suggest that he made the notes in the context of the Ninjas' contract negotiations, which the Senate has conceded are not privileged. The person who possessed the annotated contract was an audit spokesperson with no obvious reason for having the record in his possession outside his public relations role.

In addition to the assertion of legislative privilege, the Senate claims a "work product" privilege for this record. The Senate does not say that Mr. Ayyudurai is a lawyer. The Senate cites no authority for the existence of a work product privilege that would apply outside of the work of lawyers anticipating or participating in litigation. The Court declines to recognize a privilege for legislative "work product."

Communication Between Doug Logan and Randy Pullen

The Senate describes this record (Privilege Log p. 264 #9, ARZN_REV00100781) as a record "sent from a phone number associated with Audit liaison Randy Pullen to the Audit's official email account." The document consists of "a cut-and-pasted text message (or series of text messages) from Doug Logan, the CEO of Cyber Ninjas, to Mr. Pullen concerning the conduct of the audit (e.g. the handling of election tabulation equipment)." Response at 12-13.

PNI has demonstrated a reasonable basis in the record for challenging the Senate's assertion that this record contains privileged communications. Mr. Logan communicated the information about "the handling of election tabulation equipment" to Mr. Pullen, an audit spokesperson with no obvious reason for receiving the information other than public relations or public communication. The function of the "official email account" to which Mr. Pullen forwarded the information is unclear, but the privilege log shows the recipient of the message at that address, on June 12, 2021, was Mr. Bennett – another official audit spokesperson. PNI generally has a right to judicial review of Senate counsel's judgment that the purpose of the communications was "legislative" as opposed to "administrative" or "political," but in this specific instance it has especially strong grounds for questioning that judgment.

The subject matter and timing of this communication also make the privilege claim questionable. The decision on how to handle "election tabulation equipment" in the audit plainly does not have the "force of law" with "prospective application." *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103 ¶80, 290 P.3d 1226. First, the subject matter is remote from actual policymaking. Communications about the details of audit procedure, especially between non-

legislators, are unlikely to "bear the hallmarks of traditional legislation by reflecting a . . . policymaking decision" that denotes a privileged communication. *Id.*, ¶80. Second, the communication is remote in time and function from the core policymaking process. *Steiger* indicates that the privilege may not apply to matters that are not "related to [a] *pending* congressional inquiry or legislation." 112 Ariz. at 3, 536 P.2d at 691 (emphasis added). In short, a communication between Mr. Logan and Mr. Pullen about the handling of "election tabulation equipment" -- like the deliberations about the mapping consultant in *State ex rel. Montgomery v. Mathis,* and the aide's investigation in *Steiger* – was probably "related to" and meant to "facilitate" the enactment of legislation. It probably was not, however, so integral to the policymaking process that it must be kept confidential to protect the process.

Inter-Chamber Communications

The Senate describes these three records as an email exchange between Senator Borelli and Representatives Biasiucci and Finchem (Privilege Log p. 76 #3, ARZN_REV00071904) dated May 12, 2021, containing "internal legislative discussions regarding audit"; an email exchange between Senator Borelli and Representative Finchem, (Privilege Log p. 75, #5, ARZN_REV00078770) dated February 23, 2021, containing "internal legislative discussions regarding conclusions"; and a text string between President Fann and Representative Finchem (Privilege Log p. 265, #14) dated July 28 to August 3, 2021, concerning "legislative investigation and press releases." The Senate asserts legislative privilege for all three records.

PNI has demonstrated a reasonable basis in the record for challenging the Senate's assertion that these records contains privileged communications. Again, PNI has a right to judicial review of Senate counsel's judgment that the purpose of the communications was "legislative" as opposed to "administrative" or "political." These communications are perhaps more likely than the others to contain confidential policy discussions, since all participants are elected policymakers, albeit from different chambers of the legislature. On the other hand, a discussion "regarding audit" does not necessarily address policy. A discussion "regarding conclusions" could be anything. And a discussion of "legislative investigation and press releases" may not be separable into privileged and non-privileged passages. *In camera* review of the records is needed.

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.