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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

AMERICAN OVERSIGHT, Plaintiff, v. KAREN FANN, et al. Defendants, and CYBER NINJAS, INC., Real Party in Interest.	No. CV2021-008265 CV2021-000180-001 (Consolidated) **AMERICAN OVERSIGHT'S RESPONSE TO CYBER NINJAS INC.'S MOTION TO DISMISS** (Assigned to the Hon. Michael W. Kemp)
PHOENIX NEWSPAPER, INC., an Arizona corporation, et. al., Plaintiffs, v. ARIZONA STATE SENATE, et al., Defendants, and CYBER NINJAS, INC., Real Party in Interest	

It is the view of Cyber Ninjas, Inc. ("CNI or Cyber Ninjas") that orders issued by Arizona courts can be ignored with impunity, and that view carries on in its Motion to Dismiss ("Motion"). CNI's Motion fails to apprise this Court that its legal arguments have already been squarely rejected in rulings that are binding upon CNI. And the Motion also ignores the allegations pled against CNI in the Second Amended Complaint ("SAC") as well as the basis for its joinder in this action. CNI's Motion should be denied and attorneys' fees should be awarded pursuant to A.R.S. § 12-349.

The Motion essentially makes three arguments. All fail.

First, CNI asserts that the audit-related records in CNI's possession are not subject to Arizona's public records law ("PRL") because the Senate does not own them. This ignores that the Arizona Court of Appeals twice held in 2021 that records with a substantial nexus to the audit possessed by Cyber Ninjas are public records and must be produced. It also ignores that the Arizona Supreme Court elected not to accept special action jurisdiction to disturb either of those rulings, including the order to produce.

Second, citing no case law, CNI argues that it is not a "custodian" of public records within the meaning of the PRL and therefore the statute cannot apply. (Mot. at 8-10). But Cyber Ninjas already made this argument and it was rejected by the Superior Court and the Court of Appeals: "To the extent Cyber Ninjas is in sole possession of audit-related records . . . Cyber Ninjas has become the custodian of those records under the PRL" and is subject to relief under the PRL. *Cyber Ninjas v. Hannah*, 2021 WL 5183944, at *3-4, ¶¶ 17-18 (Ariz. App. Nov. 9, 2021). A copy of this ruling is attached as Exhibit 1 for the Court's convenience.

Third, again citing no authority, CNI argues that American Oversight lacks standing to sue Cyber Ninjas because American Oversight requested records from the Senate. This argument amounts to a "heads I win, tails you lose" situation because CNI simultaneously argues that it is not a public entity subject to the PRL. Regardless, American Oversight can assert claims against Cyber Ninjas because it is the sole custodian of the public records the

Senate is statutorily obligated to maintain. As the Court of Appeals explained in the PNI case, "Cyber Ninjas was properly joined as a necessary party in PNI's special action because . . . as an 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." *Id.* at ¶ 17.

Notably, even had Cyber Ninjas not already lost the precise arguments underpinning its Motion, it would be a proper party here under the joinder rules. Rule 19(a)(1)(A) requires a party to be joined, where feasible, if "in that person's absence, the court cannot accord complete relief among existing parties." *C.f.* Rule 2(b), Arizona Rules of Special Action Procedure. The Senate and Cyber Ninjas stipulated that "[c]omplete relief in this action cannot be afforded unless Cyber Ninjas is joined as a party and made directly responsible for complying with this Court's orders" because it refused to produce the Senate's public records in its possession.

At this point, CNI and its counsel are openly defying court orders compelling prompt production of these public records. American Oversight respectfully requests that the Court deny the Motion to Dismiss with prejudice, and sanction CNI's counsel for this baseless filing by awarding American Oversight its fees incurred in connection with preparing this Response.

I. BACKGROUND

A. American Oversight's Complaint Against the Senate for the Public Records Possessed by Cyber Ninjas.

American Oversight filed this special action complaint against the Arizona Senate, Karen Fann, and Warren Petersen (collectively, the "Senate") to compel production of documents related to Senate's purported "audit" of Maricopa County voting procedures, ballots, and equipment. American Oversight demanded that the Senate obtain and produce the

public records in possession of its agent, CNI. The Senate moved to dismiss, arguing that documents in CNI's possession were not subject to the PRL.

This Court rejected those arguments in its July 15, 2021 minute entry. The Court found that (i) "CNI and the subvendors are clearly agents of the Senate Defendants" [minute entry at 3]; (ii) "that actual physical possession of those records is not relevant for purposes of the PRL" [*id.*]; and (iii) that the Senate must demand the records from CNI, which is obligated to cooperate and produce them [*id.* at 4]. Consistent with its findings, the Court issued a minute entry and entered an order on August 2, 2021 compelling the Senate to disclose documents with a "substantial nexus" to the audit, including those documents in the possession of Cyber Ninjas.

The Court of Appeals accepted jurisdiction of the Senate's special action of the August 2 Order and denied relief. Among other things, the Court of Appeals ruled that "the requested records are no less public records simply because they are in possession of a third party, Cyber Ninjas," and expressly rejected the Senate's argument, now parroted by CNI, that the AO Order would "open the files of all government vendors to public inspection." *Fann v. Kemp*, 2021 WL 3674157, *4-5 (Aug. 19, 2021 Ariz. App.).[1] The Senate sought further special action relief from the Arizona Supreme Court, which declined to accept jurisdiction.

Beginning on September 14, 2021 the Senate issued a series of demands on Cyber Ninjas for the public records at issue, but Cyber Ninjas refused to produce them. *See* SAC at ¶¶ 108-114. Because American Oversight was unable to obtain the relief ordered by this Court on

[1] CNI's Motion (at 9-10), sets up an imagined parade of horribles where every government contractor will be subject to far reaching public records requests in CNI is deemed a proper party. But as *Fann* held, although "the Senate outsourced its important legislative function to [CNI]…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 governmental functions would be subject to the PRL." *Id.* at *5, ¶ 24.

August 2, 2021 as against the Senate, American Oversight and the Senate agreed to add Cyber Ninjas as a party.

B. The Senate and American Oversight join Cyber Ninjas as an Indispensable Party.

Pursuant to Rule 19(a)(1)(a) and Rule 20(b) of the Arizona Rules of Civil Procedure, as well as Rule 2(b) of the Rules of Procedure for Special Actions, the Senate and American Oversight jointly moved to join CNI as an indispensable party on December 14, 2021. The parties asserted that "complete relief in this action cannot be afforded unless Cyber Ninjas is joined as a party and made directly responsible for complying with this Court's orders." *See* 12/14/21 Stipulated Motion to Join Cyber Ninjas, Inc. as a Party (the "Joinder Motion"). Rule 19(a)(1)(A) provides that "in that person's absence, the court cannot accord complete relief among existing parties."

Rule 20 permits the joinder of defendants in a variety of contexts, including agents and their principals. *See, e.g., Atchison v. Woodmen of the World Ins. Soc*., 982 F. Supp. 835, 840 (S.D. Ala. 1997) (finding Rule 20 joinder permissible where the nondiverse defendants against whom claims were asserted were agents of the defendant who committed fraud).

The Court granted the Joinder Motion. American Oversight filed the SAC on December 16, 2021, joining CNI has a real party in interest. The PNI Litigation was subsequently consolidated with the American Oversight litigation.

C. The Cyber Ninja Litigation with Phoenix Newspapers, Inc.

Phoenix Newspapers, Inc. ("PNI") filed a separate special action complaint against Cyber Ninjas and the Senate (the "PNI Litigation") for refusing to produce requested public records related to the audit. CNI moved to dismiss, asserting, just as it has here, that it is not subject to the PRL. Judge Hannah denied CNI's motion and found that "the Ninjas have the obligations that the Public Records Law assigns to a 'custodian' of public records." *See* 9/17/21 Minute Entry attached as Exhibit 2 at 3. Thus, reasoned the Court, "section 39-

121.02(A) permits the requestor – here, PNI – to name the custodian – the Ninjas – as a defendant in the action." *Id.* Judge Hannah further ordered CNI to produce responsive documents to PNI or the Senate.

CNI sought special action relief from Judge Hannah's ruling. In its petition, CNI argued both that it is not subject to the PRL and that only documents "owned" by the Senate can be deemed public records. These arguments made last September by CNI are repeated *verbatim* in its Motion. *Cf* Motion at 3-6 *with* CNI's 9/27/21 Reply in Support of Petition for Special Action at 3-7, attached as Exhibit 3. In other words, CNI's Motion in this Court is making the **exact same** arguments it already made—and lost—in the Court of Appeals. Indeed, the Court of Appeals, precisely "because Cyber Ninjas continues to argue to the contrary," took pains to underscore its prior holding in the AO Decision: "documents relating to the audit are public records subject to the PRL *even if they are in possession of Cyber Ninjas rather than the Senate*." *See Cyber Ninjas, Inc. v. Hannah*, 2021 WL 5183944 at *2, ¶ 9 (citing *Fann v. Kemp*, at *4, ¶ 23) (emphasis added).

The Court of Appeals went on to uphold Judge Hannah's ruling that CNI is a proper party to the PNI Litigation, irrespective of its status as a private third party:

> 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 the subject to disclosure under the PRL.

Id. at *3, ¶ 17.[2] As the Court of Appeals pointedly noted, "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." *Id.* So too, here.

[2] The Court of Appeals further held that "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." *Id.* at *4, ¶ 18.

CNI sought special action relief of the Court of Appeals ruling by filing a Petition for Review in the Arizona Supreme Court. *See* Cyber Ninja Petition to Supreme Court attached as Exhibit 4. The enumerated issues for review included whether (i) documents one "does not own, create, and or have custody over…be considered 'public records'", and (ii) "any 'custodian' of records, including…[a] private contractor, [can] be subject to a lawsuit under A.R.S. § 39-121.02" or just the "'officer' of a public body". *Id.*

The Supreme Court denied CNI's Petition for Review without prejudice on February 1, 2022, after having previously denied, on December 1, 2021, CNI's application to stay enforcement of Judge's Hannah's trial court order compelling production. In sum, after considering the precise arguments based on the same authorities that make up CNI's Motion in this case, the Arizona Supreme Court left in place the orders of the Court of Appeals and Superior Court requiring CNI to produce the public records in its possession.

CNI continues to refuse to comply with those orders, leading it to be sued in this case and held in contempt in the PNI case.

II. ARGUMENT

The SAC states a claim against Cyber Ninjas, so its Motion must be denied. Before addressing the three arguments offered in Cyber Ninjas' Motion as to why the PRL does not apply, we first address the dispositive issue ignored in the Motion: regardless whether the PRL permits a direct action against Cyber Ninjas (and multiple Arizona courts have held that it does), CNI is a proper party here under joinder principles. Records with a substantial nexus to the audit are public records that the Senate is statutorily obligated to maintain, preserve and promptly produce in response to public records requests. The Senate has been ordered to produce those records to American Oversight. But the Senate's agent, Cyber Ninjas, refuses to turn over the records in its possession.

The Court of Appeals already disposed of the question whether CNI, as a private party custodian, may properly be joined as a party, when it determined that:

- CNI was the Senate's agent in performing "an important legislative function";
- "to the extent [CNI] is in sole possession of audit-related public records…CNI has become the custodian of those records under the PRL"
- CNI "was properly joined as a necessary party…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 the subject to disclosure under the PRL";
- "nothing prevents a party from joining a custodian of records as a party to a statutory special action under the PRL"; and that
- "the superior court did not err in determining that PNI properly joined [CNI], the custodian of audit records subject to the PLR"

Exhibit 1, *Cyber Ninjas v. Hannah*, 2021 WL 5183944 at *2-4, ¶¶ 9, 13-18. That ruling, and its reasoning, is binding on CNI, yet CNI's Motion fails to even mention the decision.

In these circumstances, just like with any other agent who possesses materials belonging to its principal but refuses to produce them notwithstanding a court order directed to the principal, the agent may be joined under Rule 19(a)(1)(A), which requires joinder if "in that person's absence, the court cannot accord complete relief among existing parties". The purpose of the Rule is "to ensure the joinder of all interested parties in a single action and avoid a multiplicity of litigation." 2B Ariz. Prac., Civil Rules Handbook, R. 19 (2021).

Thus, Cyber Ninjas is properly joined because it possesses public records but refuses to produce them, thereby thwarting American Oversight's ability to effectuate the relief it has obtained:

> Cyber Ninjas was properly joined as a necessary party in PNI's special action because . . . as an 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.

Cyber Ninjas, Inc. v. Hannah, 2021 WL 5183944, ¶ 17 (Ariz. App. Nov. 9, 2021).

This issue is dispositive of the Motion. We nonetheless address the remaining arguments raised by Cyber Ninjas in its Motion.

A. CNI's "ownership" and "custodian" arguments are specious and have been rejected.

CNI argues that the audit-related records in its possession are not subject to the PRL because CNI, not the Senate, owns them. This ignores that the Arizona Court of Appeals twice held in 2021 that records with a substantial nexus to the audit possessed by Cyber Ninjas are public records and must be produced. Indeed, CNI would not possess audit-related records but for the fact that it was hired by the Senate, as the Senate's agent, to perform the audit. CNI's argument also ignores that the Arizona Supreme Court elected not to accept special action jurisdiction to disturb either of the Court of Appeals' rulings, including the order to produce.

Specifically, CNI argues (at 2-6) that "it is well settled under Arizona and FOIA Caselaw" that documents the Senate does not "own must not be produced in response to a public records request." But as CNI well knows, the opposite is true. *CNI made this exact argument, word for word*, in its appeal papers in the PNI Litigation, and lost. (Exhibit 3 at 3-7). The Court of Appeals rejected that argument and held that CNI was a proper party to the PNI Litigation, and that CNI was subject to the PRL and the requirement that it disclose, as a custodian, documents with a "substantial nexus" to the audit.[3]

CNI then set forth that exact same argument (*again word for word*), in its petition for review to the Supreme Court. (Exhibit 4 at 10-15). The Supreme Court was likewise unmoved, denying CNI's request for a stay of the order compelling production, and denying CNI's petition without prejudice. Because the "issue" regarding the Senate's alleged lack of "ownership" of documents in CNI's possession was fully litigated by CNI to a final decision

[3] Similarly, this Court previously determined that CNI is "clearly" an agent of the Senate (See 7/14/21 Minute Entry), and ordered the Senate to immediately provide AO with the public records in CNI's custody. *See* 8/2/21 Order. The Court of Appeals upheld those decisions.

on the merits, as set forth in the PNI decision, CNI may not relitigate the issue here. And even if CNI were not estopped, the same result should be reached here as was reached in that case (and as was previously reached in this one).

Similarly, CNI is estopped from arguing (at 8-10) that as a mere "custodian," CNI is not subject to suit under the PRL. Judge Hannah carefully dissected that argument before rejecting it. [Ex. 2 at 3-4]. On appeal, the Court of Appeals could not have been any clearer in upholding Judge Hannah's decision: where CNI is alleged to be a custodian of public records (as AO has done here), CNI is properly joined as a defendant. *Cyber Ninjas v. Hannah*, 2021 WL 5183944, at *3-4; *see also Fann v. Kemp*, 2021 WL 3674157,at *4, ¶ 23 ("the requested records are no less public records simply because they are in possession of a third party, Cyber Ninjas"). In light of CNI's opportunity to fully litigate that question of law, and the Court of Appeals' decision disposing of that issue, CNI is estopped from relitigating that issue again here. Moreover, Cyber Ninja's failure to disclose to this Court the authority from the PNI case directly adverse to its position violates ER 3.3.

B. CNI's posturing about the terms of its contract with the Senate provides no basis for dismissal.

Next, CNI argues (at 6-8, 10-11) that its contract with the Senate somehow places CNI out of reach of the PRL. That argument, however, is premised entirely on CNI's *non sequitor* as to whether the Senate or CNI "owns" the information in question, when the issue of "ownership" is irrelevant and has been decided adversely to CNI in any event. Moreover, CNI's assertions about its contract with the Senate are wrong: Section 3.6 of the MSA requires that "all audit records (including but not limited to work papers, . . draft reports and other documents generated during the audit") be held in escrow following termination of the agreement and be available to the Senate and CNI for three years. (*See* Ex. 8 to SAC).

C. CNI's demand for dismissal based AO's purported lack of standing must be rejected.

Finally, CNI asserts (at 11-12), that AO lacks standing because it never sent CNI a public records request. That "argument" is meritless. CNI is a defendant in the American Oversight litigation in part because it was joined as an indispensable party after CNI (as custodian of certain public records) and its counsel disobeyed multiple court orders to produce public records to the Senate. *See e.g. Cyber Ninjas v. Hannah*, 2021 WL 5183944, at *3, ¶ 17 ("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"). Whether American Oversight ever sent CNI a request under the PRL (which CNI would have argued is improper) is irrelevant to whether complete relief can be afforded to American Oversight for CNI's intransigence.

III. CONCLUSION

For the reasons set forth above, the Motion should be denied and Cyber Ninjas and its counsel should be ordered to pay the reasonable attorneys' fees incurred by American Oversight in connection with this Response pursuant to A.R.S. § 12-349.

RESPECTFULLY SUBMITTED this 9th day of February, 2022.

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Exhibit 1

2021 WL 5183944
Only the Westlaw citation is currently available.
NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona, Division 1.

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
|
Review Denied January 4, 2022

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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Statecraft PLLC, Phoenix, By Kory A. Langhofer, Thomas J. Basile, Counsel for Real Parties in Interest Arizona State Senate, Karen Fann, Warren Petersen, and Susan Aceves

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

MEMORANDUM DECISION

CRUZ, Judge:

***1** ¶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

***2** ¶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 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.

***3** ¶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.

***4** ¶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-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.

All Citations

Not Reported in Pac. Rptr., 2021 WL 5183944

Footnotes

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.

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

Exhibit 2

Clerk of the Superior Court
*** Electronically Filed ***
09/20/2021 8:00 AM

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 3

ARIZONA COURT OF APPEALS

DIVISION ONE

CYBER NINJAS, INC., **Petitioner/Defendant,** **THE HONORABLE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,** **Respondent,** **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.**	**Court of Appeals** **Case No. 1 CA-SA 21-0173** **Maricopa County Superior Court** **Case No.: LC2021-00180-001** **(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).

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.

. . .

. . .

RESPECTFULLY SUBMITTED September 27, 2021.

WILENCHIK & BARTNESS, P.C.

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Exhibit 4

ARIZONA SUPREME COURT

CYBER NINJAS, INC., **Petitioner/Defendant,** **JUDGE JOHN HANNAH, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,** **Respondent,** **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.**	**Arizona Supreme Court** **Case No._____** **Court of Appeals** **Division One** **Case No. 1 CA-SA 21-0173** **Maricopa County Superior Court** **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. **Additional issues presented to, but not decided by, the Court of Appeals that the Supreme Court may need to decide if it grants review.**

A. None.

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

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

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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.*

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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.

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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.

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