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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AMERICAN OVERSIGHT, **Plaintiff,** **vs.** **KAREN FANN, et al.** **Defendants, and** **CYBER NINJAS, INC.,** **Real Party in Interest.**	**Case No.: CV2021-008265** **MOTION TO DISMISS** **(Assigned to the Honorable Judge Kemp)**

CyberNinjas, Inc. ("CNI") hereby moves to dismiss American Oversight's action for failure to state a claim for which relief can be granted in accordance with Ariz.R.Civ.P. 12(b)(6) *inter alia*.

Plaintiff fails to allege that the government actually owns much less possesses any of the documents that it is seeking from CNI. Only documents which the government actually owns, much less possesses, may be deemed public records. There is binding Arizona Supreme Court caselaw on this issue (*see Salt River*, discussed below), and even a United States Supreme Court case on point under FOIA law (*see Forsham*, discussed below).

But this is also common sense. CNI's company documents concerning things such as the amount of money that it negotiated to be paid from the Senate are clearly not "public" records that the Senate is entitled to see, much less the public—but that is exactly what is being sought here. While such things may be related to the "audit" (i.e. to CNI's contracted work for the Senate), they are neither owned by the government nor public record. This is a crucial and obvious distinction in public-records caselaw but also implicates basic common-law property rights, contract law, and even the federal and Arizona constitutions.[1] CNI's contract expressly defined what documents the government would and would not own, and it provided that the Senate does not own any records other than the audit report which CNI produced (and the Senate's own documents and information, which of course the Senate already and are already subject to public records requests). CNI's own records belong to CNI as a matter of law and they are not public record. And it should go without saying; but the law is the law, no matter how much media and/or political influences may militate against it.

1. <u>It is Well-Settled under Arizona and FOIA Caselaw that Only Documents the Government Owns, Much Less Possesses, May be Deemed Public Records</u>

The Arizona Supreme Court has previously ruled that documents which the State <u>does not own</u> must not be produced in response to a public records request—even in cases where the State is <u>in possession</u> of the records, which is not even the case here. This authority is binding on the Court and must not be neglected. 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 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). The Supreme Court noted that federal courts have "uniformly held that an agency must control a record before it is subject to disclosure"; and

[1] Private persons or companies are free from government search-and-seizure of private documents under the Fourth and Fourteenth Amendments as well as the privacy clause of the Arizona constitution.

"[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)).

Plaintiff fails to allege that the government owns CNI's documents, much less that any of CNI's documents were generated by the government or even entered the Senate's files, or were even actually 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 was completed and produced to the Senate some time ago 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, a notion that is unsupported in Arizona and FOIA caselaw. Further, in *Salt River*, the Arizona Supreme Court cited with approval (several times) two FOIA decisions that squarely addressed 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).

In *Forsham*, the United States Supreme Court considered a FOIA request for the raw data underlying a government study that was actually conducted by a private medical research organization. 445 U.S. at 169. Although a federal agency funded the study, the data was generated and possessed by the private company and 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 without foundation. 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 exclusively holds any records that are owned by the Senate, or even generated 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. 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. (In the instant action, the Court appears to be relying on the latter argument.)

The *Ciba* court rejected all three arguments. First, it 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 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.

The authorities here could not be clearer, and of course the Arizona Supreme Court's precedent is directly binding. Plaintiff's claims must be dismissed because the Plaintiff fails to allege that the government owns CNI's records, much less that the government possesses or even relied on them (even though such reliance is "irrelevant," to quote the United States Supreme Court). CNI's records are therefore not public record as a matter of law.

2. CNI's Contract Affirmatively Provides that the Senate Does not Own its Company Records

Although the burden belongs to Plaintiff and not to CNI to demonstrate that the Senate owns (much less possesses) CNI's company records, CNI's contract with the Senate was affirmatively clear that the Senate does not. (CNI's contract may be properly considered by the Court on a Motion to Dismiss as it is integral to the case; it has also been considered by the Court before, prior to CNI being joined.)

First, it should be beyond dispute that CNI was a private contractor.[2] CNI's contract with the Senate addressed ownership of documents and materials in Section 7. Section 7.3 provided:

> Contractor's Proprietary Rights. As between Client [Senate] and Contractor [CNI], Contractor owns all right, title and interest in and to the Services,[3] including, Contractor's Intellectual Property.[4] Except to the extent specifically provided in the applicable Statement of Work, this Agreement does not transfer or convey to Client or any third party any right, title or interest in or to the Services or any associated Contractor's Intellectual Property rights, but only grants to Client a limited, non-exclusive right and license to use as granted in accordance with the Agreement. Contractor shall

[2] For example, Section 18.1 expressly provides that CNI was an "independent contractor" and "[n]either party is the agent of the other nor may []either bind the other in any way…" *See also* Section 12.2: "Contractor (i) is a corporation, duly organized, validly existing and in good standing under the Laws of the State of Florida, and (ii) has full corporate power to own, lease, license and operate its assets…"

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

[4] See definition immediately below.

> retain all proprietary rights to Contractor's Intellectual Property and Client will take no actions which adversely affect Contractor's Intellectual Property rights. **For the avoidance of doubt and notwithstanding any other provision in this Section or elsewhere in the Agreement, all documents, information, materials, devices, media, and data relating to or arising out of the November 3, 2020 general election in Arizona, including but not limited to voted ballots, images of voted ballots, and any other materials prepared by, provided by, or originating from the Client or any political subdivision or governmental entity in the State of Arizona, are the sole and exclusive property of the Client or of the applicable political subdivision or governmental entity, and Contractor shall have no right or interest whatsoever in such documents, information, materials, or data.**

(Emphasis original.) In turn, Section 4.1.3 expressly defined "Contractor's Intellectual property" as:

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

Finally, Section 7.1 also provided:

> …As between Client and Contractor, Client or a political subdivision or government entity in the State of Arizona owns all right, title and interest in and to (i) any data provided by Client (and/or the End Client, if applicable) to Contractor; (ii) any of Client's (and/or the End Client, if applicable) data accessed or used by Contractor or transmitted by Client to Contractor in connection with Contractor's provision of the Services (Client's data and Client's End User's data, collectively, the "Client Data"); (iii) all intellectual property of Client ("Client's Intellectual Property") that may be made available to Contractor in the course of providing Services under this Agreement.

Nowhere in the Agreement does it provide that the Senate has ownership of CNI's company records – in fact it says just the opposite. As a matter of law, the Senate does not own anything but the report that CNI produced (and the Senate's own documents and information, which of course the Senate already has and are already subject to public records requests). What is being alleged here is not that CNI is in exclusive possession of any Senate-owned materials, but rather that CNI is in possession of its own privately-owned records, and those are simply not subject to public records law. To misapply public-records law in an effort to force CNI to give its records to the government and public clearly violates its private-property and contract rights, not to mention compels what is effectively an illegal search-and-seizure of private records. There is no genuine legal authority in support of such a thing, just a steady drumbeat of improper media and political influence.

3. CNI is Not Subject to Suit under Public-Records Law

A.R.S. § 39-121.02(A) is clear 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. CNI is neither.

The Rules of Special Action and Rule 19 of the Rules of Civil Procedure (governing joinder) also do not provide a substantive basis for a lawsuit against CNI, and certainly no basis for a claim of fees against CNI. If anyone could be named a party to a lawsuit (and subject to fee claims), simply because they allegedly have documents related to their government work, then (1) it would render the "against the officer or public body" language in A.R.S. § 39-121.02(A) nugatory; and (2) every government employee or contractor could be named as a party to a lawsuit and subject to fee claims, because they all have documents related to government work. CNI is at best an entity whose records are being claimed to be relevant, and therefore at most a witness in this action. Finally, there is no reason why relief cannot be afforded in its absence because it has no public records as a matter of law.

It has been erroneously argued (in another action) that lawsuits can be filed against any "custodian" of records, meaning that any state employee or even contractor who has possession of state records can be properly sued under the statute. A.R.S. § 39-121.02(A) expressly provides:

> 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 word "custodian" is not used when describing who is to be sued—only "officer or public body." The word "custodian" is used only in A.R.S. §§ 39-121.01 and 39-121.03, where it clearly 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 A.R.S. § 39-121.02(A) which provides that only public officers or public bodies may be sued, and the language in A.R.S. § 39-121 which provides that only "[p]ublic records and other matters in the custody of any officer" shall be open to inspection. Otherwise, any government employee or contractor would be open to being sued under public-records statutes by members of the public, and to being held responsible for their fees as well.

In another action, the erroneous argument has also been made that CNI must be treated differently because it allegedly does not provide "ordinary goods or services" and/or that it is uniquely subject to public records requests because the government has "entirely outsourced" an "important" function.[5] In reality, these arguments are without a legal basis and amount to little more than acknowledgement of improper media and political influence over this case. There is no legal authority which supports that holding a contractor liable under the public records statutes (including for fees) turns on whether it provides "ordinary services," or whether its function is "important" or "entirely outsourced." Whenever the government hires a private contractor, the government 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

[5] It was also argued in another case that CNI's contract was unique because the Senate was 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 all of the reasons herein.

important and unique. 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 – that is also an important and unique undertaking, since the courts are also important and unique. To create a "rule" that only contractors who provide "outside-of-the-ordinary" goods or services are subject to public records requests is at once dangerous, confusing and unpredictable. After all, exactly what is "unusual" about CNI's services as an auditor? Is it because CNI audited an election? In which case should not all election contractors and workers now be subject to public-records requests, litigation, and fee claims -- for example the company which provides the vote-tabulation machines? It is also performing an "out-of-the-ordinary," "important" government function which is "entirely outsourced" to a private contractor. The bottom line is that such arguments are being invented out of whole cloth and find no genuine support in either the plain wording of the law or binding Arizona and Supreme Court caselaw.

4. <u>CNI's Contract Does not Give the Government Ownership Much Less Possession of its Company Records</u>

CNI is aware that this Court previously found (in a ruling by which CNI is not bound) that a provision in CNI's Agreement with the Senate regarding the sharing of defense materials (Section 18.5) gives the Senate the right to access or request CNI's documents. First, as explained above, this does not equate to the Senate owning (much less "hav[ing] *in fact* obtained" the records, to quote the United States Supreme Court in *Forsham*); and actual ownership and possession are prerequisites to being considered a public record. "Government access to and reliance upon information" do "not signify Government ownership or control of such information." *Ciba-Geigy Corp.*, 428 F. Supp. at 530. "Mere access without ownership and mere reliance without control will not suffice to convert [private] data into agency data." *Id.* Further, the idea that CNI's private company records can be converted into "public records" simply because someone sued the Senate claiming that they are public records – such that its records are "needed for the defence of such claims" under Section 18.5, causing the Senate to obtain them and *make* them public records – is circuitous. Such logic could be used to render any of CNI's

private records "public," which is not only unfair but also "unreasonable" within the meaning of Section 18.5. Further, Section 18.5 requires only "reasonable cooperation" with the Senate—and even then, only if it is at no expense to CNI. Further, Section 18.5 provides only for reasonable cooperation in the event that either party to the Agreement is subject to a claim regarding the Agreement or its actions taken pursuant to the Agreement. The Senate's obligations (*vel non*) under public-records law exist independent of the Agreement and arise under A.R.S. §§ 39-121 *et seq*. Claims such as these regarding the Senate's obligations to provide public records to members of the public therefore do not implicate Section 18.5. Wide-ranging requests for production of documents such are at issue here are not undertakings without expense and therefore no obligation under Section 18.5 is triggered. In addition, the Senate retains the discretion under Section 18.5 to seek or sue for records, and it clearly violates the separation-of-powers doctrine to force the Senate to invoke a contractual clause much less bring a claim. Finally, the Senate is in material breach of CNI's contract for failure to pay CNI on the balance of CNI's contract, and for its failure to indemnify CNI, *inter alia*—which excuses CNI from further performance under the contract, even if Section 18.5 genuinely applied. But again, the overarching point here is that even if it were applicable, Section 18.5 would entitle the government at most to access and not ownership of the documents, so they are not public records as a matter of law.

5. Plaintiff's claims are based on records requests that were not even sent to CNI; Plaintiff lacks standing to litigate over records it has never requested from CNI

Plaintiff seeks a number of categories of documents in this suit but fails to allege that all of its requests were ever sent to CNI; in fact, the requests dated April 6, 2021 (Ex. 13 to Amended Complaint) and May 10, 2021 (Exhibit 23 to Amended Complaint) were made only to the Senate, on their face. Even if public-records law were applicable to CNI, a records request must actually be made before any response from CNI comes due. Further, Plaintiff lacks standing to litigate over records which it has not even requested from CNI. As a practical matter, CNI was first notified of Plaintiff's particular requests as part of service of the suit, and it believes that the number of responsive documents that have not yet been produced is minimal. But in the meantime

it is being forced to deal with expensive litigation and an application for default which is not fair even under public-records law as it normally operates.

Conclusion

For the foregoing reasons, CNI's Motion to Dismiss must be granted. In accordance with Rule 54(g)(1), CNI requests its fees and costs.

RESPECTFULLY SUBMITTED January 21, 2022.

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