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 13 Defense Center*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

13 HUMAN RIGHTS DEFENSE CENTER, a
 14 Washington corporation,

15 Plaintiff,

16 vs.

17 ARIZONA DEPARTMENT OF
 18 CORRECTIONS, REHABILITATION &
 19 REENTRY, a public body; and THE GEO
 20 GROUP, INC., a Florida corporation,

21 Defendants.

NO. CV 2025-006037

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

(Assigned to the Honorable _____)

23 The Human Rights Defense Center (“HRDC”), which publishes the journals *Prison*
 24 *Legal News* and *Criminal Legal News*, submits this Complaint for Statutory Special Action
 25 to Secure Access to Public Records pursuant to A.R.S. § 39-121, *et seq.* (the “Arizona
 26 Public Records Law”) and Arizona Rules of Procedure for Special Actions 1-6, and alleges
 27 as follows:
 28

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1 **PARTIES, JURISDICTION, AND VENUE**

2 1. Plaintiff HRDC publishes the journals *Prison Legal News* and *Criminal*
3 *Legal News*, independent monthly magazines providing cutting-edge review and analysis
4 of criminal justice-related news to subscribers in all 50 states. HRDC is a Washington state
5 not-for-profit corporation with its principal place of business in Boynton Beach, Florida.

6 2. By statute and case law, HRDC may request to examine or be furnished
7 copies of any Arizona public record, and custodians of public records are required to
8 furnish copies of such records “promptly.” *See* A.R.S. §§ 39-121.01(D)(1) and (E).

9 3. Defendant Arizona Department of Corrections, Rehabilitation and Reentry
10 (“ADCRR” or the “Department”), as an executive department supported in whole or in part
11 by monies from the State of Arizona, is a “[p]ublic body” as defined by A.R.S. § 39-
12 121.01(a)(2).

13 4. By law, ADCRR “shall maintain all records . . . reasonably necessary or
14 appropriate to maintain an accurate knowledge of [its] official activities and of any of [its]
15 activities which are supported by monies from the state or any political subdivision of the
16 state.” A.R.S. § 39-121.01(B). The Department’s statutory duties under the Arizona Public
17 Records Law extend to their custodians of records and, specifically, to their agents when
18 they are entrusted by contract or otherwise with ADCRR’s duties to maintain and preserve
19 public records in their custody or control.

20 5. Defendant The GEO Group, Inc. (“GEO” or “Defendant”), a corporation
21 organized under the laws of the state of Florida, has contracted with the Department to
22 operate certain ADCRR facilities.

23 6. GEO is the sole custodian of certain public records within the meaning of
24 A.R.S. § 39-121.01 that are created as a consequence of GEO’s acting as an agent of
25 ADCRR, supported by and expending monies provided by the state, to perform the core
26 governmental function of operating state prison facilities. GEO, as the sole custodian of
27 those records, is required by law to furnish copies of those records “promptly” upon
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1 request. A.R.S. § 39-121.01(D). If GEO fails or refuses to make public records in its
2 custody or control available for public inspection, then the Department, as GEO’s principal
3 in this relationship, has a duty to prevail upon its agent to cooperate with lawful public
4 records requests.

5 7. The Court has personal jurisdiction over the parties in this action, and venue
6 is proper in Maricopa County, Arizona. *See* RPSA 6(a).

7 8. This petition seeks inspection and copying of public records in accordance
8 with A.R.S. § 39-121.02(A), which provides that “[a]ny person who has requested to
9 examine or copy public records pursuant to this article, and who has been denied access to
10 or the right to copy such records, may appeal the denial through a special action in the
11 superior court, pursuant to the rules of procedure for special actions against the officer or
12 public body.” By law, “[a]ccess to public records is deemed denied if a custodian [of such
13 records] fails to promptly respond to a request for production of a public record.” A.R.S. §
14 39-121.01(E).

15 FACTS

16 9. HRDC regularly seeks public records regarding local, state and federal
17 prisons across the country, including records such as those at issue here regarding lawsuits,
18 verdicts and settlements involving allegations of civil rights violations, neglect,
19 malpractice or other torts. HRDC uses these public records in fulfilling its mission to
20 inform the public about prison conditions and operations. HRDC has successfully obtained
21 public records from Defendant GEO after filing suit in four other states.

22 10. Pursuant to A.R.S. §§ 41-1609, *et seq.*, ADCRR may contract with private
23 institutions to house prisoners committed to the Department’s custody. Defendant GEO
24 and CoreCivic, Inc., another private prison company, operate six private state prisons in
25 Arizona housing more than 10,000 inmates, for which ADCRR paid more than \$269
26 million in per-diem costs in fiscal 2024.

27 11. Defendant GEO operates four facilities housing approximately 6,000 male
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1 prisoners for Defendant ADCRR, including:

- 2 a. The Central Arizona Correctional Facility in Florence, Arizona, a
3 1,280-bed medium-security prison for sex offenders;
- 4 b. The Florence West Correctional and Rehabilitation Facility in
5 Florence, Arizona, a 750-bed minimum-security prison;
- 6 c. The Kingman Correctional and Rehabilitation Facility in Golden
7 Valley, Arizona, a 3,500-bed prison complex comprising a 2,000-bed
8 minimum-security facility and a 1,500-bed medium-security facility
9 for sex offenders; and
- 10 d. The Phoenix West Correctional and Rehabilitation Facility in
11 Phoenix, Arizona, a 500-bed minimum-security prison.

12 12. On September 23, 2024, HRDC's Public Records Manager Tiffany Hollis
13 submitted a public records request (the "Public Records Request") to GEO's Arizona
14 offices. A true and correct copy of HRDC's Public Records Request to GEO is attached
15 as **Exhibit 1**.

16 13. The Public Records Request sought

17 records in all claims or lawsuits brought against The GEO Group, Inc., and/or
18 any of its employees or agents in which payments totaling \$1,000 or more
19 were disbursed from The GEO Group, Inc., and/or those entities' insurers to
20 resolve claims against it between September 23, 2014 to the present. These
payments include but are not limited to settlements, damages, attorney fee
awards, and sanctions, irrespective of the identity of the plaintiff or claimant.

21 *Id.*

22 14. Specifically, HRDC requested, in electronic native format where possible,
23 and otherwise in electronic format:

24 a. Records sufficient to show:

- 25 1. The name of all parties involved;
- 26 2. The case or claim number;
- 27 3. The jurisdiction in which the case or claim was brought
28 (*e.g.*, US District Court for the District of Arizona,

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Arizona Supreme Court, etc.);

4. The date of resolution;
5. Payments, including legal fees, in the resolution and to whom it was paid;

b. For each case or claim detailed above:

1. The complaint or claim form and any amended versions;
2. The verdict form, final judgment, settlement agreement, consent decree, or other paper that resolved the case.

Id.

15. GEO responded on October 28, 2024, categorically denying HRDC’s Public Records Request and claiming that GEO “is not subject to the requirements or enforcement mechanisms of the [Public Records Law]” because it is a private corporation. Additionally, GEO asserted that it denied the request because it “may also seek confidential, private, or personal records/information beyond the scope of Title 39.” A true and correct copy of GEO’s denial of the Public Records Request is attached as **Exhibit 2**.

16. On November 26, 2024, counsel for HRDC wrote to GEO seeking “prompt and full compliance” with the Public Records Request, noting that HRDC had not received any responsive records. A true and correct copy of that correspondence is attached as **Exhibit 3**.

17. HRDC’s correspondence explained that the Arizona Public Records Law applied in this circumstance because GEO “is a custodian of public records related to the performance of essential governmental functions within the meaning of the statute.” Exhibit 3 at 1.

18. On December 30, 2024, GEO responded and again refused to produce the requested public records, claiming the Public Records Request was overbroad, did not have a substantial nexus to a government agency’s activities, and sought records subject to

1 private confidentiality agreements negotiated between GEO and individual litigants or
2 claimants. Additionally, GEO continued to claim that it is not a public body or custodian
3 subject to the Public Records Law, arguing that operating state correctional facilities is not
4 a public function for purposes of the Public Records Law. A true and correct copy of
5 GEO's denial letter is attached as **Exhibit 4**.

6 19. As of the date of this writing, HRDC has not received access to or copies of
7 *any* of the requested public records. On information and belief, GEO has communicated
8 its policy decision to deny such requests for public records to its principal, the Department,
9 or should have done so pursuant to Department regulations.

10 20. By their failures to provide access to or copies of all of the requested records
11 promptly, Defendants have denied HRDC's Public Records Request, and they have done
12 so wrongfully. *See* A.R.S. § 39-121.01(E) and §39-121.02(C).

13 **COUNT ONE: Violation of A.R.S. §§ 39-121, *et seq.***
14 **by Defendants ADCRR and The GEO Group, Inc.**

15 21. The Arizona Public Records Law provides that “[p]ublic records and other
16 matters in the custody of any officer shall be open to inspection by any person at all times
17 during office hours.” A.R.S. § 39-121.

18 22. Consistent with this state's long tradition of transparent government,
19 “Arizona law defines ‘public records’ broadly and creates a presumption requiring the
20 disclosure of public information.” *Lake v. City of Phoenix*, 222 Ariz. 547, 549 (2009); *see*
21 *also Cox Ariz. Publ'ns v. Collins*, 175 Ariz. 11, 14 (1993) (Arizona statutory and case law
22 articulates a “strong policy favoring open disclosure and access.”). Under Arizona law,
23 public records are those documents which have a “‘substantial nexus’ to government
24 activities . . . and the nature and purpose of a document determine whether it is a public
25 record.” *Lake*, 222 Ariz. at 549 (citation omitted).

26 23. The documents responsive to HRDC's request unquestionably are public
27 records because they have a substantial nexus to government activities: the operation of
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1 Arizona state prisons. The Department therefore was required to ensure that the requested
2 records were maintained and made available on request by its agent and records custodian,
3 GEO. See A.R.S. § 39-121.01(B).

4 24. Under the Arizona Public Records Law, a contractor to which a public body
5 has delegated a governmental function is the custodian of public records regarding its
6 performance of that public function and must “promptly furnish” those public records on
7 request. *Cyber Ninjas, Inc. v. Hannah*, No. 1 CA-SA 21-0173, 2021 Ariz. App. Unpub.
8 LEXIS 1107, at *6-8, ¶¶ 15-16. (App. Nov. 9, 2021) (mem. decision);¹ see also Ex. 3 at 2.
9 Records in GEO’s possession are “no less public records simply because they are in the
10 possession of a third party.” *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub.
11 LEXIS 834, at *12, ¶ 23 (App. Aug. 19, 2021) (mem. decision).²

12 25. It is well settled that “[a] privately owned corporation that operates prisons
13 pursuant to a contract with a state performs a public function that is traditionally the
14 exclusive prerogative of the state.” *Domingo v. Thomas*, No. CV 12-1775-PHX-DGC
15 (SPL), 2013 U.S. Dist. LEXIS 247, at *7 (D. Ariz. Jan. 2, 2013); see also *Brink v. Herron*,
16 No. CV 20-01097-PHX-SPL (DMF), 2020 U.S. Dist. LEXIS 162680, at *12 (D. Ariz. Aug.
17 7, 2020) (“The GEO Group Incorporated performs a public function, i.e., operating and
18 managing a prison.”).

19 26. Therefore, as with the Arizona Senate in *Cyber Ninjas*, ADCRR has
20 outsourced performance of the important public function of operating prisons to GEO with
21 respect to the facilities GEO operates. 2021 Ariz. App. Unpub. LEXIS 1107, at *9-10, ¶¶
22 19-20. Defendant GEO is the custodian of public records created in the course of its
23 performance of that “core governmental function” as ADCRR’s agent. *Fann*, 2021 Ariz.
24 App. Unpub. LEXIS 834, at *13, ¶ 24; *Cyber Ninjas*, 2021 Ariz. App. Unpub. LEXIS 1107,
25 at *6-7, ¶ 15.

26 _____
27 ¹ Pursuant to Ariz. Sup. Ct. R. 111(c)(3), a copy of this opinion is attached as Exhibit 5.

28 ² Pursuant to Ariz. Sup. Ct. R. 111(c)(3), a copy of this opinion is attached as Exhibit 6.

1 27. As such, Defendant GEO is required to maintain the public records at issue
2 and make them available for inspection and copying promptly upon request by members
3 of the public, including HRDC and its journalists. *Id.* at *7-8, ¶¶ 16-17. Yet, GEO has
4 refused to do so.

5 28. Moreover, ADCRR regulations *require* private prison staff to maintain and
6 disseminate records pursuant to the Department's public records policies. *See* Ariz. Dep't
7 of Corrections, Rehabilitation & Reentry, Dep't Order #106-Contract Beds, ¶ 5.2.1,
8 [https://corrections.az.gov/sites/default/files/documents/policies/100/DO%20106%20-](https://corrections.az.gov/sites/default/files/documents/policies/100/DO%20106%20-%20Eff.%204-15-24.pdf)
9 [%20Eff.%204-15-24.pdf](https://corrections.az.gov/sites/default/files/documents/policies/100/DO%20106%20-%20Eff.%204-15-24.pdf); Ariz. Dep't of Corrections, Rehabilitation & Reentry, Dep't
10 Order #201-Legal Services-Records Release, at 1
11 <https://corrections.az.gov/sites/default/files/documents/policies/200/0201.pdf> (stating
12 order applies to private prison employees who receive public records requests).

13 29. The ability to access records pertaining to the operation of state prisons is a
14 matter of intense public concern. Defendant GEO manages and operates four state prisons
15 detaining some 6,000 Arizona prisoners on behalf of ADCRR. Defendant GEO, therefore,
16 fulfills a governmental function necessary for upholding the rule of law and ensuring the
17 safety of both the public and the incarcerated. But the public cannot properly evaluate
18 Defendants' conduct and usage of government money without prompt and full access to
19 the very public records that Defendants are unlawfully withholding.

20 30. There is a strong public benefit in honoring the public's statutory right to
21 inspect these Public Records, and Defendants have failed to articulate any specific harm
22 that would arise from the release of any portion of the Public Records. There is no such
23 harm, and HRDC has given ADCRR's agent and records custodian, GEO, ample and
24 repeated opportunities to assert any.

25 31. For all these reasons, Defendants ADCRR and GEO have failed to perform
26 their duties required under the Arizona Public Records Law regarding requested records in
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1 the custody or control of GEO, and they have wrongfully denied HRDC access to inspect
2 and copy these records as a matter of law.

3 **PRAYER FOR RELIEF**

4 Wherefore, HRDC prays for relief from this Court as follows:

5 A. For a Declaration, pursuant to A.R.S. § 12-1831 et seq., that Defendants have
6 violated Arizona's Public Records Law, A.R.S. § 39-121 et seq., by failing to provide
7 prompt access to and improperly withholding public records requested by Plaintiff;

8 B. For an order setting an expeditious time for Defendants to produce all of the
9 Public Records to HRDC for inspection and copying;

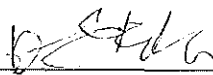
10 C. For a preliminary and permanent injunction, pursuant to A.R.S. § 12-1801 et
11 seq., ordering Defendants to immediately produce all requested public records in
12 compliance with A.R.S. § 39-121 et seq. and enjoining Defendants from further delaying
13 or improperly withholding public records in the future;

14 D. For an award of HRDC's reasonable attorneys' fees and other legal costs
15 against GEO and the Department, jointly and severally, pursuant to A.R.S. § 39-121.02(B);
16 and

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

18
19 DATED this 18th day of February, 2025.

20
21 BALLARD SPAHR LLP

22 By: 
23 David J. Bodney
24 Matthew E. Kelley
25 Helen Hitz
26 1 East Washington Street, Suite 2300
27 Phoenix, AZ 85004-2555

28 *Attorneys for Plaintiff Human Rights
Defense Center*

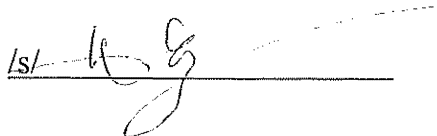
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2025, the foregoing document was filed with the Office of the Clerk of the Superior Court, Maricopa County.

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

Office of the General Counsel
Arizona Department of Corrections, Rehabilitation & Reentry
1601 West Jefferson Street
Phoenix, AZ 85007

The GEO Group, Inc.
c/o Corporate Creations Network, Inc.
3260 North Hayden Road, #210
Scottsdale, AZ 85251



Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

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Exhibit 1



Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

September 23, 2024

The GEO Group, Inc.
Central Regional Office
Attn: Public Records Officer
1777 NE Loop 410, Suite 1100
San Antonio, TX 78217

*Submitted via Certified Mail w/ Return Receipt:
7014 0150 0002 2919 3398*

Re: Request for Settlements and Verdicts Records

To the Freedom of Information Act Officer:

The Human Rights Defense Center (HRDC) makes this request pursuant to the Arizona Public Records Act, Ariz. Rev. Stat. Title 39, Chapter 1. HRDC is a non-profit dedicated to advocacy and education around criminal justice issues. Among other activities, HRDC publishes the journals *Prison Legal News* and *Criminal Legal News*.

HRDC seeks the below specified records in all claims or lawsuits brought against The GEO Group, Inc., and/or any of its employees or agents in which payments totaling \$1,000 or more were disbursed from The GEO Group, Inc., and/or those entities' insurers to resolve claims against it between September 23, 2014 to the present. These payments include but are not limited to settlements, damages, attorney fee awards, and sanctions, irrespective of the identity of the plaintiff or claimant. Specifically, HRDC requests the following records, provided in electronic native format where possible, and otherwise in electronic format:

1. Records sufficient to show:
 - The name of all parties involved;
 - The case or claim number;
 - The jurisdiction in which the case or claim was brought (*e.g.*, US District Court for the District of Arizona, Arizona Supreme Court, etc.);
 - The date of resolution;

P.O. Box 1151, Lake Worth, FL 33498
754-263-4568 | FOIA@humanrightsdefensecenter.org

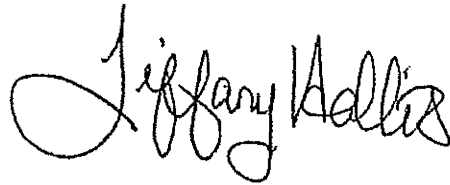
- Payments, including legal fees, in the resolution and to whom it was paid;
2. For each case or claim detailed above:
- The complaint or claim form and any amended versions;
 - The verdict form, final judgment, settlement agreement, consent decree, or other paper that resolved the case.

If this request is denied in whole or part, please justify all denials by reference to specific exemptions. If any records responsive to this request are denied in part, release all segregable portions of those records. Additionally, please outline any administrative appeals process available.

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$50. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the operation of The GEO Group, Inc. and how local government manages taxpayer money. HRDC is a member of the news media and publishes two monthly magazines, *Prison Legal News* and *Criminal Legal News*. This request is being made for news gathering purposes. This information is not being sought for commercial purposes.

Please contact me via email at FOIA@humanrightsdefensecenter.org should you require any additional information. Thank you for your time and attention in this matter.

Sincerely,



Tiffany Hollis
Public Records Manager
HUMAN RIGHTS DEFENSE CENTER

Exhibit 2

LAW OFFICES
BROENING OBERG WOODS & WILSON
Professional Corporation

Address:
2800 N. Central Avenue, Suite 1600
Phoenix, AZ 85004
(602) 271-7700

<https://www.bowwlaw.com>

JONATHAN Y. YU
(602) 271-7724
jyy@bowwlaw.com

October 28, 2024

U.S. Mail

Tiffany Hollis
HUMAN RIGHTS DEFENSE CENTER
PO Box 1151
Lake Worth, FL 33460

Re: Request for Settlements and Verdicts Records

Ms. Hollis:

I write on behalf of The GEO Group, Inc. ("GEO") in response to the Human Rights Defense Center's ("HRDC") September 23, 2024 letter requesting records and information concerning claims or lawsuits involving GEO and its employees between September 23, 2014 – Present.

As you know, Arizona's Public Records Law ("PRL") only applies to "officers" or a "public body". A.R.S. § 39-121.01. Because GEO is a private corporation, it is not subject to the requirements or enforcement mechanisms of the PRL. Notwithstanding the foregoing, the HRDC's request may also seek confidential, private, or personal records/information beyond the scope of Title 39. *See Griffis v. Pinal County*, 214 Ariz. 1, 3- 5 (2007).

For the foregoing reasons, GEO respectfully declines the HRDC's request, and directs it to the Arizona Department of Corrections Rehabilitation and Reentry, which may be in possession of documentation/information responsive to its request.

Very truly yours,

Jonathan Y. Yu

JONATHAN Y. YU
For the Firm

Exhibit 3

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www.ballardspahr.com

Matthew E. Kelley
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Fax: 602.798.5595
kelleym@ballardspahr.com

November 26, 2024

Via E-mail: jyy@bowwlaw.com

Jonathan Y. Yu
Broening Oberg Woods & Wilson
2800 N. Central Avenue, Suite 1600
Phoenix, AZ 85004

Re: Human Rights Defense Center/The GEO Group, Inc: Right to Inspect and Copy
Records Pursuant to the Arizona Public Records Law

Dear Mr. Yu:

This firm represents the Human Rights Defense Center (“HRDC”) in connection with its request to inspect and copy certain public records in the custody of The GEO Group, Inc. (“GEO”). As you know, that request was submitted on September 23, 2024 by HRDC’s Public Records Manager Tiffany Hollis to GEO pursuant to the Arizona Public Records Law, A.R.S. § 39-121 *et seq.* (the “Request”). On HRDC’s behalf, I write to secure GEO’s prompt and full compliance with HRDC’s Request.

Your October 28, 2024 correspondence to Ms. Hollis incorrectly states that the Arizona Public Records Law does not apply to GEO because it is not an officer or public body under A.R.S. § 39-121.01. However, as explained in more detail below, the Public Records Law *does* apply to GEO because it is a custodian of public records related to the performance of essential governmental functions within the meaning of the statute, and it is therefore duty-bound to comply with this Arizona law. *HRDC calls upon GEO to provide access to, or copies of, the requested public records within ten business days of its receipt of this letter.*

Factual Background

On September 23, 2024, Ms. Hollis sent, on behalf of HRDC, a request for records pursuant to the Arizona Public Records Law to GEO’s headquarters office. A true and correct copy of the Request is attached as Exhibit A for ready reference.

The Request seeks:

records in all claims or lawsuits brought against The GEO Group, Inc., and/or any of its employees or agents in which payments totaling \$1,000 or more were disbursed from The GEO Group, Inc., and/or those entities' insurers to resolve claims against it between September 23, 2014 to the present. These payments include but are not limited to settlements, damages, attorney fee awards, and sanctions, irrespective of the identity of the plaintiff or claimant. Specifically, HRDC requests the following records, provided in electronic native format where possible, and otherwise in electronic format:

1. Records sufficient to show:
 - The name of all parties involved;
 - The case or claim number;
 - The jurisdiction in which the case or claim was brought (*e.g.*, US District Court for the District of Arizona, Arizona Supreme Court, etc.);
 - The date of resolution;
 - Payments, including legal fees, in the resolution and to whom it was paid;
2. For each case or claim detailed above:
 - The complaint or claim form and any amended versions;
 - The verdict form, final judgment, settlement agreement, consent decree, or other paper that resolved the case.

Ex. A at 1-2. The Request noted that HRDC publishes the monthly magazines *Prison Legal News* and *Criminal Legal News* and therefore seeks the records as a member of the news media, not for a commercial purpose. *Id.* at 2.

On October 28, 2024, you responded to Ms. Hollis and declined to provide *any* of the requested public records, asserting that “[b]ecause GEO is a private corporation, it is not subject to the requirements or enforcement mechanisms of the [Public Records Law]” (the “Denial Letter”). A true and correct copy of the Denial Letter is attached as Exhibit B for ready reference. You also stated in the Denial Letter that “the HRDC’s [R]equest may also seek confidential, private, or personal records/information beyond the scope of Title 39.” Ex. B at 1.

As of this writing, HRDC has not received any further response to the Request.

The Arizona Public Records Law

GEO's refusal to provide these records violates the Arizona Public Records Law, which provides a broad right of public inspection and copying of public records. The statute "defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8 (2009) (quoting *Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 11 (2007)). All records with "a 'substantial nexus' to government activities qualify as public records, and the nature and purpose of a document determines whether it is a public record." *Id.* Arizona's statutory and case law articulate a "strong policy favoring open disclosure and access." *Cox Ariz. Publ'ns v. Collins*, 175 Ariz. 11, 14 (1993). In applying the statute, "[d]oubts should be resolved in favor of disclosure." Ariz. Op. Att'y Gen. No. R75-781 at 145 (1975-76).

Moreover, "[t]he requested records are no less public records simply because they are in the possession of a third party," in this instance, GEO. *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834, at *12, ¶ 23 (App. Aug. 19, 2021), *review denied sub nom. Fann v. Kemp/American Oversight*, No. CV-21-0197-PR, 2021 Ariz. LEXIS 333 (Sept. 14, 2021); *see also Cyber Ninjas, Inc. v. Hannah*, No. 1 CA-SA 21-0173, 2021 Ariz. App. Unpub. LEXIS 1107, at *4, ¶ 9 (App. Nov. 9, 2021), *review denied*, No. CV-21-0281-PR, 2022 Ariz. LEXIS 1 (Jan. 4, 2022) (same). As you may be aware, both of these cases involved public records in the possession of Cyber Ninjas, the company the Arizona Senate hired to perform an audit of the ballots cast in Maricopa County in the 2020 presidential election. *Id.* at *1-3, ¶¶ 2-4. The Arizona Court of Appeals ruled that Cyber Ninjas was the "custodian" of those public records under the Public Records Law. *Id.* at *6-8, ¶¶ 15-16.

As the Court of Appeals explained, A.R.S. § 39-121.01(D)(1) envisions that requests for public records are made to the "custodian" of those records, and that the custodian must "promptly furnish" those records. *Id.* at *6, ¶ 15. In other words, the entity that possesses or maintains control over public records is a custodian subject to the requirements of the Public Records law, regardless of whether that entity is a public body, public official or government contractor (and, for that matter, whether the custodian holds the records in digital form in the "cloud"). *Id. Cf. Lake*, 222 Ariz. at 549 (2009) (when a public agency maintains records in an electronic format, "the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law"). Indeed, the courts have held that the custodian of records is a proper defendant in a special action to enforce the public's rights to access records of governmental activities. *Cyber Ninjas*, 2021 Ariz. App. Unpub. LEXIS 1107, at *6-8, ¶¶ 15-17.

Notably, in *Cyber Ninjas* the Arizona Court of Appeals rejected the precise argument you make in the Denial Letter – that, as a private corporation, Cyber Ninjas was not subject to the Public Records Law. *Id.* at *6-11, ¶¶ 13-20. Rather, Cyber Ninjas was the custodian of public records and subject to the Public Records Law’s requirements because it created and maintained those records in the course of its performance of an important governmental function the Arizona Senate had “entirely outsourced” to it. *Id.* at *9-10, ¶ 19.

GEO is the custodian of the records HRDC seeks because it possesses those records as part of its performance of a “core governmental function,” *Fann*, 2021 Ariz. App. Unpub. LEXIS 834, at *13, ¶ 24 – that is, operating prisons for the Arizona Department of Corrections, Rehabilitation and Reentry. *See, e.g., Brink v. Herron*, No. CV 20-01097-PHX-SPL (DMF), 2020 U.S. Dist. LEXIS 162680, at *12 (D. Ariz. Aug. 7, 2020) (“The GEO Group Incorporated performs a public function, *i.e.*, operating and managing a prison.”). As with the state Senate in *Cyber Ninjas*, ADCRR has entirely outsourced performance of the important governmental function of operating prisons to GEO with respect to the facilities GEO operates.

As noted above, under Arizona law, all records with a substantial nexus to government activities are presumptively public. *See Lake*, 222 Ariz. at 549, ¶ 8. *The records requested by HRDC, therefore, are precisely the kinds of records subject to release under the Public Records Law, and as custodian of those records, GEO has a statutory duty to provide them upon request. Cyber Ninjas*, 2021 Ariz. App. Unpub. LEXIS 1107, at *8-9, ¶¶ 18-19. Although a custodian may withhold public records on the basis of privacy, confidentiality or the best interests of the state when those interests outweigh the public’s right of inspection, the burden remains on the records custodian to overcome the presumption that records are public. *Cox*, 175 Ariz. at 14.

The Requested Information Should Be Released Without Further Delay

Arizona law subjects GEO to an award of attorneys’ fees and costs where a legal challenge is necessary to combat a wrongful denial of a public records request. *Carlson*, 141 Ariz. at 491; A.R.S. § 39-121.02(B) (“The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.”); *see also Arpaio v. Citizen Publishing Co.*, 221 Ariz. 130, 134, ¶¶ 13-14 (App. 2008) (custodian of records or third party responsible for denial of access to public records can be liable to reimburse prevailing party’s reasonable attorneys’ fees and costs). GEO has not shown a lawful reason for withholding the requested materials, and HRDC is entitled to *prompt* compliance with its requests. A.R.S. § 39-121.01(E) (access deemed denied where custodian fails to “promptly” respond).

Jonathan Y. Yu
November 26, 2024
Page 5

This letter is intended to give GEO one further opportunity to release the requested records as Arizona law requires – promptly. *Accordingly, HRDC requests that you provide the requested records by no later than ten business days after the date of this letter (i.e., by December 12, 2024).* HRDC reserves all rights to take any and all further steps it deems appropriate to secure the requested records pursuant to the Arizona Public Records Law. Of course, we would prefer to resolve this matter amicably and constructively with your prompt cooperation.

We look forward to hearing from you.

Sincerely,



Matthew E. Kelley

Enclosures

CC: HRDC

Intraoffice copy to David Bodney

Exhibit 4

LAW OFFICES
BROENING OBERG WOODS & WILSON
Professional Corporation

Address:
2800 N. Central Avenue, Suite 1600
Phoenix, AZ 85004
(602) 271-7700

JONATHAN Y. YU
(602) 271-7724
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<https://www.bowwlaw.com>

December 30, 2024

Email

HUMAN RIGHTS DEFENSE CENTER
c/o Matthew E. Kelley
kelleyM@ballardspahr.com

Re: Human Rights Defense Center – Response to Request to Inspect and Copy Records

Mr. Kelley:

As you know, this firm represents The GEO Group, Inc. (“GEO”) with respect to the Human Rights Defense Center’s (“HRDC”) September 23, 2024 letter requesting records and information pursuant to Arizona’s Public Records Law (“PRL”). GEO has reviewed your November 26, 2024 response letter following GEO’s initial declination, and for multiple reasons, again respectfully declines to produce the records requested.

First, HRDC’s request is wildly overbroad. It seeks a decade’s worth of “records in all claims or lawsuits brought against The GEO Group, Inc.,” regardless of their nature, underlying facts/activities, or geographic location/venue in which the claim arose. As a result, the request as drafted encompasses records that do not have a “substantial nexus” to “a government agency’s activities” and are therefore not subject to the PRL. See *Potter v. Heredia*, 1529562 *1, *3 (App. 2024) (“Further, the ‘nature and purpose of the document’ determine its status as a public record... mere possession of a document by a public officer or agency does not by itself make that document a public record...”). Indeed, HRDC has identified no “government activity” to which the requested documents relate, let alone a “substantial nexus” to that activity. Accordingly, the requested documents do not qualify as “public records” under the PRL, and for that reason alone, GEO’s denial was appropriate.

Furthermore, GEO maintains it is not a public body or custodian subject to the requirements of the PRL. In the *Cyber Ninjas* decision upon which HRDC relies in support of its request, the Arizona Supreme Court explained that its application of the PRL to certain private entities performing certain governmental functions was narrow:

[O]ur 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.” 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.

Cyber Ninjas, Inc. v. Hannah, 2021 WL 5183944 *1, *2 (2021) (internal citations omitted) (emphasis added). In *Cyber Ninjas*, the contractor in question was commissioned by the Arizona legislature to audit the 2020 general election pursuant to the legislature's oversight authority – "an important legislative function." HRDC has not identified a comparable "important legislative function" being performed by GEO to support its requests here. No Arizona court has ever held the operation of correctional facilities is a public function for purposes of the PRL¹. Indeed, the Arizona Department of Corrections Rehabilitation and Reentry's decision to privatize its correctional medical system following a 2012 federal class action suit establishes that operating a correctional facility is no longer an exclusively governmental – let alone "an important legislative" – function.

Finally, HRDC's request seeks records subject to private confidentiality agreements negotiated between GEO and individual litigants/claimants. GEO has an interest in maintaining the confidentiality and privacy of its agreements with other parties, and cannot comply with HRDC's request without violating the terms of these private agreements. As such, GEO's interest in maintaining confidentiality outweighs HRDC's interest in disclosure. See *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 395 – 96 (App. 2013).

For the foregoing reasons, GEO respectfully declines the HRDC's request.

Very truly yours,

Jonathan Y. Yu

JONATHAN Y. YU
For the Firm

¹ In *Brink*, the Arizona District Court merely acknowledged GEO performed a traditional public function for purposes of imposing civil liability under § 1983 – not the PRL.

Exhibit 5

Cyber Ninjas, Inc. v. Hannah

Court of Appeals of Arizona, Division One

November 9, 2021, Filed

No. 1 CA-SA 21-0173

Reporter

2021 Ariz. App. Unpub. LEXIS 1107 *; 2021 WL 5183944

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.

Notice: THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

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.

Subsequent History: Later proceeding at Cyber Ninjas, Inc. v. Hannah, 2021 Ariz. LEXIS 416 (Ariz., Nov. 24, 2021)

Stay denied by, Without prejudice Cyber Ninjas, Inc. v. Hannah, 2021 Ariz. LEXIS 407 (Ariz., Nov. 30, 2021)

Stay denied by, Without prejudice, Request denied by Cyber Ninjas, Inc. v. Hannah, 2021 Ariz. LEXIS 415 (Ariz., Dec. 1, 2021)

Review denied by, Without prejudice Cyber Ninjas v. Hannah, 2022 Ariz. LEXIS 1 (Ariz., Jan. 4, 2022)

Stay denied by, Without prejudice Cyber Ninjas, Inc. v. Hannah, 2022 Ariz. LEXIS 386 (Ariz., Jan. 6, 2022)

Prior History: [*1] Petition for Special Action from the Superior Court in Maricopa County. No. LC2021-000180-001. The Honorable John Hannah, Judge.

Cyber Ninjas, Inc. v. Warner, 2021 Ariz. LEXIS 408 (Ariz., July 29, 2021)

Disposition: JURISDICTION ACCEPTED; RELIEF DENIED.

Counsel: Wilenchik & Bartness, P.C., Phoenix, By Dennis I. Wilenchik, John D. Wilenchik, Jordan C. Wolff, Counsel for Cyber Ninjas, Inc.

Ballard Spahr LLP, Phoenix, By David Jeremy Bodney, Craig Hoffman, Matthew E. Kelley, Counsel for Real Parties in Interest Phoenix Newspapers, Inc. and Kathy Tulumello.

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.

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

joined.

Opinion by: Maria Elena Cruz

Opinion

MEMORANDUM DECISION

CRUZ, Judge:

P1 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

P2 The Arizona Senate initiated an audit of voting [*2] 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.

P3 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.

P4 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 [*3] 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

P5 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, 273 P.3d 650 (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, 49 P.3d 1142 (App. 2002).

P6 Here, the issues raised in the petition are pure questions of law and are of statewide importance. Accordingly, we accept special action jurisdiction.

DISCUSSION

P7 This case presents a question of statutory interpretation, which we review *de novo*. *McHale v. McHale*, 210 Ariz. 194, 196, ¶ 7, 109 P.3d 89 (App. 2005).

P8 The PRL requires "[a]ll officers and public bodies" to "maintain all records . . . reasonably

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 Ariz. App. Unpub. LEXIS 834, 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.

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. [*4] 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).

P9 We recently addressed a request for audit documents made to the Arizona Senate under the PRL. *Fann*, 1 CA-SA 21-0141, 2021 Ariz. App. Unpub. LEXIS 834, [WL] 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. 2021 Ariz. App. Unpub. LEXIS 834, [WL] *4, ¶ 23.

P10 Cyber Ninjas also argues it cannot be subject to suit under the PRL because it is [*5] 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.

P11 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).

P12 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 [*6] 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.

P13 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.

P14 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, 165 P.3d 203 (App. 2007).

P15 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 [*7] 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).

P16 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 persons² 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, 211 P.3d 8 (App. 2008); *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 21, 960 P.2d 55 (App. 1998) (citing Ariz. R. Civ. P. 19(a)(1)(A) (where feasible, joinder may be required [*8] of a person

"if, in that person's absence, the court cannot accord complete relief among existing parties.")).

P17 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.

P18 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, 955 P.2d 534 (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, 2021 Ariz. App. Unpub. LEXIS 834, [WL] 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 [*9] 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

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

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.

P19 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[*10] 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, 218 P.3d 1004 (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.

P20 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[*11] 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.

P21 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

P22 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.

End of Document

Exhibit 6

Fann v. Kemp

Court of Appeals of Arizona, Division One

August 19, 2021, Filed

No. 1 CA-SA 21-0141

Reporter

2021 Ariz. App. Unpub. LEXIS 834 *; 2021 WL 3674157

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; the ARIZONA SENATE, a house of the Arizona Legislature, Petitioners, v. THE HONORABLE MICHAEL KEMP, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, AMERICAN OVERSIGHT, Real Party in Interest.

Notice: THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

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.

Subsequent History: Later proceeding at Fann v. Kemp, 2021 Ariz. LEXIS 413 (Ariz., Aug. 24, 2021)

Later proceeding at Fann v. Kemp, 2021 Ariz. LEXIS 412 (Ariz., Aug. 26, 2021)

Motion denied by, Without prejudice Fann v. Kemp, 2021 Ariz. LEXIS 414 (Ariz., Aug. 30, 2021)

Review denied by, Stay lifted by Fann v. Kemp/American Oversight, 2021 Ariz. LEXIS 333

(Ariz., Sept. 14, 2021)

Decision reached on appeal by Fann v. Kemp, 252 Ariz. 508, 505 P.3d 301, 2022 Ariz. App. LEXIS 17, 2022 WL 189825 (Ariz. Ct. App., Jan. 21, 2022)

Prior History: [*1] Petition for Special Action from the Superior Court in Maricopa County. No. CV2021-008265. The Honorable Michael Kemp, Judge.

Am. Oversight v. Fann, 2021 Ariz. Super. LEXIS 1184 (Ariz. Super. Ct., July 14, 2021)

Disposition: JURISDICTION ACCEPTED; RELIEF DENIED.

Counsel: Statecraft PLLC, Phoenix, By Kory A. Langhofer, Thomas J. Basile, Counsel for Petitioners.

Coppersmith Brockelman PLC, Phoenix, By L. Keith Beauchamp, Roopali H. Desai, D. Andrew Gaona, Counsel for Real Party in Interest.

Judges: Acting Presiding Judge Maria Elena Cruz delivered the decision of the Court, in which Judge Michael J. Brown and Judge Jennifer B. Campbell joined.

Opinion by: Maria Elena Cruz

Opinion

MEMORANDUM DECISION

CRUZ, Judge:

P1 In this special action, Petitioners Karen Fann, Warren Petersen, and the Arizona Senate (collectively, the "Senate") seek a writ of prohibition or other special action relief to prevent the Senate from being compelled by the superior court to disclose documents related to its audit of the November 2020 general election. For the following reasons, we accept jurisdiction and deny relief.

FACTUAL AND PROCEDURAL HISTORY

P2 The Arizona Senate initiated an audit of voting equipment used and ballots cast in Maricopa County relating to the 2020 general election, and it retained a private corporation, Cyber Ninjas, to serve as [*2] its primary vendor in conducting the audit. Cyber Ninjas then hired multiple sub-vendors to assist in the work, also private companies.

P3 In April and May 2021, Real Party in Interest American Oversight submitted public record requests to the Senate for documents related to the audit. The Senate produced about 60 pages of documents but asserted it would not produce documents in the possession and custody of Cyber Ninjas or any of its sub-vendors.

P4 American Oversight filed a complaint and order to show cause under Arizona's Public Records Law ("PRL"), Arizona Revised Statute ("A.R.S") section 39-121, *et seq.*, to compel production of the documents related to the audit, including those in the possession or custody of Cyber Ninjas and its sub-vendors. Over the following several weeks, the Senate produced about 900 more pages of records to American Oversight, and the Senate informed American Oversight that it was currently reviewing an additional 15,000 documents to disclose.

P5 The Senate then moved to dismiss American Oversight's complaint, arguing any audit records in possession of Cyber Ninjas or its sub-vendors and agents are not subject to the PRL. The Senate also argued that its compliance with the PRL is a nonjusticiable political question. [*3] The superior

court denied the motion in a July 14, 2021 minute entry.

P6 American Oversight lodged a proposed order that memorialized the court's July 14 minute entry and directed the Senate to disclose records related to the audit, including those in possession of Cyber Ninjas and its sub-vendors. The Senate objected, arguing the order would improperly serve as a final judgment on the merits; the case required further discovery; and the Senate was legislatively immune from the suit. The superior court rejected the Senate's arguments in an August 2, 2021 minute entry. The court entered the proposed order, directing the Senate to immediately disclose the records related to the audit.

P7 The Senate subsequently filed this special action petition, as well as a motion to stay the August 2 order, which we granted pending resolution of this petition.

SPECIAL ACTION JURISDICTION

P8 Special action review is generally appropriate when there is 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, 273 P.3d 650 (App. 2012). Our decision to accept special action jurisdiction is discretionary, and it is "appropriate in matters of statewide importance, issues of first impression, cases involving purely [*4] legal questions, or issues that are likely to arise again." *State v. Superior Court (Landeros)*, 203 Ariz. 46, 47, ¶ 4, 49 P.3d 1142 (App. 2002).

P9 Here, the issues raised in the petition are pure questions of law and are of statewide importance. Accordingly, we accept special action jurisdiction.

DISCUSSION

P10 The PRL provides: "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during

office hours." A.R.S. § 39-121. Section 39-121.01(B) 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." Further, "[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," and it is "the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction . . ." A.R.S. § 39-121.01(C). Section 39-121.01(A) defines "Officer" and "Public body" as follows:

A. In this article, unless the context otherwise requires:

1. "Officer" [*5] 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 public subdivision of this state, or expending monies provided by this state or any political subdivision of this state.

P11 The PRL further provides: "[a]ny person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." A.R.S. § 39-121.02(A); *see also* A.R.S. §

39-121.02(C) ("Any 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."). [*6]

I. Legislative Immunity

P12 Petitioners first argue that they are constitutionally immune from suit because "the decision whether to release or withhold audit records is a legitimate legislative function."

P13 Pursuant to the United States and Arizona Constitutions, absolute legislative immunity protects legislators from civil and criminal liability for statements made during formal legislative proceedings. Ariz. Const. art. IV, pt. 2, § 7 ("No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate."); U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place."). The protection has been extended to acts beyond pure speech and debate and applies to legislative acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972); *see also Mesnard v. Campagnolo*, __ Ariz. __, __, ¶ 15, 489 P.3d 1189, 1194 (2021) (citation and internal quotation marks omitted).

P14 However, legislators are not afforded absolute immunity [*7] for all acts that are "in any way related to the legislative process," nor is legislative immunity intended to make legislators "super-citizens," immune from all responsibility. *Mesnard*, __ Ariz. at __, ¶ 14, 489 P.3d at 1194; *United States v. Brewster*, 408 U.S. 501, 516, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972). As our supreme court has noted, the concept of legislative immunity was

intended "to shield individual officials from personal liability for their legislative acts," and "[i]t has nothing to do with shielding governmental entities from challenges to claimed illegal actions." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 134, ¶ 28, 476 P.3d 307 (2020).

P15 The Senate, relying on *Mesnard*, argues the legislature's decision whether to release documents under the PRL is a legislative act, protected by absolute immunity. *See Mesnard*, __ Ariz. at __, ¶ 21, 489 P.3d at 1195. But *Mesnard* concluded that a legislator's disclosure of a public record under the PRL was a legislative function that afforded him immunity from personal liability in a defamation suit. *Id.* Consistent with *Brnovich*, legislative immunity does not prevent this action against legislators in their capacity as elected officials, or the legislature, for its failure to comply with statutory obligations. *See Brnovich*, 250 Ariz. at 134, ¶ 28. The ability to appeal the denial of access to public records is expressly authorized by A.R.S. § 39-121.02, and American Oversight "is not suing officials for personal [*8] liability in their individual capacities." *Id.* The legislature itself enacted this statute, and it could have completely exempted itself from disclosure requirements, like its federal counterpart, the Freedom of Information Act. *See* 5 U.S.C. §§ 551(1)(A), 552. But instead, the legislature chose to include itself within the definition of those officers and public bodies subject to the PRL. *See* A.R.S. § 39-121.01(A)(1), (2).

P16 This is not to say the legislature can never properly refuse to disclose records under the PRL. There are many statutory exemptions to the PRL. *See, e.g.,* A.R.S. §§ 41-1279.05, 49-1403. Additionally, though there is a presumption in favor of disclosing public records, this presumption can be rebutted by a demonstration of "confidentiality, privacy, or the best interests of the state." *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9, 955 P.2d 534 (1998) (citation and internal quotation marks omitted). If any of these interests outweigh

the public's right to access the records, the legislature can refuse disclosure. *Id.* However, the legislature is not afforded a blanket exemption from compliance with the PRL, nor is it exempt from lawsuits contesting a denial of access to public records.

P17 The purpose of the legislative immunity doctrine is to "support the rights of the people, by enabling their representatives to execute the functions [*9] of their office without fear of prosecutions"; it does not exist to serve the personal benefit of the legislators. *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137, ¶ 17, 75 P.3d 1088 (App. 2003) (citation and internal quotation marks omitted). And it does not exist to shield the Senate from complying with a statute it has enacted. Allowing the legislature to disregard the clear mandate of the PRL would undermine the integrity of the legislative process and discourage transparency, which contradicts the purpose of both the immunity doctrine and the PRL. II. Custody under the PRL

P18 The PRL "exists to allow citizens to be informed about what their government is up to." *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty.*, 191 Ariz. at 302-03, ¶ 21 (citation and internal quotation marks omitted). "Arizona law defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 8, 156 P.3d 418 (2007). "Only documents with a substantial nexus to government activities qualify as public records, and the nature and purpose of a document determine whether it is a public record." *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8, 218 P.3d 1004 (2009) (citation and internal quotation marks omitted). We review de novo a document's status as a public record, *id.* at ¶ 7, but defer to the superior court's findings of fact. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 347, ¶ 11, 35 P.3d 105 (App. 2001).

P19 Public officials must "make and maintain records reasonably necessary to provide

knowledge [*10] of all activities they undertake in furtherance of their duties." *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242 (1984). As found by the superior court, "[t]he audit is an important public function being conducted by the Arizona Senate pursuant to the Arizona Constitution and is an official legislative activity." There is no dispute that the audit is being conducted with public funds, and that Cyber Ninjas and its sub-vendors are agents of the Senate.¹ In this case the Senate has argued no exemption that, if properly recognized, would shield itself from the responsibility to inform the public of activities regarding the audit.

P20 The superior court found that the Senate had "at least constructive possession" of its agents' records and ordered it to produce specific public records generated in connection with the audit, including "[a]ll documents and communications relating to the planning and execution of the audit, all policies and procedures being used by the agents of the Senate Defendants, and all records disclosing specifically who is paying for and financing this legislative activity as well as precisely how much is being paid."

P21 The Senate argues that it does not have "custody" of documents "maintained by corporate [*11] vendors at their own headquarters or in their own internal computer systems," and that the superior court's determination that they had constructive possession of the records is inconsistent with the PRL.

P22 We disagree. "'[C]ustody' means '[t]he care and control of a thing or person for inspection, preservation, or security.'" *W. Valley View, Inc. v. Maricopa Cnty. Sheriff's Office*, 216 Ariz. 225, 229, ¶ 16, 165 P.3d 203 (App. 2007) (quoting *Black's*

Law Dictionary 412 (8th ed. 2004)). Nothing in the plain text of the PRL suggests that physical possession of the public records by the Senate is required. "It is the nature and purpose of the document, not the place where it is kept, which determines its status." *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538, 815 P.2d 900 (1991) (citation omitted). "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.* at 541-42 (citation and internal quotation marks omitted). "Possession in this context has been interpreted to mean both actual and constructive possession. [A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person."² *Bd. of Pilot Comm'rs v. Superior Court*, 218 Cal. App. 4th 577, 160 Cal.Rptr.3d 285, 302 (Cal. Ct. App. 2013) (citation and internal quotation marks omitted).

P23 Here, the Senate defendants, as officers and a public body under the PRL, have a [*12] duty to maintain and produce public records related to their official duties. This includes the public records created in connection with the audit of a separate governmental agency, authorized by the legislative branch of state government and performed by the Senate's agents. *See* A.R.S. § 39-121.01(B). The requested records are no less public records simply because they are in the possession of a third party, Cyber Ninjas. As the North Dakota Supreme Court aptly observed:

The City contends that even if these documents are subject to the open-record law, PDI is an independent contractor and not an agent of the City, and the documents were in the possession of PDI. However, whether PDI is an independent contractor or agent is not relevant . . . PDI was hired by the City to screen and

¹The Senate admitted in its answer that Cyber Ninjas is the Senate's "authorized agent." American Oversight does not argue that Cyber Ninjas or its sub-vendors are officers or public bodies, *de facto* officers or public bodies, or quasi-agencies. *See State ex rel. Am. Ctr. for Econ. Equal. v. Jackson*, 53 N.E.3d 788, 793, ¶ 15, 2015-Ohio-4981 (Ohio Ct. App. 2015).

²"The Arizona statute, adopted in 1901, was taken from a California provision. Consequently, cases arising under the California statute are helpful to the interpretation of our law." *Salt River*, 168 Ariz. at 537 (citation omitted).

evaluate candidates for a public office. If the City had undertaken this task without hiring PDI, the applications would clearly have been subject to the open-record law. 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 [*13] 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. We conclude that the documents in this case are public records

Forum Pub. Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (citations omitted).

P24 The Senate argues that the superior court's order would open the files of all government vendors to public inspection. In this case, the Senate outsourced its important legislative function to Cyber Ninjas and its sub-vendors. However, as noted *supra* paragraph 18, only documents with a substantial nexus to government activities qualify as public records. There is no reason why vendors providing ordinary services rather than performing core governmental functions would be subject to the PRL.

P25 We find no error with the superior court's determination that the requested documents are public records that must be disclosed.

CONCLUSION

P26 For the foregoing reasons we accept jurisdiction, deny relief, and lift the stay of proceedings previously issued regarding the superior court's August 2 order.