



May 10, 2021

VIA EMAIL

Senate President Karen Fann
Arizona State Capitol Complex
1700 W. Washington Street
Phoenix, AZ 85007
kfann@azleg.gov

Senator Warren Petersen
Arizona State Capitol Complex
1700 W. Washington Street
Phoenix, AZ 85007
wpetersen@azleg.gov

Norm Moore
Senate Public Records Attorney
400 W. Congress, Ste. 201
Tucson, AZ 85701
nmoore@azleg.gov

Re: Public Records Request

Dear Senate President Fann, Senator Petersen, and Public Records Attorney Moore:

As you know, American Oversight has made several public records requests over the past month of you, other members (and former members) of the Arizona Senate, and the Arizona Senate more generally. We write today to clarify and supplement our prior requests, and to confirm the position that you have taken regarding the public's ability to access records reflecting what is happening at Veterans Memorial Coliseum.

The ongoing controversy related to the Arizona Senate's "audit" of the 2020 General Election results in Maricopa County has its origins in legislative subpoenas Senate President Fann and Senator Petersen issued. The legality of those subpoenas was litigated before Judge Timothy Thomason, who ultimately ruled that the subpoenas were issued for a valid legislative purpose.¹ On March 31, 2021, Senate President Fann announced that the audit team would be led by the firm Cyber Ninjas, whose founder has repeatedly circulated baseless accusations of widespread fraud in the 2020

¹ Jeremy Duda, *Judge Sides with Senate, Says Maricopa Must Turn over Election Materials for Audit*, AZ Mirror, Feb. 26, 2021, 2:38 PM), <https://www.azmirror.com/2021/02/26/judge-sides-with-senate-says-maricopa-must-turn-over-election-materials-for-audit/>.

elections.² The Arizona Senate then executed an agreement with Cyber Ninjas to perform the “audit”—and thus perform the public function of the “audit” itself—and committed \$150,000 in public funds to pay Cyber Ninjas for its work.³ The Arizona Senate also retained former Arizona Secretary of State Ken Bennett to serve as the Senate’s representative and “liaison” to Cyber Ninjas and the “audit,” which is also plainly a public function.

While your announcement claimed that “Senate leadership expects this audit to be done in a transparent manner with the cooperation of Maricopa County,”⁴ the public does not yet have access to basic information about the conduct of the audit.⁵ Cyber Ninjas has also attempted to keep procedural documents regarding protecting voter privacy out of public view, even as the hand counting of ballots is already in process.⁶ Additionally, from prior correspondence with the Arizona Senate’s public records attorney, Mr. Norm Moore, we understand that the Arizona Senate takes the position that documents and communications related to the conduct of the audit that are not in your physical possession but are held instead by Cyber Ninjas and/or Mr. Bennett are not public records (or are not within your custody, possession, or control) despite the fact that both Cyber Ninjas and Mr. Bennett are (a) serving as your contractors, (b) performing legislative and public functions, and (c) being paid with public funds.

Requested Records

To clarify our prior requests, and pursuant to Arizona’s Public Records Law, American Oversight seeks the following public records that have the potential to shed light on the Senate’s “audit” of Maricopa County’s election results. Prompt disclosure of these records is crucial to meaningfully inform the public about the details of the audit process before the auditors have finished reviewing ballots and handling election equipment. These requests are directed to Senate President Fann, Senator Petersen, and the Arizona Senate as a branch of the State, and your response must include documents in the physical possession of your agents and contractors, including Cyber Ninjas and Mr. Bennett, over whom you exercise control by agreement or contract:

² Jeremy Duda, *Arizona Senate Hires a ‘Stop the Steal’ Advocate to Lead 2020 Election Audit*, AZ Mirror (Apr. 1, 2021, 10:18 AM), <https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/>.

³ *Id.*

⁴ AZSenateRepublicans (@AZSenateGOP), Twitter (Mar. 31, 2021, 2:07 PM), <https://twitter.com/AZSenateGOP/status/1377321595518083074/photo/1>.

⁵ Jerod MacDonald-Evoy, *Judge Rejects Call for Secret Election Audit Hearing from Auditors, Senate Republicans*, AZ Mirror (Apr. 28, 2021, 8:24 AM), <https://www.azmirror.com/2021/04/27/judge-rejects-call-for-secret-election-audit-hearing-from-auditors-senate-republicans/?eType=EmailBlastContent&eId=19cfc01a-a092-4be0-abd6-4a95d066663f>.

⁶ Jeremy Duda, *Cyber Ninjas Releases Its Election Audit Policies After Court Order*, AZ Mirror (Apr. 29, 2021, 2:41 PM), <https://www.azmirror.com/2021/04/29/cyber-ninjas-releases-its-election-audit-policies-after-court-order/>.

1. All communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp)) exchanged between former Secretary of State Ken Bennett and any party engaged in the planning, preparation, or execution of the audit of the November 2020 Maricopa County election results being conducted by Cyber Ninjas and its subcontractors, including but not limited to: Doug Logan or anyone communicating on behalf of Cyber Ninjas, Wake Technology Services, Digital Discovery, CyFIR, former state legislative candidate Liz Harris,⁷ or any other individual or entity engaged in work on the audit.
2. Complete copies (including any attachments) of any contract, sub-contract, amendment, memorandum of understanding, or other written agreement related to the planning, preparation, or execution of the audit of the November 2020 Maricopa County election results being conducted by Cyber Ninjas and its subcontractors. Responsive documents to this portion of this request this request would include, but not be limited to, any leases for space to conduct the audit, including any lease agreement following the expiration of the existing lease agreement with the Veterans Memorial Coliseum on May 14, 2021; any contracts, or other formal or informal agreements, with third-party security, transportation, or lodging vendors or volunteers; any formal or informal agreements with third parties regarding the tabulation and aggregation of audit data; any formal or informal agreements with consultants, advisors, or counsel; and any formal or informal agreements regarding the recruitment and training of employees, contractors, or volunteers to participate in any phase of the audit.
3. All records reflecting the projected or actual costs of the audit, including but not limited to: records referencing the \$150,000 value of the contract with the Arizona Senate;⁸ records reflecting estimated costs or the budget for the audit, including any expenses beyond the specified \$150,000; records reflecting the collection of external funding for the audit, such as agreements with fundraisers, any policies regarding external revenue collection, and all records of external financial or in-kind resource contributions; and copies of all invoices, requests for reimbursement, and payments made relating to the planning, preparation, or execution of the audit or associated litigation.

⁷ Andrew Oxford, *Auditors Won't Knock on Voters' Doors in Arizona Election Review, Senate President Tells DOJ*, AZ Central (May 7, 2021, 5:39 PM), <https://www.azcentral.com/story/news/politics/arizona/2021/05/07/arizona-audit-plan-visit-voters-homes-dropped-fann-tells-doj/4996668001/> (explaining that Ms. Farris may either be directly involved in the audit or conducting similar work to the audit).

⁸ Statement of Work between Cyber Ninjas Inc. and Arizona State Senate, Mar. 31, 2021, <https://www.documentcloud.org/documents/20536503-cyber-ninjas-sow-executed-33121>.

4. Any project plans or other documents detailing the steps or procedures to be followed in each phase of the audit,⁹ including those following the expiration of the existing agreement with the Veterans Memorial Coliseum on May 14, 2021. Responsive documents to this portion of the request would include, but not be limited to, any projected timelines for the completion of the audit; organizational charts or other documents memorializing chains of custody; plans for the accessing, storage, and handling of physical ballots, confidential voter information, voting equipment, and voting software; explanations or analyses of investigative techniques, including but not limited to ultraviolet inspection, kinematic artifact detection, or analysis of paper fibers;¹⁰ and procedures for the tabulation and aggregation of audit data.
5. Records relating to or referencing the “Registration and Votes Cast Phase”¹¹ of the audit, including records relating to work planned or completed in the “Registration and Votes Cast Phase,” including but not limited to: records identifying the precincts to be canvassed and any justification for the selection of those precincts; logs or other records identifying those voters canvassed or selected for canvassing; any scripts or other guidelines, procedures, or protocols to be used by the auditors for contacting individual voters by phone, in person, or electronically; or agreements with any party regarding the recruitment and training of individuals to conduct canvassing.

The start date for these records is February 1, 2021.

Please consider this a standing request, the response to which should be updated promptly each time new information is added to any responsive records or new responsive records are created. *See W. Valley View, Inc. v. Maricopa Cty. Sheriff's Off.*, 216 Ariz. 225, 228 (App. 2007).

“Prompt” disclosure of these records is crucial to meaningfully inform the public on the details and scope of the audit process while the public still has an opportunity to affect the conduct of the process. The public has a legitimate interest in the manner in which the audit is conducted, as serious concerns exist with regard to protecting voter privacy, including the physical security of the facility where votes are being counted and the mishandling of paper ballots.¹² Further, the current audit—the second of its kind—raises potential questions concerning the integrity of certain state government officials, including the extent to which these actors seek to undermine public confidence in the

⁹ *Id.*

¹⁰ Jeremy Duda, *Governor Sidesteps Questions on Audit Amid Mounting Issues*, AZ Mirror (May 7, 2021, 7:44 AM), <https://www.azmirror.com/blog/governor-sidesteps-questions-on-audit-amid-mounting-issues/>.

¹¹ *See Oxford supra*, note 7.

¹² Andrew Oxford, *Privacy of Voters Worries Judge as Arizona Senate's Count of November Ballots Continues*, AZ Cent. (Apr. 27, 2021, 6:22 PM), <https://www.azcentral.com/story/news/politics/elections/2021/04/27/arizona-audit-judge-concerned-voter-protections-during-recount/4855290001/>.

electoral process. Mr. Bennett, the former Arizona Secretary of State acting as liaison between Cyber Ninjas and the Senate, encouraged the public to fund the audit's estimated \$2.8 million goal through a website which explicitly labels the operation as "the most in-depth Election Fraud Audit that has ever been performed."¹³

Disclosure of the requested records is most meaningful if it occurs sufficiently promptly to inform the public about the process while there is still time for them to petition their government to alter the process. Under the direction of Cyber Ninjas, more than 200,000 paper ballots have already been counted.¹⁴ Furthermore, the Senate's lease on the Veterans Memorial Coliseum will expire on May 14, 2021,¹⁵ raising further concerns about the security of ballots and equipment after the Senate is required to vacate the facility. Disclosure of records after the recount has been completed would be too late to prevent any potential harms resulting from those processes. And in any event, we believe that all of the records requested above were already requested in our prior requests.

Please promptly notify us if you are taking the position that responsive records are either not public records or are not in your possession, custody, or control because they are in the physical possession of Cyber Ninjas and/or Mr. Bennett. Mr. Moore's prior correspondence implies this, but we wish to be sure of your position.

Statement of Noncommercial Purpose

This request is made for noncommercial purposes. American Oversight seeks records regarding the Arizona State Senate's audit of Maricopa County's 2020 election results. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the government, including how the Senate's

¹³ *About the Audit*, The America Project, (last visited May 10, 2021), <https://fundtheaudit.com/maricopa/>; see Rosalind S. Helderman & Josh Dawsey, *As Trump Seizes on Arizona Ballot Audit, Election Officials Fear Partisan Vote Counts Could be the Norm in Future Elections*, Wash. Post (Apr. 29, 2021, 3:05 PM), https://www.washingtonpost.com/politics/trump-arizona-recount/2021/04/29/bcd8d832-a798-11eb-bca5-048b2759a489_story.html.

¹⁴ Andrew Oxford, *Extending Arizona Ballot Recount Past May 14 Is 'Not Feasible,' State Fair Officials Say*, AZ Central (May 5, 2021, 12:48 PM), <https://www.azcentral.com/story/news/politics/arizona/2021/05/05/arizona-audit-fair-official-says-extending-recount-not-feasible/4960234001/>.

¹⁵ Brahm Resnik, *Bamboo Ballots, Death Threats and An Ultimatum: What's Next for Arizona GOP's Election Audit?* 12 News (May 9, 2021, 4:12 PM), <https://www.12news.com/article/news/politics/bamboo-ballots-death-threats-and-an-ultimatum-whats-next-for-arizona-gops-election-audit/75-0d06c079-89ad-439a-9d82-c55d8656e97c>.

chosen contractors are protecting the privacy of voters and maintaining the security of confidential voter files and election infrastructure.¹⁶

Because American Oversight is a 501(c)(3) nonprofit, this request is not in American Oversight's financial interest and is not made for a commercial purpose. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁷

Because this request is made for noncommercial purposes, American Oversight requests that any fees charged in connection with processing this request be limited to copying and postage charges, if applicable.¹⁸ Please notify American Oversight of any anticipated fees or costs in excess of \$100 prior to incurring such costs or fees.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks "communications," please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages, and

¹⁶ See *supra*, notes 5 & 6.

¹⁷ American Oversight currently has approximately 15,690 page likes on Facebook and 106,200 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited May 10, 2021); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited May 10, 2021).

¹⁸ A.R.S. § 39-121.01(D)(1); see also *Hanania v. City of Tucson*, 128 Ariz. 135, 624 P.2d 332 (Ct. App. 1980). Furthermore, because this request is for noncommercial purposes, additional fees provided for under A.R.S. § 39-121.03(A) are not applicable and should not be assessed.

transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.

- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior messages sent or received in that email chain, as well as any attachments to the email.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages.
- If any records are withheld in full or in part, pursuant to A.R.S. § 39-121.01(D)(2), please provide an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld.
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Khahilia Shaw at records@americanoversight.org or 202.539.6507.

Sincerely,

/s/ Khahilia Shaw
Khahilia Shaw
on behalf of
American Oversight