Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-008265 07/14/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT
K. Ballard
Deputy

AMERICAN OVERSIGHT

v.

KAREN FANN, et al.

ROOPALI HARDIN DESAI

THOMAS J. BASILE

DAVID JEREMY BODNEY
KEITH BEAUCHAMP
DAVID ANDREW GAONA
KORY A LANGHOFER
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE KEMP

MINUTE ENTRY

The Court has reviewed Defendants' Motion to Dismiss, Plaintiff's Response and Reply in Support of Application for Order to Show Cause, and Defendants' Reply. The Court has also reviewed Plaintiff American Oversight's Complaint. The Court heard oral argument on July 7, 2021.

Plaintiff seeks to obtain access to records relating to an audit of the Maricopa County 2020 elections for the office of the President of the United States and a United States Senate race. No other election results are being audited. Defendants Karen Fann, President of the Arizona Senate, Warren Petersen, Chairman of the Senate Judiciary Committee, and the Arizona Senate ("Senate Defendants") take the position that records in the physical possession or custody of third-party vendors hired by the Senate to perform the audit (Cyber Ninjas, Inc. ("CNI") and CNI's subvendors) are not subject to disclosure under Arizona's Public Records Law, A.R.S. § 39-121, et seq. ("PRL") since they are private vendors and not "public bodies" within the

meaning of the statute. Defendants have agreed to produce any documents in the physical custody of any of the Defendants or of former Secretary of State Ken Bennett that are responsive to the public records requests and not protected by any constitutional, statutory or common law privilege or confidentiality. Defendants also take the position that the question of whether these records are subject to disclosure is a nonjusticiable question and beyond the scope of this Court's power.

Factual Background

The Arizona Senate is conducting an audit of voting equipment used and ballots cast in the November 3, 2020 general election in Maricopa County for the office of President of the United States and a United States Senate seat. The Arizona Senate issued legislative subpoenas to the Maricopa Board of Supervisors requesting custody of tabulation equipment, software, ballots, and other election data. The Senate declared that the audit is the exercise of its legislative constitutional powers and has an important and valid legislative purpose to evaluate whether reforms or changes are needed in the voting laws and voting procedures for the State of Arizona.

The Senate then hired a private company, CNI, to conduct the audit. The Senate also retained Ken Bennett to serve as the Senate's liaison to CNI. CNI in turn hired a number of subvendors. The Senate agreed to pay $150,000 to CNI which appears to be far short of paying for the full cost of the audit. The public does not know who is financing the remaining costs or what compensation is being made to subvendors or any other entity involved in the audit.

Prior to the filing of this Complaint, Plaintiff and Senate Defendants engaged in negotiations regarding the records being sought. Senate Defendants refused to disclose any documents or records related to the audit in the physical possession or physical control of Mr. Bennett, CNI, or CNI's subvendors. Although some records were produced from Mr. Bennett, no privilege log or listing of documents withheld has been offered.

Legal Analysis

Senate Defendants seek to dismiss the Complaint for failure to state a claim upon which relief may be granted. Ariz. R. Civ. P. 12(b)(6). In considering such a motion, all material allegations of the complaint are taken as true and read in the light most favorable to the plaintiff. *Logan v. Forever Living Products Intern., Inc.,* 203 Ariz. 191 (2002). A motion to dismiss at the initial pleading stage is not favored. *Acker v. CSO Chevira,* 188 Ariz. 252 (1997).

A. PRL and the Records of Private Vendors

There is no dispute that Defendants Fann and Peterson are "officers" who hold an elective office of a public body (the Arizona Senate) under the PRL. A.R.S. § 39-121.01(A)(1). Defendant Arizona Senate is clearly a "public body" under the PRL. As officers of a public body, Senate Defendants must maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state. A.R.S. § 39-121.01(B). As publicly stated by Defendant Fann, the audit is an important public function being conducted by the Arizona Senate pursuant to the Arizona Constitution.

The Court agrees with Senate Defendants that CNI and its subvendors are not officers or public bodies but rather private companies. Plaintiff does not argue that they are officers or public bodies or *de facto* public officers or public bodies. However, the Court does not agree with Senate Defendants that this ends the inquiry as to whether the PRL applies to records kept by third-party vendors. CNI and the subvendors are clearly agents of the Senate Defendants. CNI and the subvendors' records would not be subject to disclosure under the PRL if they had not been hired to conduct the audit on behalf of the Senate Defendants.

Whether a document is a public record under Arizona's public records law presents a question of law which is reviewed de novo. *Cox Ariz. Publ'ns, Inc. v. Collins,* 175 Ariz. 11 (1993). Arizona law defines public records broadly and creates a presumption requiring the disclosure of public documents. *Carlson v. Pima County,* 141 Ariz. 487 (1984). A.R.S. § 39-121 affirms the presumption of openness.

The broad definition of public records is not unlimited, but the law requires public officials to make and maintain records "reasonably necessary to provide knowledge of all activities they undertake *in the furtherance of their duties*. *Id.* at 490 (emphasis added). Only those documents having a "substantial nexus" with a government agency's activities qualify as public records. *Salt River Pima-Maricopa Indian Community v. Rogers,* 168 Ariz. 531 (1991).

The audit is clearly an official activity, an "important" public function. The Senate financed the audit, at least partially, by compensating CNI $150,000 in public funds. One definition of a public record includes records "required to be kept, or necessary to be kept in the discharge of a duty imposed by law to serve as a memorial and evidence of something written, said or done." *Griftis v. Pinal Cty.*, 215 Ariz. 1 (2007).

Senate Defendants have a duty to keep and maintain all records relating to this audit. The actual physical possession of those records is not relevant for purposes of the PRL. Nothing in the statute absolves Senate Defendants' responsibilities to keep and maintain records for

authorities supported by public monies by merely retaining a third-party contractor who in turn hires subvendors. The plain text makes no such exception to exclude records maintained by these third-party service providers. Allowing the Senate Defendants to circumvent the PRL by retaining private companies to perform valid legislative and/or constitutional functions would be an absurd result and undermine Arizona's strong policy in favor of permitting access to records reflecting governmental activity. Such a result would set an unsound precedent, chilling future requests from the public to gain access to public records. It would also erode any sense of transparency for conduct on the part of government officials. These documents are no less public records simply because they are in the possession of a third-party. The statute does not require the government body to have physical possession and control of the records.

The Court completely rejects Senate Defendants' argument that since CNI and the subvendors are not "public bodies" they are exempt from the PRL. The "substantial nexus" requirement also narrows the scope of what has to be disclosed which undermines Senate Defendants' concern that requiring the disclosure of these records would result in an overbroad and unduly burdensome public policy to comply with public record requests. The core purpose of the public records law is to allow public access to official records and other government information so that the public may monitor the performance of government officials and their employees. *Phoenix Newspapers, Inc. v. Keegan,* 201 Ariz. 344 (2001). Arizona Courts have consistently interpreted the PRL as being broadly construed to encourage access to public records and clearly favors the policy of disclosure. *Carlson,* 141 Ariz. at 490-91.

The Court finds that any and all documents with a *substantial nexus* to the audit activities are public records. This does not mean that all internal files of all government vendors constitute public records of the officer or public body with whom they contracted their services. The Court further finds that CNI and the subvendors are agents for the Senate Defendants who have at least constructive possession of the documents in question. In Court filings in a related case, *Arizona Democratic Party, et al. v. Fann, et al.,* CV2020-006646, Defendant Fann admitted that CNI and Mr. Bennett were the Senate's authorized agents. All 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 are subject to the PRL. Senate Defendants must demand the records from CNI and the subvendors or invoke the indemnification clause of the contract now that Senate Defendants are engaged in litigation. CNI is contractually obligated, in the event of litigation, to fully cooperate with the Senate by providing information or documents requested by the indemnifying party that are reasonably necessary to the defense or settlement of the claim. The records are, at a minimum, in the constructive possession of Senate Defendants who now find themselves in litigation over records maintained by third-party vendors.

Nor can the Senate Defendants hide behind the notion that records which could have been obtained need not be disclosed if the Senate Defendants have not in fact obtained the records. It is unknown if the Senate Defendants already have these documents in their actual control. It is also irrelevant since the PRL does not give the Senate Defendants cover to not disclose relevant public documents merely because they were generated by a third-party vendor.

The unpublished Superior Court ruling in *Stuart v. City of Scottsdale,* 1 CA-CV 18-0154, 2020 WL 7230239 (App. Dec. 8, 2020) is clearly distinguishable. That case involved a vendor of a city-owned golf course who prepared annual financial statements. The citizen plaintiff sought the records based upon the argument that the contract between the vendor and the City obligated the City to keep and maintain those documents. *Id.* at *9. The Court of Appeals held that the contract established the City's *right* to receive the records but did not create an *obligation* for the City to keep and hold those records. *Id.* (Emphasis in original). The issues of whether the financial statements were necessary to maintain an accurate knowledge of official activities or whether those records related to activities supported by monies from a government entity were not addressed in *Stuart*.

The 1980 United States Supreme Court case, *Forsham v. Harris,* 445 U.S. 169 (1980), is also distinguishable. The Court held that the records of a private company, who received federal study grants for medical research, were not agency records within the meaning of FOIA where the granting agency had not received the data. Hiring a private company to perform an important legislative function, an election audit, is substantially different than a grant to do scientific research. The other federal cases cited by the Senate Defendants are likewise distinguishable. One case concerned FOIA's legislative history on the definition of agency records which requires an agency to acquire records to trigger FOIA's requirements, *Rocky Mountain Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258 (10th Cir. 2018), and the other held that a non-profit organization did not become a federal agency by performing certain services for the Forest Service. *State of Missouri ex. rel. Garstang v. U.S. Dep't of Interior,* 297 F.3d 745 (8th Cir. 2002). None of the cases cited in the pleadings are on point with this case. This case involves records relating to a county election audit under the Arizona Public Records Law, a statute specific to Arizona and distinct from the requirements of FOIA. This unprecedented audit of voting machines and ballots for only two elective offices in one county is a matter of first impression for this Court, the State of Arizona and the United States of America.

2. The Political Question Doctrine

The Arizona Constitution entrusts some matters solely to the political branches of government, not the judiciary. *Ariz. Indep. Comm'n v. Brewer,* 229 Ariz. 347 (2012). Based upon the basic principle of separation of powers, a nonjusticiable political question is presented when there is a textually demonstrable constitutional commitment of the issue to a coordinate

political department or a lack of judicially discoverable and manageable standards for resolving it. *Kromko v. Ariz. Bd. Of Regents,* 216 Ariz. 190 (2007). Political questions are decisions that the Constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards. *Forty-seventh Legislature v. Napolitano,* 213 Ariz. 482 (2008).

The Senate Defendants cite *Mecham v. Gordon*, 156 Ariz. 297 (1988) as authority. In *Mecham,* the political doctrine applied when former governor Evan Mecham challenged the schedule and procedures used in impeachment proceedings against him. The Arizona Supreme Court upheld the separation of powers doctrine and stated that the courts will not tell the Legislature when to meet, what its agenda should be, what bills it may draft or consider, or how to conduct an impeachment inquiry. *Id.* at 302. Neither the Constitution nor any body of law provided the judiciary with standards it could enforce and judicial management was specifically excluded from the process. *Id.* at 301.

Such is not the case here. The PRL has specific mandates that public bodies and public officers are compelled to follow. Impeachment inquiries have no such mandates. The case of *Chavez v. Brewer*, 222 Ariz. 309 (2009) is instructive. In *Chavez,* the Court of Appeals rejected the Secretary of State's argument that certification of voting machines for use in Arizona was a nonjusticiable political question. *Id.* at 316. There is a statutory scheme for complying with the PRL in A.R.S. § 39-121.01. The United States Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. *Cf. El-Shifa Phamm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010).

The PRL does not in any way proscribe how the audit or any other business is to be conducted by the Legislature but merely requires the preservation and disclosure of public records subject to public scrutiny. As a practical matter, the Court cannot dictate how the Legislature is to conduct an audit that is near completion. There is no Arizona precedent to preclude the application and enforcement of a statutory scheme designed and drafted by the Legislature itself that applies to legislative functions. Plaintiff is not seeking judicial oversight that infringes on legislative authority but rather the enforcement of a statute drafted by the Legislature. In fact, the Legislature recently amended A.R.S. § 39-121.01 and chose not to exempt itself from the PRL which supports the conclusion that the Legislature intended to bind itself to comply with the PRL.

The out-of-state cases cited by the Senate Defendants, persuasive authority at best, are not on point. Records sought from the Iowa Senate involved a nonjusticiable issue because the Iowa legislature had specific rules of its own creation for telephone call records which were in conflict with Iowa's public records law. *Des Moines Reg. & Trib. Co. v. Dwyer*, 542 N.W. 2d 491 (Iowa 1996). An Indiana Appeals Court did find that a public records law issue was

justiciable but did not order disclosure because of a specific exemption adopted by the Indiana legislature. *Citizens Action Coal. Of Indiana v. Koch,* 51 N.E. 3d 236 (Ind. 2016). There is no conflict with the Arizona Public Records Law or any written exemption or specified rules adopted by the Arizona Legislature inconsistent with the PRL. Some of the other cases involve open meeting laws which are clearly distinguishable since open meeting laws have specific legal requirements about notice and procedures which are clearly within the purview of legislative and executive powers.

Finally, there is not a lack of judicially discoverable and manageable standards for resolving this issue. Plaintiff does not seek every record maintained by the third-party vendors and financial backers paying for the audit. The "substantial nexus" standard narrows the scope of the inquiry. Records concerning how the audit was planned and conducted, the identity of third-parties subsidizing the audit, and the source and specifics of the audit procedures are matters of public record subject to disclosure under the PRL.

It is difficult to conceive of a case with a more compelling public interest demanding public disclosure and public scrutiny. The Motion to Dismiss is denied.