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**IN THE SUPREME COURT
STATE OF ARIZONA**

KAREN FANN, *et al.*,

Petitioners,

v.

THE HONORABLE MICHAEL KEMP,
in his official capacity as a judge of the
Superior Court for Maricopa County,

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. CV-22-0018-PR

Court of Appeals No.
1 CA-SA 21-0216

Maricopa County Superior Court No.
CV2021-008265

**PETITIONERS' RESPONSE TO
AMERICAN OVERSIGHT'S
MOTION FOR
RECONSIDERATION**

Petitioners 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; and the Arizona Senate (collectively, the “Senate”) respectfully submit this Response in opposition to American Oversight’s Motion for Reconsideration, pursuant to the Court’s order of September 9, 2022.

INTRODUCTION

American Oversight lost this special action. The Court wholly or substantially ratified the Senate’s position with respect to all three legal questions presented for review, and expressly “disagree[d],” Op. ¶ 7, with every major facet of the Court of Appeals’ prior rulings in American Oversight’s favor. American Oversight constructs its Motion for Reconsideration solely on the possibility that, on remand, American Oversight *could* obtain *in camera* inspection of a small number of documents—equating to less than 5% of the Senate’s legislative privilege claims—*if* the Senate declines to revise the applicable privilege log entries. Success that is dependent upon such an attenuated chain of contingencies is an untenably slender reed upon which to proclaim “partial success,” Mot. for Reconsideration at 2.

ARGUMENT

I. The Senate Was the “Prevailing Party” in All Material Respects in This Special Action

In determining whether a party has “substantially prevailed” for purposes of an award of attorneys’ fees under A.R.S. § 39-121.02(B), a court must “examine all

of the claims or requests made by the requesting party, and if that party was more successful than not in obtaining the requested records, defeating the government’s denial of access to public records, or securing other relief concerning issues that were contested before the filing of the action, then the requesting party ‘substantially prevailed.’” *Am. Civil Liberties Union of Ariz. v. Ariz. Dept. of Child Safety*, 251 Ariz. 458, 462, ¶ 17 (2021). Importantly, “[a] special action represents a separate, original proceeding where an appellate court examines the action or inaction of public officials and may issue orders (similar to a common law writ) affecting future proceedings in a case.” *Coffee v. Ryan-Touhill in and for Cnty. of Maricopa*, 247 Ariz. 68, 71–72, ¶ 14 (App. 2019). A corollary is that relative success in this special action—which pivoted on a discrete and self-contained set of legal questions relating to legislative privilege—must be assessed on its own terms. American Oversight cannot bootstrap victories concerning *different* issues in *different* proceedings, *see* Op. ¶ 3 (referencing earlier round of special action litigation concerning unrelated legal issues) into even “partial” prevailing party status in this special action.

American Oversight was not successful *at all* with respect to two of the three questions for review presented in the Court’s February 15 Order, and was not “more successful than not” in connection with the third issue because the Court largely concurred with the Senate’s exposition of the burden of proof regime governing

privilege disputes.¹ To posit that there is no prevailing party at all would be an unduly generous concession to American Oversight. *See generally Democratic Party of Pima Cnty. v. Ford*, 228 Ariz. 545, 549, ¶¶ 13–14 (App. 2012) (affirming finding that no party prevailed where one party obtained records sought while the other party won contested legal issues); *ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957, 971 (D. Ariz. 2019) (commenting in contract dispute that “the Court is inclined to find that neither party was successful” where party seeking fees had won on one of four claims). For American Oversight to declare that it has attained “partial success” in this special action—despite entirely or substantially losing every contested legal issue—is baffling.

In granting the Senate’s petition for review, the Court undertook to decide (1) whether communications concerning the planning, execution or results of the Arizona Senate’s audit of the November 2020 general election in Maricopa County (the “Audit”) are protected by the legislative privilege embedded in Article IV of the Arizona Constitution and the common law; (2) whether a *prima facie* legislative privilege claim requires an affirmative showing of legislative impairment; and (3) the burden of proof framework and substantive standard that control challenges to the sufficiency of particular privilege log entries. The Court adopted unqualifiedly

¹ The Senate also prevailed in the Court of Appeals on a fourth issue, *i.e.*, American Oversight’s claim that the Senate had waived the legislative privilege. *See Fann v. Kemp*, 505 P.3d 301, 311–12, ¶¶ 33–35 (Ariz. App. 2022).

the Senate’s positions with respect to the first two issues—repudiating the Court of Appeals’ contrary holdings and American Oversight’s arguments in defense of them—and substantially ratified the Senate’s conception of the factual and legal showing necessary to obtain *in camera* review of purportedly privileged materials.

Notably, American Oversight does not and could not deny that the Senate prevailed in connection with the first two issues presented for review, which consumed the overwhelming majority of the parties’ briefing and arguments in this Court and in the lower courts. *See generally Berry v. 352 E. Virginia., L.L.C.*, 228 Ariz. 9, 13, ¶ 22 (App. 2011) (holding in contract dispute that “[i]n cases involving various competing claims, counterclaims and setoffs all tried together, the successful party is the net winner.” (cleaned up)). Its claim for prevailing party or “partial success” status as to the third issue, however, relies on a revisionist rendering of the procedural history of this special action and the scope of the question presented to the Court.

Preliminarily, some context is necessary. The massive scale of the document review triggered by American Oversight’s and others’ public records requests necessitated the Senate’s reliance on contract attorneys—many of whom had little prior familiarity with legislative privilege—to conduct its first-level privilege review and log generation. In rushing to comply with an arbitrary production deadline fixed by the trial court over the Senate’s protests, the Senate freely acknowledged the

likelihood of errors in the log, represented that it was conducting a second-level quality control review of the privilege log, and repeatedly signaled its willingness to engage cooperatively with opposing parties in reassessing challenged entries. *See* Defs.’ Response to Pls.’ Mot. to Compel (Sept. 24, 2021) at 11–12 (stating that the Senate “is working proactively to identify and correct any erroneous privilege determinations, and will consult in good faith with American Oversight (or anyone else) who has questions about particular entries”), attached as Exhibit A.²

The task of devising a privilege log also was impaired by the cacophony of objections and arguments advanced by two sets of plaintiffs in two parallel proceedings. The respective Superior Court judges ultimately announced similar but not coextensive formulations of legislative privilege, both of which this Court’s opinion decisively refute. *Compare American Oversight v. Fann*, Maricopa County Superior Court No. CV2021-008265, Minute Entry (Oct. 14, 2021) at 5 (“[T]he Court has found that the privilege asserted by legislators here does not apply except for the narrow exceptions based upon confidentiality, privacy or the best interests of the State if those interests outweigh the public’s right to access those records.”);

² As recounted in the Senate’s Response to the Motion to Compel, American Oversight’s bluster in its Motion to Compel—which American Oversight has attached to its Motion for Reconsideration in this Court—that it had elicited certain “improperly” withheld documents, Mot. to Compel at 10, was and remains false. The Senate voluntarily released these records in the course of its *sua sponte* re-review of the privilege log. *See* Response to Mot. to Compel at 11.

Phoenix Newspapers, Inc. v. Arizona State Senate, Maricopa County Superior Court No. LC2021-000180-001, Ruling (Oct. 12, 2021) at 6 (holding that “whether a specific record is exempt from disclosure will depend on the nature of the communication and on how closely it relates — in time, or place, or persons involved — to the core legislative function of drafting and debating legislation”).

It was, to say the least, difficult for the Senate to compose and finalize privilege log descriptions in the absence of a single, coherent and correct judicial explication of the legislative privilege and its application to the Audit. And the trial judges’ rulings that legislative privilege was effectively inapplicable to the Audit and/or waived mooted any question of the privilege log’s adequacy. Put another way, it was not possible for the Senate (or any other party) to discern with certainty the specific features of a valid privilege log entry unless and until the courts defined definitively the parameters of the privilege itself in relation to the Audit.

For that reason, the sufficiency of particular privilege log entries was never litigated in the lower courts. This point—which bears directly on the scope and genesis of the third issue reviewed by this Court—is important. The Court of Appeals held that, if the Senate maintained any legislative privilege claims on remand, American Oversight could **automatically** obtain *in camera* review of those materials. *See Fann v. Kemp*, 505 P.3d 301, 312, ¶ 38 (Ariz. App. 2022). This indiscriminate license for *in camera* inspections of purportedly privileged

communications and the underlying “confusion regarding privilege logs apparent in the courts below,” Op. ¶ 32, presumably prompted this Court’s request for briefing on the burden of proof framework applicable to disputed legislative privilege claims. In response, the Senate argued that Rule of Civil Procedure 26(b) was a potential guidepost but not directly controlling, and that “[t]o obtain *in camera* review, American Oversight must supply—individually, for *each* document in dispute—‘a factual basis adequate to support a good faith belief by a reasonable person’ that in camera review of the materials may reveal evidence that the document in fact is not privileged.” Senate’s Supp. Br. at 19 (citations omitted).

The Court largely adopted this rubric, invoking Rule 26(b) as an “instructive” but “not controlling” benchmark in assessing privilege log entries, Op. ¶ 33, and “afford[ing] the Senate a reasonable opportunity to revise its privilege log consistent with this opinion’s guidance,” if and to the extent it wished to do so, *id.* ¶ 35. The Court held that, to thereafter contest sufficient *prima facie* privilege claims asserted in the privilege log, “American Oversight would have to establish, on a good faith basis, that an *in camera* review of the communications would reveal that the legislative privilege does not apply.” *Id.* ¶ 36.

In short, there is no substantive discrepancy between the Senate’s position with respect to the third issue presented and the Court’s ultimate disposition of that

question. The Senate maintained, and this Court agreed, that the Court of Appeals’ *carte blanche* allowance of *in camera* review was wrong as a matter of law.

II. The Possibility That American Oversight Could Obtain *In Camera* Review of a Small Number of Documents Does Not Make it a “Prevailing Party” or Confer “Partial Success”

Thus, all that undergirds American Oversight’s Motion for Reconsideration is the conditional possibility that it might be able to procure *in camera* review of a small number of withheld documents *if* the Senate chooses not to revisit any of its privilege log entries. That tenuous reasoning, however, cannot serve as a predicate for prevailing party status for at least three reasons.

First and foremost, the number of disputed documents implicated by privilege log descriptions that the Court commented were unduly “vague,” Op. ¶ 34, is minimal. By Petitioners’ count, only 33 privilege log entries—corresponding to just 4.8% of the 694 documents that the Senate has withheld or redacted solely on legislative privilege grounds—include the formulation flagged by the Court or substantially similar verbiage.³ While the number of documents obtained in litigation is not the “singular” determinant of prevailing party status in Public Records Act cases, *ACLU-AZ*, 251 Ariz. at 462, ¶ 15, it remains a pivotal gauge of

³ An additional 402 records are protected from disclosure by both the legislative privilege and the attorney-client privilege. Because American Oversight has not, to date, challenged any of the Senate’s attorney-client privilege claims, those documents were excluded from the above calculation.

relative success. More broadly, parsing “prevailing party” status (or even “partial success”) at the level of granularity urged by American Oversight—*i.e.*, the possibility of obtaining a small percentage of the documents implicated by only one of three legal distinct issues presented to the Court—is untethered from the statutory text, incompatible with the standard set forth in *ACLU-AZ*, and wholly impractical.

Second, American Oversight has not established an entitlement to access—or even to *in camera* review—of these few dozen documents. The Court never entered an order or any other form of relief in favor of American Oversight or against the Senate in connection with these records. Rather, the Court merely furnished prospective “guidance,” Op. ¶ 35, outlining the elements of adequate privilege log entries, and securing for the Senate “a reasonable opportunity to revise its privilege log” on remand, in its discretion, *id.* If the Senate opted not to do so, American Oversight could seek *in camera* review of that small subset of documents, and the trial court would independently determine their privilege status. In short, American Oversight did not in this special action “obtain[]” any records, “defeat[]” a denial of access to public records, or “secur[e] other relief” at all. *ACLU-AZ*, 251 Ariz. at 461, ¶ 14.

Third, the small corpus of documents implicated by paragraph 34 of the Court’s opinion was never the gravamen of this litigation. *See id.* at 464, ¶ 25 (holding that requestor’s success with respect to particular document did not

necessarily make it the prevailing party, reasoning that the requestor had “filed its action to obtain public records from DCS, not to determine whether [a particular database] was a public record”). Indeed, as noted above, the parties had deferred motion practice concerning specific privilege log items and documents until the trial court resolved antecedent questions bearing on the scope and applicability of the legislative privilege, and the Senate remained continuously amendable to consultation concerning disputed log entries. Because the question of what, exactly, a valid privilege log entry must entail never crystallized into a concrete dispute in the lower courts, this Court proffered only forward-looking “guidance,” Op. ¶¶ 1, 35. That this guidance may (or may not) induce the Senate to revise certain log entries, which may (or may not) in turn trigger *in camera* review of a *de minimus* proportion of withheld documents does not even come close to making American Oversight “more successful than not” in obtaining *any* articulable “relief.” *ACLU-AZ*, 251 Ariz. at 462, ¶ 17.

CONCLUSION

The fee-shifting provision of A.R.S. § 39-121.02(B) is intended to incentivize transparency, not facilitate the commercialization of public records litigation. The Court should not accommodate American Oversight’s attempt to leverage isolated and discrete provisions of—in this Court’s own words—“guidance” on privilege log

entries into a vehicle for extracting exorbitant⁴ sums of taxpayer money. While American Oversight may or may not be entitled to a reasonable fees award in connection with other, earlier facets of this litigation relating to the availability of government contractor records, it lost this special action and the underlying trial court proceedings concerning the scope and applicability of legislative privilege. The Court accordingly should deny the Motion for Reconsideration in its entirety.

RESPECTFULLY SUBMITTED this 23rd day of September, 2022.

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⁴ See Order Granting Application for Fees and Costs in Part, *Fann v. Kemp*, Ariz. Court of Appeals No. 1 CA-SA 21-0141 (Oct. 29, 2021) (applying 40% reduction to American Oversight's requested fees award in earlier stage of Audit-related litigation).

Exhibit A



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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. CV2021-008265

AMERICAN OVERSIGHT,
Plaintiff,

v.

KAREN FANN, *et al.*,
Defendants.

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO
COMPEL**

(Assigned to the Hon. Michael Kemp)

Defendants Arizona State Senate; Karen Fann, in her official capacity as President of the Arizona Senate; Warren Petersen, in his official capacity as the Chairman of the Senate Judiciary Committee (the "Senate") respectfully submit this Response to Plaintiff American Oversight's Motion to Compel Documents Withheld on Legislative Privilege Grounds.

FACTUAL BACKGROUND

The Senate received the first of a deluge of public records requests relating to its audit of the November 2020 general election in Maricopa County (the "Audit") in April. The Senate has maintained since the Audit's inception that it would voluntarily produce for

1 public inspection its own internal documents and materials that constitute non-privileged
 2 public records, within the meaning of the Arizona Public Records Act, A.R.S. § 39-121, *et*
 3 *seq.* (the “PRA”). The scope of the requests and the volume of materials they implicated,
 4 however, far exceeded the Senate’s internal document review capacity. The Senate
 5 accordingly retained an external vendor and began earlier this summer the arduous process
 6 of harvesting, uploading and individually reviewing this massive repository of documents.
 7 The personal cell phones of President Fann and audit liaisons Ken Bennett and Randy
 8 Pullen also were carefully searched for responsive materials. Notwithstanding the burdens
 9 attendant to the August 31 production deadline set by the Court, the Senate released more
 10 than 80,000 pages of records on the deadline, accompanied by a privilege log cataloguing
 11 withheld documents.

12 Given the scale of the review, haste with which it was conducted, and the complexity
 13 of the legislative privilege,¹ the Senate continues to refine the privilege log to cull entries
 14 and clarify document descriptions as necessary. That process remains ongoing, and the
 15 Senate has been and remains willing to reassess in good faith existing privilege
 16 determinations, both *sua sponte* and in response to questions from American Oversight or
 17 others concerning particular log entries.

18 **ARGUMENT**

19 **I. Overview of the Legislative Privilege**

20 Embedded in the Speech or Debate Clause of the Arizona Constitution, *see* art. IV,
 21 pt. 2, § 7, is a testimonial and documentary privilege that protects the Legislature and its
 22 members from compelled disclosures of legislative business. The Arizona Court of
 23 Appeals, drawing heavily from federal precedents construing the cognate clause in Article
 24 I of the U.S. Constitution, has articulated the crux of the privilege as embracing “matters
 25 [that] are ‘an integral part of the deliberative and communicative processes’ relating to

26 ¹ A document review team working on pace with such a large volume of records in
 27 these circumstances inevitably confronts the “difficult[.]” task of applying legislative
 28 privilege. *See Jewish War Veterans of the United States of Am., Inc. v. Gates*, 506 F. Supp.
 2d 30, 62 (D.D.C. 2007).

1 proposed legislation or other matters placed within the jurisdiction of the legislature’ and
 2 ‘when necessary to prevent indirect impairment of such deliberation.’” *Ariz. Indep.*
 3 *Redistricting Comm’n v. Fields*, 206 Ariz. 130, 137, ¶ 18 (App. 2003) (quoting *Gravel v.*
 4 *United States*, 408 U.S. 606 (1972)); *see also Mesnard v. Campagnolo*, 489 P.3d 1189,
 5 1194, ¶ 15 (Ariz. 2021); *Steiger v. Superior Court for Maricopa County*, 112 Ariz. 1, 3
 6 (1975) (holding that the Speech or Debate Clause reaches “any matter that is generally done
 7 in a session of the House by one of its members in relation to the business before it”).
 8 “[W]hen the privilege applies it is absolute.” *United States v. Rayburn House Office Bldg.,*
 9 *Room 2113, Washington, D.C. 20515*, 497 F.3d 654, 660 (D.C. Cir. 2007).²

10 Although the legislative privilege is “deceptively simple” in concept, *Brown &*
 11 *Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995), its practical
 12 reification can sometimes prove more elusive. To that end, the Senate outlines below four
 13 settled principles that encapsulate the parameters of the legislative privilege in connection
 14 with the Audit.

15 **A. The Audit Is a Legislative Function**

16 The Audit itself is a legislative matter within the scope of the privilege. American
 17 Oversight’s surprising and puzzling insistence that the Audit actually is “a purely
 18 administrative function,” Motion at 6, collides head-on with controlling Arizona
 19 precedents, the past pronouncements of this Court, and the doctrinal predicates of American
 20 Oversight’s own PRA claims.

21 While the privilege ultimately derives from the Legislature’s constitutional
 22 lawmaking functions, courts have long recognized that investigations and other fact-finding
 23

24 ² To this end, the absolute constitutional privilege assertable by Arizona legislators in
 25 state court proceedings is distinct from the common law qualified legislative privilege
 26 available to *state* legislators in *federal* court. *See Citizens Union of the City of New York v.*
 27 *Att’y Gen. of N.Y.*, 269 F. Supp. 3d 124, 154-55 (S.D.N.Y. 2017) (discussing the
 28 distinction); *League of Women Voters of Pennsylvania v. Commonwealth*, 177 A.3d 1000,
 1004–05 (Pa. Commw. Ct. 2017) (“Legislative Respondents clearly are not invoking
 qualified legislative privilege and immunity under federal common law; rather, they are
 invoking absolute legislative privilege and immunity based on the Speech and Debate
 Clause of the Pennsylvania Constitution.”).

1 inquiries are integral to, and inseparable from, the act of legislating. *See Trump v. Mazars*
 2 *USA*, 140 S. Ct. 2019, 2031 (2020) (legislative functions “encompass[] inquiries into the
 3 administration of existing laws” and “surveys of defects” in existing programs); *Eastland*
 4 *v. U.S. Servicemembers Fund*, 421 U.S. 491, 504 (1975) (“This Court has often noted that
 5 the power to investigate is inherent in the power to make laws.”); *Tenney v. Brandhove*, 341
 6 U.S. 367, 377, 379 (1951) (legislative privilege applies when legislators are “acting in a
 7 field where legislators traditionally have power to act,” noting that legislative investigations
 8 “are an established part of representative government”).

9 For this reason, the Arizona Supreme Court aligned its jurisprudence with a long
 10 lineage of precedent when it confirmed that “written reports” and investigatory activities
 11 fall squarely within the Speech or Debate Clause’s ambit. *Mesnard*, 489 P.3d at 1194, ¶
 12 15;³ *see also* 1988 Ariz. Op. Atty. Gen. 16 (1988) (concluding that “speeches, discussion,
 13 debate, questions, answers, comments, briefings, investigations, preparation of reports and
 14 presentation of reports” in connection with impeachment investigation were protected by
 15 the Speech or Debate Clause); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 11
 16 (D.C. Cir. 2006) (holding that “making, publishing, presenting, and using legislative
 17 reports; authorizing investigations and issuing subpoenas” are “integral” to the legislative
 18 process and hence covered by the Clause); *Puente Arizona*, 314 F.R.D. 664, 670 (D. Ariz.
 19 2016) (acknowledging that “‘obtaining information pertinent to potential legislation or
 20 investigation’ is a legitimate legislative activity” (quoting *Miller v. Transamerican Press,*
 21 *Inc.*, 709 F.2d 524 (9th Cir. 1983)); *United States v. Dowdy*, 479 F.2d 213, 224 (4th Cir.
 22 1973) (holding that “gathering information in preparation for a possible subcommittee
 23 investigatory hearing” was a legislative function); *Jewish War Veterans of the United States*
 24 *of America v. Gates*, 506 F. Supp. 2d 30, 55 (D.D.C. 2007) (holding that “efforts to acquire
 25

26 ³ Notably, the subject matter of the investigation in *Mesnard*, which pertained to
 27 alleged personal misconduct by an individual legislator, bore a much more attenuated nexus
 28 to actual legislative activity than the Audit, which concerns the administration of statewide
 elections—a matter explicitly placed within the Legislature’s purview. *See* ARIZ. CONST.
 art. VII, § 12.

1 information during committee investigations or through the issuance of subpoenas
 2 constitute legislative acts protected by the Speech and Debate Clause” privilege); *Sec. &*
 3 *Exch. Comm’n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F.
 4 Supp. 3d 199, 236 (S.D.N.Y. 2015) (“[T]he applicability of the Speech or Debate Clause’s
 5 protections does not hinge on the formality of the investigation.”).

6 Indeed, the Audit’s intrinsic character as a legislative function was central to Judge
 7 Thomason’s validation of the Senate’s subpoenas to Maricopa County, *see Maricopa*
 8 *County v. Fann*, CV2020-016840 (Feb. 25, 2021), and is a fixed premise of American
 9 Oversight’s own claims. Presumably to buttress its PRA theories, American Oversight has
 10 argued that the Senate’s vendors and agents are “performing legislative and public
 11 functions,” Am. Compl. ¶ 62. This Court agreed, holding—in a finding that the Court of
 12 Appeals ratified—that the Audit is “an official legislative activity.” *Fann v. Kemp*, 2021
 13 WL 3674157, at *4, ¶ 19 (Ariz. App. Aug. 19, 2021) (quoting this Court’s August 2, 2021
 14 Minute Entry, which elsewhere characterized the Audit as “conducted pursuant to the
 15 Senate’s legislative functions as outlined in the Arizona Constitution”).⁴ In addition to
 16 being objectively correct, the Court’s determination that the Audit is a legislative function
 17 is, in any event, the law of the case.

18 American Oversight’s belated effort to contrive a dichotomy between “the audit of
 19 specific ballots” and “traditional lawmaking function[s]” such as proposing legislation,
 20 Motion at 6, is not only logically unsound and unwieldy in practice, but would upend the
 21 settled (and obvious) proposition that “[t]he acquisition of knowledge through informal
 22 sources is a necessary concomitant of legislative conduct and thus should be within the
 23 ambit of the privilege.” *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976); *see*
 24 *also Mesnard*, 489 P.3d at 1195, ¶ 21 (finding that “[p]reparation of the [investigative]
 25 report” for the legislative house was “a legislative function”). Investigatory and information

26
 27 ⁴ In this vein, this Court and the Court of Appeals rejected the Senate’s legislative
 28 immunity defense *not* because the Audit is somehow “administrative,” but rather because
 they construed the immunity as protecting individual legislators only from personal
 monetary liability. *See* 2021 WL 3674157, at *3, ¶ 15.

1 gathering activities almost always entail mundane tasks, but these incidental attributes do
 2 not detract from their innate character as legislative activities that are entwined with larger
 3 lawmaking functions. *See Jewish War Veterans*, 506 F. Supp. 2d at 54 (holding that
 4 “informal information gathering in connection with or in aid of a legitimate legislative act
 5 is itself protect by the Speech or Debate Clause”).⁵

6 **B. The Legislative Privilege Covers Factual Documents and**
 7 **Communications**

8 The second principle is a corollary of the first: legislative privilege attaches even to
 9 the communication or development of purely factual information. In contrast to the
 10 common law deliberative process privilege, the legislative privilege’s protections are not
 11 confined only to analytical material or substantive discussions of potential public policies.
 12 *See Citizens Union*, 269 F. Supp. 3d at 151 (“[I]t is not just the motives of lawmakers that
 13 are protected by the privilege, but factual information as well (so long as it was collected
 14 and summarized in connection with a legislative activity)”); *Brown & Williamson*, 62 F.3d
 15 at 421 (“[D]ocuments or other material that comes into the hands of congressmen may be
 16 reached either in a direct suit or a subpoena only if the circumstances by which they come
 17 can be thought to fall outside ‘legislative acts’ or the legitimate legislative sphere.”); *Ways*
 18 *& Means*, 161 F. Supp. 3d at 246 (“To the extent that the documents responsive to this
 19 request reflect the Committee’s or the Subcommittee’s gathering of information to aid in
 20 legislating . . . whether according to formal congressional processes, or informal efforts,

21 _____
 22 ⁵ American Oversight strains to impute to *State ex rel. Montgomery v. Mathis*, 231
 23 Ariz. 103 (App. 2012), a far more sweeping import than the court’s actual decision can
 24 possibly bear. *Mathis* held, in relevant part, that the documents relating to personnel
 25 decisions (*e.g.*, the selection of a particular contractor) generally are not protected by the
 26 legislative privilege. The Senate readily acknowledges that point, and is producing
 27 communications reflecting or concerning its selection of Cyber Ninjas and the negotiation
 28 of its contract. Nothing in *Mathis* purported to excise legislative investigations from the
 scope of the Speech or Debate Clause—and even if it had, *Mesnard* implicitly abrogated
 any such holding in any event. Similarly, the Supreme Court rejected a legislative immunity
 argument in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), because the underlying
 communications—*i.e.*, a press release and newsletter to constituents—were political in
 nature. The *Hutchinson* court never entertained the notion, championed by American
 Oversight here, that legislative fact-finding inquiries elude legislative privilege because
 they are somehow “administrative.”

1 they are protected under the Clause and need not be produced.” (internal citations omitted)).
 2 It follows that even factual communications or records relating to or reflecting (for example)
 3 preparations for the Audit, procedures, protocols or practices applied in the Audit, and Audit
 4 findings and conclusions are privileged.⁶

5 **C. The Legislative Privilege Extends to Agents, Consultants and Vendors**

6 The privilege envelopes communications between and among legislative vendors
 7 and consultants. *See Fields*, 206 Ariz. at 140, ¶ 30; *see also Doe v. McMillan*, 412 U.S.
 8 306, 312 (1973) (Speech or Debate protections extended to congressional contractors and
 9 investigators). This point is important. The entire gravamen of American Oversight’s PRA
 10 theory is that the Senate “outsourced its important legislative function to Cyber Ninjas and
 11 its sub-vendors.” *Fann*, 2021 WL 3674157, at *5, ¶ 24. American Oversight cannot have
 12 it both ways; if these individuals and entities are effectively instrumentalities of the
 13 legislative branch for purposes of the PRA, then the institution’s attendant privileges must
 14 extend to them as well.

15 **D. The Legislative Privilege Does Not Apply to Political Communications,
 16 Public Relations Matters, or Third Party Communications**

17 Any conceptualization of legislative privilege must of course confront its limitations.
 18 Despite American Oversight’s disingenuous mischaracterization that the Senate somehow
 19 believes “every substantive communication about the audit” is privileged, Motion at 4, the
 20 Senate freely acknowledges that many communications and records that refer or relate to
 21 the Audit indeed are not privileged. Four primary constraints on the privilege merit
 22 attention.

23 First, legislative privilege does not protect “‘political’ acts” or communications, such
 24 as speechmaking or partisan campaign activities, *see Fields*, 206 Ariz. at 137, ¶ 18. To that
 25
 26

27 ⁶ Notwithstanding the foregoing principle, the Senate months ago released various
 28 formal policies and procedures adopted for the Audit, and also will make public the
 auditors’ final reports, which will detail their findings.

1 end, the Senate has released, for example, emails and text messages between legislators and
2 political party leaders or grassroots activists, even if they pertain to the Audit.

3 Second, records containing or reflecting only public relations matters (e.g.,
4 communications with reporters or the development of press releases) are not insulated from
5 disclosure, see *Mesnard*, 489 P.3d 1197, ¶ 31;⁷ *Hutchinson*, 443 U.S. at 133 (the transmittal
6 of information to the media or other public outlets is not privileged), and the Senate is
7 continuing to release such records.

8 Third, documents or communications concerning only the selection of Audit
9 personnel/vendors or the negotiation of their contracts, see *Mathis*, 231 Ariz. at 123, ¶ 80,
10 are outside the scope of legislative privilege. It bears emphasis, however, that this exception
11 is just that: it excludes documents relating to the contractor selection process. Nothing
12 more. American Oversight’s strained effort to distend *Mathis* into a sweeping and specious
13 proposition that the entire Audit is somehow “administrative” is both logically untenable
14 and unmoored from any actual legal authority. See *Office of Eddie Bernice Johnson*, 459
15 F.3d at 10-11 (distinguishing “making, publishing, presenting, and using legislative reports;
16 authorizing investigations and issuing subpoenas,” which are legislative functions protected
17 by the privilege, from personnel decisions, which often are not).

18 Fourth, the Senate agrees that communications with third parties that were not acting
19 as consultants, advisors or vendors in connection with the Audit are subject to disclosure
20 under the PRA.⁸

21 Before concluding this analysis of legislative privilege, however, it is worth pausing
22 to appreciate the fundamentally opportunistic character of American Oversight’s argument.
23 It begins its Motion with a litany of questions to which it desires answers, assumes that

24 _____
25 ⁷ The *Mesnard* court suggested, however, that the privilege might reach press
26 communications that either were issued on behalf of the house as a whole, or that are made
“to restore public trust in the chamber.” 489 P.3d at 1198, ¶ 35.

27 ⁸ Although such communications likely are privileged to the extent they assisted or
28 advanced the Audit, see *Puente Arizona*, 314 F.R.D. at 670, the Senate has chosen not to
assert legislative privilege over isolated and discrete communications with individuals who
had no actual advisory or consultancy role in the Audit process.

1 probative documents actually exist, and then reverse engineers an absurdly anemic vision
 2 of the privilege that is tailormade to elicit those records that it believe are most congenial
 3 to its partisan agenda (assuming they exist at all). That is not how legislative privilege—or
 4 any privilege—works. The legislative privilege is an external, static, and constitutionally
 5 imposed limitation on the PRA; its contours do not reflexively morph to accommodate the
 6 disclosure (or, for that matter, the withholding) of particular documents based on their
 7 perceived “importance.”

8 The conception of legislative privilege offered by the Senate is principled, consistent,
 9 and hews closely to decades of accreted precedents, both in Arizona and elsewhere. It likely
 10 will ensure the release of some of the materials American Oversight finds most interesting
 11 (e.g., documents relating to the selection of Cyber Ninjas and the negotiation of its contract,
 12 or certain funding sources), even if it does happen to preserve the confidentiality of others.
 13 Indeed, American Oversight’s dismissive—and factually false—assertion that the Senate
 14 has “withheld virtually every substantive text message and email about the audit,” Motion
 15 at 2, surely would come as a surprise to even a casual reader of the news—or of American
 16 Oversight’s own website. See, e.g., Dillon Rosenblatt & Kyra Haas, *Trump Helped*
 17 *Bankroll Senate Audit, Texts Suggest*, ARIZONA CAPITOL TIMES, Aug. 31, 2021, available
 18 at [https://azcapitoltimes.com/news/2021/08/31/trump-helped-bankroll-senate-audit-texts-](https://azcapitoltimes.com/news/2021/08/31/trump-helped-bankroll-senate-audit-texts-suggest/)
 19 [suggest/](https://azcapitoltimes.com/news/2021/08/31/trump-helped-bankroll-senate-audit-texts-suggest/); American Oversight, *Arizona Senate Releases ‘Audit’ Records Following Court*
 20 *Order*, Sept. 1, 2021, available at [https://www.americanoversight.org/arizona-senate-](https://www.americanoversight.org/arizona-senate-releases-audit-records-following-court-order)
 21 [releases-audit-records-following-court-order](https://www.americanoversight.org/arizona-senate-releases-audit-records-following-court-order) (“Included in the documents is information
 22 regarding audit payments as well as emails and text messages that audit officials and
 23 legislators exchanged with outside parties, including prominent Republicans, election
 24 conspiracy theorists and activists, members of Trump’s legal team, and others.”).

25 **II. The Senate Has Never Waived Legislative Privilege**

26 In a second run at circumventing legislative privilege, American Oversight invents
 27 a term it calls “waiver by conduct.” Motion at 9. To be sure, legislative privilege over a
 28 particular document can be waived—namely, by disseminating to third parties *that*

1 particular document. No case has countenanced or endorsed the broad conception of
 2 implied or subject matter waiver that American Oversight advances. *See, e.g., Puente*
 3 *Arizona*, 314 F.R.D. at 671 n.5 (“Plaintiffs also fail to provide persuasive authority that
 4 waiver of the legislative privilege with respect to some documents waives the privilege with
 5 respect to any other documents Plaintiffs choose to request.”); *Favors v. Cuomo*, 285 F.R.D.
 6 187, 213 (E.D.N.Y. 2012) (declining to find that dissemination of some emails necessarily
 7 waived privilege as to other communications); *Brown & Williamson*, 62 F.3d at 421 n.11
 8 (rejecting argument that congressman waived legislative privilege over documents by
 9 referencing them during radio interview).⁹

10 Further, a moment’s reflection on American Oversight’s “waiver by conduct”
 11 construct quickly reveals its obvious irreconcilability with *Fields*, and the (presumably)
 12 unintended consequences it would yield. The Arizona Independent Redistricting
 13 Commission regularly conducts public meetings during which it discusses matters within
 14 its constitutional purview. If those public hearings result in the forfeiture of privilege with
 15 respect to all documents pertaining to the same subject matter, then the Commission’s
 16 legislative privilege would be quickly vitiated. Far from endorsing such a perplexing
 17 proposition, the Court of Appeals held that the legislative privilege between the
 18 Commission and its consultants remained intact unless or until the Commission chose to
 19 designate them as testifying experts in external litigation—and even then, waiver would be
 20 confined to “the particular subject of the expert’s testimony.” *Fields*, 206 Ariz. at 145, ¶
 21 50. Further, it is curious that American Oversight, as a self-styled champion of transparency
 22 (at least for one political party), would champion such a notion in any event. If a public
 23

24 ⁹ American Oversight’s theory that Defendants have effectuated a waiver because they
 25 “selectively released public records in their possession while likely withholding any of
 26 consequence,” Motion at 10, is puzzling. If American Oversight is saying that the Senate
 27 has released *privileged* documents, that is surprising, and American Oversight should
 28 identify which records it believes qualify for that designation. To the extent American
 Oversight is observing that the Senate has released non-privileged documents pursuant to
 the PRA, then its argument—*i.e.*, that the Senate must surrender privileged records because
 it previously produced non-privileged records as required by law—dissolves into
 incomprehensibility.

1 legislative hearing in fact effectuates a waiver of the legislative privilege with respect to all
 2 records and communications underlying the subject matter of that hearing, then such a
 3 holding surely will portend many more cloistered, non-public legislative hearings.

4 **III. There Is No Basis for Ordering an *In Camera* Review at This Time**

5 Before parsing the legal deficiencies in American Oversight’s demand for an *in*
 6 *camera* inspection of “representative samples” of privileged documents, Motion at 10, it is
 7 worth appreciating the factual backdrop against which it is made. In a twist of self-serving
 8 irony, American Oversight faults the privilege log for including some erroneous
 9 withholdings. *See* Motion at 10. As American Oversight surely will recall, the Senate
 10 repeatedly pointed out that, while it would fulfill American Oversight’s request for
 11 responsive and non-privileged internal Senate records, the August 31 deadline it demanded
 12 was unreasonable. American Oversight got the deadline it sought, but even legislative
 13 bodies are subject to the immutable laws of time, space and finite resources. While the
 14 records and privilege log were produced on time, the compressed timetable inevitably
 15 resulted in the inadvertent withholding of some non-privileged documents. These were the
 16 product of isolated human errors by review team members, not a systemic misconception
 17 of privilege doctrines.

18 American Oversight’s contention that the Senate revised its privilege log “[o]nly
 19 after American Oversight challenged certain designations,” Motion at 10, is surprising and
 20 disappointing. During a telephonic meet and confer on September 3, counsel for the Senate
 21 advised counsel for American Oversight that the Senate previously had begun refining its
 22 privilege log and already had corrected some of the errors cited by American Oversight. A
 23 follow-up email on September 7 again noted that, with respect to one of American
 24 Oversight’s objections, “[o]ur paralegal had flagged these documents for production during
 25 our internal re-review of the log (unrelated to our meet and confer).” *See* Exhibit 1. In any
 26 event, the Motion—intentionally or not—inaccurately casts the Senate as an antagonist in
 27 some kind of imagined cat and mouse game. To the contrary, while the Senate will
 28 vigorously defend legislative privilege, it is working proactively to identify and correct any

1 erroneous privilege determinations, and will consult in good faith with American Oversight
 2 (or anyone else) who has questions about particular entries. (And it is worth noting that the
 3 potential errors identified by American Oversight constituted a very small percentage of the
 4 log’s total entries).

5 **A. The Senate’s Privilege Log is Facially Sufficient**

6 As an initial matter, it bears emphasis that the Senate’s privilege log is not governed
 7 by the Rules of Civil Procedure. The parties are not undertaking any “discovery”; the
 8 documents at issue are not relevant to the pursuit of some extrinsic legal claim. Rather,
 9 American Oversight is seeking the records for their own sake, as is its prerogative under the
 10 PRA. Thus, while the Senate believes that Rule 26’s conception of an adequate privilege
 11 log is in some respects a useful interpretive touchstone, the Rules do not control the
 12 sufficiency of a log prepared and produced pursuant solely to A.R.S. § 39-121.01(D)(2),
 13 which provides for simply an “index of records or categories of records that have been
 14 withheld and the reasons the records or categories of records have been withheld from the
 15 requesting person.”

16 With that in mind, a facially sufficient privilege log entry generally consists of “(a)
 17 the [parties] involved, (b) the nature of the document, (c) all persons or entities shown on
 18 the document to have received or sent the document, (d) all persons or entities known to
 19 have been furnished the document or informed of its substance, and (e) the date the
 20 document was generated, prepared, or dated.” *In re Grand Jury Investigation*, 974 F.2d
 21 1068, 1071 (9th Cir. 1992) (citation omitted); *W. Mortgage & Realty Co. v. KeyBank Nat’l*
 22 *Ass’n*, 113CV00216EJLREB, 2015 WL 13841480, at *2 (D. Idaho Apr. 15, 2015) (“While
 23 a privilege log may certainly include the subject matter of the document, a party is
 24 not *required* to include such subject matter information. It is sufficient . . . for the privilege
 25 log to include, among other things, ‘the nature of the document.’ (citing *Dole v. Milonas*,
 26 889 F.2d 885 (9th Cir. 1989)); *see also Loftin v. Bande*, 258 F.R.D. 31, 33 (D.D.C. 2009)
 27 (“Privilege logs must ‘state the basis upon which the privilege is claimed, state the subject
 28

1 matter, number of pages, author, date created, and the identity of all persons to whom the
2 original or any copies of the document were shown or provided.””).

3 Importantly, the required granularity of any given log entry correlates inversely with
4 the breadth of the log as a whole. “Details concerning time, persons, general subject matter,
5 etc., may be appropriate if only a few items are withheld, but may be unduly burdensome
6 when voluminous documents are claimed to be privileged or protected, particularly if the
7 items can be described by categories.” Fed. R. Civ. P. 26 (Advisory Committee Comment
8 to 1993 Amendments); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 637-38 (D. Nev. 2013)
9 (rejecting claims that privilege log entries were insufficiently detailed, pointing to the *In re*
10 *Grand Jury* criteria and the large volume of documents at issue).

11 Virtually every log entry includes each of the necessary elements. In addition, each
12 entry denoted the “general subject matter,” *Scott v. Chipotle Mexican Grill, Inc.*, 94 F. Supp.
13 3d 585, 600 (S.D.N.Y. 2015), to which the document relates. That American Oversight
14 chose to confine its public records requests to a single “general subject matter”—*i.e.*, the
15 Audit—does not engender a heightened duty by the Senate to dissect its descriptions into
16 exponentially more particularized levels of specificity. Further, as discussed *supra*, because
17 the Audit itself is, as a legislative investigation, largely insulated by legislative privilege,
18 the inclusion of the term in any given log entry *prima facie* establishes the applicability of
19 the privilege. In any event, notwithstanding and subject to the foregoing, the Senate is in
20 the process of refining its privilege log to indicate the facet of the Audit process (*e.g.*,
21 planning and procedures, findings, etc.) to which each document relates.

22 **B. To Obtain *in Camera* Review, American Oversight Must Affirmatively**
23 **Show Reason to Believe That *Specific* Challenged Documents Are In Fact**
24 **Not Privileged**

25 *In camera* review cannot be premised on a suspicion or hunch. When, as here, a
26 *prima facie* claim of privilege is made, “the court may not invade the privilege to determine
27 its existence, even *in camera* using a special master.” *Clements v. Bernini*, 249 Ariz. 434,
28 438, ¶ 1 (2020). Because even *in camera* inspection infringes the categorical confidentiality

1 that privilege precepts are intended to preserve, “the court may not view the documents
2 until it has determined, as to each document, that in camera review is necessary to resolve
3 the privilege claim. Such review may be required if the receiving party makes a factual
4 showing to support a reasonable, good faith belief that the document is not privileged.”
5 *Lund v. Myers*, 232 Ariz. 309, 312, ¶ 15 (2013). The Supreme Court in *Lund* accordingly
6 concluded that the trial court had erred in “ruling that it would review all the [disputed]
7 documents to determine whether they are privileged,” *id.* at 312, ¶ 18, irrespective of
8 whether the challenging party had adduced any articulable basis for impugning the claims
9 of privilege.

10 As discussed above, the Senate has easily discharged its obligation to delineate a
11 *prima facie* showing of privilege—*i.e.*, the identification of each document’s date,
12 communicants, general subject matter and applicable privilege(s)—with respect to all or
13 substantially all documents enumerated in its privilege log. *See generally Clements*, 249
14 Ariz. at 440, ¶ 8 (reciting the four elements of the attorney-client privilege); *see also In re*
15 *Grand Jury Investigation*, 974 F.2d at 1071 (valid privilege log entry includes “(a) the
16 [parties] involved, (b) the nature of the document, (c) all persons or entities shown on the
17 document to have received or sent the document, (d) all persons or entities known to have
18 been furnished the document or informed of its substance, and (e) the date the document
19 was generated”); *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 502 (4th Cir. 2011)
20 (finding *prima facie* showing where party “provided a privilege log in which it identified
21 the nature of each document, the date of its transmission or creation, the author and
22 recipients, the subject, and the privilege asserted”).

23 Further, judicial efforts to probe claims of legislative privilege are imbued with
24 singularly sensitive constitutional dimensions. The legislative privilege was designed to
25 “reinforc[e] the separation of powers so deliberately established” by the Framers. *United*
26 *States v. Johnson*, 383 U.S. 169, 178 (1966). As the U.S. Supreme Court held in assessing
27 claims of the qualified (rather than absolute) executive privilege, it is the “duty” of a court
28 confronting assertions of the privilege “to treat the . . . material as presumptively privileged”

1 and to demand, as a condition precedent to *in camera* review, that the party seeking such
 2 inspection demonstrate that such review is “essential.” *Nixon v. United States*, 418 U.S.
 3 683, 713 (1974); *see also In re Sealed Case*, 121 F.3d 729, 759 (D.C. Cir. 1997) (holding
 4 that “the showing required to obtain *in camera* review” of documents over which executive
 5 privilege is claimed “entails demonstrating with specificity that the subpoenaed materials
 6 likely contain important evidence and that this evidence, or equivalent evidence, is not
 7 practically available from another source”).

8 Drawing on this principle, courts have insisted that litigants demanding *in camera*
 9 inspections of the legislative branch’s internal records surpass a **heightened** standard of
 10 proof. As the Virginia Supreme Court explained:

11 Because the purpose of legislative privilege is to protect the legislature from
 12 intrusion by the other branches of government and to disentangle legislators
 13 from the burden of litigation and its detrimental effect on the legislative
 14 processes, a legislator is generally not required to produce a detailed
 15 privilege log in order to invoke the privilege. A legislator must merely
 16 address, in describing the function of the evidence requested (and, in the case
 17 of a communication, with whom such communications would have
 18 occurred), why the privilege would apply. Courts may request more
 information only when essential to determine whether the privilege should
 attach and in some cases, review of such additional information may be
 required *in camera*.

19 *Edwards v. Vesilind*, 790 S.E.2d 469, 478–79 (Va. 2016) (internal citations omitted); *see*
 20 *also Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 62 (D.D.C.
 21 2007) (agreeing that “the Members [of Congress] are correct that judicial resolution of
 22 claims of legislative privilege is a last resort, not a first step. This order of operation best
 23 serves the principal purposes underlying the Speech or Debate Clause—ensuring legislative
 24 independence and preserving the separation of powers”); *cf. Church v. Montgomery County,*
 25 *Maryland*, 335 F. Supp. 3d 758, 771 (D. Md. 2018) (explaining that the executive privilege
 26
 27
 28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 24, 2021, I electronically transmitted the
3 attached document to the Clerk’s Office using the TurboCourt System for filing and
4 transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

5 Keith Beauchamp
6 Roopali H. Desai
7 D. Andrew Gaona
8 **COPPERSMITH BROCKELMAN PLC**
9 2800 North Central Avenue, Suite 1900
10 Phoenix, Arizona 85004
11 kbeauchamp@cblawyers.com
12 rdesai@cblawyers.com
13 agaona@cblawyers.com

14 *Attorneys for Plaintiff*

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28
By: /s/Thomas Basile
Thomas Basile

Exhibit 1

Subject: FW: AO v. Fann - Meet and Confer Call Today
Date: Tuesday, September 7, 2021 at 11:46:13 AM Mountain Standard Time
From: Kory Langhofer
To: Andy Gaona, Keith Beauchamp, rdesai@cblawyers.com
CC: Thomas Basile

Andy:

Thanks for your call on Friday. I've included below answers to the issues you raised. As you'll see, the metadata issues for some of the missing fields will require consultation with the data vendor, and some of the issue will require manual revisions to the privilege log. We're working on both of those, and will check back in when we have something to report. In the meantime, however, some of the issues are easy (Howie Fischer, for example) so we didn't want to delay our response on those points. We'll ask the data vendor to get started on a supplemental production with the documents identified below, which we'll upload to the Public Reading Room. Happy to discuss again by telephone, if necessary.

-Kory

Kory Langhofer
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Desk: (602) 382-4078
Cell: (602) 571-4275

This transmission may be protected by the attorney-client privilege or the attorney work product doctrine. If you are not the intended recipient, please delete all copies of the transmission and advise the sender immediately.

From: Andy Gaona <agaona@cblawyers.com>
Date: Friday, September 3, 2021 at 10:42 AM
To: Kory Langhofer <kory@statecraftlaw.com>, Tom Basile <tom@statecraftlaw.com>
Cc: Keith Beauchamp <kbeauchamp@cblawyers.com>, Roopali Desai <rdesai@cblawyers.com>
Subject: AO v. Fann - Meet and Confer Call Today

Kory & Tom:

In advance of our call at 11a, we thought it might be helpful to share some of the issues we've identified with the privilege log that we'd like to discuss (in addition to the broad assertion of legislative privilege with which we disagree):

- I. **Privilege log questions**
 - a. Generic descriptions for legislative privilege (e.g., "containing internal legislative discussions regarding audit/regarding conclusions/regarding analysis/regarding practices/procedures) with no additional context are replicated throughout the log—these conclusory descriptions are inadequate for us to assess the withholdings.

We will review any descriptions that American Oversight believes are inadequate. As a general matter, though, we believe it's sufficient to identify a document with specificity (by Bates number, for example), provide a general description of the document, and assert the basis for withholding it; we know of no binding

authority requiring a lengthy or detailed description of withheld documents.

- b. Many non-email documents in the log provide us with even less information to assess the withholding, providing us nothing beyond custodian, privilege type, and description. E.g., p. 265, no. 100790.

We will update the descriptions of such documents. This appears to affect a relatively small number of documents, based on issues with the metadata for the relevant files—so hopefully our data vendor can resolve the issue quickly.

- c. Individuals for whom we need an explanation for who they are or the basis for claiming privilege with them on emails):

- i. On legislative privilege withholdings:

1. Scott Saleska (srsaleska@gmail.com) – p. 34, no. 34533

This document was withheld under the marital privilege. Scott Saleska appears to be Kirsten’s spouse.

2. Trevor (trevr396@yahoo.com) – p. 86, no. 48992

This document will be produced.

3. Gianna Elms (patriotrehab@me.com) – p. 140, no. 84526

This document concerns draft legislation concerning election procedures; it predates and does not concern the Senate’s audit of the 2020 general election. It is accordingly being recategorized as non-responsive.

4. spence@gorightstrategies.com – p. 140, no. 84526

Same.

5. David Bradley (dave@kinoconsult.com); barb2022@gmail.com; drceloza@gmail.com – p. 141, nos. 60312, 60318

These documents will be produced. Our paralegal had flagged these documents for production during our internal re-review of the log (unrelated to our meet and confer).

6. Capitol Media Services (capmedia@hotmail.com) – p. 184, nos. 63334, 63340 (we struggle to see how a communication with Howie Fischer could be privileged)

Same.

7. Kelly Karnes (kelly.karnes@gmail.com) – p. 208, no. 96137

Same.

8. Doug Cole (dcole@azhighground.com) – p. 216, no. 98083

This document will be produced.

- ii. On attorney-client privilege withholdings in full:

1. Meghaen Dell’Artino (meghaen@p3gr.com) – p. 185, nos. 88123, 88126

These documents will be produced.

- d. Where legislative privilege is invoked for “negotiations,” is the Senate withholding documents that predate the agency relationship when the contract was signed by preemptively labeling them “internal” discussions? E.g., p. 15, nos. 12175, 12178, 12179, 12180

We will discuss this issue with the Senate and get back to you.

- e. Where Bennett/Pullen are custodians between pp. 226-265, what is the Senate’s basis for invoking legislative privilege or both legislative privilege and attorney-client privilege where there are communications between contractors and third parties with no legislative connection? E.g., p. 244, no. 100066 (email between arizonaaudit@gmail.com and amar@thisischristian.com withheld under legislative privilege for “containing internal legislative discussions regarding audit.”). Sample non-legislative, non-contractor individuals on these communications include:

The legislative privilege protects communications between agents of legislators as if they were made by legislators. So private communications among agents of legislators that do not include legislators (emails and texts between Pullen and Bennett without copying any senators, for example) about the audit are protected by the legislative privilege.

- i. Jovan Pulitzer and Larry Marson – p. 226, no. 99465

Both Mr. Pulitzer and Mr. Marson consulted for the audit.

- ii. Shiva Ayyadurai – pp. 255-262, nos. 100493, -494, -503, -504, -505, -518, -519, -521,

-586, -695 [the records show a contract was executed with Shiva on 7/31/21, meaning that these comms are from before he was a contractor]

Mr. Ayyadurai consulted for the audit before he was under contract.

iii. Vicki Vaughn – p. 255, no. 100480

Ms. Vaughn worked on the audit.

f. We need further clarification on specific parameters/justification for “other privilege”/”spousal discussions?”

We will revise the privilege log to define the “other” privileges with greater specificity.

g. Missing or cut off fields in the log:

Some of these will require coordination with our data vendor to resolve metadata issues. We’ll update the privilege log as necessary. In the meantime, I’ve added the missing information below (subject to revision after review by the data vendor).

i. No “from”:

1. P. 51, no. -30347

We will work with the data vendor to resolve this.

2. Two emails to Doug Logan: p. 80, nos. -74991 & -74992

These emails will be produced.

3. Emails to other cyberninjas folks: p. 81, nos. 74993, 74996

Same

4. P. 147, no.85967 (and CC field just says the word “to”);

From Norm Moore. No cc.

5. p. 148, nos. 85987, 85994, 86016, 86033 (no “to” either), 86036, 86042, 86053

All are from Norm Moore, who was identified as the custodian (although we assumed that “86036” in your list was a typo, and that you meant 86035). For 86033, the email was sent to Karen Fann <KFann@azleg.gov> and Adrian Luth <ALuth@azleg.gov>.

6. P. 149, nos. 86082 (no “to” either), 86087–89, 86094 (no “to” either), 86101

All are from Norm Moore, who was identified as the custodian. 86082 was sent to Karen Fann <KFann@azleg.gov>; Warren Petersen <wpetersen@azleg.gov>; Wendy Baldo <wbaldo@azleg.gov>; and Greg Jernigan <GJernigan@azleg.gov>, with a copy to kory@statecraftlaw.com and tom@statecraftlaw.com.

7. P. 150, nos. 86121, 86123, 86125 (no “to” either), 86133, 86134, 86135 (no “to” either), 86139, 86140

All are from Norm Moore, who was identified as the custodian.

8. P. 151, nos. 86141-42, 86149–69

All are from Norm Moore, who was identified as the custodian.

9. 152, no. 86179,

It is from Norm Moore, who was identified as the custodian.

10. P. 179, nos. 87066, -69, -72, -73 (Norm Moore is custodian but not listed on emails)

a. Several messages like this appear on pp. 147-, where Moore is custodian but not listed on the emails and/or no to/from)

All are from Norm Moore, who was identified as the custodian.

11. P. 190, no. 88564

It is from Phyllis Heivilin <PHeivilin@azleg.gov>.

12. P. 197, nos. 91428, 91431, -34

All are from Chris Kleminich, who was identified as the custodian.

13. P. 199, no. 91452, -64, -66

All are from Chris Kleminich, who was identified as the custodian.

14. P. 204, no. 91667

It is from Chris Kleminich, who was identified as the custodian.

ii. No “to”:

1. P. 67, no. -70600

This will be produced (and was flagged by our internal re-review of the privilege log, independently of the meet and confer).

2. P. 118, nos. 52801, 52803, 52814, 52817

We will work with the data vendor to resolve this.

iii. No "to" or "from":

1. P. 81, nos. 74994, 74997, 74999, 75325

These will be produced.

2. P. 191, nos. 88635, -36, -38, -39, -40, -41, -42, -43, -44, -45, -46, -47, -48, -49, -50, -51, -52

We will work with the data vendor to resolve this.

3. P. 197, nos. 91425, -29

We will work with the data vendor to resolve the first one. The second one will be produced.

4. P. 199, nos. 91450, -59, -68, -73

We will work with the data vendor to resolve the first and fourth. The second and third will be produced.

5. P. 200, no. 91475: no "to" + formatting issue w/"from" that appears to be Chris Kleminich?

It is from Chris Kleminich. We will work with the data vendor to resolve the rest.

6. P. 204, no. 91665

It is from Chris Kleminich. We will work with the data vendor to resolve the "to" issue.

7. P. 226, no. 99464

This is apparently an NTV file, and was mis-tagged as an email. Consequently, there is neither a sender nor a recipient.

8. P. 265, nos. 100783, 100786, -87, -88, -89, -90, -91, -92

100783 is from Linda Brickman to Karen Fann and Doug Logan.

100786 to -92 are from Randy Pullen via (6025242241@mms.att.net) to Ken Bennett (via arizonaaudit@gmail.com).

iv. Cut off "to" field:

1. p. 123, no. 81446

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2. p. 124, 81450

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v. Cut of "cc" field:

1. p. 131, no. 83051

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3. p. 185, no. 88126

This document will be produced.

4. p. 186, no. 88128

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5. p. 198, no. 65623

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