ARIZONA SUPREME COURT

ARIZONA CIVIL LIBERTIES UNION OF ARIZONA, Plaintiff/Appellee, v. DEPARTMENT OF CHILD SAFETY, Defendant/Appellant.	No. CV-20-0030-PR Court of Appeals No. 1 CA-CV 18-0486 Maricopa County Superior Court No. CV2014-007505

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The Department of Child Safety ("DCS") opposes the American Civil Liberties Union of Arizona ("ACLU-AZ")'s Petition for Review. In *American Civil Liberties Union of Arizona v. Arizona Department of Child Safety*, No. 1 CA-CV 18-0486 (Jan. 14, 2020) ("Opinion"), the court of appeals affirmed in part, vacated in part, and remanded the superior court's decision awarding ACLU-AZ attorney fees in its action seeking public records from DCS.

After ACLU-AZ filed its action, DCS produced records ("the post-litigation documents") that were responsive to thirteen of ACLU-AZ's outstanding records requests. The superior court awarded ACLU-AZ fees under A.R.S. § 39-121.02(B), which authorizes an award to a requestor who substantially prevails in an action seeking public records. It held that ACLU-AZ had substantially prevailed because DCS had not promptly produced the post-litigation documents and because the court of appeals had held in a previous appeal in the case that DCS's case-management system, the Children's Information Library and Data Source ("CHILDS"), was a public record.

DCS appealed, and the Opinion affirmed the finding that DCS had not promptly produced the documents but reversed the fees award after determining that ACLU-AZ could not have substantially prevailed on the CHILDS issue because DCS had never opposed ACLU-AZ's position that CHILDS was a public

record. The Opinion determined that section 39-121.02 authorizes awards to requestors who have sought specific public records, have had the request denied, and have substantially obtained the information that the request sought in an action under the statute. It directed the superior court in determining on remand whether ACLU-AZ had substantially prevailed to consider whether the scope of the post-litigation documents that DCS had produced was sufficient, when measured against the scope of ACLU-AZ's outstanding requests when it filed the action, to establish that ACLU-AZ had substantially obtained the information that its requests had sought. Because both the record and section 39-121.02's plain language support the Opinion's determinations, this Court should deny review.

ISSUES PRESENTED FOR REVIEW

1. Does section 39-121.02's plain language establish that the Opinion correctly determined the showing necessary to "substantially prevail" under it?

2. Did the Opinion disregard the previous remand's scope?

MATERIAL FACTS

In 2013, ACLU-AZ requested public records from DCS's predecessor agency. Opinion ¶¶ 1 n.2, 3. After producing some records—including some from CHILDS—the agency stopped providing records as it dealt with a backlog of uninvestigated cases and associated organizational issues. *Id.* ¶ 3. ACLU-AZ submitted additional requests during that time. *Id.*

Dissatisfied with DCS's response, ACLU-AZ filed this action. *Id.* ¶ 4. DCS then produced the post-litigation documents but objected to ACLU-AZ's remaining sixty-four requests because they asked it to create new records from the data that existed in CHILDS rather than to produce existing records. *Id.* ¶¶ 4, 33. The superior court agreed that DCS need not respond to those requests. *Id.* ¶ 4.

ACLU-AZ appealed. In *American Civil Liberties Union of Arizona v. Arizona Department of Child Safety*, 240 Ariz. 142 (App. 2016) ("*ACLU-AZ I*"), the court held that CHILDS was a public record, ¶ 12, but that DCS need not respond to the outstanding requests, ¶ 24. It remanded for the superior court to determine whether DCS had promptly produced the post-litigation documents and to redetermine whether ACLU-AZ had substantially prevailed. *Id.* ¶¶ 31, 36-37.

On remand, the superior court found that DCS had not promptly furnished the documents (Pet. App. 41-42) and awarded ACLU-AZ fees for that reason and because *ACLU-AZ I* had held that CHILDS was a public record (*id.* at 42-43). DCS appealed. Opinion ¶ 8.

The Opinion affirmed the finding that DCS had not promptly produced the post-litigation documents, ¶ 19, but held that the superior court had erred in deciding that ACLU-AZ had substantially prevailed based on the determination that CHILDS was a public record, ¶ 24. It vacated the fees award and remanded

for a redetermination of whether ACLU-AZ had substantially prevailed. *Id.* ¶ 34. ACLU-AZ petitioned for review.

REASONS WHY THE COURT SHOULD DENY REVIEW

I. Section 39-121.02's Plain Language Establishes that the Opinion Correctly Determined the Showing Necessary to "Substantially Prevail" Under It.

A. The Opinion Correctly Interpreted Section 39-121.02's Plain Language.

ACLU-AZ mistakenly contends that the Opinion misconstrued and rewrote section 39-121.02 and deprived the superior court of discretion to determine whether a requestor has "substantially prevailed" for purposes of awarding fees under it. Pet. at 2-3, 6-16. In interpreting statutes, this Court looks first to their plain text, which controls unless it results in an absurdity or a constitutional violation. *State v. Green*, 248 Ariz. 133, 135, ¶ 8 (2020). Section 39-121.02 creates "the statutory procedure necessary to obtain public records." *Paradigm DKD Grp., LLC v. Pima Cty. Assessor*, 246 Ariz. 429, 435, ¶ 19 (App. 2019). As relevant, it provides as follows:

> A. Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body.
>
> B. The court may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.

As both *Paradigm* and the Opinion recognize, the statute's plain language focuses on the specific public records to which a requestor has sought access and to which access has been denied. *Paradigm* held that the statute does not permit a fees award based on obtaining records outside the underlying record request's scope because that would frustrate the statute's express requirement that requestors "attempt to gain access to public records extra-judicially before bringing such a request to court." 246 Ariz. at 435, ¶ 20. The Opinion read subsections (A) and (B) together and determined (1) that they authorize a requestor who has been denied access to file a special action, "the foundation" of which "is the improper denial of access" and (2) that they authorize awarding fees "only to the extent" that the requestor sought specific documents, the request was denied, and the court ultimately granted access to those documents. Opinion ¶ 25. The Opinion noted that *Paradigm* had established that success in such an action "is measured against the pre-action requests that were wrongfully denied." *Id.*; 246 Ariz. at 437, ¶ 27.

The Opinion observed that subsection (B) requires that a requestor have *substantially* prevailed to obtain an award, that every statutory term must be given meaning, that the statute did not define "substantially prevail," and that *Paradigm* had come closest to defining it by stating that a requestor may "substantially prevail" only to the extent that the action was necessary to accomplish the record request's purpose, 246 Ariz. at 437, ¶ 27. Opinion ¶¶ 23, 26. The Opinion defined

"substantial" as "'[i]mportant, essential, and material; of real worth and importance' or '[c]onsiderable in extent, amount, or value; large in volume or number.'" *Id.* ¶ 26 (quoting *Black's Law Dictionary* [11th ed. 2019]). It concluded that to *substantially* prevail, the requestor must receive documents "'of real worth'" to its request, "either by their quality or their quantity." *Id.* It explained that "[t]he pertinent question is whether the documents received were material to the request at issue or whether the request to which the government was forced to respond is significant or substantial." *Id.*

ACLU-AZ mischaracterizes the Opinion as holding that a requestor can substantially prevail based only on the records that the requestor receives and that other factors—including the litigation's results—are irrelevant. Pet. at 1-4, 13-15. Instead of stating that the action's result was irrelevant to determining whether a requestor substantially prevailed, the Opinion focused the inquiry on the requestor's "degree of success in the action"—that is, on whether the requestor "substantially obtained the information" that the underlying request sought. Opinion ¶ 28. In doing so, the Opinion did not preclude courts from considering legal determinations or other factors in deciding whether a requestor has substantially prevailed. It simply held that courts cannot consider factors that are not related to the requestor obtaining access to documents originally withheld. *Id.* ¶ 31. This comports with the statute's plain language, which authorizes an award

when a requestor substantially prevails in an action to gain access to such documents, and with *Paradigm*'s holding that a requestor can substantially prevail only to the extent that the action was necessary to accomplish a record request's purpose. *Paradigm*, 246 Ariz. at 437, ¶ 27.

ACLU-AZ also mistakenly alleges that the Opinion reduces the determination whether a requestor has substantially prevailed to a "pseudo-mathematical equation" that relegates superior courts "to the role of bean counters." Pet. at 1-4, 6, 13-15. The Opinion expressly stated that its holding did *not* mean "that a party may only substantially prevail based on the number of documents the requestor received relative to the total documents it sought to obtain through its action." Opinion ¶ 28. It explained that a party could substantially prevail *either* by obtaining documents "that were substantial to the underlying request" *or* by receiving responses "to a request which, by its nature, was substantial to the action." *Id.* ¶ 31; *see also id*. ¶ 26.

The Opinion noted that after ACLU-AZ filed its action, DCS produced responses to thirteen of the seventy-seven requests that were outstanding when the action was filed and that the superior court correctly declined to require DCS to respond to the remaining requests. *Id*. ¶ 33. Although the Opinion stated that DCS's thirteen post-litigation responses "provide[d] the context" for determining whether ACLU-AZ had substantially prevailed, it did not reduce that determination

to "a pseudo-mathematical equation," Pet. at 3. Opinion ¶ 33. It instead stated that the superior court must consider *both* "the scope of relief sought" *and* "the scope of the documents produced" and must focus on "whether the post-litigation documents were sufficient, measured against ACLU-AZ's overall requests, to find that ACLU-AZ had obtained a substantial victory against DCS." *Id.* ¶¶ 33-34.

ACLU-AZ also erroneously claims that the Opinion "gutted' the superior court's discretion to determine whether a requestor has substantially prevailed. Pet. at 2-3, 6-7. If the Opinion actually had reduced the determination to a "pseudo-mathematical equation," *id*. at 3, there would have been no need to remand the case. Instead of resolving the issue itself based on a simple equation, it stated that "whether the records provided were substantial to the underlying request or whether a party has received responses to a request, which by its nature, was substantial to the action" was a question of fact for the superior court, which was "in a better position to understand what information the requestor primarily sought." Opinion ¶¶ 28, 31. In remanding, it emphasized that the superior court had broad discretion to make that determination, *id*. ¶¶ 23, 28, 34, and stated that nothing in it should be interpreted to suggest a particular outcome, *id*. ¶ 34.

For the foregoing reasons, ACLU-AZ's assertions that the Opinion misconstrued the statute and improperly curtailed the superior court's discretion fail.

B. The Opinion Correctly Precluded the Superior Court from Considering the Determination that CHILDS Was a Public Record in Deciding Whether ACLU-AZ Had Substantially Prevailed.

ACLU-AZ mistakenly argues that the Opinion erroneously precluded the superior court from considering the determination that CHILDS was a public record in deciding whether it had substantially prevailed. *See* Pet. at 2-5, 13.

The strong presumption in favor of disclosure that the public-records statutes create applies only to documents that qualify as public records. *Griffis v. Pinal County*, 215 Ariz. 1, 5, ¶ 12 (2007). In the initial proceedings, the superior court did not determine whether CHILDS was a public record. *ACLU-AZ I*, 240 Ariz. at 146, ¶ 7. On appeal, the court of appeals held that it was. *Id*. at 146-47, ¶¶ 8-12. On remand, the superior court determined that DCS had maintained that CHILDS was not a public record and that ACLU-AZ had substantially prevailed primarily because of that holding. Pet. App. 41-43.

The Opinion reversed the finding that DCS had maintained that CHILDS was not a public record. Opinion ¶ 32. ACLU-AZ cited statements that DCS's then-director and its trial counsel had made at the hearing to support its contrary contention, but the Opinion held that taken in context, "those statements merely reflected DCS's position that it was not required to create new methods of searching and compiling information from CHILDS, not that the information on CHILDS was categorically immune from public-records requests." *Id*. It noted

that DCS had responded to several of ACLU-AZ's requests with CHILDS documents and had never argued in *ACLU-AZ I* that CHILDS "was immune to all public-records requests." *Id*.

The record supports this determination. ACLU-AZ identifies no evidence that DCS withheld documents on the ground that CHILDS was not a public record *before* it filed suit, and it relies on a single out-of-context statement made at the hearing (Pet. at 4), while ignoring several contradictory statements made at the same hearing. (Resp. App. at 21:7-17, 22:19-20, 25:8-26:7, 44:18-24, 53:8-20, 54:11-22, 55:9-17, 56:13-57:2, 57:18-24, 63:8-17, 65-72, 73-74.) Because the superior court's finding was clearly erroneous, the Opinion did not improperly restrict the court's discretion by reversing it. *See McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6 (App. 2002) (stating that appellate courts accept superior court factual findings unless they are clearly erroneous).

The Opinion's holding precluding the superior court from considering the determination that CHILDS was a public record in deciding whether ACLU-AZ had substantially prevailed is correct for two reasons. First, DCS was never adversarial on the issue. Opinion ¶ 32. (Resp. App. 75-84.) This comports with the statute's plain language. As *Paradigm* explained, "[s]emantically, one does not 'prevail' over an agency cooperating with, or acting to facilitate, one's goals; instead, one prevails over an adversary." 246 Ariz. at 436, ¶ 22. Moreover, one

can substantially prevail under the statute only to the extent that one's action "is necessary to accomplish" the purpose of the underlying request. *Id*. at 437, ¶ 27. To obtain the requested records, ACLU-AZ did not need to file suit to require DCS to reverse a position that DCS had never taken.

Second, the CHILDS holding did not result in ACLU-AZ obtaining any additional documents. Opinion ¶ 32. Although *ACLU-AZ I* held that CHILDS was a public record, it also affirmed the superior court's holding that DCS need not respond to ACLU-AZ's remaining requests. 240 Ariz. at 147-50, ¶¶ 12-24. Because a section 39-121.02 action is founded on an improper denial of access to records, a requestor can substantially prevail only to the extent that the action results in the court granting access to the records sought. Opinion ¶ 25.

For the foregoing reasons, ACLU-AZ's assertion that the Opinion erroneously precluded the superior court from considering the determination that CHILDS was a public record in deciding whether ACLU-AZ substantially prevailed fails.

C. The Opinion Did Not Ignore Public Policy by Construing Section 39-121.02 in Accordance with Its Plain Language.

ACLU-AZ maintains that because courts should broadly construe public-records statutes to further the public policy of facilitating access to public records, the Opinion erred by construing section 39-121.02 to not permit the superior court to consider on remand the factors that it had previously considered as well as

additional factors in determining whether ACLU-AZ had substantially prevailed. Pet. at 11-16. It notes that the superior court previously held that ACLU-AZ substantially prevailed because DCS did not promptly produce the post-litigation documents and because DCS had argued that CHILDS was not a public record. *Id.* at 5-6.

"Access to a public record is deemed denied if a custodian fails to promptly respond" to a public-records request. A.R.S. § 39-121.01(E). Denial of a public-records request is a prerequisite to filing a section 39-121.02(A) action. In determining whether DCS had promptly produced the post-litigation documents, the superior court was also determining whether DCS would be deemed to have denied ACLU-AZ's requests. The determination was therefore relevant to deciding whether ACLU-AZ had a basis for its action, not to whether it substantially prevailed in it. If the court had found that DCS had promptly produced the documents, DCS would not have been deemed to have denied ACLU-AZ's requests and ACLU-AZ would have had no basis for its action, much less any entitlement to a fees award. The Opinion therefore did not err by not instructing the court to consider on remand DCS's failure to promptly produce the documents in determining whether ACLU-AZ substantially prevailed. And as previously explained, the Opinion correctly precluded the court from considering the finding that CHILDS was a public record in making that determination.

ACLU-AZ maintains that the superior court should also be allowed to consider that *ACLU-AZ I* established as a matter of first impression that agencies must query their electronic databases in response to public-records requests. Pet. at 13-14. But this was not a matter of first impression because *Lake v. City of Phoenix* held that if agencies select electronic databases for storing records, they "must also assume the responsibility of producing such records in response to records requests that comply with the public records law." 220 Ariz. 472, 482, ¶ 29 (App. 2009), *vacated in part on other grounds*, 222 Ariz. 547 (2009). In *ACLU-AZ I*, the court held that the same reasoning applied in this case. 240 Ariz. at 148, ¶ 16. Moreover, like *ACLU-AZ I*'s determination that CHILDS was a public record, its determination that agencies must query their electronic databases did not result in AZCLU-AZ obtaining any additional documents.

ACLU-AZ suggests that this Court should read into section 39-121.02(B) the standards that apply in Freedom of Information Act ("FOIA") fees-award cases. Pet. at 14-15. It may sometimes be appropriate to consider FOIA cases in interpreting Arizona's public-records statutes. *ACLU-AZ I*, 240 Ariz. at 149, ¶ 18. Doing so here is unnecessary, however, because the factors that the Opinion instructed the superior court to consider on remand fully comport with section 39-121.02's plain language. *See Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, 548 n.3, ¶ 12 (App. 2012) (declining to adopt FOIA fees award factors

because section 39-121.02(B)'s language was unambiguous). Although ACLU-AZ argues that restricting courts to those factors will undermine the public-records statutes' purposes, Pet. at 11-16, as *Paradigm* explained, authorizing fees awards based on factors beyond those that section 39-121.02's plain language contemplates can also undermine those purposes. 246 Ariz. at 436, ¶ 24.

For the foregoing reasons, ACLU-AZ's assertion that the Opinion ignored public policy fails.

D. The Opinion Did Not Hold that Only Requestors Who Obtain Documents in a Special Action Can Substantially Prevail Under Section 39-121.02(B).

ACLU-AZ mistakenly asserts that the Opinion erroneously held that only requestors who obtain documents in a special action can substantially prevail under section 39-121.02(B). Pet. at 9-11 & n.3. In analyzing the statute's plain language, the Opinion stated that "action" in subsection (B) "necessarily refers to a special action appealing the denial of records" authorized by subsection (A). Opinion ¶ 25. Because ACLU-AZ filed a special action under subsection (A), *ACLU-AZ I*, 240 Ariz. at 146, ¶ 6, the Opinion had no reason to address whether a requestor seeking access to public records in an action other than a special action could substantially prevail under section 39-121.02(B). It focused solely on the standard that the superior court should apply in determining whether a requestor like ACLU-AZ has substantially prevailed within the meaning of subsection (B) in

a special action from the denial of a records request under subsection (A). *See* Opinion ¶¶ 25-34. As previously discussed, it correctly interpreted the statute's plain language with respect to that standard.

II. The Opinion Did Not Disregard the Previous Remand's Scope.

ACLU-AZ erroneously contends that the Opinion ignored the scope of *ACLU-AZ I*'s remand. Pet. at 16-17. In *ACLU-AZ I*, the court of appeals vacated the superior court's denial of ACLU-AZ's fees request and remanded for the court to determine whether DCS had promptly produced the post-litigation documents and to redetermine whether ACLU-AZ had substantially prevailed. 240 Ariz. at 153, ¶ 37. ACLU-AZ maintains that it was inherent in the remand that it could substantially prevail based solely on a determination that DCS had not promptly produced the documents. Pet. at 16-17. As previously discussed, ACLU-AZ is mistaken because that determination was relevant to whether DCS would be deemed under section 39-121.01(E) to have denied ACLU-AZ's requests for those documents, thereby entitling ACLU-AZ to file an action seeking them, not to whether ACLU-AZ had substantially prevailed in that action. *See* Opinion ¶ 20. The Opinion therefore did not ignore the remand's scope.

CONCLUSION

The Court should deny ACLU-AZ's Petition.

Respectfully submitted this 6th day of May, 2020.

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community college in Cochise County, I've had exposure to the requirement and our responsibility to provide public records as needed.

Q. Sir, the ACLU, in their legal briefs, the innuendo is that the entire CHILDS Database is a public record. Do you believe that?

A. I do not. I believe that is a stretch, at best. That is data. That is not a report. I've never been required to produce a report, create a report, and then to, in essence, do that tailored for a specific request as a priority from the agency.

And I should point out that this is a very time intensive, difficult process that takes an enormous amount of staff time. And it's not just Nick's time. It's not his staff, who are difficult to find, by the way, because there are very few people we can find that can manipulate data the way we need for these reports to be created.

Q. Sir, you heard Plaintiff's counsel talk about openings in the agency and in Nick's unit, in particular.

Is that still a problem?

A. It absolutely is. In fact, Nick's unit is 25 percent vacant.

Q. Can you tell your Honor why that is problematic?

A. Yes. Because it's been difficult, if not impossible, to find the people who are capable of doing

that work because every position is authorized for hiring. And we make efforts to find people, first.

And then secondarily, because the people we are trying to hire that can do this are paid a much greater sum in the private sector to be able to do this work. And so it's very difficult for us to find them. I luckily am not having that difficulty finding specialists. I'm not having that difficulty finding case aides. I'm not having the difficulty finding people in child welfare, in other areas. But similar to specialty mental health, behavioral health and medical personnel, it's not easy to find people to do this work.

Q. Sir, another innuendo in the legal papers filed by the plaintiff is that somehow your agency discriminates and doesn't like the ACLU.

Is there any truth to that innuendo?

A. No. I believe that it's my responsibility to serve the public and the people, and that would include the ACLU. And I will be happy to give them every one of those 206 reports that we already created and produced.

Q. Are you familiar with the public records requests that, the three different ones that total 91 separate requests that have been filed by the ACLU in this matter?

A. Yes, sir. I was an astounded. And I finally saw them and read them shortly before I became aware of this

process, well into my tenure as a director of the Division.

Q. Does Nick's unit have the time to be the research assistant for the ACLU, searching this CHILDS Database at their beck and call?

A. No, absolutely not.

MR. BEAUCHAMP: Objection. Foundation.

THE COURT: Overruled. Go ahead.

THE WITNESS: No, absolutely not. In fact, it hinders our ability to do the core job that we have. For example, for over a year, we were unable to get a report that told us about repeat reports. This is essential to child safety. If we are not able to track repeat reports, then children are placed at greater risk; and we need to be able to have reports likes that.

It took me, as I shared with you, practically seven months to get reports that I had promised the legislature that we would post that were taking Chapin Hall data and cleaning and scrubbing it and looking at it. To do that, we already do not do our regular and cleaning of the data because there are so many problems with the database and the data itself. This is an astoundingly bad database.

But there are so many problems with that data that it should be regularly validated. And we are not

doing that because there are simply not enough resources to be able to do that.

Q. BY MR. TRYON: Sir, you heard Plaintiff's counsel questioning about the database system, the management system that we called CHILDS. If you had an unlimited amount of money, would you address that problem?

A. Absolutely. I would replace it immediately, but the estimates for replacement are between $40 and $80 million and that would take between three and four years; and we were given $5 million to explore the possibility. And quite frankly, I doubt whether we'll get more from the legislature, given what's happening. In fact, I have to be in front of the Joint Legislative Budget Committee today to beg for the money to be released to us for the second quarter so that we can continue doing the work protecting children.

Q. Well, good luck with that, sir.

A. I need it. Thank you.

Q. Sir, as the director, did you make a decision that Nick's unit would no longer work at the beck and call of the ACLU?

A. Yes, I did. I was astounded that the agency had exceeded to do this request. And not only here, but in other settings. You know, Nick is a great guy and he works really hard, but his only answer seems to be yes.

And he doesn't understand the strategic level needs of the agency. He doesn't understand, for example, when he's doing work like this, that my data research person is unable to do her work and is doing the work that his staff should be doing and not doing it as well as his staff should be doing, which delays reports that we need for the operation of this agency.

Secondly, it has always been in my experience in state government a policy that, when you have a report, you produce that report. That is public information. You are never required to create a report that doesn't exist already. And just because data is there, doesn't mean it doesn't exist.

And frankly, if I could provide all of the data and make sure that the information was available, I'd give them every bit of data that we have in the system. But we have responsibilities to make sure we're protecting people and we are protecting our liability as an agency for compliance with federal and state law.

And then secondarily, I was astounded that nobody questioned the practice and that it was driven so low in the organization. In my 28 and a half years of state government, I said back then that I was never exposed to an agency that was so poorly run and that had so little direct supervision at that high level to make these kinds

of policy decisions. That's not something I would have authorized.

I would have asked that we assess the request and identify every single report that could be considered to be complete with those requests, provide that information and let the ACLU know that these reports don't exist and we're not going to create reports from whole cloth.

Q. Sir, if you will, we have drawn a line in this litigation saying to the ACLU, we're not giving you anything the courts -- if the judge disagrees and orders you to do that, would you please tell the judge the impact that would have on your agency to go back to work for the ACLU.

MR. BEAUCHAMP: I object to the characterization of that question.

THE COURT: I'll sustain the objection to the form, but --

Q. BY MR. TRYON: Did you understand the question, sir?

A. Yes, I do. It would be crippling to the ability of this agency to proceed.

MR. BEAUCHAMP: He sustained my objection.

THE COURT: That's okay. I'm going to let him answer t.

MR. BEAUCHAMP: Okay.

THE WITNESS: I apologize, your Honor.

THE COURT: That's all right. It went to form. I'm going to let him answer the substance of it. Go ahead. I think you just did.

THE WITNESS: Yes, I did your Honor. It would be crippling to the agency. It would be literally impossible for us to accomplish the core mission. We have been tasked by the Governor with creating an agency that is systemized, that is automated and that functions to serve the protection of our children, the most vulnerable children in Arizona. And we do not do that unless we have access to the information we need and that that information is accurate.

We already cannot meet our needs when it comes to legislatively-mandated reports and state and federal legal requirements for reports. It's already difficult for use to achieve that, much less this crushing workload on top of what we are trying to accomplish. We are, I think of one mind that our job is to do the best possible job to protect children. And this works at cross purposes with that goal.

Q. BY MR. TRYON: Sir, are you familiar with the estimate, Mr. Espadas said it would take five months to complete answering the ACLU's requests in this matter?

A. Yes, I am. Again, Nick is a great guy; but Nick

is three levels below me in this organization and has no clue about the strategic needs of the agency. He doesn't understand that, for every single thing he does, that there are other things that not being done or that are being done by other people, that are impeding their ability to do their job.

A perfect example of that is what I describe -- Katherine Guffy (phonetic), which is the closest thing I have to a research bureau in this agency which we need desperately. Her ability to do her work is putting children at risk, first of all. And then secondarily, her inability to do her work has led to her trying to do his work and do it inefficiently, which is making our job even more difficult.

Q. Sir, another -- this isn't an innuendo. This is a direct statement in the plaintiff's pleadings. Why don't you -- you, meaning the director -- why don't you just hire another person and have him spend five months working for the ACLU?

Why don't you do that, sir?

MR. BEAUCHAMP: Objection. That appears nowhere in our papers. I would be happy if you would find that quote.

THE COURT: Yeah, I'm going to sustain that. You can ask a broad question, why don't you hire people. But

I thought he already answered that.

MR. TRYON: Yes, your Honor, he did. And if I'm incorrect, I will apologize. But I'll double check that.

THE COURT: It's okay. I thought he already told me why he couldn't get people. He's trying. They're authorized. They're not out there willing to take it at the pay they're offering. That's what I heard.

MR. TRYON: Thank you, your Honor.

Q. Sir, if you were able to hire a full-time person to help the ACLU respond to their request, would you do that? Do you have the money to do that?

A. I do not have the money to do that. But if I were able to hire that extra person, that might give us the capacity -- and that's assuming we were to hire the 25 percent vacancy rate and get them to full staffing. That would only allow us to accomplish what we now need to do that we don't have authorization for.

It's the same thing -- I'll draw an analogy -- with the specialists that do the casework in the field. We had to hire hundreds of new positions just in order to meet the basic needs of this agency. That has nothing to do with the 13,024 backlog or the 6595 NI cases that were not investigated. We went from 843 on average new investigations per week last fiscal year, and we are already at 942 new investigations this year.

Without the capacity to do the work, it's meaningless to have extra bodies if they are insufficient; and that would be the case here. One person would be insufficient for this work.

Q. Sir, the people in the field, we're all familiar that DPS, Phoenix Police and other major police agencies have laptops in the police car.

Do your field workers have laptops to access CHILDS?

A. No, with the exception of 192 that I purchased and put out in the field with another 1700 that I'm hoping today -- please God -- that I'm hoping to get authorization from JOBC to spend the money that we were promised that so that every employee could have that laptop. But that still doesn't solve the problem. The problem is CHILDS, the database and access.

What it does is create efficiencies for these employees in the field. Because right now when you're waiting in court to be called in -- in fact, I just met an employee that waited over four hours and was never called into the hearing because the hearing went on longer. And for four hours, he was incapable of doing any work because they didn't have a laptop and they weren't able to link to the child.

Right now, they must stop what they're doing in

the field and go back to the institution or to the office to access CHILDS and to enter information into CHILDS. In fact, that's part of the problem that we have with our reports; that is, that data entry is so difficult for these staff that they have to stop what they're doing to be able to make the data entry.

MR. TRYON: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. BEAUCHAMP:

Q. I'm Keith Beauchamp, Mr. Flanagan. I don't think we've met. You testified that Mr. Espadas' unit is 25 percent understaffed.

How many people are in that unit?

A. There are eight people in that unit --

Q. Okay.

A. -- that he supervises.

Q. And how many positions of those eight are vacant?

A. Two.

Q. And for how long have those two positions been vacant, to your knowledge?

A. Those two and I believe one other had been vacant for as long as I've been associated with the agency.

Q. Did you read Mr. Espadas' deposition given in

this case?
A. No, I did not.
Q. Do you have an understanding as to what testimony Mr. Espadas gave as to really why those two or really three positions were vacant?
A. No.
Q. Do you think Mr. Espadas knows more about why those positions are vacant than you do?
A. I would suspect that he has information that I do not have, since I am the director of the agency and he oversees that unit, yes.
Q. You testified that one difficulty in hiring people was that they wanted more money than you could pay.
What's your basis for knowing that with respect to the two vacant spots in the RSU?
A. That's based upon information that I got from Michael Wisehart when I first came on board and was talking about the unit and filling those positions.
Q. So that would have been in the early part of 2014?
A. Yes, sir.
Q. Have any offers been made for the two vacant positions in the RSU since you started at DCS or -- strike that -- since January of 2014?
A. I don't know, sir.

Q. So you don't know whether offers have been made at all, correct?
A. That's correct, I do not to know.
Q. Does the mission of the Department include complying with the public records statute in Arizona?
A. Yes, it does.
Q. Do you, as the director, have obligations with respect to transparency?
A. I do.
Q. What are those obligations?
A. To make every bit of it -- and I would say that that is heightened as a result of the creation of this agency and my accepting the mission of this agency. Because that specific direction I got from our Governor was to be as open and transparent as absolutely possible, given the restrictions of the law and our mission.
Q. And the language you added there at the end about given the restriction of the law, that's not in the statute. That's just something you're saying now, isn't it?
A. Well, yes, because I cannot contradict, I cannot override capita, for example. I can't do something that's contrary to law.
Q. So you might have conflicting statutory obligations is what you're saying, right?

A. Yes, sir.
Q. And the statute doesn't direct you to place the transparency statutory obligation below any other statutory obligations, does it?
A. Again, unless there's a conflict, no.
Q. I blew up various statutory provisions for the purposes of today's hearing. And since we're talking about this one, can you read the bottom part of that?
A. Yes, sir. It reads --
Q. I'm going to ask you that. So this is a quotation from ARS 8543 (sic) Section A2. And it reads: The director shall -- parentheses two -- provide transparency by being open and accountable to the public for the actions of the Department.
That's the statute you're talking about, correct?
A. Yes.
Q. How many employees does DCS have at the moment, approximately?
A. We are approaching approximately 2500. We will, at the end of the day, be close to 3000.
Q. And of those approximately 3000 positions, approximately how many of those are not caseworker positions?
A. I don't know the exact answer to that, but I would guess that about six or so hundred are not in direct

field positions, direct provision of care and service.

Q. As a consequence of the enactment of the statute that created DCS, you, as director, are obligated to provide regular reports to the legislature and the governor with respect to employee staffing, correct?

A. That's correct.

MR. BEAUCHAMP: I have marked -- I haven't marked yet, but I've got a document in my hand that's dated August 8, 2014. I'd like to use this and given, following his testimony, I would likely move to admit it, your Honor. Your Honor, I have one for you, if you would like and one for the clerk.

THE COURT: This is 53?

MR. BEAUCHAMP: Yes, your Honor, this would be 53.

THE COURT: Okay. Any objection to this, by the way?

MR. TRYON: May I have just a moment?

(Discussion off the record.)

MR. TRYON: No, your Honor.

THE COURT: All right, 53 is admitted.

(Whereupon, Exhibit No. 53 was admitted into evidence.)

Q. BY MR. BEAUCHAMP: Do you recognize what we've marked as Exhibit 53?

A. I do.
Q. Could you please tell me what it is?
A. This is a document that has a cover memorandum signed by me, addressed to Governor Brewer and copied to a number of legislators and other people that served the legislature and the executive branch. Attached to that is the automated monthly staffing report, which is compliant with the statute giving the information about who it is that we have hired with the agency.
Q. On page 2 of this document, which is the monthly staffing report itself, there are two spreadsheet or boxes. And in those boxes, would you agree that, as of July 2014, there are funds budgeted for 1406 specialists one, two, three and four personnel?
A. That's correct.
Q. And in addition to those 1406 budgeted positions, there are 1639 non-caseworker personnel positions that are appropriate?
A. That's correct.
Q. And of those roughly 1600 non-caseworker positions, approximately 1145 were filled as of July 31, 2014, correct?
A. That's correct.
Q. And if you were to add up that 1145 number with the 1309 number in the box that appears above it, you

would come up with 2454 employees as of July 31st; is that correct?

A. I will have to trust your math.

Q. Okay. And that's pretty consistent with what you were telling me a moment ago in terms of broad strokes, correct?

A. Yes. Because the bottom box includes positions that are a direct provision of service, including OCWI, case aides, unit supervisors, the people directly in the field.

Q. To your knowledge, has any consideration been given to adding additional positions to the RSU unit?

A. No, there have not been. And I can explain why, if you ask.

Q. Sure. Tell us why.

A. Sure. The process of creating the agency and identifying what the legislature would accept and pay for was a process of compromise. There were three and a half months of work that were done that identified what the needs of the agency were. We clearly did not get everything that we need. We got what was acceptable in the process of compromise. So we didn't get as many caseworkers as we necessarily need or we didn't get as many other positions as we needed. This was a process to focus on the most critical needs of the agency. So the

triage was to focus on the capacity problems that led to the non-investigated cases.

Q. And the requests that were initially made by Governor Brewer to the Legislature, there actually was not a request to add additional positions to the RSU Unit, was there?

A. No. And that's precisely because that negotiation took place beforehand.

Q. Let's talk about transparency for a moment. Will you agree with me that the legislature, not only intended, but directed that DCS be more transparent than the predecessor agency?

A. Yes.

Q. And if you -- I'll give you the exhibit numbers if you would like. If you will look at Exhibit 34.

A. You said 34, sir?

Q. Yes, sir. Governor Brewer's Executive Order Establishing the Cabinet Level Child Safety and Family Services Division position on January 13, 2014, the second paragraph from the bottom on page 1 provides:

Whereas an independent standalone organizational and direct reporting structure for the State Child Welfare Program will ensure the effective delivery of services and efficient utilization of resources providing appropriate outcomes for youth -- I'm sorry -- for children, youth and

families through transparency, increased accountability and coordinated delivery service.

Do you see that?

A. Yes, I do.

Q. So the concept of increased accountability and increased transparency appears initially, at least in the Governor's executive order in mid January of 2014, correct?

A. That's correct, and even in specific direction from her preceding that.

Q. And if you turn to Exhibit 33, which is the Governor's State of the State Message. So it's the exhibit immediately before the one I just read from.

A. Uh-huh.

Q. If you turn to page 7, one of the comments that the Governor makes according to this transcript of her State of the State of the Union -- I'm sorry -- her State of the State Message is, quote, enough with the lack of transparency, correct?

A. That's correct.

Q. And the Care Team issued its report at the end of January of 2014, correct?

A. That's correct.

Q. And that report's dated January 31, 2014, correct?

A. I don't know the exact date, but I'll accept that.

Q. Would you turn to Exhibit 38. Do you have in front of you, sir?

A. Uh-huh, yes.

Q. Would you agree that Exhibit 38 is the January 31, 2014, Care Team report?

A. Yes.

Q. And the chair of the Care Team was yourself, correct?

A. That's correct.

Q. And consequently, I assume it's fair to say that you agree with the assessments and the recommendations that are found in the report, correct?

A. I do.

Q. If you look on page 1, that is the numbered page 1 of the report of the letter --

A. Yes, sir.

Q. -- there's an executive summary. And under the the lessons learned heading, the very first bullet point said, NI. NI is referring to the non-investigated cases.

Would you agree?

A. That's correct.

Q. And it says NI happened due to systemic failure, a lack of accountability and transparency and bad decision

making, correct?

A. That's correct.

Q. And the conclusion appears in other places in this report -- that is the conclusion of the Care Team -- that a lack of transparency contributed to the problems that were at CPS, if you will?

A. That's correct.

Q. To address that lack of -- strike that. To address the problems that the lack of transparency caused, the Care Team recommended that there be more transparency in any subsequent agency or in any changes that were made, correct?

A. That's correct.

Q. And if you turn to page 12 of the Care Team report, this is the heading or the part of the report that's entitled, Strategic Recommendations. And the first paragraph of the Strategic Recommendations section, in the very last sentence, the Care Team wrote: In order for the recommendations of the Care Team to drive meaningful change, the agency must have accountability and transparency in documenting progress for implementation of these solutions, correct?

A. That's correct.

Q. And in the boxes below that, which identifies major categories of recommendations, improved transparency

is one of those major categories of recommendations, correct?

A. Yes, it is.

Q. And improving the functionality of CHILDS is another, correct?

A. Yes, it is.

Q. And if you could turn to the next page, on page 13 of Exhibit 38, the first full paragraph on that page says, as its first sentence: Chief among the Care Team recommendations is to establish an agency grounded in transparency with a rigorous commitment to accountability, correct?

A. That's correct.

Q. If you turn back it page 18?

A. Forward, forward to page 18?

Q. Just skip to page 18, whether it's backwards or forwards for you. On page 18, it says: Achieve transparency without jeopardy.

Do you see that heading?

A. I do.

Q. And the first sentence below that says: The agency must strive to establish maximum transparency in its actions to recapture the trust of the public and create agency accountability, correct?

A. That's correct.

Q. And in the third bullet point below that section, it reads: It is imperative that the agency share its outcomes and communicate both positive and negative information in order to be held accountable by the public it serves through a robust public information and community liaison operation, correct?

A. That's correct.

Q. And then the bullet point below that says: The agency should conduct trainings internally to manage public records requests, correct?

A. That's correct.

Q. Have you established a public records request unit at the department since you have arrived?

A. We have not yet, no.

Q. And in fact, what you have done, is you have made the department less transparent by changing the existing policy of allowing public citizens and organizations, such as the ACLU to obtain information from CHILDS?

A. I disagree completely with that.

MR. TRYON: Objection, argumentative.

THE COURT: Overruled.

THE WITNESS: I disagree completely with that. In fact, we have become far more transparent and more functional as a result of organizing the requests and making sure that those requests are made and exceeded to

based upon our ability and the mission of the agency. And we've published more information than our predecessors have to include creating a website and posting information on that website which will increase over time that gives a data look into the agency in our productivity and our outcomes.

Q. BY MR. BEAUCHAMP: And the information that is provided is information that the agency, someone at the agency deems as what the public ought to know, correct?

A. No. I would agree disagree with that typification also. We produce everything that we have available or can make available that makes sure that we are explaining what we're doing and how we're doing it.

Q. The decisions about what information is going to be provided are made by individuals at the Department, correct?

A. By me, yes.

Q. And if there is information that a citizen or a citizen organization wants to obtain that the Department hasn't provided, as far as you're concerned, they are not going to get it if it comes up?

A. If it is something that is not in an existing report or one that we can provide readily without it impeding our ultimate mission accomplishment, yes.

Q. And that was not the policy of DES or CPS, was

it?

A. You had mentioned policies earlier, and I believe --

Q. You could answer that one, I believe, yes or no. Could you please answer that one and then give me whatever --

A. Well, it was not the policy then, no, because that's the wrong definition of policy, sir.

Q. We can talk about that for a moment. You indicated that you were astounded at what low-level supervision there was. You're aware that, with respect to the May 2013 requests, that one of the requests that's at issue in this litigation, Flora Sotomayor and Mr. Ewy were involved in the initial meetings to discuss what would be provided in response to that, correct?

A. I am.

Q. Do you feel like Mr. Wisehart did a bad job of supervision on the May 2013 report?

A. I do. I think he made a bad decision by referring the information forward without thinking about the consequences and without raising it to the director of the agency. But I do not think he did a bad job, given the problems that he was facing.

Q. If you would turn to Exhibit 32 for a moment. Exhibit 32 is a press release issued by the Governor when

she signed legislation that authorized the creation of DCS I believe. And in the section paragraph of Exhibit 32, the Governor wrote: The legislation passed this week -- and I'll skip a few words here -- mandates, transparency and accountability.

Taking out a little bit of the middle, that's what that says?

A. That's correct.

Q. And would you agree with that characterization of what the legislation created, wouldn't you?

A. I absolutely do and obviously argued for that.

MR. BEAUCHAMP: Would you turn to Exhibit 25, please. Your Honor, I don't have a watch on me. I don't know how much, where we are timewise.

THE COURT: How much more do you have?

MR. BEAUCHAMP: I'm probably half way through, so I've got a bit left. I'm happy to break. That's why I was raising the issue.

THE COURT: What is your preference? Do you want to finish this? Does he need to get out? Sounds like he has someplace to be.

MR. BEAUCHAMP: I do actually have a slight preference, which is, if it were permissible, I would like to have the break, given that I didn't have the chance to depose him and didn't know some of what he was going to

say in terms of getting myself organized.

THE COURT: What time is your thing this afternoon?

THE WITNESS: The Joint Legislative Budget Committee, your Honor, begins at 1:30.

THE COURT: How much time?

MR. BEAUCHAMP: Given that, I will go forward and finish. I'm getting it will be about 15 minutes. But I think that what he's going to go to at 1:30 is more important than this.

THE COURT: All right.

Q. BY MR. BEAUCHAMP: Exhibit 25 is an e-mail exchange relating to a Children's Action Alliance request.

Have you seen this e-mail exchange before?

A. Yes, I have.

Q. Let me ask you, what did you do to prepare for your testimony today, Mr. Flanagan?

A. I looked at the information that had been given to me previously by the Attorney General's Office.

Q. Do you recall that you, in approximately mid April of 2014, there was a request from the Children's Action Alliance for some information that was going to come out of the CHILDS system?

A. I do now looking at this document, yes.

Q. Is this document one of the documents you

reviewed in preparation for your testimony today?

A. Yes, it is.

Q. Okay. And let me turn back to the end of this document so we understand what we're talking about. On page 4 of Exhibit 25 is the last part of the request from Beth Rosenberg, the director of Child Welfare and Juvenile Justice with the Children's Action Alliance.

If you look at her request -- please read it. I understand her request to say that the Children's Action Alliance is asking the Department to provide the number of children in foster care in each county for a particular point in time, although they're flexible as to what that point in time is.

Would you agree that that's a fair characterization for a request?

A. Yes, I do.

Q. And as of April 18, 2014, that information was not available in any report that's distributed by the department.

Would you agree?

A. To my knowledge, that's correct.

MR. TRYON: Excuse me, your Honor. We have an outstanding objection to the relevancy of this entire issue. It was raised when your Honor ordered production of these documents. This line of questioning has nothing

to do with the issue we're before the Court.

MR. BEAUCHAMP: I beg to differ. I think that the witness has testified very broadly about the effects that providing responses would have on this agency. And he's testified about the concept that my client should be satisfied with information that's contained in preexisting reports.

I think this demonstrates that the information that people are asking for is not that difficult to obtain and that there is important information that's not provided in the reports that the Department sets out. I also think it relates to the notion that, ultimately, of whether the Department's acting in good faith here.

THE COURT: I'm going to you allow it. I'm going overrule the objection. Go ahead.

Q. BY MR. BEAUCHAMP: So that request is made on the 18th. If you look at the bottom of page 2 and then going on to page 3 is an e-mail from Mr. Espadas on which you are copied.

Are you with me on the bottom of page 2 there, sir?

A. Yes. And I'm assuming that you're looking at the Friday, April the 18th?

Q. That's correct. And Director Flanagan, if there are times you're not with me, just let me know.

Otherwise, I'm just going to ask the questions.

So Mr. Espadas writes there: We have been doing the report for quite a while.

And then if you look back at the top of page 3, he says: It's not a difficult pull. It's just taking the time to stop other things and pull it.

Do you see that?

A. I do.

Q. And you respond to that: That's my problem with this. We should not be taking you or your unit's time to create reports we don't already have in our library for constituents and their needs or wants.

Then you write: We need to be focused on our needs and those aligned with the executive, correct?

A. Yes. And that sounds to me that that's exactly consistent with what I've been saying.

Q. So even when you're told by Mr. Espadas that it's not that difficult to provide the information out of CHILDS that the Children's Action Alliance has requested, and that he's been doing that for some time now, you tell him not to do it, correct?

A. Yes, sir. Precisely because this is the first time that I became aware that he was responding directly.

Q. Director Flanagan, with all due respect, I'm going to ask you questions; and you get a chance to

provide answers to them, but not beyond the scope of my question. And if I'm going to be done here in time for you to make that meeting, I would ask you to answer my question and not add on more. Your lawyer will get back up here and ask you anything he wants.

A. I thought I was being responsive to your question. And I'm sorry, but I still do.

Q. Following the direction from you on the 18th not to provide that information -- well, let me back up. When you say we should be focused on our needs and those that are aligned with the executive. What do you mean by aligned with the executive there?

A. So in this particular case, with the completion of the NI investigations, with the recreation of the agency, with solving the problems we were facing with providing safety for the children that we are responsible for which we were not doing adequately.

Q. Well, what is it about the needs of the executive and being aligned with those needs that made it inappropriate not to let Mr. Espadas provide the information to the Children's Action Alliance the?

A. Well, first of all, it's inappropriate, highly inappropriate for somebody from the public to contact an employee of the agency directly and respond for and then get information without that chain of command being

involved or aware.

Secondly, it's highly inappropriate for that employee to make a decision to do that when it conflicts with the direction they've been given from the agency and from the executive, since we're an executive branch agency, or for that matter, for the legislature.

Thirdly, because he had never considered the consequences, he doesn't understand the consequences of doing work like this. And he says himself in the exhibit that you shared with me that this has an impact probably because he has to stop other things he's doing to do it, which is exactly the argument that I've made. This is highly inappropriate.

Q. So it's inappropriate for members of the public to contact individuals of the Department directly without going through the chain of command. There was no chain of command for public records requests and there still isn't --

A. Actually, that's not accurate.

Q. Could you let me finish my question, sir?

A. Yes, sir.

Q. There wasn't -- because she's taking things down. I'm not being petty. She's got to write this.

There was no chain of command for civilian public records requests that the time Department had for April

18, 2014?

A. No. There was.

Q. And --

A. You're wrong. There was.

Q. Okay.

A. There's a public records request unit that nobody bothered to go through. And that unit, you've mentioned at least one of those people's names earlier in this process.

Q. And you said that it was inconsistent with the direction that was provided by the Legislature and the Governor for Mr. Espadas to provide this information, correct? That was point two of the three points that you just gave.

A. It's inconsistent with the direction from the executive and the legislature for him to be doing things that takes us off the task we were assigned to do to protect children's safety, yes, it is. And it's inappropriate for a request to be made for public records and not go through the public records office.

Q. If you go on the website right now, will you find the public records office of the Department?

A. You will find the public records office for the Department of Economic Security who still serves us.

Secondly, you will also find that there is a

person in my office, Mark Ewy, who is a person that can be gone to for public records requests.

Q. You won't find that on the public website, Mr. Ewy, will you?

A. I don't know if Mr. Ewy's name is there or not, but there is an office, yes.

Q. And you think that providing the information requested by the public is inconsistent with the statutory direction in Section 85, 453 to provide transparency by being open and accountable to the public?

A. No, sir, I don't. It seems you're twisting my words. I am absolutely of the belief that I'm completely in line with the legislative requirement and the statutory requirements to be open and transparent. I am not in agreement with us having to provide, create reports, to spend staff time that keep us from the primary mission of the agency. I am more than willing to give you every one of the 206 reports we have and any future reports we produce. And if we are able to fix CHILDS, I would be more than happy to give you everything that we can possibly produce with an efficient and effective system, as I have ADJC and ADC before.

Q. So if you have the information available, you're willing to provide it.

Is it what you're saying?

A. Absolutely.

Q. And if you turn to page 1 of Exhibit 25, Mr. Espadas tells you that he has the information available for the Children's Action Alliance because he's pulled it on his own time over the weekend. And you still told him not to provide it, didn't you?

A. I'm not sure where you're seeing that I told him not to provide information.

Q. That's a question to you. You told him not to provide that information, didn't you?

A. No, I didn't. I didn't tell him not to provide the information. Because he had gone ahead and done the information, the information is now available. It's in a report. It's a public report.

But I have an issue with him having done that. He doesn't have his own time. His own time is work time for the agency.

Q. So my question to you was, if you look at this e-mail that's dated May 25th, the first page of Exhibit 25, Mr. Espadas said: This past weekend, I put this together for her.

And he's got the table here in the chart. And he says: If you are amenable to me providing her the information, I will make a very clear statement that, in the future, all of these types of requests must go through

either the TIO office or the deputy director.

Do you see that?

A. Yes, I do.

Q. And is it your testimony, as well -- what did you tell, did you tell him it was okay to provide this information?

A. Yes. Once information is -- and this is consistent with my belief.

Q. I'm not asking in the abstract?

MR. TRYON: Excuse me, your Honor. Counsel asked a question and he didn't like the answer.

THE COURT: Go ahead and answer.

THE WITNESS: It is entirely consistent with my belief that, if we have a report, no matter how we got that report, that it be provided. And, yes, my direction was, we have the report, we have the information, you can provide it. What you cannot do is you cannot tweak it for her, you cannot do additional work for her; and furthermore, the request for reports cannot come to you from her.

Q. BY MR. BEAUCHAMP: So your testimony is you told Mr. Espadas, upon your receipt of this e-mail on May 5 of this year, to provide the information he has contained here in this e-mail?

A. Every bit of information we have available in an

existing report is made available upon requests, absolutely.

MR. BEAUCHAMP: Could you read my question back, please?

THE COURT: Let's just move on. Ask again.

MR. BEAUCHAMP: One final question.

Q. Do you know if this information in this e-mail that we've marked as Exhibit 25 is in any report?

A. It is a report, yes, sir. This e-mail is a report. It's a public document. And, yes, this information, to my knowledge, has been provided.

Q. Can you identify any state or federal reports that are required by statute, for which RSU has responsibility, that presently are late?

A. That presently are late?

Q. Yes.

A. Not that I know of, any reports that are currently presently late. However, I am made aware of reports that are late because they're not provided on time or that there are problems with gathering data because I'm made aware of that.

Q. And I think there's no dispute, some federal and state statutory reporting has been late?

A. Correct.

Q. We don't dispute that. My question before you

now is, as we sit here today, there are no late federal or statutorily required reports for which RSU would have any responsibility, correct?

A. To my knowledge, there are no reports due currently so they couldn't be late.

Q. Well, if it was due last month and it hadn't been provided, it would be late. You're not aware of any those, right?

A. No. But I also don't know what's going to happen with our next report.

Q. And the Section 1229 report is not late either, is it?

A. No. The 1229 has been submitted.

Q. You testified that you had been in other litigation involving public records requests?

A. I didn't say litigation. But, yes, I've been involved in public records for quite some time.

Q. I understand that you don't believe that the CHILDS data is a public record, correct?

A. Do not believe that the data, absent it having been turned into a report, is public record because it has to first be turned into a report. And it would have to then be scrubbed to make sure that it was not releasing information that we're not authorized to release.

Q. To your knowledge, is there any statute that

defines what is and what is not a public record in Arizona?

A. It says report. That's all I know. So that's my recollection is a report.

Q. What's the present status of attempting to replace the CHILDS Database?

A. The current status is, as Michael Wisehart indicated to you, there had been previous work done and estimated costs and made recommendations on methodologies. We received $5 million from the Legislature to begin the process of exploring how we could implement one of those methodologies to replace CHILDS. And, again, the estimates were between $40 and $80 million, depending on what methodology was used.

Q. Are you aware of any efforts made by the ACLU with respect to any of its three requests to prioritize or narrow those requests?

A. Yes. I believe -- I can't recall exactly, but I believe that one of the final requests was a restatement of something that had gone before. But I didn't see anything that eliminated any of the previous requests. So I saw it as a cumulative request, three documents with a very large number of requests.

Q. Since you've been the director of DCS and made aware of the ACLU's requests, is it fair to say that you

have become the decisionmaker as to what, if anything, further would be provided to the ACLU?

A. Yes, it is.

Q. And in the course of your role as decisionmaker, have you taken into account whether to accept any of the offers that have been made by the ACLU to reduce the scope or burden of their requests?

A. I can't recall any discussions about reducing the scope of the request made by the ACLU.

Q. Are you aware of any requests made to counsel at the Attorney's General's Office in an effort to prioritize the request shortly after the litigation was filed?

A. Yes.

Q. And are you the person who decided that no response would be provided to those prioritization offers?

A. I don't know what you mean by no response. My response was no because we've looked at this and it would require the creation of reports that don't currently exist.

Q. Are you aware of a settlement offer that was made by the ACLU in July of 2014 offering to eliminate a number of their requests?

A. I am aware of discussions with the AG's office personnel about settlement request discussions. But the problem was still that it required the creation of reports

that were not currently in existence.

Q. Did you ask Mr. Espadas or have any internal discussions with -- well, strike that. What's your understanding as to what the reduced scope or burden on the Department would have been as a consequence of the July 11th offer from the ACLU?

A. My understanding is that the bottom line is still that we would have to create reports, and it would take an inordinate amount of staff time to be able to do that.

Q. The ACLU's offer actually offered to withdraw 57 of the 72 requests, correct?

A. I don't know that, but I trust you.

Q. And that would have substantially reduced the burden on the Department, wouldn't it?

A. I don't, in my estimation, believe that it makes very much difference whether we have to shovel a mountain out of the way or we have to shovel a large hill out of the way. We just don't have the capacity to do that. And it impedes the mission of the agency. And I'm responsible for the safety and the lives of the children under my jurisdiction. That has to be the first priority.

MR. TRYON: Your Honor, Counsel had one question about 20 questions about.

MR. BEAUCHAMP: I never said I had one question. I never say that. But in any event, I don't have any more

questions, your Honor.

MR. TRYON: Just a few questions, if I may, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. TRYON:

Q. Sir, your understanding that the Department does not have to create public records, is that just something you created? Or has that been told to you by your attorneys at DOC?

MR. BEAUCHAMP: Excuse me. I'm sorry. If he's going to answer that question, I'm going consider service deemed to be waived.

THE COURT: I don't need him to answer that question. I have to answer that question for both sides in this case. That's what the law requires. So he's not going to tell me what the law requires. He can tell me what he does. That's fine.

MR. TRYON: Thank you, your Honor. I was only going to ask him, if I may, his understanding of what the law is as based upon what his attorneys have told him. That's all I was going to ask, and I appreciate your ruling.

THE COURT: I don't need to get into what his

attorneys have told him.

Q. BY MR. TRYON: Sir, Counsel has asked many questions, the purpose of which is to try and convince the judge that you're not transparent.

Do you believe that your agency is transparent?

A. I absolutely do. And there are many demonstrable ways in which we can show that.

Q. Does your direction to not provide further information to the ACLU have anything to do with transparency, or it is based on something else?

A. It has absolutely nothing to do with the issue of transparency. And I'd like to say again that, if we had these reports available, they would be provided without hesitation. Even if I weren't to like those reports, we've released information that is detrimental to the perception of this agency because I believe we owe it to the public to show that information.

MR. TRYON: No further questions, your Honor.

THE COURT: All right. Thank you, sir.

THE WITNESS: Thank you, your Honor.

THE COURT: How about we come back at 1:30? Does that work?

MR. TRYON: May this witness be excused, your Honor? M

MR. BEAUCHAMP: Sure.

THE COURT: Okay. He's excused.
MR. TRYON: That's fine, your Honor.
MR. BEAUCHAMP: 1:30 is fine with us.
THE COURT: All right. See you all at 1:30.
MR. BEAUCHAMP: Thank you, your Honor.
(Lunch recess.)
THE COURT: Are we on the record?
THE BAILIFF: Yes.
THE COURT: Both records, I guess, if that's the way we're going today. Go ahead.
MR. TRYON: Thank you, your Honor. We've taken the liberty of placing Mr. Espadas on the witness stand.
And before I proceed with him, your Honor, Counsel and I have reached an agreement that all of the Exhibits, 1 through 53, I believe, can be admitted but for --
MR. BEAUCHAMP: There are two documents, 15 and 16, that we have agreed not to include in this stipulation.
THE COURT: All right. So everything is admitted, 1 through 53, except 15 and 16.
MR. BEAUCHAMP: That's correct, your Honor. We reserve the right, if we need to, to try and bring it up, but we're not going to trouble you with it.
THE COURT: All right. Thank you.

redacted in case your Honor was wondering why it's blackened.

Q. Sir, using those exhibits, can you tell the Court what you did to develop answers to the requests set forth from the ACLU?

A. From the -- you mean, from the start?

Q. Yes.

A. Well, the first thing I did after getting the request was, I had my secretary actually make a matrix to keep track of this because it was --

Q. That's how you work, right?

A. Right. It makes it easier for a lot of the requests, especially when they're this big. And when it requires so many different pieces of information to keep track of, it's just easier to track things.

After that, you had a -- after I read through it and talked about it with a couple of my staff on a couple of the issues that I wasn't entirely, they had a better grasp of whether they could, we could provide the information, I ask for a meeting to get clarification on many of the questions. Some of the questions didn't exactly didn't translate well to what we do.

Q. And you asked for a meeting of what participants, sir?

A. That would be upper management, I guess. I was

not lead on the project. So the lead on the project when it first came in was Michael Wisehart. So I asked for a meeting with him so he could clarify it. And it turned out to be him and a number of other folks, Flora Sotomayor and, I think, Alex Ong and that window and people, upper people.

We walked through that to get some clarification on how to go about answering some of these things and then kind of, at that point, delineated how some of these appeared to be a little bit easier to answer than some of the others. And so.

Q. Did you answer those that were easier?

A. The ones that were easier, we, to my knowledge, we, we gave answers that came out of my unit if it applied. If not, those answers were gathered from whoever they needed to be. Some of the stuff, some the questions had to be answered by the comprehensive medical and dental program, which is a health plan for foster kids. And some of the information had to be answered by the Crisis Response Unit, which handled fatalities and things of that sort.

MR. TRYON: Your Honor, Exhibit 45 reflects an agreed-upon document for your assistance so that you can determine the status of all three requests and what was done, whether it was produced and there was no objection

by the ACLU, whether it was produced and the ACLU objected, and then whether it wasn't produced at all.

Q. And, sir, what I want to do is have one specific example of what you did, for the Court's edification. And I'm going to limit it to item number one from the first request from the ACLU.

If you look at the first request, do you still have that in front of you, sir?

A. Is that Exhibit 46?

Q. Yes, sir.

A. Okay.

Q. Go to item one, question one. And as I read it, it has, at least as they have labeled, three subparts.

Do you see where I am, sir?

A. Yes. The average monthly workload per full-time employee.

Q. And this item was produced to the ACLU, and they didn't object to the production. And what I'm asking you, sir, if you could tell the Court the steps you went through just for that one, to produce that one, the answers to that first item?

A. I didn't do the first one.

Q. Okay. Which one, who did that?

A. I believe Alex Ong did that one.

Q. Can you go through that same itemization in 45

and tell me one that you did prepare? In other words, one through eight were produced.

Did you, were you involved in the production of two through eight?

A. Yes, we did some of these that were one through eight.

Q. So what I would like you to do, sir, is just focus in on one that you recall, one through eight. You said one wasn't, but let's say item two. And in answering that question, did you go through the steps that you previously told us about reflected in the PowerPoint exhibit?

A. Yes. What we did -- I'll use numbers five, number five as the example, if I can.

Q. Sure.

A. That was one of the questions I had that I raised at the meeting that I had with Michael Wisehart and everybody else who was in the meeting. For example, did they want me to provide it state, you know, state fiscal year, federal fiscal year? If it was on a federal fiscal year, did they want me to make sure that we used the same data that we used for the Semi Annual Child Welfare Outcome Report, things of that nature. So kind of --

Q. Sir, I'm looking at item five and I don't see the words "fiscal year" in there. Where are you reading that?

A. Well, that's, when you're asking for data, I think -- let me see. It says: Please provide, on page 1, please provide any and all records reflecting public information for state fiscal years 2011, 12, 13 or for each semi annual reporting period.

Q. I'm sorry. So reading that preface then to five, would you proceed with what you did?

A. Okay. So I asked which they wanted me to do it on. And I was told to do the federal fiscal year and to go back and match the data from the semi annual report, which would have been a federal fiscal year.

Q. The federal fiscal year is different from Arizona State?

A. Yes. Federal fiscal year runs from October through September, and the state fiscal year runs July through June. So I went back, and then I had to look for -- I had to go back and find all of those data files to be able to make sure that we had the correct data that went with that.

And then I had to go through and basically dissect what they're asking for. So if they want -- whoops, I'm on the wrong -- number five. So they're asking, in number five they want, they want number and percentages of reports that were assigned for investigation where the alleged victim was in out-of-home

care and were categorized as high risk response time one. And then they wanted to know whether they were close within the response time, not close or not responded to.

And so, basically, within the file, I've got to find the data markers, basically, the date that would tell us that I could do the calculation. They would say, okay, here's a number of days from when it came in to the date when they responded; and then find out whether they responded timely or not.

Q. Sir, the time -- can you give us your best estimate of the time you spent answering the requests that were produced to the ACLU? And by you, I mean you and your unit?

A. Right. Hours wise, probably over 40 hours. I know I personally was in there for a full weekend, and I answered some of these questions. But that wasn't all of the questions that we were tasked with, and it wasn't all of the questions that are supposed to have gotten done.

Q. I wasn't limiting my question to just number five. I'm limiting -- I'm asking you, in a general fashion, numerous records were produced to the ACLU, correct?

A. Correct.

Q. And I'm asking you to tell the Court the amount of time that you spent in answering their requests?

A. We don't -- it's a little hard because we don't keep track with.

Q. Right.

A. I would just have to kind of guess.

Q. Would you be guessing? If you're guessing, I don't want you to guess.

A. Yeah, I would be guessing.

Q. Okay. Would it be fair to say that it was a substantial amount of time?

A. Yeah.

Q. And, sir, can you examine what is marked as 51, which is the very last exhibit. And it should be your declaration that was submitted in this matter.

A. Okay.

Q. And, sir, you -- in that declaration, you stated your best estimate of how much time it would take just you and your unit to answer the remaining requests of the ACLU that have not been answered.

Could you tell the Court what that number is?

A. Do you know what page that's on?

MR. BEAUCHAMP: I believe it's page 9 and page 10.

THE WITNESS: Thank you.

Q. BY MR. TRYON: Thank you. Go to the bottom of page 9, the last, second to the last sentence starting

with: I estimate.

A. So I estimate that the process of attempting to respond to the Request Category Two would require an original investment of, at least, 40 to 80 man hours for each of the following requested groupings. And so from, for the May 2013 request, it would be numbers nine through 12 and 23. And then from the January 28th, 2014, request, it would be numbers 28 through 30, 31 through 33 and 34.

Q. Sir, in your declaration, you used the terms Category One and Category Two. And you and I know what that is. Could you please tell the Court what that is.

A. Sure. In going through the matrix with all of the requested items from the ACLU, I was instructed to label them as either Category One or Category Two as to the level of work and effort it would take to produce it. Category one being less than eight hours, and Category two would have been more.

Q. Sir, does your estimate include time that would be required by individuals, other than your unit?

A. No. My estimates are just for myself and my folks, my unit.

THE COURT: Does your unit include batch programmers.

THE WITNESS: My estimate does include for the batch programmers, however, they're not technically part

mean, that is kind of the point here. If the government's already told us about it, we don't need a public records requests, unless we just don't know how to get to it. So I don't know if I'm being clear.

MR. TRYON: No. You are, your Honor. And you have a difficult decision to make here. I can tell you that I have read almost every case report on these issues. And there are cases that hold what you've suggested to the plaintiff's counsel that, if you have the money and the wherewithal and CBS news and CNN, you can come in and pay for it and have it done, in some cases.

As you noted here, we have some problematic issues involving security that had, by law, cannot be given; you know, identification and stuff like that.

THE COURT: You can't turn over the hard drive, in other words.

MR. TRYON: Yes. So it has to be clamped. And even under the most liberal interpretation, that cannot be done. And obviously, your Honor, the State can't put all of their records in the computer and say, gotcha. And they're not doing it. And that's why, your Honor, I went to great detail to show how many public records are available and what they do tell.

And your Honor, counsel's right. There is no Arizona case that uses the word burden. The briefs that

have been filed in this case are very well written and they do detail all of the issues. But what counsel is forgetting, there's a case called *Griffis*, G-r-i-f-f-i-s, in Pinal County. It's cited in our papers, your Honor. And it sets forth the two prongs necessary for you to reach.

And the first prong, you've addressed. Is this a public record? That's the first decision. If it's not a public record, case is closed. See you later. Our position, your Honor, is it is not a public record. Arizona has 100 agencies, I learned when I went in the AG's office. All of these agencies either have or will have these kinds of issues. The more digital agencies, DPS, for instance, DOC, DECS, everything is going or will be in the computer; and this issue will come up.

The State certainly isn't saying, if we're putting it in the computer, you don't have access to it. The issue is, are we forced to create records. The law hasn't changed from the old days. Here's our shelves of public records. Which one do you want? It's the same thing. We have public records available digitally. Which one do you want? But you cannot force us to go into any database and create a record. And what counsel, what they --

THE COURT: Well, I guess that's the question,

superior court abuse its discretion in concluding that ACLU-AZ did not substantially prevail and denying its request for attorneys' fees?

ARGUMENT

I. The Superior Court Correctly Concluded that Much of the Information Requested by ACLU-AZ Did Not Constitute "Public Records" Because to Fulfill the Request, the Department Would Have to Create Records.

A. Standard of Appellate Review.

This Court reviews a trial court's grant or denial of relief on a special action petition for an abuse of discretion, but reviews de novo whether there was a wrongful denial of access to public records, while deferring to the trial court's findings of fact. *West Valley View, Inc. v. Maricopa Cnty. Sheriff's Office*, 216 Ariz. 225, 227, ¶ 7 (App. 2007) (citations omitted).

B. The Superior Court Correctly Concluded that Much of the Information Requested by ACLU-AZ Did Not Constitute "Public Records" Because to Fulfill the Request, the Department Would Have to Create Records.

The ACLU-AZ claims that "[t]he entire CHILDS system, and the related data files created by the RSU, are public records that must be available to the public." (Opening Brief at 24.) And ACLU-AZ fears that "public records laws would largely be eviscerated if state agencies were not obligated to search and produce records from their electronic databases." (*Id.* at 28.) But ACLU-AZ

confuses raw data with existing records and misreads the requirements of the public records law. If ACLU-AZ's requirement prevailed, public records requestors could commandeer agency staff members and require them to use data to create records that meet the requestor's needs instead of requiring the disclosure of records that the agency maintains which accurately reflect its activities. The superior court correctly concluded that many of their requests were requests for statistical research rather than public records, and therefore that DCS had no obligation under the public records law to comply with the requests.

1. The Department is not required to create records to respond to public records requests.

The Department acknowledges its duties under A.R.S. § 41-151.14 to maintain certain records of its operations and under A.R.S. § 39-121 to ensure that public records and other matters in the custody of any state officer are open to inspection by the public. In addition to the general record keeping requirements applicable to all state agencies, the Department is also required to maintain "all reports of child abuse and neglect and related records" in its "case management system." A.R.S. § 8-804.01(A). And as a condition of receiving federal funds, Arizona must maintain a Statewide Automated Child Welfare Information System (SACWIS). 42 U.S.C. § 622(b)(8)(A)(i).

The Department is required to maintain records only insofar as they are "reasonably necessary or appropriate to maintain an accurate knowledge of [its] official activities and of any of [its] activities which are supported by monies from this state . . . ." A.R.S. § 39-121.01(B). The Department is not, however, legally obligated to create records in response to a public records request. *See* Ariz. Op. Atty. Gen. I85-023. Although Arizona courts have not specifically addressed this issue, the Attorney General Opinion is consistent with case law in States that have. *See, e.g., Sperr v. City of Spokane*, 96 P.3d 1012, 1015 (Wash. App. 2004) ("An agency has no duty to create or produce a record that is non-existent."); *Shulten, Ward & Turner, LLP v. Fulton-DeKalb Hosp. Auth.*, 535 S.E.2d 243, 245 (Ga. 2000) (Georgia's public records statute "places no duty on an officer or agency to create a record, but concerns itself only with the records which a public body actually creates") (internal quotes and citations omitted); *State ex rel. Lanham v. Smith*, 861 N.E.2d 530, 532 (Ohio 2007) ("Respondents have no duty to create or provide access to nonexistent records."); *Thomas v. Cornyn*, 71 S.W.3d 473, 486 (Tex. App. 2002) ("[A] governing body is not required to create records where none exist . . . . [O]nly information *in existence* is subject to disclosure.") (internal citation omitted; emphasis in original). The Supreme Court of Ohio addressed an issue strikingly similar to this case—compilation of information that does not exist

in record form but could be created only by writing a computer program—and held that the agency was under no duty to create new records. *State ex rel. Kerner v. State Teachers Retirement Bd.*, 695 N.E.2d 256 (Ohio 1998).

2. The Department would have to create new records to respond to ACLU-AZ's requests.

In this case, a substantial number of ACLU-AZ's requests would require the Department to create records because records do not exist that contain all of the various data points that ACLU-AZ seeks to obtain in each request.[9] But ACLU-AZ's requests are not requests for *records*, they are requests for *information*, and that information can be gleaned only by doing research and analysis in a process that *creates* records—something public records law does not require DCS to do.

For example, Item 12 from the May 2013 Request seeks the "number of children who were substantiated victims of abuse and/or neglect perpetrated by their caregiver(s) while placed in each of the following [out-of-home] care settings: a) unlicensed foster care, b) licensed foster care, c) congregate care." (Ex. 1 at 3.) There is no record in CHILDS that provides a response to that

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9. Specifically, Items 9-23 (except 22(a)) from the May 2013 request, Items 1-23 and 25-34 from the January 28 request, and all 24 items from the January 31 request would require DCS to create records through statistical and data analysis.

request. (*See* Ex. 51 at ¶¶ 10, 13.) To respond to that query, the Department must cull disparate data points from CHILDS via a computer program and then analyze the resulting data to provide an answer. That process then *creates* a new record. More specifically, DCS would have to call upon batch programmers to code a new program to extract the requested data file. (*Id.* at ¶ 13.) That file would then need to be loaded into a database for searching. (*Id.*) Indeed, that request is what the Department eventually labeled a "Category Two" request, that is, one which requires multiple steps and computer programs to extract, test, categorize, and analyze data. (Ex. 51 at ¶ 13.)

For the outstanding Category Two requests (approximately 13% of the 91 requests), DCS would have to call upon batch programmers at CHILDS to code a new program to extract the requested data file, then the RSU would load that file into a database for searching. (Ex. 51 at ¶¶ 10, 13.) Then, for those requests, as well as for all of the Category One requests (approximately 66% of the requests), the RSU would have to search one or more data files (or combine multiple data files) to compile and collate the numerous requested data points into a readable and usable format. (*Id.*; Ex. 14 at 100:22 – 101:2, 102:3-11.)

The ACLU-AZ sees this process as akin to the production of electronic metadata, required by *Lake v. City of Phoenix*, 222 Ariz. 547, 548, ¶ 1 (2009). The

metadata requested in *Lake*, however, was data already contained within the electronic record. *Id.* The Arizona Supreme Court held that "when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law." *Id.* at 551, ¶ 14. Here, ACLU-AZ seeks the compilation of data that has not previously been compiled. *Lake* does not stand for the proposition that a state agency must research and analyze information to create a responsive record to address a highly specific query.

3. The out-of-state cases cited by ACLU-AZ are distinguishable because in those cases, the requested data already existed without the requirement for data and statistical analysis.

The ACLU-AZ relies on cases from other states to support a claim that "retrieval of computer-archived data does not involve the creation of a new record." (Opening Brief at 29.) But, the cases it cites involve simple retrieval of existing *records* from a computer system, while the issue here is whether the compilation and analysis of information in a computer system constitutes the creation of new records when such information is not present in an already existing record.

In *Hamer v. Lentz*, an early case addressing retrieval of information from computers to respond to public records requests, the Illinois Supreme Court held that obtaining responsive information from two sources—one of which existed only on electronic tapes—did not amount to the creation of a new record. *Hamer*, 547 N.E.2d 191, 194-95 (Ill. 1989). *Hamer* is distinguishable because the information requested was already in the possession of the agency, albeit in two locations. The case did not involve manipulation and analysis of data.

Similarly, in *Tennessean v. Electric Power Board of Nashville*, the issue was not the Electric Power Board's creation of a public record, but rather the court-ordered production of requested information even though it would require developing a computer program to provide "only the information" requested. *Tennessean*, 979 S.W.2d 297, 299 (Tenn. 1998). The court specifically noted that the "request did not require [the agency] to compile or collect statistics, nor did it require an explanation, interpretation, or analysis of information." *Id.* at 304. Because the Electric Power Board had the information requested and it was not exempt from disclosure, the court held that the Board was required to disclose it. *Id.*

In *Cohen*, in which a New York court held that an agency could be required to use "existing programs and software" to redact confidential information from an

existing record. *N.Y. Pub. Interest Research Group, Inc. v. Cohen*, 729 N.Y.S.2d 379, 382 (N.Y. Sup. Ct. 2001). The court reasoned that "[t]here is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency." *Id.* In contrast to the request in *Cohen*, ACLU-AZ's requests are not for existing records from which confidential information must be redacted; instead its requests involve creating new records. *Seigle v. Barry*, 422 So.2d 63 (Fla. Dist. Ct. App. 1982), supports the superior court's decision here. Although the *Seigle* court recognized that information stored in computers may comprise public records, it clarified that access to computerized records need be provided only "through the use of programs currently in use by the public official responsible for maintaining the public records," rather than requiring "a tremendous expenditure of time and effort for the mere sake of translating information readily and inexpensively available in one format into another format more suitable to the applicant's particular purposes." *Id.* at 66.

As computer databases became more common for keeping public records, courts responded accordingly. In *Cole*, the requested information existed in the Pennsylvania Department of Environmental Protection's database, but the Department had withheld some of the information and objected to producing any

of the information in a specific format. *Com., Dep't of Envtl. Prot. v. Cole*, 52 A.3d 541, 547 (2012). As ACLU-AZ noted, the court held that "pulling information from a database is not the creation of a record." *Id.* at 549. That case was later distinguished by *Pennsylvania State Police v. McGill*, however, where the court stated that, in *Cole*, "the agency possessed the information necessary to comply with a [public records] request but simply did not take adequate steps to supply that information," whereas in *McGill*, the information request could not be met by "simply examin[ing] and compil[ing] information already in [the agency's] possession." *McGill*, 83 A.3d 476, 482 (2014). Instead, the agency would have to cross-reference its records with those of municipal law enforcement agencies, then redact confidential information, and doing so would entail the creation of a record. *Id.*

Because ACLU-AZ's requests involved more than simply retrieving an existing data file and redacting confidential information, but instead would require computer programming and analysis to extract, review, and produce responsive data, this Court should affirm the superior court's correct conclusion that the requests would require the Department to produce new records and therefore were beyond the scope of a public records request. As the *McGill* court noted, a requestor may not "'shanghai' government employees to create a record when one

does not exist and take them away from their normal responsibilities." 83 A.3d at 481.

II. The Superior Court Correctly Found that Creating and Producing Records Responsive to ACLU-AZ's Requests Would Hinder DCS's Ability to Meet Its Obligations, Goals, and Directives, Making Any Order to Do So Contrary to the Best Interests of the State.

A. Standard of Appellate Review.

The standard of review set forth in Argument I(A) of this Brief also applies here.

B. The Superior Court Correctly Found that Creating and Producing Records Responsive to ACLU-AZ's Requests Would Hinder DCS's Ability to Meet Its Obligations, Goals, and Directives, Making Any Order to Do So Contrary to the Best Interests of the State.

The ACLU-AZ claims that the burden on the agency producing requested records cannot serve as the basis for a finding that the production is not in the best interest of the state and that "a judicially created 'burden' exception would likely eviscerate the public records statute." (Opening Brief at 38.) Because producing the information requested would prevent the Department from accomplishing the obligations, goals, and directives mandated by the Governor, the Legislature, and federal authorities, the superior court correctly found that requiring the