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SIDEBAR:

- The Ombudsman for Public Access is Staff Attorney Danee Garone.
- Open meeting law and public records law materials and updates are [available on our website](#).
- [Click here](#) to view our open meeting law booklet.
- [Click here](#) to view our public records law booklet.
- Review past [Public Access Newsletters](#).
- [Upcoming Training/Outreach](#).
- TBA
- Contact Danee Garone for more information.



# The Public Record

State Ombudsman Dennis Wells

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## Courts Uphold Order for Senate to Disclose Audit Records

On October 14, 2021, the superior court, in [American Oversight vs. Fann, et.al.](#), granted American Oversight's motion to compel the Arizona Senate to produce 2020 Maricopa County election audit records withheld by the Senate on the basis of legislative privilege.

The court held that the communications regarding the audit amongst Senate leadership and with the contractor conducting the audit are *not* protected by legislative privilege. The court held that the records "are not an integral part of deliberations or communications regarding proposed legislation," the Senate's actions constituted waiver of any potential application of the privilege, and the public's interest in the records outweighs the Senate's interest in non-disclosure.

On August 19, 2001, the Court of Appeals of Arizona (in [Fann v.](#)

[Kemp](#)) denied the Senate's request for relief from an earlier superior court order to turn over public records related to the audit.

The Court of Appeals held that legislative immunity does not prevent legal action against the Legislature for failure to comply with statutory obligations, such as disclosure under the public records law. The Legislature could have written into the public records law that the Legislature is exempt; however, it included itself in the definition for which bodies are subject to the public records law.

The Court of Appeals also held that the contractors conducting the audit "are agents of the Senate," and the audit is being conducted with public funds. In other words, the Senate could not circumvent the public records law by delegating govern-

ment duties to a private, third party.

In the spring of 2021, American Oversight made public records requests to the Senate for a variety of records regarding an audit commissioned by Senate leadership into results of the 2020 election in Maricopa County. Initially, the Senate disclosed about 60 pages of records, but said it would not produce records in the custody of private entities that contracted (and subcontracted) with the State to conduct the audit. The Senate also argued it was immune from suit because of legislative immunity.

On August 2, 2021, the superior court ordered the Senate to disclose records related to the audit. The Senate appealed the order to the Court of Appeals, leading to the August 19 decision.

## Supreme Court Opines on Attorney Fees for Records Matters

On August 25, 2021, the Arizona Supreme Court explained what it means for a requester to "substantially prevail" in a public records law court matter and be able to seek attorney fees and costs.

A.R.S. §39-121.02(B) states that a "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." In [Am. Civil Liberties Union of Arizona v. Arizona Dep't of Child Safety](#), the Supreme Court considered what it means for a requester to "substantially prevail" in a public records law matter.

First, the Supreme Court held, "[A] party has 'substantially prevailed' if, after a comprehensive examination by the trial court, it was more successful than not in obtaining the requested records, defeating the government's denial of access to public records, or securing other relief concerning issues that were contested before litigation was initiated."

Second, the Court held that requesters obtaining attorney fees and legal costs is not limited to special actions. The plain text of the statute states "in any action under this article." As a result, requesters can also be awarded fees and costs in actions for declaratory or injunctive relief under the public records law.

## Appeals Court: No Right to Juror Names

On July 20, 2021, the Court of Appeals of Arizona held the Arizona law authorizes the use of an innominate jury, and the public does not have a First Amendment right to disclosure of juror names.

In Morgan v. Dickerson, two individuals sought access to the names of jurors for two criminal trials in Cochise County. Neither judge would release the jurors' names during or after the trials. The individuals filed a special action in superior court. The individuals asserted that Arizona law does not authorize the use of an innominate jury system, and that such a system violates the First Amendment to the US Constitution.

The Court of Appeals held that Arizona law does in fact explicitly protect juror information, "In sum, our statutes and rules generally require a trial court to keep juror records and biographical information private."

The Court then considered whether the practice of protecting juror names violates the First Amendment. The Court reviewed various US Supreme Court cases touching on First Amendment rights concerning judicial proceedings. The Court said, "These cases, however, focused on public access to courtroom proceedings, not to the disclosure of certain confidential information held by the court itself. Juror biographical information, including juror names, is not evidence to be presented or, if not disclosed in the proceeding, necessarily part of the public proceeding. Rather, it is information held by the government, which ordinarily possesses a broad spectrum of confidential information not made available to those observing court proceedings."

Nevertheless, the court considered the "experience" test laid out in one of the US Supreme Court cases and concluded that the individuals did not provide a record of "the experience in that *type* or *kind* of hearing throughout the United States." [Internal citations and quotations marks emitted.]

The Court then laid out a variety of reasons for protecting juror names, such as juror safety and maintaining a fair trial. The Court thus concluded that judges can lawfully employ the use of innominate juries.

## Arizona Ombudsman – Citizens' Aide

Greetings,



In this issue, we discuss updates in the ongoing legal action concerning access to Senate records regarding the 2020 Maricopa County election audit, a court case concerning attorney fees in records matters, and access to juror names.

As always, our goal is to provide you with timely and informative information related to Arizona's Public Record and Open Meeting Laws. If you have suggestions and ideas for an upcoming newsletter, or questions you want answered, please feel free to contact our office.

Sincerely,  
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