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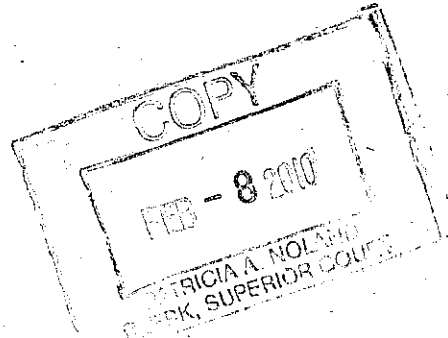
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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

11 **IN AND FOR THE COUNTY OF PIMA**

12 **DEMOCRATIC PARTY OF PIMA**
13 **COUNTY, a political organization,**

14 **Plaintiff,**

15 **-vs-**

16 **BETH FORD, in her official capacity as**
17 **Pima County Treasurer, and the PIMA**
18 **COUNTY BOARD OF SUPERVISORS, a**
body politic,

19 **Defendants.**

NO. C20088876

**Democratic Party's Statement of
Issues Concerning Retrieval and
Copying of Public Records**

Assigned to:
Honorable Ted Borek

20 The Plaintiff Democratic Party of Pima County, by and through undersigned counsel, hereby
21 submits its legal and factual position regarding the factors that this court should consider in
22 fashioning its order in this simple public records lawsuit.

23 The court will need to enter an order that requires public records to be produced as quickly
24 as feasible and in a secure manner that does not destroy the chain of custody of those records that
25 are being held for possible use in a separate lawsuit. Since the records are in a secure facility that
26

has adequate facilities for the task at hand, the retrieval, inspection and copying of the records can easily and promptly be accomplished.

I. The Defendants Are Feigning Ignorance of The Law and The Facts.

During our recent hearing in correspondence, and in pleadings, the Pima County Board of Supervisors have repeatedly claimed that allowing the Democratic Party to see and copy the poll tapes should not be a precedent for the future. This memorandum will examine their "functional equivalent of ballot" nonsense in a later section. Of special interest is A.R.S. § 16-161 that requires the Board of Supervisors "for a period of six months," to keep those records "open to public inspection of electors."

In other words all 3.1 million Arizona electors may inspect these records as a specific requirement by statute but the Pima County Board of Supervisors wants to make sure that the largest political party in Pima County can not examine them in the future without another lawsuit.

The defendant Board of Supervisors is fully aware of the contents of the boxes that they packed. Their election division employee Mary Martinson prepared transmittal sheets listing the contents of all the boxes. The examination, retrieval and copying should take no longer than one morning since the poll tapes and yellow sheets should be in four boxes only. Furthermore, those four boxes probably do not have any ballots in them.

The defendant Board of Supervisors surely knows what is in the boxes they packed. As for Beth Ford, she has remained ignorant of the contents of the boxes by her own admission. The defendant Ford in her "undisputed issues" section of her pleadings Defendant Beth Ford's Statement of Issues Concerning Retrieval Photocopying, Examination, and Destruction of Requested Documents stated that "unknown" to her the yellow sheets and poll tapes had been placed in some or all of the boxes with the Ballots.

It may be "unknown" to her but she possesses documents that list what is in each box, (See

1 Exhibit A). She could readily ask Mary Martinson or ask Patti Davidson, her Chief Deputy
2 Treasurer who is her office contact person on the storage of the boxes.

3 Documents in Beth Ford's and Pima County's possession show that all the documents
4 requested by Plaintiff should be in four boxes. Iron Mountain Customer Box #'s 353469064,
5 353469065, 353469066 and 353469067.

7 **II. Requirements of Arizona's Public Record Laws**

8 **A. Disclosure must be Prompt.**

9 This is a public records lawsuit pursuant to Arizona's Public Records statutes,
10 A.R.S. § 39-121 et seq. Our statute concerning public records is straight forward and is
11 stated in one sentence.

12 **A.R.S. § 39-121**

13 Public records and other matters in the custody of any officer shall be open to
14 inspection by any person at all times during office hours.

15 Unlike laws in other states or the Federal law relating to public records Arizona's laws do
16 not have a "waiting period." Our public records statutes refer repeatedly to "during office hours"
17 and "promptly" responding.

18 **A.R.S. § 39-121.01 provides in subsection (D)(1):**

19 Any person may request to examine or be furnished copies, printouts or photographs
20 of any public record during regular office hours or may request that the custodian
21 mail a copy of any public record not otherwise available on the public body's web
22 site to the requesting person. The custodian may require any person requesting that
23 the custodian mail a copy of any public record to pay in advance for any copying and
24 postage charges. The custodian of such records shall promptly furnish such copies,
25 printouts or photographs and may charge a fee if the facilities are available, except
26 that public records for purposes listed in § 39-122 or 39-127 shall be furnished
without charges.

27 The issue of "promptness" was most recently addressed in Phoenix New Times L.L.C v.
28 Arpaio, 217 Ariz. 533, 177 P. 3d 275 (App.2008):

29 Although Arizona law requires that the document be promptly furnished, it does not
30 specify a specific number of days from the request by which time a public body must

1 furnish the documents. We have previously defined "prompt" in this context as
2 being "quick to act" or producing the requested records "without delay." West Valley
3 View, Inc. v. Maricopa County Sheriff's Office, 216 Ariz. 225, 230, ¶ 21, 165 P.3d
4 203, 208 (app. 2007) (quoting Webster's New World Dictionary 1137 (2d ed. 1980)
5 Supra at 538.

6 The Democratic Party first made its written request for the public records requested in this
7 lawsuit in a letter dated October 2, 2008. The court in Phoenix New Times, LLC v Arpaio, 217
8 Ariz.533, 539, 177 P.d 275, 281 (App. 2008) noted that the time to respond promptly begins to run
9 with the request and not the lawsuit.

10 "In assessing the promptness of MCSO's response, we look to the time that the
11 original request was made, and not to the time that the special action seeking access
12 to the records was filed. The statute requires that the documents be furnished
13 promptly in response to a request for public documents rather than in response to a
14 special action to obtain the documents once access has allegedly been delayed or
15 denied." See A.R.S. § 39-121.01 (D)(1), (E).

16 Now, in January 2009 Beth Ford suggests that she provide the requested public records in
17 August 2009 or as soon as she decides is a good time at her discretion. She has no discretion,
18 however, to fail to follow the law. Arizona law could not be clearer as to the requirement for
19 promptness.

20 **B. Beth Ford Cannot Charge the Democratic Party for Costs of Searching for the**
21 **Records**

22 Arizona law makes a distinction between public records that are requested for a commercial
23 purpose (See A.R.S. § 39-121.013 D) and for non-commercial requests such as the one before this
24 court. It is Arizona public policy that costs of searching for the records cannot be charged to the
25 Democratic Party. Arizona Attorney General Opinion I86-090 (R85-095), 1986, discusses the case
26 law, statutes and public policy related to this issue.

"Under Arizona law, a party requesting records for a non-commercial use may be
charged a copying fee, but may not be charged the cost of searching for the records.
A.R.S. § 39-121.01 (D)(1); Hanania v. City of Tucson, 128 Ariz. 135 624 P.2d. 332
(App 1980)....

We now turn to the question of fees charged for making copies of public records. A
public official "may charge a fee if the facilities are available" for making copies of
records subject to A.R.S. § 39-122. A.R.S. § 39-121.01 (D)(1). Before August 7,

1 1985, the law provided that a public official in furnishing copies of public record for
2 non-commercial purposes could charge a "reasonable fees, not exceeding a
3 commercial rate for like service." A.R.S. § 39-121.03(A). However, that limitation
4 was repealed. Ch. 213 § 4, Laws 1985 (1st Reg. Sess.). In our opinion this change
5 eliminates the requirement that charges for copies be limited to the going commercial
6 rate and permits an agency to charge any fee it deems appropriate for copying
7 records, including a reasonable fee for the cost of the time, equipment and personnel
8 used in producing copies of records subject to public disclosure, but not costs of
9 searching for the records. See *Hanania*.

6 The records requested are stored at the Iron Mountain company facility, a private storage
7 company. Iron Mountain's business plan provides for the rental of a large 900 square foot room
8 where either individual boxes or pallets of boxes are provided by the company so that the
9 transportation of stored documents is not necessary. They provide on site copying facilities for those
10 records as a benefit to their customers. Hence, the copying costs are standard Iron Mountain fees
11 and the Democratic Party will pay those fees. They are the only fees authorized by law.

12 The Arizona Secretary of State Election Procedures Manual, at page 173, has a section
13 related to the storage of "ballots and reports." (Exhibit B, attached).

14 **Storage of Ballots and Reports**

15 After the canvass is complete, the officer in charge of elections shall:

- 16 • seal the ballots,
- 17 • Deliver the ballots to the County treasurer for secure storage.
- 18 • The county Treasurer shall keep the ballots unopened and unaltered for a
19 period of:
 - 24 months for ballots for federal offices,
 - Six months all other ballots,
- 20 • Store the official returns.

21 [A.R.S. § 16-624]

22 Any unusual expenses that the County Treasurer must incur is either her responsibility or the
23 responsibility of the Board of Supervisors who polluted the ballot storage by including other public
24 records in the same boxes. The Board of Supervisors created the problem for which they now want
25 to charge the Democratic Party. The statute refers to "ballots" and the Election Procedures Manual
26 refers to "ballots." Ballots are simply different under law than other public records such as the poll
tapes and yellow sheets.

1 **C. This Court Cannot Order the Destruction of These Public Records as Requested**
2 **by Beth Ford.**

3 Beth Ford has requested this court to order her to destroy these important public records six
4 months after they are examined by the Democratic Party. Her request of the Court for specific
5 authority to destroy those public records is a request that is contrary to law. In the defendant Beth
6 Ford's "undisputed issues" section of her memorandum on these issues points 5 and 7 are
7 noteworthy. Number 7 states that "there was no legal requirement for the poll tapes and yellow
8 sheets to be stored with the ballots. Number 5 notes that it was "unknown to Ford" that those public
9 records "had been placed in some or all of the boxes with the ballots."

10 The Democratic Party agrees that the poll tapes and yellow sheets should not have been
11 placed in the ballot boxes, if in fact they are in the same boxes. Simply acknowledging the Board
12 of Supervisors actions as a "mistake" ignores the depth of the problem. All Public records are the
13 property of the State of Arizona. They are not the property of either Pima County or the County
14 Treasurer.

15 A.R.S. 41-1347 reads in relevant part as follows:

- 16 A. All records made or retrieved by public officials or employees of this state in
17 the course of their public duties are the property of this state. Except as
18 provided in this article, the director and every other custodian of public
19 records shall carefully protect and preserve the records from deterioration,
20 mutilation, loss or destruction and when advisable, shall cause them to be
21 properly repaired and renovated....
- 22 B. Records shall not be destroyed or otherwise disposed of by any agency of this
23 state unless it is determined by the state library that the record has no further
24 administrative, legal, fiscal, research or historical value. The original of any
25 record produced or reproduced pursuant to §41-1348 may be determined by
26 the state library to have no further administrative, legal, fiscal, research or
historical value. A person who destroys or otherwise disposes of records
without the specific authority of the state library is in violation of § 38-421.

27 In turn A.R.S. § 38-421 provides that such destruction is a "class 4 felony."

28 The Arizona State Library, archives and Public Records Director Gladys Ann Wells has given
29 Pima County the right under ordinary circumstances to destroy the records sought in this case. That

1 permission was qualified, however, in that "records required for ongoing or foreseeable official
2 proceedings such as audits, lawsuits, or investigations, must be retained until released from such
3 official proceedings, notwithstanding the instructions of their schedule."

4 5 **III. Role of Political Parties in Elections and Ballot Security**

6 **A. Political Parties are organized pursuant to statute with Special Responsibilities** 7 **and Privileges.**

8 The plaintiff Pima County Democratic Party is a special organization created pursuant to
9 specifics statutes that require a specific form of organization and grant political parties special
10 privileges. The entire election process is built around those political parties. They are not "clubs"
11 or pressure groups or special interests or any of the forms of groups that exist with independent roles
12 in our political process.

13 Although each voter may register to vote and claim an affiliation with any political party
14 whether a recognized party or no party at all those people do not constitute the county committee.
15 The "county committee" of a recognized political party such as the Pima County Democratic Party
16 is "composed of the whole of its elected precinct committeemen." A.R.S. § 16-821.

17 The precinct committeemen are public officials that serve two year terms in office. A.R.S.
18 § 16-822. The county committee is therefore composed of hundreds of elected public officials.
19 Those elected public officials are required by statute to meet at a specific date and elect designated
20 officers such as a county chairman that are required by statute. A.R.S. § 16-824.

21 The particular number of elected precinct committee persons depends to some extent on the
22 number of voters in each precinct that claim an affiliation with that party. Of particular importance
23 is the statutory requirement that any vacancy in the office of precinct committee person must be
24 filled from names submitted by the political parties themselves. A.R.S. § 16-821 B.

25 The Board of Supervisors have a small number of employees in their permanent employment
26 who "direct" election procedures. The largest political parties designate some 3,000 members who

1 actually conduct the elections at the precincts. Those persons are chosen by the political parties
2 themselves although they are paid by the Board of Supervisors and assigned to specific polls by the
3 election division. At each general election approximately 1,500 persons from the Pima County
4 Democratic Party work in various roles to conduct the election.

5 The defendants to this lawsuit place great importance on no one "seeing" a particular ballot
6 as if such a ballot from a past election had any significance whatsoever. There were more than
7 122,000 ballots cast at the RTA election which the canvass showed was approved by almost a 60%
8 to 40% margin. That means 48,800 ballots carried votes against and 73,200 ballots carried votes in
9 favor. Among those ballots voters may have split their votes various ways. Seeing any particular
10 ballot is meaningless.

11 The Democratic Party is not interested in the particular votes on a particular ballot. The only
12 meaningful issue is the totality of votes on ballots and those totals have been determined and the
13 election settled. Any suggestion that extraordinary steps need to be taken to avoid across the room
14 glances at ballots must be evaluated in the full knowledge of the meaningless nature of individual
15 ballots.

16 The Democratic Party is totally and intimately familiar with ballots because we are involved
17 with ballots from the beginning to end of the election process. The recognized political parties in
18 Pima County receive copies of the proposed ballots for each precinct several months prior to the
19 partisan elections so they can approve the ballot form.

20 The documents sought in this lawsuit provide an example of the role of political parties such
21 as the Democratic Party. Exhibit C to this memorandum is an example of the "yellow sheets" we
22 have requested. It is entitled "Official Ballot Report and Certificate of Performance" and at the
23 bottom of the form it notes that the white copy goes into the unofficial bag and the yellow copy into
24 the ballot transfer bag. The attached example is from voting area 235 of the November 3, 2004
25 general election. The example carries the signature of five election officials: a poll inspector, a poll
26 judge, a poll marshal and two clerks.

1 The Board of Supervisors are required to appoint the various polling officials from lists of
2 names submitted by the political parties themselves. A.R.S. § 16-531. The board of supervisors
3 trains those individuals but their appointments must be from names submitted by the parties.

4 The various political party representatives are the persons who handle the ballots, account for all
5 ballots and fill out the Official Ballot Report and Certificate of Performance which they then sign.

6 In other words the records our political party seeks were created and signed by political party
7 representatives.

8 After the report is placed in the ballot bag the contents are "delivered promptly by two
9 members of the election board of different political parties to the central polling place...." A.R.S.
10 §16-608 A. In addition to those political party members, each political party chairman can
11 personally designate another person of his party to protect the ballots and guarantee the chain of
12 custody by accompanying the ballots from each polling place to the central counting place. A.R.S.
13 § 16-608 B.

14 This transportation is of live ballots on election day. The effect of the statute is that the
15 security of the ballots is protected by political party selected persons. The parties are the security.

16 Political party representatives receive the ballots at the central count center. Political party
17 representatives are to observe the ballots at all times. The party observers at the central count facility
18 can not touch them but, the election personnel must notify party observers whenever they are going
19 to touch the ballots. A.R.S. § 16-621 A provides in part:

20 A.R.S. § 16-621

21 A. All proceedings at the counting center shall be under the direction of the
22 board of supervisors or other officer in charge of elections and shall be
23 conducted in accordance with the approved instructions and procedures
24 manual provided for in §16-452 under the observation of representatives of
25 each political party and the public, but no persons except those authorized for
26 the purpose shall touch any ballot or ballot card or return ...(emphasis added)

25 Subsection C of § 16-621 contains requirements that are relevant to the issue of a video
26 camera to record the copying process requested by the Democratic Party. That statute requires a

1 video recording of the ballots at the counting center. Pima County complies with this statute and
2 video records the ballots at all times in the tabulation room.

3 C. For any statewide, county or legislative election, the county recorder of
4 officer in charge of elections shall provide for a live video recording of the
5 custody of all ballots while the ballots are present in a tabulation room in the
6 counting center. The live video recording shall include date and time
7 indicators and shall be linked to the secretary of state's website. The
8 secretary of state shall post links to the video coverage for viewing by the
9 public. The county recorder or officer in charge of elections shall record the
10 video coverage of the ballots at the counting center and shall retain those
11 recordings as a public record for at least as long as the challenge period for
12 the general election. If the live video feed is disrupted or disabled, the
13 recorder or officer in charge of elections is not liable for the disruption but
14 shall attempt to reinstate video coverage as soon as is practicable. Any
15 disruption in video coverage shall not affect or prevent the continued
16 tabulation of ballots. This paragraph is contingent on legislative
17 appropriation. (Emphasis added)

11 **IV Beth Ford, Pima County Treasurer Has Nothing to Do With Elections and Does**
12 **Not Know What Is In The Boxes.**

13 Beth Ford, as Pima County Treasurer is a "county line officer" elected to office for a two year
14 term. A.R.S. § 11-406. The Pima County Board of Supervisors fixes her salary and budget. Ariz.
15 Const Act. 12 § 4. The duties of her office are set out in A.R.S. § 11-491 et seq and primarily relate
16 to collecting taxes and being a custodian of monies.

17 Beth Ford has no election responsibilities. As number 5 of her "undisputed issues" explains,
18 it was "unknown to her" that other public records were put in the boxes with the ballots. That is
19 because her sole involvement with ballots is to sign her name twice, or more precisely to be informed
20 twice through her staff.

21 The boxes containing ballots were filled by Pima County election division personnel. The
22 Plaintiff believes, based on her handwriting, that election division employee Mary Martinson created
23 the inventory list of the RTA boxes stored at Iron Mountain. The normal practice of the election
24 department is to prepare documents for the signature of the County Treasurer directing the election
25 division to deliver to storage the numbered boxes on the inventory. The normal practice is for the
26 election department to prepare approximately twenty-four months later a request for the County

1 Treasurer to sign, asking the election division to pick up those same boxes and transport them to be
2 destroyed.

3 Therefore, as County Treasurer, Beth Ford's normal involvement is to sign her name twice
4 and everything else is handled by the election division of the board of supervisors. That is it. That
5 is her only involvement. Perhaps her total lack of familiarity with the role of political parties has led
6 her to make suggestions not based on experience but on the desires of those who set her salary and
7 her budget.

8 The Democratic Party fully agrees that those boxes are in her custody and that she has
9 responsibilities as custodian. It is the Democratic Party, as one of the two major political parties,
10 that is experienced in election security, ballot observation, and analysis of election documents. The
11 court should keep those facts and experience in mind when reviewing the security measures
12 suggested by the defendants.

13 Furthermore, the Pima County Democratic Party has an excellent track record of concern for
14 election integrity. The plaintiff has played a key role in recent legislative changes improving election
15 security and multiple improvements in improving Pima County's physical election security and
16 procedural improvements. Judge Miller made a factual finding in the "database" lawsuit about the
17 helpful activities of the Pima County Democratic Party concerning election security. Various Pima
18 County election officials such as Brad Nelson, the county election director, have testified under oath
19 concerning the helpful assistance of the plaintiff.

20
21 **V. The "Poll Tape" or "Election Results Report"**

22
23 The second document requested by the plaintiff are the Election Results Report or "Poll
24 Tape." An example of such a poll tape is attached as Exhibit D. That example is a cut and paste
25 product of a longer actual tape from the 2004 general election but is attached so that the court can
26 understand the content and function of the report. It is the approximate size of the relatively short

1 RTA election tapes. As can be seen this official report also requires the signatures of the various poll
2 officials.

3 The "poll tapes" are the Diebold accuvote optical scan tapes printed at each polling location
4 showing the end of election day voting results for all ballots cast at the polling place and counted by
5 the optical scanner for all issues on the ballot. These reports are important documents used as an
6 audit tool as part of the preparation of the final canvass that is approved by the board of supervisors.

7
8 While voting itself is a secret process the counting of votes is a public process. Arizona's
9 public policy in that regard has been consistent since before statehood and is best stated in A.R.S.

10 §16-601:

11 **§ 16-601 Tally of vote**

12 As soon as the polls are closed and the last ballot has been deposited in the
13 ballot box, the election board or the tally board shall immediately count the
14 ballots cast. The count shall be public, in the presence of bystanders, and shall
be continued without adjournment until completed and the result determined
and declared.

15 The printing of the poll tape at the poll is simply an automated method of complying
16 with that requirement.

17 Both the poll tapes and the yellow sheets are specifically listed as to be kept "open to
18 the inspection of electors." In other words, separate and apart from general public record law
19 the legislature has determined that these documents must be open for inspection by any or
20 all of Arizona's 3.1 million electors. A.R.S. §16-616.

21 **A.R.S. §16-616.**

22 One of the poll lists and one of the tally lists used at the election shall be
23 withheld by the election board from the sealed packages of ballots and other
24 election supplies and shall be separately sealed in an envelope and returned to
25 the officer in charge of the election in the same manner as the official returns.
26 The officer shall, for a period of six months, keep such envelope open to the
inspection of electors. (Emphasis added)

1 A. Pima County's "Nonsense" Defense That Poll Tapes Could Serve as the
2 Functional Equivalent of Ballots.

3 Apparently unaware of A.R.S. §16-616, or simply blinded by their hostility to any
4 oversight, the Defendant Pima County Board of Supervisors, in paragraph 7 of their answer
5 dated February 10, 2009, claims that "in general 'poll tapes' are the functional equivalent of
6 ballots and are therefore not subject to disclosure under Arizona's public records laws." The
7 same argument was made by the defendant Beth Ford in her Controverting Certificate to
8 Motion to Set where she claimed expert testimony would be required since "this case
9 involves the important issue of whether" poll tapes "constitute the functional equivalent of"
10 ballots and "can properly be withheld from disclosure under the state's public records laws."

11 The defendant Beth Ford no longer makes that argument and the Pima County Board
12 of Supervisors say they "won't urge that issue" since the Democratic Party already has the
13 same information in the database they received after protracted litigation but only so long as
14 they retain the right to make the same argument in the future.

15 The suggestion that the possession by the Democratic Party of the electronic database
16 of past elections makes any difference is specious since the Democratic Party will have the
17 database in all future elections as well.

18 Judge Michael Miller ruled in Democratic Party of Pima County v. Pima County
19 Board of Supervisors, Pima County Cause No. 2007 2d 73 that the board of supervisors must
20 provide data for all elections. His ruling of May 23, 2008 discussed the issue in terms
21 relevant to the instant case.

22 Should Future Database Records Be Ordered Disclosed?

23 Plaintiff requests disclosure of databases for future elections. Although courts are
24 generally hesitant to order a defendant to obey a law in the future, prospective relief
25 under the public records law is appropriate where it is expected that the same type of
26 record will be produced on a regular basis and it is possible to make clear and
unambiguous request for those records. See West Valley View, Inc. v Maricopa
Sheriff's Office, 216 Ariz. 225, ¶ 17-18, 165 P.3d 203 (App. 2007). Election
database files are a regular and necessary part of elections conducted by Pima

1 County. The database files are readily identifiable. Moreover, the findings that
2 support disclosure of past election database files apply equally to all future elections.
3 In the event that Pima County contends that the election database files for a particular
4 election present significantly different public interest concerns, it can request specific
5 relief from this order. Plaintiff is entitled to disclosure of future databases.....
6 IT IS HEREBY ORDERED granting Plaintiff's Motion For Disclosure Of All
7 Election Data Files, including future elections, which disclosure shall be made no
8 later than the recording of the official canvass and the declaration of the election
9 results.

10 Judge Miller's reasoning concerning why he ordered disclosure of the electronic database in
11 the future applies with equal intellectual force to the Pima County's desire to not have any precedent
12 regarding poll tapes in the future. The board of supervisors argues that poll tapes are the "functional
13 equivalent of ballots." The "function" of a poll tape is to create a written record of all ballots cast
14 and the votes received at a specific voting location. It serves as an audit tool to compare with the
15 official canvass report that is later approved by the board of supervisors.

16 The official canvass report lists the votes cast at the precinct, the provisional ballot votes, and
17 the "early votes". In other words the same information concerning the precinct cast votes should be
18 on both records. A copy of the official canvass can be purchased by any person for \$5 dollars on a
19 DVD provided by the board of supervisors. That DVD has the same information for each precinct
20 that the board argues could reveal the identity of a voter. The board of supervisors is quite correct
21 in saying we have that information. The poll tapes contain other information, however, that is
22 important to the Democratic Party in carrying out the responsibilities and to which it has a legal
23 right.

24 Pima County has a budget of almost one and a half billion dollars. They approve the budget
25 of the Pima County Treasurer. They can easily grind down organizations like the Democratic Party
26 that survive on voluntary contributions. This case is itself a good example. The board of supervisors
insistence that they want to raise their "functional equivalent of ballots" argument in the future
emphasizes why there needs to be a precedent set in this case.

The parties to this lawsuit have gone down this same harassment road before in the
Democratic Party of Pima County v. Pima County Board of Supervisors and Beth Ford Pima County

1 Treasurer, Pima Co. Cause number C20070516. That lawsuit concerned public record "summary
2 reports" that had been placed in the same boxes as the ballots following the 2006 general election.

3 Judge Michael Miller ordered the boxes opened and the public records retrieved and copied. He
4 further ordered the defendants to pay \$16,500 in attorneys' fees and \$2,356.25 in costs.

5 The Democratic Party was not required to pay any expenses of the retrieval, nor even of the
6 copies received, and the retrieval process proceeded without any problems. Actually, there was one
7 "problem" in that Pima County's election director produced 87 boxes and insisted that all the boxes
8 from the 2006 general election had been produced. The Democratic Party observers explained to
9 him that he was wrong. Through the assistance of the Democratic Party observers the election
10 department was educated about their mistake and then produced 52 additional boxes. (See Exhibit
11 E, Declaration of Michael A. Duniho).

12 The merits of that lawsuit serve as a useful example of the role of political parties during
13 elections. More than one half of all ballots are now cast as "early ballots" that are mostly counted
14 before election day. Before the 2006 general election the legislature passed a law requiring an audit
15 procedure for early ballot counting.¹ The audit procedure required the printing of a total of all votes
16 tallied to that point and a second printing of the votes tallied after a select "batch" of ballots was
17 counted by the computer. This printing process is both necessary in order to later determine if the
18 ballot batch was accurately counted by the machine and hazardous because the "audit batch"
19 procedure requires the printing of actual vote totals before election day.

20 A.R.S. § 16-602 G sets out the procedure for this process. The procedure is for the
21 "chairman's designees" of the political parties to designate the batches of ballots to serve as audit
22 batches. Since the printing of actual vote totals is otherwise illegal pursuant to A.R.S. § 16-621 A,
23 the totals are printed upside down in the presence of the party observers so that the actual numbers
24 cannot be read by anyone. After the audit batch of ballots is counted the second printing is also
25

26 ¹ That legal change resulted from suggestions from the Pima County Democratic Party's Election
Integrity Committee that also supplied technical advice to the legislature.

1 upside down and the ballots, together with the two tallies (known as summary reports), are placed
2 in an envelope and sequestered for a post-election manual audit which is itself conducted by political
3 party appointed auditors.

4 The Democratic Party observers kept a security log that recorded the date and time each
5 summary report was printed during the 2006 general election. After a post election review of the
6 election computer audit log the Democratic Party observers learned that summary reports had been
7 printed by election division employees on October 30 and November 2 when our observers were not
8 present as required by law. The party requested to examine all the printed summary reports and to
9 receive copies. The board of supervisors election division claimed that all of the printed reports were
10 in the same boxes as the ballots and that those were the only summary reports that had been printed.
11 The Democratic Party then filed its lawsuit in order to confirm whether or not the copies were in the
12 boxes as the election division claimed or whether the election division had illegally printed actual
13 tallies without notice to the parties.

14 The result of the examination of the boxes confirmed the accuracy of the Democratic Party
15 observers' log entries because two reports that their observers log had identified as printed without
16 political party observers present were not in the boxes with the ballots as claimed by the election
17 division. (Exhibit E).

18 Beth Ford was present for the opening retrieval of documents and closing of the boxes.
19 Plaintiff predicts that she will testify that the political party observers behaved quite appropriately
20 and civilly in what may have been her first experience with political party observers. None of the
21 bizarre security suggestions about throwing disruptive persons out of the room can be based on her
22 experience.

23 The original 87 boxes produced by the election division were opened, examined and re-sealed
24 in approximately half a day. Once the Democratic Party observers convinced the election department
25 of their error they arranged for a second shipment of 52 boxes which were examined a week later
26 in less than half a day. (Exhibit E)

1 Exhibit F is an e-mail from Brad Nelson, Pima County Election Director, dated June 25, 2008
2 lauding the efforts of the Democratic Party observers during the opening of the boxes pursuant to
3 court order from our first lawsuit with these same parties.

4 "The fault was not that of Iron Mountain it was my offices. Kudos' to Mickey
5 Duniho for discovering the miscue. With Mr. Duniho's great assistance it was
6 discovered that 52 boxes from the 2006 election cycle remained to be pulled from
7 Iron Mountain and brought to the offices of the Pima County Election Department."

8 All of the suggestions related to Ford calling security or throwing persons out of the room
9 is propaganda. The real life track record of the serious patriotic observers of the Democratic Party
10 is one of helpful assistance.

11 **VI. Plaintiff's Proposed Procedure**

12 The Democratic Party has made specific proposals for copying, the most recent of which was
13 contained in a letter on January 12, 2010. (Exhibit G). That proposal is as follows:

14 The Democratic Party proposes the following procedures:

- 15 1. All boxes remain at Iron Mountain where they are currently under the legal control
16 of the Pima County Treasurer.
- 17 2. Iron Mountain provides the boxes at a room for that purpose at their facility.
- 18 3. Treasury office employees open the boxes and retrieve the poll tapes and yellow
19 sheets.
- 20 4. Democratic Party observers (or any other observer) examine the original and
21 photograph the original if desired.
- 22 5. Photocopies are made of each document at Iron Mountain for Democratic Party (or
23 anyone else).
- 24 6. The documents are replaced in the boxes where found. The boxes are resealed with
25 tape. Employees sign across the tape and box.
- 26 7. Stationary video in corner of room records process. DVD's can be made for anyone.

1 We will provide equipment.

2 The Democratic Party's proposal is quite simple yet provides for maximum security. It is
3 more secure because the boxes and all contents remain at their current safe storage previously
4 selected by Beth Ford and the Pima County Board of Supervisors. No original documents need leave
5 the premises. Iron Mountain has copying facilities as a part of their normal business. Beth Ford
6 need not be personally present. She has trusted employees and can direct others to open the boxes
7 and produce the documents. The boxes are cardboard boxes that are taped shut. A simple box
8 cutter, knife or sharp object can open the boxes and packing tape can close them. Beth Ford was
9 personally involved with the same procedure related to the "summary reports" lawsuit. Those boxes
10 were sealed with packing tape and the persons sealing the boxes simply signed over the tape.

11 The entire examination and copying process should be complete within one morning or
12 afternoon. Exhibit A is believed to be the transmittal sheets for all of the RTA boxes. The sheets
13 list 105 boxes. The sheets describe the contents of the boxes.

14 Three boxes are described as containing "official returns envelopes," and a fourth box
15 "official and early envelopes." Plaintiff is not certain that those boxes contain the records we are
16 seeking but believes that those four boxes likely contain all the records they seek.

17 Obviously, the defendant Board of Supervisors knows the answer to their question. Michael
18 Duniho, one of plaintiff's observers, reports that he recalled that all of the poll tapes and yellow
19 sheets were in separate boxes during the 2006 general election opening of the boxes. It is logical that
20 such may be the case since those records are contained in envelopes separate from the ballots when
21 placed in the ballot bags.

22 Even if the records are in boxes with ballots they should be readily identifiable.

23 The plaintiff's proposal is simple, secure and low cost. It meets all the requirements of a
24 rational retrieval of the documents.

1 **VII. DISPUTED ISSUES:**

2 **Democratic Party's Response to Beth Ford's Suggested "Retrieval Process"**

3 The following numbered suggestions are verbatim the suggestions of Beth Ford.

- 4
- 5 1. The process of retrieving the poll tapes and yellow sheets from the Ballot boxes
- 6 (Document Retrieval Process") will take place at Iron Mountain, the location where
- 7 the Ballot boxes for the 2006 Special Election are currently stored.

8 **Democratic Party:** Agree X Disagree

9 **Pima County:** Agree Disagree

10 **Reason(s) for disagreement:**

- 11
- 12 2. One representative from each political party and one representative from the Pima
- 13 County Elections Department shall be permitted (but not required) to view the
- 14 Document Retrieval Process that takes place at Iron Mountain. Disagree.

15 **Democratic Party:** Agree Disagree X

16 **Pima County:** Agree Disagree

17 **Reason(s) for disagreement:** Two or three persons would be more time efficient where one

18 examines the records, copies or photographs if necessary and the other keeps track of the

19 process on a laptop spread sheet. The use of a portable flat scanner would be helpful. The

20 Democratic Party had two observers during the same process required by their prior lawsuit

21 and it worked quite well.

- 22
- 23 3. Any person viewing the Document Retrieval Process shall be required to remain in
- 24 a designated area no closer than five (5) feet from the persons who are directly
- 25 involved in the retrieval efforts.

26 **Democratic Party:** Agree Disagree X

1 **Pima County:** Agree _____ Disagree _____

2 **Reason(s) for disagreement:** This requirement makes no sense. The persons who are
3 involved in the process must bring the documents to the observers. If she means no closer
4 than five feet from the "boxes" it would make more sense. Since we will not be searching
5 the boxes they can be much further away. As for "persons," there must be interaction
6 between observers and county treasurer employees for the process to proceed smoothly.

7
8 4. No photography or videotaping shall be permitted during the Document Retrieval
9 Process.

10 **Democratic Party:** Agree _____ Disagree X

11 **Pima County:** Agree _____ Disagree _____

12 **Reason(s) for disagreement:** A "no photography" requirement is contrary to law. A.R.S.
13 § 39-121.01 D (1) provides that "any person may request to examine or be furnished copies,
14 printouts or photographs of any public record..." The plaintiff is requesting to "examine" the
15 documents, to be "furnished copies" and also photograph the records as permitted by law.

16 Pima County has alerted the parties that the records may be faded and difficult to
17 copy. That is one of the reasons why plaintiff wants the ability to photograph if necessary.

18 The "video" is of special interest. It is not required by law but it is something that
19 makes a lot of sense to the plaintiff for the following reasons. The legislature has determined
20 that live video coverage of ballots during an election is good public policy. A.R.S. §16-621
21 C. Pima County does video its ballot counting area continuously when ballots are present.
22 In the board of supervisors suggested procedures in this case "@ Elections Department" they
23 suggested that the ballots should be continuously videoed while on site. The defendant
24 themselves referred to such video coverage as "the standard procedure when ballots are in
25 the building." The County furthered described their suggested video coverage as quoted
26 below:

1 "7. Video coverage for the duration of the presence of the retrieval materials in
2 the Technical Center will be captured from the Storage Vault and the
3 Counting Room will be recorded. Contents will be saved to DVD media for
4 subsequent viewing by any party to the lawsuit following a commitment for
5 payment of copying costs."

6 In fact, the county thought that such video recording was so important they wanted to charge
7 the Democratic Party \$3,200.00 for "video file conversion to DVD-64 hours @ \$50.00" and
8 \$3,075.84 for a "Sheriff's Deputy-72 hours x \$42.72" to watch the video feed. The
9 Democratic Party is offering the same secure "standard" service for free to all parties and
10 observers.

11 Rule 30 (A) (1) of the Rules of Civil Procedure provides that any deposition may be video
12 taped but that " the notice shall state the technique for recording the deposition and the
13 protocols to be used for such recording, the identity of the person recording the deposition,
14 and the placement of camera(s)...." It is standard practice in litigation that the handling of
15 evidence or testing by experts is videotaped.

16 Therefore, the video suggestion of the Democratic Party is based upon those three
17 "standards." The standard practice of the election division as required by statute, the
18 standard practice concerning depositions and the standard practice of expert or other
19 examination of key evidence in litigation. The existence of continued litigation as evidenced
20 by Judge Harrington's Stay Order further argues for the complete non-intrusive video
21 recordings as suggested by the plaintiff. This is not an exotic request. It is just good sense.

22
23 5. Iron Mountain personnel will bring the Ballot boxes from the Special Election to a
24 room at Iron Mountain in which each of the boxes will be opened, one at a time.

25 Democratic Party: Agree _____ Disagree X _____

26 Pima County: Agree _____ Disagree _____

1 **Reason(s) for disagreement:** The plaintiff believes that Iron Mountain stores the boxes on
2 pallets and prices their retrieval based on pallets. The suggestion that the boxes should be
3 brought into the room one box at a time will greatly extend the time required to examine the
4 boxes which total 105. Since Iron Mountain moves boxes mechanically they might be
5 required to retrieve a pallet, put it in a separate room, and then bring in one box a time.

6 Plaintiff suggests that four boxes initially should be examined with three most likely
7 to contain all the records sought and no ballots. Iron Mountain "customer box numbers
8 353469064, 353469065 and 353469066" were designated by Pima County's Election
9 Division to contain "official returns envelopes." We do not know for sure because Beth Ford
10 has refused to look and the county has not disclosed their packing procedures.

11
12 6. Ford and one or two persons who will assist her (with such persons either being
13 current employees from her office or being persons Ford hires to assist with this
14 particular process- see the Timing and Payment of Costs paragraphs 58-64, below)
15 will unseal each of the Ballot boxes and remove any yellow sheets and poll tapes
16 from each box.

17 **Democratic Party:** Agree X Disagree _____

18 **Pima County:** Agree _____ Disagree _____

19 **Reason(s) for agreement:** The Democratic Party had a good experience with Ms. Ford the
20 last time the boxes were opened and found her to be quite pleasant. We do not know why
21 she needs to be personally present but we would prefer her presence as long as she did not
22 claim to be unavailable because of her statutory responsibilities as Treasurer and thus delay
23 the prompt disclosure of the public records.

24
25 7. The Document Retrieval Process will occur in a manner so as to attempt, to the
26 extent reasonably possible, not to disturb the order of the ballots, assuming that such

ballots are stacked and in some type of order.

Democratic Party: Agree X Disagree

Pima County: Agree Disagree

Reason(s) for agreement: The Democratic Party believes the ballots are generally in boxes by precinct but otherwise are not in any particular order. After all, they are simply used ballots. We anticipate that they will be found on top of whatever else is in the boxes. This anticipation is based on information from observers at the hand count in Maricopa County. The intrusion of ballot boxes would only be necessary after the boxes without ballots are examined.

8. During the Document Retrieval Process, no individual Ballots will be examined.

Democratic Party: Agree X Disagree

Pima County: Agree Disagree

Reason(s) for agreement: The Democratic Party has no interest in individual ballots. There are tens of thousands of them and they are totally immaterial to this lawsuit.

9. During the Document Retrieval Process, no Ballots will be transferred from one box to another box unless the original box containing the Ballots has been damaged to such extent that it is no longer usable, in which case all Ballots from such original box will be transferred to a new box and the new box will be appropriately marked. Ballots transferred to a new box for this reason will not be combined with Ballots from any other box.

Democratic Party: Agree X Disagree

Pima County: Agree Disagree

Reason(s) for disagreement:

10. Any poll tapes and yellow sheets contained in a Ballot box will be inventoried by Ford and her assistant(s) on form inventory sheets as they are removed from that Ballot box.

Democratic Party: Agree X Disagree

Pima County: Agree Disagree

Reason(s) for agreement: Our observers expect to do the same. The Democratic Party has a spreadsheet for that purpose. Either parties can use our spreadsheet or receive a copy later from our observer.

11. Ford and her assistant(s) will also designate on the form inventory sheets any Ballot boxes that do not contain poll tapes and/or yellow sheets. .

Democratic Party: Agree X Disagree

Pima County: Agree Disagree

Reason(s) for agreement: We expect to do the same, but only if the poll tapes and yellow sheets are not in separate boxes.

12. After removal and inventory of the poll tapes and yellow sheets from a Ballot box, the poll tapes and yellow sheets will be placed by Ford and her assistant(s) in separate bankers boxes, never to be returned to the Ballot boxes.

Democratic Party: Agree Disagree X

Pima County: Agree Disagree

Reason(s) for disagreement: This is a bad idea. The key issue here is to preserve those items in a secure setting. Judge Harrington's order and the Libertarian Party interest as plaintiff can best be accommodated by not altering the contents of any box. The contents should be retrieved, examined, copied, photographed if necessary and replaced in the same boxes.

1 13. Each Ballot box will be resealed by Ford and her assistant after removal and
2 inventory of any poll tapes and yellow sheets that were contained therein, and the
3 Ballot boxes with the Special Election ballots inside will be returned to storage at
4 Iron Mountain.

5 Democratic Party: Agree _____ Disagree X

6 Pima County: Agree _____ Disagree _____

7 Reason(s) for disagreement: The Democratic Party agrees to the re-sealing and return to
8 storage of all boxes at Iron Mountain but suggests that the same items should be returned to
9 the same boxes. Ford's plan results in the box contents being altered for no sufficient reason.

10 It complicates chain of custody when such a complication benefits noone.

11
12 14. At the end of each day of the Document Retrieval Process, the inventory sheets for
13 the Ballot boxes opened that day will be photocopied under Ford's direction at Iron
14 Mountain.

15 Democratic Party: Agree _____ Disagree X

16 Pima County: Agree _____ Disagree _____

17 Reason(s) for disagreement: The copying should occur throughout the day immediately
18 following the retrieval of the records from each box.

19
20 15. One copy of the inventory sheets for the Ballot boxes opened that day will be given
21 to each representative in attendance at the Document Retrieval Process.

22 Democratic Party: Agree X Disagree _____

23 Pima County: Agree _____ Disagree _____

24 Reason(s) for agreement: However the inventory is catalogued each observer or party
25 should have equal information. The plaintiff disagrees with this suggestion as part of the
26 plan to place the documents at an off-site location. For on-site purposes each observer

1 should have equal information.

2
3 16. In addition, a copy of the inventory sheets will be placed in each of the bankers boxes
4 into which, on that day, poll tapes and yellow sheets were placed.

5 Democratic Party: Agree _____ Disagree X _____

6 Pima County: Agree _____ Disagree _____

7 Reason(s) for disagreement: This process pre-supposes the permanent removal of the
8 documents from their original boxes. Therefore, the Democratic Party opposes this entire
9 process.

10
11 17. The original of the inventory sheets shall be retained by Ford.

12 Democratic Party: Agree _____ Disagree X _____

13 Pima County: Agree _____ Disagree _____

14 Reason(s) for disagreement: For the same reason previously stated. Plaintiff's objection
15 is not to her retention of an original inventory but to the process where the inventory alone
16 is created and documents copied on a later date.

17
18 18. At the end of each day of the Document Retrieval Process, the bankers boxes
19 containing the poll tapes, yellow sheets and inventory sheets will be taped shut,
20 appropriately marked, and transported by Ford to the vault that is in Ford's office.

21
22 Democratic Party: Agree _____ Disagree X _____

23 Pima County: Agree _____ Disagree _____

24 Reason(s) for disagreement: This idea would dramatically alter the security of the
25 documents in a very negative way. The boxes are currently protected from destruction
26 because of allegations in court that the RTA was criminally rigged. It would be folly to

1 permit potential evidence to leave the security of its present storage.

2 Furthermore, the defendant Pima County Board of Supervisors and the suspects in
3 the criminal allegations has a specific and dramatic history of violating secure court ordered
4 procedures when related to election materials. In the database lawsuit, Democratic Party
5 of Pima County v. Pima County Board of Supervisors, Cause No. C20072073, computer hard
6 drive copies of the database were placed in the Pima County Superior Court Clerk's Vault
7 with an 8 1/2" X 11" court order taped to the top of an 8 1/2" X 11" box requiring that the box
8 could only be accessed by both parties at the same time with a specific court order. In direct
9 violation of that court order John Moffatt, defendant's witness in this case, walked into the

10 clerk's office with no notice to the Democratic Party and was given the entire box with no
11 court order shown and without even being required to sign a receipt. (See Exhibit E, point
12 8) With a specific history of such brazen conduct in clear violation of the court's order and
13 the security of this court's vault, the Democratic Party is not comforted that Beth Ford wants
14 to take key records back to her office before copies have been made. Those documents
15 should remain where they were found.

16
17 19. No special security personnel will be utilized during the Document Retrieval Process
18 (apart from the security that is normally present at Iron Mountain).

19 Democratic Party: Agree X Disagree

20 Pima County: Agree Disagree

21 Reason(s) for agreement: Experience has shown that none is necessary for observers
22 appointed by political parties.

23
24 20. Any disruptive conduct by a person viewing the Document Retrieval Process will
25 result in the process being terminated if the offending person does not leave the
26 premises immediately when asked to do so by Ford.

1 Democratic Party: Agree X Disagree

2 Pima County: Agree Disagree

3 Reason(s) for agreement: This issue is another argument in favor of video recording. Just
4 like "fences make good neighbors" video recording makes people more polite.

5
6 21. In addition, in Ford's discretion, security personnel can be called by Ford if a person
7 engages in disruptive conduct.

8 Democratic Party: Agree X Disagree

9 Pima County: Agree Disagree

10 Reason(s) for disagreement: This statement is an obvious truth. The issue of interest is
11 "why" it is stated. The Democratic Party in Pima County has been here since before
12 statehood. The purpose seems to be one of suggesting a possibility when the known history
13 is the opposite.

14
15 22. Unless a specific date is set for the commencement of the Document Retrieval
16 Process by court order, Ford shall establish the date on which the process shall begin,
17 within the limits of the Timing and Payment of Costs paragraphs 58-64, below.

18 Democratic Party: Agree Disagree X

19 Pima County: Agree Disagree

20 Reason(s) for disagreement: This matter has dragged on long enough. The law requires
21 "prompt" and Ford's suggestions and conduct demonstrates that she does not understand
22 prompt.

23
24 23. Ford will give not less than fifteen (15) calendar days notice to the political parties
25 and the Pima County Elections Department of the day that the Document Retrieval
26 Process will begin.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The court should set a date. It should occur as soon as feasible.

24. If the Document Retrieval Process takes more than one day, Ford will designate the next date on which the process will continue, which date will depend upon her availability and that of her assistant(s) but which shall be within the limits of the Timing and Payment of Costs paragraphs 58-64, below.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The retrieval process should proceed on successive days if possible so that it may be promptly completed. Plaintiff thinks there is no reason it can not all be completed in one day.

25. Ford will determine the duration of the document retrieval efforts on any particular day.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The plaintiff recommends that the court set the times. The entire package of Ford's suggestions demonstrates that she is "stalling" and that specificity is required.

26. Ford will direct this Document Retrieval Process and make all decisions on any questions or issues that arise during such process.

Democratic Party: Agree X Disagree _____

1 Pima County: Agree _____ Disagree _____

2 Reason(s) for disagreement: As long as Ford complies with the court order and her legal
3 responsibilities she may make any decision consistent with her role as legal custodian.

4
5 27. The photocopying of the poll tapes and yellow sheets (Photocopying Process") will
6 take place on a date or dates following the Document Retrieval Process and at a place
7 other than Iron Mountain.

8 Democratic Party: Agree _____ Disagree X

9 Pima County: Agree _____ Disagree _____

10 Reason(s) for disagreement: It is part of Iron Mountain's normal business to provide
11 copying facilities. On site copying is quick and cheap. The plaintiff could easily provide a
12 flat plate scanner, if necessary. There are multiple on-site methods for copying. An
13 interesting aspect of this entirely unnecessary and insecure proposal, as well as others, is the
14 obvious desire to get the documents to another location for delayed copying.

15 It is apparent that Beth Ford's suggestions are reflections of the desire of the election
16 division to get the documents to another location for reasons unknown. Ms. Ford earlier
17 sought to delay this case for an additional six months in order to address with expert
18 testimony the "issue" of whether the poll tapes were "functional equivalents of ballots."
19 Later, Ford explained that her raising of that defense was based on Pima County's desire and
20 not her own desire to make that defense. Ford claimed her pled defense was "based upon the
21 misunderstanding of Ford's counsel that Pima County intended to argue that the 2006 special
22 election 'poll tape' was exempt from the disclosure requirements of the public records
23 statutes because they are or could be the functional equivalent of ballots." (Footnote 4, page
24 6 of Ford's Response to Plaintiffs Renewed Application For Order to Show Cause, dated
25 January 12, 2010).

26 In other words and in plain English, Ford claims she only raised that defense because

1 she thought Pima County wanted her to. The same motive may be involved with her desire
2 to remove records from Iron Mountain for copying at another location on another day. It is
3 clear, however, that every effort must be made to make sure that Pima County election
4 division personnel have no opportunity for access to any of these original documents.

5 In a memorandum dated May 18, 2007, Pima County Administrator C.H.
6 Huckelberry requested that Iron Mountain be instructed not to permit any access by any
7 election division person, or even Mr. Huckleberry himself, to the RTA election materials.
8 See Exhibit H, attached.

9 May 18, 2007

10 From: C.H. Huckleberry, County Administrator
11 To: Brad Nelson, Elections Director

12
13 In addition, we need to protect, secure and seal any information related to
14 Division of Elections actions regarding not only November 2006 election, but
15 also the May 2006 RTA election. Even though the ballots/returns for the
16 RTA election are eligible for destruction pursuant to A.R.S. 16-624, please
17 ensure that all ballot and election returns for this election now stored at our
18 contract records management facility are retained, with specific instructions
19 not to destroy these documents. Further, since the allegations are against an
20 official of the Division of Elections, it would be appropriate to ensure that
21 there are very specific instructions approved by the County Attorney to the
22 contract records management firm, that Division of Elections personnel,
23 including you as the Director, and myself as your immediate supervisor, are
24 not granted any independent access to said records without independent
25 oversight and supervision. This will ensure that County Administration and
26 the Division of Elections cannot be accused of having independent access to
the ballots and altering same. (Emphasis added)

19 Almost three weeks after that memorandum the Pima County Attorney filed
20 pleadings in this court stating that "any attempt by counsel for either side to elicit testimony
21 from anybody involved with the Pima County's Division of Election or the Pima County
22 computer system runs a significant risk of impacting that witness's constitutional rights and
23 eliciting an assertion of the Fifth-Amendment privilege." (Emphasis in original). The
24 astonishing pleading by the County Attorney that they could not speak to anyone in the
25 election division about the RTA without "a significant risk impacting that" person's Fifth
26 Amendment rights is a statement without known precedent in this nation. (Exhibit I)

1 Plaintiff's security concerns are the same as County Administrator Huckleberry.
2 Under no circumstance should the Division of Election Personnel or any county personnel
3 touch the stored boxes without "independent oversight and supervision." Presumably Iron
4 Mountain received such county attorney approved instructions from Brad Nelson as
5 Huckleberry requested. It is noteworthy, however, that Beth Ford, the actual legal custodian,
6 was outside the loop and ignored by Huckelberry and the County Attorney. She was not
7 asked to give instructions concerning records in her exclusive legal control.

8
9 28. One representative from each political party and one representative from the Pima

10 County Elections Department shall be permitted (but not required) to view the
11 Photocopying Process.

12 **Democratic Party:** Agree _____ Disagree X

13 **Pima County:** Agree _____ Disagree _____

14 **Reason(s) for disagreement:** The Democratic Party had two observers at the earlier retrieval
15 and copying and it worked well. There is plenty of space at Iron Mountain so space is not
16 a problem. The plaintiff recommends two persons for its observation and examination team,
17 which would make the process more efficient.

18
19 29. No photocopying or video taping shall be permitted during the Photocopying Process.

20 **Democratic Party:** Agree _____ Disagree X

21 **Pima County:** Agree _____ Disagree _____

22 **Reason(s) for disagreement:** Plaintiff has previously addressed this point. The photography
23 that may be required is for the documents themselves if desired. The county has noted that
24 some of the documents may be faint and difficult to copy. Photography or digital scanning
25 could assist in those instances. The suggested video taping is more akin to security cameras
26 at stores and is not designed for close ups or head shots.

30. Any person viewing the Photocopying Process shall remain in a designated area no closer than 5 feet from the persons who are actually making the photocopies.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: This suggestion makes no sense. The Plaintiff is permitted by law to examine the original documents and has requested to do so. There is no reason for this requirement. We assume, however, that the copying is likely to take place wherever Iron Mountain keeps their machine. We are not requesting to run their machine. The law permits us to examine the original, receive a copy and to take photographs of the documents if we desire. Those rights are the ones we wish to exercise.

31. Ford and one or two persons who will assist her (with such persons either being current employees from her office or being persons Ford hires to assist with this particular process- see the Timing and Payment of Costs paragraphs 58-64, below) will remove the bankers boxes containing the poll tapes, yellow sheets and inventories from the vault in her office and will unseal the bankers boxes in order that the poll tapes and yellow sheets can be photocopied.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The plaintiff strongly re-asserts its objection to removal of the documents from Iron Mountain and copying at the Treasurer's office.

32. Ford's assistants, under Ford's supervision, will make (or will make arrangements for) one set of photocopies of the poll tapes and yellow sheets for each person/political party that requests and pays for a copy, a copy will be retained by Ford, and a copy will be made for the Pima County Election Department.

Democratic Party: Agree X Disagree _____

1 **Pima County:** Agree _____ Disagree _____

2 **Reason(s) for agreement:** Plaintiff agrees with this suggestion so long as the copies are
3 made at Iron Mountain. Some of the poll tapes and yellow sheets will need to be copied on
4 both sides if the election officials wrote comments or signed the back side of the documents.
5 One of the reasons plaintiff wishes to examine the originals is to check for any writing on the
6 back side of documents.

7
8 33. After being photocopied, the poll tapes and yellow sheets will be returned by Ford
9 and her assistant(s) to the same bankers box from which they were taken.

10 **Democratic Party:** Agree _____ Disagree X

11 **Pima County:** Agree _____ Disagree _____

12 **Reason(s) for disagreement:** The documents should not be in Ford's office or anywhere
13 outside of their current secure storage.

14
15 34. The bankers boxes containing the poll tapes and yellow sheets that were copied will
16 be taped shut, appropriately marked, and transported by Ford and her assistant(s)

17 **Democratic Party:** Agree _____ Disagree X

18 **Pima County:** Agree _____ Disagree _____

19 **Reason(s) for disagreement:** The documents should not be in Ford's office.

20
21 35. No special security personnel will be utilized during the Photocopying Process.

22 **Democratic Party:** Agree X Disagree _____

23 **Pima County:** Agree _____ Disagree _____

24 **Reason(s) for agreement:** As long as the copying is conducted at Iron Mountain.

25
26 36. Any disruptive conduct by a person viewing the Photocopying Process would result
in the process being terminated if the offending person does not leave the premises

1 immediately when asked to do so by Ford.

2 Democratic Party: Agree X Disagree _____

3 Pima County: Agree _____ Disagree _____

4 Reason(s) for agreement: Ford is the custodian. This provision further argues for video
5 recording. Ford can confirm that there were no problems last time and no disruptions are
6 anticipated this time. The Democratic Party uses competent observers. The last opening of
7 the boxes proved their competence exceeded that of the election staff since they correctly
8 determined some 52 boxes were missing when the election director, after consultation with
9 his staff, insisted that all of the boxes had been produced. (See Exhibit E and F). The

10 missing 52 boxes was a huge error that Brad Nelson, Pima County's Election Director,
11 conceded was his office's fault. The plaintiff has proven repeatedly its interest in election
12 integrity and improving security.

13
14 37. In addition, at Ford's discretion, security personnel can be called by Ford if a person
15 engages in disruptive conduct.

16 Democratic Party: Agree X Disagree _____

17 Pima County: Agree _____ Disagree _____

18 Reason(s) for disagreement:

19
20 38. Assuming that receipt of payment for the cost of the photocopies has already been
21 received by Ford, the photocopies will be immediately provided to those persons who
22 had requested them.

23 Democratic Party: Agree X Disagree _____

24 Pima County: Agree _____ Disagree _____

25 Reason(s) for agreement: The plaintiff can provide Ford or Iron Mountain with funds in
26 advance or bring rolls of quarters, whichever Ford prefers. A check at the conclusion makes
more sense and is the normal procedure related to payment for public records. However, if

1 Ford wants funds in advance or on deposit the plaintiff has no objection.

2
3 39. Unless a specific date is set for the commencement of the Photocopying Process by
4 court order, Ford shall establish the date on which the process shall begin, within the
5 limits of the Timing and Payment of Costs paragraphs 58-64, below.

6 Democratic Party: Agree _____ Disagree X

7 Pima County: Agree _____ Disagree _____

8 Reason(s) for disagreement: Ford suggests that she will "commence" the retrieval process
9 sometime during the second week in June 2010 and proceed thereafter at her pace with the
10 plaintiff paying for her employees wages to locate the records. The law requires "prompt"
11 and does not require for the plaintiff to pay her employees wages. See Phoenix New Times
12 L.L.C. v. Arpaio, 217 Ariz. 533, 177 _ 3d 275.

13
14 40. Ford will give not less than seven (7) calendar days notice to the political parties and
15 the Pima County Elections Department of the date, time and place when and where
16 the Photocopying Process will commence.

17 Democratic Party: Agree _____ Disagree X

18 Pima County: Agree _____ Disagree _____

19 Reason(s) for disagreement: The photography should occur at Iron Mountain at the time
20 the boxes are opened. The plaintiff predicts that everything can be completed in one morning
21 or afternoon.

22
23 41. Ford will direct the Photocopying Process and make all decisions on any questions
24 or issues that arise during such process.

25 Democratic Party: Agree X Disagree _____

26 Pima County: Agree _____ Disagree _____

Reason(s) for agreement: As long as Ford follows the court's order and Arizona law we do

1 not object to her making all those decisions. In fact, we assert that she, as the legal
2 custodian, is the person who should make any decisions not covered by the court's order.
3

4 **Document Examination Process**

5
6 42. The process of reexamining the poll tapes and yellow sheets that were retrieved from
7 the Ballot boxes during the Document Retrieval Process and, if desired, comparing
8 them to the photocopies made and provided as part of the Photocopying Process
9 ("Document Examination Process") will occur in the Treasurer's Office, the
10 conference room of Ford's legal counsel, or any other reasonably suitable location
11 chosen by Ford.

12 **Democratic Party:** Agree _____ Disagree X

13 **Pima County:** Agree _____ Disagree _____

14 **Reason(s) for disagreement:** Those documents should not leave Iron Mountain or the boxes
15 where they were found. That is the "suitable location" and not a law office or other place she
16 chooses.

17
18 43. Photocopy and videotaping of the Document Examination Process shall be permitted,
19 including photography and/or videotaping of the retrieved poll tapes and/or yellow
20 sheets from which the photocopies were made, provided that such photograph and
21 videotaping does not disturb the orderly manner in which the documents are to be
22 examined and returned to the same bankers boxes from which they came.

23 **Democratic Party:** Agree X Disagree X

24 **Pima County:** Agree _____ Disagree _____

25 **Reason(s) for disagreement:** Ford and the Democratic Party are in agreement that
26 photography of the documents is proper and Ford approves video taping of the boxes being
opened and the documents being retrieved. Such videotaping actually ensures a complete

1 chain of custody process. That is why the plaintiff has suggested such protection. Our
2 objection to the "bankers boxes" and removal of the documents has previously been stated.
3 There is no logical reason why Ford would propose video taping of her banker's box scheme
4 and not the video taping of the boxes themselves when the documents are retrieved.

5
6 44. Ford and one or two persons who will assist her (with such persons either being
7 current employees from her office or being persons Ford hires to assist with this
8 particular process- see the Timing and Payment of Costs paragraphs 58-64, below)
9 will arrange to move the bankers boxes containing the yellow sheets, poll tapes and
10 inventory sheets from the vault in Ford's office to the location chosen by Ford, where
11 the persons who obtained copies can inspect the yellow sheets and poll tapes and
12 compare their copies to the documents that were retrieved from the Ballot boxes.

13 **Democratic Party:** Agree _____ Disagree X

14 **Pima County:** Agree _____ Disagree _____

15 **Reason(s) for disagreement:** Copies should be made at Iron Mountain. Inspection of the
16 originals should be made at Iron Mountain. The boxes must remain at Iron Mountain by
17 prior court order and the contents of those boxes should remain intact.

18
19 45. Ford and her assistant(s) will unseal and open the bankers boxes containing the poll
20 tapes, yellow sheets and inventories at the location at which the Document
21 Examination Process is to occur

22 **Democratic Party:** Agree _____ Disagree X

23 **Pima County:** Agree _____ Disagree _____

24 **Reason(s) for disagreement:** The "bankers boxes" plan is fraught with problems. The
25 documents should be examined at Iron Mountain and remain in the boxes where found.

26 46. The Document Examination Process will occur in a reasonable and orderly manner,

as directed by Ford, and in such a manner so as to enable Ford and her assistant(s) to return the yellow sheets and poll tapes to the particular bankers box in which they had been placed following the Document Retrieval and Photocopying Processes.

Democratic Party: Agree _____ Disagree X _____

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: Based on previously expressed reasons any removal of those records is a very bad idea.

47. No special security personnel will be utilized during the Document Examination Process.

Democratic Party: Agree _____ Disagree X _____

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: Plaintiff has suggested a security video camera system. Otherwise, no special security would be required. The documents to be examined were created and signed by political party observers at the precincts. Plaintiff's observers are quite familiar with these routine public records. It is certainly true that special security personnel is not required.

48. Any disruptive conduct or conduct that interferes with those procedures adopted by Ford to ensure a reasonable and orderly examination of the documents by a person attending or involved in the Document Examination Process will result in the process being terminated if the offending person does not leave the premises immediately when asked to do so by Ford.

Democratic Party: Agree X _____ Disagree X _____

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The plaintiff suggests that the procedures should be in the court order and that a video security system be utilized. Ford can deal with "disruptive

1 conduct that interferes with those procedures," by requesting the person to leave. Her
2 authority extends to all persons present including the board of supervisor observer or other
3 political party observers.

4
5 49. In addition, at Ford's discretion, security personnel can be called by Ford if a person
6 violates the required procedures or engages in disruptive conduct.

7 Democratic Party: Agree X Disagree

8 Pima County: Agree Disagree

9 Reason(s) for disagreement:

10
11 50. After the document Examination Process is completed, Ford and her assistant(s) will
12 reseal, appropriately mark, and return the bankers boxes with the poll tapes, yellow
13 sheets and inventory sheets to the vault in Ford's office.

14 Democratic Party: Agree Disagree X

15 Pima County: Agree Disagree

16 Reason(s) for disagreement: All records should remain at Iron Mountain.

17
18 51. Unless a specific date is set for the commencement of the Document Examination
19 Process by court order, Ford shall establish the date on which the process shall
20 begin, within the limits of the Timing and Payment of Costs paragraphs 58-64,
21 below.

22 Democratic Party: Agree Disagree X

23 Pima County: Agree Disagree

24 Reason(s) for disagreement: The court should set a date.

25
26 52. Ford will give not less than seven (7) calendar days notice to the political parties and
the Pima County Elections Department of the date, time and place when and where

the Document Examination will commence.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The court should set a date. The plaintiff assumes such a date will be set with adequate notice to the parties and after receiving Ford's input.

53. Ford will direct the Document Examination Process and make all decisions on any questions or issues that arise during such process.

Democratic Party: Agree X Disagree _____

Pima County: Agree _____ Disagree _____

Reason(s) for agreement: Consistent with the law and the court's order Ford retains the responsibilities of a legal custodian.

Destruction of Documents

54. The retrieved yellow sheets and poll tapes removed from the Ballot boxes will be destroyed six (6) months after the completion of the Document Examination Process unless a court order to the contrary is issued prior to such destruction ("Document Destruction Process")

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: Once all lawsuits and investigations are completed Ford may destroy the documents pursuant to law.

55. Ford and one or two persons who will assist her (with such persons either being current employees from her office or being persons Ford hires to assist with this particular process- see the Timing and Payment of Costs paragraphs 58-64, below)

will accomplish the document destruction.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The laws against destruction of public records applies to everyone who participates.

56. No notice will be given to other concerning the Document Destruction Process, and no third parties will have the right to view such process.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: See above.

57. Ford will direct the Document Destruction Process and will make all decisions on any questions or issues that arise during the process.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: See above.

Timing and Payment of Costs

58. Due to the current volume of workload at the Pima County Treasurer's Office, the Document Retrieval Process will commence on a date selected by Ford between June 11, 2010, and June 18, 2010, unless the court otherwise orders a specific commencement date for such process.

Democratic Party: Agree _____ Disagree X

Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: The law requires "prompt." As of February 8, 2010 it has

1 been 494 days since the original October 2, 2008 written request. It is another 123 days to
2 June 11, 2010. Therefor, Ford suggests that the plaintiff wait 617 days for the process to
3 "begin."

4 The court in Phoenix New Times, L.L.C. v Arpaio (App. Div 1 2008), 217 Ariz. 533,
5 538, 177 P.3d 275, 280 noted that they had "previously defined "prompt" in this context as
6 "quick to act" or producing the requested records 'without delay.' West Valley View, Inc. V.
7 Maricopa County Sheriff's Office, 216 Ariz. 225, 230, 165 P.3d 203, 208 (app. 2007) quoting
8 Webster's New World Dictionary 1137 (2d ed. 1980).

9 The court in Phoenix New Times case examined specific requests that had been made by the
10 Phoenix New Times and found that various response delays of 41 days, 49 days, 77 days, 108
11 days, and 143 days were all too long and constituted a wrongful denial as a matter of law.
12 The court clearly needs to enter an order that promptly permits the plaintiff to examine and
13 receive copies of the records to which it is entitled.

14
15 59. The photocopying Process and the Document Examination Process will also be
16 completed during June or early July, 2010.

17 Democratic Party: Agree _____ Disagree X _____

18 Pima County: Agree _____ Disagree _____

19 Reason(s) for disagreement: See prior response.

20
21 60. If the Document Retrieval Process, Photocopying Process and Document
22 Examination Process occur on or before June 11, 2010, employees from Ford's office
23 will be available to assist Ford, and no charge will be imposed on the Democratic
24 Party for such assistance.

25 Democratic Party: Agree _____ Disagree X _____

26 Pima County: Agree _____ Disagree _____

Reason(s) for disagreement: There should be no charge at any time for Ford's employees

1 to retrieve the records. Arizona law is clear on this point. Ford should be quite familiar with
2 the public records laws and the fact that her office does not charge any person who requests
3 records from her office for non-commercial purposes the salaries of her employees. The
4 same rules apply to plaintiff's request.

5
6 61. If the Document Retrieval Process, Photocopying Process and/or Document
7 Examination Process are mandated to occur prior to June 11, 2010, then Ford will
8 need to hire persons to provide assistance with such processes and the Democratic
9 Party will be required to pay the employment costs of such persons.

10 Democratic Party: Agree _____ Disagree X

11 Pima County: Agree _____ Disagree _____

12 Reason(s) for disagreement: Ford is not permitted to charge her employment costs to the
13 plaintiff. The legislature has already made this public policy decision. She cannot chose her
14 personal public policy. She must follow the law.

15
16 62. The following costs should be imposed upon the Democratic Party in relation to
17 compliance with its public records request:

- 18 • Fees required to be paid to Iron Mountain to retrieve the Ballot boxes and return them
19 to storage after the yellow sheets and poll tapes are removed, if and to the extent any
20 such fees are required by Iron Mountain.
- 21 • Fees required to be paid to Iron Mountain for use of conference area(s) needed for the
22 Document Retrieval Process, if and to the extent any such fees are required by Iron
23 Mountain.
- 24 • Monies required to be paid to Iron Mountain for photocopies of the inventory sheets
25 to be made on the date(s) of the Document Retrieval Process.
- 26 • Reasonable photocopying costs for photocopies of the yellow sheets and poll tapes
(except photocopy costs required because a representative from another political

1 party or third party also requests a copy of such documents).

- 2 • Monies that are paid to persons who would assist Ford with the Document Retrieval,
3 Photocopying and Document Examination Processes if and to the extent such
4 processes are required to take place prior to June 11, 2010.

5 **Democratic Party:** Agree _____ Disagree X _____

6 **Pima County:** Agree _____ Disagree _____

7 **Reason(s) for disagreement:** It was Ford's choice to place the boxes at Iron Mountain. It
8 was Ford's choice to accept boxes when she did not know the contents or to not inquire
9 whether public records in addition to ballots were in the boxes. Having placed the boxes at

10 Iron Mountain she is prohibited from requiring the plaintiff to pay for those retrieval costs.
11 The expenses to her office of opening the boxes at Iron Mountain is far less than at any other
12 location because the removal and transportation of the boxes from that facility carries a per
13 box charge and another per box charge for return. The cheapest cost option is to examine
14 the documents on premises.

15 The plaintiff agrees that it will pay photocopying charges to Iron Mountain or Pima
16 County for its copies. Plaintiff believes the room charge at Iron Mountain is \$100, but
17 whatever is charged is an expense that the legislature has determined should not be
18 chargeable as part of a non-commercial public records request.

19 Salaries of Ford and her employees may not be charged to Plaintiff by law.

- 20
21 63. An estimate of the above costs of the Document Retrieval, Photocopying and
22 Document Examination Processes (except the photocopy costs resulting from a
23 request for copies being made by another political party or other third party) will be
24 required to be paid in advance by the Democratic Party.

25 **Democratic Party:** Agree _____ Disagree X _____

26 **Pima County:** Agree _____ Disagree _____

Reason(s) for disagreement: The plaintiff does not agree to paying the unlawful "above

1 costs" in advance. The plaintiff is agreeable to paying all lawful charges either in advance
2 or more appropriately when incurred as the number of copies is not known. If the copies
3 were to cost 25 cents each the plaintiff anticipates expenses of no more than \$275.00

4 The plaintiff was not charged for copies in its prior lawsuit with these two parties and
5 suspects that this lawsuit is not really about whether the Democratic Party is good for the
6 \$275.00. Nonetheless, the plaintiff agrees to provide Ford with the copy funds in advance.

7
8 64. Any person or party requesting photocopies of the poll tapes and yellow sheets (other
9 than the Pima County Elections Department) shall be required to pay, in advance the
10 cost of such copies.

11 Democratic Party: Agree _____ Disagree X

12 Pima County: Agree _____ Disagree _____

13 Reason(s) for disagreement: Public Record requests are routine and it is also routine that
14 the copies are counted and the requestor pays the total. Payment in advance is a radical departure
15 from standard procedure. The plaintiff is certainly willing to do so if the Court or Ford wishes to
16 require it, and she apparently does so the plaintiff will arrange for the funds in advance in whatever
17 form she believes is most secure.

18
19 DATED this 8th day of February, 2010.

20 RISNER & GRAHAM

21 BY: William J. Risner

22 William J. Risner, Esq.
23 Attorneys for Plaintiff

24 Copies of the foregoing mailed this
25 8th day of January, 2010, to:

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