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6 *Attorneys for Plaintiff Scott Peterson*
7

8 ARIZONA SUPERIOR COURT

9 MARICOPA COUNTY

10 Scott Peterson, an individual, doing
business as the Checks and Balances
11 Project,

12 Plaintiff,

13 v.

14 Arizona Corporation Commission, a
political subdivision; Robert Stump, in his
15 official capacity as Arizona Corporation
Commissioner, Arizona Attorney General's
16 Office, a public body; Mark Brnovich, in
his official capacity as Attorney General of
17 the State of Arizona,

18 Defendants.
19

No. LC2015-000453

**MOTION TO MODIFY THE MASTER'S
FINAL REPORT PURSUANT TO
RULE 53(h)**

**OPPOSITION TO DEFENDANT'S
MOTION TO ADOPT MASTER'S
REPORT AND TO DISMISS COUNT ONE
OF THE COMPLAINT**

ORAL ARGUMENT REQUESTED

(Assigned to the Honorable Randall Warner)

20 After a month and a half, and more than 40 hours of work, the Special Master, David Cole
21 (the "Master"), issued a conclusory two-paragraph Master's Report ("Report"), the entire
22 substance of which was that "[b]ased upon [h]is review" of the text messages, "none of the text
23 messages are subject to production." This Report is fatally insufficient in at least two respects.¹
24 As explained below, first, the Report is lacking in the "detailed finding[s]" necessary for this
25 Court's review. *Scottsdale Mem'l Health Sys., Inc. v. Maricopa Cty.*, 224 Ariz. 125, 143, 228
26

27 ¹ In an attempt to avoid motion practice before this Court, Plaintiff asked the Master to
28 revise the Report along the lines requested in this Motion. The Master denied Plaintiff's request.
[See Jan. 22, 2016 E-Mail from D. Cole to D. Barr (Exhibit A)]

1 P.3d 117, 135 (Ct. App. 2010). Second, the Report does not aid the Court in resolving this case,
2 as it was intended to do.

3 Moreover, the Master has suggested to the Parties that he would “honestly have no idea
4 how to” provide more detailed explanation of his review in this Report and that he does not have
5 additional time to spend on this Report. [See Exhibit A; see *id.* (“Counsel should also be aware
6 that I was initially contacted in November, 2015, at which time I was employed on a part-time
7 basis; since then, I have gone full-time.”)] Accordingly, Plaintiff hereby moves, pursuant to Ariz.
8 R. Civ. P. 53(h), this Court to wholly reject the Master’s Report and either review the text
9 messages *de novo* or appoint another special master to do the work that has yet to be done.

10 For the same reasons Plaintiff opposes Defendants’ Motion to Adopt the Master’s Report
11 as the Court’s Findings of Fact and to Dismiss Count One of the Complaint.

12
13 **I. THE REPORT LACKS THE ANALYSIS NECESSARY FOR THIS COURT’S REVIEW**

14 Where, as here, a Master’s findings are subject to review by the Superior Court, the
15 Master must make sufficiently “detailed findings” to allow the Court “a meaningful opportunity
16 to review the master’s work.”² *Scottsdale Mem’l Health*, 224 Ariz. at 143, 228 P.3d at 135. The
17 Report in this case does not provide any such information to allow a “meaningful opportunity” for
18 review of the Master’s conclusions. *Id.*

19 Again, Plaintiff seeks the disclosure of any public records among the 3,547 text messages
20 sent between Arizona Corporation Commissioner Bob Stump (“Commissioner Stump”) and 18
21 separate phone numbers, as set forth in Plaintiff’s letter dated August 7, 2015 (the “Requested
22 Records”). [See Oct. 28, 2015 Complaint for Special Action (“Compl.”) at Exhibit Q (listing
23 phone numbers); see *id.* ¶¶ 33, 37-43] All of the 18 phone numbers belong to people or entities
24 who communicated with Commissioner Stump in his role as a Corporation Commissioner. Some
25

26 ² By statute, the Master’s legal conclusions, such as whether a particular text message is a
27 public record or protected from disclosure in any way, is reviewed *de novo*. Ariz. R. Civ.
28 P. 53(h)(3). Factual findings, for instance, how many and which text messages that were
recovered fall within the scope of Plaintiff’s request, are reviewed under a clearly erroneous
standard. *Id.* at 53(h)(2). The Report is devoid of any factual findings.

1 of the phone numbers even belong to members or employees of the Corporation Commission.
2 Subsequent to the filing of the Complaint, the Arizona Attorney General's Office informed
3 Plaintiff that it had retrieved thousands of text messages from Commissioner Stump's iPhone.

4 The Court then appointed the Master to "review . . . all text messages that have been
5 retrieved by means of a forensic examination" and identify all messages that should be produced.
6 [Nov. 19, 2015 Stipulation to the Appointment of a Master ("Order") ¶¶ 2, 4] Specifically, this
7 Court ordered the Master to identify and disclose all text messages that are responsive to
8 Plaintiff's record request and that "fall within the substantial nexus test set forth by the Supreme
9 Court of Arizona in *Griffis v. Pinal County*, 215 Ariz. 1, 4 ¶ 10, 156 P.3d 418, 421 (2007)" and
10 "are not subject to any privilege recognized by Arizona law." [*Id.* ¶¶ 2, 3] Put differently, to
11 determine whether the text messages were subject to disclosure, the Master had to decide, subject
12 to this Court's review: (1) whether any of the text messages recovered by the Attorney General's
13 Office were among those requested by Plaintiff; and, if so, (2) whether they were public records;
14 and, if they were public records, (3) whether they should be otherwise withheld because an
15 interest of confidentiality, privacy, or best interest to the State overcame the presumption of
16 disclosure. *Carlson v. Pima Cty.*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984).

17 To permit the Court to review the Master's work, the Report, at a minimum must contain
18 information regarding the Master's decision and reasoning with respect to each of these
19 questions. But, again in his Report, the Master simply concluded that based on this criteria that
20 "none of the text messages are subject to production."³ He provided no reasoning or "detailed
21 analysis." *Scottsdale Mem'l*, 224 Ariz. at 144, 228 P.3d at 136. And so, the Court has no way of
22 reviewing the Master's conclusions. The Report should be set aside for this reason alone.

23
24
25 ³ Notably, though, Judge Cole provided some cursory explanations about his review to
26 *The Arizona Republic*, including that the text messages reviewed "either weren't a match" to
27 Plaintiff's list "or they were with a person that was not one of the targets"; that "[t]he nature of
28 most of the texts was private,"; and that "[t]here was nothing that met the definition of a public
record." [See Ryan Randazzo, *Review: Regulator Bob Stump's deleted text messages mainly personal*, Arizona Republic (Jan. 22, 2016), <http://www.azcentral.com/story/money/business/energy/2016/01/22/review-bob-stumps-deleted-text-messages/79179590/> (Exhibit B)]

1
2 **II. THE REPORT FAILS TO AID THE COURT IN RESOLVING THIS CASE**

3 Additionally, “the special master’s role must be defined and conducted with due regard
4 for the continuing responsibility of the judiciary for the outcome of the proceedings.” *Scottsdale*
5 *Mem’l*, 224 Ariz. at 143, 228 P.3d at 135. Here, the Report provides no assistance to this Court,
6 as it was intended to, in resolving this case. First, as explained above, the Report provides no
7 assistance to the Court in analyzing the recovered records.

8 But perhaps most notably, the Report also does not aid the Court in resolving Plaintiff’s
9 request for a declaration that Commissioner Stump failed to preserve and maintain public records
10 as required by law. *See* A.R.S. §§ 39-121.01(B) and (C). Specifically, Plaintiff alleged that by
11 “‘routinely delet[ing] text messages’ that were public records ‘not long after he received them,’
12 Commissioner Stump violated Arizona law, including . . . A.R.S. § 39-121.01(C),” and failed to
13 “preserv[e], maint[ain] and care” for public records. [*See* Compl. ¶¶ 44-51] As the Report
14 currently stands, the Court and parties do not know, of the total text messages reviewed, how
15 many, if any, were the 3,547 text messages sought by Plaintiff’s public records request.⁴ Without
16 this information, the Court and parties cannot know whether the public records Plaintiff seeks
17 have been destroyed in violation of Arizona law.

18 **Conclusion**

19 Because the Report is both insufficiently detailed to permit review and does not materially
20 aid the Court in resolving Plaintiff’s claims, Plaintiff moves the Court to wholly reject the Report
21 and review the text messages *de novo* or appoint another special master to do the same.

22 And, for the same reasons, Plaintiff opposes Defendants’ Motion to Adopt the Master’s
23 Report as the Court’s Findings of Fact and to Dismiss Count One of the Complaint.

24
25 ⁴ Plaintiff has asked the Arizona Attorney General’s Office to allow his forensic expert,
26 Bryan Neumeister, to examine Commissioner Stump’s iPhone. [*See* Jan. 29, 2016 Letter from
27 D. Barr to K. Hartman-Tellez (Exhibit C)] As of the date of filing, Plaintiff has not received a
28 response to his request. If it is denied, and because Judge Cole’s comment to *The Arizona*
Republic indicated that few, if any, of the texts he reviewed were the text messages sought by
Plaintiff in this case, Plaintiff anticipates moving this Court for its own expert be permitted to
examine Commissioner Stump’s iPhone and to produce a report for this Court.

1 February 3, 2016

PERKINS COIE LLP

2

By: 

3

Daniel C. Barr

4

Alexis E. Danneman

5

2901 North Central Avenue, Suite 2000

Phoenix, Arizona 85012-2788

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Attorneys for Plaintiff Scott Peterson

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Copy of the foregoing filed on February 3, 2016
with the Clerk of Court, Maricopa County
Superior Court and a copy delivered to the
Hon. Randall Warner

9

10 Copy of the foregoing emailed and mailed
on February 3, 2016, to:

11 Karen J. Hartman-Tellez
12 Assistant Attorney General
13 Agency Counsel Section
1275 W. Washington Street
Phoenix, Arizona 85007

14 David J. Cantelme
15 Cantelme & Brown P.L.C.
3003 N. Central Avenue, Suite 600
Phoenix, Arizona 85012
16 *Attorneys for Arizona Corporation Commission*

17 Timothy A. La Sota
18 Timothy A La Sota PLC
1702 E. Highland Avenue, Suite 204
Phoenix, Arizona 85016-4665
19 *Attorney for Commissioner Robert Stump*

20



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22

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EXHIBIT A

From: [Cole David](#)
To: [Barr, Daniel \(Perkins Coie\)](#); [Dave Cole](#); [David Cantelme](#); [Hartman-Tellez, Karen](#); tim@timlasota.com; [Janice Alward](#); [Jodi Jerich](#); [Danneman, Alexis F. \(Perkins Coie\)](#)
Cc: [Cole David](#)
Subject: RE: Peterson v. ACC
Date: Friday, January 22, 2016 2:08:31 PM

Dear Mr. Barr, *et al*,

You (Mr. Barr) have asked me to amend my recently-filed Report in five respects.

Perhaps it would help if I describe, in general terms, how I went about my task.

- I reviewed the statutes and cases relevant to my inquiry.
- Before looking at the list you provided, which I understand to contain messages between Commissioner Stump and 18 specified individuals and entities, I reviewed all the messages that were included in the information given me by the Attorney General. I made notations for any and all messages that were (arguably) subject to production. I conducted my own searches, using names and cell phone numbers.
- Using the list you provided, I ran further searches, using names, cell phone numbers, and specific times at which messages were sent either to or from Commissioner Stump.

With regard to the first of your five requests, I honestly have no idea how to provide an answer. Please bear in mind that the Attorney General provided me with the results of five different searches and that, as I told the parties earlier, there is a great deal of redundancy.

With due respect, I believe these request fall outside the ambit of the relevant court orders. When I was first approached about this matter, I was advised that, in the event I was ultimately appointed master, it would take 30 to 40 hours to complete the task. That estimation turned out to be pretty accurate; at this juncture, I have put in between 40 and 45 hours. In the event I am ordered to provide the additional information you have requested, the total time required will be far in excess of 40 hours. Counsel should also be aware that I was initially contacted in November, 2015, at which time I was employed on a part-time basis; since then, I have gone full-time.

For these reasons, I hereby (1) politely decline your request for an Amended Report, and (2) request the parties to follow the procedure detailed in Rule 53(h), Ariz. R. Civ. P. I further request that the parties make your 1/22/16 letter and my 1/22/16 response part of the record.

Best Regards,

Dave Cole

From: [Barr, Daniel \(Perkins Coie\)](#) [<mailto:DBarr@perkinscoie.com>]
Sent: Friday, January 22, 2016 12:10 PM
To: [Dave Cole](#); [David Cantelme](#); [Hartman-Tellez, Karen](#); tim@timlasota.com; [Janice Alward](#); [Jodi Jerich](#);

Cole David; Danneman, Alexis E. (Perkins Coie)
Subject: Peterson v. ACC

Dear Judge Cole,

Thank you for your work as Special Master in reviewing the text messages provided to you by the Attorney General's Office and for doing much of your work over the holiday season. If possible, the parties and the Court would greatly benefit if you could amend your report to provide the following information:

- 1) The total number of text messages that you reviewed and their date range;
- 2) Out of the total number of text messages you reviewed, how many of those were the text messages sought by plaintiff's public records request (the 3,598 text messages between Commissioner Stump and 18 individuals and entities between May 1, 2014 through March 11, 2015). If the answer to this question is "zero" or some small number that would greatly streamline the litigation going forward;
- 3) If you did review any of the text messages sought by plaintiff, can you identify which ones by the date, time and the sending and receiving phone numbers?
- 4) For any such text messages identified in response to number 3 above, can you please indicate which ones that you believe are not public records in accordance with the standard put forth by the Supreme Court in *Griffis v. Pinal County*?
- 5) If you found that any text messages identified in response to number 3 above were a public record under the *Griffis* test, could you provide which reason under the *Carlson v. Pima County* (i.e., where an interest in privacy, confidentiality or best interest of the state overcomes the presumption of disclosure) for deciding that the text message should not be produced.

If you believe that our request exceeds the scope of your work as requested by Judge Warner, I would be glad to seek the Court's approval for our request. Again, since you have just spent many hours reviewing these text messages, you are in the best position to provide the answers to the above questions that will greatly assist the parties and the Court going forward.

Again, thank you for all you work in this matter.

Dan Barr

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From: Dave Cole [<mailto:drcoleua@gmail.com>]
Sent: Wednesday, January 20, 2016 4:09 PM
To: David Cantelme; Barr, Daniel (Perkins Coie); Hartman-Tellez, Karen; tim@timlasota.com; Janice Alward; Jodi Jerich; Cole David; Danneman, Alexis E. (Perkins Coie)
Subject: Fwd: FW: Emailing: 201601201547.pdf

Report is attached. I signed it on Jan. 14 and delivered it to Judge Warner's staff that day.

On Wed, Jan 20, 2016 at 4:05 PM, Cole David <coled@mcao.maricopa.gov> wrote:

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

EXHIBIT B

Review: Regulator Bob Stump's deleted text messages mainly personal

 **Ryan Randazzo**, The Republic | azcentral.com 4:45 p.m. MST January 22, 2016



(Photo: Nick Oza/The Republic)

The former judge who spent 43 hours reading through Bob Stump's deleted text messages said the majority were personal messages, and nothing met the definition of a public record.

Dave Cole was selected by Superior Court Judge Randall Warner. Both the clean-energy group suing to review Stump's texts and the Arizona Corporation Commission where Stump works as an elected utility regulator approved him as a "Special Master" in the case.

He was to determine which, if any, of the deleted text messages could be released.

The clean-energy-funded Checks and Balances Project sued the Arizona Corporation Commission in October to access text messages that Stump sent around the time of the 2014 election, when two of his friends were seeking seats on the five-member commission. They contend Stump was texting two commission candidates and an independent political group supporting them.

The Arizona Attorney General's Office, which had the phone because of another investigation, downloaded the text messages that had been deleted and handed them over to Cole to review and determine if they met the definition of a public record.

They didn't, Cole said in a report to the court made public this week and in a Thursday interview with *The Arizona Republic*.

"The nature of most of the texts was private," Cole said. "There was nothing that met the definition of a public record."



AZCENTRAL

[Judge: Bob Stump's texts aren't public](#)

<http://www.azcentral.com/story/money/business/energy/2016/01/20/arizona-judge-none-bob-stumps-texts-public/79091496/>

Dan Barr, the attorney for Checks and Balances, provided the court with a list of 3,598 messages he wanted reviewed. The list includes 18 contacts and the dates and times of messages that Checks and Balances wanted to review under Arizona's public-records law. The list was culled from a log Verizon Wireless provided. Verizon said in a letter to the commission that it couldn't retrieve the messages themselves.

Cole said Thursday that the messages he reviewed "either weren't a match to Dan's list, or they were with a person that was not one of the targets."

Personal messages also are not a public record, he said.

"One of the definitions (of a public record) is that they should have a nexus to (Stump's) work," Cole said. "It's not, 'Gee, this is something people ought to hear.'"

He said the Attorney General's Office estimated there were 13,000 or more text messages sent by the phone, and five different tools were used to retrieve them.

Cole was provided with hard copies of text messages retrieved with each tool. He said the documents ranged from about 150 pages to about 500 pages, and he spent 43 hours examining them to find matches to the messages that Barr was seeking.

One of the problems was that the software used to retrieve the deleted texts did not provide complete reports, Cole said.

"There were some that indicated a time and date, but there was no content to it," he said. "With some, there was no way to tell who said what to whom."



AZCENTRAL

[SolarCity funded clean-energy advocacy group that targeted Arizona utility regulators](#)

[\(http://www.azcentral.com/story/money/business/energy/2015/12/13/solarcity-funded-group-targeted-arizona-utility-regulators/77105808/\)](http://www.azcentral.com/story/money/business/energy/2015/12/13/solarcity-funded-group-targeted-arizona-utility-regulators/77105808/)

When Barr received the report Wednesday, he said he was frustrated that Cole reported, in a single page, that not one of the messages he reviewed was a public record.

"Is it even mathematically probable that none (of the 3,600 messages) was a public record? I don't think so," Barr said.

Barr sent Cole a letter Friday asking him for further explanation, including how many, if any, of the 3,598 messages he is seeking that Cole was able to review, and the specific reasons each was withheld.

"If he provides more information it will be far more helpful to the parties and the trial judge moving forward," Barr said Friday.

Cole said he will send it along to Judge Warner, who will have to determine whether the request is within the scope of his duties, for which he is being paid \$150 an hour. He also said it's possible the parties will challenge his report.

"I'm hanging around," he said.

Barr's client, the Checks and Balances Project, has suggested that Stump was sending messages to commission candidates Tom Forese and Doug Little, as well as the head of an independent political group that was supporting their election. By law, candidates can't coordinate with such groups.

Checks and Balances director Scott Peterson also has said that the texts could show that Arizona Public Service Co., the biggest utility regulated by the commission, was involved in funding the political groups that were helping elect utility regulators.

"We find it extremely unlikely ... that none of Bob Stump's text messages is a public record," Peterson said.



AZCENTRAL

Clean-energy group sues utility regulators for access to Bob Stump's phone

[\(http://www.azcentral.com/story/money/business/energy/2015/10/28/clean-energy-group-sues-utility-regulators-access-bob-stumps-phone/74767206/\)](http://www.azcentral.com/story/money/business/energy/2015/10/28/clean-energy-group-sues-utility-regulators-access-bob-stumps-phone/74767206/)

Cole served as Arizona's Solicitor General from March 2011 to January 2013. That job entails reviewing appellate briefs in civil and criminal matters and other duties. Cole, a University of Arizona graduate, also served on the Arizona Superior Court in Maricopa County from 1989 to 2007.

He was appointed in 1991 by the Chief Justice of the Arizona Supreme Court as co-Chair of the Victims' Rights Implementation Committee. He served as presiding judge of the Maricopa County DUI Court from 1997 to 2000.

Cole was involved in a similar public records debate in 2012 when he was Solicitor General. At the time, it was discovered that the Arizona Attorney General's Office under Tom Home had redacted embarrassing information from an investigation file that was released as a public record. Home appointed Cole Solicitor General.

Cole said at the time that the redactions were based on a 1984 Arizona Supreme Court ruling stating that information can be withheld on grounds of privacy, confidentiality or the best interests of the state. He also said it was the policy of his office to redact information that was known to be defamatory, false, gossip, innuendo, rumors and hurtful remarks that are not connected to the agency releasing the records.

Read or Share this story: <http://azc.cc/1RE4uZU>

ARIZONA'S TROUBLED CORPORATION COMMISSION

The panel entrusted with Arizona consumer protection in utilities issues is embroiled in conflict-of-interest scandals. Here's a look at the five commissioners.

The Republic/azcentral.com
The Republic/azcentral.com

EXHIBIT C

January 29, 2016

Karen J. Hartman-Tellez
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007

Re: *Peterson v. Arizona Corporation Commission, et.al.*

Dear Karen:

Thank you for your letter of January 22, 2016 explaining the steps the Attorney General's Office took to retrieve text messages and related metadata from Commission Bob Stump's smartphone. While we appreciate the Attorney General's efforts to extract the text messages from Commission Stump's phone, we would like our forensic expert, Bryan Neumeister, to examine the smartphone as well. As you may know, Mr. Neumeister is a widely regarded expert in the field and often assists federal and state law enforcement agencies. We propose that Mr. Neumeister do the following, all at the expense of plaintiff Scott Peterson:

1. Speak with those people who examined Commission Stump's smartphone and read any forensic reports they created as a result of their examination. Mr. Neumesiter would then determine if a further examination of the smartphone is necessary;
2. If Mr. Neumeister determines that a further examination of the phone is necessary, he would first do an iTunes back up and a logical extraction covering all of the phone's erased files;
3. Mr. Neumesiter would then use the latest version of Oxygen Analyst, which is a program that the Attorney General's Office did not use in examining Commission Stump's smartphone. We believe that the use of Oxygen Analyst may cure the problem cited by Judge Cole in the *Arizona Republic* that the software used by the Attorney General's Office did not provide complete reports;
4. Mr. Neumeister would perform all this work in the presence of forensic people from the Attorney General's Office and the extraction of the data from the phone would be videotaped;

Karen J. Hartman-Tellez

January 29, 2016

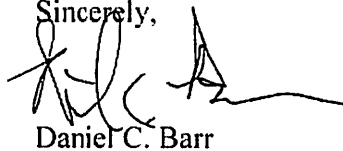
Page 2

5. Mr. Neumeister would then give one copy of whatever data he extracted from Commissioner Stump's smartphone to the Attorney General's Office and a second copy to the Court or to a Special Master; and
6. Mr. Neumeister would not retain a copy of the data extracted from Commissioner Stump's smartphone. He would also produce a report for the Court on his examination of Commissioner Stump's smartphone.

I hope this proposal is acceptable to you. It would not cost the State one penny and will probably result in the State having a more complete record of the data from Commissioner Stump's phone. In any event, having Mr. Neumeister examine the smartphone would eliminate any questions concerning the extraction of the text messages and data in our case.

Please let me know if you have any questions about my proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'DCB', with a long horizontal flourish extending to the right.

Daniel C. Barr

DCB:sln

cc: David Cantelme (david@cb-attorneys.com)
Tim LaSota (tim@timlastoa.com)

117049-0001/129655009.1