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12 ARIZONA SUPERIOR COURT

13 MARICOPA COUNTY

14 Scott Peterson, an individual, doing  
15 business as the Checks and Balances  
16 Project,

17 Plaintiff,

18 v.

19 Arizona Corporation Commission, a  
20 political subdivision; Robert Stump, in  
21 his official capacity as Arizona  
22 Corporation Commissioner, Arizona  
23 Attorney General's Office, a public  
24 body; Mark Brnovich, in his official  
25 capacity as Attorney General of the  
26 State of Arizona,

27 Defendants.

No. LC2015-000453

**REPLY IN SUPPORT OF PLAINTIFF'S  
SECOND MOTION FOR FURTHER  
INSPECTION OF COMMISSIONER  
STUMP'S PHONE**

ORAL ARGUMENT REQUESTED

(Assigned to the Honorable Randall  
Warner)

28 The Arizona Attorney General ("Defendant") has failed to meet its burden of  
showing that it adequately searched for the 3,547 text messages exchanged between  
Commissioner Stump's state-issued iPhone and 18 individuals that worked for or did  
business with the Commission (the "Requested Records"), many of which Commissioner  
Stump freely admits to have deleted.<sup>1</sup> Plaintiff Scott Peterson ("Plaintiff") thus requests

<sup>1</sup> The Attorney General continues to insist that "[c]onducting a forensic  
examination to extract deleted data from a mobile phone is akin to creating new records."  
[Defendants' Response in Opposition to Second Motion for Further Inspection of  
Commissioner Stump's Phone ("Opposition") at 2 n.2] These messages, however, exist

1 that his expert, Bryan Neumeister, be permitted to examine the iPhone under the  
2 supervision of the Attorney General's Office.<sup>2</sup> In the alternative, Plaintiff requests that  
3 this Court exercise its discretion to grant an evidentiary hearing to determine the adequacy  
4 of the Attorney General's search.

5 **I. THE ATTORNEY GENERAL HAS NOT DEMONSTRATED THE**  
6 **ADEQUACY OF ITS SEARCH**

7 It is the burden of the Attorney General, as the custodian of the public records at  
8 issue in this case, to establish that it "adequately searched" for the Requested Records.  
9 *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 539, 177 P.3d 275, 281 (App. 2008).  
10 Specifically, the Attorney General "must demonstrate its search was 'reasonably  
11 calculated to uncover all relevant documents.'" *Hodai v. City of Tucson*, 239 Ariz. 34, 44  
12 ¶ 32, 365 P.3d 959, 969 (App. 2016) (quoting *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d  
13 964, 986 (9th Cir. 2009)). It has failed to meet its burden in this case.

14 **A. Lack of HASH Values and Content in the Text Messages Are Strong**  
15 **Indicia that the Search Was Not Adequate.**

16 There is strong evidence that the Attorney General's search was technologically  
17 inadequate and thus not "reasonably calculated to uncover all relevant documents." *Id.*  
18 It is not Plaintiff, but instead Defendants whose arguments that "reflect[] a basic  
19 misunderstanding of the technology." [Opposition at 3].

20 *First*, that the Attorney General's forensic search did not produce any HASH values  
21 suggests that its search was inadequate. Plaintiff, of course, agrees with Defendants that  
22 "individual deleted text messages residing on an iPhone 5 do not have HASH values in  
23 their native form" and that "HASH values are calculated for electronic data in order to  
24 authenticate copies of the extracted data." [Opposition at 5-6] But that misses the point.

25 on Commissioner Stump's iPhone, it is just a matter of recovering them. This is not a  
26 case where Plaintiff is asking Defendants to create new content, such as an index of  
27 documents. See *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 400, 267 P.3d  
28 1185, 1192 (App. 2011).

<sup>2</sup> Contrary to the Defendants' suggestion, Plaintiff has in no way ever suggested  
that he would have access to these records. [Opposition at 6] Mr. Neumeister frequently  
works for and with government agencies in conducting investigations.

1 When data is extracted from a smart phone, the programs used to extract data—including  
2 those used by Defendants in this case—all automatically generate HASH values for each  
3 extracted message.<sup>3</sup> [Declaration of Bryan Neumeister (“Neumeister Decl.”) ¶¶ 4-5 (“In  
4 my experience, I have never seen data extracted from a smart phone that did not contain  
5 unique HASH values for each extracted text message.”)] Among other things, that  
6 Defendants cannot identify any HASH values from their searches suggests that they may  
7 not have used the programs correctly or that they do not understand the contents of the  
8 reports generated by such programs.

9 *Second*, that the recovered messages lacked content also suggests the Attorney  
10 General’s search was inadequate. Defendants focus their argument on the fact that “[t]he  
11 measure of the adequacy of a search . . . is not the possibility of the existence of records  
12 that were not captured.” [Opposition at 5] Even assuming this were true,<sup>4</sup> this argument  
13 again misses the point. It is, technologically, “very unlikely that any search would have  
14 revealed the existence of text messages without content.” [Neumeister Decl. ¶ 6] The  
15 fact that the Attorney General has recovered text messages lacking content suggests that  
16 there was a problem executing the search.

17 **B. The Attorney General’s Other Arguments Do Not Help It Establishing**  
18 **the Adequacy of its Search.**

19 The Attorney General offers various additional reasons why its search was  
20 “‘reasonably calculated to uncover all relevant documents.’” [Opposition at 3 (quoting  
21 *Hodai*, 239 Ariz. at 44 ¶ 32, 365 P.3d at 969 ¶ 32)] Specifically, the Attorney General  
22 argues its search was “reasonably calculated” because (1) it searched the phone multiple  
23 times; (2) used multiple people to do so; and (3) used “state of the art forensic software,”  
24 including CelleBrite. [Opposition at 3-4]

25 But, none of these reasons, alone or together, establish the adequacy of the

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26 <sup>3</sup> Among other things, HASH values show whether the content of a text message  
27 has been altered.

28 <sup>4</sup> At a minimum, Defendants’ failure to recover any of the 3,547 text messages  
sought by Plaintiff casts doubt on the adequacy of the Attorney General’s search.

1 Attorney General's search. Of course a "simple search by one person with knowledge  
2 may be sufficient." [Opposition at 4 (quoting *Hodai*, 239 Ariz. at 44 ¶ 33, 365 P.3d at 969  
3 ¶ 33)]. But in this case, the deficiencies found in the Attorney General's report suggest, at  
4 a minimum, that the person who searched the phone was not a person with the requisite  
5 "knowledge." *Hodai*, 239 Ariz. at 44 ¶ 33, 365 P.3d at 969 ¶ 33.<sup>5</sup>

## 6 **II. AN EVIDENTIARY HEARING IS APPROPRIATE**

7 Again, the Attorney General has not met its burden to show that its "search was  
8 'reasonably calculated to uncover all relevant documents.'" *Hodai*, 239 Ariz. at 44 ¶ 32,  
9 365 P.3d at 969 ¶ 32 (quoting *Lahr*, 569 F.3d at 986). Because the Attorney General has  
10 not done so, Plaintiff requests that this Court allow it the search to which he is entitled.  
11 To this end, and because the Attorney General has shown that it is unable to do so,  
12 Plaintiff requests that this Court appoint Bryan Neumeister to examine the phone.

13 In the alternative, Plaintiff requests that this Court grant an evidentiary hearing to  
14 determine the adequacy of the Attorney General's search. Of course, in some  
15 circumstances, this Court could choose to resolve such a dispute through affidavits or  
16 declarations alone. *See Phoenix New Times*, 217 Ariz. at 539, 177 P.3d at 281. But this is  
17 not such a case.

18 First, Plaintiff believes the Court would be aided by live testimony about these  
19 nuanced technological issues. But, perhaps more importantly, Plaintiff and Defendants  
20 disagree on a critical fact. While Defendant's declarant Jim Connell asserts that he is "not  
21 aware of any program that gives HASH values to individual text messages extracted from  
22 a mobile phone," Mr. Neumeister asserts that he is not aware of any program that does  
23 not. [Neumeister Decl. ¶ 5] This factual difference, which is at the heart of Plaintiff's  
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25 <sup>5</sup> Plaintiff has no doubt that the Attorney General's Office was incentivized to  
26 adequately search the iPhone because of the fact that it was "conducting the forensic  
27 examination of the phone to gather evidence in a criminal investigation." [Opposition at  
28 4] But it did not. Plaintiff would have assumed that instead of opposing further searches,  
the Attorney General's Office would have welcomed the help of an additional expert to  
obtain any remaining information from the iPhone at no cost to the public.

1 argument that the Defendants' search was inadequate counsels strongly in favor of an  
2 evidentiary hearing. *Cf. Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2012) (holding that  
3 an evidentiary hearing was appropriate in that case where conflicting affidavits were  
4 submitted).

5  
6 May 16, 2016

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Superior Court and a copy delivered to the  
Hon. Randall Warner

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