



Maricopa County Attorney

ALLISTER ADEL

May 21, 2021

VIA EMAIL ONLY

The Honorable Karen Fann
President of the Arizona Senate
Fifty-Fifth Legislature
1700 West Washington, Senate Building
Phoenix, Arizona, 85007
kfann@azleg.gov

RE: Litigation Hold and Preservation Notice

Dear Senate President Fann:

Our office represents Maricopa County, the Maricopa County Board of Supervisors, the Office of the Maricopa County Recorder, Maricopa County Recorder Stephen Richer, in his official capacity, and County employees.

Your May 13, 2021 letter to the Maricopa County Board of Supervisors Chairman Jack Sellers, which was published widely, falsely claimed, “[w]e have recently discovered that the entire ‘Database’ directory from the D drive of the machine ‘EMSPPrimary’ has been deleted. This removes election related details that appear to have been covered by the subpoena...[t]his suggests that the main database for all election related data for the November 2020 General Election has been removed.”

Soon after, the Senate Audit’s twitter account posted, “Breaking Update: Maricopa County deleted a directory full of election databases from the 2020 election databases from the 2020 election cycle days before the election equipment was delivered to the audit: This is spoliation of evidence!”

On May 17, 2021, Representatives Matt Gaetz, Andy Biggs, Marjorie Taylor Greene and Paul Gosar sent a letter to the Department of Justice asserting this false claim that “an entire ‘database’ directory of election information was deleted from the Election Management System Primary Machine...[t]he apparent deliberate deletion of the election management system prior to the information being transferred to the independent auditors, runs afoul of Arizona election law.” The Representatives’ false claim relied solely on these false statements.

Our clients delivered the server exactly as it was kept by the Maricopa County Elections Department. Nothing was deleted, or added, from the server when we prepared it to be sent to the Senate pursuant to the Senate’s subpoena.

**LITIGATION HOLD NOTICE &
DOCUMENT PRESERVATION REQUEST**

Because of the wrongful accusations that the County destroyed evidence, the County or its elected officers may now be subject to, or have, legal claims. Likewise, we have reason to believe this audit is not being done in accordance with Arizona law. Accordingly, as set forth in detail below, you must preserve all documents related to your “audit”, including any and all communications between you and any other member of the Senate or their staffs, and also any communications between you and your agents, including, but not limited to, Ken Bennett, Cyber Ninjas, CyFir, Wake TSI, and those firms’ various owners, officers, employees, agents, subcontractors, or volunteers that they utilized in the conduct or furtherance of the “audit” you and they are conducting.

You must give this litigation hold letter to all of your agents, contractors, volunteers, or anyone else who is designated, retained, employed, or otherwise utilized by you or the Arizona Senate to participate in the “audit” being conducted of Maricopa County’s election equipment and ballots. This includes whoever operates the “audit’s” Twitter account. All those persons are likewise subject to this litigation hold letter.

In general, litigants have a duty to preserve documents and evidence that they know, or reasonably should know ““is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”” *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250 (Ct. App. 1997) (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y.1991)). Please preserve and ensure that you and the Senate’s agents and/or representatives preserve all such documents and evidence in their possession, custody and/or control. This includes, but is not limited to the following:

1. All documents and evidence, whether paper or electronic, including but not limited to written records, photographs, video, audio, recordings, spreadsheets, calendars, contact lists and/or contact files, logs, data files, dictations, databases, images, texts, timelines, archive files, browsing histories and tangible evidence.
2. All communications and correspondence, whether paper or electronic, including but not limited to written correspondence, voice mails, e-mails, calendar invites, text messages, instant messages, third-party messaging systems/applications messages and data, chats/chat strings, video files, audio files, and social media posts and messages, whether designated as public or private. This includes but is not limited to any communications and/or correspondence on third party messaging systems/applications such as WhatsApp, SnapChat, Telegram, and Signal.
3. All Social Media information, including but not limited to account information, posts, communications, photographs, images, videos, audio, invites, likes, tweets, comments and messages. Social Media includes, but is not limited to, Facebook, Twitter, Instagram, TikTok, Reddit, Tumblr, SnapChat, Meetup, Parler, MeWe, Gab, and/or LinkedIn.
4. Please preserve all physical cellular and/or computer/tablet devices (“Devices”) owned or

used by you and your agents, clients and contractors for the “audit” of Maricopa County’s election equipment and ballots, as well as any subcontractors that they or you have retained, employed, or utilized in any way in the furtherance of your “audit.” **Please note that these devices must be preserved in their entirety, for forensic imaging and ESI.**

5. All application data and metadata relating to any social media or third-party messaging apps located on the Devices, such as the existence and contents of chat logs, including but not limited to any and all “disappearing” or “deleted” messages notifications, including messages sent or received by clients. Please note that this obligation includes records of the download and/or deletion of the social media or third-party messaging apps in their native format.
6. Any and all records from the applicable “App Store” for the Devices, above, recording the purchase and download of any social media or third-party messaging app from App Store accounts linked to the Devices.
7. Any and all records, whether paper or electronic, pertaining to account information, calls, texts, messages and/or other communications on the Devices, maintained by the cellular service provider and/or application provider and/or messaging provider in relation to your clients’ Devices.

The above list is not exhaustive and is not intended to act as a substitute for your and your agents’ careful review of all documents, files, evidence, and Devices to identify and preserve those documents and evidence that may relate to our clients claims against you and your agents.

Please keep in mind that the term “documents” is interpreted broadly to include paper, electronic, audio and video recordings, computer-based records (i.e., databases), e-records/digital records, and any other recorded forms of information that may be related to your and your agents’ actions related to the Senate’s “audit” of the 2020 general election. It is imperative that any documents that relate to the above allegations be (1) identified, (2) separated from other files, and (3) preserved and protected from destruction or alteration. All documents that may relate to the allegations should be maintained and preserved regardless of their date. This may include documents that were created prior to the alleged events in question, as well as after. All documents that are preserved must be maintained in their original state, without destruction or alteration, until our Office has notified you in writing that any dispute arising from the allegations has been fully resolved. This includes maintaining in its original form all metadata.

A failure to preserve these materials could prove detrimental to the legal interests of our clients. The case law in Arizona and the Ninth Circuit empower the trial courts to impose significant sanctions against parties who fail to preserve evidence. The body of case law includes the imposition of potentially significant sanctions for the willful destruction of evidence as well as non-willful and non-bad faith failure to preserve evidence. *See, e.g., Souza*, 191 Ariz. 247; *Unigard Security Insur. Co. v. Lake Engineering & Manuf. Corp.*, 982 F.2d 363 (9th Cir. 1992).

Our clients reserve their rights to seek redress of their grievances and to be made whole in a court of law.

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Please take steps immediately to preserve any and all documents and evidence that may be related to you and your agents' "audit" of the 2020 general election. If you should have any questions or need further information, please do not hesitate to contact me.

Sincerely,

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

By /s/Thomas P. Liddy

Thomas P. Liddy

Division Chief

Civil Services Division

Maricopa County