

ARIZONA COURT OF APPEALS

DIVISION ONE

BARBARA LAWALL, in her  
official capacity as Pima County  
Attorney,

Appellant,

v.

R.R. ROBERTSON, L.L.C., an  
Arizona limited liability company,  
doing business as R3  
INVESTIGATIONS; RICHARD R.  
ROBERTSON; and CHRISTOPHER  
DUPONT,

Appellees.

No. 1 CA-CV 14-0367

Maricopa County Superior Court  
No. CV2013-016013

**ANSWERING BRIEF OF APPELLEES R.R. ROBERTSON, L.L.C. AND  
RICHARD R. ROBERTSON**

Daniel C. Barr (#010149)  
D. Andrew Gaona (#028414)  
**PERKINS COIE LLP**  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
*DBarr@perkinscoie.com*  
*AGaona@perkinscoie.com*  
Telephone: 602.351.8000  
Facsimile: 602.648.7000

*Attorneys for Appellees*  
*R.R. Robertson, L.L.C. and*  
*Richard R. Robertson*

August 19, 2014

# TABLE OF CONTENTS

	<b>Page</b>
Introduction & Statement of the Case.....	1
Statement of Facts.....	3
Issues Presented for Review .....	8
Standard of Review.....	8
Argument.....	8
I.    R3’S PUBLIC RECORDS REQUESTS WERE NOT MADE FOR A “COMMERCIAL PURPOSE.” .....	8
A.    Because R3 Uses Public Records to Obtain Information for Use in its Business, the Fact that it Charges a Fee for its Charging and Sentencing Analysis is Irrelevant.....	9
B.    R3’s Use of the Public Records at Issue is Expressly Excepted From the Definition of “Commercial Purpose.” .....	12
1.    Historical charging and sentencing data, like that requested by R3, can be “evidence” or “research for evidence” in judicial and quasi-judicial proceedings.....	13
2.    The Evidence Exception is not limited to merely a “specific, pending action” or a “contemplated action.” .....	17
a.    The language of the statute does not support the conclusion that the Evidence Exception applies only to a “pending” or “contemplated” case.....	17
b.    Requiring a “specific” or “contemplated” action is practically unsound.....	19

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
c. Requiring a “specific” or “contemplated” action is contrary to governmental interests because it would subject PCAO to a flood of individual requests.....	20
d. Requiring a “specific” or “contemplated” action is contrary to public policy because it interferes with the attorney-client privilege. ....	22
II. R3 IS ENTITLED TO AN AWARD OF ATTORNEYS’ FEES ON APPEAL.....	23
Conclusion .....	23

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Bilke v. State</i> , 206 Ariz. 462, 80 P.3d 269 (2003) .....	16
<i>Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.</i> , 177 Ariz. 526, 869 P.2d 500 (1994) .....	17
<i>Dawson v. Withycombe</i> , 216 Ariz. 84, 163 P.3d 1034 (App. 2007) .....	7
<i>Estate of Braden ex rel. Gabaldon v. State</i> , 228 Ariz. 323, 266 P.3d 349 (2011) .....	18
<i>Estate of McGill v. Albrecht</i> , 203 Ariz. 525, 57 P.3d 384 (2002) .....	18
<i>New Sun Bus. Park, LLC v. Yuma Cnty.</i> , 221 Ariz. 43, 209 P.3d 179 (App. 2009) .....	18
<i>Phoenix Newspapers, Inc. v. Keegan</i> , 201 Ariz. 344, 35 P.3d 105 (App. 2001) .....	8
<i>Primary Consultants, L.L.C. v. Maricopa Cnty. Recorder</i> , 210 Ariz. 393, 111 P.3d 435 (App. 2005) .....	10
<i>Star Publishing Co. v. Parks</i> , 178 Ariz. 604, 875 P.2d 837 (App. 1993) .....	passim
<i>State v. Carbajal</i> , 177 Ariz. 461, 868 P.2d 1044 (App. 1994) .....	16
<i>W. Valley View, Inc. v. Maricopa Cnty. Sheriff's Office</i> , 216 Ariz. 225, 165 P.3d 203 (App. 2007) .....	22

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<b>STATUTES</b>	
A.R.S. § 3-368(A) .....	18
A.R.S. § 6-464.....	18
A.R.S. § 6-466(D).....	18
A.R.S. § 11-903(C) .....	18
A.R.S. § 12-120.21(A)(1) .....	3
A.R.S. § 13-701(C) .....	15
A.R.S. § 13-701(E)(6).....	14
A.R.S. § 23-1023(C) .....	18
A.R.S. § 25-381.18(D).....	18
A.R.S. § 28-3301(C) .....	18
A.R.S. § 36-3808(A).....	18
A.R.S. § 39-121.02(B) .....	23
A.R.S. § 39-121.03(A).....	8, 17
A.R.S. § 39-121.03(C) .....	21
A.R.S. § 39-121.03(D).....	passim
A.R.S. § 44-1415(D).....	18
A.R.S. § 46-455(J) .....	18
A.R.S. § 48-3901(B) .....	18
A.R.S. § 48-3905(B) .....	18

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**OTHER AUTHORITIES**

Arizona Rule of Civil Appellate Procedure 21 .....	23
1985 Ariz. Sess. Laws, ch. 213, § 4 .....	17
Black’s Law Dictionary 457 (abr. 7th ed. 2004) .....	13, 15

## **Introduction & Statement of the Case**

The task of determining the proper sentence for a criminal defendant in Arizona can be a difficult one. Although the statutory sentencing scheme provides judges with the Legislature’s prescribed range of penalties, the circumstances of each offense and defendant often make it difficult to arrive at a sentence that is fair and commensurate with other similarly-situated cases. And for decades, judges operated largely in the dark—relying on experience and anecdote—in making that difficult determination. Attorneys advising their clients were no different.

But there is a better way. Ten years ago, an innovative superior court judge used historical sentencing and charging data to determine the proper sentence for a high profile defendant. Taking that cue, Appellees R.R. Robertson, L.L.C. and Richard R. Robertson (collectively, “R3”) began to request data from various public entities to offer criminal defense attorneys an empirical way to show a sentencing judge and prosecutors that a particular sentence is fair (or not, as the case may be). This “Charging and Sentencing Analysis” transforms raw data obtained from public records into a format usable in this context, and in assessing plea agreements and conducting settlement conferences.

At the core of this appeal is whether R3 is requesting this data for a “commercial purpose,” a key distinction under Arizona law because it determines the fees that a public entity can charge. Here, not only does R3 properly “use . . .

information gathered from public records in [its] trade or business,” *Star Publishing Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837, 838 (App. 1993), but its requests also involve the “use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body,” A.R.S. § 39-121.03(D) (the “Evidence Exception”). The Arizona Supreme Court, the Maricopa County Attorney’s Office, and the Pinal County Attorney’s Office have recognized as much for the past four years, never once taking issue with R3’s requests.

The Pima County Attorney’s Office, however, is another story. R3’s requests for historical sentencing and charging data from Appellant Barbara LaWall, the Pima County Attorney (“PCAO”) were rebuffed. Instead of providing the records, PCAO required the payment of additional fees based on its claim that the requests were for a “commercial purpose,” a claim based on an unfounded interpretation of the Public Records Law, and the Evidence Exception more specifically. When R3 disputed this claim, PCAO responded quickly with the filing of a complaint in superior court, thus transforming a routine public records request into a long, expensive, and unnecessary process for R3.

After considering the parties’ cross-motions for summary judgment, in which PCAO took a series of ever-changing legal positions, the trial court granted summary judgment in R3’s favor. It correctly found that R3 does not use the records for a “commercial purpose” because R3’s use does not fit the statutory

definition of that term. And in so doing, the trial court faithfully applied this Court’s decision in *Star Publishing* and the Evidence Exception.

In this appeal, PCAO continues to advance an interpretation of the Public Records Law that is fundamentally flawed, endangers the sanctity of the attorney-client privilege by purporting to require the disclosure of information about case strategy to a prosecuting agency, and—contrary to its goal of shifting the cost of compliance with the Public Records Law—perversely creates government inefficiencies that will adversely impact the taxpayers of Pima County. As a result, and as detailed below, the sound judgment of the trial court should be affirmed. This Court has jurisdiction over this matter pursuant to A.R.S. § 12-120.21(A)(1).

### **Statement of Facts**

The facts of the case are undisputed. R3 Investigations (“R3”) is an established, full-service legal investigations firm serving attorneys and their clients throughout Arizona. [Index of Record on Appeal (“ROA”) 15 ¶ 1] As part of the variety of services it offers, R3 routinely obtains public records from public entities, some based on the case-specific needs of clients and others prospectively in anticipation of upcoming investigations or proceedings. [ROA 15 ¶ 3]

Among other services, R3 offers clients a “Charging and Sentencing Analysis.” [ROA 15 ¶ 5] These analyses use historical charging and sentencing data to create, among other things: (1) summaries of outcomes in cases with

similar charges; (2) a comparison of other cases matching the specifics of a certain plea offer; (3) analysis of all cases handled by a particular prosecutor, judge or law enforcement agency; and (4) comparisons of charging and sentencing disparities based on age, gender, and race. [*Id.*]

To perform Charging and Sentencing Analyses, R3 obtains historical charging and sentencing data through public records requests, which it uses to populate a database of R3's own maintenance and design. [ROA 30 ¶ 28]<sup>1</sup> Once the database is populated, the data is filtered and sorted to provide a variety of custom analyses tailored to the requirements of the individual client. [ROA 30 ¶¶ 27, 28] In many cases, the analysis is much more in-depth than a simple calculation, and R3's investigators use the records as a mere starting point for additional research, which often involves reviewing additional charging and sentencing documents. [ROA 30, Ex. A at 7-8] Armed with the data gleaned from public records and other documents, investigators then compile the full report.

Each Charging and Sentencing Analysis is conducted at the request of a defense attorney based on her specific needs. [ROA 30 ¶ 28] The clients, in turn, use the analyses for a variety of purposes, including analyzing plea offers, making

---

<sup>1</sup> Over the past four years, R3 has obtained public records for its Charging and Sentencing Analyses from the Arizona Supreme Court, the Maricopa County Superior Court, the Maricopa County Attorney's Office and the Pinal County Attorney's Office. [ROA 15 ¶ 9] None of the entities from which R3 has previously obtained records for this purpose have ever asserted that R3's request was for a "commercial purpose" as defined by Arizona's Public Records Law.

arguments during settlement conferences, and most notably, for use in a sentencing hearing and/or as part of a sentencing memorandum. [ROA 15 ¶ 6] R3's analyses have been used as evidence in sentencing proceedings in superior court on at least six different occasions over the past four years [ROA 15 ¶ 15], including: (1) *State v. Jakscht*, Maricopa County Superior Court No. CR2010-118085 [ROA 15 ¶ 16 & Ex. 4], (2) *State v. Linsk*, Maricopa County Superior Court No. CR2012-153890-001 [ROA 39 ¶ 1(a) & Ex. 2], and (3) *State v. Cyrus*, Maricopa County Superior Court No. CR2011-006318-001 [ROA 39 ¶ 1(b) & Ex. 3]. Similar analyses have also been used as evidence in at least two proceedings before the Arizona Board of Executive Clemency. [ROA 15 ¶ 15]

The use and importance of historical charging and sentencing data by sentencing judges is noted in two law review articles by the Hon. Stephen A. Gerst (Ret.), a former Maricopa County Superior Court Judge who spent twenty-one years on the bench. [ROA 15 ¶ 24 & Ex. 2 ¶¶ 13-17, Exs. 10-11] Judge Gerst was particularly well-suited to testify to the use of this data; in fact, he used historical charging and sentencing data—like that provided by R3—to determine a fair and proportionate sentence for Bishop Thomas O'Brien, a former bishop of the Roman Catholic Diocese of Phoenix, who was convicted of the felony offense of leaving the scene of an accident. [ROA 15 ¶ 25 & Ex. 2 ¶¶ 5-12] In Judge Gerst's view,

analyses of the type provided by R3 would be useful evidence to be considered by a judge as part of a sentencing proceeding. [ROA 15 ¶ 26]

On October 17, 2013, R3 sent a public records request to PCAO seeking a “copy of selected portion of [PCAO’s] ‘register’ . . . of all criminal cases prosecuted by [PCAO] that were initiated in calendar years 2002 through current.” [ROA 15 ¶ 17 & Ex. 5] Its request stated that it was for a “non-commercial purpose as defined in A.R.S. § 39-121.03(D) since this information will be used as evidence or as research for evidence in actions before judicial or quasi-judicial bodies.” [ROA 15, Ex. 5 at 2]

On November 12, 2013, PCAO denied the request, and explained that the request did not fall under the Evidence Exception because: (1) it interpreted the exception to only apply to a “specific, pending case or proceeding,” and (2) its belief that the use of prosecution records in plea and sentencing assessments does not qualify as “evidence” or “research for evidence.” [ROA 15 ¶ 19 & Ex. 6 at 2] R3 replied through counsel, noting that PCAO’s legal positions were “inconsistent with both the plain language and the spirit of the Public Records Laws.” [ROA 15 ¶ 20 & Ex. 7 at 1] PCAO responded in kind by filing the instant declaratory judgment action. [ROA 15 ¶ 21]

On December 9, 2013, R3 sent an additional public records request, which expressly stated that it sought records in order to “conduct research on behalf of

counsel for a client, the results of which will be used as evidence before a judicial body.” [ROA 15 ¶ 22 & Ex. 8] On December 12, 2013, PCAO responded via letter to R3’s counsel, stating its belief that the Second Request was also for a commercial purpose. The letter reiterated PCAO’s belief that the Evidence Exception only applied to records request related to “a specific, pending case or proceeding,” and further asserted that “the [Evidence Exception] simply does not apply when a third party seeks to obtain public records . . . and prepare a document containing them for sale to the litigant or the litigant’s counsel.” [ROA 15 ¶ 23 & Ex. 9 at 2] PCAO subsequently amended its complaint to include the Second Request [ROA 4] and a similar request by Christopher DuPont. [ROA 22]

After considering the parties’ cross-motions for summary judgment, the trial court granted summary judgment in favor of R3 on all claims [ROA 53], and awarded R3 its reasonable attorneys’ fees in the amount of \$30,833.50 [ROA 59].<sup>2</sup> After the entry of final judgment [ROA 63], PCAO filed a timely notice of appeal [ROA 64].

---

<sup>2</sup> Because PCAO’s Opening Brief did not raise the trial court’s award of fees to R3 as a separate issue on appeal, that issue has been waived. *Dawson v. Withycombe*, 216 Ariz. 84, 100 n.11, 163 P.3d 1034, 1050 n.11 (App. 2007).

## **Issues Presented for Review**

Arizona’s Public Records Law permits public entities to charge additional fees for their compliance with public records requests made for a “commercial purpose,” which does not include: (1) the “use of information gathered from public records in [its] trade or business,” or (2) the use of a public record as “evidence or as research for evidence in an action in any judicial or quasi-judicial body.” Did the trial court properly conclude that R3’s public records requests were not for a “commercial purpose,” as defined in A.R.S. § 39-121.03(D)?

## **Standard of Review**

Whether R3’s public records requests were made for a “commercial purpose” under the Public Records Law is a question of law that this Court reviews *de novo*. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 347-48 ¶ 11, 35 P.3d 105, 108-09 (App. 2001).

## **Argument**

### **I. R3’S PUBLIC RECORDS REQUESTS WERE NOT MADE FOR A “COMMERCIAL PURPOSE.”**

The parties agree on one thing in this case—the distinction between a public records request made for a “commercial purpose” and all others is critical, as it determines whether the requesting party must pay for staff time and the value of the records on the commercial market in addition to regular copying charges. *See* A.R.S. § 39-121.03(A). These considerations of cost are what motivated PCAO’s

prosecution of this case, and are ultimately what color its tortured reading of the Public Records Law. But as the trial court correctly held below, R3’s public records requests were not made for a “commercial purpose” under what PCAO [at 13] has coined the “Use Clause” of A.R.S. § 39-121.03(D),<sup>3</sup> and in all events, those requests were properly made under the Evidence Exception.

**A. Because R3 Uses Public Records to Obtain Information for Use in its Business, the Fact that it Charges a Fee for its Charging and Sentencing Analysis is Irrelevant.**

PCAO first contends [at 17] that “[b]ecause R3 compiles records into a usable format for a fee, its use squarely falls under the Use Clause—it engages in the ‘use of a public record . . . for the purpose of producing a document containing all or part of the copy, printout or photograph for sale.’” But it succeeds only in (1) misrepresenting the nature of the Charging and Sentencing Analyses that R3 performs, and (2) mischaracterizing a previous decision of this Court.

Contrary to PCAO’s suggestion, a use of public records *is not* classified as “commercial” solely because a requesting party uses the public records in furtherance of a profit-seeking purpose. Indeed, in *Star Publishing*, this Court made clear that a for-profit news entity was not requesting public records for a

---

<sup>3</sup> The “Use Clause” of A.R.S. § 39-121.03(D) defines “commercial purpose” as “the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale[.]”

“commercial purpose” *even though the records were used to create a product—there, a newspaper—sold for a fee.* 178 Ariz. at 605, 875 P.2d at 838.<sup>4</sup>

More specifically, Star Publishing intended to use the public records it sought (autopsy reports) to gain information, which it then customized to create a unique product for sale to customers (a news story). And as this Court explained:

[w]e believe this section to be aimed at the direct economic exploitation of public records *not at the use of information gathered from public records in one’s trade or business.* Thus, the reproduction of a public report or a group of public records for sale as such would be a commercial purpose. Learning facts from public records that might inform one in a daily occupation or might be newsworthy would not be a commercial purpose.

*Id.* (emphasis added). Like the newspaper in *Star Publishing*, R3 does not merely reproduce the records wholesale to sell them to the highest bidder, but rather uses them as raw information around which it assembles a commercially useful product: in *Star Publishing* a newsworthy article; here, a sophisticated set of aggregated data keyed to a client’s needs.

Moreover, and pointing to the examples of Charging and Sentencing Analyses that were in the record before the trial court, PCAO [at 18-19] further argues that because R3’s work product generally “includes . . . excerpted public

---

<sup>4</sup> Although it ultimately turned on a statutory exception not at issue here, *Primary Consultants, L.L.C. v. Maricopa County Recorder*, 210 Ariz. 393, 400 ¶ 28, 111 P.3d 435, 442 (App. 2005) is also instructive, given its holding that a political consulting firm’s requests for voter data were not commercial even though consultants used the data in furtherance of a profit-seeking purpose.

records,” and often attaches other public records (*i.e.*, pre-sentence reports and minute entries), it is *per se* a “document containing all or part of the copy, printout or photograph for sale” (quoting A.R.S. § 39-121.03(D)). As a threshold matter, the categorical rule suggested by PCAO was rejected—at least implicitly—in *Star Publishing*, where the Court carefully distinguished between “direct economic exploitation of public records” and “[l]earning facts from public records that might inform one in a daily occupation.” 178 Ariz. at 605, 875 P.2d at 838. On the facts of that case, suppose that the newspaper wished to quote directly from one of the autopsy reports at issue—“producing a document containing all or part” (A.R.S. § 39-121.03(D)) of a public record—as part of an article in a newspaper that it would sell. Would that then constitute a “commercial purpose” for the request? Hardly. As a result, the distinction drawn by PCAO ignores both controlling precedent and common sense.

More to the point, however, is the fact that R3 does not reproduce public records outright for the purposes of sale. Rather, it aggregates and organizes the data and combines it with other research. Then, R3 provides its client with a completed product as part of a suite of investigative services, for which it is paid an agreed-upon fee based on its time and knowledge. An R3 “Charging and Sentencing Analysis” is thus a distinct, customized product that informs defense attorneys—who are similarly paid for their time and knowledge—how to better

serve the particular needs of their clients, and can ultimately assist judges in reaching a fair and proportional sentence. The final product bears little resemblance to the raw data output gained through public records requests, and provides a new way to synthesize and understand the information to achieve greater clarity for criminal defendants, their attorneys, and courts.<sup>5</sup>

If R3 merely reproduced the data it seeks for sale, PCAO's assertion that the use is "commercial" would be appropriate. But that is plainly not the case before the Court. Because R3's intended use of the data it seeks is not to sell a wholesale reproduction of public records, but is instead to use information gleaned from public records as part of its business, the trial court correctly held that it is simply not a "commercial purpose" under the Public Records Law. *See Star Publishing*, 178 Ariz. at 605, 875 P.2d at 838.

**B. R3's Use of the Public Records at Issue is Expressly Excepted From the Definition of "Commercial Purpose."**

Even if this Court were to conclude that R3's requests are for a "commercial purpose" under the Use Clause, they nonetheless fall squarely under the Evidence Exception, which provides that "[c]ommercial purpose does not mean the use of a

---

<sup>5</sup> This is best evidenced by reviewing the Charging and Sentencing Analyses in *State v. Jakscht* [ROA 15, Ex. 4], *State v. Linsk* [ROA 39, Ex. 2], and *State v. Cyrus* [ROA 39, Ex. 3]. Indeed, R3's work product in *Cyrus* (which was submitted to the court in full) exceeds 300 pages, is a comprehensive review of what would be a fair and proportional sentence for that particular defendant, and is a far cry from the "direct economic exploitation of public records" with which *Star Publishing* was concerned. [ROA 39, Ex. 3]

public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body.” A.R.S. § 39-121.03(D). PCAO’s disagreement with the trial court is twofold, as it argues that: (1) the term “evidence” requires that the “product of the records [be] admissible before a judicial or quasi-judicial body” [Appellant’s Opening Brief (“OB”) at 24-26], and (2) that the word “action” requires a requesting party to make specific reference to either a pending or contemplated action [*id.* at 20-24].

But among other things, the former proposition conveniently ignores that the statute also expressly permits the use of public records as “research for evidence,” while the latter gives short shrift to the relevant rules of statutory construction, is not practical, and endangers the sanctity of the attorney-client privilege. As a result, the trial court’s holding was correct as a matter of law. Much as PCAO may wish that the Evidence Exception contained language requiring disclosure of the nexus between a public records request and a “pending” or “contemplated” action, none exists. Its remedy lies with the Legislature, not this Court.

**1. Historical charging and sentencing data, like that requested by R3, can be “evidence” or “research for evidence” in judicial and quasi-judicial proceedings.**

PCAO [at 24] does not disagree that the term “evidence” is generally defined as “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact,” Black’s Law

Dictionary 457 (abr. 7th ed. 2004), and accepts R3’s “conce[ssion]” that the Evidence Exception would apply to a use of public record that would “directly or indirectly tend to prove or disprove some fact relevant to an action before a ‘judicial or quasi-judicial body.’” [OB at 24 (quoting ROA 17 at 10:13-14)] Nor does it dispute [at 25] that R3 Charging and Sentencing Analyses have been submitted to and considered by superior court judges in sentencing proceedings. Instead, it argues [at 25-26] that a comparative sentencing analysis is not “evidence” properly considered as mitigation under A.R.S. § 13-701(E)(6), and is, at most, merely “information” that a judge might consider at sentencing.

Despite PCAO’s “because I said so” assertion, historical charging and sentencing data (as aggregated into a Charging and Sentencing Analysis by R3) is relevant and admissible in sentencing proceedings because it provides information about the “defendant’s character or background” *and* the “nature and circumstances of the crime”—particularly as it relates to others who have committed the same crime under similar circumstances—that may weigh into a judge’s determination of a fair, just, and proportional sentence. *See* A.R.S. § 13-701(E)(6) (permitting a court to consider “[*a*]ny *other factor* that is relevant to the defendant’s character or background or to the nature or circumstances of the crime and that the court finds to be mitigating.”) (emphasis added). Given this all-

encompassing language, it is thus no surprise that PCAO could find no support for its narrow reading of Section 13-701(E)(6). [OB at 25]<sup>6</sup>

Whether a Charging and Sentencing Analysis is formally entered “into evidence” and is separately labeled as an exhibit that would be transmitted to this Court in the event of appeal, or instead is merely “evidence” that the sentencing judge considers in imposing a sentence, it is “[s]omething . . . that tends to prove or disprove the existence of an alleged fact” (Black’s Law Dictionary 457)—here, whether a particular sentence is proper under the particular circumstances of a defendant’s case. PCAO’s protestations aside, that is all that is required for mitigation, especially in light of the fact that a mitigated sentence may be imposed if the sentencing court finds a mitigating circumstance to be true based “on *any* evidence or information introduced or submitted to the court or the trier of fact before sentencing.” A.R.S. § 13-701(C) (emphasis added). The three examples of Charging and Sentencing Analyses presently before the Court [ROA 15, Ex. 4;

---

<sup>6</sup> In addition, PCAO’s standard of “admissibility” is unworkable because a public entity is not a judge or officer qualified to make abstract determinations of admissibility that are completely divorced from the facts of a particular case, nor does the Public Records Law imbue public entities with the authority to make such decisions. Under PCAO’s interpretation of the statute, the luckless (and unqualified) public employee would be forced to master multiple codes of evidence and apply them correctly depending on the rules governing the specific type of proceeding contemplated. This fact—coupled with the varied standards of admissibility that apply to various “quasi-judicial bodies” [ROA 33 at 7-8]—is yet another insurmountable barrier to PCAO’s interpretation of the Evidence Exception.

ROA 39, Exs. 2 & 3] are themselves proof of at least their potential utility to a sentencing judge, and the avowals of Judge Gerst are no different [ROA 15, Ex. 2 ¶¶ 12-14, 17]. *See also State v. Carbajal*, 177 Ariz. 461, 463, 868 P.2d 1044, 1046 (App. 1994) (“The trial court is in the best position to determine the evidence surrounding the aggravating and mitigating factors and which factors should be given credence.”).

More fundamentally, however, PCAO’s interpretation of the statute all-but-eliminates the specific carve-out for uses of public records as “research for evidence,” thus improperly rendering that phrase a nullity. *See, e.g., Bilke v. State*, 206 Ariz. 462, 464, 80 P.3d 269, 271 (2003) (holding that it is important to preserve the meaning in every word of a statute). That the Legislature included such a broad, inclusive term at all (rather than limiting the exception to the more commonly understood “evidence”) indicates its intention that the public records laws be broadly construed to favor the requester.

And indeed, there are many things that an attorney may do as “research for evidence” that will never see the light of day in a courtroom, including many of the uses to which a Charging and Sentencing Analysis can be put. For example, an attorney may request a Charging and Sentencing Analysis from R3 for purposes of evaluating a plea offer or advising a client of the risk she might face for a

particular set of charges.<sup>7</sup> This is undoubtedly the sort of “research for evidence” contemplated by the Legislature in enacting the Evidence Exception. As a result, there are simply too many variables to impose the stringent requirements proposed by PCAO, which is precisely why the Public Records Law expressly requires a statement of commercial purpose, A.R.S. § 39-121.03(A), but does not contain a similar requirement for non-commercial requests.<sup>8</sup>

**2. The Evidence Exception is not limited to merely a “specific, pending action” or a “contemplated action.”**

**a. The language of the statute does not support the conclusion that the Evidence Exception applies only to a “pending” or “contemplated” case.**

First, PCAO’s contention that the Evidence Exception applies only to a specific case or proceeding that is either “pending” or “contemplated” finds no support in the text of A.R.S. § 39-121.03(D), which refers generally to “research for evidence in *an action*.” (emphasis added). “[W]here the language [of a statute] is plain and unambiguous, courts generally must follow the text as written.” *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). It follows, therefore, that courts “are not at liberty to rewrite the

---

<sup>7</sup> Of course, that same research may eventually be submitted as part of a sentencing memorandum, or in support of a particular sentence provided for in a plea agreement.

<sup>8</sup> The Public Records Law as initially enacted required requesting parties to provide a “verified statement that the reproductions will not be used for a commercial purpose,” a requirement removed by the Legislature in 1985. 1985 Ariz. Sess. Laws, ch. 213, § 4.

statute under the guise of judicial interpretation.” *New Sun Bus. Park, LLC v. Yuma Cnty.*, 221 Ariz. 43, 47 ¶ 16, 209 P.3d 179, 183 (App. 2009) (internal citation and quotation marks omitted).

The Evidence Exception contains neither of the qualifications suggested by PCAO, nor has any Arizona appellate court interpreted the statute in such a narrow manner. If the Legislature intended to limit the reach of the statute in the manner suggested by PCAO, it “would have expressly done so.” *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 327 ¶ 15, 266 P.3d 349, 353 (2011); *Estate of McGill v. Albrecht*, 203 Ariz. 525, 530–31 ¶ 20, 57 P.3d 384, 389–90 (2002) (rejecting claim that a statute required a showing of “gross negligence” where the plain language did not provide as much because “[t]he legislature surely knows how to require a showing of gross negligence, having used that term in a great number of statutes”). And as to at least one of PCAO’s manufactured limitations, specifically that an action be “pending,” the Legislature has made the requisite showing of its knowledge in at least *nine different statutes* spanning across *eight separate titles* of the Arizona Revised Statutes.<sup>9</sup> That there are other statutes that simply use the term “action,” and in which PCAO argues (without support) that the

---

<sup>9</sup> See A.R.S. §§ 3-368(A), 6-464, 6-466(D), 23-1023(C), 25-381.18(D), 28-3301(C), 36-3808(A), 44-1415(D), 46-455(J). In addition, the Legislature has chosen to use the term “contemplated action” in at least three statutes, albeit in a different context. See A.R.S. §§ 11-903(C), 48-3901(B), 48-3905(B).

term “pending” is implied [OB at 22-23] does not change that indisputable conclusion.

**b. Requiring a “specific” or “contemplated” action is practically unsound.**

Second, PCAO’s proposed interpretation of the Evidence Exception also makes little sense when considered in the context of the practical realities of the practice of law. There are any number of instances where public records could be requested by someone who is paid to obtain that record by a client, contractor, or employer, who may incorporate all or part of the public record into another document, when there is no “pending” or specifically “contemplated” action. For example:

- An attorney hired to investigate the propriety of advancing a class action claim against a public body might make a public records request in search of “evidence,” or more notably, as “research for evidence” in an “action” that may never be brought;
- Similarly, an attorney hired by a client determining whether to settle a claim pre-litigation (and therefore “pre-action”), and who wishes to examine the client’s exposure to a judgment given a particular type of claim and factual circumstances, may request public records and incorporate information found in those records in a memorandum to the client for an “action” that may (or may not) ultimately be brought;

- The same would be true of an attorney hired by an insurer who requested, for example, a police report created after a car accident, which would be incorporated (at least in part) in a memorandum analyzing whether the insurer would have a duty to defend if an “action” were brought against the insured;
- Finally, a criminal defense attorney who knows a client is under investigation, but against whom no indictment or information has been brought, might request charging and sentencing data to advise his client as to the potential risk she would face to provide advice as to whether a pre-indictment plea might be in order. That information, of course, could be used later if the matter proceeded to trial.

Under PCAO’s restrictive view of the scope of the Evidence Exception, each of the examples discussed above would constitute a “commercial purpose,” which simply cannot be the result intended by the Legislature.

**c. Requiring a “specific” or “contemplated” action is contrary to governmental interests because it would subject PCAO to a flood of individual requests.**

Third, as the trial court noted in both oral argument and its ruling [ROA 53 at 3 n.2; Transcript of Oral Argument (“TR”) at 21:17-22:8], PCAO’s “specific action” requirement is “disingenuous” because it is contrary to PCAO’s own

interests. Routine quarterly records requests<sup>10</sup> are less burdensome than a blizzard of individual requests, which must be customized to fit the individual needs of the case. R3's attempt to establish routine "data dumps" favors efficiency and streamlines access to public records, directly lessening the burden on PCAO administrators and the taxpayers of Pima County.

PCAO posits [at 23] that R3 (and the trial court) "fails to appreciate . . . the true breadth of its argument," and that without a "specific" or "contemplated" action, the commercial versus non-commercial distinction becomes moot because canny future requesters may cloak commercial requests as non-commercial by claiming them to be "research for evidence" in a future unknown proceeding. The facts of this case simply do not align with this parade of horrors envisioned by PCAO. Here, R3 has clearly articulated its plans for the records and the intended use of the data is not a disputed fact. In fact, as the trial court noted, there are very few other plausible uses of the data other than as "evidence or research for evidence" in criminal proceedings. [TR at 24:20-24] Moreover, PCAO has a statutory remedy if it determines that public records it released are, in fact, being used for a "commercial purpose." *See* A.R.S. § 39-121.03(C) (describing a

---

<sup>10</sup> When making the records requests, R3 advised PCAO that it would be making the request quarterly and thus requested that system administrators preserve the data extraction query for re-use. [ROA 15, Ex. 5 at 2] Running a pre-written query on a regular schedule is far less burdensome than individualized and *ad hoc* requests for data customized to specific cases.

requesting party’s potential liability for misuse of a public record). Its fear in this regard is therefore misplaced.<sup>11</sup>

**d. Requiring a “specific” or “contemplated” action is contrary to public policy because it interferes with the attorney-client privilege.**

Finally, if the application of the Evidence Exception required a “specific” or “contemplated” action—and as PCAO has suggested throughout this litigation, that the details of that proceeding be disclosed to the public entity [*see, e.g.*, ROA 32 at 11]—a requesting party (such as an attorney or an investigator working as an agent of an attorney) would be required to detail both the identity and needs of her client *to the prosecuting agency*. In doing so, it would be impossible to not divulge confidential and privileged facts of the case, thus representing a dangerous and unnecessary intrusion into the attorney-client relationship. A request made prospectively on behalf of a client not yet formally implicated in a proceeding, but facing possible indictment, is all-the-more-troublesome, as it could unintentionally tip off prosecutors. Such results are not contemplated by the Public Records Laws, and counsel strongly against PCAO’s suggested standards.

---

<sup>11</sup> To the extent that PCAO’s argument is rooted in the prospective nature of the requests, this Court previously rejected the argument that the Public Records law does not permit such requests. *W. Valley View, Inc. v. Maricopa Cnty. Sheriff’s Office*, 216 Ariz. 225, 229 ¶ 14, 165 P.3d 203, 207 (App. 2007).

**II. R3 IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES ON APPEAL.**

Pursuant to Rule 21, Ariz. R. Civ. App. P. and A.R.S. § 39-121.02(B), and consistent with the trial court's award of attorneys' fees below [ROA 59], R3 requests an award of its attorneys' fees and costs on appeal because it will substantially prevail in a contested action arising under the Public Records Law.

**Conclusion**

R3's public records requests were not for a "commercial purpose." As a result, the trial court's judgment should be affirmed, and R3 should be awarded its attorneys' fees and costs on appeal.

August 19, 2014

Respectfully submitted,

**PERKINS COIE LLP**

By: /s/ D. Andrew Gaona

Daniel C. Barr

D. Andrew Gaona

2901 North Central Avenue, Suite 2000

Phoenix, Arizona 85012-2788

*Attorneys for Appellees*

*R.R. Robertson, L.L.C. and Richard R.*

*Robertson*