

JEFF FINE
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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

14 PHOENIX NEWSPAPERS, INC.,
 15 SCRIPPS MEDIA, INC., KPNX-TV
 16 CHANNEL 12, a Division of Multimedia
 17 Holdings Corporation, and MEREDITH
 CORPORATION,

18 Plaintiffs,

19 vs.

21 ARIZONA DEPARTMENT OF HEALTH
 22 SERVICES and DR. CARA CHRIST, in
 23 her official capacity as the Director for the
 Arizona Department of Health Services,

24 Defendants.

NO. CV2020-005385

**COMPLAINT FOR STATUTORY
 SPECIAL ACTION TO SECURE
 RIGHT TO INSPECT AND COPY
 PUBLIC RECORDS**

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1 **Preliminary Statement**

2 This is a statutory special action to secure copies of public records maintained by
3 the Arizona Department of Health Services that show the *number* of COVID-19 positive
4 residents at nursing care institutions, and the *number* of their transfers to and from
5 hospitals, in the state of Arizona. There is no question that these records are “public
6 records” within the meaning of Arizona law, nor is there any doubt that the information
7 contained in those records involves matters of acute public concern. Among persons
8 most susceptible to life-threatening complications from COVID-19 are individuals over
9 the age of 65 who have underlying health conditions. Many of those individuals live in,
10 or are contemplating moving to, a nursing home, retirement home or long-term care term
11 facility (collectively, a “Nursing Care Institution”).¹ In Maricopa and Pima Counties, for
12 example, a majority of the deaths attributed to COVID-19 have claimed residents of long-
13 term care facilities. Yet inexplicably, the state is concealing this information from the
14 public.

15 The Arizona Department of Health Services and its Director, Dr. Cara Christ
16 (collectively, “Defendants”), have denied all requests to inspect these public records.
17 Their reasons for denying access to the records have shifted in recent days – initially,
18 citing a federal statute but, more recently, switching to alleged state “privacy” law.
19 When questioned about her rationale at an April 29 press conference, Dr. Christ said she
20 will “happily” provide the information if a court of law disagrees with the Department’s
21 decision to deny access to these public records. In brief, Defendants have left members

22 _____
23 ¹ Arizona law defines a “nursing care institution” as “institution or other place,
24 however named, whether for profit or not, including facilities operated by the state or a
25 subdivision of the state, that is advertised, offered, maintained or operated for the express
26 or implied purpose of providing care to persons who need nursing services on a
27 continuing basis but who do not require hospital care or care under the daily direction of
28 a physician.” Ariz. Rev. Stat. § 33-446(9). For purposes of this statutory special action,
and as reflected in the News Organizations’ public records requests, the term “Nursing
Care Institutions” includes assisted living facilities that provide ongoing personal care
services to residents.

1 of the public no choice but to exercise their statutory rights to inspect these wrongfully
2 withheld records by this special action. *See, e.g.*, A.R.S. § 39-121.02.

3 Plaintiffs Phoenix Newspapers, Inc., which publishes *The Arizona Republic* and
4 azcentral.com (“PNI”), Scripps Media, Inc., which owns and operates KNXV-TV and
5 publishes abc15.com (“Scripps”), KPNX-TV Channel 12, a Division of Multimedia
6 Holdings Corporation, which owns and operates KPNX-TV and publishes 12news.com
7 (“KPNX”), and Meredith Corporation, which, through its wholly-owned subsidiary
8 KPHO Broadcasting Corporation, owns and operates KTVK 3TV and KPHO-TV and
9 publishes azfamily.com (“Meredith”) (collectively, the “News Organizations”), submit
10 this Complaint for Statutory Special Action pursuant to A.R.S. § 39-121 *et seq.* (the
11 “Arizona Public Records Law”) and Ariz. R. Special Actions 1-6. They do *not* seek the
12 names of, or other personally identifying information about, *any* residents of these
13 Nursing Care Institutions. Rather, they respectfully request this Court’s enforcement of
14 their statutory right to secure the data and information sorted by Nursing Care Institution,
15 contained in these public records “promptly,” as required by law. *See* A.R.S. §§ 39-
16 121.01(D)(1) and (E).

17 For their Complaint, the News Organizations allege as follows:

18 **PARTIES, JURISDICTION AND VENUE**

19 1. Plaintiff PNI publishes *The Arizona Republic*, a newspaper of general
20 circulation in Maricopa County, Arizona, and azcentral.com, a part of the USA Today
21 network. PNI is a news organization with its principal place of business in Phoenix,
22 Arizona.

23 2. Plaintiff Scripps owns and operates KNXV-TV (ABC15), the Phoenix
24 ABC television network affiliate, and publishes abc15.com, in Phoenix, Arizona. Scripps
25 is a news organization with its principal place of business in Cincinnati, Ohio.

1 3. Plaintiff KPNX owns and operates KPNX-TV (12 News), the Phoenix
2 NBC television network affiliate owned by TEGNA, Inc., and publishes 12news.com.
3 KPNX is a news organization with its principal place of business in Phoenix, Arizona.

4 4. Plaintiff Meredith, through its wholly owned subsidiary KPHO
5 Broadcasting Corporation, owns and operates KTVK 3TV, a local independent television
6 station, and KPHO-TV, the Phoenix CBS network affiliate, and publishes azfamily.com
7 (together, Arizona's Family) in Phoenix, Arizona. Meredith is a news organization with
8 its principal place of business in Des Moines, Iowa.

9 5. News Organizations PNI, Scripps, KPNX and Meredith provide breaking
10 news on matters of public concern to their readers, viewers and listeners, including
11 regular updates on the spread and containment of the COVID-19 pandemic. They aim to
12 provide their audiences accurate and reliable news reports by which individuals can make
13 informed decisions as citizens and members of this community.

14 6. By statute and well-established case law, the News Organizations may
15 request to examine or be furnished copies of any public record, and public officers and
16 public bodies are required to furnish copies of such records to them "promptly." See
17 A.R.S. § 39-121.01(D)(1).

18 7. Defendant Dr. Cara Christ ("Director Christ") is the Director of the Arizona
19 Department of Health Services, and she is named only in her official capacity. Director
20 Christ is an appointed officer of the State of Arizona and is an "[o]fficer" within the
21 meaning of A.R.S § 39-121.01(A)(1).

22 8. Defendant Arizona Department of Health Services (the "Department" and,
23 together with Director Christ, "Defendants") is the State of Arizona's principal public
24 health agency, which operates at the direction of Director Christ. The Department is a
25 "[p]ublic body" within the meaning of A.R.S § 39-121.01(A)(2).

26 9. By law, Director Christ and the Department "shall maintain all records . . .
27 reasonably necessary or appropriate to maintain an accurate knowledge of their official
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1 activities and of any of their activities which are supported by monies from the state or
2 any political subdivision of the state.” A.R.S § 39-121.01(B).

3 10. The Court has personal jurisdiction over the parties in this action, and
4 venue is proper in Maricopa County, Arizona.

5 11. This Complaint seeks inspection and copying of public records in
6 accordance with A.R.S. § 39-121.02(A), which provides that “[a]ny person who has
7 requested to examine or copy public records pursuant to this article, and who has been
8 denied access to or the right to copy such records, may appeal the denial through a
9 special action in the superior court, pursuant to the rules of procedure for special actions
10 against the officer or public body.” By law, “[a]ccess to public records is deemed denied
11 if a custodian [of such records] fails to promptly respond to a request for production of a
12 public record.” A.R.S. § 39-121.01(E).

13 FACTS

14 12. Humanity is enduring a global pandemic that has radically affected all
15 aspects of daily life. COVID-19, a viral infection that attacks respiratory and
16 cardiovascular tissues, has spread to all corners of the state of Arizona. As of May 3,
17 2020, ADHS reports that Arizona has 8,640 cases of COVID-19, and the virus has caused
18 362 deaths. *Data Dashboard*, Arizona Department of Health and Safety,
19 <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php>.

20 13. The elderly and individuals with underlying health conditions are
21 disproportionately likely to require hospitalization and intensive care due to COVID-19.
22 The Centers for Disease Control and Prevention (“CDC”) estimates that “8 out of 10
23 deaths in the U.S. have been in adults 65 years old and older.” *Coronavirus Disease*
24 *2019 (COVID-19)*, Centers for Disease Control and Prevention,
25 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

26 14. Long-term care facilities have been particularly hard hit. For example, *The*
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1 *Arizona Republic* reported that, as of April 29, 2020, 60 residents and 30 staff members
2 of one facility had been infected, according to the facility's spokesperson, and at least 20
3 residents had died during the COVID-19 outbreak. Anne Ryman, *State health official*
4 *won't reveal which nursing homes have COVID-19 outbreaks without a judge's order,*
5 *azcentral.com* (Apr. 29, 2020), [https://www.azcentral.com/story/news/local/arizona-](https://www.azcentral.com/story/news/local/arizona-health/2020/04/29/coronavirus-arizona-nursing-homes-covid-19-cases-doug-ducey-stay-at-home-order/3053646001/)
6 [health/2020/04/29/coronavirus-arizona-nursing-homes-covid-19-cases-doug-ducey-stay-](https://www.azcentral.com/story/news/local/arizona-health/2020/04/29/coronavirus-arizona-nursing-homes-covid-19-cases-doug-ducey-stay-at-home-order/3053646001/)
7 [at-home-order/3053646001/](https://www.azcentral.com/story/news/local/arizona-health/2020/04/29/coronavirus-arizona-nursing-homes-covid-19-cases-doug-ducey-stay-at-home-order/3053646001/). Relying on the facility's executive director, *The Arizona*
8 *Republic* reported that Desert Cove Nursing Center in Chandler had confirmed 40
9 positive cases among its residents, 13 among its staffers and the deaths of four of its
10 residents. Anne Ryman, *53 test positive for COVID-19 at Chandler nursing home; 4*
11 *residents have died,* *azcentral.com* (May 1, 2020),
12 [https://www.azcentral.com/story/news/local/arizona-health/2020/05/01/desert-cove-](https://www.azcentral.com/story/news/local/arizona-health/2020/05/01/desert-cove-nursing-center-chandler-arizona-reports-53-covid-19-cases/3070065001/)
13 [nursing-center-chandler-arizona-reports-53-covid-19-cases/3070065001/](https://www.azcentral.com/story/news/local/arizona-health/2020/05/01/desert-cove-nursing-center-chandler-arizona-reports-53-covid-19-cases/3070065001/); *see also* Zach
14 Crenshaw, *13 residents at Chandler assisted living facility have died from COVID-19*
15 *complications, 14 others test positive,* *abc15.com* (Apr. 21, 2020),
16 [https://www.abc15.com/news/coronavirus/13-residents-at-chandler-nursing-home-have-](https://www.abc15.com/news/coronavirus/13-residents-at-chandler-nursing-home-have-died-from-covid-19-complications-14-others-test-positive)
17 [died-from-covid-19-complications-14-others-test-positive.](https://www.abc15.com/news/coronavirus/13-residents-at-chandler-nursing-home-have-died-from-covid-19-complications-14-others-test-positive)

18 15. As of May 3, 2020, 103 residents of long-term care facilities have died of
19 COVID-19 complications in Maricopa County, a figure that now represents 64% of the
20 county's total COVID-19 deaths. Anne Ryman, *More than 100 in long-term care*
21 *facilities have now died of COVID-19. Here's why it keeps happening,* *azcentral.com*
22 (Apr. 29, 2020), [https://www.azcentral.com/story/news/local/arizona/2020/05/03/more-](https://www.azcentral.com/story/news/local/arizona/2020/05/03/more-than-100-covid-19-deaths-long-term-care-facilities-arizona/3045515001/)
23 [than-100-covid-19-deaths-long-term-care-facilities-arizona/3045515001/](https://www.azcentral.com/story/news/local/arizona/2020/05/03/more-than-100-covid-19-deaths-long-term-care-facilities-arizona/3045515001/).

24 16. On March 11, 2020, Governor Ducey issued an Emergency Declaration in
25 which he declared that a State of Emergency exists in Arizona due to the COVID-19
26 outbreak.

27 17. A.R.S. § 36-787(A) provides that "[d]uring a state of emergency . . .

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1 declared by the governor in which there is an occurrence or imminent threat of an illness
2 . . . or pandemic disease . . . that poses a substantial risk of a significant number of human
3 fatalities . . . the department shall coordinate all matters pertaining to the public health
4 emergency response of the state.”

5 18. Among other duties during a pandemic, the Department is responsible for
6 “[p]lanning and executing public health emergency assessment, mitigating, preparedness
7 response and recovery for this state,” “[c]oordinating public health emergency response
8 among state, local and tribal authorities” and “[o]rganizing public information activities
9 regarding state public health emergency response operations.” *Id.* § 36-787(A)(1), (2),
10 (5).

11 19. The Legislature directly tasked the Department with “[p]rovid[ing]
12 information and advice on request by . . . private citizens, business enterprises and
13 community organizations on matters within the scope of the department’s duties.” A.R.S.
14 § 36-104(9).

15 20. On April 7, 2020, Governor Ducey issued Executive Order No. 2020-22,
16 mandating that Nursing Care Institutions, Residential Care Institutions and certain other
17 healthcare institutions “shall report through EMResource or alternative form to the
18 Arizona Department of Health Services every week the number of COVID-19 positive
19 residents, the number of transfers to and from an acute hospital, the number and type of
20 PPE [personal protective equipment] . . . , and the estimated use of each type of PPE per
21 week” (the “COVID-19 Data”).

22 21. The Governor noted that “the elderly population and those with serious
23 underlying health conditions are most at risk from COVID-19” and warned that an
24 “introduction of COVID-19 into Nursing Care Institutions, which serve as both
25 healthcare providers and as full-time homes for some of the most vulnerable Arizonans,
26 can result in an outbreak and have devastating consequences.”

27 22. Once submitted to the Department by the nursing homes, the documents
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1 containing COVID-19 Data become public records that are subject to a strong
2 presumption in favor of public access. *See, e.g., Lake v. City of Phoenix*, 222 Ariz. 547,
3 549 (2009). Here, the documents containing the COVID-19 Data are of critical
4 importance to the public. Among other benefits, their disclosure will allow individuals to
5 monitor the rate of infection at, and transfers to hospitals from, those Nursing Care
6 Institutions, and to evaluate their relative safety, especially for loved ones residing in or
7 contemplating moving to those facilities during this pandemic. Disclosure, too, will
8 allow the public and public policymakers to reach more informed judgments about the
9 containment of this public health crisis in Arizona.

10 23. On or about April 7, 2020, PNI submitted a public records request to the
11 Department seeking “[a]ll weekly reports submitted to the state by nursing homes that
12 detail the number of COVID-19 positive residents, the number of transfers to and from
13 hospitals, the number and type of PPE and the estimated use of each type of PPE per
14 week.”

15 24. On or about April 16, 2020, the Department responded, “we do not have a
16 timeframe when this aggregate statewide level data will be posted on the ADHS
17 website.”

18 25. That same day, PNI asked whether the Department intended to “release
19 information in those reports down to the nursing home level,” inquiring what the
20 Department’s response meant for PNI’s public records request.

21 26. The Department has failed to furnish copies of the requested records to
22 PNI, nor has it given PNI any reason to believe access to the public records will be
23 forthcoming.

24 27. On or about April 6, Scripps contacted the Department by text message to
25 inquire whether the Department would “start reporting outbreaks at long term care
26 facilities.” The Department responded that “there [were] no plans to report this on [its]
27 dashboard.

1 28. On or about April 13, 2020, Scripps submitted a public records request to
2 the Department seeking records related to “any outbreaks in businesses, long-term care
3 facilities, or congregate settings in Maricopa County with confirmed cases.” Scripps
4 requested (1) “a list by name of businesses -- number of positive cases;” (2) “a list of any
5 congregate setting that the state has tracked with positive cases;” and (3) a list of “all
6 long-term care facilities with the number of positive cases.” Scripps clarified that it was
7 “NOT requesting any names of individuals.”

8 29. On or about April 29, 2020, after weeks of unfulfilled public records
9 requests to the Department, Scripps submitted a “final” public records request to the
10 Department seeking (1) “[t]he names and locations of long-term care facilities that have
11 known COVID-19 cases;” (2) “[t]he number of COVID-19 cases and the number of
12 COVID-19 deaths broken down by long-term care facility names and locations;” and (3)
13 “[t]he dates those cases were reported to and/or learned by the State of Arizona.”

14 30. The Department has failed to furnish copies of the requested records to
15 Scripps, nor has it given Scripps any reason to believe access to the public records will be
16 forthcoming.

17 31. On or about April 7, 2020, KPNX submitted a public records request to the
18 Department seeking, among other records, “data or reports related to the number of
19 confirmed positive tests at skilled nursing facilities statewide, including the name of the
20 nursing facility.”

21 32. On or about April 7, 2020, the Department responded to KPNX, stating that
22 “it is currently unclear as to how long it will take to conduct the search for records,
23 review any resulting records for confidentiality . . . , and ultimately fulfill your request.”

24 33. On or about April 22, 2020, KPNX contacted the Department to inquire
25 about the status of its request, reiterating the categories of information that it seeks.

26 34. The Department has failed to furnish copies of the requested records to
27 KPNX, nor has it given KPNX any reason to believe access to the public records will be
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1 forthcoming.

2 35. On or about April 10, 2020, Meredith requested COVID-19 “data on long-
3 term facilities” and requested the number of “cases and deaths in each facility.”

4 36. On or about April 13, 2020, the Department responded that it was “in the
5 process of gathering [information about the number of confirmed COVID-19 residents at
6 nursing homes] and making it available to the public.”

7 37. On or about April 30, 2020, Meredith submitted a public records request to
8 the Department seeking “reports on long-term care facilities and COVID-19 statistics,
9 individual long-term care facilities and testing statistics of COVID-19 and those results.”

10 38. The Department has failed to furnish copies of the requested records to
11 Meredith, nor has it given Meredith any reason to believe access to the public records
12 will be forthcoming.

13 39. In sum, the News Organizations requested access to the following
14 categories of public records related to COVID-19 from the Department (the “Public
15 Records”): (1) “[t]he names and locations of long-term care facilities that have known
16 COVID-19 cases;” (2) “[t]he number of COVID-19 cases and the number of COVID-19
17 deaths broken down by long-term care facility names and locations;” and (3) “[t]he dates
18 those cases were reported to and/or learned by the State of Arizona;” (4) “[a]ll weekly
19 reports submitted to the state by nursing homes that detail the number of COVID-19
20 positive residents, the number of transfers to and from hospitals, the number and type of
21 PPE and the estimated use of each type of PPE per week;” and (5) “data or reports related
22 to the number of confirmed positive tests at skilled nursing facilities statewide, including
23 the name of the nursing facility.” These Public Records should include all of the
24 COVID-19 Data that Governor Ducey *required* be submitted on a weekly basis to the
25 Department by every Nursing Care Institution in the State of Arizona.

26 40. The Department has withheld the Public Records containing the COVID-19
27 Data from public inspection. As a matter of law, therefore, the Department has denied
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1 the News Organizations' requests by "fail[ing] to promptly respond" A.R.S. § 39-
2 121.01(E).

3 41. As of this writing, the Department has refused to produce *any* of the Public
4 Records containing the COVID-19 Data in response to the News Organizations' requests.

5 42. In press conferences and interviews, the Department has broadly invoked
6 and withdrawn reliance on a federal law, the Health Insurance Portability and
7 Accountability Act of 1996 ("HIPAA"), and then cited confidentiality and privacy
8 concerns to rationalize its failure to comply with its duties under the Arizona Public
9 Records Law.

10 43. The News Organizations do *not* seek any public records for a commercial
11 purpose, or to reveal the confidential health information of any individual. Instead, the
12 News Organizations seek these Public Records that contain the COVID-19 Data to
13 inform the public of the weekly information regarding the number of residents that have
14 tested positive for COVID-19, the number of residents that have been transferred to or
15 from an acute care facility, and information regarding the availability of PPE pursuant to
16 Governor Ducey's Executive Order 2020-22.

17 44. The only conceivable way that revealing the COVID-19 Data in the Public
18 Records could reveal which individual Nursing Care Institution residents have tested
19 positive for COVID-19 would be (1) the number of residents of a given Nursing Care
20 Institution is known to the public or is otherwise available, (2) the identity of the
21 residents of that Nursing Care Institution is known to the public or is otherwise available,
22 *and* (3) the number of residents of that Nursing Care Institution that have tested positive
23 for COVID-19 encompasses nearly the entire population of that Nursing Care Institution.
24 Defendants, however, have failed to identify these circumstances for a single Nursing
25 Care Institution within the State.

26 45. However, to the extent that the Public Records containing the COVID-19
27 Data also include information that could be used to identify which residents, if any, of a
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1 given Nursing Care Institution have tested positive for COVID-19 or have otherwise been
2 transferred to or from an acute hospital, the Department should have redacted such
3 information but disclosed the remainder promptly. *See, e.g., Carlson v. Pima Cty*, 141
4 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984).

5 46. Nor can Defendants rely on the HIPAA to refuse to release the Public
6 Records that contain the COVID-19 Data because state agencies like the Department and
7 its employees are *not* covered entities or associates (45 C.F.R. § 160.103), but instead are
8 a part of a public health authority. *See* 45 C.F.R. § 164.501. The United States
9 Department of Health and Human Services has confirmed in recent bulletins issued in
10 connection with the COVID-19 virus that HIPAA's privacy rules only applies to covered
11 entities and business associates, not public health authorities like the Department and its
12 employees. [https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-
13 waiver-bulletin-508.pdf](https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf)

14 COUNT ONE

15 (Violation of Arizona Public Records Law)

16 47. The News Organizations reallege and incorporate by reference the
17 allegations set forth in paragraphs 1 through 46 of this Complaint.

18 48. The Public Records Law provides that “[p]ublic records and other matters
19 in the custody of any officer shall be open to inspection by any person at all times during
20 office hours.” A.R.S. § 39-121.

21 49. The Public Records requested by the News Organizations are indeed
22 “public records” within the meaning of the Arizona Public Records Law. *See* A.R.S.
23 § 39-121.01(B); *Lake v. City of Phoenix*, 222 Ariz. 547, 549 (2009) (“Arizona law
24 defines ‘public records’ broadly and creates a presumption requiring the disclosure of
25 public information.”).

26 50. COVID-19 and its prevalence in Nursing Care Institutions around the state
27 are matters of acute public concern.

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1 51. In accordance with A.R.S. §§ 39-121 and -121.01(B), Defendants are
2 required to maintain the Public Records and make them available for inspection and
3 copying by persons such as the News Organizations and their journalists.

4 52. There is a strong public benefit in honoring the public's statutory right to
5 inspect these Public Records, and Defendants have failed to establish the probability of
6 any specific, material harm that would outweigh such public benefit and preclude the
7 release of any portion of the Public Records. See, e.g., *Cox Ariz. Publ'ns v. Collins*, 852
8 P. 2d 1194 (1993).

9 53. For these reasons, Defendants have failed to perform their duties required
10 under the Arizona Public Records Law, and they have wrongfully denied the News
11 Organizations access to inspect and copy the Public Records as a matter of law. See Ariz.
12 R. Special Actions 3.

13 **PRAYER FOR RELIEF**

14 Wherefore, the News Organizations pray for relief from this Court as follows:

15 A. For an order setting an expeditious time for Defendants to produce all of
16 the Public Records to the News Organizations for inspection and copying;

17 B. For an award of the attorneys' fees and other legal costs reasonably
18 incurred by the News Organizations in this special action to secure these Public Records
19 as provided by A.R.S. § 39-121.02(B); and

20 C. For such other and further relief as the Court deems just and proper.

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DATED this 5th day of May, 2020.

BALLARD SPAHR LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2020, the foregoing document was filed with the Office of the Clerk of the Superior Court, Maricopa County.

I further certify that a complete copy of the foregoing was sent for hand-delivery via process server this same date upon the following:

Arizona Department of Health Services
150 North 18th Avenue
Phoenix, Arizona 85007

Dr. Cara Christ, Director
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Arizona Attorney General
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DMWEST #40119214 v1