

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AUDIT-USA,
Plaintiff/Appellant,

v.

MARICOPA COUNTY; MARICOPA COUNTY BOARD OF
SUPERVISORS,
Defendants/Appellees.

No. 1 CA-CV 22-0254
FILED 2-14-2023

Appeal from the Superior Court in Maricopa County
No. LC2021-000074-001
The Honorable Joseph P. Mikitish, Judge

AFFIRMED

COUNSEL

Risner & Graham, Tucson
By William J. Risner, Kenneth K. Graham
Counsel for Plaintiff/Appellant

Maricopa County Attorney's Office, Phoenix
By Joseph Eugene La Rue, Joseph Branco
Counsel for Defendants/Appellees

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OPINION

Judge James B. Morse Jr. delivered the opinion of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Michael J. Brown joined.

M O R S E, Judge:

¶1 Americans United for Democracy, Integrity, and Transparency in Elections ("AUDIT-USA") filed a statutory special action in superior court after Maricopa County and the Maricopa County Board of Supervisors (collectively "County") did not respond to a public-records request for digital images of ballots cast in the November 2020 general election. The superior court granted the County's motion to dismiss, and AUDIT-USA appeals. Because the superior court correctly determined that the County was not authorized under Arizona law to provide copies of the digital images of cast ballots to AUDIT-USA, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In February 2021, AUDIT-USA sent a letter to the County requesting electronic copies of all (1) ballot images from the November 2020 general election; (2) Cast Vote Records ("CVR") linked to the ballot images; and (3) JavaScript Object Notation ("JSON") or Extensible Markup Language files accompanying the ballot images and CVR. AUDIT-USA then sent a second letter to the County to follow up on its initial request. The County did not respond to either request.

¶3 On March 12, 2021, AUDIT-USA filed a special action under A.R.S. § 39-121.02(A) seeking an order to show cause concerning the release of the ballot images. Two weeks later, the County responded to AUDIT-USA's initial public-records request, providing AUDIT-USA copies of the CVR in JSON format but declining to provide electronic copies of the ballot images.

¶4 The County then filed a motion to dismiss under Arizona Rule of Civil Procedure ("Rule") 12(b)(6), alleging AUDIT-USA failed to state a claim upon which relief can be granted as "Arizona law expressly forbids public dissemination of digital images of ballots, even in response to public records requests." The court granted the County's motion, concluding that AUDIT-USA is not entitled to relief under any

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interpretation of the facts because A.R.S. § 16-625 "expressly prohibits unauthorized copying or transfer of digital images of ballots."

¶5 AUDIT-USA moved for a new trial, but the court denied its motion. AUDIT-USA timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 This appeal concerns the interpretation of A.R.S. § 16-625. We review questions of statutory interpretation and the dismissal of a complaint for failure to state a claim de novo. *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 194, ¶ 6 (2016); *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). "Dismissal under [Rule 12(b)(6)] is appropriate 'only if as a matter of law plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504, ¶ 7 (2018) (quoting *Coleman*, 230 Ariz. at 356, ¶ 8). In deciding whether to grant a Rule 12(b)(6) motion, courts may consider a complaint's exhibits or public records concerning matters referenced in the complaint. *Coleman*, 230 Ariz. at 356, ¶ 9.

¶7 AUDIT-USA first addresses whether (1) public-records law is applicable and (2) AUDIT-USA is an "appropriate requester" under public-records law. "Despite the unlimited disclosure expressed by the wording of" Arizona public-records law, numerous exceptions apply, *Carlson v. Pima County*, 141 Ariz. 487, 490 (1984), and "public records law . . . does not mandate disclosure of every document held by a public entity," *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8 (2009). Because the County is precluded by statute from disclosing the ballot images requested by AUDIT-USA, we need not resolve whether public-records law applies.

¶8 The controlling statute provides:

Electronic data and digital images; ballots; security. The officer in charge of elections shall ensure that electronic data from and electronic or digital images of ballots are protected from physical and electronic access, including unauthorized copying or transfer, and that all security measures are at least as protective as those prescribed for paper ballots.

A.R.S. § 16-625.

¶9 The County argues that A.R.S. § 16-625 prohibits it from providing electronic copies of cast ballot images to AUDIT-USA. AUDIT-

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USA argues that the County is authorized to make copies of the ballot images because A.R.S. § 16-625 does not categorically prohibit disclosure but specifies "protective requirements" meant to prevent fraud or manipulation of the ballot images.

¶10 "Statutory interpretation requires us to determine the meaning of the words the legislature chose to use. We do so . . . according to the plain meaning of the words in their broader statutory context" *S. Ariz. Home Builders Ass'n v. Town of Marana*, --- Ariz. ---, ---, ¶ 31, 522 P.3d 671, ---, ¶ 31 (2023). "Absent ambiguity or absurdity, our inquiry begins and ends with the plain meaning of the legislature's chosen words" *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523, ¶ 11 (2021).

¶11 The parties acknowledge the County is the "officer in charge" for purposes of A.R.S. § 16-625. And the officer-in-charge must ensure that "electronic or digital images of ballots are protected from physical and electronic access" and "unauthorized copying or transfer." A.R.S. § 16-625. AUDIT-USA argues that because it only requests an "electronic *copy*" of all cast ballot images and does not seek "physical and electronic *access*" to the ballot images, the County can "authorize any copying or transfer." (Emphasis added.) AUDIT-USA further argues that A.R.S. § 16-625 does not prohibit the County from making copies of the ballot images because the statute was meant to secure the original files of the ballot images, not the copies. At oral argument, AUDIT-USA also suggested that A.R.S. § 16-625 is a "protection statute" not a "disclosure" measure, and because the digital images are already protected by voting software, the County is authorized to disclose copies of the digital images. However, read together, A.R.S. § 16-624 requires that paper ballots remain "unopened and unaltered" absent a court order, and A.R.S. § 16-625 requires equally protective "security measures" for ballot images.

¶12 Section 16-624(A) requires cast paper ballots to be packaged and deposited in a secure facility. Those packages containing the cast ballots must remain "unopened and unaltered" for 24 months following the election unless a court orders them opened. A.R.S. § 16-624(A), (D). Unless prohibited by law from doing so, the county treasurer must then destroy the ballots after the 24-month period "without opening or examining the contents." *Id.* There may be circumstances in which disclosing digital images of cast ballots is authorized by court order, but those do not include general disclosures pursuant to a public-records request. *See* A.R.S. §§ 16-624(D) (requiring delivery of paper ballots to the court in the event of a contest or recount), -625; *see also* A.R.S. § 16-168(F) (authorizing government officials in the scope of their duties to access confidential voter

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information); cf. *Democratic Party of Pima Cnty. v. Ford*, 228 Ariz. 545, 549, ¶¶ 13-14, ¶ 14 n.4 (App. 2012) (noting the trial court entered an order granting a political party's public-records request to access ballot records protected under A.R.S. § 16-624).

¶13 AUDIT-USA acknowledges that the paper ballots "should be in unopened boxes so that their security is assured as required by state and federal law for 22 to 24 months" and only requests copies of the ballot images. But if AUDIT-USA cannot obtain copies of the paper ballots, it cannot obtain copies of the digital images of those ballots. See A.R.S. § 16-625 (requiring security measures for digital images of ballots to be "at least as protective as those prescribed for paper ballots"). And access to digital images could only be "authorized" in the same way access is permitted for paper ballots – namely, court order.

¶14 While AUDIT-USA points to evidence in the legislative history, the County also cites legislative history to support its position. "We do not consider legislative history when the correct legal interpretation can be determined from the plain statutory text and the context of related statutes." *State v. Ewer*, --- Ariz. ---, ---, ¶ 20 (Jan. 18, 2023). Here, the statute makes the security measures for digital images of ballots equivalent to those for paper ballots, and neither a contest, recount, nor qualifying circumstance has occurred. Thus, the superior court correctly determined that AUDIT-USA failed to state a claim upon which relief can be granted. See *Conklin*, 245 Ariz. at 504, ¶ 7 (dismissing a complaint under Rule 12(b)(6) is appropriate "if as a matter of law plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof" (quoting *Coleman*, 230 Ariz. at 356, ¶ 8)).

CONCLUSION

¶15 We affirm. Further, we deny AUDIT-USA's request for attorney fees on appeal. See A.R.S. § 39-121.02(B) (awarding attorney fees "if the person seeking public records has substantially prevailed").



AMY M. WOOD • Clerk of the Court
FILED: AA