

ARIZONA PUBLIC RECORDS LAW: WHAT YOU NEED TO KNOW

Presented by Lisa Neuville
Disclosure Officer
Arizona Department of Revenue

Learning Objectives

- Become familiar with the Arizona public records statutes
- Learn what is and is not a public record
- Learn about record retention schedules
- Learn how to handle actual public records requests

Arizona Public Records Statute

- Arizona Revised Statutes (A.R.S.) § 39-121:
 - “Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.”
 - The purpose of the law is to allow the public access to official records so that the public may monitor the performance of government officials and their employees. *Phoenix Newspapers, Inc. v. Keegan*, 200 Ariz. 344, 15 P.3d 105 (App. 2001).

Who is Subject to Public Records Law

Applies to Public Bodies. For purposes of the public records law, a "Public body" includes:

- State
- Any county, city, town, school district or tax-supported district in this state
- Any branch, department, board, bureau, commission, council or committee of the foregoing
- Any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state

What Is A Record

Statute defines a “record” very broadly to include:

- “all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media. . .”
A.R.S. § 41-151.18

It includes more than physical documents -- e-mail and electronic compilations, including embedded metadata, are subject to the law.

- *Star Publishing Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 891 P.2d 899 (App.1994); *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (2009).

What Are Record Formats

□ Paper & Printed Materials

- Brochures
- Tax returns or bills
- Personnel files
- Correspondence
- Printed training materials
- Appraisals
- License applications

□ Electronic or digital

- Computer files
- Network servers
- Emails
- USB/Thumb drives
- CD/DVD
- Voice mail and text messages
- Videos

What Is A Public Record

- A public record includes all records “reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by funds from the state or any political subdivision thereof.” A.R.S. § 39-121.01(B)
- Includes:
 - ▣ A record that is “required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done.”
 - ▣ Any “written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not . . .”

Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952).

What Is Not a Public Record

- “A public record must have some relation to the official duties of the public officer that holds the record.” *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 815 P.2d 900 (1991).
- A personal record is not a public record. For example, a personal e-mail on an office e-mail account, or a doctor’s appointment on an Outlook calendar would not constitute a public record.
- “The purpose of the law is to open government activity to public scrutiny, not to disclose information about private persons.” *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418 (2007).

What About Records Located Outside of the Office or Office Equipment

- A 2000 amendment to A.R.S. § 39-121 changed the statute to clarify the record must be in “the *custody* of any officer” and not necessarily “in the office.”
- Work e-mails on personal e-mail accounts, work documents saved to home computers and work related phone records from personal phones are public records and may be subject to public records requests.

Remember

12/13/13

Gmail - Rec



Re:

David Wildstein <david.wildstein@gmail.com>
To: Bridget Anne Kelly <bridgetannekelly@yahoo.com>

Tue, Aug 13, 2013 at 7:35 AM

Got it

On Aug 13, 2013, at 7:34 AM, Bridget Anne Kelly <bridgetannekelly@yahoo.com> wrote:

> Time for some traffic problems in Fort Lee.

Record Retention

- Public records do not have to be kept forever
 - ▣ Paper records could quickly fill all government buildings
 - ▣ There is an expense to securely storing paper and electronic records
 - ▣ Some records are difficult to maintain for long periods of time
- The period that a record is kept is based on the type of record and applicable record retention schedules

Where are Record Schedules Located

- The Arizona State Library, Archives & Public Records is responsible for approving record retention schedules.
- Schedules applicable to all public bodies can be found on the Arizona State Library, Archives & Public Records website at:
<http://www.azlibrary.gov/arm/retention-schedules>

Types of Schedules

- Statewide Schedules
- Agency modifications to General Schedules
- Agency Custom Schedules
- Note: scheduled retention periods may be extended by litigation holds

Retention Schedules



Arizona State Library, Archives and Public Records

General Records Retention Schedule for All Public Bodies Administrative Records

Schedule Number:
000-12-15

Authorization and Approval

Pursuant to ARS §41-151.12, the retention periods listed herein are the minimum amount of time records may be kept. Keeping records for a time period shorter than their approved retention period is illegal. Records required for ongoing or foreseeable official proceedings such as audits, lawsuits or investigations, must be retained until released from such official proceedings, notwithstanding the instructions of this schedule. If it is believed that special circumstances warrant that records should be kept for a shorter time than the time period listed in this schedule or that any of these records may be appropriate for transfer to the State Archives, please contact the Records Management Division to inquire about a change to the retention period. Only the Arizona State Library, Archives and Public Records has the authority to set records retention periods. Public records, including electronic records, not listed in this schedule are not authorized to be destroyed.

A handwritten signature in cursive script, appearing to read "Lisa Maxwell".

Lisa Maxwell, Director
Records Management Division
Arizona State Library, Archives and Public Records

Date Approved: *March 6, 2012*

Retention Schedules

**General Retention Schedule for
All Public Bodies
Administrative Records**

<u>Item #</u>	<u>Records Series</u>	<u>Retention (Yrs.)</u>	<u>Start of Retention</u>
1.	Accident and Fire Prevention Program Records (including lists of first aid trained personnel)	1	After superseded or obsolete
2.	Administrative Directives (Fire Districts only)	6	After calendar year created or received
3.	Advertisements	3	After calendar year published
4.	Appointment Calendars	1	After calendar year of last entry
5.	Assurance Statements (statement from Public Body concerning retention and maintenance of permanent electronic records; office copy, official copy at Arizona State Library, Archives and Public Records (ASLAPR)/History and Archives Division)		Send original records to ASPAPR. Destroy agency copy after superseded or obsolete
6.	Certificates of Compliance (certificate from microfilm vendors verifying microfilm meets Arizona State Library, Archives and Public Records (ASLAPR) standards; office copy, official copy at ASLAPR/History and Archives Division)		Send original records to ASPAPR. Destroy agency copy after superseded or obsolete
7.	Citizenship Verification Records (When applying for public benefit in response to ARS §1-501, §1-502 and similar)		
	a. Filed with application paperwork	-	Retain per retention requirements for corresponding application records
	b. Filed separately from application paperwork		
	i. application approved	-	Retain as long as applicant receives benefits

Lisa Maxwell, Director 
Records Management Division
Arizona State Library, Archives and Public Records

Examples of Retention Periods

- The official copy of employee personnel records must be kept for 5 years after employee leaves or term of office ends.
- Contracts must be kept for 6 years after fulfilled, expired, cancelled, or revoked.
- General correspondence may be destroyed after administrative or reference value has been served.

Retention Schedule for Email

- There is no record retention schedule for email because that is a format, not a type of document.
 - ▣ Email about a medical issue may be a human resources document
 - ▣ Email about an audit would be treated as an audit record
 - ▣ Email about training is a training record
 - ▣ Email about a general issue is general correspondence

Who May Request Public Records

- A.R.S. § 39-121: “. . . *any person*. . .”
- They do not have to give a reason, only whether or not it is for a commercial purpose.
- But no one group is entitled to greater access than any other (i.e., no special considerations for the press).

Commercial Purpose

- Unless prohibited by law, a person may obtain public records for commercial purposes. However, the public body may impose a charge that includes:
 - ▣ A portion of the cost to the public body for obtaining the original or copies of the records.
 - ▣ A reasonable fee for the cost of time, materials, equipment and personnel in producing such reproduction.
 - ▣ The value of the reproduction on the commercial market as best determined by the public body.

A.R.S. § 39-121.03(A)

What Is a Commercial Purpose

- A commercial purpose is the use of a public record for:
 - the purpose of sale or resale
 - the purpose of producing a document containing all or part of the copy, printout or photograph for sale
 - obtaining names and addresses for the purpose of solicitation or the sale of names and addresses to another for the purpose of solicitation
 - any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record.

Commercial purpose does not mean 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)

Penalty – Commercial Purpose

- If a person fails to identify that the request is for a commercial purpose, or misstates the purpose, the person making the request may face:
 - ▣ Damages in the amount of three times the amount which would have been charged for the public record had the commercial purpose been stated;
 - ▣ Costs and reasonable attorney fees; or
 - ▣ The amount of three times the actual damages if it can be shown that the public record would not have been provided had the commercial purpose of actual use been stated at the time of obtaining the records.

A.R.S. § 39-121.03(C)

Prompt Response Required

- A.R.S. § 39-121.01(E): “Access to a public record is deemed denied if a custodian fails to promptly respond to a request for production.”
- Definition of “promptly” depends on circumstances such as where records are stored, the amount of records requested, and other barriers to the production of the records.
- The public body has the burden of showing that it responded promptly. *Phoenix New Times v. Arpaio*, 217 Ariz. 533, 177 P.3d 275 (App. 2008).
- It is important to promptly respond to the requestor even if it is only to acknowledge the request and give the requestor an estimated production date.

Limitations on Requests

- A public records request must be for a “record” and not just for information.
Can’t ask “how many conferences did the DOR Director attend last year?” That is a questions and not a request for a record.
- Public body does not have to create new records to respond to request, but may chose to do so.

How to Decide Whether to Disclose

As a general rule, don't fight the question of whether something is a public record. Focus instead on whether there is a competing legal or policy reason why the record should not be disclosed.

- ▣ “[T]he proper way to view all requests for information is not to determine whether or not a record is technically a public record or other matter, but instead to determine if release of the information would have an important and harmful effect upon the official duties of the official or agency.” *Church of Scientology v. City of Phoenix*, 122 Ariz. 338, 594 P.2d 1034 (App. 1979).

Denying Public Inspection

- Just because something is a public record does not mean that the public has access to the record. While there are no statutory exceptions to the public records laws, the courts have recognized some reasons why a public body may deny inspection.
 - ▣ The record is confidential.
 - ▣ The record involves the privacy interests of persons.
 - ▣ Disclosure would be detrimental to the best interests of the State.

Confidentiality

- Arizona has statutes and rules that make records confidential, including A.R.S. §§ 42-2001 through -2004 (tax records) and A.A.C. R2-5-105 (personnel files). A public body may deny inspection of a record that is confidential. *Berry v. State*, 145 Ariz. 12, 699 P.2d 387 (App. 1985).
- The Attorney General's Office Agency Handbook, Chapter 6, Appendix 6.1 lists state statutes making records confidential. The Handbook can be found on the Attorney General's Website, www.azag.gov/agency-handbook
- Numerous federal laws also make records confidential that may be in the possession of an Arizona public body.

Privileged Information

- Attorney-client privilege and attorney work-product privilege are common law confidentiality exceptions that apply to public records requests.
- When responding to record requests, be careful to review all the information for privileged communications. An email from an attorney may be in the middle of an email chain.

Privacy

- Arizona courts have recognized personal privacy as an exception to the public records disclosure requirements. Information is private that is not freely available to the public and “encompasses the individual’s control of information concerning his or her person.” *Scottsdale Unified School District v. KPNX Broad. Co.*, 191 Ariz. 297, 955 P.2d 534 (1998).

Protected Information

- Examples of information that would be considered private include:
 - ▣ social security numbers,
 - ▣ personal addresses and personal phone numbers of public employees,
 - ▣ birth dates of employees

Ariz. Att'y Gen. Op. I91-004.

Balancing Test

- Denying inspection of public records based on privacy requires a balancing of the privacy interest at stake against the general public interest in disclosure. It's relevant whether the information in question is available through alternative means that is less invasive to privacy.
- Example: *A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, 42 P.3d 615 (App. 2002) (Involving police department 911 call).

Best Interest of the State

- The Arizona Supreme Court has recognized that public records may be withheld from inspection if such disclosure would be detrimental to the best interests of the State. *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952).
- A public body may refuse inspection under this standard when “the release of information would have an important and harmful effect of the duties of the officials or agency in question.” *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 806 P.2d 348 (App. 1991).
- The courts apply a balancing test and the public body has the burden of specifically demonstrating the harm.

Examples of Balancing

- The Supreme Court held that names of everyone applying or considered for university president could be withheld. However, once a prospect was seriously considered and interviewed, that person became a candidate and the public's right to know became the stronger position. *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. at 258, 806 P.2d at 352.
- Courts have also held that the State may withhold video tape showing undercover officers and the location of the surveillance cameras. *KPNX TV v. Superior Court*, 183 Ariz. 589, 905 P.2d 598 (App. 1995)

Unreasonably Burdensome

- No specific authority under public records law.
- Court upheld an overly broad request under the analogous Supreme Court Rule 123 governing court records. *Arpaio v. Davis*, 221 Ariz. 116, 210 P.3d 1287 (App. 2009).
- Best practice is to work with the requestor to narrow scope of the request. If that does not work or if the requests continue, there may be room to argue that denial fits the exception for the best interests of the state.

Duty to Redact

- A record will often include both protected and non-protected information. It will often be a violation of law if the document is not released at all if the protected information can be redacted.
- Can redact by:
 - ▣ Darkening out the protected information.
 - ▣ Replacing the protected information with empty brackets.
 - ▣ Extracting the non-protected information into a different document.

Log of Records Withheld

- A.R.S. § 39-121.01(D)(2): “If requested, the custodian of the records . . . shall furnish an index of records OR categories of records that have been withheld and the reasons the records or categories of records have been withheld from the requesting person.”
- Note: there is an “or” in the statute. A public body may list the categories of records that have been withheld rather than provide an index.