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# The Public Record

MARCH 2015

## Commercial Purpose

Government agencies frequently struggle with public records requests for a commercial purpose for good reason. There is only one Arizona case that discusses the definition found in A.R.S. § 39-121.03(D).

In *Primary Consultants, LLC v. Maricopa County*, 210 Ariz. 393 (Ariz. Court of Appeals 2005) the court held that phrase “for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record” is not a catch all phrase. However, the phrase is limited to modifying the phrase of “the sale of names and addresses to another.”

The court went on to state that the requestor’s status of a for-

profit business and its use of the public record in furtherance of that business is not the correct analysis to conclude that the request falls within the statutory definition of a commercial purpose.

Many agencies attempt to use the language of “for the purpose of sale or resale or for the purpose of producing the document containing all or part of” the public record to support the conclusion that using the information in a record to obtain a financial benefit constitutes a commercial purpose under the statute. We find this argument to be inconsistent with *Primary Consultants*.

The other challenge that agencies face is when a requestor brazenly states that it is a noncommercial

request when it is obvious that they intend to use the record for a commercial purpose. This situation is the most obvious when a requestor files the same public records request stating a noncommercial purpose following a quote for the production of a commercial request. The statute only allows the relief in AR.S. § 39-121.06(C) of litigation for three times the cost of the commercial record, costs and attorney’s fees. The statute does not indicate that mischaracterizing the purpose of the request is grounds for a denial.

Interestingly, the commercial purpose statute only contains one provision relating to a denial in subsection (B). This section

## Pending Legislation



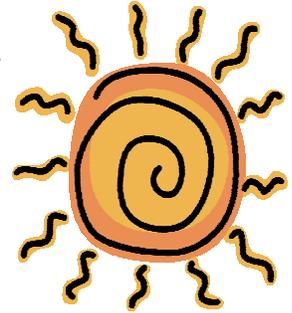
- HB1339 – Adds “unduly burdensome” as a grounds to deny a public records request.
- HB2354 – Prohibits government agencies from recovering attorneys fees in public records litigation.
- HB2239 – Allows a victim’s attorney to obtain a free copy of a police report on behalf of the victim.
- SB1073 – Allows former judges to have their residential address and telephone number redacted from the County Assessor and County Treasurer records.

# Commercial Purpose Continued...

states that a custodian may apply to the Governor if they feel that the purpose of the request is a "misuse or abuse" of the right to receive public records. Unfortunately, the statute states that if the Governor fails to issue an executive order within thirty days of the application, the agency must release the records.

If a custodian receives a public records request with a stated commercial purpose, their discretion is limited to valuation and applying to the Governor. There are no other grounds to deny the request than those available for noncommercial purposes. Many agencies mistakenly deny the request because they argue that release names and contact information is an invasion of privacy. However, the statute specifically contemplates this release by stating "obtaining the names and addresses from public records for the purpose of solicitation".

The Court of Appeals, Division One is currently considering a case involving interpretation of A.R.S. § 39-121.03(D) "for the purpose of sale or resale or for the purpose of producing the document containing all or part of" the public record. The case *LaWall v. RR Robertson* is set to hear oral arguments on March 18, 2015. The decision should offer significant guidance for the interpretation of the commercial purpose definition and the appropriate agency response.



## Arizona Ombudsman – Citizens' Aide

Greetings!

I hope our Spring newsletter finds you doing well. As always, our goal is to provide you with timely and informative information related to Arizona's Public Record and Open Meeting Laws.

If you have information you would like to share in an upcoming newsletter, or questions you want answered, please feel free to contact our office. Hardcopies of Ombudsman Booklets are available upon request.

Sincerely,

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[Opinion No: I13-012 \(R13-018\), Re: Charging Copying Fees Under Arizona's Public Records Law](#)