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DANEE GARONE

SIDEBAR:

- The Ombudsman for Public Access is Staff Attorney Danee Garone.
- Open meeting law and public records law materials and updates are [available on our website](#).
- [Click here](#) to view our open meeting law booklet.
- [Click here](#) to view our public records law booklet.
- Review past [Public Access Newsletters](#)
- [Upcoming Training/Outreach](#)

March 6: Auditor General --  
Phoenix -- Open Meeting Law

From the Office of the Arizona Ombudsman — Citizens' Aide

# The Public Record

State Ombudsman Dennis Wells

JANUARY  
2018

## Lunney v. State: Public Records on Private Devices

In December of 2017, the Arizona Court of Appeals issued a ruling in which it held that the phone records for a law enforcement officer's private phone may be public records subject to disclosure if the officer uses the personal phone for public business.

The court held that "when a 'substantial question' exists as to whether information is subject to disclosure, courts must first determine if the information qualifies as a public record." Citing Griffis v. Pinal County, the court said that "the threshold to show whether a 'substantial question' exists about a document's status is 'relatively low.'"

The court then explained that, at least in the case of a public employee's personal phone records, "a requestor can raise a

'substantial question' by showing the employee used his or her personal cell phone for a public purpose."

The court cautioned that "mere use of a private cell phone during working hours is insufficient to meet the threshold showing; rather, the requestor must present evidence the information on, or use of, a private cell phone created a public record." If requester is able to meet the threshold showing, then the burden shifts to the government to establish that the record is instead private.

In essence, the court seems to have held that the standard laid out in Griffis should be applied in deciding whether a record created on a private device is a public record subject to disclosure. In Griffis, the court held that a rec-

ord constitutes a public record subject to disclosure if it has a "substantial nexus" to government activity. Records that do not have a substantial nexus to government activity are not public records not subject to disclosure regardless of whether they were created using government resources.

This decision runs counter to a formal opinion issued by the Arizona Attorney General (AG) in July of 2017, which we discussed in our previous issue. In that opinion, the AG essentially concluded that records created by public officials or government employees on private electronic devices or accounts are not public records. The AG did not seem to think the Griffis standard applied to records created on private devices or accounts.

## Supreme Court Subjects State Bar to Public Access

As of the start of 2018, the Arizona State Bar is now subject to open meeting and public records law policies.

On November 23, 2016, the Arizona Court issued Administrative Order 2016-126, amending Rule 32 of the Rules of the Supreme Court. Subsection (m) of the rule reads, "Meetings and Records. The State Bar will conduct meetings and maintain records under public access policies adopted by the Supreme Court."

The Court ordered that the "State Bar Board of Governors provide the Court a proposed public meetings policy for consideration by February 1, 2017 and a proposed public records policy by May 1, 2017." The Court ordered that the "provisions of these rule changes will become effective upon approval by the Court of each of these policies."

On April 5, 2017, the Court issued order 2017-34, in which it adopted the open meeting policy submitted by the Board of Governors of the State Bar. The policy went into effect on August 1, 2017. On August 31, 2017, the Court issued order 2017-102, in which the Court adopted the public records policy submitted by the Board of Governors of the State bar. The policy went into effect on January 1, 2018.

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## Pending Legislation: 53rd Legislature

**HB 2065:** This bill would amend several sections of the open meeting law in Title 38. It would codify the Attorney General's opinion that one-way electronic communications from a member of a public body to a quorum that proposes legal action constitute a "meeting" subject to the open meeting law.

The bill would also require that meeting minutes or recordings include a record of how each member of the public body voted on each legal action.

Lastly, the bill would alter the open meeting law enforcement scheme. Under the bill, the Attorney General, the county attorneys, and anyone affected by an alleged violation of the open meeting law could take a public body, as a whole, to court over an alleged open meeting violation. The bill however, would allow only the Attorney General to take individual members of public bodies to court for alleged violations and would limit these court actions to when a member of a public body "knowingly" violates the open meeting law. The bill would also increase the possible civic penalties for second and subsequent violations of the open meeting law from \$500 to \$5,000.

**HB 2118:** This bill would alter the public records law. Specifically, it would amend A.R.S. § 39-121.02. Most of the changes do not appear as though they would substantively alter the public records law; however, the bill would change how attorneys fees are awarded when a court finds that a public body or official improperly denied access to records. As it stands now, the law allows a court to award attorney fees and related legal costs when a requester "has substantially prevailed" in their special action. The bill, however, would remove discretion from the court and require that courts award attorneys fees and related legal costs when the requester "substantially prevails" in their special action.

## Arizona Ombudsman – Citizens' Aide

### Greetings!

**Please note:** The Office of the Ombudsman has moved to a new location, indicated listed below.



In our fall/winter newsletter, we discuss the Arizona Court of Appeals's recent public records law decision, the Arizona Supreme Court's decision to subject the Arizona State Bar to public access, and pending legislation.

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 suggestions and ideas for an upcoming newsletter, or questions you want answered, please feel free to contact our office. Public records law and open meeting law training is also available upon request.

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