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- 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](#).
- Contact Danee Garone for more information.



From the Office of the Arizona Ombudsman — Citizens' Aide

# The Public Record

State Ombudsman Joanne MacDonnell

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## Supreme Court: Courts Cannot Decide Meeting Law Questions re Legislature

In Puente v. Arizona State Legislature, the Arizona Supreme Court overruled the Arizona Court of Appeals and held that whether the Legislature complied with the Open Meeting Law is a non-justiciable political question.

The Court reasoned that the Open Meeting Law, as applied to the Legislature, amounts to legislative procedure. The Arizona Constitution grants the Legislature alone the authority to decide its own procedural rules, which means the Legislature can “interpret, amend, enforce, or disregard those rules with almost limitless impunity.” The courts are only empowered to review such exercises of legislative authority for limited reasons, which do not apply in this case.

The Court held that, in this

case, it “lack[s] judicially discoverable and manageable standards to decide whether the Legislature properly disregarded its own procedural rules.”

The Court further reasoned that one legislature can not bind future legislatures to specific procedures, even if enacted via statute.

As we noted in our prior issue, the Plaintiff filed a complaint in superior court alleging that 26 legislators planning to participate at a private conference would violate the Open Meeting Law because quorums of several legislative committees would be present. The Plaintiff asked, in part, for the court to hold that the gathering would violate the Open Meeting Law and enjoin the legislators from attending without complying with the various provisions within the

Open Meeting Law.

After oral argument, the Superior Court dismissed the complaint on the grounds that it constituted a non-justiciable political question. The Plaintiff appealed.

On appeal, the Court of Appeals held that whether the Legislature is acting in violation of the Open Meeting Law is *not* a non-justiciable political question.

Due to the separation of powers doctrine, courts typically do not adjudicate challenges to executive or legislative action that involve “political questions.” Essentially, a court does not get to decide whether the Legislature acted reasonably when carrying out its own constitutional authority and in the absence of judicially discoverable and manageable standards.

## Appeals Court: Privacy Not Sufficient to Withhold Name of Shooter

In Smith v. Town of Marana, the Arizona Court of Appeals held that the privacy interests of an individual connected to a criminal investigation do not overcome the Public Record Law’s presumption of disclosure.

In this case, Marana law enforcement investigated a shooting. Prosecutors did not charge the shooter with a crime because of self-defense considerations. The man who was shot requested records from the town. The agency provided records but withheld the names and “images” of both individuals. The requester filed suit. The trial court ruled in the requester’s favor, and the town appealed.

The Court said that, “outside of the context of past alleged criminal activity, the Town has not specifically demonstrated why the shooter’s right to privacy in his actions taken in public outweighs the presumption of openness in public records.” Essentially, the town failed to persuade the Court that tangible harm would come to the shooter should the shooter’s name be disclosed by the town and that the harm outweighed the public’s right to the relevant records.

## Court: Senate Election Audit Records Are Privileged

In *Fann v. Kemp*, the Arizona Supreme Court reversed a lower court order that the Senate disclose *all* communications regarding an audit into the 2020 election. The Court held that “the Senate engaged in a privileged legislative act when it exercised its statutory and constitutional authority to investigate the 2020 general election.” The Court also held that “the Senate’s internal communications concerning the authorization, planning, and findings of the Audit investigation are privileged,” but “the Senate must disclose communications concerning administrative, political, or other non-legislative matters.”

The Court reasoned that because the Legislature can enact substantive election laws, and because investigating an election is within the Legislature’s authority, investigating the 2020 election is a legislative act that is covered by legislative privilege. The Court noted that some categories of communications related to the audit are not protected by the privilege. For example, “communications concerning the administration of the Audit—including payment, employment of consultants, and the like—are non-privileged administrative functions.” Similarly, communications related to public reaction to the audit are not protected by the privilege.

The Court explained that legislative privilege in Arizona “extends beyond pure speech or debate in the legislature” to communications that are substantively related to legislation or to other matters within the Legislature’s jurisdiction. While the Court explained that not every action taken by a legislator is covered by legislative privilege, it said, “Privileged legislative acts bear the hallmarks of discretionary, policymaking choices that might have prospective implications, such as the creation of legislation, traditionally in areas where legislators have the power to act.” Further, the Court said, “Legislative investigation is often sufficient to invoke legislative privilege because such inquiries frequently precede formal legislative action.”

This matter first arose after the 2020 election when the Senate contracted with a private third party to conduct an audit of Maricopa County ballots. As we noted in an earlier edition, a nonprofit organization made public records requests for a variety of records related to the audit. The Senate refused, and the organization sued. Both the trial court and the Court of Appeals held that the records were not exempt from disclosure. The Senate then turned over more than 22,000 records; however, it withheld about a thousand records on legislative privilege grounds and submitted a log of many of the withheld records to the trial court. After decisions by the trial court and Court of Appeals, the Senate appealed to the Arizona Supreme Court.

## Arizona Ombudsman – Citizens’ Aide

Greetings,



In this issue, we explain three public access court cases, including a Public Records Law case touching on privacy concerns and two cases regarding how the Open Meeting Law and Public Records Law apply uniquely to the Legislature.

Please note that our office will soon be moving to a new location: 2020 N. Central Ave., Suite 570, Phoenix, AZ 85004. The location, on Central Ave. and Palm Lane, is closer to most government offices and more convenient to public transportation and multiple freeways than our current location on Northern. We will announce

via our website (<https://www.azoca.gov>) the exact moving date once it is determined. Our phone numbers, fax number, and email addresses will remain the same.

Sincerely,  
Joanne MacDonnell  
Ombudsman—Citizens’ Aide

7878 N. 16th Street  
Suite 235  
Phoenix, AZ 85020  
Main: 602-277-7292

Danee Garone  
Staff Attorney  
Direct: 602-544-8710  
Email: [dgarone@azoca.gov](mailto:dgarone@azoca.gov)



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