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MESSAGE FROM THE  
OMBUDSMAN

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

# The Public Record

State Ombudsman Dennis Wells

JULY 2021

## Court: AZ DPS Failed to Promptly Produce Records

On July 2, a Maricopa County Superior Court judge held that the Arizona Department of Public Safety (“DPS”) failed to promptly provide requested public records to a Phoenix Newspapers, Inc. reporter as required by the Arizona public records law.

First, according to the court, the reporter made a request to DPS in September of 2019 for “an ‘updated version’ of a spreadsheet showing Border Strike Force cases.” The reporter had made a similar request in the past, and DPS had produced the records within 30 days. In this case, however, DPS did not produce the responsive records until 18 months later.

DPS argued that the lengthy production time was due to pandemic-related delays, review by the Governor’s office, and understaffing at DPS. The judge was not

persuaded. He explained that the request was already about six months old by the time the pandemic affected government operations. The judge also explained that while the review by the Governor’s office is not unlawful, it does not relieve the agency of its obligation under the law to promptly provide records.

As for the staffing issue, the judge said, “Things like a recent increase in public records requests, unanticipated staff issues, or the pandemic, might justify some delays in unusual circumstances. But ultimately, the statute requires DPS to promptly respond to public records requests, and it must allocate its resources to meet that statutory obligation.”

Second, according to the court, the reporter also requested an index of what was redacted from the spreadsheet(s). The court held that DPS failed to comply

with its obligations under the public records law and had not “produced an index or explanation of what was redacted.”

Third, according to the court, the reporter also made a request in February of 2021 for “All activity reports for personnel assigned to the Border Strike Force from January 2015 through January 2021.” According to the court, DPS did not provide any of the records at the time the special action was filed and, at the time of the judge’s decision, DPS had “produced some, but they are not responsive.”

The court explained that the records DPS produced did not show the activities of the Border Strike Force employees.

The judge ordered DPS to produce the index and any records responsive to the 2021 request within 30 days.

## Public Records Lawsuit Re Senate Election Audit

On July 14, a superior court judge denied the defendants’ motion to dismiss in [American Oversight vs. Fann, Et.Al.](#), a lawsuit involving access to records related to the Arizona Senate’s audit of the Maricopa County 2020 election results. American Oversight argues that the records at issue are public records subject to disclosure because they have been created in response to action taken at the behest of the Senate. In contrast, the Senate argues that at least some of the records, regardless of whether they are public records, do not need to be produced under the Public Records Law because they are in the custody of private entities that contracted (and subcontracted) with the State to conduct the audit.

In denying the motion, the judge held that the defendants, including Senate President Fann, are officers who must maintain records of official activities, including the audit, under A.R.S. §39-121.01(A)(1). The judge cited statements by President Fann in which she noted the audit was an important public function.

While the judge said that some of the entities involved are not public entities normally subject to the public records law, in this case they “are clearly agents of the Senate Defendants,” and “[a]llowing the Senate Defendants to circumvent the PRL by retaining private companies to perform valid legislative and/or constitutional functions would be an absurd result and undermine Arizona’s strong policy in favor of permitting access to records reflecting governmental activity.” The judge held that the records have a substantial nexus to government activity and “are, at a minimum, in the constructive possession of Senate Defendants.”

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## Legislation - 55th Legislature, 1st Session

- **HB 2804** — This bill would have amended multiple sections of the open meeting law. Most prominently, it would amend A.R.S section 38-431.03 so that a public body could only obtain legal advice in executive session in regard to a discussion permitted by any of the other eight enumerated types of executive sessions. In other words, a public body can only engage in private discussions with an attorney on the narrow range of topics laid out in subsection (A) of the statute. This would have the practical effect of curtailing the attorney-client privilege between public bodies and their legal counsel. The bill narrowly passed out of the House 31-29 on March 4. It was transmitted to the Senate on March 5 but held. It did not pass into law.
- **HB 2073** — This bill amends various statutes to protect various information from public disclosure and publishing. Specifically, the bill would protect information about municipal court commissioners, members of the Commission on Appellate Court Appointments, hearing officers, and various former prosecuting attorneys from the federal to the municipal level. For example, the bill would amend A.R.S. sections 39-123 and 39-124 amending the definition of “eligible person” to include hearing officers, members of the Commission on Appellate Court Appointments., and, through modification of another definition, various former prosecuting attorneys. The bill was signed into law by the Governor on March 24.
- **HB 2152** — This bill would require law enforcement agencies, when disclosing body camera video, to redact, “ANY PORTION OF THE VIDEO RECORDING THAT SHOWS THE FACE OR AN IDENTIFIABLE BODY PART OF ANY PERSON WHO APPEARS IN THE VIDEO RECORDING IF THE PERSON IS NOT THE SUBJECT OF A POLICE INVESTIGATION OR ENFORCEMENT ACTION” when certain criteria apply, including when the person was in a private location or had an “expectation of privacy.” The bill narrowly passed the House on February 23 by a vote of 31-29, and it was transmitted to the Senate. The bill was held in the Senate and did not pass into law.
- **HB 2058** — This bill continued Arizona State Library, Archives and Public Records. The agency was set to terminate in the summer but the Governor extended it through March via Executive Order. The bill passed the House on February 11 by a vote of 59-0 and passed the Senate 28-0 on April 1. It was passed as an emergency measure and signed into law by the Governor on April 7.
- **HB 2247** — This bill clarified AZOCA access to DCS’s case management system by amending A.R.S. section 41-1376 so that the AZOCA shall have “direct remote access.”

## Arizona Ombudsman – Citizens’ Aide



Greetings,

In this issue, we discuss two public records court matters and also take a look at public access legislation considered during the most recent legislative session.

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.

Sincerely,  
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