

INSIDE:

OCA REPORT —  
DEPARTMENT OF  
CHILD SAFETY AND  
RECORD RETEN-  
TION

HOMEOWNERS AS-  
SOCIATIONS AND  
THE OPEN MEETING  
LAW

LEGISLATION:  
53RD LEGISLATURE

MESSAGE FROM  
DANE GARONE

SIDEBAR:

- The Ombudsman for Public Access is Staff Attorney Dane 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 — See our website for the most up-to-date information.



From the Office of the Arizona Ombudsman — Citizens' Aide

# The Public Record

State Ombudsman Dennis Wells

MAY 2018

## OCA Report—Department of Child Safety and Record Retention

On May 2, 2018, the Arizona Ombudsman — Citizens' Aide (OCA) released a [public report](#) on the Department of Child Safety (DCS) that dealt, in part, with Title 39 public records law.

The complaint stemmed from a 2017 complaint filed by a step-mother with the OCA alleging, in part, that DCS failed to comply with Arizona law by failing to properly inform the step-mother of her right to appeal DCS's proposed finding of substantiation of the neglect allegation made against her.

The OCA made various findings that DCS acted contrary to law and otherwise improperly with how it handled the step-mother's matter. Among them was a finding regarding DCS's record retention.

The OCA found, "DCS acted contrary to law, unreasonably, unfairly, and/or unsupported by an adequate statement of reasons by not examining and/or retaining the video evidence that constituted the basis for a proposed finding of neglect against the [step-mother]."

In its investigation of the step-mother, DCS initially concluded she had neglected her step-children because she had filmed and published to social media a video of one of the children spoon-feeding the other.

DCS eventually admitted that it never obtained a copy of the video on which the finding of neglect was based. As a result of failing to obtain the video, DCS was also unable to maintain a copy of the video in its own records.

A.R.S. § 39-121.01(B) requires officers and public bodies to "maintain 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 monies from this state . . ." Further, pursuant to A.R.S. § 39-121.01 (C), an agency "shall be responsible for the preservation, maintenance and care of that body's public records."

In this case, DCS failed to obtain and to maintain the record on which it based its initial finding that the step-mother neglected her step-children. As a result, the OCA found that DCS acted contrary to law by failing to comply with A.R.S. § 39-121.01

## HOAs and the Open Meeting Law

According to the Arizona Republic, there roughly 9,000 homeowners associations (HOAs) in Arizona and half of the homeowners in the Phoenix metropolitan area live in HOAs. As a result, it is very common for residents to contact the Ombudsman-Citizens' Aide (OCA) with open meeting law questions and complaints concerning HOAs. However, are HOAs subject to the open meeting law?

The answer is no. Essentially, HOAs are not subject to open meeting law because they are private entities that do not fit the definition of "public body" in A.R.S. § 38-431. That being said, HOAs are still subject to some meeting requirements laid out in A.R.S. § 33-1804. These requirements are similar in many ways to the Title 38 open meeting law, but have key differences such as only opening HOA meetings up to members of the HOAs, as opposed to the public at large.

Because HOAs are non-governmental and not subject to the open meeting law, they are outside of the OCA's authority to investigate. So, what can a member of an HOA do when it has an issue with an HOA? They can sue. They can try to vote out the HOA board members and replace them with different board members. They can file a petition for an administrative hearing with the Arizona Department of Real Estate via its Homeowners Association Dispute Process.

## Legislation: 53rd Legislature

**HB 2065:** This bill passed and was signed into law. It amended several sections of the open meeting law in Title 38.

It codified 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. Meeting minutes or recordings must now include how each member of the public body voted on each legal action.

Lastly, the bill altered the open meeting law enforcement scheme. The Attorney General, the county attorneys, and anyone affected by an alleged violation of the open meeting law can still take a public body, as a whole, to court over an alleged open meeting violation. Now, however, only the Attorney General can take individual members of public bodies to court for alleged violations and only for "knowing" violations. The court may now impose on individuals penalties of up to \$500 for a second violation and up to \$2,500 for subsequent violations of the open meeting law, whereas the maximum for each violation was previously \$500.

**HB 2118:** This bill did not pass. It would have amended A.R.S. § 39-121.02 to change how attorneys fees are awarded when a court finds that a public body or official improperly denied access to records. The bill would have removed discretion from the courts and required that courts award attorneys fees and related legal costs when the requester "substantially prevails" in their special action.

**HB 2207:** This bill passed but was vetoed by the Governor. The bill, as it was eventually amended and passed, would have amended A.R.S. § 32-4801 to require licensing authorities to make digital recordings of meetings. It would also have required the licensing authorities to post these recordings and "all final decisions, orders and actions" on their websites within five days and retain them on their websites for at least three years.

**HB 2265:** This bill did not pass. It would have essentially overturned the Lunney v. State Court of Appeals case by amending A.R.S. § 39-121.02 so that records created on non-governmental electronic devices, equipment, and account are not public records subject to disclosure.

## Arizona Ombudsman – Citizens' Aide

### Greetings!



In our spring newsletter, we discuss our most recent public report regarding the Department of Child Safety, HOAs and the open meeting law, and recent public access 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.

Sincerely,  
Danee Garone  
Staff Attorney

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

Danee Garone  
Direct: 602-544-8710  
Email: dgarone@azoca.gov



**Making government more responsive to the people of Arizona**