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MESSAGE FROM  
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](#)**

Open meeting law:

November 7 at 10:00 AM -  
Phoenix - Central Arizona  
Project

November 9 at 9:00 AM -  
Phoenix - AHCCCS

January 23 at 10:00 AM -  
Parker - La Paz County

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From the Office of the Arizona Ombudsman — Citizens' Aide

# The Public Record

State Ombudsman Dennis Wells

OCTOBER  
2018

## Open Meeting Law Changes

As of August 3, 2018, several changes to the open meeting law have gone into effect.

First, the Legislature amended the definition of "meeting" as defined in A.R.S. § 38-431. "Meeting" now also includes "[a] one-way electronic communication by one member of a public body that is sent to a quorum of the members of a public body and that proposes legal action." and "[a]n exchange of electronic communications among a quorum of the members of a public body that involves a discussion, deliberation or the taking of legal action by the public body concerning a matter likely to come before the public body for action."

Although this language is new, it is essentially in line with a widely-accepted interpretation of the

already existing definition language as laid out in a 2005 Arizona Attorney General opinion. See Ariz. Att'y Gen. Op. 105-004.

Second, the Legislature amended A.R.S. § 38-431.01(B). In addition to the pre-existing requirement that meeting minutes/recordings include the names of each member of a public body who proposes motions, the minutes/recordings must now include "a record of how each member voted" on each legal action. So, for each vote a public body takes, the minutes/recordings must accurately depict how each member voted.

Third, the Legislature drastically altered the enforcement/penalty scheme for the open meeting law by amending A.R.S. § 38-431.07. Prior to the changes, the Attor-

ney General, the county attorneys, or any person affected by a violation of the open meeting law could commence legal action against individual members of a public body. Now, only the Attorney General can commence legal action against individual members and only for "knowingly" violating the open meeting law. County attorneys and other affected parties can take legal action against a public body as a whole.

Prior to the changes, a court could impose on individual members penalties of no more than \$500 per violation. Now, a court may impose a fine of up to \$500 for a second violation and up to \$2,000 for subsequent violations. Public bodies may not pay or reimburse for the fines levied against individual members.

## AG Handbook and AZOCA Booklet Updates

In September, the Arizona Attorney General's office (AG) issued a major new revision of its agency handbook for the first time since 2014. The changes include revisions and updates to the open meeting and public records law chapters. It can be found on the Attorney General's website under "office."

One notable change is that the Attorney General removed language from the open meeting law chapter that dealt with how quorums should be determined when seats on the public body are vacant. Previously, the Attorney General had said that quorums should be based on the total number of seats, not the number of filled seats.

The Arizona Ombudsman—Citizens' Aide (ACOCA) also issued a revised and updated edition of its open meeting law handbook. It includes the recent statutory changes to the open meeting law, the new revision of the Attorney General's agency handbook chapter on the open meeting law, updated frequently asked questions, and additional resources and information.

The Arizona Ombudsman—Citizen's Aide open meeting law booklet can be found online at <http://www.azoca.gov/open-meeting-and-public-records-law/open-meetings/>.

## The Public Records Law and Drafts

Are drafts of records public records subject to disclosure under the public records law?

First, a record is a public record if it has a “substantial nexus” to government activities. Griffis v. Pinal County, 215 Ariz. 1, 4, ¶ 10 (2007). It is the “nature and purpose” of a record that controls whether it is a public record. Id. There is no exception for drafts or unfinished records. Thus, drafts of records created by government employees in pursuance of their duties are public records. In Arizona, there is a legal presumption in favor of disclosing public records. Lake v. City of Phoenix, 222 Ariz. 547, 549, ¶8 (2009).

Second, neither Arizona statute nor the courts have laid out or recognized a deliberative process exception to disclosure for drafts or work product. In fact, the courts have specifically declined to recognize a general exception for unfinished police reports and police reports related to ongoing criminal prosecution. See Lake v. City of Phoenix, 220 Ariz. 472, 483, ¶ 36 (Ct. App. 2009), *vacated in part on other grounds* and Cox Arizona Publications, Inc. v. Collins, 175 Ariz. 11, 14 (1993). Thus, drafts and work product are presumed to be subject to disclosure.

An agency or official can, however, withhold public records if they can show that disclosure of the records would harm a privacy or state interest in such a way that outweighs the collective public’s interest in the records. See Carlson v. Pima County, 141 Ariz. 487, 491 (1984). As the Arizona Court of Appeals has said, “If disclosure is to be avoided, the public entity must point to specific risks with respect to a specific disclosure; it is insufficient to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases.” Star Pub. Co. v. Parks, 178 Ariz. 604, 605, 875 (App. 1993). So, although the courts have not recognized a deliberative process/draft exception to disclosure, it is conceivable that some sort of deliberative process rationale could be used to successfully establish that a state interest necessitates withholding a particular draft record.

In sum, drafts (and other work product) are public records presumed to be subject to disclosure under the public records law. They can only be withheld if the government can show a strong, specific countervailing privacy or state interest.

## Arizona Ombudsman – Citizens’ Aide

### Greetings!

In our summer/fall newsletter, we discuss recent changes to the open meeting law, updated versions of the Attorney General’s agency handbook and the Ombudsman—Citizen’s Aide’s open meeting law booklet, and how drafts are handled under the public records law.

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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