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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 updated open meeting law booklet.
- [Click here](#) to view our updated public records law booklet.
- Review past [Public Access Newsletters](#)
- [Upcoming Training/Outreach](#) - Contact Danee Garone for more.

February 22 at 10:30 AM—  
Phoenix—Personnel Board

March 20 at 12:00 PM—  
Phoenix—For charter schools

April 11 at 10:00 AM—Bisbee—  
Cochise County

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From the Office of the Arizona Ombudsman — Citizens' Aide

# The Public Record

State Ombudsman Dennis Wells

FEBRUARY  
2019

## Current Member Access to Past Executive Session Minutes

A new year means newly-elected and appointed members of public bodies. Inevitably, this leads to questions about new members' access. For instance, does the open meeting law entitle a member of a public body to access minutes for executive sessions that occurred when they were not a member of the public body and/or for which they were not present?

The answer is yes. The Arizona Court of Appeals held in [Picture Rocks Fire Dist. v. Urdike](#), 145 Ariz. 79 that current members of public bodies are entitled to access minutes for executive sessions for which they were not present regardless of whether they were a member of the public body at the time. The Court took a very precise look at the language of the relevant statute.

A.R.S. § 38-431.03(B)(1) states that "[m]inutes of and discussions made at executive sessions shall be kept confidential except from [ . . . ] [m]embers of the public body which met in executive session."

The Court began with a grammar discussion. Essentially, one might be tempted to read the statute as saying that only members of a public body who were actually part of the public body at the time of the executive session and present for the executive session can obtain the executive session minutes; however, if this is what the Legislature intended, the statute would likely use the word "who" instead of "which." The statute's use of "which" means that the "met in executive session" language refers not to "members" but instead to "the

public body." This means that (current) members of the public body can access executive minutes for executive sessions conducted (ever) by the public body.

To conclude otherwise, as the court points out, would lead to absurd results. Imagine a scenario in which the public elects all new members to a public body. As the Court said, "To forbid them access, and require that they make an independent determination uninformed as to their predecessors' action or declining to act, hamstring a public body."

Additionally, it seems unreasonable to think the Legislature intended that members of a public body who were voted out of office might be the only ones who can ever view past executive session minutes.

## Record Retention: Arizona Going Google with G Suite

Arizona has chosen Google's G Suite to provide email, calendar, and collaboration services for state government. As of January 15, almost 70 agencies have already migrated over to the new platform. The final group of agencies that will be migrating include large, prominent agencies like DES, DCS, DPS, DOR, and ASRS.

Under current law, government officials/agencies are responsible for retaining and maintaining their public records in accordance with retention schedules promulgated by Arizona State Library, Archives and Public Records. Additionally, officials/agencies are responsible for complying with public records requests for their records.

The use of a third party's software for email, calendar, and collaboration services may have serious record retention and public records request implications, particularly if the state's records are stored on Google's servers. At this point, it is not clear to our office how the change will affect, if at all, the state agencies' ability to comply with record retention and records request responsibilities.

## Legislation: 54th Legislature

**HB 2032:** This bill would amend A.R.S. § 15-181, making most charter school entities and “management organizations” that contract with charter schools subject to the open meeting law, and these entities will have to post prominently on the websites of the charter school *and* state board for charter schools meeting notices, agendas, and minutes.

**HB 2174:** This bill would amend A.R.S. § 13-907 so that courts can seal arrest and conviction records when a judgment of guilt is set aside. This bill would also add A.R.S. § 13-4052, which would mandate the erasure of records pertaining to an arrest or charge when the prosecutor dismisses or vacates the matter, the time to appeal expires, or an appeal is not filed within a certain period of time.

**HB 2191:** This bill would amend A.R.S. § 39-121.01 of the public records law and add § 39-129. This bill would prohibit the use of criminal justice records or the information therein for soliciting business or pecuniary gain. Records custodians must deny requests for such records unless the requester signs a statement that they will not use the records for soliciting business or pecuniary gain. The bill would also prohibit an individual from obtaining such records if they know the records will be published online or otherwise and removal from said publication will cost a fee or some other consideration. The bill would include monetary damages for violations.

**HB 2501:** This bill would amend A.R.S. §§ 41-151.09, 41-151.15, and 41-151.26 so that the Arizona State Library is the central depository of electronic records, in addition to already being the repository for physical records.

**HB 2507:** This bill would amend A.R.S. § 2507 so that newly acquired police vehicles must have video recording systems, and every uniformed peace officer must have wearable video recording systems.

**SB 1135:** This bill would make a variety of changes to A.R.S. § 39-121.01 of the public records law. The bill would require that agencies/officials respond to a records request within ten business days by providing the requested records, telling the requester that the request is being worked on and providing an estimate of when to expect a final response, providing a detailed denial, or explaining that the agency/official does not have the requested record and directing the requester to the agency/official that likely does.

**SB 1164:** This bill would amend A.R.S. § 38-431.03 of the open meeting law to clarify that public bodies can disclose executive session minutes and discussions to the Ombudsman-Citizens’ Aide in the course of an investigation.

## Arizona Ombudsman – Citizens’ Aide

### Greetings!

In our winter newsletter, we delve into a timely and common open meeting law question concerning executive session minutes access, the record retention implications of the State switching to Google for email, calendar, and collaboration services, and we take a look at pending 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.



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