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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](#)
- Please visit our website for [more information on training](#).
- [Upcoming Training](#)

December 2: Arizona Association of Counties -- Open Meeting Law

January 7: Central Arizona Project -- Open Meeting Law

January 18: County Supervisors Association of AZ — Public Records and Open Meeting Law

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# The Public Record

State Ombudsman Dennis Wells

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## Public Records Law: Does it Apply to Courts?

The short answer is, yes, State courts must comply with public records law principles but not for the same reason or in the exact same ways that most other public offices and officials must.

The foundation of Arizona public records law, the first chapter of Title 39 of the Arizona Revised Statutes, does not apply to State courts. Instead, under Supreme Court rule 123, the courts must still comply with records requirements and principles that are similar to those found in Title 39.

The Arizona Constitution states that “the Supreme Court shall have administrative supervision over all the courts of the State.” Ariz. Const., art. 6, § 3. The Supreme Court has held that this administrative supervision authority includes regulating how the courts handle records issues,

such what is available to the public upon request.

Pursuant to its constitutional authority, the Supreme Court created Rule 123, which mandates how State courts handle record issues.

“In *London v. Broderick*, the Arizona Supreme Court implicitly recognized that requests for judicial records are governed by Rule 123 and reaffirmed the constitutionality of Rule 123 as recognized in Rule 123(a).” *Arpaio v. Davis*, 210 P.3d 1287, 1291 (Ariz. Ct. App. 2009).

The Court held that rules like Rule 123 are valid even if they conflict to some degree with State statute as long as the rules are promulgated via an appropriate exercise of constitutional authority.

“The Supreme Court held that the application of Rule 123 to the courts achieves the same purpose as the Public Records Law does for other government offices.” *Id.*

In sum, the public records law as most people think of it does not apply to the Courts; however, under Supreme Court Rule 123, State courts are required to disclose records in a manner similar to what is required of other public officials by Title 39.



## ACLU v. Department of Child Safety

In June, the Court of Appeals decided *Am. Civil Liberties Union v. Arizona Dep't of Child Safety*, 377 P.3d 339, 342 (Ct. App. 2016).

In this case, the ACLU made requests for records to the DCS's predecessor agency. Many of the requests would require the agency “to tally or compile numerical or statistical information and percentages.”

The court held that “[u]nder Arizona's public records law, an agency is required to search for records upon request”; however, the court held that the obligation to search for a record does not require an agency to “to tally or compile previously untallied and un-compiled information or data to respond to a public records request.” The court said, “Searching an electronic database to produce existing records and data is not the same as searching an electronic database to compile information about the information it contains.” Essentially, the court held that public records law does not require an agency to analyze or compile data and information to create a record that does not already exist to satisfy a request for records or data.

## ADOA Switching from Email to Facebook at Work

In late June, KTAR reported that the Arizona Department of Administration (ADOA) would be switching the agency's primary form of internal communication from email to a new version of Facebook geared toward the workplace called Facebook at Work. Now called Workplace by Facebook, the platform is essentially an office-friendly version of Facebook that allows real-time communication amongst employees and collaboration on projects.

ADOA expects Workplace to allow faster and more stream-lined communication between State employees. What will the use of this platform mean for public records law?

Well, as with any other type of record, anything created via Workplace that has a substantial nexus to State business would constitute a public record and need to be retained. With other electronic communications like email or instant messaging, there is no universal retention schedule. The retention period for a particular electronic communication depends on the content of that particular communication. All of the same concepts will apply to records created with or in Workplace.

The use of third party internet platforms like Workplace create unique record retention challenges. Many third party platforms, such as Instagram or Twitter, host content remotely on non-government servers. Ultimately, public records law places the burden of retaining public records on public agencies. Public agencies can lose control of public records stored on a another party's servers.

Agencies like ADOA that plan using Workplace will need to develop strategies and plans for retaining public records created with or in Workplace for the proper length of time as prescribed by the Arizona State Library, Archives and Public Records division of the Secretary of State's office.

If you have questions regarding retention, we suggest contacting the folks at Arizona State Library, Archives and Public Records.

## Arizona Ombudsman – Citizens' Aide



**Greetings!**

In our fall newsletter, we discuss how public records law applies to the courts, a new legal wrinkle regarding public records requests for data, and challenges arising from the use of new web-based office communication platforms.

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,

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