

The Public Record

Arizona Ombudsman-Citizens' Aide

Public Records Law 101: Avoid the top ten most common pitfalls.

Like most states, and the federal government, Arizona has a public records law (Title 39) mandating that all public records be open to inspection and copying. The general policy is that all records required to be kept under A.R.S. § 39-121.01(B) are presumed open to the public for inspection as public records. Sounds simple enough, right? Not necessarily. Arizona's public records law is very broad and application of the law is far from black and white. Consequently, uncertainty and inconsistency among public bodies is common throughout Arizona. However, with training and the right attitude, government employees can confidently respond to public record requests and avoid ten of the most common pitfalls.

Upcoming training:

- Open Meeting Law and Public Records Law training on July 24, 2008 at the Arizona State Board of Charter Schools in Phoenix.
- Open Meeting Law and Public Records Law training on August 1, 2008 in Pinetop-Lakeside, Arizona.
- These training are open to all public bodies. Please contact Liz Hill for more information. She may be reached at 602-285-9136 x32 or by e-mail at ehill@azoca.gov.

Pitfall #10: Failure to have, update, or follow retention schedules

Public bodies have a duty to submit a retention schedule for each type of record to the Director of Arizona State Library, Archives, and Public Records for approval. The retention schedule determines how long records may be maintained and when records must be destroyed.

Pitfall #9: Not Knowing what constitutes a public record or "other matter"

A public record is everything created or received by a government agency or employee that relates to public business (even if on personal computers!). "Record" means all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics made or received by any governmental agency in pursuance of law or in transaction of public business. This includes electronic records. Other matters include items related to public matters that are not required by law to be submitted to government, but are created or received by the government agency.

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Recent Attorney General Opinions

The Arizona Attorney General's Office recently issued two opinions regarding Arizona's Open Meeting Laws.

On December 24, 2007, the Arizona Attorney General issued Opinion I07-013. The issue was whether the open meeting law prohibits members of a public body from making comments to the media concerning issues that may come before the public body. The attorney general concluded that the open meeting law does not prohibit a member of a public body from speaking to the media regarding matters that may come before the public body. A meeting subject to the open meeting law requires a gathering of a quorum of members of the public body, and a gathering does not occur when members merely hear or read a comment, including a proposal for legal action, made by another member in the media.

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Public Records Law 101 cont.

Pitfall #8: Not disclosing promptly

Access is deemed denied if a public body fails to promptly respond. While promptly is not defined by statute, and depends on what is reasonable under the circumstances, last year the Arizona Court of Appeals applied Webster's definition: "quick to act or to do what is required" or "done, spoken, etc., at once or without delay." *West Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 165 P.3d 203 (Ariz. App. Div. 1, 2007)(review denied).

It is important to remember that mere inconvenience does not warrant delay. Recently, the court of appeals found that Maricopa County Sheriff's Office wrongfully denied the New Times access to public records under A.R.S. § 39-121.01(D) (1) with respect to eight of the nine records, because it failed to promptly furnish the records requested. *Phoenix New Times, L.L.C. v. Joseph M. Arpaio*, 177 P.3d 275 (Ariz. App. Div. 1, 2008)(review pending).



Records include electronic records.

Pitfall #7: Not Knowing when to withhold records

There are three reasons to withhold records: 1) the record is made confidential by statute, 2) the record involves the privacy interests of persons and that interest outweighs the public's right to know, or 3) disclosure would be detrimental to the best interests of the State. The latter two are balancing tests that grant the custodian discretion to refuse inspection of public records. These tests must be applied on a case-by-case basis and inevitably result in inconsistencies.

Pitfall #6: E-mail

E-mail is a public record if it relates at all to public business. This includes e-mail sent from or received by accounts other than government e-mail accounts. Similarly, purely personal e-mail, which has no relationship to official duties, does not necessarily qualify as a public record just because it was on a government computer and e-mail system. *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418 (2007).

Pitfall #5: Redaction

If a public record contains protected information, public bodies must redact (black out) the protected information and release the remaining portions of the record. Public bodies may not charge a fee for redaction.

Pitfall #4: Promises of Confidentiality and Rubber Stamps

The law controls the character of the document. Marking a document privileged, confidential, top secret, etc. or making promises of confidentiality (including clauses in settlement agreements), does not determine whether the record is subject to disclosure.

Pitfall #3: Fees

Inspection of records is free. The public records law does not allow public bodies to charge a fee for making records available or for search time. However, with few exceptions, public bodies may impose a reasonable copying fee if the requestor requests a copy. Public bodies may also require the requestor to pay in advance for copying and postage charges of public records mailed.

Pitfall #2: Not Understanding what constitutes a commercial purpose

In *Primary Consultants, L.L.C. v. Maricopa County Recorder*, 210 Ariz. 393, 111 P.3d 435 (Ariz. App. Div. 1, 2005), the Arizona Court of Appeals broke down the statutory definition of commercial purpose into three sections:

1. Use of a public record for the purpose of sale or resale;
2. Obtaining names and addresses from public records for the purpose of solicitation; or
3. Sale of names and addresses to another for the purpose of solicitation or any purpose for which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of a public record.

"A public record is everything created or received by a government agency or employee that relates to public business."

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Public bodies may impose a copying fee.

Public Records Law 101 continued....

Pitfall #1: Records Dump

Public bodies may not dispose of or destroy records after receiving a public records request regardless whether the retention period has expired.

In a nutshell, government employees have a legal and ethical obligation to comply with the public records law. It is simply part of doing business. Any person who is denied access may file a special action in superior court. In 2006, the law was amended to allow the court to award attorney fees to a requestor of public records if the requestor substantially prevails in a court action. In addition, civil or criminal penalties may be imposed. Reduce these risks by becoming familiar with the law and its requirements.

“Government employees have a legal and ethical obligation to comply with the public records law.”



Two recent Attorney General Opinions.

Attorney General Opinions continued....

Most recently, on March 11, 2008, the Arizona Attorney General issued Opinion I08-001. The issue was whether an open meeting law violation concerning an improperly noticed agenda item effected the validity of properly noticed agenda items. The attorney general concluded that when a public body violates the open meeting law by discussing, proposing, or taking legal action on a matter not properly noticed on the agenda, that violation does not nullify all other legal action taken at the meeting when the violation has no demonstrated prejudicial effect on the complaining parties.

2008 Legislation

Over a 1,000 bills were introduced last session. Several affect maintenance of records, disclosure of records, and other access related matters. A couple that might be of particular interest are House Bills 2454 and 2159. House Bill 2454 was signed by the Governor on June 26, 2008, and amends A.R.S. § 8-807 making Child Protective Services' records open to the public in cases involving the fatality or near fatality of a child/children. See Laws 2008, ch. 279, § 1. House Bill 2159 was also signed by the Governor on June 26, 2008. It adds A.R.S. § 39-128 and opens public employees' disciplinary records, including an employee's response, to public inspection. See Laws 2008, ch. 277, § 1. These changes take effect September 26, 2008.

For information on how a bill becomes law, go to <http://azleg.gov/alisPDFs/hbillaw.pdf>.

