

SPECIAL  
POINTS OF  
INTEREST:

- **Sunshine week** is March 14 – 20, 2010
- **Upcoming trainings** posted at [www.azoca.gov](http://www.azoca.gov) under presentations

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# The Public Record

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## *Schoeneweis v. Hamner: The Privacy Balancing Test*

This past winter the Arizona Court of Appeals determined that the probate court abused its discretion when it failed to conduct an in camera inspection of an autopsy report, photographs, and investigative documents to balance competing interests of privacy and access.

Scott Schoeneweis, who was a prominent sports figure, petitioned the probate court to have the autopsy report, photographs, and investigative documents, as well as other documents, related to his wife's death sealed. The probate court denied the request. Schoeneweis filed a special action to stay and review the superior court's ruling.

The court of appeals agreed that the autopsy report, photographs, and investigative records are

public records. Under Arizona's public records law, public records and other matters in the custody of any public body or public officer, shall be open to



### Privacy vs. Public Awareness

inspection and copying unless they are made confidential by statute, a privacy interest outweighs the public's interest, or disclosure is detrimental to the best interests of the State.

After acknowledging that no

statute precludes disclosure of autopsy reports, autopsy photographs or related investigative records, the court of appeals admonished the superior court for not properly weighing privacy concerns against the policy in favor of disclosure.

Although there is no requirement to conduct an in camera review of documents upon request, the court of appeals believes it becomes necessary when the court contemplates releasing documents, such as those at issue in this case, which inherently raise significant privacy concerns.

The issue was remanded.

The full opinion may be found at <http://www.cofad1.state.az.us/opinionfiles/SA/SA090152.pdf>.

## Is your committee subject to the open meeting law?

Public bodies and public officials often use advisory committees, standing committees, special committees, subcommittees, task forces or working groups (hereinafter referred to as Committees) as a means to carry out their duties or to provide advice, input, or make recommendations

before they make decisions on complex matters.

This often leaves government officials and the public wondering whether these folks are subject to the open meeting law. The answer is not always simple.

Arizona's open meeting law ap-

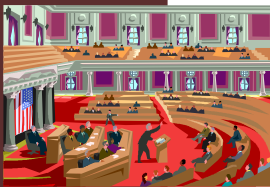
plies to multimember public bodies as defined under ARS § 38-431(6). This includes all standing, special, or advisory committees or subcommittees of, or appointed by, the public body. In 2007, the Legislature clarified section 38-431(1) defining

*(Continued on page 2)*



Third party documents submitted to public bodies are public records.

*“The open meeting law is designed to shine light on deliberations and discussion, not just final decisions.”*



# Access to Proprietary Information

Public bodies are often faced with requests for records obtained from private third parties, which the third party considers to be proprietary information or trade secret. Although there are statutes that protect certain records and information, there is no blanket statutory exemption for proprietary information or trade secrets from public disclosure if obtained by a public body in the course of conducting public business (e.g., engineering plans, architectural designs, blueprints, licensed software, etc.)

As a result, public bodies are placed between a rock and a hard place. On one hand, they have an obligation to third parties to protect proprietary information and on the other hand, they have an obligation to provide records received in the pursuance of their duty under the public records law.

We recommend public bodies take a proactive approach to this issue and put procedures in place to make sure third parties understand the public body’s responsibilities and obligations to release informa-

tion and records to the general public upon request as well as give the third party an opportunity to protect their information.

First, third parties should clearly and specifically mark any records or information submitted to a public body, which it deems trade secret or proprietary information.

Second, upon receipt of a request to examine or be furnished copies of records in the possession of a public body,  
*(Continued on page 3)*

## Committees continued...

*(Continued from page 1)*  
“advisory committee or subcommittees as any entity, however designated, that is officially established, on motion and order of a public body or by the presiding office of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or con-

sidered or a course of conduct to be taken or considered by the public body.”

Therefore, when determining whether a Committee is subject to the open meeting law we must ask four questions:

1. Who created the Committee?
2. How was the Committee created?

3. What is the Committee doing?
4. Who has the authority to take action?

For instance, a Committee created on motion and order of a city council, school board, board or commission of the state or political subdivision, fire district governing board,  
*(Continued on page 3)*

## Bills to Watch: Legislative Update

There are numerous bills moving their way through the Legislature that address access to public meetings and certain records.

Following are a few Bills, which specifically address Titles 38 (open meeting law) and Title

39 (public records law).

HB2115:

- Requires Counties with a website to post on their website Board of Supervisor meeting minutes.

HB 2209:

- Requires the Arizona

Secretary of State to conspicuously post open meeting law materials on its website.

- Stipulates that persons elected or appointed to a public body must review open meeting law materials before taking office.

*(Continued on page 3)*

# Committees continued...



*(Continued from page 2)*

etc. to make recommendations to the Public Body must comply with all open meeting law requirements.

Conversely, a committee appointed by the city manager for purposes of advising the city manager or making

recommendations to the city manager on matters within the scope of the city manager’s authority are not subject to the open meeting law.

But what about Committees appointed by the city manager to review or make recommendations on issues that ultimately require city council action? This is much less clear. At the very least, the Committee’s failure to comply with the open meeting law may be seen as an attempt to circumvent the law.

Public officials should tread care-

fully. Although committees can serve a useful purpose, it is important that everyone involved carefully consider whether the Committee must comply with the open meeting law. Remember, the open meeting law is designed to shine light on deliberation and discussion, not just final decisions. When important steps in deliberation or discussion take place by a Committee that may not be subject to the open meeting law, the Committee should consider whether voluntary compliance would serve the greater good. When in doubt, comply.

*“...make sure third parties understand the public body’s responsibilities and obligations to release information and records to the general public...”*

# Proprietary Information continued...

*(Continued from page 2)*

which are clearly and specifically marked trade secret or proprietary information, the public body should inform the third party of the request and give the third party a reasonable amount of time (i.e., 10 to 20 days) to secure a court order enjoining release of the records.

Third, make it clear to the third party that you have an obligation to

promptly furnish requested records and absent a court order, the public body will release the documents.

Taking steps to address this issue will put third parties on notice of government transparency and help alleviate any uncertainty regarding disclosure.

# Bills to Watch continued...

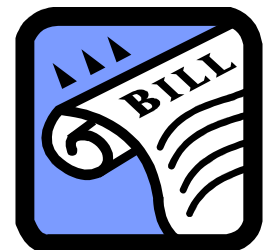
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- Requires all public bodies to conspicuously post a statement on their website stating the physical and electronic posting locations for meeting notices.
- Requires that all individual meeting notices be posted on the website.

HB2387:

- Permits Public Officers to remove the name, address telephone number, and email address of the sending party before disclosing the contents of emails received.

To review the full text of these and other bills of interest, go to <http://azleg.gov/>



**Several bills may affect Arizona’s open meeting law and public records law**



## Ombudsman—citizens' aide

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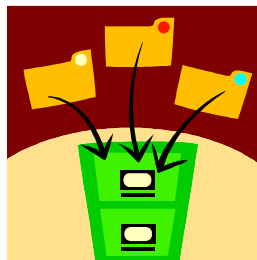
Thank you for reading our March 2010 newsletter. It's just in time for Sunshine Week, which is taking place March 14th through 20th. This is a good time to remind ourselves of the importance of government transparency and make sure Arizona government is complying with Arizona's public record and open meeting laws. For questions, feel free to call or email Liz Hill, Assistant Ombudsman for Public Access directly at 602-285-9136 x32 or [ehill@azoca.gov](mailto:ehill@azoca.gov).



# Revised Retention Schedules

The Arizona State Library, Archives and Public Records, a Division of the Secretary of State's Office, continues to revise the General Records Retention Schedules for all public bodies. Each new General Schedule supersedes the corresponding General Schedule. The new Schedules also **supersede any previously approved Custom Schedules** dealing with similar records series, so it is important to download the new Schedules for use. The following Retention Schedules have been revised, and are now on our website: *Administration, Elections, Electronic Communications & Social Networking, Library, Management, Purchasing / Procurement*. As the ASLAPR goes through this process, **they would appreciate your help**

**and participation.** First, if you would like to be on an e-mail distribution list to receive each new Draft Schedule as they are released for review and comments by public bodies, please let Jerry Kirkpatrick know by contacting him at: [jkirkpatrick@lib.az.us](mailto:jkirkpatrick@lib.az.us).



**Public record pitfall: Failure to have, update, and follow a re-**

Secondly, as the new General Schedules are approved and signed by Director GladysAnn Wells, they are posted to the ASLAPR website. You are encouraged to visit their website regularly and download the new Schedules. They are also emailing the new Schedules as they are released, so let Jerry Kirkpatrick know if you would like to be on that distribution list as well. The ASLAPR appreciates your help and contribution during this important revision process, and your invaluable input helps them ensure the new General Schedules accurately reflect the way Arizona's public bodies conduct business.  
*Submitted by Jerry Kirkpatrick, Records Management Specialist*