

POINTS OF
INTEREST

- For upcoming training opportunities visit our website at www.azoca.gov and click on presentations.
- For the last four newsletters, visit our website and click on newsletters/reports. Older newsletters are available upon request.
- Open Meeting Law Booklets, Public Records Law Booklets, and updates are available online.

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The Public Record

VOLUME 2, ISSUE 4

NOVEMBER 2009

Comments on Recent Lake Opinion

Arizona is beginning to embrace the electronic world in which we conduct our public business. On October 29, 2009, in *Lake v. City of Phoenix*, --- P.3d ---, 2009 WL 3461304, Ariz., October 29, 2009 (NO. CV-09-0036-PR) the Arizona Supreme Court held that “when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata is subject to disclosure under Arizona’s public records law.” Seems

straightforward enough, right? I am not so sure.

It is well-established that public records include



The Arizona Supreme Court held that metadata embedded in documents is subject to disclosure

electronic records created or received by a public

entity in the course of conducting public business. However, in Arizona, access to electronic records has remained a gray area. Issues related to choice of format, inspection of electronic records, access to data contained in databases, redaction of electronic records, and fees for providing electronic copies of public records, simply have not been addressed by the Legislature or the courts.

Conversely, during the
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Social Networking and Open Government

BY: JERRY KIRKPATRICK, RECORDS MANAGEMENT SPECIALIST
AND LIZ HILL, ASSISTANT OMBUDSMAN—PUBLIC ACCESS

In our August 2009 newsletter, we tackled the tangled web of social media: Twitter, Facebook, My Space, LinkedIn, blogs, microblogs, etc. We ac-

knowledged that government entities and public officials are taking advantage of, or are considering taking advantage of, the unique opportunities they

afford.

But we warned, that use of this media must comply with a variety of statutes,

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(Continued from page 1) *Comments on Lake Opinion*

past couple of decades, the federal government and a majority of states have addressed access to electronic records in one way or another. In fact, upon request, the federal government and majority of states require that public entities furnish electronic records in the electronic format in which the record is maintained. Like the recent Arizona Supreme Court Opinion, the Washington Court of Appeals specifically addressed metadata and held that metadata describing the history, tracking, and management associated with email sent by a private citizen to deputy mayor was a public record within scope of the public records act. *O'Neill v. City of Shoreline*, 145 Wash. App. 913, 187 P.3d 822 (Wash.App.Div.I, July 21, 2008).

However, although Arizona's highest court tackled the issue of whether metadata embedded in an electronic document must be disclosed upon request, the Opinion's simplicity raises some important questions. In an apparent effort to dispel agency concern regarding harassment and burdensome requests the Court states, "not every public records request will require disclosure of the native file. Public entities may provide paper copies if the nature of the request precludes any need for the electronic version." *Lake v. City of Phoenix*, 2009 WL 3461304 at 4, paragraph 15. How will the public entity know, or otherwise determine, whether the nature of any given request precludes the need for the electronic version given the fact that persons requesting records for a non-commercial purpose are under no obligation to set forth the purpose for which copies of the records will be used? The Courts determination is problematic and seems contrary to the presumption favoring disclosure.

The Court also provides that "[p]ublic records requests that are unduly burdensome or harassing can be addressed under existing law, which recognizes that disclosure may be refused based on concerns of privacy, confidentiality, or the best interests of the state." *Id.* at 4, paragraph 15. Currently, however, the public record statutes do not address burdensome requests. Is the Court suggesting that public entities have discretion to deny access to requests it deems burdensome or harassing under the guise that compliance is detrimental to the best interests of the public entity? If so, what are the standards for denying access? This is a matter best addressed by the Arizona Legislature.

In addition, the Court's holding refers to public records maintained in an electronic format. Some have asked whether this requires access to the record in the format it is ultimately maintained or the format in which it was created. I believe it is the former. The Court did not decide when, or if, a public entity is required to retain public records in an electronic format. Indeed, electronic records may be converted to alternative formats so long as they are retained pursuant to the applicable retention and destruction schedule approved by Arizona State Library, Archives, and Public Records. Accordingly, public records should be available for inspection and copying in the format in which the record exists at the time of the request.

Thus, although Arizona is finally entering the 21st Century and addressing access to electronic records, it has a long way to go.

Metadata is information describing the history, tracking, or management of an electronic document including file designation, create and edit dates, authorship, comments, and edit history. *Lake v. City of Phoenix*, --- P.3d ----, 2009 WL 3461304, Ariz., October 29, 2009 (NO. CV-09-0036-PR) (*internal quotations omitted*).

Pursuant to Arizona Revised Statutes (A.R.S.) § 38-121.01(B), public records include all records reasonably necessary and appropriate to maintain an accurate knowledge of their activities regardless of physical form or characteristics. *See* A.R.S. § 41-1350.

Meeting Faux Pas: Five Common Pitfalls



Most appointed and elected public officials strive to build public confidence among their constituents. There are five sure fire ways to quickly deflate that confi-

- Practice meeting etiquette and avoid these five faux pas**
1. Pass notes during a meeting;
 2. Whisper to other board members during a meeting;
 3. Text, use handheld devices, and use laptops during a meeting;

4. Meet and talk among a quorum before and after a meeting; and
5. Fail to post courtesy notices when a quorum may be present at social events.

Public officials should take steps to avoid these negative perceptions.

“Use of [social] media must comply with a variety of statutes, rules, and ethical obligations”

Legislative Sessions

On Tuesday, November 17, 2009 the Legislature began its fourth special session to discuss the budget and other related topics.

The 49th Legislature, 2nd Regular Session is scheduled to begin January 11, 2010. Stay tuned for proposed leg-

islation regarding public records and open meetings.

Important deadlines may be found on the Legislature's website at www.azleg.gov. You can also use the website as a tool to track pending legislation and stay up-to-date on current issues.



Revised General Retention Schedules

BY: JERRY KIRKPATRICK, RECORDS MANAGEMENT SPECIALIST

The Arizona State Library, Archives and Public Records (now a division of the Arizona Secretary of State's Office) continues to revise the General Schedules for all State Agencies, Counties, Municipalities and all other political subdivisions. Most

recently, the *Administration and Management Schedules* were revised, along with new *Purchasing / Procurement Schedules*. The *Electronic Communications and Social Networking Records Schedules* have been signed and will be on-line by Friday, November

20th. Pending Schedule revisions include the *Library, Elections and Human Resources Schedules*, which should be signed by the beginning of December.



Arizona Library, Archives, and Public Records is updating general retention and disposition schedules.

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rules, and ethical obligations including Arizona's public records law.

Communication of any kind carries with it the potential weight of statutory records requirements. Arizona Revised Statutes § 39-121.01(B) clarifies that this specifically includes "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 connection with the transaction of public business...." A.R.S. § 41-1350. Accordingly, use of social networking applications may result in creating or receiving public records.

The statutory requirements regarding records management of public records are never easy, and that is especially so for these records. One will quickly find that many social networking applications have little or no records management / records retention capabilities built in to them. The Arizona State Library, Archives and Public Records (Library and Archives) has written a retention schedule that includes social networking records (to be published near the end of November 2009), along with guidance regarding the convergence of records management requirements and social networking applications.

The transitory nature of most social networking communication does not mean that any records created or received while using such tools will be transitory. It is the **content and the intent** of the communication that determines whether these communications will qualify as records, and the specific retention period required for such records.

Placing social networking records on a retention schedule will help draw attention to the fact that these can be records, and require the appropriate retention as records. Following are several tips and recommendations:

- Have a policy on social networking (along with other e-communications) and focus on records management responsibilities and requirements.
- Know and comply with the terms of use established by the venue for your social networking activities, and incorporate them into your policy (no profanity, etc).
- Manage unique records. Comments, wall postings, etc received by users, friends, fans (and others) of your social networking site will be unique records. Comments posted to some sites can be forwarded as an e-mail, which increases your ability to better manage these unique records.
- Set up guidelines for what topics / subjects / information can be blogged or networked. Copies / duplicates of information already existing and being managed elsewhere by an agency are **not** public records.
- Make sure your information technology professionals are able to track the use of these technologies as they do e-mail and other e-communications. Involve them by asking how you can capture, retain and manage these records.
- Try to keep communications / blogs to a single topic. This will make it easier to manage these records. Retention schedules are built around managing records according to one specific retention period for each specific records series / type.
- Whenever and wherever possible, use a title or heading for your information. This will help with managing these records.
- Train, train, and train some more. You can never train too much on the records management aspects of social networking and other forms of electronic communication. Training is an important aspect of any compliance program.
- Oversight. Who controls the content of these social networking records? They will usually control the retention of the records, therefore controlling the entire records management process.
- Control social networking activities from the very beginning. Consider teaching your agencies / departments how

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Greetings everyone! We hope you enjoyed our November 2009 newsletter. As always, our intent is to bring you interesting and helpful information in a timely manner. If you have ideas for a story, a special item of concern, or an article you would like to submit, contact Liz Hill directly at 602-285-9136 x32 or ehill@azoca.gov. She is waiting to hear from you!

Also, don't forget, our public records law and open meeting law booklets and updates are available on our website!

Wishing you all a safe and happy holiday season.



Social Networking and Open Government

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to set up a social networking account / page. (Example – Federal Government Facebook page)

- Keep a matrix of your agencies / divisions / employees use of Web 2.0 technology. This matrix should include the specific technology involved, departments involved, web address / location of each, and the opportunities / potential for each.
- Be realistic and proactive. You may need to “turn off” certain aspects of a social networking site / application, if you are not

prepared to fully manage these records.

The pending retention and destruction schedule established by Library and Archives provides an invaluable framework and assists public bodies in determining what constitutes a social networking record. It also permits flexibility in determining how long to retain the identified records. Of course, any of these records retained by the public body are public records and must be furnished for inspection and copying upon request unless one of the three exceptions to disclosure applies: 1) confidential by statute, 2) a privacy interest outweighs the pub-

lic's right to know, or 3) disclosure is detrimental to the best interests of the state. The latter two are judicially created balancing tests that are applied on a case-by-case basis.

Arizona Government Information and Technology's recently published policy on social networking is also now available on its website at www.azgita.gov. It is Policy 505 under policies, standards, and procedures.