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

August 9: Arizona Developmental Disabilities Planning Council -- Open Meeting Law

August 24: League of Cities and Towns -- Public Records Law

August 25: DES Division of Developmental Disabilities -- Open Meeting Law



From the Office of the Arizona Ombudsman — Citizens' Aide

# The Public Record

State Ombudsman Dennis Wells

JULY 2017

## Attorney General Opinion: Records on Personal Devices and Accounts

On July 7, the Arizona Attorney General (AG) issued a formal opinion in which he concluded that records created by public officials or government employees on private electronic devices or accounts are not public records.

In the opinion, the AG addressed whether “messages sent and received via texting and social media sites by officers or public bodies that have a substantial nexus to the job [are] public records, even if the employee uses a private cell phone or electronic device.”

First, the AG concluded that for records that are sent or received using government systems, devices, or accounts, the test for determining whether records are “public records” subject to the public records law is whether the

records have a substantial nexus to government activity. Records of a purely personal nature are never public records. The “substantial nexus” test was laid out in *Griffis v. Pinal Cnty.*, 215 Ariz. 1 (2007). This aspect of the Attorney General’s opinion is in line with the prevailing opinion on this issue.

Second, and more significantly, The AG said that “[m]essages sent or received by a private electronic device or through a private social media account implicate the public official’s duty to provide a reasonable account of official conduct, but do not themselves harbor public records.” Essentially, the AG concluded that a record sent or received using a public official’s personal electronic device or account is not a public record,

the implication being that it is not subject to disclosure. This conclusion is in sharp contrast to a commonly held view that the *Griffis* “substantial nexus” test applies to all records regardless of whether sent or received on government devices or accounts. The AG concluded that the *Griffis* court did not explicitly extend the “substantial nexus” test to records sent or received on private devices or accounts.

Lastly, while the AG concluded that record sent or received using personal devices or accounts are not public records, he cautioned that the public records law still obligates public officials to “record their work and otherwise maintain records” that are related to official government activities. The AG did not explain this duty further.

## Must Meeting Minutes be Posted Online?

One of the more common open meeting law questions we receive from both public officials and members of the public is: Does the open meeting law require that public bodies post meeting minutes or recordings online? Unless the public body is of a city or town of a certain population, the answer is no, open meeting law does not require that public bodies post meeting minutes or recordings online.

So, what does the open meeting law require? A.R.S. § 38-431.01(D) states, “The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting except as otherwise specifically provided by this article.” The open meeting law does not require posting minutes or a recording online; it merely requires that a public body make minutes available for inspection.

Public bodies of cities and towns with populations of at least 2,500, however, are subject to some web posting requirements. A.R.S. § 38-431.01(E) requires such a public body to post to its website a statement of legal actions taken at the meeting or a recording of the meeting. Subcommittee or advisory committees for such public bodies have 10 working days to post. Additionally, city and town councils must post approved minutes to their websites within two working days of approving the minutes or recording. These postings must remain online for at least a year. A.R.S. § 38-431.01(J).

## Public Records Law and Copyrights

What happens when someone requests a public record that contains material protected by federal copyright law? Imagine the following scenario: Your office receives a public records request for the architectural drawings of a building that your office has on file. While attempting to fulfill the request, you discover that the drawings are protected by copyright. Should you handle the request as you would any other?

Unfortunately, neither Arizona statutes nor case law addresses how agencies and officials should handle requests for records that are protected by federal copyright, so it is difficult to confidently discern the correct way to handle these types of requests. Arizona public records law provides a broad right of access to government records. In contrast, federal copyright law gives copyright owners the exclusive right to make and distribute copies of and, in some cases, to perform or display their copyrighted works. 17 U.S.C.A. § 106. Under Article VI of the U.S. Constitution, when federal law conflicts with State law, federal law reigns supreme. As a result, we think it is reasonable to conclude that Arizona public records law must yield when it conflicts with federal copyright law.

What this means is that providing copies of copyrighted public records to satisfy a request under the public records law could potentially constitute copyright infringement if your agency does not have permission from the copyright holder; however, depending on the variety of record at issue, there may be no issue under copyright law with allowing inspection of a copyrighted public record.

So, what should you do if someone requests copies of a public record from your office and you discover that the record is copyrighted? First and most importantly, you should consult with your agency's legal counsel about the matter. Consider whether you might be able to get permission from the copyright holder to provide a copy to the requester. Ultimately, you probably cannot provide copies of copyright-protected records without the copyright holder's permission; however, you may be able to reach a compromise by instead making the record available for inspection. Explain to the requester why you can not produce a copy of the record.

## Arizona Ombudsman – Citizens' Aide

### Greetings!



In our summer newsletter, we discuss the Attorney General's recent public records law opinion, meeting minutes posting requirements, and how public records law sometimes intersects with federal copyright law.

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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