

Arizona's Public Records Law

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Role of the Arizona Ombudsman

- Brief overview of the office (Brochure)
- Public Access Program
 - Investigate complaints relating to public access laws.
 - Prepare materials and provide training on public access laws.

A.R.S. § 41-1376.01

Arizona Public Records Law

A.R.S. §§ 39 -121 to -161

- Public records and other matters in the custody of a public body or public officer shall promptly be made available to any person for inspection and copying.



Arizona's Public Policy

- Records of government shall be open to public inspection to:
 - Increase the public's access to and knowledge of government
 - Make government accountable

Who is covered?

- Public bodies

- The state, any county, city, town, school district, or political subdivision.
- Any branch, department, board, bureau, commission, council, or committee of the foregoing.
- Any public organization or agency that receives money from or expends money provided by the state or a political subdivision of the state.

A.R.S. § 39-121.01(A)(2)

Common Pitfalls

- 10) Not knowing what is a public record or “other matter”
- 9) Failure to have, update, or follow record management system
- 8) Inappropriately handling requests
- 7) Failing to promptly furnish public records
- 6) Not knowing the exceptions
- 5) Making promises you cannot keep
- 4) Failure to recognize e-mail issues
- 3) Charging unauthorized fees
- 2) Not understanding commercial purpose
- 1) Records dump



What is a public record? (Pitfall #10)

- Everything created or received by a public body or public officer that relates to public business or is created or received in the course of conducting public business (even if on personal computers)
 - Pursuance of a duty
 - Required by law to be maintained
 - Records of official transactions

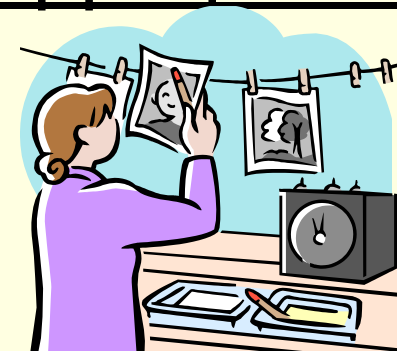
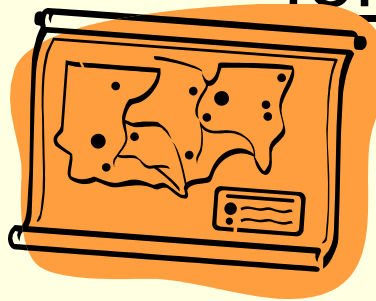


Includes records as defined under ARS § 41-1350



- 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 and preserved or appropriate for preservation....

§ 41-1350.



Electronic Records include:

- Web pages
- Word processing files
- Databases
- E-mail
- Metadata
- Social Networking Utilities



Supreme Court Opinion

Lake v, City of Phoenix, 222 Ariz. 547, 218 P.3d 1004 (2009)

- 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 our public records law.

2008 Legislation

A.R.S. § 39-128 added by Laws 2008, Ch. 277, § 1:

- Requires a public body to maintain disciplinary records
- Disciplinary records of all government employees shall be open to inspection and copying, unless inspection or disclosure is specifically prohibited by statute

Took effect September 26, 2008.

Examples of Public Records and Other Matters

- Calendars
- Reports
- Briefs
- Legal Memoranda
- Policies and procedures
- Maps
- Accident reports
- Training videos and materials
- Photographs
- Personnel records
- Case files
- Data bases
- E-mail
- Correspondence to/from
- Permits
- Licenses
- Certificates
- Applications
- Salaries
- Agendas
- Minutes
- Exhibits
- Budgets
- Revenue/expenditures
(financial information)
- Annual reports
- Travel claims
- Phone bills
- Police reports
- Drafts

What's not a public record?

- Extra copies
- Multiples of blank forms
- Post-it notes
- Commercially available software
- Private papers (including purely personal e-mail)
- Articles, periodicals, materials needed only for reference

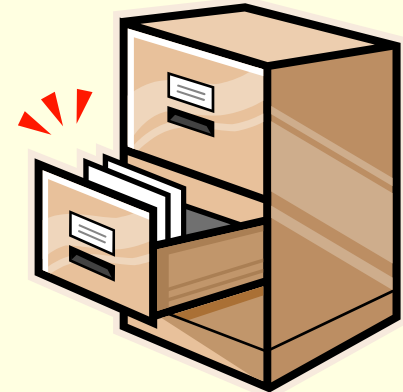


Griffis v. Pinal County, 215 Ariz. 1, 156 P.3d 418 (2007)

- 2007 Arizona Supreme Court decision.
- Nature and purpose of document determines its status, not its location or the use of government property.
- Purely personal e-mails generated or maintained on a government e-mail system are not, as a matter of law, public records under Arizona's public record laws.
- *In camera* review

Failure to have, update, and follow a record management system (Pitfall #9)

- Make and maintain appropriate records
- Have a records management program
- Preserve records
- Adhere to retention schedules
- Properly destroy records
- www.lib.az.us



Duty to Make and Maintain Appropriate Records - A.R.S. § 41-1350

Containing adequate and proper documentation of the:

- organization
- functions
- policies
- decisions
- procedures
- and essential transactions of the agency

Duty to Have a Records Management Program - A.R.S. § 41-1346(A)

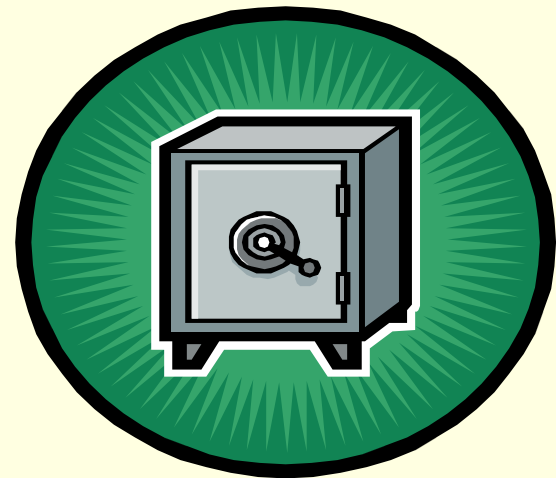
- to establish and maintain an
- active and continuing program
- for economical and efficient management of public records

Duty to Preserve Records

A.R.S. § 39-121.01(C)

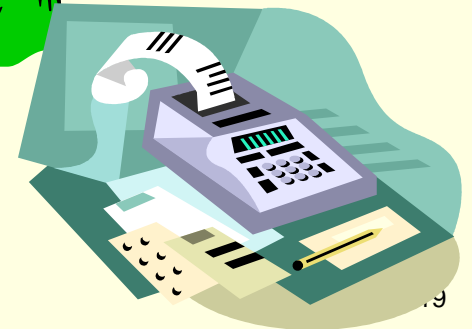
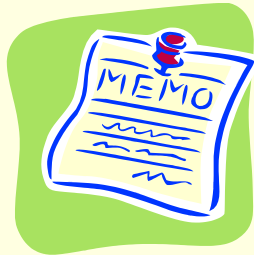
It is the duty of the head(s) of each public agency to protect records from:

- deterioration
- mutilation
- loss
- destruction



Retention Schedules

Must have, update and follow a Records Retention Schedule for every type of record



Duty to Submit a Custom Retention Schedule

- To the Director of the Arizona State Library, Archives and Public Records
- For records not covered in the general schedules or because there is a valid reason to retain for a different retention period



Overlooked Types of Records – Must Be Included

- Voice mail
- Computerized records
- E-mail
 - **see the E-mail Guidelines from Arizona State Library, Archives & Public Records Department**
 - **[http://www.lib.az.us/records/](http://www.lib.az.us/records/GuidanceAndRelatedResources.cfm)**
 - **GuidanceAndRelatedResources.cfm**

Retention of E-mail:

- E-mail is not a record series
- Many e-mail messages are transitory communications without retention value
- Others require retention
 - Evidence of official policies, actions, decisions, or transactions



Retention Schedules for School Districts

<http://www.lib.az.us/records/school.aspx>

How to get there:

- **go to www.lib.az.us**
 - click “records management”
 - click “retention schedules and manuals”
 - select general retention schedules for school districts and charter schools

Questions the Head of a Public Body Should Ask

- Has the Director of State Library approved a retention/destruction schedule?
- Is there a key person in the agency responsible for public records?
- Is the public body following its retention schedule?
- Is the retention schedule reviewed annually?

Things to consider:

Information Technology Department should:

- Understand public body's retention policy
- Take steps not to lose e-records
- Program databases to facilitate responding to public record requests
- Maintain an inventory of all places e-records may be stored: servers, individual computer hard drives, removable storage media, personal digital assistants, home computers.

The Problem

- No active program in place
- Staff and board members are not properly trained on record management obligations
- Keep records too long
 - Makes it more difficult to find records and respond to the request



For Assistance

- Arizona State Library, Archives & Public Records
- Record Management Division
 - Main number: 602-926-3815
 - Jerry Kirkpatrick: 602-926-3820
(direct line) or jkirkpatrick@lib.az.us

Handling Public Record Requests

(Pitfall #8)

- May require requestor to designate whether for non-commercial or commercial purpose.

A.R.S. § 39-121.03(A)

- If verbal, may request that they put it in writing (see next slide)
- If non-commercial, inquiry should end there (unless other requirements are provided for by statute)

Government Entity May Not:

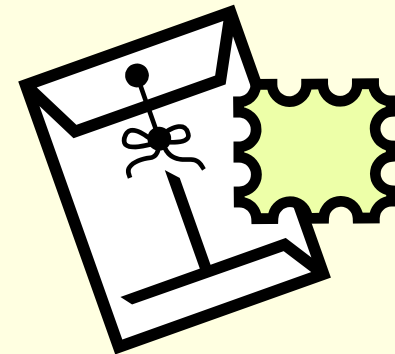
- Require that requests be made in writing
- Require identification (unless statute limits disclosure to specific persons)
- Require that the requestor state a purpose for requesting the records
- Impose a fee for the search time, redaction, or mere inspection of records

Custody

- A.R.S § 39-121 provides that public records in the ***custody*** of any officer must be open to inspection.
- This includes records under the **control** of the officer, even when:
 - Stored at a warehouse
 - Transported to another office
 - Received from another public body
 - They are copies - originals are with or controlled by another individual or entity

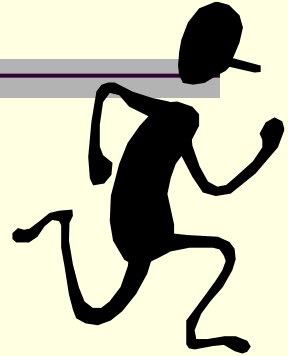
Mailing Records in Response to Request - A.R.S. § 39-121.01

- Person may request that the custodian mail a copy of any public record not otherwise available on the public body's web site
- Custodian may require requestor to pay in advance for any copying and postage charges



Promptly Furnish (Pitfall #7)

- A.R.S. § 39-121.01(D) and (E)
- “Promptly furnish” is not defined by statute
- Depends on what is reasonable under the circumstances
- Acknowledge and communicate
- Access is deemed denied if a custodian fails to promptly respond
- How long would it take if you wanted it?



Criteria to consider

- Agency's resources
- Nature of the request
- Content of the records
- Location of the records

Mere inconvenience to the public body does not warrant delay.

Initial Case on “Promptly”

West Valley View, Inc. v. Maricopa County Sheriff's Office, 216 Ariz. 225, 165 P.3d 203 (Ariz. App. Div. 1, 2007)(*review denied*).

- Court applied Webster's definition: “quick to act or to do what is required” or “done, spoken, etc., at once or without delay
- Sheriff was required to produce press releases to West Valley View at the same time it sent them by e-mail to other media
- Awarded costs and attorney's fees on appeal; remand for fees in superior court

“On-Going Requests”

- Presumption is disclosure
- Court of Appeals held that A.R.S. § 39-121.01(D)(1) does not require submission of separate requests for successive records when records are:
 - Clearly articulated (easily defined)
 - Part of defined category (identifiable category)
 - Created over time (regularly generated)Example: press releases

Another Opinion Discussing Promptly

Phoenix New Times, L.L.C. v. Joseph M. Arpaio, 217 Ariz. 533, 177 P.3d 275 (Ariz. App. Div. 1, 2008)(*review denied*)

- Court 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.

Most Recent Opinion Discussing Promptly

Lake v. City of Phoenix

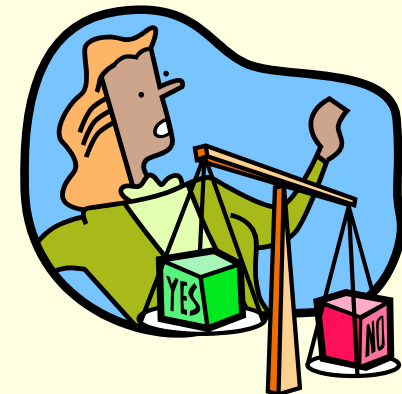
- City successfully overcame burden of establishing that its responses to David Lake's requests were prompt given the circumstances surrounding each request.
- Factors taken into consideration included:
 - Broad nature of request
 - Records covered several years
 - Records involved multiple persons
 - Number of requests the city handles each year
 - City's process for locating, reviewing, and producing records

Not Knowing the Exceptions

(Pitfall #6)

Reasons to Withhold Records:

- Confidential by law
- Privacy
- Best Interest of the State

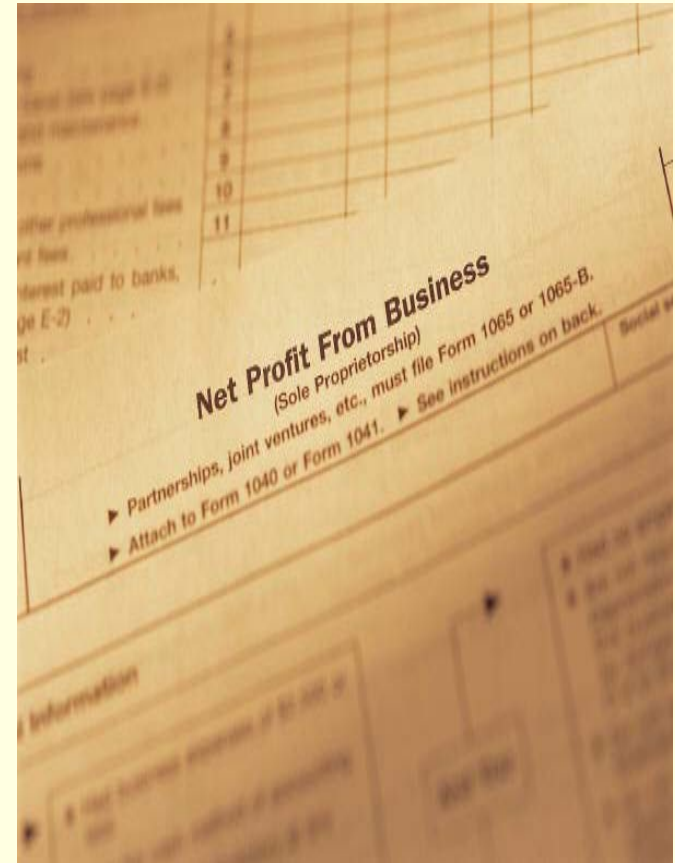


“Confidentiality”

- Made so by law, not by a rubber stamp
- Made confidential by statute, rule, or a recognized privilege
 - Constitution
 - Statute (state and federal)
 - State Agency Rule (force and effect of law)
 - Court Rule (e.g., Arizona Supreme Court Rule 123)

Examples of Confidential Records

- Tax returns
- Student education records (FERPA)
- Medical records
- Vital records
- Lists provided at the end of Ch. 6 of the AZ Agency Handbook (revised 2001)



“Privacy”

- Constitutionally-protected right – Arizona Constitution, art. II, § 8
- Standard:
 - Disclosure would invade privacy and
 - That interest outweighs the public’s right to know.

Note: Embarrassment does not preclude disclosure.

Privacy Cases

A.H. Belo Corp. v. Mesa Police Dept., 202 Ariz. 184, 42 P.3d 615 (App. 2002)

- Family's interest in privacy outweighed public interest in 911 tape that recorded child's crying because transcript provided sufficient information.
- Government met burden of putting forth interest that justified withholding access.

Scottsdale Unified School Dist. v. KPNX, 191 Ariz. 297, 955 P.2d 297 (1998)

- Teacher's privacy interest in birth dates outweighed public interest in conducting criminal background checks.

Schoeneweis v. Hamner

Cite: 221 P.3d 48, 570 Ariz. Adv. Rep. 17 (2009)

Holdings:

- autopsy report, photographs, and investigative documents are public records, but probate court was required to conduct in camera inspection to weigh privacy concerns
- Death certificate is public record, but access is limited by statute
- Medical examiner's determination of cause of death is not privileged

“Best Interests of the State”

- Standard: The burden is on the government to show that the public body would be seriously impaired in the performance of its duties.
- Must balance the adverse impact on government against the public right to be informed about operations of government.

See Matthews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952).

Note: Fear of litigation does not preclude disclosure.

Best Interest Case (one example)

Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 35 P.3d 105 (App. 2001)

- Best interests includes the overall interests of the government and the people
- Must consider how disclosure would adversely affect the agency's mission as well as other ways the public would be affected

Redaction

- Redact protected information and release the rest

Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (Ariz. 1984).

- Use black out rather than white out.
- Photocopy after marking.
- Cannot charge fees for redacting.

Practical pointer: Ideally agencies should keep confidential information in one record and public information in another.

Proper Analysis



- Is there a question whether the document is a public record or “other matter”?
- If not, disclose unless one of the three exceptions apply.

Appeal Rights - A.R.S. § 39-121.02

If denied access, any person may file a special action in Superior Court.

Remember: Access is deemed denied if a custodian fails to promptly respond



What if you get sued and lose?

If a public entity gets sued, and the person filing the action “**substantially prevails**,” the public body may have to pay:

- Costs
- Attorney Fees

A.R.S. § 39-121.02(B)



Arpaio v. Citizen Publishing Co.

221 Ariz. 130, 211 P.3d 8 (Ariz. App. Div. 2, 2008)

- *Citizen* sought correspondence between PCAO and Arpaio's office concerning transfer of forfeiture case from Attorney General's Office to PCAO.
- Pima County Attorney filed declaratory relief action against *Citizen* and Arpaio, after Arpaio objected to PCAO's release of public records to *Citizen*.
- Trial court found that Arpaio's privilege claims lacked merit, ordered disclosure, and awarded \$25,241 in fees to *Citizen* as the substantially prevailing party.
- Appellate court affirmed, rejected Arpaio's argument that fees could only be assessed against the "custodian," and granted *Citizen's* request for fees on appeal.

Promises of Confidentiality

(Pitfall #5)

- A promise to keep confidential is not enough, standing alone, to stop disclosure.
 - *PNI v. Ellis*, 215 Ariz. 268, 159 P.3d 578 (Ariz. App. Div. 1 2007); *Moorehead v. Arnold*, 130 Ariz. 503, 637 P.2d 305 (App. 1981)
 - This includes clauses in settlement agreements.
- The law controls the character of the document, not the rubber stamp.
 - e.g., confidential, client privileged, top secret
 - Rubber stamps give a false sense of security.

Requests for Confidentiality

Phoenix Newspapers, Inc. v. Ellis, 15 Ariz. 268, 159 P.3d 578 (App. 2007)

- Notice of Claim filed with a school district regarding allegations of sexual assault is a “public record” and matter of public interest.
- Request for confidentiality does not change the nature of the document

Failure to Recognize E-mail

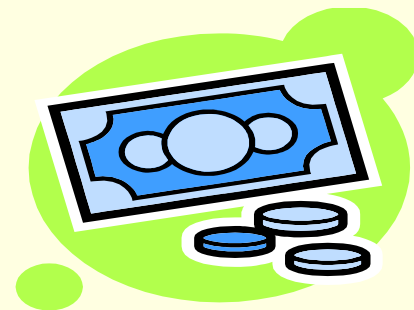
Issues (Pitfall #4)

- Not a secure medium unless encrypted
- Once sent, you lose control
 - It is a public record if it relates at all to public business
 - If it's on a government computer, someone else may review it and decide whether it should be released
- Pitfalls
 - Failure to retain or retaining too long
 - Use of home computers
 - Inappropriate content

Charging Unauthorized Fees

(Pitfall #3)

- May impose a copying fee which includes:
 - Time
 - Equipment
 - Personnel used in reproducing the copies (per page cost)
- May not charge for search time
 - A.R.S. § 39-121.01(D)
 - *Hanania v. City of Tucson*
 - Attorney General Opinion I86-090
- May charge for postage if mailed
- Fees for copies of electronic records



Not Understanding Commercial Purpose - A.R.S. § 39-121.03 (Pitfall #2)

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**.
3. **Sale of names and addresses** to another for certain purposes.

Primary Consultants, LLC v. Maricopa County Recorder, 210 Ariz. 393, 111 P.3d 435 (App. 2005)

Court of Appeals Clarified “Commercial Purpose”

The phrase: “for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record”

- Not an independent fourth section
- Not a “**catch-all**”
- Modifies the sale of names and addresses to another

Not a “Commercial Purpose”

- Newsgathering

Star Publishing Company v. Parks, 178 Ariz. 604, 875 P.2d 837 (App. 1993)

- Political consulting firm’s use of voter information in furtherance of its business

Primary Consultants, LLC v. Maricopa County Recorder, 210 Ariz. 393, 111 P.3d 435 (App. 2005)

If for a Commercial Purpose

- Person must provide a statement setting forth the commercial purpose for which the records will be used

A.R.S. § 39-121.03(A)

Reminder: No statement required for non-commercial requests.

Commercial Purpose Fee

A.R.S. § 39-121.03(A)

- Reasonable fee for cost of time, materials, equipment and personnel in reproducing
- Portion of the cost to the public body for obtaining the record
- Value of the reproduction on the commercial market as best determined by the public body

Records Dump (Pitfall #1)

- Dumping/shredding records after request or subpoena comes in
- **DON'T DO IT!**
- Litigation hold

Zubilake v. UBS Warburg LLC, 220 F.R.D. 422 (2004) and many others



Additional Resources



- Ombudsman Publications
- Ombudsman website www.azoca.gov
- Department of Library, Archives, and Public Records www.lib.az.us
- Title 2, Chapter 3, Article 3 of the Arizona Administrative Code (A.A.C. R2-3-301 et seq.)
- Case law
- Attorney General Opinions www.azag.gov or <http://azmemory.lib.az.us/>
- Arizona Agency Handbook, Chapter 6, www.azag.gov