
Arizona's Public Records Law

**State Bar of Arizona
Phoenix, AZ
February 2, 2010**

Overview

- Public records laws: requirements and obligations
- Records management
- Electronic records
- Access to public records
- Pitfalls
- Recent legislation
- Recent case law

Arizona Records Laws



A.R.S. §§ 39 -121 to -161

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

A.R.S. §§ 41 - 1338 to -1351

- Definition, access, records management, archives

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 employee that relates to public business or is created or received in the course of public business (even if on personal computers)
 - Created or received in the pursuance of a duty
 - Required by law to be maintained
 - Records of official transactions

Includes records defined under A.R.S. § 41-1350

- Any books, papers, maps, photographs or other documentary materials, regardless of physical form, or characteristics, including prints or copies of such items produced or reproduced on film or electronic media pursuant to §41-1348, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of the data contained therein.

Is it a public record? ~ Yes!

- Synonymous with “government records”
- Some public records may be confidential
- May be in any format (text, images, audio)
- May be in any media (paper, film, data)
- Created or received in the course of business
- Result from the work of an employee, regardless of where they were created

Is it a public record? ~ No!

- Must be created or received in the course of business.
- Must merit “preservation”
- Copies and draft . . . maybe
- Personal records

Examples

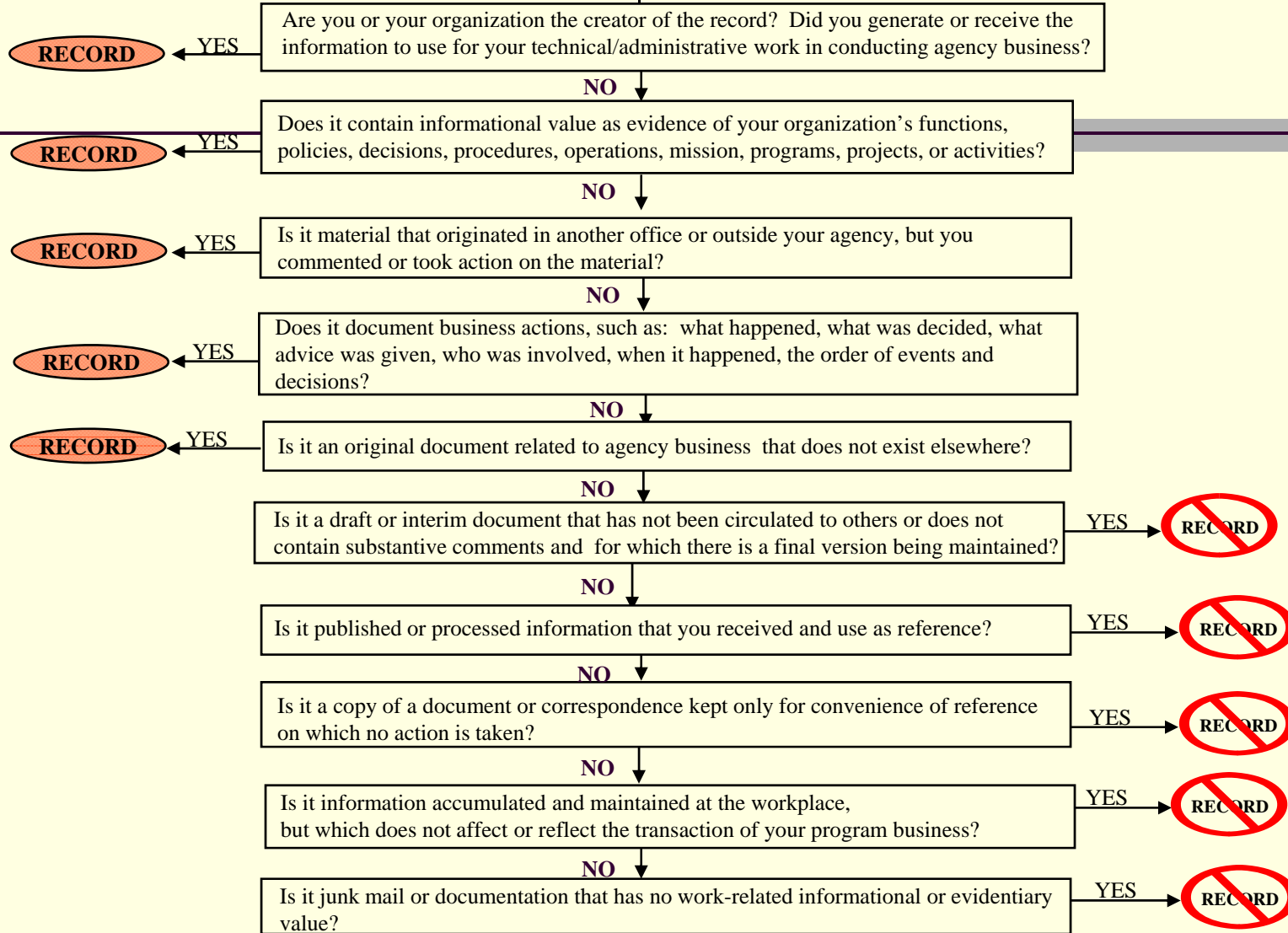
- Extra copies
- Multiples of blank forms
- Post-it notes
- Commercially available software
- Private papers (including purely personal e-mail)
- Articles, periodicals, materials needed only for reference



Is it a public record? ~ Maybe?

- What's a record is open to interpretation. When in doubt, assume it's a record.
- Remember: even if you think a document is a not a record, it may be subject to discovery
- Check with your records officer or Records Management Division

Recorded Information



**When in doubt, treat it as a record.
Call your Records Officer for information.**

“Other Matters”

- “Items not required by law to be kept by government but held in official capacity and related to public matters

Salt River Pima-Maricopa Indian Cmty., 168 Ariz. 531, 815 P.2d 900 (1991)

- “Other” matters are only “**public**” matters

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

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

2008 Legislation

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

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

Took effect September 26, 2008.

Lake v. City of Phoenix

220 Ariz. 472, 207 P.3d 725 (Ariz. App. Div. 1, 2009)

222 Ariz. 547, 218 P.3d 1004 (2009)

(vacated in part and remanded)

- Public records stored in a computer database are subject to disclosure
- Email of former employee in possession of the City is subject to disclosure
- Unfinished police reports are public records subject to disclosure

Failure to have, update, or follow record management system ARS §41-1346 (Pitfall #9)

The head of each state and local agency shall . . .

- Establish and maintain an active, continuing program for the economical and efficient management of public records
- Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency
- Submit to the director of the Arizona State Library and Archives schedules proposing the length of time each record series should be retained
- Designate an individual at a sufficient level of management within the agency to manage the records management program

. . . and some more.

“Make and maintain records . . .”

- Containing adequate and proper documentation of the
 - organization
 - functions
 - policies
 - decisions
 - procedures
 - and essential transactions of the agency

— ARS §41-1346

“Duty to Preserve Records . . .”

- Protect from
 - Deterioration
 - Mutilation
 - Loss
 - Destruction

- ARS §39-121.01(C)

“Duty to have a Records Management Program”

- “Establish and maintain an active, continuing program for the economical and efficient management of the public records of the agency”
- “Submit . . . schedules proposing the length of time each record series warrants retention for administrative, legal or fiscal purposes”

ARS §41-1346(A)

Why bother?

- To protect the rights of the state and of persons directly affected by the agency's activities
- Ensure that valuable information is not destroyed prematurely
- Ensure that valueless information does not clutter offices or disk drives
- To protect the integrity and authenticity of records in case of litigation

The Basics of a Records Program

- Responsibility
- Location
- Organization
- Records retention
- Records destruction
- Routine course of business
- Reported to Library & Archives/RMD

1. Responsibility

- Must be at a level of management sufficient to direct the records management program in an efficient and effective manner
- Monitors the program for compliance
- Can coordinate discovery and open record requests

2. Records Location

- A survey of record
 - Where they're stored
- A series: A group of records that are created or received as the result of some function or activity

3. Record Organization

- Have a filing system
- Employees generally taught how to use the system
- Employees' use of the system impacts access and retrievability

4. Retention Schedule

- Retention period established for a series
 - Rare historical files within a series may be transferred to the Archives
 - Form for records of historical cases
- General schedules list retention periods for most common records
- Special schedules can be developed for records specific to your agency

5. Destruction

- Retention schedules serve as permission
- One-time requests for obsolete records
- Work with Records Management staff for unusual situations
- Destruction may be suspended if reasonable cause to suspect the records are relevant to pending litigation, audit, or investigation

6. RM is Routine Course of Business

- Historically valuable records generally transferred to the Archives
 - Motion to Designate Case as Historically Significant
 - http://www.supreme.state.az.us/selfserv/Historically_Significant/MotionDesignHistSignif.pdf

- Non-permanent records should be recycled, shredded, or otherwise destroyed in some manner that protects the confidentiality of the information

7. Report Destruction

- Form on RMD website
 - List of the series using the name on the retention schedule
 - Dates of records destroyed
 - Estimated volume of records destroyed
- Protects agency against charges of spoliation

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



Electronic Records

May you live in interesting times

Pros and Cons

- Simultaneous access
- Remote access
- Speed of retrieval
- Multiple sorts
- Improved analysis
- Reduced physical storage space
- Brave new world
- Few best practices
- Grow exponentially
- Copies waste space, create inefficiencies
- Preservation
- Lack affordances of paper
- Paper recordkeeping conventions don't translate

Records are records . . .

- Enterprise systems
 - Workflow systems
 - Databases
 - Geographic information systems (GIS)
- Email, voice mail, PDAs
- Websites
- Social media
- Office applications
 - Word processing documents
 - Spreadsheets
- Audio and video recordings

E-Records are Different

- The information is less fixed
 - It can be easily altered
 - Alterations are hard to detect
- Additional efforts are necessary to protect the records' integrity, to ensure trustworthiness
 - Use PDF to avoid overwriting
 - Use hash algorithms to demonstrate integrity

No Established Traditions or Best Practices for Recordkeeping

- Records are often scattered on servers, in email accounts, on hard drives, on thumb drives, PDAs . . . everywhere
- Often many copies
- Need to create the digital equivalent of “digital file cabinets”

E-Records Management

- Policies and procedures
 - Most e-records management problems require human solutions, not software
 - Requires conscious decisions about how to work with digital information

- File system
 - Simple, manual system
 - Sophisticated document management systems with integral records management functions

Email Management

- Email is a record
 - Even if sent using a personal account
 - Subject to open records laws, discovery
- Requires policies and training
- Email systems are poor recordkeeping systems
- Email is both the message and metadata
- Non-records may be deleted at any time
- Records retention is based on content

Griffis v. Pinal County

215 Ariz. 1, 156 P.3d 418 (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

Unread Mail - Microsoft Outlook

File Edit View Go Tools Actions Business Tools Help

Messages

E-mail Auto-link Link to Record

New Reply Reply to All Forward Send/Receive Find Type a contact to find

Mail

Favorite Folders

- Unread Mail (7)
- Inbox (7)
- For Follow Up [36]
- Sent Items

All Mail Folders

- Drafts
- Inbox (7)
- Junk E-mail [94]
- Mail
 - _Annual Report FYE 2007
 - _Annual Report FYE2006
 - _CIO Search
 - _GAW
 - _Legislative Letter
 - _SirsMigration
 - ADOA Imaging
 - Agency Website
 - Archive It
 - Archives Bldg
 - ATIC/CIAC
 - Az Memory
 - BAGELSS
 - Best Practices Exchange 2007
 - CIAC
 - Copyright
 - DGIR + E Recs
 - Dig Repo Coor 2
 - E Rate Tech Plan
 - Economic Outcomes
 - Email Procedures
 - ERate
 - Groundbreaking
 - IT Projects

Unread Mail

Received	From	Subject	Size	I..
Fri 9/7/2007 3...	Noel Ramirez	RSS Findings	46 KB	I..
Thu 9/13/200...	Larry S. Jackson	[Bestpractices] search capabil...	13 KB	I..
Fri 9/14/2007 ...	Diane Goldenberg-Hart	[CNI-ANNOUNCE] NISO to Hold F...	13 KB	I..
Mon 9/17/200...	Charles W. Bailey, Jr.	Dune and Many Colored Land	11 KB	I..
Tue 9/18/200...	Naomi Nelson	next conference call	10 KB	I..
Tue 9/18/200...	Eddy Cheng	New Bulding Move in Excel 2003	44 KB	I..
Wed 9/19/200...	O'Brien, Amy G.	9/17 Core Team Minutes & 2-w...	141 KB	I..

7 Items

Connected

Databases

- Is a database a record or a container of records?
- Are the records complete and self-contained, or scattered among many tables and fields?
- Preservation strategies
 - Snapshots
 - Selected reports
 - Selected reports plus underlying data

Websites and Digital Publications

- Are public records
 - ARS §41-1350
- Copies to be sent to the State Documents Depository Library Program
 - ARS §35-103; §41-1331, 1335, 1338
 - AAC R2-3-501 et seq.
- Available on the Internet Archive
 - <http://archive-it.org/collections/645>
- Additional copies offline at the Library and Archives

Archive-It.org - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://archive-it.org/collections/645

ARCHIVING THE INTERNET FOR FUTURE GENERATIONS
COLLECT IT, MANAGE IT, SEARCH IT...ARCHIVE-IT

ARCHIVE-IT

Enter Search Terms Here... Select an Institution ...Or Search All Collections Go

About Us | Partners | FAQ | Contact Us | Press Room | Partner Login

Arizona State Agencies

The Arizona State Agencies collection contains content state government agencies, boards, and commissions.

Enter Search Terms Here...

- <http://accq.azhighered.org/>
- <http://acpe.epsilonium.com/>
- <http://aq.arizona.edu/extension/>
- <http://aqic.az.gov/>
- <http://alistrack.azleg.gov/>
- <http://amepac.azhighered.org/>
- <http://arizonatele.com/>
- <http://az.gov/webapp/portal/>
- <http://az.webjunction.org/>
- <http://az211.communityos.org/>
- <http://azcapitol.lib.az.us/>
- <http://azdirect.state.az.us/>
- <http://azdohs.gov/>
- <http://azppse.state.az.us/>
- <http://cip.lib.az.us/>
- <http://crime.azvictims.com/azvoca/>
- <http://edocket.azcc.gov/>
- <http://genealogy.az.gov/>
- <http://qocyf.az.gov/>
- <http://lists.azag.gov/>
- <http://massagetherapy.az.gov/>
- <http://photos.lib.az.us/>
- <http://pressroom.arizonaquide.com/>
- <http://stayinschool.azhighered.org/>
- <http://tpd.az.gov/>
- <http://training.ade.az.gov/>
- <http://www.aata.state.az.us/>
- <http://www.abor.asu.edu/>
- <http://www.acdhh.org/>
- <http://www.aci.azcorrections.gov/>
- <http://www.ade.az.gov/>
- <http://www.adoa.gov/hris/>
- <http://www.adotenvironmental.com/>
- <http://www.aepa.nesinc.com/>
- <http://www.anaac.state.az.us/>

Internet Archive Wayback Machine - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://wayback.archive-it.org/645/*http://www.ade.az.gov/

Arizona State Agencies Web Archive (Arizona State Library, Archives, and Public Records)

INTERNET ARCHIVE waybackmachine

Enter Web Address: http:// All Take Me Back Compare Archive Pages

Searched for <http://www.ade.az.gov/>

117 Results

Look up URL in general Internet Archive web collection

Proxy Mode Help

Search Results for Jan 1, 1996 - Dec 31, 2007

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
0 pages	0 pages	0 pages	0 pages	0 pages	1 page	2 pages	28 pages	31 pages	31 pages	15 pages	9 pages
					Mar 31, 2001	Sep 24, 2002	Feb 2, 2003 Feb 10, 2003 Mar 20, 2004 Apr 8, 2003 Apr 11, 2003 Apr 21, 2003 Apr 24, 2003 Apr 24, 2003 May 28, 2003 May 29, 2003 May 29, 2003 Jun 18, 2003 Jun 18, 2003 Jun 19, 2003 Jun 24, 2003 Jul 23, 2003 Aug 1, 2003 Aug 8, 2003 Oct 10, 2003 Oct 28, 2003 Nov 24, 2003 Nov 26, 2003 Nov 26, 2003 Nov 26, 2003 Dec 2, 2003 Dec 20, 2003 Dec 22, 2003 Dec 24, 2003	Jan 23, 2004 Mar 17, 2004 Mar 20, 2004 Mar 30, 2004 Apr 3, 2004 Apr 21, 2003 Apr 24, 2003 Apr 24, 2003 Jun 6, 2004 Jun 11, 2004 Jun 11, 2004 Jun 12, 2004 Jun 12, 2004 Jun 14, 2004 Jun 18, 2003 Jun 19, 2003 Jun 24, 2003 Jul 23, 2003 Aug 1, 2003 Aug 8, 2003 Oct 10, 2003 Oct 28, 2003 Nov 24, 2003 Nov 26, 2003 Nov 26, 2003 Nov 26, 2003 Dec 2, 2003 Dec 20, 2003 Dec 22, 2003 Dec 24, 2003	Jan 23, 2004 Jan 22, 2005 Jan 28, 2006 Feb 6, 2005 Feb 8, 2005 Feb 10, 2005 Feb 11, 2005 Feb 27, 2005 Mar 18, 2005 Mar 20, 2005 Mar 20, 2005 Apr 7, 2005 Apr 10, 2005 Apr 16, 2005 May 15, 2005 May 20, 2005 Jun 6, 2005 Jun 23, 2005 Jul 15, 2005 Jul 16, 2005 Jul 20, 2005 Jul 21, 2005 Aug 9, 2005 Aug 29, 2005 Sep 9, 2005 Sep 24, 2004 Sep 21, 2005 Sep 19, 2004 Nov 2, 2005 Nov 2, 2005 Dec 10, 2005 Dec 12, 2005 Dec 19, 2005	Jan 11, 2006 Jan 17, 2006 Jan 28, 2006 Feb 5, 2006 Feb 15, 2006 Feb 18, 2006 Feb 26, 2006 Mar 1, 2006 Mar 10, 2006 Mar 10, 2006 Mar 16, 2006 Mar 21, 2006 Apr 26, 2006 May 20, 2006 May 20, 2006 May 31, 2006	Apr 18, 2007 May 18, 2007 Jun 14, 2007 Jul 16, 2007 Aug 15, 2007 Sep 13, 2007 Sep 13, 2007 Sep 17, 2007 Sep 17, 2007

Home | Copyright © 2005, Internet Archive | Terms of Use | Privacy Policy

Social Media



- Facebook
- Twitter
- Created *or received* means comments become part of the public record and must be managed appropriately
- Guidance
 - GITA P505 at http://www.azgita.gov/policies_standards/
 - ASLAPR Retention Schedule at <http://www.lib.az.us/records/pdf/state%20-%20email.pdf>

Backups and Offline Storage

- Backups are not recordkeeping systems
 - Designed for system recovery
 - May have many copies of the same document
 - Implications for discovery
- Offline storage may be part of a digital recordkeeping system
 - Must be indexed
 - Must be monitored for integrity

Things to Consider

- Unintended consequences
 - Public agencies are held to a different standard than corporations and individuals

- It's a people problem
 - Training
 - Awareness
 - Compliance
 - Supervision and evaluation

Role of Information Technology

Information Technology Department should

- Understand agency'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

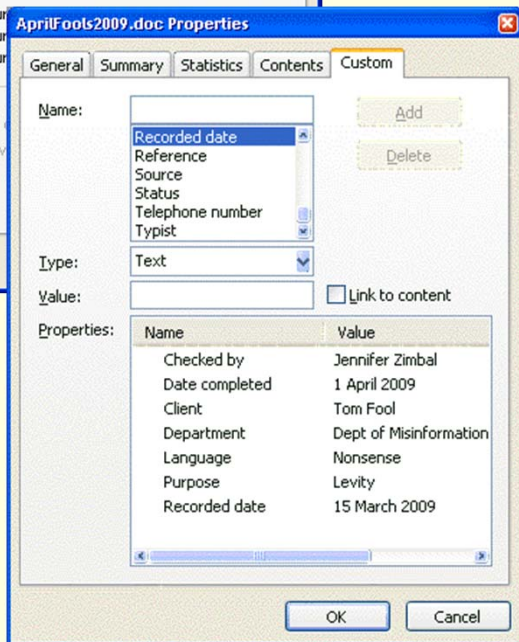
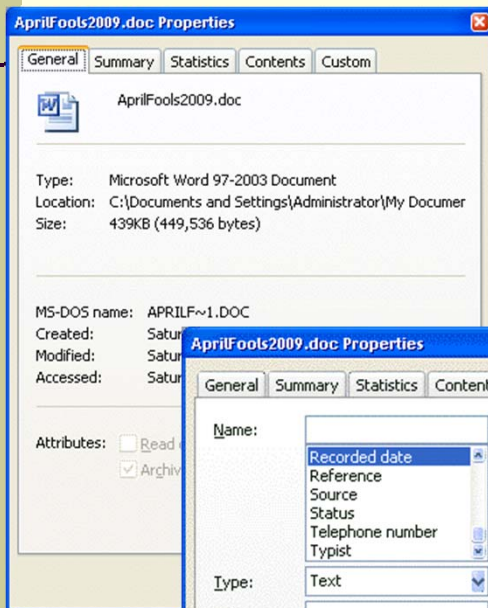
O'Neill v. City of Shoreline

145 Wash.App. 913, 187 P.3d 822 (2008)

- Washington Court of Appeals held that metadata to an email is part of the public records that must be disclosed
 - The “to”, “from” and “date” header information

Metadata

- Data about data
 - *Vernacular*
- Data that provides information about other data
 - *Merriam-Webster Online Dictionary (1983)*
- A characterization or description documenting the identification, management, nature, use, or location of information resources (data)
 - *A Glossary of Archival and Records Terminology (2005)*



MEMORANDUM

From:	TO: All Staff FROM: Richard Pearce-Moses RE: Cost savings efforts DATE: 15 March 2009
Exposition:	In light of recent budget cuts backs, it will be necessary to take some extraordinary measures to ensure that we will be able to save money. Current efforts are focused on reducing the costs of paper. <ol style="list-style-type: none"> 1. Effective immediately, employees should use 10 point type or smaller. Employees are responsible for their own reading glasses. 2. Avoid use of a comma before the final conjunction in clauses containing two or more elements. For example, the "lazy, small, and yellow dog" should now be written, "the lazy, small and yellow dog." 3. Use contractions and abbreviations whenever possible. E.g., use "n.b." for "pay attention." 4. Don't use periods James Joyce didn't need them for Ulysses If it's good enough for great literature it's good enough for us 5. Quit using the u after a "q" any silent "e" at the end of a word Use Use RPMJ of shortr fonetic spellings is encourage Use & or + 6. Employees r entered in a drawing if they "find" paper in other agencies Ev'ry ream eams a chanc
Sachator:	Cc: GAW JC Bcc: FSL RPM/jaz

Lake v. City of Phoenix

222 Ariz. 547, 218 P.3d 1004 (2009)

- Lake sought metadata to determine if his supervisor had backdated notes documenting Lake's performance. The City denied Lake's request, asserting that metadata is not a public record.
- 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.

Lake v. City of Phoenix (Cont.)

- 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* n.1.
- Not every request for public records will require disclosure of metadata.
- A request for an electronic record with metadata may be satisfied by providing a copy of the record in its native format.

Metadata

- Is part of the record (*Lake v. Phoenix*)
 - Treating such metadata as something separate disregards the integrity of the record
- May be stored separately for document management
 - Would be a “written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not”

Inappropriately Handling Requests

(Pitfall #8)

- 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

Receiving the Request

- Determine whether the request is for a 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

How to Make an Effective Request

- In writing
- Define subject matter and scope
- Inspect and/or Copy
- State amount of copying fees willing to pay
- Ask for response by date certain
- Non-commercial purpose v. commercial purpose

Failing to Promptly Furnish Public Records (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.

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 Recent 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.

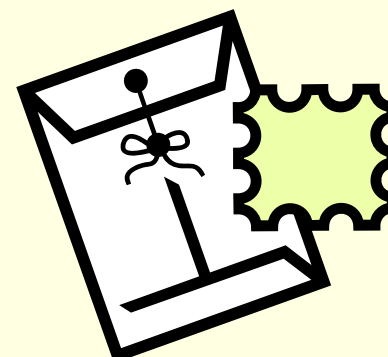
Most Recent Opinion Discussing Promptly

Lake v. City of Phoenix, 220 Ariz. 472, 207 P.3d 725 (Ariz. App. Div. 1, 2009)

- City successfully overcame burden of establishing that its responses to 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

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

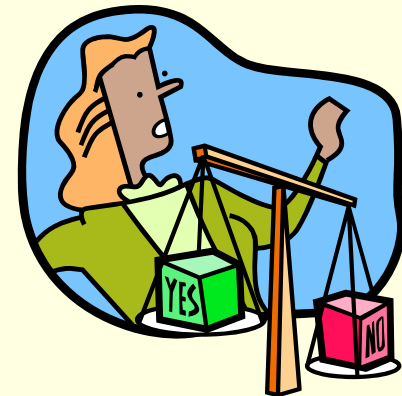


Not Knowing the Exceptions

(Pitfall #6)

Reasons to Withhold Records:

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

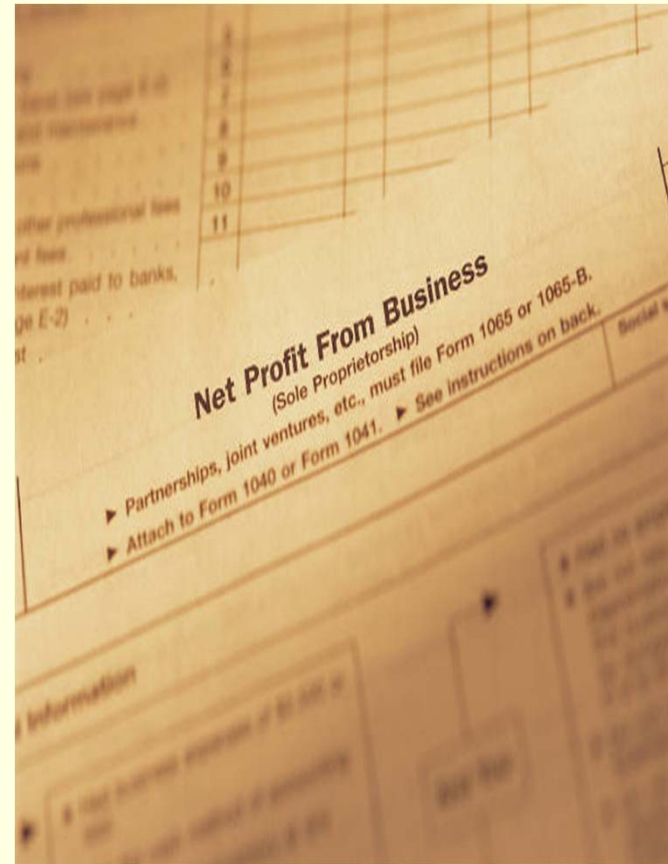


“Confidentiality”

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



Statutory Exemptions

A.R.S. §§ 39-123 and -124 protects home address and home telephone numbers for:

- Peace officer
- Justice
- Judge
- Commissioner
- Public defender
- Prosecutor
- Code enforcement officer

Also protects photographs of police officers.

2007 Amendment: adding

- Adult and Juvenile Corrections Officers
- Corrections support staff
- Probation officers
- Board of Executive Clemency
- Law enforcement support staff
- National Guard members acting in support of a law enforcement agency
- Persons protected under an order or protection or injunction against harassment
- Firefighters assigned to Arizona counterterrorism center
- Victims of domestic violence or stalking who have order or protection or injunction against harassment

Criminal Penalties – A.R.S. § 39-124

- Class 6 felony if state or local government employee knowingly releases home address or telephone number of previously listed persons (or knowingly releases photograph of peace officer) with intent to:
 - Hinder an investigation
 - Cause physical injury
 - Cause property damage
- to the protected class or their immediate family

Anti-Identification Procedures

A.R.S. §§ 41-4171 and -4172

- Requires government agencies to develop and establish commercially reasonable procedures to secure entity and **personal identifying information** that is collected or obtained by the agency.

“Personal Identifying Information”

- [A]ny written document or electronic data that does or purports to provide information concerning a name, signature, electronic identifier or screen name, electronic mail signature, address or account, biometric identifier, driver or professional license number, access device, residence or mailing address, telephone number, employer, student or military identification number, social security number, tax identification number, employment information, citizenship status or alien identification number, personal identification number, photograph, birth date, savings, checking or other financial account number, credit card, charge card or debit card number, mother's maiden name, fingerprint or retinal image, the image of an iris or deoxyribonucleic acid or genetic information.

A.R.S. § 13-2001(10)

This does not change what's a public record

- A governmental agency shall . . . ensure that entity identifying information or personal identifying information that is collected or obtained by the governmental agency is secure and cannot be accessed, viewed or acquired **unless authorized by law. Nothing in this article shall be construed to restrict, diminish or otherwise affect the provisions of title 39.**
 - *i.e. no automatic requirement to redact information from public records. Must apply privacy balancing test on a case-by-case basis.*

Identity Theft Prevention – A.R.S. § 44-7601

- An entity cannot discard a record containing the first name or initial and a last name without redacting:
 - Social security number
 - Credit card, charge card, or debit card number
 - Retirement account number
 - Savings, checking, or securities entitlement account number
 - Driver license or non-operating identification number

“Entity” – A.R.S. § 44-7601(G)

- All types of corporations and other business entities
- **Governments, governmental subdivisions, or agencies**
- “any other legal or commercial entity”

Civil Penalties – A.R.S. § 44-7601(C)

- \$500 – 1st offense
- \$1000 – 2nd offense
- \$5000 – 3rd or subsequent offense

“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.

“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 Interests of the State”

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.

Index of Withheld Records – A.R.S. § 39-121.01(D)(2)

- If requested, **state** agency shall provide an index of records or categories of records that have been withheld and reasons they were withheld
- Exceptions:
 - Dep't of Public Safety
 - AZ Motor Vehicle Division
 - Dep't of Juvenile Corrections
 - State Dep't of Corrections

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
- Double damages.

A.R.S. §§ 39-121.02(B) and 12-349



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.

Making Promises You Cannot Keep (Pitfall #5)

- A promise to keep confidential is not enough, standing alone, to preclude 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
- 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 and personal e-mail accounts
 - Inappropriate content

Retention of E-mail:

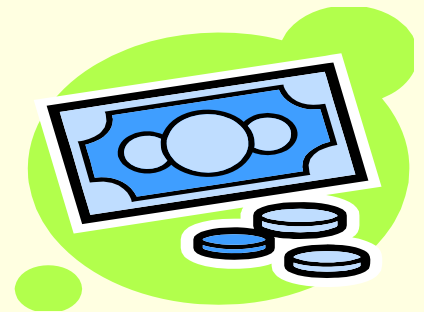
- E-mail is not a record series
- Many e-mail messages are transitory communications without retention value
- Others require retention
 - Evidence of official policies, actions, decisions, or transactions



Charging Unauthorized Fees

(Pitfall #3)

- May impose 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 copying electronic records



Free Copies - A.R.S. § 39-122

- Cannot charge fees for documents needed for certain claims presented to U.S.
 - Pension
 - Allotment
 - Allowance
 - Compensation
 - Insurance
 - Other benefits

A.R.S. § 39-127

- Victim of a Part I crime has right to one free copy of the police report.
 - Part I Crimes include: homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson.
- On request of the victim, the court must provide a free copy of a case transcript arising out of the offense committed against the victim to the victim (or immediate family member of deceased or incapacitated victim) for purposes of litigation or representation of a victims' right.

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”

- Newspaper request for newsgathering
Star Publishing Company v. Parks, 178 Ariz. 604, 875 P.2d 837 (App. 1983)
- 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

In re Napster, Inc. v. Copyright Litigation, 462 F. Supp. 2d 1060 (N.D. Cal. 2006); *Zubilake v. UBS Warburg LLC*, 220 F.R.D. 422 (2004) and many others



Government Ethics

- Oath of Office – A.R.S. § 38-231
- Support the Constitution of the United States and Constitution and laws of the State of Arizona



Ethics Policy

- “It is the public policy of this state that all public officers and employees of this state shall discharge their public duties in full compliance with applicable laws concerning ethical conduct.”
 - 1992 Ariz. Sess. Laws, ch. 134, § 1
- State employees must take class within 6 months of hiring. A.R.S. §§ 38-591 and -592.

Additional Resources



- Ombudsman Publications
- Ombudsman website www.azoca.gov
- Arizona State 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
- Arizona Agency Handbook, Chapter 6, www.azag.gov