

Arizona Public Records Law

Prepared for the Arizona Independent
Redistricting Commission

Roy Herrera

Counsel

Ballard Spahr LLP

herrerar@ballardspahr.com

Public Records Law

“Arizona law requires all officers and public bodies to maintain records reasonably necessary to provide an accurate accounting of their official activities and of any government funded activities.”

- Arizona Ombudsman Citizens' Aide,
Arizona State Legislature

Arizona Public Records Law

In 8 topics:

1. Purpose of the Law
2. Applicable Statutes
3. Scope of the Law
4. Exceptions to Public Records Law
5. Executive Session
6. Extent of Required Access
7. Best Practices
8. Enforcement and Penalties

Purpose of the Law

- All 50 states have public records law
 - Federal government: Freedom of Information Act (“FOIA”)
- Increase public access to government information
- Accountability through transparency

Applicable Statutes

ARS Title 39, Chapter 1

- **§§ 39-101 through -103: Requirements for Material Used**
 - Standards for physical/electronic storage of public records, set by Director of the Arizona State Library
- **§§ 39-121 through -128: Searches and Copies of Public Records**
 - Laws governing public access and public body's obligations to provide copies and inspection
- **§§ 39-141 through -145: Lost Records**
- **§ 39-161: False Records**
 - Acknowledgement, certification or notarization of a document that one knows to be false is a Class 6 felony.

Scope of the Law

- Arizona law requires all officers and public bodies to “maintain records, including records defined in [Title 41], that are reasonably necessary to provide an accurate accounting of their official activities and government-funded activities.”

A.R.S. § 39-121.01(B)

Scope of the Law

Who is subject to public records law?

- “any person elected or appointed to hold any elective or appointive office of any public body” A.R.S. § 39-121.01(A)(1)
 - Public body includes “any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state.”

A.R.S. § 39-121.01(A)(2)

Scope of the Law: “Public Records”

What constitutes a “public record?”

- Not defined in the public records statutes
- A.R.S. § 39-121.01(B) points to Title 41:
 - “All books, papers . . . 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 and preserved . . . As evidence of the organization, functions, policies, decisions, procedures, operations . . .”
- May also include any document held by a public officer in his or her official capacity.

Scope of the Law: “Public Records”

Examples of a “public record” include:

1. Official records of proceedings of state boards and commissions;
2. Records of expenditures of public monies;
3. Notices of claim filed with public agencies;
4. Annual reports filed by public agencies;
5. Disciplinary records of public employees;
6. Metadata embedded within electronic public records

Scope of the Law: “Public Records”

- Public records on personal devices
 - The fact that requested materials may be stored on a personal device does not exempt those records from public inspection
 - Arizona courts have recognized that it is the *nature* of the records, not the location, that determines whether the materials fall under the Public Records Law. *See Lunney v. State*, 244 Ariz. 170, 178-179 (App. 2017)

Exceptions to the Law

1. Strong presumption in favor of access, but presumption may be outweighed by legitimate government considerations of privacy and/or the best interests of the State.
 - a) Government bears the burden of proving the interest outweighs public access.
 - b) Parties to litigation against the government are entitled to an even stronger presumption of access.
2. Other recognized exceptions include:
 - a) Records deemed confidential by statute, including:
 - Executive session minutes
 - Information on voter registration forms
 - Voting registration records of peace officers and other eligible persons
 - b) Records involving personal privacy interests
 - May be redacted where possible, rather than withheld

Exceptions to the Law: Confidential Records

- Proceed carefully where a document may be confidential and therefore exempt from disclosure as a public record.
 - When in doubt, consult counsel
- While it is a “prohibited personnel practice” to take adverse action against an officer/employee who discloses a public record, adverse action is permitted against one who discloses a confidential record.

A.R.S. § 38-532(E)

Exceptions to the Law: Executive Session

There is a presumption of confidentiality for records/minutes of an executive session which was called for a lawful purpose.

“Minutes of and discussions made at executive sessions shall be kept confidential except from:

1. Members of the public body that met in executive session;
2. Officers, appointees or employees who were the subject of discussion or consideration . . .;
3. The auditor general on a request made in connection with an audit authorized as provided by law;
4. A county attorney or the attorney general when investigating alleged violations of [open meeting law].”

A.R.S. § 38-431.03(B).

Exceptions to the Law: Applicable Privileges

- Legislative Privilege
 - “IRC Commissioners, who are constitutional officers, are cloaked with legislative privilege for actions that are ‘an integral part of the deliberative and communicative processes’ utilized in developing and finalizing a redistricting plan, and ‘when necessary to prevent indirect impairment of such deliberations.’” *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130 (App. 2003).
 - Applies to both testimony and documents
 - The privilege may also apply to independent contractors of the Commission, but may only be invoked by the Commission
- Deliberative Process Privilege
 - This privilege protects against disclosure of the mental processes of a decision maker, and would likely apply to IRC Commissioners.
 - But the Court of Appeals declined to create a clear rule regarding its application.
 - *Rigel Corp. v. State*, 225 Ariz. 65, 73 (App. 2010) (“we have held that government agencies do not ordinarily have a privilege to refuse to produce evidence unless a statute has specifically created an exemption. To date, our legislature has not codified any such privilege in the Arizona Public Records statutes. We will not, via decisional law, create this privilege at this time.”) (internal citations omitted).

Extent of Required Access

1. Inspection and copies

- a) “Public records . . . Shall be open to inspection by any person at all times during office hours.”
 - Records may not be inspected or copied at times or in ways that disrupt public business. *Ariz. Atty Gen. Op. 180-97.*

2. Prompt access required

- a) A.R.S. § 39-121.01(E) requires a prompt response:
 - “Access to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record . . .”
 - Government bears the burden of proving the response was sufficiently prompt

3. Ongoing requests

- a) Requests may seek continuous release of “easily defined and identifiable category of documents that the public agency admittedly regularly generates.” *W. Valley View Inc. v. Maricopa Cty. Sheriff’s Office*, 216 Ariz. 225 (App. 2007).

4. Commercial use vs. non-commercial use

- a) Non-commercial requestors may be charged a nominal copying fee, while commercial requestors may be charged a more extensive fee.
- b) Most uses are non-commercial, including use as evidence in a judicial action

Best Practices: Preservation and Maintenance

- “Each officer and public body is required to secure, protect, and preserve public records from deterioration, mutilation, loss or destruction, unless the records are disposed of pursuant to [Arizona state law].”

Ariz. Agency Handbook § 6.7.1.

- Public documents may only be disposed of when the “the record has no further administrative, legal, fiscal, research or historical value.”

A.R.S. § 41-151.15(B).

Best Practices: Preservation and Maintenance

Best practices in preservation and maintenance, provided by Arizona Agency Handbook and A.R.S.:

1. Make records that contain adequate and proper documentation of the organization's functions, policies, and decisions
2. Designate an individual to manage the records program
3. Create a retention schedule generally in line with state requirements
 1. Though not required to submit the schedule for State Library approval, helpful guidance is available through the Library/Secretary of State
 2. *See* Records Officer Handbook, provided by State Library
4. Adhere closely to retention and disposition schedule once set. Dispose of records only as permitted per the schedule and relevant law

Best Practices: Responding to Requests

Best practices in responding to public records requests, provided by Arizona Ombudsman Citizens' Aide:

1. Provide acknowledgement/receipt of request
2. Identify all records to be reviewed, per the scope of the request
3. Provide an anticipated date of production (prompt but realistic)
4. Review the records to determine responsiveness and remove any confidential information
 - a) Redact as necessary information deemed confidential by statute
 - b) Use the Agency Handbook list of confidentiality statutes as a guide
5. Review any specific privacy concerns short of statutory confidentiality, weigh against public's right to access
6. Produce the records directly to the requestor
 - a) Provide a log of any documents withheld or redacted

Enforcement & Penalties

- “Any person who has requested to examine or copy public records pursuant to this article, and who has been denied access to or the right to copy such records, may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body.”

A.R.S. § 39-121.02(A).

- If the requestor “substantially prevails,” in their action, the court may award attorneys’ fees and costs.
- The requestor may also have an action against the public body for damages resulting from the denial.