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What You Need To Know About Arizona Public Records Law

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Where are the laws governing public records requests found?

Arizona Revised Statutes Title 39, Chapter 1 (A.R.S. §39-121 through A.R.S. §39-161)

The Arizona Attorney General Agency Handbook, Chapter 6

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Who is entitled to request and view public records?

A.R.S. §39-121

Permits “any person at all times during office hours” to inspect public records.

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Who is considered a “person”?

A “person” entitled to inspect public records includes a corporation, company, partnership, firm, association, or society as well as a natural person.

Attorney General Opinion No. 78-216.

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What is deemed a public record?

A.R.S. §39-121.01(B):

"B. All officers and public bodies shall maintain all records, including records as defined in section 41-151.18, reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state."

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Well what does that mean…

A.R.S. §41-151.18:

“"records" means all 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 section 41-151.16, 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 data contained in the record, and includes records that are made confidential by statute.”

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What are “other matters”?

A.R.S. §39-121:

“Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.”

“Other matters subject to the public’s right of access include ‘documents which are not required by law to be filed as public records…” – *Salt River Pima-Maricopa Indian Cmty v. Rogers* 168 Ariz. 531, 539. (1991)

“Other matters” includes documents held by the public officer in his or her official capacity and in which the public’s interest in disclosure outweighs the governmental interest in confidentiality. *Id.*

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There is really no distinction between what is considered a "public record" and what is considered an "other matter." *Griffis v. Pinal County,* 215 Ariz. 1, 4 n.5. (2007)

Please note that while most documents held by a public officer will be considered public records, documents that relate solely to personal matters and have no relation to official duties are not public records even if a public officer or agency possesses them or uses public funds to create them. *Id.*

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"Public records" are those records that are "reasonably necessary to provide knowledge of all activities [that public employees or institutions] undertake *in the furtherance of their duties." Griffis v. Pinal County,* 215 Ariz. 1, 4, 156 P.3d 418, 421 at 10 (2007) (emphasis in original).

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Private versus Public Records:

"The public is not entitled to a public employee's purely personal records." *See Griffis,* 215 Ariz. at 4.

"However, the line between public and private records is not always clear, and when a 'substantial question' exists as to whether information is subject to disclosure, courts must first determine if the information qualifies as a public record." *Id.,* at 5.

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Are my private emails public records?

Maybe.

If the email is purely personal and does not relate to official duties then it is most likely not a public record subject to disclosure. However, if the email does relate to official duties it will most likely be considered a public record because its status as a public record is not dependent on where the email was originated or stored.

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Are my personal cell phone records public records?

Maybe.

If a requestor can raise a “substantial question” by showing that the personal cell phone was used for a public purpose then the owner of the phone will have the burden to demonstrate that records are private. *Lunney v. State*, 244 Ariz. 170, at 179 (Ariz. Ct. App. 2017).

Note: Mere use of a private cell phone during working hours is insufficient to meet the threshold showing; there must be additional evidence presented that the use of the phone, or information on it, created a public record. *Id.*

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How long do I have to maintain a record?

Depends on the type of record. The Arizona State Library, Archives and Public Records Division maintains record retention schedules which outline how long each type of record must be maintained. Those schedules are available for online searching here:

http://www.azlibrary.gov/arm/retention-schedules

It is highly advisable to follow the records retention schedules not only insofar as how long a document must be maintained, but also as to when it can be destroyed.

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What is the process for destroying a public record?

A.R.S. §41-151.19 Requires that a report of records destruction that includes a list of all records disposed of shall be filed at least annually with the state library on a form prescribed by the state library. That form is entitled the "Certificate of Records Destruction" form, and can be found on the Arizona State Library website.

The Arizona State Library provides additional guidance concerning the maintenance and destruction of public records through guidelines available online at:

http://www.azlibrary.gov/arm/guidance-standards-and-statutes

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What are the consequences for destroying a public record too soon?

A.R.S. §39-121.01(C)

Makes each public body responsible for the preservation, maintenance and care of that body's public records. While Title 41 of the Arizona Revised Statutes does not impose penalty for premature destruction of public records there may be consequences under Title 39.

A.R.S. §39-121.02(A):

"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."

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Destruction of records prior to the required retention period's expiration could be considered an improper "denial" of access to or the right to copy those records.

A.R.S. §39-121.02(B)

Permits the prevailing party in a suit concerning the disclosure of public records to be awarded attorney's fees "and other legal costs that are reasonably incurred." This can get quite expensive…

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But wait there's more!

A.R.S. §39-121.02(C)

Permits "any person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial." This creates a cause of action for damages caused by a wrongful denial of access to a public record, if improper destruction is deemed a "wrongful denial" then damages could potentially be sought.

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Bottom line, it is not settled if premature destruction of a record would constitute an improper “denial” of access to a public record, but it is better to err on the side of caution and follow the applicable Arizona State Library retention schedule.

If a record is destroyed too early, an Arizona State Library “Notice of Destruction Prior to Records Disposition Date” form should be filled out and submitted. This form is available on the Arizona State Library website.

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Do I have to create a record in response to a public records request?

No! A public body (like a school district) must furnish existing public records promptly when requested but a public body does not have an obligation to prepare a record which does not exist. *See* Attorney General Opinion No. I85-023.

This means that if the public record exists at the time the request is made then it is potentially disclosable. If the record does not exist at the time the request is made, then the public body is not required to create it.

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Recent Case Development:

"Arizona's public records law does not require an agency to tally and compile previously untallied and un-complied information or data to respond to a public records request." *ACLU of Arizona v. Arizona Department of Child Safety.* 240 Ariz. 142, (Ariz. Ct. App. 2016).

There is no requirement to create "a new record that complies analytical information about information." *Id, at 148.*

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Recent Case Development:

"The State is not required to create a single comprehensive document responding to the Lunney's request. But to the extent the information requested is a public record, the State is required to 'query and search' its electronic databases and produce any responsive documents that result from those searches." *Lunney v. State*, 244 Ariz. 170, at 178 (Ariz. Ct. App. 2017).

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Who is subject to the Public Records Law?

Public Records law applies to "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." *See* A.R.S. §39-121.01(A)(1).

For example, in the context of a school district this definition includes members of the Governing Board, members of the administration, certificated employees and classified employees as each is either elected or appointed to his or her public office or employment.

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When can access to a Public Record be denied?

Disclosure of a public record may be denied if that public record is rendered confidential by statute. A listing of public records exempted from public disclosure by statute is available in the Arizona Attorney General Agency Handbook, Chapter 6, Appendix 6.1 and Appendix 6.2. Please note that this listing does not include exemptions which are rooted in Federal Law, like FERPA, and each request for public records will require in an individualized review.

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Additionally, although there is a presumption in favor of access to public records, this presumption may be outweighed by legitimate government considerations of privacy and the best interests of the State. *See Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.,* 191 Ariz. 297, 300. (1998)

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When does a privacy interest outweigh the public's interest in disclosure?

When the public's interest in public disclosure does not outweigh the privacy interest in the record sought. *See Carlson v. Pima County,* 141 Ariz. 487, at 490-491 (1984). This is not an exact science and will require an individualized analysis.

Examples of when a privacy interest outweighs the public's interest in public disclosure are teachers' birth dates and the home addresses of state employees.

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In the previously mentioned *Scottsdale Unified* case, a public records request for the birth date of teachers was submitted to the school district in order to perform a criminal background check on all teachers. The Arizona Supreme Court determined that while there was certainly a public interest in performing criminal background checks on teachers, that a teacher's privacy interest in his or her own birthdate outweighed such interest as it was "at best speculative" that there may be at least one teacher in the entire group with an undiscovered criminal conviction.

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The Arizona Attorney General held that a state employee's home address and telephone number are public records but are exempt from disclosure as the privacy interest of that state employee, and the harm such a disclosure would cause, outweighed the public's interest in disclosure. Arizona Attorney General Opinion No. I91-004.

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What is the "best interests of the State" exemption from disclosure?

A denial of a public records request based on the "best interests of the State" exemption requires that the public entity demonstrate that the effectiveness of the public entity in the performance of its duties will be significantly impaired if disclosure of the information is made. *See* Attorney General Opinion No. I83-006 (Addendum). However, the "best interests of the State" exemption cannot be used to save a public officer or school district from inconvenience or embarrassment. *Id.*

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Recent Case Development:

"An unreasonable administrative burden may constitute a sufficient reason to deny a public records request under Arizona law." *ACLU of Arizona v. Arizona Department of Child Safety, 240 Ariz. 142, at 153 (Ariz. Ct. App., 2016), citing from Hodai v. City of Tuscon, 239 Ariz. 34, Paragraph 27, (Az Ct. of App., 1-7-2016).*

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Unreasonable Burden:

"To determine if producing documents 'poses an unreasonable administrative burden,' courts consider whether the general presumption in favor of disclosure is overcome by: '(1) the resources and time it will take to locate, compile, and redact the requested materials; (2) the volume of materials requested; and (3) the extent to which compliance with the request will disrupt the agency's ability to perform its core functions." *Lunney v. State*, 244 Ariz. 170, at 181 (Ariz. Ct. App. 2017), citing from *Hodai v. City of Tuscon*, 239 Ariz. 34, at 43, (Az Ct. of App., 1-7-2016).

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Unreasonable Burden:

In *Lunney,* the Court held that the State's assertions that the public record request would require review of approximately 1100 employees' time sheets which were not automated or kept in a central location, that it would take a single employee six to eight weeks to complete the response, and that the State did not have an employee who could work on the request for six to eight weeks was sufficient to deny the request as being unduly burdensome.

Lunney v. State, 244 Ariz. 181, at 182 (Ariz. Ct. App. 2017)

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What is the timeline for response to a request for public records?

A.R.S. §39-121.01(D)(1)

States that the custodian of public records for a public entity "shall promptly furnish such copies, printouts, or photographs." If the custodian of public records fails to deliver the records "promptly", the public records request will be deemed denied which may or may not incur liability for such denial.

Well, what does "promptly" mean then?

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"'Prompt', …mean[s] quick to act or to do what is required,' or 'done, spoken, etc. at once or without delay.'" *See West Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 230 (App. 2007). The burden to prove that a response to a public record request is "prompt" rests with the public entity responding to the public records request.

So again, what does "promptly" really mean?

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"Promptly" does not have an exact definition.

However, determining what is "prompt" is a factual determination based upon multiple factors such as the accessibility of the records, the volume of the material requested, and the need to redact confidential information from the requested records. If it is anticipated that the preparation of records in response to a public records request will be delayed, it is best practice to advise the requestor of the delay and the reason for it. This may also provide a good opportunity to request that the scope of the public records request be reduced or revised to be more focused.

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What are the responsibilities to protect privileged information?

The public entity responding to a public records request is ultimately responsible for protecting privileged information in documents prepared in response to the request. When a document contains both public and privileged information, the public entity is responsible to redact out the privileged information and provide the redacted copy of the document to the requestor.

See Carlson v. Pima County, 141 Ariz. 487, at 491 (1984).

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It is important that the public entity record the reasons for the redaction and keep two copies of the documents prepared in response to a public records request: one copy of the un-redacted record and one copy of the redacted record. This will provide a reference as to what material was redacted and what the justification for the redaction was should there ever be a challenge to the denial of that portion of the public records request.

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What are the permissible charges the public entity can impose?

What a public entity can charge is in part determined by statute and in part determined by that particular entity's operating policies. Charges for preparation of public records are also dependent on whether or not the record was made for a “commercial purpose” or not.

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A “commercial purpose” is defined in A.R.S. §39-121.03(D) as:

“[T]he use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from public records for the purpose of solicitation or the sale of names and addresses to another for the purpose of solicitation or 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. Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body.”

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A.R.S. §39-121.03(A)

Requires that a public records requestor provide a statement that identifies whether or not the public records request is made for a "commercial purpose."

A failure to identify a "commercial purpose" and then a subsequent use of the public records request for a "commercial purpose" may result in that public records requestor being liable for three times the amount which would have been charged if the public records request had been properly identified. A.R.S. §39-121.03(C)

Great, but what are the charges for a "commercial purpose?

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- A portion of the cost to the public body for obtaining the original or copies of the documents, printouts or photographs.

- A reasonable fee for the cost of time, materials, equipment and personnel in producing such reproduction.

- The value of the reproduction on the commercial market as best determined by the public body.

- These charges may be significantly higher than those charges incurred by non-commercial purpose public records requestors.

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Can a public records requestor be charged to view records?

No!

"Pursuant to Arizona's public records law, a member of the public is entitled to inspect public records at all times during a public body's office hours. Although a public body may charge a fee to copy and mail public records when that action is requested, the statute does not expressly permit charging a fee when the requesting party wants merely to inspect public records. If, for whatever reason, the public body must make a copy of a public record to properly provide the record to the requesting party for inspection, then charging a copying fee is not appropriate."

See Arizona Attorney General Opinion No. I13-012.

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- For the most part, public records requests will be for non-commercial purposes. A.R.S. §39-121.01(D)(1) states:

- "The custodian of such records shall promptly furnish such copies, printouts or photographs and may charge a fee if the facilities are available..."

- The "fee" referenced includes a reasonable amount for the cost of time, equipment, and personnel used in producing copies of records, but not for the costs of searching for the records. What is considered reasonable is in the discretion of the public entity. Many public entities have a policy which outlines what the charges for non-commercial purpose public records requests are, and many of those policies may not reflect charges for the cost of the time, equipment, and personnel used in producing the copies.

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What are the consequences of failure to comply with Arizona Public Records laws?

If a public entity is deemed to have failed to comply with Arizona Public Records laws, then the public entity could be liable for both attorney's fees and damages.

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Attorney's Fees – A.R.S. §39-121.02(B) provides that a court "may award attorney fees and other legal costs that are reasonably incurred in any action under this article if the person seeking public records has substantially prevailed.

Basically if the public entity improperly denies a public records request or otherwise fails to comply with its responsibilities under the Public Records Laws and the public records requestor successfully challenges such denial or failure in court, the public entity could be responsible for the public records requestor's legal fees.

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Damages – A.R.S. §39-121.02(C)

States that any "Any person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial."

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This creates the right for a public records requestor to seek compensation against a public entity for any damages the public records requestor suffered as a result of the public entity's improper denial of the public records request or other failure to comply with its public records request law responsibilities. Please keep in mind that an award of damages does not preclude an additional award of attorney's fees.

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