
What You Need to Know About Arizona's Public Records Law

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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



Handling Public Record Requests

(Pitfall #8)

- Neither the identity of the requester nor the purpose of the request determine the merits of the request.
 - Public records law does not require a person to identify themselves (unless otherwise provided by statute)
 - Reason for request not required for non-commercial requests
- Arizona law does not require written requests.
 - If verbal, may request that they put it in writing, but failure to do so is not a basis for denial.
- Requestor must designate whether for non-commercial or commercial purpose.
 - If a commercial request, statement of intended purpose required.

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

Most Recent Opinion Discussing Promptly

Lake v. City of Phoenix

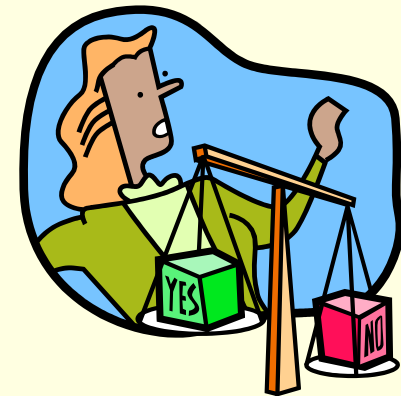
- City successfully overcame burden of establishing that its responses to Lake's requests were prompt given the circumstances surrounding each request.
- Factors taken into consideration included:
 - Broad nature of request
 - Records covered several years
 - Records involved multiple persons
 - Number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

Not Knowing the Exceptions

(Pitfall #6)

Reasons to Withhold Records:

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



Types of Media

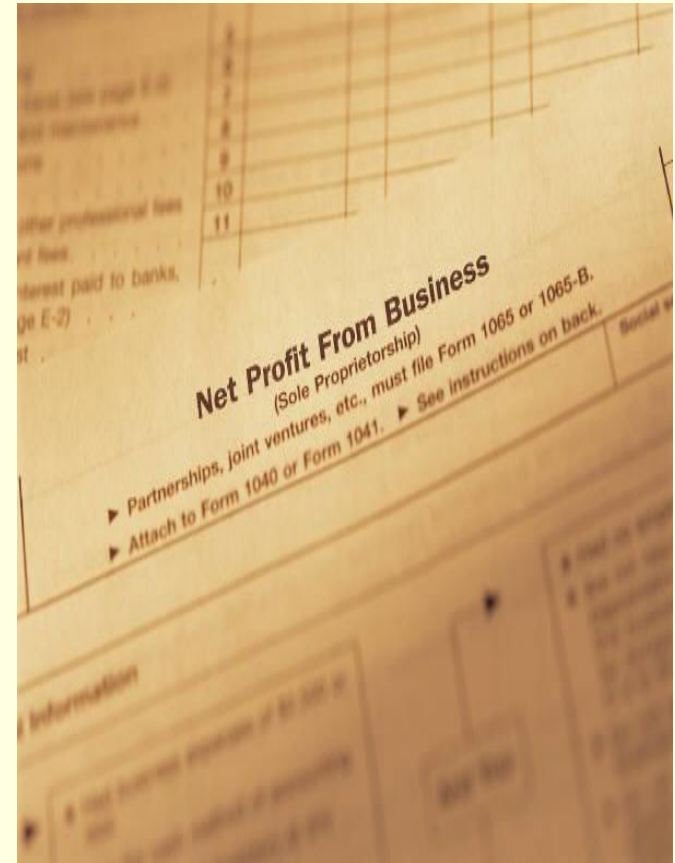
- Videos/ Body Cameras
- Facebook
- Blogs
- Twitter
- Audio recordings
- Emails

“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 2011)



“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 Interest Case

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 whether release would adversely affect the agency's mission.
- Must prove specifically how this adverse affect outweighs the presumption of disclosure.

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.

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

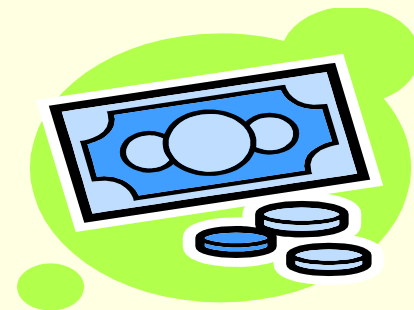
Phoenix Newspapers, Inc. v. Ellis, 15 Ariz. 268, 159 P.3d 578 (App. 2007)

- 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

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



Commercial Purpose A.R.S. § 39-121.03

(Pitfall #2)

The 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.

Understanding What Actually Constitutes a Commercial Purpose

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 any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record.

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)

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

Dealing with Frequent Requestors

- Congress Elementary School v. Jean Warren, 227 Ariz. 16 (Ct of Appeals 2011)
- Holdings: 1) the school district could not obtain prospective relief under the public records law to enjoin four individuals from making public records requests without court leave 2) the requests made by defendant individuals did not constitute a public nuisance, and 3) the defending individuals were entitled to attorney fees for their successful defense.

Failed Legislation

- SB 1339 – would have added “unduly burdensome” as a grounds for denying a public records request.
- Best Interest of the State Argument

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

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PUBLIC RECORDS LAW

ISSUES INVOLVING EMERGING TECHNOLOGY AND
SOCIAL MEDIA PLATFORMS

This training does not constitute a legal opinion or legal advice on the part of the Library, Archives and Public Records Branch, of the Secretary Of State.

ALL RECORDS MANAGEMENT IN ARIZONA IS GOVERNED BY ARIZONA REVISED STATUTES (ARS)

- ❖ In Arizona, **everything that we do** in Records Management is governed by Arizona Revised Statutes (ARS).
- ❖ The ARS that govern Records Management are:
 - ❖ **§ 41-151.12 – §41-151.19**

IS SOCIAL MEDIA “STUFF” A “RECORD”?

(WALL POSTS, VIDEOS, TWEETS, ETC.)

41-151.18. Definition of records

In this article, unless the context otherwise requires:

- ❖ **"records"** means 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 connection with the transaction of public business...
- ❖ **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.
- ❖ **Not a record –extra copies of documents preserved only for convenience of reference**

WHAT'S THE ROI ON RECORDS MANAGEMENT?

The **benefits** of having a **good Records Management Program** in place:

Financial Benefits:

- ❖ Save money and resources previously being spent on storing records
(physical floor space, server space, off-site storage):
- ❖ Save money and resources for records no longer needed:
 - ❖ spent in searching for, retrieving, copying, producing or redacting records in response to requests

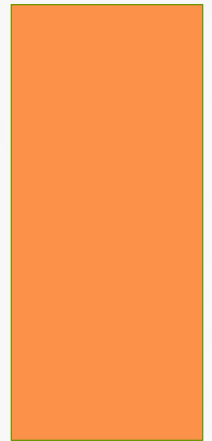
Risk Management Benefits:

- ❖ If you have the information, you need to provide it for Public Records Request, Audit, Investigation, Litigation
- ❖ If you don't have the information because you destroyed it per a Retention Schedule, you are legally OK.
 - ❖ Caveat: records were not destroyed in the face of a Public Records Request, Audit, Government Investigation or Litigation.



CHALLENGES OF SOCIAL MEDIA – RECORDS MANAGEMENT

ISSUES INVOLVING EMERGING TECHNOLOGY AND
SOCIAL MEDIA PLATFORMS



WHO IS MANAGING ALL THAT STUFF?

Questions to think about:

- ❖ What is the difference between **data and records**?
- ❖ Whose “**responsibility**” is it to provide Records Management service to their customers?
- ❖ Who is in the **best position to “manage”** electronic records?
 - ❖ The creator of the content / record?
 - ❖ Or, the “post-er” of the content / record?
- ❖ Why do these questions matter?

UNIQUE VS. COPY – IT MATTERS!

Important RM Concept for all forms of Electronic Communication, including social media:

- ❖ **Is Content in Communication a Copy?**
- ❖ Is that content (of original not copy) **being retained and managed** (from RM perspective) elsewhere?
- ❖ **Is Content Unique information?**
- ❖ Is Unique Content **being retained and managed** (from RM perspective)?

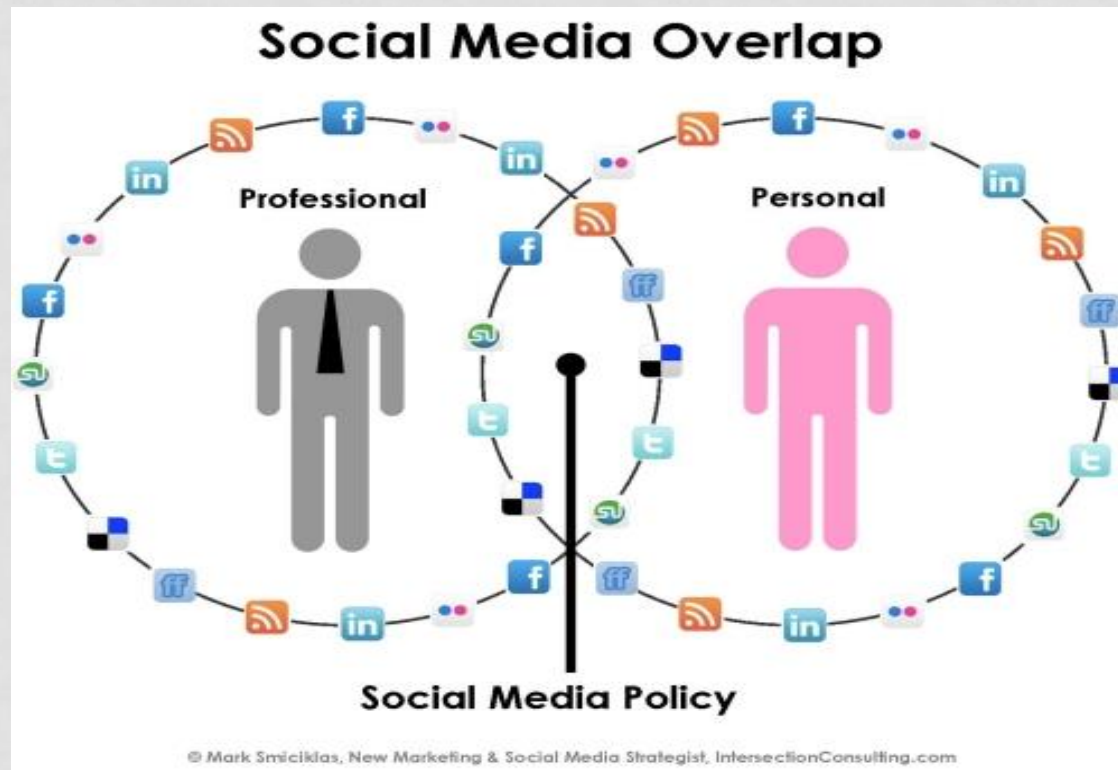
HOW CAN ANYTHING SO EASY BE SO DIFFICULT?

Challenges with Social Media Records:

- ❖ A.R.S. require we (government) control (manage) our records during their entire retention period.
- ❖ Social Media sites provide little to no tools to help manage YOUR records on THEIR sites.
- ❖ Who controls the content on Social Media sites?

= Challenges to compliance with RM Statutes.

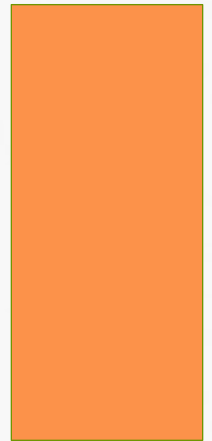
SOCIAL MEDIA DANGER ZONE





WHAT RECORDS MANAGERS NEED TO KNOW ABOUT EMERGING TECH

ISSUES INVOLVING EMERGING TECHNOLOGY AND
SOCIAL MEDIA PLATFORMS



ARE LAW ENFORCEMENT RECORDINGS RECORDS? HOW LONG DO WE NEED TO KEEP THEM?

Two very **relevant**, timely, and complex questions

LAPR needs solution with buy-in:

- ❖ **Formed the Arizona Law Enforcement Records Work Group**
- ❖ **Members:** From State Agencies, Counties and Municipalities
 - ❖ Members include: Criminal Justice, Information Technology, Law Enforcement, Legal, Procurement, Records Management and Risk Management
- ❖ **Goals:**
 - ❖ **Consistency in AZ:** Develop Statewide Policies and Procedures, Guidance, and / or Best practices for Law Enforcement Recordings
 - ❖ **Address:** retention, privacy, redaction, sharing of recordings, risk, vendors, IT architecture needed to house recordings, etc.

SOCIAL MEDIA SOLUTION: A POLICY, A MATRIX, AND A PRACTICE (RM)

Components of a Fully Integrated RM Solution to Social Media:

❖ “4 Pillars” of Records Management

Retention Schedules

Policies

Training

Documentation and Auditing

❖ Social Media Matrix

❖ Implementation and execution (enterprise-wide)

❖ Software / Technology Solution

Understanding the Solution?

❖ What is required in order to be in compliance?

❖ What your solution can and cannot do

❖ Need to create a workaround

SOCIAL MEDIA POLICY...

RECORDS MANAGEMENT PERSPECTIVE

- ❖ State and Understand Why You Are Using Social Media
- ❖ Define the Roles and Responsibilities
- ❖ Determine Who “Owns” the Content
- ❖ “Use the Matrix, Luke”
- ❖ Use the *Terms of Use*
- ❖ Execution, Implementation, Compliance and Auditing

SOCIAL MEDIA MATRIX

Overall Goals of the Matrix:

- ❖ Map business (or unit) moving to social media
- ❖ Map information moving to social media
- ❖ Assess your information needs and expectations
- ❖ Assess public accountabilities

QUESTIONING THE MATRIX

Question to ask and answer BEFORE:

- ❖ Why are you using social media?
- ❖ Intended vs Actual audience?
- ❖ Goals?
- ❖ Message?

Information to Capture:

- ❖ Who “owns” the product?
- ❖ Departments / Individuals using Social Media?
- ❖ Sites are they using / links?
- ❖ Access keys?
- ❖ Content?

SOCIAL MEDIA RETENTION PERIODS

Social Media Records managed by content

Public Information and Marketing Records General Retention Schedule:

http://apps.azlibrary.gov/records/general_rs/Public%20Information%20and%20Marketing.pdf

HOW LONG DO WE NEED TO KEEP SOCIAL MEDIA RECORDS?

3 MAIN RETENTION PERIODS

Retention Period: After reference value has been served

Type of Record:

Graphic Art (temporary / minor, draft)

Retention Period: 2 years after calendar year created or received

Type of Records:

Advertising and Outreach Records, Broadcast Logs, Photographs, Press Releases, Public Event Records (including calendar), Public Service Announcements (PSA), Speeches

Historical Records: Permanent. May Transfer to State Archives

Type of Records:

Graphic Art (Final version)

Records of enduring value

SOCIAL MEDIA VIRGINS BEWARE!

1. If You Post it, You Own It

- ❖ Whatever content / records government bodies post to Social Media sites **belongs** to the public body and **NOT** to the Social Media site - from a Records Management point-of-view.

2. If You Own It, You Manage It

- ❖ If you post something to any Social Media site, and the posting (words, pics, video, etc.) is work-related, then you have a statutory responsibility to retain the posted information for the approved & correct retention period.

3. If You Created It, You Should Manage It

- ❖ The **Creator of any content** being posted to social media sites (or other websites) needs to be **responsible for the proper retention** of the content they created.

YOU'VE GOT THE POWER - AT LEAST SOME

4. “Blogs and Wall Posts, Oh My!”

- ❖ These are the two most likely areas for Unique content that will need to be managed.

5. Email All Wall Posts

- ❖ Make sure you set up your social media site to generate an email to your designated email account (ex. info@yourcityortown.gov) **whenever anyone posts a comment to your wall.**

6. Maybe You Need to Purchase a Solution?

- ❖ If you are using social media consistently, weekly or daily
- ❖ If you have significant business information and processes on Social Media

SOCIAL MEDIA / NETWORKING POLICY TEMPLATE - LINKS

State of Arizona Social Media Policy:

https://aset.az.gov/sites/default/files/P505%20Social%20Networking%20Policy_0.pdf

National Archives Guidance on Social Media:

<http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>

Social Media Database of 113 Policies:

<http://www.socialmediatoday.com/SMC/155843>

Web 2.0 Governance Policies and Best Practices:

<http://govsocmed.pbworks.com/w/page/15060450/Web-2-0-Governance-Policies-and-Best-Practices>

Social Media Policies Database:

<http://socialmediagovernance.com/policies.php>

GOT QUESTIONS?

