

ARIZONA OPEN MEETING AND PUBLIC RECORDS LAWS

Arizona State
Board for
Charter
Schools

August 12, 2019

PURPOSE OF THE OML

- “It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. A.R.S. § 38-431.09(A).
- Ensures government transparency and accountability by opening up government collective decision-making to the public. *Karol v. Bd. of Educ. Trustees, Florence Unified Sch. Dist. No. 1*, 122 Ariz. 95, 97 (1979).

SOURCES OF LAW

- Arizona Revised Statutes §§ 38-431 to 38-431.09
- Arizona Agency Handbook, Chapter 7
https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_7.pdf
- Case law
- Arizona Attorney General Opinions
<https://www.azag.gov/complaints/omlet/omlet-info>

WHO IS SUBJECT TO THE OML

- Applies to “public bodies” – the legislature, all **boards** and commissions **of this state** or political subdivisions, all **multimember governing bodies of** departments, agencies, **institutions and instrumentalities of this state or political subdivisions.”** A.R.S. § 38-431(6).
- Includes advisory committees or subcommittees established by the public body or its presiding officer “whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.” A.R.S. § 38-431(1).
- Includes special and standing committees and subcommittees of a public body. A.R.S. § 38-431(6).

WHO IS SUBJECT TO THE OML

- Applies to the Arizona State Board for Charter Schools and governing boards of charter schools. A.R.S. § 38-431(6); Ariz. Op. Atty. Gen'l I95-010.
- Applies to charter school corporate boards if (1) a quorum of the charter school governing board is present, and (2) there is discussion about matters that could foreseeably come to a vote before the charter school governing board. Ariz. Op. Atty Gen'l I00-009.

GENERAL REQUIREMENTS

- All **meetings** of a public body shall be public, and all persons desiring to attend shall be permitted to attend and listen to the deliberations and proceedings. A.R.S. § 38-431.01(A).
- All **legal action** of public bodies shall occur during a public meeting. A.R.S. § 38-431.01(A).

WHAT IS A MEETING?

- A meeting is “the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action.” A.R.S. § 38-431(4).
- It does not matter what label is placed on a gathering. It may be called a work or study session, or the discussion may occur at a social function.
- May include communications (one-way or exchange) among a majority of members via email, text message, or social media.

LEGAL ACTION

- All discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that may foreseeably require final action or a final decision by the governing body, constitute “**legal action.**”
A.R.S. § 38-431(3).

AGENDAS

- The public body may discuss, consider, or decide only those matters listed on the agenda and other matters related thereto. Whether a matter is related to an agenda item will be construed narrowly.
- Agendas for public meetings must contain a listing of the specific matters to be discussed, considered, or decided at the meeting.
- Agenda item for executive session must contain a general description of the matters to be considered; notice of an executive session must specifically cite the subsection of A.R.S. § 38-431.03 that permits the executive session. A.R.S. § 38-431.02(B), (I).

CALLS TO THE PUBLIC

- The OML does not establish a right for the public to participate in the discussion or in the ultimate decision of the public body.
- The public body may not discuss or take action on matters raised during the call to the public if they are not on the agenda.
- Members may respond to criticism by those who have spoken during a call to the public, ask staff to review a matter, or ask that a matter be placed on a future agenda.

EXECUTIVE SESSIONS

- Executive sessions are an exception to the general requirement that all meetings must be open to the public. A.R.S. § 38-431.03.
- Before a public body may go into executive session
 - The notice requirements must be met
 - Vote by a quorum to hold the executive session
 - The motion to go into executive session must state the grounds for the executive session (For example, “I move to enter into executive session for the purpose of receiving legal advice on this agenda item.”)

EXECUTIVE SESSIONS

- Only members of the public body and those individuals whose presence is reasonably necessary for the public body to carry out its executive session responsibilities may attend the executive session. A.R.S. § 38-431(2).
- Must advise all present that the discussion and minutes of the executive session is confidential under the OML. A.R.S. § 38-431.03(C).
- Must discuss and consider only the specific matters authorized by the executive session.
- May not take a vote or make a final decision in the executive session, but must reconvene to the public meeting to take a vote or make a final decision. A.R.S. § 38-431.03(D).
- No motion or vote is taken to adjourn the executive session.

AUTHORIZED EXECUTIVE SESSIONS

- OML identifies seven instances in which a public body **may** go into executive session: A.R.S. § 38-431.03(A)
 - Personnel Matters
 - Confidential Records or Information
 - Legal Advice
 - Litigation, Contract Negotiations, and Settlement Discussions (this limited situation allows the public body to discuss and arrive at some consensus on its position before it instructs its legal counsel)
 - Discussions with Designated Representatives Regarding Salary Negotiations
 - International, Interstate, and Tribal Negotiations
 - Purchase, Sale or Lease of Real Property

PENALTIES FOR VIOLATIONS OF THE OML

- Nullification or voiding of the action taken.
- Civil penalties of up to \$500 to \$2500 for each violation. Assessed against the person who knowingly violated the OML, not the public body.
- Attorneys fees. Can be paid by the public body, unless the person who violated the law acted with intent to deprive the public of information.
- Removal from office if the member acted with intent to deprive the public of information.

A.R.S. § 38-431.07.

PUBLIC RECORDS LAW

- “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.” A.R.S. § 39-121.
- “A governmental entity always bears the burden of overcoming the presumption of disclosure . . . public records are presumed open to the public for inspection unless the public official can demonstrate a factual basis why a particular record ought not be disclosed to further an important public or private interest.” *American Civil Liberties Union of Ariz. v. Ariz. Dept. of Child Safety*, 240 Ariz. 142, 151 ¶ 29 (Ct. App. 2016).

WHO IS SUBJECT TO PUBLIC RECORDS LAW?

- Officers of public bodies, such as the Arizona State Board for Charter Schools. “Officer” means 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.”
A.R.S. § 39-121.01(A).
- Charter Schools, which are “public schools’ that are sponsored by other public bodies and that receive financial support . . . from the state treasurer. Ariz. Op. Atty. Gen. 195-015.

WHAT IS A PUBLIC RECORD?

- Broadly defined – the statute requires public access to “public records and other matters.” A.R.S. § 39-121.
- “[A]ll records . . . reasonably necessary or appropriate to maintain an accurate knowledge of . . . official activities and any . . . activities which are supported by [public] monies.” A.R.S. § 39-121.01(B).

WHAT IS A PUBLIC RECORD?

- “[D]ocuments having a ‘substantial nexus’ with a government agency’s activities.” *Griffis v. Pinal County*, 215 Ariz. 1, 4 (2007).
- “[C]ontent-driven inquiry.” *Id.*
- Includes hard copies and electronic records, including metadata. *Lake v. City of Phoenix*, 222 Ariz. 547, 551 (2009).
- Exception -- documents of a “purely private or personal nature.” *Griffis*, 215 Ariz. at 4 (“The purpose of the law is to open government activity to public scrutiny, not to disclose information about private persons.”).

PUBLIC RECORDS ON PERSONAL DEVICES

- Emails, text messages, and calls sent or received on personal devices may be subject to disclosure as public records; if the requester raises a substantial question that the personal device was used for a public purpose, the burden shifts to the party asserting that the records are private. *Lunney v. State*, 244 Ariz. 170, 179, ¶ 28 (Ct. App. 2017).
- However, “mere use of a private cell phone during working hours is insufficient to meet the threshold showing; rather, the requester must present evidence the information on, or use of, a private cell phone created a public record.” *Id.*

PUBLIC RECORDS ON PERSONAL DEVICES

- Messages sent or received by a public officer's electronic device or through a private social media account implicate public officer's duty to provide a reasonable account of official conduct, but are not deemed public records merely because a public officer created or received the communication. Ariz. Op. Atty. Gen. I17-004.
- The content of the message or purpose of the use of the personal device is the key. If it has a substantial nexus to the public business, it is a public record. See *Lunney*, at 179, ¶¶ 28-30.

RETENTION OF PUBLIC RECORDS

- Each agency has its own retention schedule. Charter Board's schedule:
https://apps.azlibrary.gov/records/state_rs/CS-1162.pdf
- If a record is not included on agency's retention schedule, the Arizona Department of Library & Archives has general schedules that apply.
http://dev-sand-library.pantheonsite.io/sites/default/files/arm-all-general-schedules-2018_01_12.pdf

PROMPT DISCLOSURE REQUIRED

- Public official must “promptly furnish” requested copies of public records. A.R.S. § 39-121.01(D)(1).
- Failure to promptly provide access to public records is “deemed deni[al]” of access. A.R.S. § 39-121.01(E).
- It is important to promptly respond to the requester, even if it is only to explain that the production of records will take time.

PROMPT DISCLOSURE REQUIRED

- There is no set time for response, but a public official bears the burden of demonstrating that given the specific facts and circumstances of the request, he responded promptly. *Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 538, ¶ 14 (Ct. App. 2008).
- Whether a response is prompt depends on the factual circumstances of the request. *Lunney*, 244 Ariz. at 179, ¶ 31.

BASES FOR WITHHOLDING RECORDS

- Courts have identified three bases for nondisclosure:

- Confidentiality
- Privacy
- Best Interests of the State

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

- Confidentiality generally refers to statutory provisions that deem a record confidential such as FERPA or A.R.S. § 15-350.

OPTIONS SHORT OF NONDISCLOSURE

- Even where privacy or state interests justify non-disclosure of portions of a record, the public official has a duty to redact the information necessary to protect those interests and release the remainder. *Judicial Watch v. City of Phoenix*, 228 Ariz. 393, 396 (Ct. App. 2011).
- *In camera* review may be used to determine whether (a) documents are public records or (b) the balance of interests supports non-disclosure. *Griffis*, 215 Ariz. at 5; *Ellis*, 215 Ariz. at 274.

BALANCING TEST

- Must weigh the public interest in access against the particular privacy or state interest at stake. *Keegan*, 201 Ariz. at 349-50.
- Burden of justifying nondisclosure is on the public official. *Mitchell v. Super. Ct.*, 142 Ariz. 332, 335 (1984).
- To overcome the presumption of openness, must show “the probability that specific, material harm will result from disclosure.” *Id.*
- “Global generalities” are insufficient to override the public interest in access. *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993).